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JUDGMENTS & DECISIONS

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DATE: 14.05.2021

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Committee of Creditor with
100% voting.



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Regards,
Mohit Kumar Bansal
Lexstone Group

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Reportable

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

Writ Petition (C) No. 116 of 2019

Forum for People's Collective Efforts (FPCE) & Anr.

...Petitioners

Versus

The State of West Bengal & Anr.

...Respondents

Signature Not Verified
Digitally signed by
Sanjay Kumar
Date: 2024.05.04
16:49:52
Reason: 

J U D G M E N T

Dr Justice Dhananjaya Y Chandrachud

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- B Legislative history**
- C RERA - the legislative process**
- D Salient features – RERA**
- E Salient provisions of WB-HIRA**
- F RERA and WB-HIRA – provisions at variance**
- G Submissions**
 - G.1 For the petitioners**
 - G.2 For the Union of India**
 - G.3 For the State of West Bengal**
- H Analysis**
 - H.1 Entry 24, List II – West Bengal’s ‘housing industry’ defense**
 - H.2 The Constitutional Scheme of Article 254 and repugnancy**
 - H.3 Repugnancy – RERA and WB-HIRA**

**H.3.1 Meaning of “is in addition to and not in derogation
 of any other law”**

H.3.2 Meaning of “law for the time being in force”

H.3.3 Knitting it together

H.4 Lack of Presidential Assent for WB-HIRA

I Conclusion

A The challenge

1 The constitutional validity of the West Bengal Housing Industry Regulation Act, 2017 (“**WB-HIRA**”/the “**State enactment**”) is challenged in a petition under Article 32. The basis of the challenge is that:

- (i) Both WB-HIRA and a Parliamentary enactment – the Real Estate (Regulation and Development) Act, 2016 (“**RERA**”/the “**Central enactment**”) are relatable to the legislative subjects contained in Entries 6 and 7 of the Concurrent List (interchangeably referred to as ‘List III’) of the Seventh Schedule to the Constitution;
- (ii) WB-HIRA has neither been reserved for nor has it received Presidential assent under Article 254(2);
- (iii) The State enactment contains certain provisions which are either:
 - a. Directly inconsistent with the corresponding provisions of the Central enactment; or
 - b. A virtual replica of the Central enactment; and
- (iv) Parliament having legislated on a field covered by the Concurrent List, it is constitutionally impermissible for the State Legislature to enact a law over the same subject matter by setting up a parallel legislation.

Nuances apart, this, in substance, is the essence of the challenge.

B Legislative history

2 Before Parliament enacted the RERA in 2016, the state legislatures had enacted several laws to regulate the relationship between promoters and purchasers of real estate. Among them was the West Bengal (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993 (the “**WB 1993 Act**”). This legislation of the State of West Bengal was reserved for and received Presidential assent, following which it was published in the Official Gazette on 9 March 1994. Many other States enacted laws on the subject, including among them:

- (i) The Maharashtra Housing (Regulation and Development) Act, 2012 (the “**Maharashtra Act**”), which received Presidential assent on 2 February 2014; and
- (ii) The Kerala Real Estate (Regulation and Development) Act, 2015 (the “**Kerala Act**”), was enacted by the State Legislative Assembly on 3 February 2016.

3 On 14 August 2013, the Bill for enactment of the RERA was introduced in the Rajya Sabha. The Bill was passed by the Rajya Sabha on 10 March 2016, and by the Lok Sabha on 15 March 2016. The law received the assent of the President on 25 March 2016, and was published in the Official Gazette on the next day. RERA was then partially enforced on 1 May 2016¹, while the rest of its provisions were enforced on 19 April 2017². The Maharashtra Act was specifically repealed by

¹ Sections 2, 20 to 39, 41 to 58, 71 to 78 and 81 to 92.

² Sections 3 to 19, 40, 59 to 70, 79 to 80.

RERA³, while the Kerala Act was repealed by the State Legislative Assembly through the Kerala Real Estate (Regulation and Development) Repeal Act, 2017⁴.

4 In the State of West Bengal, draft rules under the RERA were framed on 18 August 2016 but no further progress was made in that regard. On 16 August 2017, the motion for passing the WB-HIRA Bill was adopted in the State Legislative Assembly. The State enactment received the assent of the Governor of West Bengal on 17 October 2017. *Inter alia*, the WB-HIRA repealed the WB 1993 Act⁵. The remaining provisions of WB-HIRA were enforced by a notification⁶ dated 29 March 2018, issued by the Governor of the State of West Bengal in exercise of the power conferred by sub-section (3) of section 1 of WB-HIRA. Thereafter on 8 June 2018, the State of West Bengal framed rules under WB-HIRA.

C RERA - the legislative process

5 The Standing Committee on Urban Development (2012-2013) of the Fifteenth Lok Sabha submitted its Thirtieth Report on the Real Estate (Regulation and Development) Bill, 2013 (the “**RERA Bill 2013**”) pertaining to the Ministry of Housing and Urban Poverty alleviation. While adopting the draft report on 12 February 2014, the Committee emphasized the need for enacting a comprehensive legislation to

³ “Section 92. Repeal: The Maharashtra Housing (Regulation and Development) Act, 2012 is hereby repealed.”

⁴ Its Statement of Objects and Reasons noted “... As per clause (1) of article 254 of the Indian Constitution, if any provision of a law made by the legislature of a State is repugnant to any law made by the Parliament, the law made by the legislature of a State shall become void. Therefore the Government have decided to repeal the Kerala Real Estate (Regulation and Development) Act, 2015.”

⁵ “86. Repeal and Savings. (1) The West Bengal (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993 is hereby repealed.”

⁶ No. 18-HIV/3M-3/17 (PART-2)

regulate the real estate sector. The backdrop is succinctly summarized in the prefatory paragraphs of the report, which are set out below:

“Over the past few decades, the demand for housing has increased manifold. In spite of Government’s efforts through various schemes, it has not been able to cope up with the increasing demands. Taking advantage of the situation, the private players have taken over the real estate sector with no concern for the consumers. Though availability of loans both through private and public banks has become easier, the high rate of interest and the higher EMI has posed additional financial burden on the people with the largely unregulated Real Estate and Housing Sector. Consequently the consumers are unable to procure complete information or enforce accountability against builders and developers in the absence of an effective mechanism in place. At this juncture the need for the Real Estate (Regulation and Development) Bill is felt badly for establishing an oversight mechanism to enforce accountability of the Real Estate Sector and providing adjudication machinery for speedy dispute redressal.

1.2. The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated. There is, thus, absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is inadequate to address all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasized in various forums.”

6 Upon being introduced in the Rajya Sabha, the RERA Bill 2013 was referred to a twenty-one member Select Committee, on a motion adopted by the House on 6 May 2015. The Committee held seventeen sittings – nine in Delhi and the remaining in different parts of the country. As many as 445 persons appeared before the Select

Committee drawn from different categories and groups of stakeholders - representatives of consumers; resident welfare associations; promoter – builders; banks and financial institutions; Housing Ministries of all the States and Union Territories; law firms and independent experts in the field of real estate. Following a press communique, the Select Committee invited suggestions and views from the members of the public, receiving a total of 273 suggestions. It further visited Kolkata, Bengaluru, Mumbai and Shimla to interact with stakeholders in various parts of the country. While discussing diverse issues which were presented before it by stakeholders, the Select Committee noted the grievances of consumers, many of whom were duped by unscrupulous promoters and were made to run from pillar to post to secure possession of the apartments which were agreed to be sold or a refund of their moneys. The plight of the consumers is highlighted in the following passage in the report of the Select Committee, which was presented before the Rajya Sabha on 30 July 2015:

“(i) Consumers and Resident Welfare Association

The Committee came across many instances of standalone projects where the consumers were fleeced by the unscrupulous promoters. These consumer invested their hard earned money for their dream houses which turned out to be a nightmare for them while they run from pillar to post either to get the possession of their apartment or refund of their money back and fighting cases in the courts. The consumers were unanimous in their submission that they have no means to know about the real status of the project for example whether all the approvals have been obtained, who is holding the title of the land, what is the financing pattern of the project and what has been the past record of the builder, etc As a result, they invested their money without having any information about the project. In many cases, they were not given what was promised to them and in almost all the cases

the project was delayed. Submitting their views on the Bill, they highlighted the following points:-

- a) There should not be any deemed provision for the registration of project by promoter. The projects should be registered only after thorough scrutiny.
- b) Any housing project should commence only after obtaining all the approvals by the promoter and they should have access to all the documents before entering into agreement of sale.
- c) The advance cost of apartment, plot or building before entering into written agreement should not be more than one lakh or 5 % of the cost of apartment whichever is less (Clause 13(1)).
- d) There should be model "agreement for sale" which should be appended to the Bill.
- e) In case of default by a promoter, they should be given refund of money at the market rate prevailing at that time with interest.
- f) There should be one criterion for selling a flat i.e. the carpet area which should be clearly defined and should not be linked to National Building Code which can be damaged any time independent of the Bill.
- g) The definition of the term 'advertisement' should be made more exhaustive and the definition of the term 'allottee' should also include the association of allottees or group of allottees so that they can in case of need take up the cause collectively.
- h) Information relating to various clearances, credentials of promoter i.e., cases pending against, defaults in payments in the past, projects left in between in the past, etc. water harvesting environmental impact, net worth of promoters and financing pattern etc. should be given.
- i) Regarding the provision to keep 50% of the amount realized for the project from allottees in a separate account, it was demanded that this amount should not be less than 70%.
- j) On structural defect after handing over the possession, it was demanded that the liability of promoter should be increased from 2 years to 5 years.
- k) In case any project is abandoned by a promoter the way out suggested in clause 16 is inappropriate. In such an eventuality, the promoter be subjected to heavy penalty and compelled to carry the project through rather than considering the suggested options which were not practicable.
- l) In case of default, allottees are charged penalty at much higher rate of interest compared to default on the part of the promoter.

- m) There should not be any exemption to any project from the provisions of this Bill in respect of area and number of flats.
- n) Timely formation of the association of allottees and handing over of the common areas to the association for management at the earliest.
- o) Parking areas accommodation for domestic help to be dealt as per the Supreme Court Judgment.”

7 In bringing about a balance between the need to protect consumers with the necessity of encouraging investment in the real estate sector, the Committee observed that while it shared the concerns of consumers, many of whom have to suffer because of 'fly by night operators', it was cognizant of the position that the real estate sector was largely being developed through private promoters, all of whom could not be tarred with the same brush. The Select Committee observed that there was a need to ensure that a renewed impetus is provided for the growth of the real estate sector to fulfill the government's objective of ensuring housing for all, while at the same time protecting the interest of consumers. The Committee struck a legislative balance between these objects, seeking to “stand by the good consumer and the good promoter”.

8 Following the report of the Select Committee, the Real Estate (Regulation and Development) Bill, 2016 (the “**RERA Bill 2016**”) was introduced. The Statement of Objects and Reasons accompanying the RERA Bill 2016 emphasizes the basic rationale for the enactment of the legislation:

“STATEMENT OF OBJECTS AND REASONS

The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent

years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. **The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasized in various forums.**

2. In view of the above, **it becomes necessary to have a Central legislation, namely the Real Estate (Regulation and Development) Bill, 2013 in the interests of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector.** The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.

3. **The proposed Bill will ensure greater accountability towards consumers and significantly reduce frauds and delays as also the current high transactions costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardization in the sector, thus paving the way for accelerated growth and investments in the long run."**

(emphasis supplied)

9 The legislative background antecedent to and ultimately culminating in the enactment of the RERA indicates: *firstly*, the circumstances which gave rise to the need for comprehensive Parliamentary legislation on the subject; *secondly*, the

specific inadequacies in the development of the real estate sector which were a source of exploitation of purchasers; *thirdly*, the legislative policy underlying the enactment of the law; and *fourthly*, the context in which specific statutory provisions have been adopted as the instrument for bringing about orderly development and growth of the real estate sector. The legislative background demonstrates the concern of the policy makers that the unregulated growth of the real estate sector, accompanied by a lack of professionalism and standardization, had resulted in serious hardship to consumers. The real estate sector is of crucial significance to meet the demand for housing in the country. While remedies were provided to consumers by the Consumer Protection Act, 1986, this recourse was “curative” and did not assuage all the concerns of buyers on the one hand and promoters on the other hand in the sector. There existed an asymmetry of information between promoters and buyers of real estate. Buyers lacked adequate information about the title to the land, the nature of the development, pricing of projects and the progress of construction. A lack of standardization and uniformity was a key factor restraining the balanced growth and development of the real estate sector. The Central enactment sought to remedy the drawbacks of the existing regulatory framework in the country by establishing a real estate regulatory authority to ensure that transactions between promoters and buyers are governed by the twin norms of efficiency and transparency. It sought to bring about accountability towards consumers and to significantly reduce frauds, delays and high transaction costs. While imposing duties and responsibilities on promoters and purchasers, RERA sought to achieve its objectives by ensuring:

- (i) Symmetry of information between promoters and purchasers;
- (ii) Transparency of contractual conditions;
- (iii) Threshold standards of standardization of accountability; and
- (iv) A fast-track dispute resolution mechanism.

Besides the Statement of Objects and Reasons, the long title to the legislation dwells on the purpose of the law in the following terms:

“An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.”

10 As such, the legislative background underlying the enactment of the RERA demonstrates a clear emphasis on:

- (i) Standardization;
- (ii) Uniformity; and
- (iii) Symmetry of information.

These elements provide the justification for enacting a comprehensive legislation which is uniformly applicable to all parts of the country.

D Salient features – RERA

11 Before we proceed further, some of the salient features of the RERA need to be noticed:

(i) The expression ‘real estate project’ is defined in Section 2(zn):

“(zn) “real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;”

(ii) The expression ‘apartment’, which is adverted to in the definition of real estate project under Section 2(zn), is defined in Section 2(e) as follows:

“(e) “apartment” whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;”

(iii) The provisions of the RERA are comprised in ten Chapters. Broadly, the division is as follows:

Chapter I	Preliminary
Chapter II	Registration of Real Estate Projects and Registration of

	Real Estate Agents
Chapter III	Functions and Duties of Promoters
Chapter IV	Rights and Duties of allottees
Chapter V	The Real Estate Regulatory Authority
Chapter VI	Central Advisory Council
Chapter VI	The Real Estate Appellate Tribunal
Chapter VII	Offences, Penalties and Adjudication
Chapter IX	Finance, Accounts, Audits and Reports
Chapter X	Miscellaneous

- (iv) RERA mandates the registration of real estate projects and real estate agents. The salient features of this process are:
- a. Mandatory registration of real estate projects with the real estate regulatory authority is required before the promoter can advertise, market, book, sell or offer for sale or invite persons to purchase a plot, apartment or building in a real estate project;
 - b. Mandatory registration of real estate agents before facilitating the sale or purchase of plots, apartments or buildings in real estate projects;
 - c. Mandatory public disclosure of all project details by promoters;

- d. Promoters are required to make a mandatory public disclosure of all registered projects on the web-site of the authority including lay out plans, land titles, statutory approvals, agreements;
- (v) RERA also provides the functions and duties of promoters, in the following terms:
 - a. Disclosure of all relevant information relating to the project;
 - b. Adherence to approved plans and project specifications as approved by competent authorities;
 - c. Obligations regarding veracity of advertisements or prospectus;
 - d. Transfer of title by a registered deed of conveyance;
 - e. Refund of monies in case of default;
 - f. Prohibition on accepting more than ten per cent of the cost as advance without entering into a written agreement for sale;
 - g. Rectification of structural defects for a specified period from the date of possession;
 - h. Formation of an association, society or cooperative society of allottees and the execution of a registered deed of conveyance;
- (vi) It also provides the rights and obligations of allottees, which are:
 - a. Obtaining information about sanctioned plans, lay outs and specifications approved by the competent authority;
 - b. The date wise time schedule for completion of the project including provisions for essential amenities;

- c. Claiming possession, including possession of the common areas by the association;
 - d. Refund in the event for default;
 - e. Duty to make payments of consideration for the sale of the apartment, plot or building together with interest as prescribed;
 - f. Duty to take possession;
- (vii) Establishment of a real estate authority by the appropriate government (the State government in a State with corresponding provisions for Union territories), with the following details provided:
- a. Composition of the authority;
 - b. Qualifications for appointment to the authority;
 - c. Removal of members and conditions of service;
 - d. Functions of the authority include the growth and promotion of the real-estate sector;
- (viii) RERA also provides for the establishment of a Central Advisory Council to advise and make recommendations to the Central government on all matters concerning the implementation of RERA, on major questions on policy, towards protection of consumer interest, to foster the growth and development of real-estate sector and on any other matter as assigned by the Central government.
- (ix) It also establishes the Real-Estate Appellate Tribunal, provides the following details about the institution:
- a. Establishment;

- b. Settlement of disputes and appeals;
 - c. Composition;
 - d. Conditions of service;
 - e. Powers;
 - f. Appeals;
- (x) RERA notes the offences, penalties and adjudication, along with:
- a. Delegated legislation;
 - b. Power of the appropriate government to make rules;
 - c. Framing of regulations by the authority; and
- (xi) Finally, Sections 88 and 89 of the RERA provide as follows:

“88. Application of other laws not barred.—The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

89. Act to have overriding effect.—The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

E Salient provisions of WB-HIRA

12 The long title to the State enactment describes the purpose and content of the legislation as:

“An Act to establish the Housing Industry Regulatory Authority for regulation and promotion of the housing sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish a mechanism for

speedy dispute redressal and for matters connected therewith or incidental thereto.”

Its preamble is in the following terms:

“Whereas it is expedient to establish the Housing Industry Regulatory Authority for regulation and promotion of the housing sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish a mechanism for speedy dispute redressal and for matters connected therewith or incidental thereto.”

The above excerpts indicate that the State enactment purports to set up a regulatory authority for the housing industry. Save and except for this emphasis on the housing industry, the broad purpose of the State enactment coincides with RERA. Before we set out a comparative table of the corresponding provisions of WB-HIRA and RERA, it is necessary to note at the outset that there is, in most of the substantive provisions, a complete overlap of the provisions contained in the two statutes. Evidently, the Bill for the introduction of WB-HIRA in the State legislature was prepared on the basis of the RERA as a drafting model. Hence, during the course of this judgment, the provisions of the State enactment which are at variance to those in the Central enactment will be delineated separately. However, at this stage, a sampling of some of the crucial provisions would indicate that they are identical in their entirety, in the State of West Bengal’s WB-HIRA and RERA which has been enacted by Parliament. This identical nature is evident from the tabulated statement set out below, in which the identical provision is placed in the middle (as extracted

from the RERA), while it is flanked with its relevant Section number and title from RERA and WB-HIRA on both sides:

Section and Title of RERA	Provision	Section and Title of WB-HIRA
2(b) – Definition of “advertisement”	(b) "advertisement" means any document described or issued as advertisement through any medium and includes any notice, circular or other documents or publicity in any form, informing persons about a real estate project, or offering for sale of a plot, building or apartment or inviting persons to purchase in any manner such plot, building or apartment or to make advances or deposits for such purposes;	2(a) – Definition of “advertisement”
2(d) – Definition of “allottee”	(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;	2(c) – Definition of “allottee”
2(e) – Definition of “apartment”	(e) "apartment" whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;	2(d) – Definition of “apartment”
2(j) – Definition of	(j) "building" includes any structure or erection or	2(h) – Definition of

Section and Title of RERA	Provision	Section and Title of WB-HIRA
“building”	part of a structure or erection which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade, or for any other related purposes;	“building”
2(k) – Definition of “carpet area”	(k) "carpet area" means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment. <i>Explanation.</i>— For the purpose of this clause, the expression "exclusive balcony or verandah area" means the area of the balcony or verandah, as the case may be, which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee; and "exclusive open terrace area" means the area of open terrace which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee;	2(j) – Definition of “carpet area”
2(n) – Definition of “common areas”	(n) "common areas" mean— (i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase; (ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings; (iii) the common basements, terraces, parks, play areas, open parking areas and common storage spaces; (iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service	2(m) – Definition of “common areas”

Section and Title of RERA	Provision	Section and Title of WB-HIRA
	personnel; (v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy; (vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use; (vii) all community and commercial facilities as provided in the real estate project; (viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;	
2(zk) – Definition of “promoter”	(zk) "promoter" means— (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or (iii) any development authority or any other public body in respect of allottees of— (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or (b) plots owned by such authority or body or	2(zj) – Definition of “promoter”

Section and Title of RERA	Provision	Section and Title of WB-HIRA
	placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or (iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or (vi) such other person who constructs any building or apartment for sale to the general public. <i>Explanation.</i>—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;	
2(zm) – Definition of “real estate agent”	(zm) "real estate agent" means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each	2(zl) – Definition of “real estate agent”

Section and Title of RERA	Provision	Section and Title of WB-HIRA
	other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called;	
2(zn) – Definition of “real estate project”	(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;	2(zm) – Definition of “real estate project”
3 – Prior registration of real estate project with Real Estate Regulatory Authority	(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act: Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act: Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that	3 – Prior registration of real estate project with Real Estate Regulatory Authority

Section and Title of RERA	Provision	Section and Title of WB-HIRA
	stage of registration. (2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required— (a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases: Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act; (b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act; (c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project. <i>Explanation.</i>—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.	
4 – Application for registration of real estate projects	(1) Every promoter shall make an application to the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be specified by	4 – Application for registration of real estate projects

Section and Title of RERA	Provision	Section and Title of WB-HIRA
	the regulations made by the Authority. (2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely:— (a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter; (b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending; (c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases; (d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority; (e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency	

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	evacuation services, use of renewable energy; (f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project; (g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees; (h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any; (i) the number and areas of garage for sale in the project; (j) the names and addresses of his real estate agents, if any, for the proposed project; (k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project; (l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:— (A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person; (B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;	

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	(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be; (D) that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose: Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project: Provided further that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project: Provided also that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for the project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project. <i>Explanation.</i>— For the purpose of this clause, the term "schedule bank" means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934; (E) that he shall take all the pending approvals on	

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	time, from the competent authorities; (F) that he has furnished such other documents as may be prescribed by the rules or regulations made under this Act; and (m) such other information and documents as may be prescribed. (3) The Authority shall operationalise a web based online system for submitting applications for registration of projects within a period of one year from the date of its establishment.	
5 – Grant of registration	(1) On receipt of the application under sub-section (1) of section 4, the Authority shall within a period of thirty days. (a) grant registration subject to the provisions of this Act and the rules and regulations made thereunder, and provide a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder: Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter. (2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of	5 – Grant of registration

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	the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project. (3) The registration granted under this section shall be valid for a period declared by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4 for completion of the project or phase thereof, as the case may be	
6 – Extension of registration	The registration granted under section 5 may be extended by the Authority on an application made by the promoter due to force majeure, in such form and on payment of such fee as may be specified by regulations made by the Authority: Provided that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year: Provided further that no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter. <i>Explanation.</i>— For the purpose of this section, the expression "force majeure" shall mean a case of war, flood, drought, fire, cyclone, earthquake or	6 – Extension of registration

Section and Title of RERA	Provision	Section and Title of WB-HIRA
	any other calamity caused by nature affecting the regular development of the real estate project	
7 – Revocation of registration	(1) The Authority may, on receipt of a complaint or suo motu in this behalf or on the recommendation of the competent authority, revoke the registration granted under section 5, after being satisfied that— (a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made thereunder; (b) the promoter violates any of the terms or conditions of the approval given by the competent authority; (c) the promoter is involved in any kind of unfair practice or irregularities. <i>Explanation.</i>—For the purposes of this clause, the term "unfair practice means" a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:— (A) the practice of making any statement, whether in writing or by visible representation which,— (i) falsely represents that the services are of a particular standard or grade; (ii) represents that the promoter has approval or affiliation which such promoter does not have; (iii) makes a false or misleading representation concerning the services; (B) the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not	7 – Revocation of the registration

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	intended to be offered; (C) the promoter indulges in any fraudulent practices. (2) The registration granted to the promoter under section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation. (3) The Authority may, instead of revoking the registration under sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter. (4) The Authority, upon the revocation of the registration,— (a) shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration; (b) shall facilitate the remaining development works to be carried out in accordance with the provisions of section 8; (c) shall direct the bank holding the project back	

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	account, specified under subclause (D) of clause (I) of sub-section (2) of section 4, to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8; (d) may, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary. Revocation of registration.	
8 – Obligation of Authority consequent upon lapse of or on revocation of registration	Upon lapse of the registration or on revocation of the registration under this Act, the Authority, may consult the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority: Provided that no direction, decision or order of the Authority under this section shall take effect until the expiry of the period of appeal provided under the provisions of this Act: Provided further that in case of revocation of registration of a project under this Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.	8 – Obligation of Authority consequent upon lapse of or on revocation of registration
9 – Registration of real estate agents	(1) No real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being the part of the real estate project registered under section 3,	9 – Registration to real estate agents

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	being sold by the promoter in any planning area, without obtaining registration under this section. (2) Every real estate agent shall make an application to the Authority for registration in such form, manner, within such time and accompanied by such fee and documents as may be prescribed. (3) The Authority shall, within such period, in such manner and upon satisfying itself of the fulfillment of such conditions, as may be prescribed— (a) grant a single registration to the real estate agent for the entire State of Union territory, as the case may be; (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of the Act or the rules or regulations made thereunder: Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter. (4) Whereon the completion of the period specified under sub-section (3), if the applicant does not receive any communication about the deficiencies in his application or the rejection of his application, he shall be deemed to have been registered. (5) Every real estate agent who is registered as per the provisions of this Act or the rules and regulations made thereunder, shall be granted a registration number by the Authority, which shall	

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	be quoted by the real estate agent in every sale facilitated by him under this Act. (6) Every registration shall be valid for such period as may be prescribed, and shall be renewable for a period in such manner and on payment of such fee as may be prescribed. (7) Where any real estate agent who has been granted registration under this Act commits breach of any of the conditions thereof or any other terms and conditions specified under this Act or any rules or regulations made thereunder, or where the Authority is satisfied that such registration has been secured by the real estate agent through misrepresentation or fraud, the Authority may, without prejudice to any other provisions under this Act, revoke the registration or suspend the same for such period as it thinks fit: Provided that no such revocation or suspension shall be made by the Authority unless an opportunity of being heard has been given to the real estate agent.	
10 – Functions of real estate agents	Every real estate agent registered under section 9 shall— (a) not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority; (b) maintain and preserve such books of account, records and documents as may prescribed; (c) not involve himself in any unfair trade practices,	10 – Functions of real estate agents

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	namely:— (i) the practice of making any statement, whether orally or in writing or by visible representation which— (A) falsely represents that the services are of a particular standard or grade; (B) represents that the promoter or himself has approval or affiliation which such promoter or himself does not have; (C) makes a false or misleading representation concerning the services; (ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered. (d) facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building, as the case may be; (e) discharge such other functions as may be prescribed.	
11 – Function and duties of promoter	(1) The promoter shall, upon receiving his Login Id and password under clause (a) of sub-section (1) or under sub-section (2) of section 5, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing, including— (a) details of the registration granted by the Authority; (b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be,	11 – Functions and duties of promoter

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	booked; (c) quarterly up-to-date the list of number of garages booked; (d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate; (e) quarterly up-to-date status of the project; and (f) such other information and documents as may be specified by the regulations made by the Authority. (2) The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto. (3) The promoter at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:— (a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority; (b) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.	

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	(4) The promoter shall— (a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed. (b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be; (c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees; (d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;	

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	(e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable: Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project; (f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act; (g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project): Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal	

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	charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person; (h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be; (5) The promoter may cancel the allotment only in terms of the agreement for sale: Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause. (6) The promoter shall prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority.	
12 – Obligations of promoter regarding veracity of the advertisement or prospectus	Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act: Provided that if the person affected by such incorrect, false statement contained in the notice,	12 – Obligations of promoter regarding veracity of the advertisement or prospectus

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	advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.	
13 – No deposit or advance to be taken by promoter without first entering into agreement for sale	(1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. (2) The agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.	13 – No deposit or advance to be taken by promoter without first entering into agreement for sale
14 – Adherence to sanctioned plans and project specifications by the promoter	(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.	14 – Adherence to sanctioned plans and project specifications by the promoter

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	(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make— (i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person: Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee. <i>Explanation.</i>—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc. (ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the	

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	project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building. <i>Explanation.</i>—For the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only. (3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.	
15 – Obligations of promoter in case of transfer of a real estate project to a third party	(1) The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority: Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots	15 – Obligations of promoter in case of transfer of a real estate project to a third party

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	or buildings as the case may be, in the real estate project made by the erstwhile promoter. <i>Explanation.</i>—For the purpose of this sub-section, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only. (2) On the transfer or assignment being permitted by the allottees and the Authority under sub-section (1), the intending promoter shall be required to independently comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees: Provided that any transfer or assignment permitted under provisions of this section shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.	
16 – Obligations	(1) The promoter shall obtain all such insurances	16 – Obligations of

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of promoter regarding insurance of real estate project	as may be notified by the appropriate Government, including but not limited to insurance in respect of — (i) title of the land and building as a part of the real estate project; and (ii) construction of the real estate project (2) The promoter shall be liable to pay the premium and charges in respect of the insurance specified in sub-section (1) and shall pay the same before transferring the insurance to the association of the allottees. (3) The insurance as specified under sub-section (1) shall stand transferred to the benefit of the allottee or the association of allottees, as the case may be, at the time of promoter entering into an agreement for sale with the allottee. (4) On formation of the association of the allottees, all documents relating to the insurance specified under sub-section (1) shall be handed over to the association of the allottees.	promoter regarding insurance of real estate project
17 – Transfer of title	(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified	17 – Transfer of title

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	period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate. (2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws: Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate.	
18 – Return of amount and compensation	(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other	18 – Return of amount and compensation

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	reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act: Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed. (2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force. (3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.	
19 – Rights and duties of allottees	(1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information	19 – Rights and duties of allottees

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	as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter. (2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale. (3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4. (4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder. (5) The allottee shall be entitled to have the	

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	necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter. (6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any. (7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6). (8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee. (9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same. (10) Every allottee shall take physical possession	

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	of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be. (11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.	
20 – Establishment and incorporation of Real Estate Regulatory Authority	(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under this Act: Provided that the appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority: Provided further that, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be: Provided also that until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority for the	20 – Establishment and incorporation of Housing Industry Regulatory Authority

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	purposes under this Act: (2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.	
21 – Composition of Authority	The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government.	21 – Composition of Authority
22 – Qualifications of Chairperson and Members of Authority	The Chairperson and other Members of the Authority shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department dealing with Housing and the Law Secretary, in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at least twenty years in case of the Chairperson and fifteen years in the case of the Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration: Provided that a person who is, or has been, in the service of the State Government shall not be appointed as a Chairperson unless such person has held the post of Additional Secretary to the Central Government or any equivalent post in the	22 – Qualifications of Chairperson and Members of Authority

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	Central Government or State Government: Provided further that a person who is, or has been, in the service of the State Government shall not be appointed as a member unless such person has held the post of Secretary to the State Government or any equivalent post in the State Government or Central Government.	
23 – Term of office of Chairperson and Members	23. (1) The Chairperson and Members shall hold office for a term not exceeding five years from the date on which they enter upon their office, or until they attain the age of sixtyfive years, whichever is earlier and shall not be eligible for re-appointment. (2) Before appointing any person as a Chairperson or Member, the appropriate Government shall satisfy itself that the person does not have any such financial or other interest as is likely to affect prejudicially his functions as such Member.	23 – Term of office of Chairperson and Members
24 – Salary and allowances payable to Chairperson and Members	(1) The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed and shall not be varied to their disadvantage during their tenure. (2) Notwithstanding anything contained in sub-sections (1) and (2) of section 23, the Chairperson or a Member, as the case may be, may,— (a) relinquish his office by giving in writing, to the appropriate Government, notice of not less than three months; or (b) be removed from his office in accordance with	24 – Salary and allowances payable to Chairperson and Members

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	the provisions of section 26 of this Act. (3) Any vacancy caused to the office of the Chairperson or any other Member shall be filled-up within a period of three months from the date on which such vacancy occurs.	
25 – Administrative powers of Chairperson	The Chairperson shall have powers of general superintendence and directions in the conduct of the affairs of Authority and he shall, in addition to presiding over the meetings of the Authority, exercise and discharge such administrative powers and functions of the Authority as may be prescribed.	25 – Administrative power of Chairperson
26 – Removal of Chairperson and Members from office in certain circumstances	(1) The appropriate Government may, in accordance with the procedure notified, remove from office the Chairperson or other Members, if the Chairperson or such other Member, as the case may be,— (a) has been adjudged as an insolvent; or (b) has been convicted of an offence, involving moral turpitude; or (c) has become physically or mentally incapable of acting as a Member; or (d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or (e) has so abused his position as to render his continuance in office prejudicial to the public interest. (2) The Chairperson or Member shall not be removed from his office on the ground specified under clause (d) or clause (e) of sub-section (1)	26 – Removal of Chairperson and other Members from office in certain circumstances

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	except by an order made by the appropriate Government after an inquiry made by a Judge of the High Court in which such Chairperson or Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges	
27 – Restrictions on Chairperson or Members on employment after cessation of office	(1) The Chairperson or a Member, ceasing to hold office as such, shall not— (a) accept any employment in, or connected with, the management or administration of, any person or organisation which has been associated with any work under this Act, from the date on which he ceases to hold office: Provided that nothing contained in this clause shall apply to any employment under the appropriate Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or provincial Act or a Government Company, as defined under clause (45) of section 2 of the Companies Act, 2013, which is not a promoter as per the provisions of this Act; (b) act, for or on behalf of any person or organisation in connection with any specific proceeding or transaction or negotiation or a case to which the Authority is a party and with respect to which the Chairperson or such Member had, before cessation of office, acted for or provided advice to, the Authority; (c) give advice to any person using information which was obtained in his capacity as the Chairperson or a Member and being unavailable to or not being able to be made available to the public; (d) enter into a contract of service with, or accept an appointment to a board of directors of, or accept an offer of employment with, an entity with	27 – Restrictions on Chairperson or Members on employment after cessation of office

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	which he had direct and significant official dealings during his term of office as such. (2) The Chairperson and Members shall not communicate or reveal to any person any matter which has been brought under his consideration or known to him while acting as such.	
28 – Officers and other employees of Authority	28. (1) The appropriate Government may, in consultation with the Authority appoint such officers and employees as it considers necessary for the efficient discharge of their functions under this Act who would discharge their functions under the general superintendence of the Chairperson. (2) The salary and allowances payable to, and the other terms and conditions of service of, the officers and of the employees of the Authority appointed under sub-section (1) shall be such as may be prescribed.	28 – Officers and other employees of Authority
29 – Meetings of Authority	(1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority. (2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting. (3) All questions which come up before any	29 – Meetings of Authority

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	meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote. (4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application: Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.	
30 – Vacancies, etc., not to invalidate proceeding of Authority	No act or proceeding of the Authority shall be invalid merely by reason of— (a) any vacancy in, or any defect in the constitution of, the Authority; or (b) any defect in the appointment of a person acting as a Member of the Authority; or (c) any irregularity in the procedure of the Authority not affecting the merits of the case	30 – Vacancies, etc., not to invalidate proceeding of Authority
31 – Filing of complaints with the Authority or the adjudicating officer	(1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be. <i>Explanation.</i>—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered	31 – Filing of complaints with the Authority

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	under any law for the time being in force. (2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be specified by regulations.	
32 – Functions of Authority for promotion of real estate sector	The Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government of the competent authority, as the case may be, on,— (a) protection of interest of the allottees, promoter and real estate agent; (b) creation of a single window system for ensuring time bound project approvals and clearances for timely completion of the project; (c) creation of a transparent and robust grievance redressal mechanism against acts of omission and commission of competent authorities and their officials; (d) measures to encourage investment in the real estate sector including measures to increase financial assistance to affordable housing segment; (e) measures to encourage construction of environmentally sustainable and affordable housing, promoting standardisation and use of appropriate construction materials, fixtures, fittings and construction techniques; (f) measures to encourage grading of projects on various parameters of development including grading of promoters; (g) measures to facilitate amicable conciliation of	32 – Functions of Authority for promotion of real estate sector

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	disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations; (h) measures to facilitate digitization of land records and system towards conclusive property titles with title guarantee; (i) to render advice to the appropriate Government in matters relating to the development of real estate sector; (j) any other issue that the Authority may think necessary for the promotion of the real estate sector.	
33 – Advocacy and awareness measures	(1) The appropriate Government may, while formulating a policy on real estate sector (including review of laws related to real estate sector) or any other matter, make a reference to the Authority for its opinion on possible effect, of such policy or law on real estate sector and on the receipt of such a reference, the Authority shall within a period of sixty days of making such reference, give its opinion to the appropriate Government which may thereafter take further action as it deems fit. (2) The opinion given by the Authority under subsection (1) shall not be binding upon the appropriate Government in formulating such policy or laws. (3) The Authority shall take suitable measures for the promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies.	33 – Advocacy and awareness measures
34 – Functions of	The functions of the Authority shall include—	34 – Functions of

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Authority	(a) to register and regulate real estate projects and real estate agents registered under this Act; (b) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted; (c) to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public; (d) to maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked; (e) to fix through regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be; (f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder; (g) to ensure compliance of its regulations or orders or directions made in exercise of its powers under this Act; (h) to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the	Authority

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	provisions of this Act.	
35 – Powers of Authority to call for information, conduct investigations	(1) Where the Authority considers it expedient to do so, on a complaint or suo motu, relating to this Act or the rules of regulations made thereunder, it may, by order in writing and recording reasons therefor call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be. (2) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under sub-section (1), the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:— (i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority; (ii) summoning and enforcing the attendance of persons and examining them on oath; (iii) issuing commissions for the examination of witnesses or documents; (iv) any other matter which may be perscribed.	35 – Powers of Authority to call for information, conduct investigations
36 – Power to issue interim orders	Where during an inquiry, the Authority is satisfied that an act in contravention of this Act, or the rules and regulations made thereunder, has been committed and continues to be committed or that such act is about to be committed, the Authority	36 – Power to issue interim orders

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	may, by order, restrain any promoter, allottee or real estate agent from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where the Authority deems it necessary	
37 – Powers of Authority to issue directions	37. The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.	37 – Powers of Authority to issue directions
38 – Powers of Authority	(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder. (2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure. (3) Where an issue is raised relating to agreement, action, omission, practice or procedure that— (a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or (b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India.	38 – Powers of Authority
39 – Rectification	The Authority may, at any time within a period of	39 – Rectification of

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of orders	two years from the date of the order made under this Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties: Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act: Provided further that the Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.	orders
43 – Establishment of Real Estate Appellate Tribunal	(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the — (name of the State/Union territory) Real Estate Appellate Tribunal. (2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be. (3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative to Technical Member. (4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal: Provided that, until the establishment of an Appellate Tribunal under this section, the	43 – Establishment of Housing Industry Appellate Tribunal

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	appropriate Government shall designate, by order, any Appellate Tribunal Functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act: Provided further that after the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred. (5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter: Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard. <i>Explanation.</i>—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.	
44 – Application	(1) The appropriate Government or the competent	44 – Application for

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for settlement of disputes and appeals to Appellate Tribunal	authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal. (2) Every appeal made under sub-section (1) shall be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the Authority or the adjudicating officer is received by the appropriate Government or the competent authority or the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed: Provided that the Appellate Tribunal may entertain any appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not filling it within that period. (3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may after giving the parties an opportunity of being heard, pass such orders, including interim orders, as it thinks fit. (4) The Appellate Tribunal shall send a copy of every order made by it to the parties and to the Authority or the adjudicating officer, as the case may be. (5) The appeal preferred under sub-section (1), shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within a period of sixty days from the date of receipt of appeal: Provided that where any such appeal could not be disposed of	settlement of disputes and appeals to Appellate Tribunal

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	within the said period of sixty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within that period. (6) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to deposing of such appeal and make such orders as it thinks fit.	
45 – Composition of Appellate Tribunal	The Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial member and other shall be a Technical or Administrative Member, to be appointed by the appropriate Government. <i>Explanation.</i>—For the purposes of this Chapter,— (i) "Judicial Member" means a Member of the Appellate Tribunal appointed as such under clause (b) of sub-section (1) of section 46; (ii) "Technical or Administrative Member" means a Member of the Appellate Tribunal appointed as such under clause (c) of sub-section (1) of section 46.	45 – Composition of Appellate Tribunal
46 – Qualifications for appointment of Chairperson and Members	(1) A person shall not be qualified for appointment as the Chairperson or a Member of the Appellate Tribunal unless he,— (a) in the case of Chairperson, is or has been a Judge of a High Court; and (b) in the case of a Judicial Member he has held a judicial office in the territory of India for at least	46 – Qualifications for appointment of Chairperson and Members

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	fifteen years or has been a member of the Indian Legal Service and has held the post of Additional Secretary of that service or any equivalent post, or has been an advocate for at least twenty years with experience in dealing with real estate matters; and (c) in the case of a Technical or Administrative Member, he is a person who is well-versed in the field of urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, public affairs or administration and possesses experience of at least twenty years in the field or who has held the post in the Central Government, or a State Government equivalent to the post of Additional Secretary to the Government of India or an equivalent post in the Central Government or an equivalent post in the State Government. (2) The Chairperson of the Appellate Tribunal shall be appointed by the appropriate Government in consultation with the Chief Justice of High Court or his nominee. (3) The judicial Members and Technical or Administrative Members of the Appellate Tribunal shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department handling Housing and the Law Secretary and in such manner as may be prescribed.	
47 – Term of office of Chairperson and	(1) The Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal shall hold office, as such for a term not exceeding five years from	47 – Term of office of Chairperson and

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Members	the date on which he enters upon his office, but shall not be eligible for re-appointment: Provided that in case a person, who is or has been a Judge of a High Court, has been appointed as Chairperson of the Tribunal, he shall not hold office after he has attained the age of sixty-seven years: Provided further that no Judicial Member or Technical or Administrative Member shall hold office after he has attained the age of sixty-five years. (2) Before appointing any person as Chairperson or Member, the appropriate Government shall satisfy itself that the person does not have any such financial or other interest, as is likely to affect prejudicially his functions as such member.	Members
48 – Salary and allowances payable to Chairperson and Members	(1) The salary and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members shall be such as may be prescribed and shall not be varied to their disadvantage during their tenure. (2) Notwithstanding anything contained in sub-sections (1) and (2) of section 47, the Chairperson or a Member, as the case may be, may:— (a) relinquish his office by giving in writing to the appropriate Government a notice of not less than three months; (b) be removed from his office in accordance with	49 – Salary and allowances payable to Chairperson and Members

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	the provisions of section 49. (3) A vacancy caused to the office of the Chairperson or any other Member, as the case may be, shall be filled-up within a period of three months from the date on which such vacancy occurs.	
49 – Removal of Chairperson and Member from office in certain circumstances	(1) The appropriate Government may, in consultation with the Chief Justice of the High Court, remove from office of the Chairperson or any judicial Member or Technical or Administrative Member of the Appellate Tribunal, who— (a) has been adjudged as an insolvent; or (b) has been convicted of an offence which, in the opinion of the appropriate Government involves moral turpitude; or (c) has become physically or mentally incapable; or (d) has acquired such financial or other interest as is likely to affect prejudicially his functions; or (e) has so abused his position as to render his continuance in office prejudicial to the public interest. (2) The Chairperson or Judicial member or Technical or Administrative Member shall not be removed from his office except by an order made by the appropriate Government after an inquiry made by the Judge of the High Court in which such Chairperson or Judicial member or Technical or Administrative Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those	48 – Removal of Chairperson, Member etc

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	charges. (3) The appropriate Government may suspend from the office of the Chairperson or Judicial member or Technical or Administrative Member in respect of whom a reference of conducting an inquiry has been made to the Judge of the High Court under sub-section (2), until the appropriate Government passes an order on receipt of the report of inquiry made by the Judge of the High Court on such reference. (4) The appropriate Government may, by rules, regulate the procedure for inquiry referred to in sub-section (2).	
50 – Restrictions on Chairperson or Judicial Member or Technical or Administrative Member on employment after cessation of office	(1) The Chairperson or Judicial Member or Technical or Administrative Member, ceasing to hold office as such shall not:— (a) Accept any employment in, or connected with, the management or administration of, any person or organisation which has been associated with any work under this Act, from the date on which he ceases to hold office: Provided that nothing contained in this clause shall apply to any employment under the appropriate Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or provincial Act or a Government Company as defined under clause (45) of section 2 of the Companies Act, 2013, which is not a promoter as per the provisions of this Act; (b) act, for or on behalf of any person or organisation in connection with any specific	50 – Restrictions on Chairperson or Judicial Member or Technical or Administrative Member on employment after cessation of office

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	proceeding or transaction or negotiation or a case to which the Authority is a party and with respect to which the Chairperson or Judicial Member or Technical or Administrative Member had, before cessation of office, acted for or provided advice to, the Authority; (c) give advice to any person using information which was obtained in his capacity as the Chairperson or Judicial Member or Technical or Administrative Member and being unavailable to or not being able to be made available to the public; (d) enter into a contract of service with, or accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he had direct and significant official dealings during his term of office as such. (2) The Chairperson or Judicial Member or Technical or Administrative Member shall not communicate or reveal to any person any matter which has been brought under his consideration or known to him while acting as such.	
51 – Officers and other employees of Appellate Tribunal	(1) The appropriate Government shall provide the Appellate Tribunal with such officers and employees as it may deem fit. (2) The officers and employees of the Appellate Tribunal shall discharge their functions under the general superintendence of its Chairperson. (3) The salary and allowances payable to, and the other terms and conditions of service of, the officers and employees of the Appellate Tribunal	51 – Officers and other employees of Appellate Tribunal

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	shall be such as may be prescribed.	
52 – Vacancies	If, for reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a Member of the Appellate Tribunal, the appropriate Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellee Tribunal from the stage at which the vacancy is filled.	52 – Vacancies
53 – Powers of Tribunal	(1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice. (2) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure. (3) The Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872. (4) The Appellate Tribunal shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:— (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents;	53 – Powers of Appellate Tribunal

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	(c) receiving evidence on affidavits; (d) issuing commissions for the examinations of witnesses or documents; (e) reviewing its decisions; (f) dismissing an application for default or directing it ex parte; and (g) any other matter which may be prescribed. (5) All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 for the purposes of section 196 of the Indian Penal Code, and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973	
54 – Administrative powers of Chairperson of Appellate Tribunal	The Chairperson shall have powers of general superintendence and direction in the conduct of the affairs of Appellate Tribunal and he shall, in addition to presiding over the meetings of the Appellate Tribunal exercise and discharge such administrative powers and functions of the Appellate Tribunal as may be prescribed.	54 – Administrative powers of Chairperson of Appellate Tribunal
55 – Vacancies, etc., not to invalidate proceeding of Appellate Tribunal	No act or proceeding of the Appellate Tribunal shall be invalid merely by reason of— (a) any vacancy in, or any defect in the constitution of, the Appellate Tribunal, or (b) any defect in the appointment of a person acting as a Member of the Appellate Tribunal; or (c) Any irregularity in the procedure of the Appellate Tribunal not affecting the merits of the case.	55 – Vacancies, etc., not to invalidate proceeding of Appellate Tribunal
56 – Right to legal representation	The applicant or appellant may either appear in person or authorise one or more chartered	56 – Right to Legal re-presentation

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	accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be. <i>Explanation.</i>—For the purposes of this section,— (a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act; (b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act; (c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act; (d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.	
57 – Orders passed by Appellate Tribunal to be executable as a decree	(1) Every order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.	57 – Orders passed by Appellate Tribunal to be executable as a decree

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	(2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by the court.	
58 – Appeal to High Court	(1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908: Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time. <i>Explanation.</i>—The expression "High Court" means the High Court of a State or Union territory where the real estate project is situated. (2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.	58 – Appeal to High Court
59 – Punishment for non-registration under Section 3	(1) If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to ten per cent. of the estimated cost of the real estate project as determined by the Authority. (2) If any promoter does not comply with the	59 – Punishment for non-registration under Section 3

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	orders, decisions or directions issued under sub-section (1) or continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent. of the estimated cost of the real estate project, or with both.	
60 – Penalty for contravention of Section 4	If any promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project, as determined by the Authority.	60 – Penalty for contravention of Section 4
61 – Penalty for contravention of other provisions of this Act	If any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.	61 – Penalty for contravention of other provisions of this Act
62 – Penalty for non-registration and contravention under Sections 9 and 10	If any real estate agent fails to comply with or contravenes the provisions of section 9 or section 10, he shall be liable to a penalty of ten thousand rupees for every day during which such default continues, which may cumulatively extend up to five per cent. of the cost of plot, apartment or buildings, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority	62 – Penalty for non-registration and contravention under Sections 9 and 10
63 – Penalty for failure to comply with orders of Authority by promoter	If any promoter, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of the real estate project as determined by the Authority	63 – Penalty for failure to comply with orders of Authority by promoter
64 – Penalty for	If any promoter, who fails to comply with, or	64 – Penalty for

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failure to comply with orders of Appellate Tribunal by promoter	contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to three years or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of the real estate project, or with both.	failure to comply with orders of Appellate Tribunal by promoter
65 – Penalty for failure to comply with orders of Authority by real estate agent	If any real estate agent, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated and as determined by the Authority	65 – Penalty for failure to comply with orders of Authority by real estate agent
66 – Penalty for failure to comply with orders of Appellate Tribunal by real estate agent	If any real estate agent, who fails to comply with, or contravenes any of the orders, decisions or directions of the Appellate Tribunal, he shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the estimated cost of plot, apartment or building, as the case may be, of the real estate project, for which the sale or purchase has been facilitated, or with both.	66 – Penalty for failure to comply with orders of Appellate Tribunal by real estate agent
67 – Penalty for failure to comply with orders of Authority by allottee	If any allottee, who fails to comply with, or contravenes any of the orders, decisions or directions of the Authority he shall be liable to a penalty for the period during which such default continues, which may cumulatively extend up to five per cent. of the plot, apartment or building cost, as the case may be, as determined by the Authority	67 – Penalty for failure to comply with orders of Authority by allottee
68 – Penalty for	If any allottee, who fails to comply with, or	68 – Penalty for

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failure to comply with orders of Appellate Tribunal by allottee	contravenes any of the orders or directions of the Appellate Tribunal, as the case may be, he shall be punishable with imprisonment for a term which may extend up to one year or with fine for every day during which such default continues, which may cumulatively extend up to ten per cent. of the plot, apartment or building cost, as the case may be, or with both.	failure to comply with orders of Appellate Tribunal by allottee
69 – Offences by companies	(1) Where an Offence under this Act has been committed by a company, every person who, at the time, the offence was committed was in charge of, or was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section, shall render any such person liable to any punishment under this Act if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.	69 – Offences by companies

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	<i>Explanation.</i>—For the purpose of this section,— (a) "company" means any body corporate and includes a firm, or other association of individuals; and (b) "director" in relation to a firm, means a partner in the firm	
74 – Grants and loans by State Government	The State Government may, after due appropriation made by State Legislature by law in this behalf, make to the Authority, grants and loans of such sums of money as the State Government may think fit for being utilised for the purposes of this Act.	70 – Grants and loans by State Government
75 – Constitution of Fund	(1) The appropriate Government shall constitute a fund to be called the 'Real Estate Regulatory Fund' and there shall be credited thereto,— (a) all Government grants received by the Authority; (b) the fees received under this Act; (c) the interest accrued on the amounts referred to in clauses (a) to (b). (2) The Fund shall be applied for meeting— (a) the salaries and allowances payable to the Chairperson and other Members, the adjudicating officer and the administrative expenses including the salaries and allowances payable to be officers and other employees of the Authority and the Appellate Tribunal; (b) the other expenses of the Authority in connection with the discharge of its functions and	71 – Constitution of Fund

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	for the purposes of this Act. (3) The Fund shall be administered by a committee of such Members of the Authority as may be determined by the Chairperson. (4) The committee appointed under sub-section (3) shall spend monies out of the Fund for carrying out the objects for which the Fund has been constituted.	
76 – Crediting sums realised by way of penalties to Consolidated Fund of India or State account	(1) All sums realised, by way of penalties, imposed by the Appellate Tribunal or the Authority, in the Union territories, shall be credited to the Consolidated Fund of India. (2) All sums realised, by way of penalties, imposed by the Appellate Tribunal or the Authority, in a State, shall be credited to such account as the State Government may specify.	72 – Crediting sums realised by way of penalties to Consolidated Fund of State
77 – Budget, accounts and audit	(1) The Authority shall prepare a budget, maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the appropriate Government in consultation with the Comptroller and Auditor General of India. (2) The accounts of the Authority shall be audited by the Comptroller and Auditor General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Authority to the Comptroller and Auditor General of India. (3) The Comptroller and Auditor-General and any person appointed by him in connection with the	73 – Budget accounts and audit

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	audit of the accounts of the Authority under this Act shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor General generally has in connection with the audit of Government accounts and, in particular shall have the right to demand and production of books, accounts, connected vouchers and other documents and papers, and to inspect any of the offices of the Authority. (4) The accounts of the Authority, as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded annually to the appropriate Government by the Authority and the appropriate Government shall cause the audit report to be laid, as soon as may be after it is received, before each House of Parliament or, as the case may be, before the State Legislature or the Union territory Legislature, where it consists of two Houses, or where such legislature consists of one House, before the House.	
78 – Annual report	(1) The Authority shall prepare once in every year, in such form and at such time as may be prescribed by the appropriate Government,— (a) a description of all the activities of the Authority for the previous year; (b) the annual accounts for the previous year; and (c) the programmes of work for the coming year. (2) A copy of the report received under sub-section (1) shall be laid, as soon as may be after it is received, before each House of Parliament or, as the case may be, before the State Legislature or the Union Territory Legislature, where it consists of	74 – Annual report

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	two Houses, or where such legislature consists of one House, before that House.	
79 – Bar of Jurisdiction	No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.	75 – Bar of Jurisdiction
80 – Cognizance of offences	(1) No court shall take cognizance of any offence punishable under this Act or the rules or regulations made thereunder save on a complaint in writing made by the Authority or by any officer of the Authority duly authorised by it for this purpose. (2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.	76 – Cognizance of offences
81 – Delegation	The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to make regulations under section 85, as it may deem necessary.	77 – Delegation
82 – Power of appropriate Government to supersede Authority	(1) If, at any time, the appropriate Government is of the opinion,— (a) that, on account of circumstances beyond the control of the Authority, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or (b) that the Authority has persistently defaulted in complying with any direction given by the	78 – Power of State Government to supersede Authority

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	appropriate Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Authority or the administration of the Authority has suffered; or (c) that circumstances exist which render it necessary in the public interest so to do, the appropriate Government may, by notification, supersede the Authority for such period, not exceeding six months, as may be specified in the notification and appoint a person or persons as the President or the Governor, as the case may be, may direct to exercise powers and discharge functions under this Act: Provided that before issuing any such notification, the appropriate Government shall give a reasonable opportunity to the Authority to make representations against the proposed supersession and shall consider the representations, if any, of the Authority. (2) Upon the publication of a notification under sub-section (1) superseding the Authority,— (a) the Chairperson and other Members shall, as from the date of supersession, vacate their offices as such; (b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Authority shall, until the Authority is reconstituted under sub-section (3), be exercised and discharged by the person or persons referred to in sub-section (1);	

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	and (c) all properties owned or controlled by the Authority shall, until the Authority is reconstituted under sub-section (3), vest in the appropriate Government. (3) On or before the expiration of the period of supersession specified in the notification issued under sub-section (1), the appropriate Government shall reconstitute the Authority by a fresh appointment of its Chairperson and other members and in such case any person who had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment. (4) The appropriate Government shall cause a copy of the notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament or, as the case may be, before the State Legislature, or the Union Territory Legislature, as the case may be, where it consists of two Houses, or where such legislature consists of one House, before that House.	
83 – Powers of appropriate Government to issue directions to Authority and obtain reports and returns	(1) Without prejudice to the foregoing provisions of this Act, the Authority shall, in exercise of its powers and in performance of its functions under this Act, be bound by such directions on questions of policy, as the appropriate Government may give in writing to it from time to time: Provided that the Authority shall, as far as practicable, be given an opportunity to express its	79 – Powers of State Government to issue directions to Authority and obtain reports and returns

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	views before any direction is given under this sub-section. (2) If any dispute arises between the appropriate Government and the Authority as to whether a question is or is not a question of policy, the decision of the appropriate Government thereon shall be final. (3) The Authority shall furnish to the appropriate Government such returns or other information with respect to its activities as the appropriate Government may, from time to time, require.	
84(1) – Power of appropriate Government to make rules	(1) The appropriate Government shall, within a period of six months of the commencement of this Act, by notification, make rules for carrying out the provisions of this Act.	80(1) – Power of State Government to make rules
85(1) – Power to make regulations	(1) The Authority shall, within a period of three months of its establishment, by notification, make regulations, consistent with this Act and the rules made thereunder to carry out the purposes of this Act.	81 – Power to make regulations
87 – Members, etc., to be public servants	The Chairperson, Members and other officers and employees of the Authority, and the Appellate Tribunal and the adjudicating officer shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.	82 – Members, etc., to be public servants
90 – Protection of action taken in good faith	No suit, prosecution or other legal proceedings shall lie against the appropriate Government or the Authority or any officer of the appropriate Government or any member, officer or other employees of the Authority for anything which is in good faith done or intended to be done under this	84 – Protection of action taken in good faith

Section and Title of RERA	Provision	Section and Title of WB-HIRA
	Act or the rules or regulations made thereunder.	
91 – Power to remove difficulties	(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty: Provided that no order shall be made under this section after the expiry of two years from the date of the commencement of this Act. (2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.	85 – Power to remove difficulties

It needs to be emphasized that the tabulated provisions of the State enactment are verbatim a reproduction of the Central enactment in most instances, with minor differences between the provisions (due to RERA being a Central enactment, and WB-HIRA being a State enactment) but those are not relevant for our present discussion. It is also important to note that Section 83 of WB-HIRA provides as follows:

“83. Application of other laws not barred.- The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.”

13 Section 83 corresponds to Section 88 of the RERA. However, there is no provision in WB-HIRA corresponding to Section 89 of RERA, according to which overriding effect has been given to the RERA, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Further, the repealing provisions of the two enactments are distinct. Section 92 of the RERA has repealed the Maharashtra Act, while Section 86(1) of WB-HIRA repeals the WB 1993 Act.

F RERA and WB-HIRA – provisions at variance

14 In the previous section, this judgment has dwelt on the substantial overlap between the provisions of RERA and the subsequently enacted WB-HIRA. However, in this segment of the judgment, it would be necessary to visit the inconsistencies and deviations made in WB-HIRA from the provisions of the RERA. These divergences are indicated in the following tabulation, which has been put on record by the Union of India during its submissions:

S.No.	Particulars	RERA	WB-HIRA
1	Definition of Car Parking Area:	Under the scheme of RERA: Open Car parking areas are covered under the definition of 'common areas', therefore it cannot be sold. Under, Section 2(n) "common areas" mean—	<u>Section 2 (i):</u> 'Car parking area' has been defined to mean ' such area as may be prescribed '. <u>Further, in WB-HIRA Rules:</u>

S.No.	Particulars	RERA	WB-HIRA
		(i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase; (ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings; (iii) the common basements, terraces, parks, play areas, open parking areas and common storage spaces;	Car parking means an area either enclosed or unclosed, covered or open excluding open car parking areas reserved for common areas and facilities to park vehicles located at any level having sufficient drive way and maneuvering space for loading and uploading as sanctioned by the competent authority and includes all types of car parking areas sanctioned by competent authority.
2	Definition of 'Garage'	Section 2(y): 'Garage' has been defined to mean 'a place within a project having a roof and walls on three sides for parking any vehicle, but does not include an un-enclosed or uncovered parking space such as 'open parking areas'.	Section 2 (x): 'Garage' has been defined to mean 'garage and parking space as sanctioned by the Competent Authority'.
3	Planning Area	RERA applies to only those real estate projects which are located within the planning area notified by the appropriate government or a competent authority to be a planning area.	There exists no separate concept of a planning area. WB-HIRA applies to all projects in the State of West Bengal.
4	"Force Majeure" events for the purpose of Extension of registration	The registration granted under section 5 may be extended by the Authority on an application made by the promoter due to force majeure, in such form and on payment of such fee as may be specified by regulations made by the Authority.	Section 6: Force Majeure events mean a case of war, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature affecting the regular development of the real estate project or any other circumstances as may be prescribed.

S.No.	Particulars	RERA	WB-HIRA
		Under, Section 6, they are limited to a case of war, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature affecting the regular development of the real estate project.	It gives the wider discretion to regulatory authority/State to give extension to real estate project's registration and it may adversely affect the interest of homebuyers.
5	Power of the Regulatory Authority	Section 38 (3): Where an issue has effect of monopoly situation, the authority has power to make suo-motu reference to the Competition Commission of India in certain cases.	No such power to make suo-motu reference to the Competition Commission of India. It may also affect the interest of homebuyers.
6	Establishment of Central Advisory Council	Section 41: Provides for establishment of Central Advisory Council, chaired (ex officio) by the Union Minister of Housing. The functions of the Central Advisory Council shall be to advise and recommend the Central Government (i) on all matters concerning the implementation of this Act; (ii) on major questions of policy; (iii) towards protection of consumer interest; (iv) to foster the growth and development of the real estate sector; (v) on any other matter as may be assigned to it by the Central Government.	Section 41: WB-HIRA provides for establishment of State Advisory Council chaired (ex-officio) by State Minister of Housing. However, the purpose of having a Central Advisory Council was entirely different, which can't be substituted by establishing State Advisory Council. Any advisory of Central Government based upon the recommendation of CAC will have no effect in the state of West Bengal.

S.No.	Particulars	RERA	WB-HIRA
		Recently, during COVID-19 global pandemic time, To address the concerns of homebuyers, who have invested their lifetime savings not deprived of delivery of their dream house/flat and to ensure the completion of projects, based upon the recommendations of Central Advisory Council (CAC) on 13th May, 2020 Ministry has issued the necessary advisory to all States/Union Territories and their Regulatory Authorities for issuance of requisite orders/ directions under the enabling provisions of RERA to invoke force majeure clause and extend the completion date 'suo motu' or revised / extended completion date for all real estate projects registered under RERA for a period of 6 months, where completion date expires on or after 25th March, 2020. However, the stakeholders (homebuyers & promoters) of West Bengal got deprived as they were not covered under the purview of RERA.	
7	Compounding of Offences	Section 70: Provides for compounding of offences under the Act.	There is no such provision.
8	Factors for adjudging quantum of compensation or interest.	Section 71(1): provides that Regulatory Authority shall appoint an adjudicating officer for purpose of adjudging compensation under sections 12, 14, 18 and section 19, who	Section 40(3): Factors stated in WB-HIRA for adjudging the quantum of compensation or interest, payable by a promotor,

S.No.	Particulars	RERA	WB-HIRA
		is or has been a District Judge to be an adjudicating officer.	allottee or real estate agent, as the case may be, are required to be considered by the Regulatory Authority. The power to adjudging compensation has also been given to Regulatory Authority which is being chaired by administrative person not judicial person.
9	Court which may try offences	Section 80(2): No Court inferior to Metropolitan Magistrate or a First Class Judicial Magistrate shall try any offence punishable under the Act.	There is no such provision.
10	Section 84(2)	This provision contained illustration in regard to the exercise of the rule making power.	There is no such provision.
11	Power to make regulation	Section 85(2) contains illustration in regard to the nature of regulations.	There is no such provision.
12	Overriding effect	Section 89: RERA has been given overriding force and effect	There is no such provision.

15 Now, it is in this backdrop that it becomes necessary to consider the submissions made by the parties.

G Submissions

G.1 For the petitioners

16 Mr Devashish Bharuka, learned Counsel appearing on behalf of the petitioners urged the following submissions:

(I) Nature of RERA and WB-HIRA

- a. The subject of both the central and the state enactments is covered by Entries 6 and 7 of the Concurrent List to the Seventh Schedule to the Constitution;
- b. RERA is a complete and exhaustive code which regulates the contractual relationship between a builder/promoter and a buyer/consumer in the real estate sector and provides remedial measures. Parliament has indicated an intent to occupy the whole field;
- c. RERA regulates the rights and obligations between promoters and buyers of real estate in addition to the provisions of the Indian Contract Act, 1872. The enactment, in ensuring the actual transfer of property to the buyer furthers the objects of the Transfer of Property Act, 1882. It provides for the enforcement of contracts through remedial measures which are in addition to the remedies provided in the Consumer Protection Act, 1986 and its successor legislation of 2019. RERA, in other words, is a special statute governing the real estate sector encompassing rights and obligations found in different central enactments; and

- d. WB-HIRA covers the identical field of regulating the contractual behavior of promoters and buyers in real-estate projects. The state law is a 'copy-and paste' replica of the central legislation (except for certain provisions which are inconsistent with RERA) and covers the field which is occupied by the central enactment.

(II) WB-HIRA is repugnant to RERA

- a. The subjects of both sets of legislations are contained in Entries 6 and 7 of the Concurrent List;
- b. The state law does not fall either under the subject of land (Entry 18, List II⁷) or industry (Entry 24, List II). That WB-HIRA does not fall under Entry 24, List II is evident from the meaning of the expression 'industry' as explained in the following decisions:
- *Tika Ram Ji v State of UP*, (1956) SCR 393 at pg. 412, 420 [5-Judges]
 - *Calcutta Gas Co. Ltd. v State of West Bengal*, (1962) Supp. 3 SCR 1 [5-Judges]
 - *ITC Ltd. v Agricultural Produce Market Committee & Ors.*, (2002) 9 SCC 232 [5-Judges]
 - *Accountant and Secretarial Services Pvt. Ltd. v UOI* (1988) 4 SCC 324 [2-Judges]
 - *Ashoka Marketing Ltd. v Punjab National Bank*, (1990) 4 SCC 406 [5-Judges]

⁷ Interchangeably referred to as 'State List'

- *Indu Bhushan Bose v Rama Sundari Debi*, (1969) 2 SCC 289 [5-Judges]
- c. The tests of repugnancy as enunciated in the judgments of this Court are three-fold: *First*, there may be a direct inconsistency or conflict between the actual terms of the competing statutes; *Second*, even if there is no direct conflict, where Parliament has intended to occupy the entire field by enacting an exhaustive or complete code, the state law in the same field would be repugnant and inoperative; and *Third*, a conflict may arise where the State Legislature has sought to exercise its powers over the same subject matter as the legislation by Parliament;
 - d. RERA being an exhaustive code regulating the contractual relationships between promoters and buyers in the real-estate sector, WB-HIRA entrenches on an occupied field and is hence repugnant and *void* under Article 254(2) of the Constitution;
 - e. WB-HIRA was not reserved for the assent of the President and is hence not protected by Article 254(2) nor would the state enactment be protected by Article 255 which applies only to a situation where a 'recommendation' or 'previous sanction' is required to be given by the Governor or the President; and
 - f. Without prejudice to the earlier submissions on the doctrine of occupied field, there are inconsistencies between RERA and WB-HIRA. The state legislature has made several changes which tilt the law in favour of the promoter – builder. For example:

1. Though, the adjudication of compensation under the RERA is entrusted to an adjudicatory officer who is a judicial officer, this provision for an adjudicating officer does not find place in the state enactment.
2. Changes have been made in the definition of the expression's 'garage' and 'force majeure'.
3. Removal of the concept of planning area in the state legislation.
4. Change in the jurisdictional court which takes cognizance of offences;

(III) Complete change of stance by the State government.

- a. At the time when WB-HIRA was enacted by the state legislature, it was intended to govern the field of housing industry under Entry 24 of List II in the State of West Bengal and not the field of 'contracts' and 'transfer of property' under Entries 6 and 7 of List III. This is evident from the following circumstances:
 1. The Statement of Objects and Reasons of the Bill from when it was introduced in the state legislature, specifically notes that housing comes under the ambit of industry which is why the state decided to enact its own legislation;
 2. The long title of the state enactment seeks to establish a housing industry regulatory authority for regulation and promotion of the housing sector;
 3. The Governor of West Bengal was not informed of RERA when assent was sought;

4. Even in the counter affidavit filed in this Court, the State government has pleaded that “as per WB-HIRA, housing comes under the meaning of ‘industry’”; and
5. Once it is conceded during the course of oral submissions that the legislation does not fall under Entry 24 of List II but Entries 6 and 7 of List III, the entire edifice of the legislation being referable to the State List is negated and the state enactment is *void* under Article 254(1).

(IV) Effect of Sections 88 and 89 of RERA:

- a. It is common ground that both the central and state laws fall under the subjects of legislation contained in the Concurrent List;
- b. The State of West Bengal has submitted that Sections 88 and 89 of RERA allows the States to by-pass the requirement of Presidential assent under Article 254(2) to enact a statute which is substantially identical to RERA for creating parallel regimes across the country;
- c. Accepting this submission and allowing the State to provide a “duplicate regime would result in complete chaos in the real-estate sector;
- d. At the time when RERA was enacted several state laws were in existence including

State Act	Date of Presidential assent
Maharashtra Ownership Flats (Regulation of the promotion of Construction, Sale,	12.12.1963

management and Transfer) Act, 1963	
Karnataka Ownership Flat (Regulation of the promotion of Construction, Sale, Management and Transfer) Act, 1972	29.06.1973
Gujarat Ownership Flats Act, 1973	28.06.1973
Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987	15.05.1987
West Bengal (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993	09.03.1994
Punjab Apartment and Property Regulation Act, 1995	02.08.1995

The above state laws covered certain areas beyond what is covered by RERA. Hence, Section 89 read with the proviso to Article 254(2) impliedly repeals such provisions to the extent to which they overlap with the RERA. Significantly, the state legislations covering the same subject matter were enacted in Maharashtra in 2012 and in Kerala in 2015. By Section 92 of RERA, Parliament repealed the Maharashtra legislation while Kerala repealed its own law in 2017;

- e. The legislative history of RERA would indicate that there was a clarion call for a uniform national law in the real-estate sector for some time;
- f. Section 88 of RERA stipulates that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force while

Section 89 gives overriding force and effect to RERA notwithstanding anything inconsistent contained in any other law for the time being in force;

- g. The expression “for the time being in force” may, according to context and intent refer to either
 - 1. a specific period of time or
 - 2. to all periods of time.

Since RERA is remedial and regulatory, it is to operate together with existing laws including the Consumer Protection Act for the purpose of providing wholesome statutory protections- both to promoters and consumers. Section 89 gives overriding effect to RERA over inconsistent existing laws;

- h. Sections 88 and 89 do not prohibit the enactment of laws by Parliament or the state legislatures in future. However, in the case of a future state law covering the same field, its validity has to be tested only on the touchstone of Article 254 without reference to Sections 88 or 89. In the event of a future Parliamentary law, its effect and impact would be tested on the general principles of interpretation of statutes such as general and special laws, an earlier and later law and the rule of harmonious construction. The State cannot enact a law on the subject matter without seeking Presidential assent;
- i. The expression “in addition to and not in derogation of” was intended to indicate that the remedies in RERA are addition to those provided by other

statutes including the Consumer Protection Act and the Insolvency and Bankruptcy Code, 2016 (“**IBC**”).

- j. Provisions analogous to Sections 88 and 89 of the RERA are contained in several other central statutes on the subjects in the Concurrent List some of which are tabulated below:

Central Law under List III	Addition and not in Derogation provision	Overriding over other Inconsistent laws
Electricity Act, 2003 (List III, Entry 38)	Sec. 175	Sec.174
Limited Liability Act, 2008 (List III, Entry 7)	Sec. 71	--
The Commercial Courts, 2015 (List III, Entries 11-A, 13, 46)	--	Sec. 21
Insolvency and Bankruptcy Code, 2016 (List III, Entry 9)	--	Sec. 238
The Mental Healthcare Act, 2017 (List III, Entry 16)	--	Sec. 120
The Fugitive Economic Offenders Act, 2018 (List III, Entry 1)	Sec. 22	Sec. 21

If the interpretation of the State of West Bengal is accepted, the States would have an open hand to legislate by enacting a parallel regime as in the case of WB-HIRA without obtaining Presidential assent. This would destroy the federal legislative scheme of the primacy of Parliament under Article 254.

(V) Applicability of Article 256

- a. The interpretation placed by the State of West Bengal on Sections 88 and 89 is contrary to the request of the Union of India to the State to repeal WB-HIRA and to notify the rules under RERA;
- b. The State was under a constitutional mandate to act under Article 256 rather than enacting its own law without Presidential assent under Article 254(2); and
- c. The enactment of a parallel regime for implementing provisions analogous to RERA in the State of West Bengal will create serious inconvenience and absurdity and render the entire scheme of RERA as a uniform national regulation, unworkable. Under RERA, the State government acts as a delegate of Parliament whereas with WB-HIRA, the State has shifted its role to that of a delegator.

(VI) Upon the declaration of WB-HIRA as unconstitutional, the 1993 legislation in West Bengal may also be declared as repealed in view of the following:

- a. Section 89 of the RERA impliedly repeals all earlier state acts with Presidential assent under the proviso to Article 254(2); and
- b. In the alternative, Section 86 of WB-HIRA which repeals WB 1993 Act may be severed by applying the doctrine of severability.

On the above grounds, it has been submitted that WB-HIRA is *void* for want of legislative competence.

G.2 For the Union of India

17 Ms Aishwarya Bhati, learned Additional Solicitor General appearing on behalf of the Union of India urged the following submissions:

(I) Background and Statement of objects of RERA

- a. The legislative background before the enactment of the RERA in 2016 indicates that a comprehensive exercise was carried out by the Select Committee of the Rajya Sabha which heard the views of stakeholders from across the country;
- b. Parliament has enacted RERA, as the Statement of Objects and Reasons indicates, having due regard to
 - 1. The necessity of a central legislation to provide effective protection to real estate buyers and protect them from exploitation;
 - 2. The need to ensure uniformity and standardization of business practices;

3. The key purpose of RERA is to ensure uniformity, transparency, efficiency, symmetry, standardization and efficacious dispute resolution;
- c. While enacting the RERA, Parliament by its definition of “appropriate government” in Section 2(g) entrusted wide powers to the State governments including the power to frame rules and regulations.
- d. Some of the salient features of RERA include
 1. Registration of real estate projects;
 2. Registration of real estate agents;
 3. Mandatory disclosures of project details on the web-site of the authority;
 4. Fast track dispute settlement mechanism;
 5. Establishment of a Central Advisory Council to recommend policy measures for protecting consumer interest and ensure faster growth and development of the real estate sector; and
 6. Establishment of a real estate regulatory authority and appellate tribunal for oversight of real estate transactions and to settle disputes by imposing interest and compensation.

(II) Constitutional validity

- a. The validity of RERA has been upheld by the Bombay High Court⁸ (except for Section 46(1)(b));

⁸ WP 2737 of 2017, decided on 6 December 2017

- b. As many as 29 States and Union Territories have notified rules under RERA as of the date of the filing of the counter affidavit;
- c. As on date, 34 States and Union Territories have notified the rules (with the sole exceptions of Nagaland where the process is going on and West Bengal which has enacted its separate legislation). The provisions of WB-HIRA bear an uncanny resemblance to RERA and large portions of the State legislation have been copied verbatim from the central legislation;
- d. The Statement of Objects and Reasons of WB-HIRA also indicates that the purpose was to regulate and promote the housing sector in an efficient and transparent manner in the interests of consumers. The objects of the state legislation are synonymous with RERA and the State statute deals with the same subject matter in an identical manner. The State of West Bengal in effect has set up a parallel mechanism and parallel regime which is similar to the RERA on a majority of counts; and
- e. Though in the counter affidavit, the State of West Bengal sought to justify the state law primarily under Entry 24 of List II of the Seventh Schedule, this stand has been specifically given up at the time of the oral submissions.

(III) Article 254 of the Constitution and repugnancy

Repugnancy of a statute enacted by the state legislature with a central statute on a subject in the concurrent list may arise in any one or more of the following modes:

First, there may be an inconsistency or conflict in the actual terms of competing

statutes; *second*, though there is no direct conflict between a State and Central statute, the latter may be intended to be an exhaustive code in which event it occupies the whole field, excluding the operation of the state law on the subject in the concurrent list; and *third*, even in the absence of an actual conflict, repugnancy may arise when both the State and Central statutes seek to exercise power over the same subject matter;

a. First test of repugnancy: direct conflict

There is a direct inconsistency between several provisions of the RERA and WB-HIRA:

1. Under the RERA open car parking areas are covered by the definition of 'common areas' in Section 2(n), indicating therefore that they cannot be sold; on the other hand in the State enactment, Section 2(i) allows the car parking area to be prescribed by rules made by the state government;
2. The definition of 'garage' in Section 2(y) of RERA does not include unenclosed or uncovered parking spaces such as open parking areas, whereas Section 2(x) of WB-HIRA defines the expression 'garage' to mean parking spaces as sanctioned by the competent authority;
3. RERA applies only to those real estate projects situated in a planning area while there is no concept of a planning area in the state legislation;

4. Section 6 of the RERA specifically confines *force majeure* events to specific eventualities whereas the corresponding provision of state enactment is much wider leaving it to be prescribed by the rules;
5. Under Section 38(3) of RERA, the Authority has been entrusted with the power to make a reference to the Competition Commission of India in the event of a monopoly situation while there is no such provision in the state enactment;
6. While Section 41 of the RERA provides for a Central Advisory Council to advise and recommend the Central government on specific matters, the corresponding provision of WB-HIRA provides for the establishment of a State Advisory Council chaired by the State Minister of Housing;
7. Unlike Section 70 of RERA which has a provision of compounding of offences, there is no corresponding provision in WB-HIRA;
8. Section 71(1) provides for the appointment of an adjudicating officer of the rank of a district judge by the regulatory authority for adjudging compensation. Section 40 of WB-HIRA entrusts the adjudicatory function to the administrative regulatory authority without providing for a judicial officer; and
9. Section 80(2) of the RERA provides that no court inferior to that of a Metropolitan Magistrate or Judicial Magistrate First Class shall try an offence under the RERA, while there is no such provision in WB-HIRA.

The Central government has established a fund of Rs 25,000 crores (known as the SWAMIH) to provide for last mile funding for projects which are net-worth positive and registered under RERA, including those projects declared as NPAs or those which are the subject matter of proceedings before the NCLT under the IBC. If the state law is allowed to hold the field, buyers of real estate projects in the State of West Bengal which are not registered under the RERA will lose the benefit of the above provision.

b. Second test of repugnancy: Occupied field

1. The entire subject of WB-HIRA is the same as RERA as a result of which the state law is repugnant to the central legislation;
2. The enforcement of the RERA would be completely obstructed in the State of West Bengal if WB-HIRA is given effect to;
3. Sections 88 and 89 of RERA cannot be construed in isolation. While Section 88 permits the existence of other laws in addition to RERA, this would not apply to other legislation which would completely derail, obstruct and assault the very existence of RERA;
4. In the decision in **Pioneer Urban Land & Infrastructure Ltd vs Union of India**⁹, the provisions of three central enactments were construed harmoniously namely RERA, the Consumer Protection Act, 1986 and the IBC. Construing these enactments harmoniously, the Court held that the IBC and Consumer Protection Act as well as RERA provide

⁹ (2019) 8 SCC 416

concurrent remedies to allottees of flats which can be exercised at their option; and

5. Even assuming that Sections 88 and 89 of RERA are construed as an intent of the Parliament to not occupy the field exhaustively, they cannot be implied to allow the operation of State laws which completely eclipse and encroach upon RERA so much so that the existence of RERA is impossible as long as WB-HIRA is given effect to by the State.

c. Third test of repugnancy: implied repeal

1. The subject matter of both the enactments is the regulation of the real estate sector;
2. WB-HIRA stands in the State of West Bengal in place of RERA. Both cannot stand together. As a matter of fact, while WB-HIRA is fully operational in the State of West Bengal, RERA is non-operational;
3. The only exception would be where the State legislation contains distinct matters which are of a cognate and allied nature. However, in the present case, WB-HIRA deals on all fours with the subject matter of RERA and not with any distinct matter which is cognate or allied; and
4. The state enactment has created an identical but parallel and mutually exclusive regime in the State of West Bengal, which cannot co-exist with the regime which is enacted under RERA.

On the above grounds, it has been submitted that the state enactment fails all the three tests of repugnancy. While the failure of the first test would only require WB-

HIRA to yield to RERA to the extent of the repugnancy, since the State enactment in the present case completely obstructs and hinders the Parliamentary law, the repugnancy is, according to the submission, absolute and complete.

G.3 For the State of West Bengal

18 Mr Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the State of West Bengal has urged the following submissions:

(I) RERA does not cover the whole field and is not exhaustive:

- a. An analysis of RERA would indicate that its objective is to regulate and promote the real estate sector and to ensure the sale of plots, apartments, buildings and real estate projects in an efficient and transparent manner. The other object is to protect consumer interest and establish an adjudicating mechanism for speedy resolution of disputes, including appeals;
- b. A survey of the provisions of RERA would indicate that it is based on plans sanctioned and approved by competent authorities under state enactments. The sanctioned plan provides a specific period for construction and local bodies are responsible for the sanctioning of plans under local laws. Similarly, local authorities provide for completion certificates. The diverse provisions of RERA contemplate the jurisdiction of local authorities governed by state laws in the matter of sanctioning of plans and completion of construction projects. This is supported by

references to the planning area (Section 2(zh)) and appropriate government (Section 2(g) of RERA); and

- c. The provisions of Sections 88 and 89 of RERA indicate that the central legislation is not a complete or exhaustive code on the subject matter legislated upon by Parliament.

(II) Constitutional validity

- a. While enacting RERA in exercise of its legislative powers under Articles 245 and 246 of the Constitution, Parliament has enacted the legislation on the subjects assigned to it under Entries 6 and 7 of List III of the Seventh Schedule which pertain to transfer of property and contracts not relating to agricultural land. Since the enactment in the State of West Bengal follows the provisions of RERA “broadly and substantially”, the state enactment would also be covered by Entries 6 and 7 of List III of the Seventh Schedule;
- b. In the Counter Affidavit filed by the State of West Bengal it was contended that the State enactment falls under Entry 24 of List II, as it deals with the housing industry. This contention is not correct and is not being pressed. This is for the reason that the ambit of Entry 24 of List II has been explained in the decisions of the Constitution Bench in **Tika Ramji vs State of UP**¹⁰ and **ITC Ltd vs Agricultural Produce Market Committee**¹¹

¹⁰ (1956) SCR 393

¹¹ (2002) 9 SCC 232

to exclude those subjects which are specifically included in the other Entries of List III in the Seventh Schedule; and

- c. In view of the above position, Entry 24 of List II will not cover the field which is covered by Entries 6 and 7 of List III. Hence, the present case has to be adjudicated upon by considering both RERA and WB-HIRA as being referable to subjects in Concurrent List. Consequently, the Court will have to determine as to whether Article 254 has a nullifying effect on the state enactment.

(III) Article 254 and Repugnancy

- a. In view of the language of Article 254, the state law would be *void* only if it is inconsistent with and repugnant to a law made by Parliament in the Concurrent List and, in such an event, only to the extent of the repugnancy;
- b. Repugnancy would arise if there is a conflict between a state enactment and central enactment which cannot be reconciled or if the central enactment occupies the whole field completely and exhaustively. Applying the above tests, there is no repugnancy or inconsistency between WB-HIRA and RERA. Irrespective of Sections 88 and 89 of RERA, Article 254 is not attracted;
- c. The submission of the petitioner is based on the substantial identity between WB-HIRA and RERA. This substantial identity is indicative of consonance, conformity and symmetry. Identity of subject matter does not

- constitute inconsistency or repugnancy, particularly when the central enactment is not a complete and exhaustive code; and
- d. In the present case, the state law is complementary to the central law.

(IV) Sections 88 and 89 of RERA

- a. Sections 88 and 89 indicate that RERA was not intended by Parliament to be a complete and exhaustive code nor is it intended to be exclusive in operation. Sections 88 and 89 allow other laws to operate and wherever there is an inconsistency with RERA, the central act would prevail.;
- b. Sections 88 and 89 indicate a Parliamentary intent that RERA should co-exist with other legislations;
- c. Section 88 refers to “any other law for the time being in force”. Such an expression has been construed by this Court to cover laws which were operating when RERA was enacted as well as laws made after the enforcement of RERA;
- d. The expression ‘laws for the time being in force’ has been deployed in Section 2(zr) and Section 18(2) of RERA as well as in Section 89. This supports the contention of the State of West Bengal;
- e. Parliament has chosen to repeal only the Maharashtra Act by way of Section 92 of RERA. Prior to WB-HIRA, in the State of West Bengal, the WB 1993 Act was operating. Parliament did not repeal this Act. The WB 1993 Act was repealed only by Section 86 of WB-HIRA to align the State Act with the RERA. The fact that Parliament repealed only the

Maharashtra Act indicates that RERA does not evince any intention to shut out other state enactments. On the contrary the Parliamentary intent is to make RERA permissive and accommodative of state legislation;

- f. The fact that other states had not enacted a law like WB-HIRA does not take away the plenary legislative powers of the State of West Bengal;
- g. In exercise of the rule making power under Section 80(1) of the WB-HIRA, the State of West Bengal has framed rules on 5 June 2018. A dedicated web-site has been made operational. The regulatory authority has been established on 23 July 2018 while its Chairperson and Members were appointed on 25 June 2020 and 30 June 2020. The Appellate Tribunal has been established on 29 July 2019 and both the Authority and the Appellate Tribunal are adjudicating all complaints; and
- h. One of the reasons for enacting WB-HIRA was to enable the State to have its own State Advisory Council for advising and recommending to the State government on the implementation of the law on major questions of policy, protection of consumer interest and development of the real estate sector.

(V) The few inconsistencies between WB-HIRA and RERA are of a minor nature:

- a. There is no real conflict with the provisions of RERA under which an adjudicating officer decides disputes as to compensation under Section 71. Under Section 31, a complaint can be filed both before the 'Authority' and the 'Adjudicating Officer'. Under WB-HIRA, the Authority decides and there

- is an appeal provided to the Tribunal and then to the High Court. Consequently, there is no conflict;
- b. While under WB-HIRA, the Chairperson of the Tribunal can be removed in consultation with the Chief Justice of the High Court, as in the case of RERA, both Acts contemplate an enquiry by a Judge of the High Court. This secures the independence of the Chairperson;
 - c. As regards the definition of 'garage,' 'planning area,' and '*force majeure*', there is no significant difference. RERA adopts a declaration of planning area in the law relating to Town and Country Planning of the State and hence a separate provision in the State Act is not required. Similarly, the definitions of 'garage' and *force majeure* are not variant;
 - d. The State Advisory Council is to act in compliance with the rules framed by the Central government. Where the rules have not been framed by the Central government or there is an issue which is not governed by the Central Act, the State can prescribe a rule or policy on the recommendation of the State Advisory Council. Sections 83 and 84 of RERA contemplate a role for the State in this regard;
 - e. Under RERA grants are made by the Central government whereas under WB-HIRA grants are given by the State government. This does not result in a conflict. The State cannot provide for grants by the Central government. Moreover, there is nothing to prevent the Central government from making a grant under Article 282 of the Constitution;

- f. Even if the Central Act provides certain additional features which are absent in the State Act, the State Act would be bound to treat those as being superimposed on the State law in view of Section 89 of RERA. Moreover, a Removal of Difficulties Order can be issued under Section 85 of WB-HIRA; and
- g. Article 256 of the Constitution does not enable the Union Executive to give directions to the State legislature. Federalism is a basic feature of the Constitution. WB-HIRA follows the principle of cooperative federalism. The Union government has no authority to direct the State legislature to repeal its law.

These submissions will now fall for analysis.

H Analysis

H.1 Entry 24, List II – West Bengal’s ‘housing industry’ defense

19 The interesting feature of the case with which we commence the discussion is that when it was enacted, WB-HIRA was intended to cover the field of ‘housing industry’ under Entry 24 of List II. The Statement of Objects and Reasons to the WB-HIRA Bill notes that:

“2. Since the ‘**housing**’ comes under the periphery of ‘**industry**’, it is contemplated that the State Government should go for its **own State Legislation**... ..”

20 The long title to the state enactment explains that WB-HIRA is “an act to establish Housing Industry Regulatory Authority (“HIRA”) for regulation and promotion of housing sector...”.

21 In the Counter Affidavit which has been filed on behalf of the State of West Bengal before this Court the subject of the legislation is asserted to fall within the purview of the following Entries in the **State List** of the Seventh Schedule to the Constitution:

- Entry 5- Local Government
- Entry 18- Land
- Entry 24- Industries subject to the provisions of entries 7 and 52 of List I
- Entry 35- Works, lands and buildings vested in or in the possession of the State
- Entry 64- Offences against laws with respect to any of the matters in this List
- Entry 66- Fees in respect of any of the matters in this List, but not including fees taken in any court.

Even as among the above Entries, the Counter Affidavit substantively dwells on Entry 24 of the State List. The defense in the Counter is that (i) housing as an industry falls in Entry 24 of the State List; (ii) Entry 24 is subject to the provisions of Entries 7¹² and 52¹³ of List I; (iii) there is no declaration by Parliament within the

¹² “7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.”

¹³ “52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.”

meaning of Entries 7 or 52; (iv) WB-HIRA falls within the ambit of 'industry' in Entry 24 of the State List. That indeed is the basis of the Counter Affidavit. Paragraphs 15, 16 and 17 of the Counter are extracted below:

"15. It is most respectfully submitted that, **as per WBHIRA "housing" comes under the meaning of "Industry"**. Therefore, the State Government ought to go for curated legislations, specific to the need of the State. Furthermore, State law can also be amended by the State itself without approaching the central government as and when the occasion arises to meet the necessity of the people of the state. That, even the **Real Estate Activities being an industry' vests in the State Legislature competence to enact a legislation on the subject matters by virtue of Entry 24 of the State List in the Seventh Schedule to the Col since the matter falls within the purview of the State list unless brought under the Control of the Union by the relevant Legislation.**

16. That it is imperative to note that Entry 24 of State List in its widest amplitude takes in all Industries. In other words, the **legislative power of the State under Entry 24 of State List is eroded only to the extent to which control was assumed by the Union pursuant to a declaration made by parliament under Entry 52 of Union List. In the absence thereof, under Entry 52 of Union List, the State Legislature will have power to legislate under Entry 24 of State List.** That under Entry 52 of the Union List, it is required that an express declaration be made by the Parliament, an abstract declaration is not contemplated. In the event the Parliament passes a law containing a declaration specifying the industry and indicating the nature and extent of the Union control over the concerned industry, then to that limited extent the State's legislative power is curtailed. **It is reiterated that even in the case of a declaration under Entry 52 by the Central Government, "industry" as a whole is not taken out of Entry 24 of the State List.**

17. That, in furtherance of the above, it is further submitted that a perusal of RERA exhibits that there is no declaration even in the abstract that the Union intends to assume control over the real estate sector."

(emphasis supplied)

22 As a matter of fact, it has also been urged that Entries 6 and 7 of the Concurrent List would not cover the subject of the housing industry since the field covered by these Entries “merely enables the manner and mode in which property is to be transferred and contracts are to be executed”. This submission is sought to be buttressed by stating that WB-HIRA is merely an extension of RERA with a wider purview of the housing industry as opposed to RERA which deals with a limited extent only with real estate. In other words, since the legislation falls under Entry 24 of the State List, there was – in the submission - no necessity of reserving the law for the assent of the President.

23 Faced with the judgments of this Court defining the ambit of the expression “industry” in the Union and the State Lists, the basis of asserting the legislative competence of the State legislature (‘industry’ in Entry 24 of List II) over the subject of the State enactment as set out in the Counter Affidavit has been specifically given up in the course of the oral submissions in this Court. As a matter of fact, the written submissions which have been placed on the record during the course of the hearing specifically state that the claim of WB-HIRA being referable to Entry 24 of the State List “as it deals with housing industry” is “not accurate and is not being pressed”. The reason which has been adduced is that the ambit of Entry 24 of List II has been explained to exclude from within its fold subject matters which are specifically included in the other Entries of the three Lists of the Seventh Schedule.

24 Before proceeding with the discussion any further, it would be necessary for this Court to dwell on the concession which has been made on behalf of the State of

West Bengal. The concession is based on a correct assessment of the ambit of the expression ‘industry’ in the three lists. In **Tika Ramji vs State of UP**¹⁴ (“**Tika Ramji**”), there was a challenge to the validity of the UP Sugarcane (Regulation of Supply and Purchase) Act 1953 under which the UP Sugarcane Supply and Purchase Order 1954 was made. The *vires* of the Act was challenged on the ground that the Act was respect to the subject of industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest, within the meaning of Entry 52 of List I. Parliament enacted the Industries (Development and Regulation) Act 1951 declaring that it was expedient in the public interest that the Union should take in its control the industries specified in the First Schedule which included the industry engaged in the manufacture or production of sugar. In **Tika Ramji** (supra), the argument was that the expression ‘industries’ should be construed as not only including the process of manufacture or production but also activities antecedent, such as acquisition of raw-material and subsequent, such as the disposal of finished products. A Constitution Bench of this Court held that the expression ‘industry’ in its wide sense would be capable of comprising three different aspects: first, raw materials which are an integral part of the industrial process; second, the process of manufacture and production; and third, distribution of the products of the industries. The Court held that the process of manufacture or production would be comprised in Entry 24 of List II except where the industry is a controlled industry when it would fall under Entry 52 of List I. The Constitution Bench rejected the contention that the expression “industries” in Entry 52 of List I was wide

¹⁴ 1956 SCR 393

enough to encompass the power to legislate in respect of raw material said to be an integral part of the industrial process or the distribution of the products of the industry.

25 The decision in **Tika Ramji** (supra) was followed by a Constitution Bench in **Calcutta Gas Co. (Proprietary) vs State of West Bengal**¹⁵ which held that the expression 'industry' in all the three Lists must be given the same meaning and since ordinarily, industry is in the field of State legislation, the word must be construed in such a manner that no entry in List II is deprived of its entire content. A Constitution Bench of this Court in **ITC Ltd. vs Agricultural Produce Market Committee**¹⁶ reiterated the principles which have been enunciated in **Tika Ramji** (supra). Justice YK Sabharwal, (as the learned Chief Justice then was), speaking for himself and Justice Brijesh Kumar, reiterated the principles which were adopted by the Constitution Bench in **Tika Ramji** (supra). After considering the precedents of this Court, the judgment reiterated the principles enunciated in **Tika Ramji's** (supra) case. In a concurring judgment, Justice Ruma Pal noted:

“126. To sum up: **the word “industry” for the purposes of Entry 52 of List I has been firmly confined by Tika Ramji [1985 Supp SCC 476: 1985 Supp (1) SCR 145] to the process of manufacture or production only.** Subsequent decisions including those of other Constitution Benches have reaffirmed that Tika Ramji case [AIR 1956 SC 676 : 1956 SCR 393] authoritatively defined the word “industry” — to mean the process of manufacture or production and that it does not include the raw materials used in the industry or the distribution of the products of the industry. Given the constitutional framework, and the weight

¹⁵ AIR 1962 SC 1044

¹⁶ (2002) 9 SCC 232

of judicial authority it is not possible to accept an argument canvassing a wider meaning of the word “industry”. Whatever the word may mean in any other context, it must be understood in the constitutional context as meaning “manufacture or production”.

(emphasis supplied)

26 In view of the settled exposition of the ambit of Entry 24 of List II to the Seventh Schedule, there can be no manner of doubt that the subject of WB-HIRA is not ‘industries’ within the meaning of Entry 24. Both the central legislation – RERA and the State legislation – WB-HIRA have substantially similar provisions. These provisions seek to regulate the contractual relationship between builders/promoters and their buyers in the real estate sector. They recognize rights and obligations *inter se* promoters, buyers and real estate agents. Both the State law and the Central law provide for remedial measures to enforce compliance with contractual rights and corresponding obligations. Hence, quite correctly, the arguments before this Court have been addressed on the basis that the subject of both the central and the state legislations – RERA and WB-HIRA falls under Entries 6 and 7 of the Concurrent List to the Seventh Schedule. Entries 6 and 7 are extracted below:

“6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.”

Now it is true that the edifice of the defense which was set up before this Court in the Counter Affidavit is premised on the State enactment being a law on the subject

of ‘industries’ falling within the ambit of Entry 24 of the State List. The genesis of this defense traces its origin to the Statement of Objects and Reasons accompanying the Bill when it was introduced in the State legislature in West Bengal. Indeed, the long title also indicates that the State legislation sought to establish a ***Housing Industry*** Regulatory Authority (“**HIRA**”). But these references in the Statement of Objects and Reasons; the long title and the Counter Affidavit do not preclude the State of West Bengal from asserting, in the course of the submissions, that the State legislation in pith and substance is not one which is on the subject of industries within the meaning of Entry 24 of List II and that it falls within the ambit of Entries 6 and 7 of List III. Indeed, as we have noticed in the earlier part of this judgment, there is a substantial overlap between the provisions of RERA and WB-HIRA. Even the inconsistencies which have been noticed earlier are on the same subject matter. The provisions of RERA essentially seek to regulate the contractual relationship between builders/promoters and purchasers in the real estate sector. RERA, truly speaking, falls within the ambit of Entries 6 and 7 of the Concurrent List. The substantial overlap between the state and the central legislation is evident on a comparative analysis of the two legislations which has been alluded to in the earlier part of this judgment. The State of West Bengal is not precluded from seeking to sustain its legislation on the basis that in pith and in substance it falls within the ambit of Entries 6 and 7 of the Concurrent List. The analysis of the constitutional challenge in the present case must therefore proceed on the basis that both the central legislation – RERA, and the state legislation – WB-HIRA, fall within the subjects embodied in Entries 6 and 7 of List III of the Seventh Schedule. That

indeed is the foundation on which submissions have been urged and the further analysis is based. In a matter involving the constitutional validity of its law the State of West Bengal has not been precluded by this court from urging the full line of its defense.

H.2 The Constitutional Scheme of Article 254 and repugnancy

27 The distribution of legislative powers in Part XI of the Constitution envisages that Parliamentary legislation extends to the entire territory of India or its part while state legislation extends law to the whole or any part of a state. Under Article 246¹⁷, the legislative power to make laws “with respect to” any of the matters enumerated in List I of the Seventh Schedule – the Union List – is entrusted to Parliament. Clause (1) of Article 246 which embodies this principle is prefaced with a non-obstante provision which gives it precedence over clauses (2) and (3). Article 246 (2) enunciates the principles governing the exercise of legislative power “to make laws with respect to any of the matters enumerated in List III of the Seventh

¹⁷ “246. Subject matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List)

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List)

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule (in this Constitution referred to as the State List)

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.”

Schedule, the Concurrent List. Clause (2) begins with a non-obstante provision which gives it precedence over Clause (3). Clause (2) embodies the principle that Parliament and (subject to clause (1)) the legislature of any State have the power to make laws with respect to any of the matters in List III. Clause 3 stipulates that the legislature of any State has the exclusive power to make laws for the State or any part of it “with respect to any of the matters enumerated in List II”, the State List. Some of the salient features of Article 246 need to be noticed.

- (i) An exclusive power has been entrusted to Parliament to legislate on matters enumerated in List I;
- (ii) The plenary power entrusted to Parliament to legislate with respect to a matter enumerated in List I is reaffirmed by the non-obstante provision which operates notwithstanding anything in Clauses (2) and (3);
- (iii) On matters which have been enumerated in List III:
 - a. Parliament has the power to make laws notwithstanding clause (3); and
 - b. The State legislature also has the power to make laws subject to clause (1).
- (iv) The State legislatures have the exclusive powers to make laws for the State or any part of it with respect to matters in List II, this power being subject to clauses (1) and (2);
- (v) Clauses (1) and (2) of Article 246 employ non-obstante provisions in respect of
 - a. The exclusive power entrusted to Parliament over List I matters;

- b. The power entrusted to Parliament over List III matters;
- (vi) Though, the legislature of a State has exclusive power to make laws with respect to matters on the State List, this is subject to clauses (1) and (2).

28 Parliament, under Article 248, has been entrusted with the residuary powers of legislation (subject to Article 246A) to make any law with respect to any matter which is not enumerated in the Concurrent or State Lists. The 101st Amendment to the Constitution, which came into force from 16 September 2016, inserted Article 246A¹⁸ to make a special provision with respect to the goods and services tax. Article 246A begins with a non-obstante provision, giving it overriding force over Articles 246 and 254. Under clause (1), Parliament and, subject to clause (2), the legislature of a State has the power to make laws with respect to goods and services tax imposed by the Union or by the State. Under clause (2), Parliament has been entrusted with the exclusive power to make laws with respect to goods and services tax where the supply of goods, services or both takes place in the course of inter-state trade and commerce.

¹⁸ “(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation. - The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.”

29 Article 254¹⁹ contains provisions for inconsistencies between laws made by Parliament and by the legislatures of the States. Clause (1) of Article 254 stipulates that where a State law “is repugnant” to a Parliamentary law which Parliament is competent to enact or to a provision of an existing law “with respect to one of the matters enumerated in the Concurrent List”, then the law made by Parliament is to prevail and the law made by the legislature of a State shall “to the extent of the repugnancy” be *void*. The provisions of clause (1) are subject to clause (2). Clause (1) also provides that in the event of a repugnancy between a law enacted by the State legislature with a provision of a law made by Parliament which it is competent to enact or to a provision of an existing law with respect to a matter enumerated in the Concurrent List, the law enacted by Parliament is to prevail whether it was enacted before or after the State law or, as the case may be, the existing law. Clause (1) of Article 254 is however made subject to clause (2) which envisages that if a State law on a matter enumerated in the Concurrent List contains a provision which is repugnant to an earlier law of Parliament or an existing law with respect to

¹⁹ 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State

the subject matter, the law made by the legislature of the State will prevail in the State if it has been reserved for the consideration of the President and has received such assent. Despite the grant of Presidential assent, the Parliament is not precluded from enacting any law with respect to the same matter in future including a law adding to, amending, varying or repealing the law made by the legislature of the State.

30 Some of the salient features of Article 254 may be noticed at this stage:

- (i) **Firstly**, Article 254(1) embodies the concept of repugnancy on subjects within the Concurrent List on which both the State legislatures and Parliament are entrusted with the power to enact laws;
- (ii) **Secondly**, a law made by the legislature of a State which is repugnant to Parliamentary legislation on a matter enumerated in the Concurrent List has to yield to a Parliamentary law whether enacted before or after the law made by the State legislature;
- (iii) **Thirdly**, in the event of a repugnancy, the Parliamentary legislation shall prevail and the State law shall “*to the extent of the repugnancy*” be void;
- (iv) **Fourthly**, the consequence of a repugnancy between the State legislation with a law enacted by Parliament within the ambit of List III can be cured if the State legislation receives the assent of the President; and
- (v) **Fifthly**, the grant of Presidential assent under clause (2) of Article 254 will not preclude Parliament from enacting a law on the subject matter, as stipulated in the proviso to clause (2).

31 A long line of precedent of this Court has developed on the content of the concept of repugnancy as envisaged in Article 254. It becomes necessary to visit some of those precedents in order to prepare a jurisprudential foundation for addressing the central challenge in the present case. In **Zaverbhai Amaldas vs State of Bombay**²⁰ (“Zaverbhai”), the contention of the State was that as a result of the Essential Supplies (Temporary Powers) Act (Act 24 of 1946) which was followed by amendments in 1948-1949 and 1950, Section 2 of Bombay Act 36 of 1947 had become inoperative. The amendments of 1948 and 1949 were made when Section 107(2) of the Government of India Act was in force. At the time when the Amending Act of 1950 was enacted, the Constitution had come into operation. Justice TL Venkatarama Aiyar speaking for the Constitution Bench, held that there was no express repeal of the Bombay Act by Central Act 52 of 1950 in terms of the proviso to Article 254(2). Hence, the question to be decided was whether the amendments made to the Essential Supplies (Temporary Powers) Act by the Central legislature in 1948, 1949 and 1950 were “further legislation” under Section 107(2) of the Government of India Act, 1947 or a “law with respect to the same matter” falling within Article 254(2). In this context, the Court held:

“8...The important thing to consider with reference to this provision is whether the legislation is “in respect of the same matter”. **If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Article 254(2) will have no application. The principle embodied in Section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the Centre and by the**

²⁰ (1955) 1 SCR 799

Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.”

(emphasis supplied)

Dealing with the issue, the Court held that a State legislation whose subject matter is identical to a law enacted by the Parliament would be repugnant under Article 254(1):

“11. It is true, as already pointed out, that on a question under Article 254(1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that **if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law.** We must accordingly hold that Section 2 of Bombay Act 36 of 1947 cannot prevail as against Section 7 of the Essential Supplies (Temporary Powers) Act 24 of 1946 as amended by Act 52 of 1950.”

(emphasis supplied)

32 The judgement of the Constitution Bench in **Tika Ramji** (supra) explained the concept of repugnancy arising by reason of both Parliament and the State legislature having operated in the same field in respect of a matter enumerated in the Concurrent List. Justice NH Bhagwati adopted the three tests of repugnancy on inconsistency spelt out by Nicholas’ text on the Australian Constitution and observed:

“27. Nicholas in his *Australian Constitution*, 2nd Ed., p. 303, refers to three tests of inconsistency or repugnancy:—

(1) There may be inconsistency in the actual terms of the competing statutes (*R. v. Brisbane Licensing Court*, [1920] 28 CLR 23).

(2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code (*Clyde Engineering Co. Ltd. v. Cowburn*, [1926] 37 CLR 466).

(3) **Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter** (*Victoria v. Commonwealth*, [1937] 58 CLR 618; *Wenn v. Attorney-General (Vict.)*, [1948] 77 CLR 84).”

(emphasis supplied)

Section 109 of the Australia Constitution Act of 1900²¹ envisages a style of federalism and repugnance in similar terms to the Indian Constitution. Therefore, Australian jurisprudence would also be instructive in interpreting repugnance between provisions of the State law against Parliamentary enactments. The Constitution Bench in **Zaverbhai** (supra) thereafter moved on to cite other judgments of the High Court of Australia, observing:

“28. Isaacs, J. in *Clyde Engineering Company, Limited v. Cowburn* [(1926) 37 CLR 466, 489] laid down one test of inconsistency as conclusive: “If, however, a competent legislature expressly or implicitly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field”.

Dixon, J. elaborated this theme in *Ex parte McLean* [(1930) 43 CLR 472, 483]:

²¹ “109. Inconsistency of laws.—When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

“When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and Section 109 applies. That this is so is settled, at least when the sanctions they impose are diverse. But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject-matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter”.

To the same effect are the observations of Evatt, J. in *Stock Motor Plough Ltd. v. Forsyth* [(1932) 48 CLR 128, 147]:

“It is now established, therefore, that State and Federal laws may be inconsistent, although obedience to both laws is possible. **There may even be inconsistency although each law imposes the very same duty of obedience. These conclusions have, in the main, been reached, by ascribing “inconsistency” to a State law, not because the Federal law directly invalidates or conflicts with it, but because the Federal law is said to “cover the field”.** This is a very ambiguous phrase, because subject-matters of legislation bear little resemblance to geographical areas. It is no more than a cliché for expressing the fact that, by reason of the subject-matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in other words, the subject is either touched or trenched upon by State authority” (emphasis supplied)

33 The decision has also adverted to a judgment of Justice BN Rau, speaking for the Calcutta High Court in **O P Stewart vs B K Roy**²², where it was observed:

“29...

at p.632 “It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says “do” and the other “don’t”, there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test: there may well be cases of repugnancy where both laws say “don’t” but in different ways. For example, one law may say, “No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time” and another law may say, “No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time”. Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified”.”

Significantly, after comparing the gamut of impugned provisions before it, in holding that no provision of the impugned Act and the Rules made by the UP legislature and its delegate stood invalidated by any provision contained in Act 65 of 1951 as amended in 1953 or 1955 and the Sugarcane Control Order 1955 issued under it, the Constitution Bench held:

“31. In the instant case, there is no question of any inconsistency in the actual terms of the Acts enacted by Parliament and the impugned Act. The only questions that arise are whether Parliament and the State Legislature sought to exercise their powers over the same subject-matter or whether the laws enacted by Parliament were intended to be a complete exhaustive code or, in other words, expressly

²² AIR 1939 Cal 628

or impliedly evinced an intention to cover the whole field. It would be necessary, therefore, to compare the provisions of Act 65 of 1951 as amended by Act 26 of 1953, Act 10 of 1955 and the Sugar Control Order, 1955 issued thereunder with those of the impugned Act and U.P. Sugarcane Regulation of Supply and Purchase Order, 1954 passed thereunder.

34...**Suffice it to say that none of these provisions do overlap, the Centre being silent with regard to some of the provisions which have been enacted by the State and the State being silent with regard to some of the provisions which have been enacted by the Centre.** There is no repugnancy whatever between these provisions and the impugned Act and the Rules framed thereunder as also the U.P. Sugarcane Regulation of Supply and Purchase Order, 1954 do not trench upon the field covered by Act 10 of 1955. There being no repugnancy at all, therefore, no question arises of the operation of Article 254(2) of the Constitution and no provision of the impugned Act and the Rules made thereunder is invalidated by any provision contained in Act 65 of 1951 as amended by Act 26 of 1953 or Act 10 of 1955 and the Sugarcane Control Order, 1955 issued thereunder.”(emphasis supplied)

34 To complete this trinity of cases we may next advert to the decision in **Deep Chand vs State of UP**²³. The Constitution Bench dealt *inter alia* with the issue as to whether the provisions of the Uttar Pradesh Transport Service (Development) Act, 1955 were repugnant to the provisions of a subsequent Parliamentary enactment—the Motor Vehicles (Amendment) Act 1956. As in the case of **Tika Ramji** (supra), the Court cited the three pronged test of repugnancy formulated by Nicholas in his text on the Australian Constitution. The Constitution Bench recorded that the decision in **Tika Ramji** (supra) had accepted the three rules with the decision in **Zaverbhai** (supra) having laid down a similar test. Reformulating the principle, Justice K Subba Rao in his separate opinion observed:

²³ (1959) Supp (2) SCR 8

“28...

Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature and

(3) **Whether the law made by Parliament and the law made by the State Legislature occupy the same field...**

(emphasis supplied)

The judgment noted that a comparison of the provisions of the UP Act and the Amending Act indicated that both the legislations were intended to operate “*in respect of the same subject matter in the same field*”. Justice K Subba Rao noted that the unamended Motor Vehicles Act 1939 did not make any provision for the nationalization of transport services but the States introduced amendments to implement the scheme of nationalization of road transport. With a view to introduce a Union law throughout the country, Parliament enacted the Amendment Act by inserting Chapter IVA in the Motor Vehicles Act, 1939. This object, the Court ruled, would be frustrated if the argument that both the UP Act and the Amending Act should co-exist in respect of schemes to be framed after the Amendment Act, were accepted. Additionally, the learned judge also observed that the provisions of the scheme, the principles of compensation and the manner of its payment differed in the two Acts.

35 In **State of Orissa vs M/s M A Tulloch**²⁴, the legislation in issue was the Orissa Mining Areas Development Fund Act, 1952 under which certain areas were constituted as mining areas and the State government was empowered to levy a fee

²⁴ (1964) 4 SCR 461

at a percentage of the value of the mined ore at the pit's mouth. Entry 23 of the State List covers "regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union". Entry 54 of the Union List deals with "regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest". The Parliament subsequently enacted the Mines and Minerals (Development and Regulation) Act, 1957 which contains the declaration envisaged by the latter part of Entry 54 of the Union List. The High Court had held that on the coming into force of the Central Act, the Orissa Act ceased to be operative by reason of the withdrawal of legislative competence since the entry in the State List is subject to a Parliamentary declaration and a law enacted by Parliament. Justice N Rajagopala Ayyangar, speaking for the Constitution Bench, dealt with the issue of repugnancy in the following observations:

"14...Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. **The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance.** Where such is the position, the inconsistency is demonstrated not by a

detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation.”

(emphasis supplied)

The Court held that the intent of the subsequent Parliamentary enactment was to cover the entire field and there was an implied repeal of the Orissa Act.

36 In 1979, a Constitution Bench in **M Karunanidhi vs Union of India**²⁵ (“**M Karunanidhi**”) revisited the issue of repugnancy in the context of the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973. Though the State legislation was subsequently repealed, it was urged that during the time that it was in force, it was repugnant to the provisions of the India Penal Code, the Prevention of Corruption Act and the Criminal Law (Amendment) Act, 1952. The State Act had the assent of the President. Hence by virtue of Article 254(2), it was urged that the aforementioned Central Acts stood repealed and could not revive even after the State Act was repealed. Justice S Murtaza Fazal Ali formulated the principles governing repugnancy in the following observations:

“8...

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the

²⁵ (1979) 3 SCC 431

constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254."

The Constitution Bench held that although the ingredients of criminal misconduct as defined in Section 5(1)(d) of the Prevention of Corruption Act were substantially the same in the State Act as in the Central Acts, the prescribed punishment varied. The Court held that the State Act did not contain a provision repugnant to the Central Acts but it was "a sort of complementary Act which runs *pari passu* the Central Acts". The Court held:

"37. Last but not the least there is a very important circumstance which completely and conclusively clinches the issue and takes the force out of the argument of Mr Venugopal on the question of repugnancy. It would be seen that in the original State Act, Section 29 ran thus:

"Act to override other laws, etc.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom, usage or contract or decree or order of a court or other authority."

This section underwent an amendment which was brought about by Tamil Nadu Act 16 of 1974 which substituted a new

Section 29 for the old one. The new section which was substituted may be extracted thus:

*“Saving—*The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public man from any proceeding by way of investigation or otherwise which might, apart from this Act, be instituted against him.”

This amendment received the assent of the President on April 10, 1974 and was published in the Tamil Nadu Government Gazette Extraordinary dated April 16, 1974. We have already shown that although the State Act was passed as far back as December 30, 1973 it received the assent of the President on April 10, 1974, that is to say, on the same [Ed. : But see paras 4 and 7 of this judgment and 1974 MLJ (Stat.) Mad. Acts p. 2 wherein it is stated that Act II of 1974 was assented to by the President on Dec. 30, 1973 and published in T. N. Govt. Gaz. Extra., Pt. IV, S. 2 at p. 5, dated Jan. 2, 1974] date as Act 16 of 1974. The Act was however brought into force on May 8, 1974 when the new Section 29 which had already replaced the old section and had become a part of the statute. Therefore, for all intents and purposes the State Act cannot be read in isolation, but has to be interpreted in conjunction with the express language contained in Section 29 of the State Act. This section has in unequivocal terms expressed the intention that the State Act which was undoubtedly the dominant legislation would only be “in addition to and not in derogation of any other law for the time being in force” which manifestly includes the Central Acts, namely, the Penal Code, 1860, the Corruption Act and the Criminal Law (Amendment) Act. Thus, the Legislature about a month before the main Act came into force clearly declared its intention that there would be no question of the State Act colliding with the Central Acts referred to above. The second part of Section 29 also provides that nothing contained in the State Act shall exempt any public man from being proceeded with by way of investigation or otherwise under a proceeding instituted against him under the Central Acts. It is, therefore, clear that in view of this clear intention of the legislature there can be no room for any argument that the State Act was in any way repugnant to the Central Acts. We have already pointed out from the decisions of the Federal Court and this Court that one of the important tests to find out as to whether or not there is repugnancy is to ascertain the intention of the legislature regarding the fact that the dominant legislature allowed the subordinate legislature to operate in the same field *pari passu* the State Act.”

Since the State Act created distinct and separate offences with different ingredients and different punishments, it was held not to collide with the Central Acts. Another feature of the State Act in **M Karunanidhi** (supra) was that as originally enacted, the legislation contained a provision (Section 29) giving overriding effect to its provisions, notwithstanding anything inconsistent contained in any other law for the time being in force". Subsequently, by Tamil Nadu Act 16 of 1959, a new Section 29 was substituted. The substituted Section 29 provided that the provisions of the Act were in addition to and not in derogation of any other law for the time being in force and nothing in the Act would exempt a "public man" from any proceeding by way of an investigation or otherwise, which might apart from the Act be instituted against them. The amendment received the assent of the President on 10 April 1974 and was published in the Gazette on 16 April 1974. The State Act though enacted in December 1973 received the assent of the President subsequently. Interpreting the provisions of the substituted Section 29, the Constitution Bench held:

"37...

This section has in unequivocal terms expressed the intention that the State Act which was undoubtedly the dominant legislation would only be "in addition to and not in derogation of any other law for the time being in force" which manifestly includes the Central Acts, namely, the Penal Code, 1860, the Corruption Act and the Criminal Law (Amendment) Act. Thus, the Legislature about a month before the main Act came into force clearly declared its intention that there would be no question of the State Act colliding with the Central Acts referred to above. The second part of Section 29 also provides that nothing contained in the State Act shall exempt any public man from being proceeded with by way of investigation or otherwise under a proceeding instituted against him under the Central Acts. It is, therefore, clear that in view of this clear intention of the legislature

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(emphasis supplied)

37 A three judge Bench of this Court in **Hoechst Pharmaceuticals Ltd. vs State of Bihar**²⁶, considered the constitutional validity of Section 5(1) of the Bihar Finance Act, 1981 which provided for the levy of a surcharge on every dealer, whose gross turnover during a year exceeded Rs 5 lacs, in addition to the tax payable by him. The Act received the assent of the President. The challenge was on the ground that the price fixation of essential commodities in general and drugs and formulations in particular was an occupied field by various Control orders issued by the Union government under Section 3(1) of the Essential Commodities Act 1955, Justice AP Sen, speaking for the three judge Bench, rejected the arguments of the appellant that there was a repugnancy between sub-Section (3) of Section 5 which was relatable to Entry 54 of List II and the Control order issued by the Central government under Section 3(1) of the Essential Commodities Act relatable to Entry 33 of List III. The Court held that the question of repugnancy under Article 254(1) between a law made by Parliament and the law made by the State legislature arises only in case both the legislations occupy the same field with respect to one of the

²⁶ (1983) 4 SCC 45

matters enumerated the Concurrent List and there is a direct conflict between the two laws. Article 254(1), it held, has no application to cases of repugnancy due to overlapping found between List II on the one hand and Lists I and III on the other. In such a case, the State law will fail not because of the repugnancy to the Union law but due to want of legislative competence. The Court rejected the argument that sub-Section (3) of Section 5 being a State law must be struck down as *ultra vires* on the ground that the fixation of the price of essential commodities was an occupied field covered by central legislation. The power of the State legislature to make a law with respect to the levy and imposition of a tax on the sale or purchase of goods (relatable to Entry 54 of List II) and to make ancillary provisions is plenary and was not subject to the power of Parliament to make a law under Entry 33 of List III. There was therefore no question of a clash between the two laws and the question of repugnancy, the Court held, “does not come into play”.

38 In **State of Kerala vs Mar Appraem Kuri Company Ltd.**²⁷, a Constitution Bench dealt with the question as to whether the Kerala Chitties Act, 1975 became repugnant to the Chit Funds Act, 1982 enacted by Parliament on the date when the Parliamentary legislation received the assent of the President or subsequently, when a notification was issued under Section 1(3) bringing the Central Act into force in the State of Kerala. On comparing the Central and State statutes in the course of the judgment, Chief Justice SH Kapadia, noticed various provisions of the State Act in conflict with the Central legislation. The High Court had also noticed several

²⁷ (2012) 7 SCC 106

inconsistencies. The Court held that the Act of 1982 was enacted as a Central legislation to ensure uniformity in the provisions applicable to Chit Fund institutions throughout the country. There was thus an intent to occupy the entire field falling under Entry 7 of List III. A significant aspect of the Central legislation was Section 3 which gave overriding effect to the law enacted by Parliament. Moreover, Section 90 provided for the repeal of State legislations, manifesting, in the view of the Court, an intent of Parliament to occupy the field hitherto occupied by the State legislations. The Court observed that every aspect relating to the conduct of chits as was covered by the State Act had been touched upon by the Central Act in a more comprehensive manner. The Court held that on the enactment of the Central legislation on 19 August 1982, intending to occupy the entire subject of chits under Entry 7 of List II, the State Legislature was denuded of its power to enact a law on the subject.

39 A two judge Bench of this Court in **Innoventive Industries Ltd. vs ICICI Bank**²⁸ (“**Innoventive Industries**”), dealt with the provisions of the Maharashtra Relief Undertakings (Special Provisions) Act 1958 vis-à-vis the provisions of the IBC. Speaking through Justice RF Nariman the court held that the IBC is an exhaustive code on the subject matter of insolvency in relation to corporate entities, referable to Entry 9 of List III of the Seventh Schedule which deals with “bankruptcy and insolvency”. On the other hand, the subject covered by the Maharashtra legislation fell within Entry 23 of List III which deals with “social security and social

²⁸ (2018) 1 SCC 407

insurance; employment and unemployment". IBC was held to prevail after adverting to the earlier line of precedent, the Court formulated the three tests of repugnancy in the following terms:

"51.6. Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.

51.7. Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject-matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject-matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.

51.8. A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject-matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be

repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject-matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.”

40 Our journey of tracing the precedents of this Court, commencing from **Zaverbhai** (supra) up until **Innoventive Industries** (supra) indicates a thread of thought dwelling on when, within the meaning of Article 254(1), a law made by the legislature of a State can be considered to be repugnant to a provision of a law made by Parliament with respect to one of the matters in the Concurrent List which Parliament is competent to enact. The doctrine of repugnancy under Article 254(1) operates within the fold of the Concurrent List. Clause (1) of Article 254 envisages that the law enacted by Parliament will prevail and the law made by the legislature of the State shall be void “to the extent of repugnancy”. Clause (1) does not define what is meant by repugnancy. The initial words of Clause (1) indicate that the provision deals with a repugnancy between a law enacted by the State legislature with: (i) A provision of a law made by Parliament which it is competent to enact; or (ii) To any provision of an existing law; and (iii) with respect to one of the matters enumerated in the Concurrent List.

41 The initial part of Clause (1) alludes to a law enacted by a state legislature being “repugnant” to a law enacted by Parliament or to an existing law. The concluding part of clause 1 provides for a consequence, namely that the State law would be void “to the extent of the repugnancy” and the Parliamentary enactment shall prevail. The concept of repugnancy emerges from the decisions of this Court

which have elaborated on the context of clause (1) of Article 254. Clause (2) of Article 254 has also employed the expression “repugnant” while providing that a law enacted by the legislature of a State which is repugnant to a law enacted by Parliament or an existing law on a matter within the Concurrent List shall, if it has received the assent of the President, prevail in the State. The decisions of this Court essentially contemplate three types of repugnancy:

- (i) The *first* envisages a situation of an absolute or irreconcilable conflict or inconsistency between a provision contained in a State legislative enactment with a Parliamentary law with reference to a matter in the Concurrent List. Such a conflict brings both the statutes into a state of direct collision. This may arise, for instance, where the two statutes adopt norms or standards of behavior or provide consequences for breach which stand opposed in direct and immediate terms. The conflict arises because it is impossible to comply with one of the two statutes without disobeying the other;
- (ii) The *second* situation involving a conflict between State and Central legislations may arise in a situation where Parliament has evinced an intent to occupy the whole field. The notion of occupying a field emerges when a Parliamentary legislation is so complete and exhaustive as a Code as to preclude the existence of any other legislation by the State. The State law in this context has to give way to a Parliamentary enactment not because of an actual conflict with the absolute terms of a Parliamentary law but because the

nature of the legislation enacted by Parliament is such as to constitute a complete and exhaustive Code on the subject; and

- (iii) The *third* test of repugnancy is where the law enacted by Parliament and by the State legislature regulate the same subject. In such a case the repugnancy does not arise because of a conflict between the fields covered by the two enactments but because the subject which is sought to be covered by the State legislation is identical to and overlaps with the Central legislation on the subject.

42 The distinction between the first test on the one hand with the second and third tests on the other lies in the fact that the first is grounded in an irreconcilable conflict between the provisions of the two statutes each of which operates in the Concurrent List. The conflict between the two statutes gives rise to a repugnancy, the consequence of which is that the State legislation will be void to the extent of the repugnancy. The expression ‘to the extent of the repugnancy’ postulates that those elements or portions of the state law which run into conflict with the central legislation shall be excised on the ground that they are void. The second and third tests, on the other hand, are not grounded in a conflict borne out of a comparative evaluation of the text of the two provisions. Where a law enacted by Parliament is an exhaustive Code, the second test may come into being. The intent of Parliament in enacting an exhaustive Code on a subject in the Concurrent List may well be to promote uniformity and standardization of its legislative scheme as a matter of public interest. Parliament in a given case may intend to secure the protection of vital

interests which require a uniformity of law and a consistency of its application all over the country. A uniform national legislation is considered necessary by Parliament in many cases to prevent vulnerabilities of a segment of society being exploited by an asymmetry of information and unequal power in a societal context. The exhaustive nature of the Parliamentary code is then an indicator of the exercise of the State's power to legislate being repugnant on the same subject. The third test of repugnancy may arise where both the Parliament and the State legislation cover the same subject matter. Allowing the exercise of power over the same subject matter would trigger the application of the concept of repugnancy. This may implicate the doctrine of implied repeal in that the State legislation cannot co-exist with a legislation enacted by Parliament. But even here if the legislation by the State covers distinct subject matters, no repugnancy would exist. In deciding whether a case of repugnancy arises on the application of the second and third tests, both the text and the context of the Parliamentary legislation have to be borne in mind. The nature of the subject matter which is legislated upon, the purpose of the legislation, the rights which are sought to be protected, the legislative history and the nature and ambit of the statutory provisions are among the factors that provide guidance in the exercise of judicial review. The text of the statute would indicate whether Parliament contemplated the existence of State legislation on the subject within the ambit of the Concurrent List. Often times, a legislative draftsman may utilize either of both of two legislative techniques. The draftsman may provide that the Parliamentary law shall have overriding force and effect notwithstanding anything to the contrary contained in any other law for the time being in force. Such a provision is indicative

of a Parliamentary intent to override anything inconsistent or in conflict with its provisions. The Parliamentary legislation may also stipulate that its provisions are in addition to and not in derogation of other laws. Those other laws may be specifically referred to by name, in which event this is an indication that the operation of those specifically named laws is not to be affected. Such a legislative device is often adopted by Parliament by saving the operation of other Parliamentary legislation which is specifically named. When such a provision is utilized, it is an indicator of Parliament intending to allow the specific legislation which is enlisted or enumerated to exist unaffected by a subsequent law. Alternatively, Parliament may provide that its legislation shall be in addition to and not in derogation of other laws or of remedies, without specifically elucidating specifically any other legislation. In such cases where the competent legislation has been enacted by the same legislature, techniques such as a harmonious construction can be resorted to in order to ensure that the operation of both the statutes can co-exist. Where, however, the competing statutes are not of the same legislature, it then becomes necessary to apply the concept of repugnancy, bearing in mind the intent of Parliament. The primary effort in the exercise of judicial review must be an endeavour to harmonise. Repugnancy in other words is not an option of first choice but something which can be drawn where a clear case based on the application of one of the three tests arises for determination.

H.3 Repugnancy – RERA and WB-HIRA

43 While proceeding with the analysis on the basis of the above foundation, two aspects of the RERA must be noticed at the fore-front. Firstly, the RERA factors in the existence of municipal or local authorities constituted under State legislation whose powers and functions in regard to the development of land are regulated by legislation enacted by the State legislatures. The RERA recognizes that local bodies constituted under laws enacted by the State legislatures regulate diverse aspects of construction activity as an incident of the development of land. Secondly, in diverse provisions, the RERA has imposed the duty of complying with its regulatory provisions upon the 'appropriate government'. This expression encompasses, in respect of matters relating to the State, the State government. In the case of Union Territories, the definition of the expression 'appropriate government' in Section 2(g) is bifurcated into three categories:

- (i) A Union Territory without a legislature;
- (ii) The Union Territory of Puducherry; and
- (iii) The Union Territory of Delhi.

44 Parliament while enacting the RERA has imposed the obligation to secure compliance with its provisions in diverse aspects upon the State governments. Each of these two facets needs to be developed and analyzed for the purpose of the discussion.

45 The statutory dictionary which is adopted in the provisions of Section 2 contains various definitions which expressly recognize the existence of State enactments regulating construction activities. The definition of the expression 'commencement certificate' in Section 2(m) is as follows:

“(m) "commencement certificate" means the commencement certificate or the building permit or the construction permit, by whatever name called issued by the competent authority to allow or permit the promoter to begin development works on an immovable property, as per the sanctioned plan;”

The definition of the expression “commencement certificate” adverts to a building or construction permit issued by “the competent authority” to allow or permit the promoter to begin the development work on an immoveable property in accordance with the sanctioned plan. This definition incorporates the notion of a “competent authority” (which is defined in Section 2(p)), and of a sanctioned plan (which is defined in Section 2(zq)). The expression ‘competent authority’ is defined as follows:

“(p) "competent authority" means the local authority or any authority created or established under any law for the time being in force by the appropriate Government which exercises authority over land under its jurisdiction, and has powers to give permission for development of such immovable property;”

The above definition refers to a local authority or an authority created or established under any law for the time being in force by the appropriate government, exercising authority over land within its jurisdiction, with powers to permit the development of immoveable property.

46 The expression ‘sanctioned plan’ is defined in Section 2(zq) in the following terms:

“(zq) "sanctioned plan" means the site plan, building plan, service plan, parking and circulation plan, landscape plan, layout plan, zoning plan and such other plan and includes structural designs, if applicable, permissions such as environment permission and such other permissions, which are approved by the competent authority prior to start of a real estate project;”

47 The expression ‘planning area’ is defined in Section 2(zh) in the following terms:

“(zh) "planning area" means a planning area or a development area or a local planning area or a regional development plan area, by whatever name called, or any other area specified as such by the appropriate Government or any competent authority and includes any area designated by the appropriate Government or the competent authority to be a planning area for future planned development, under the law relating to Town and Country Planning for the time being in force and as revised from time to time;”

The above definition of a planning area clearly incorporates a reference to its designation by an appropriate government or a competent authority including an area designated for ‘future planned development’ under the law relating to town and country planning for the time being in force, and as revised from time to time. The definition implicitly recognizes the existence of town and country planning legislation in the State governing planned development and the existence of development plans authorized and sanctioned under the terms of such legislation.

48 In a similar manner, the definition of the expression ‘completion certificate’ in Section 2(q) recognizes that the real estate project has been developed according to the plan, layout plan and specifications duly approved by the competent authority as provided for in local laws. Section 2(q) is in the following terms:

“(q) "completion certificate" means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;”

49 The expression ‘local authority’ is defined in Section 2(zc) as follows:

“(zc) "local authority" means the Municipal Corporation or Municipality or Panchayats or any other Local Body constituted under any law for the time being in force for providing municipal services or basic services, as the case may be, in respect of areas under its jurisdiction;”

The above definition recognizes the existence of municipal corporations, municipalities or Panchayats and local bodies constituted under any law for the time being in force for providing municipal services or basic services in respect of the areas under its jurisdiction.

50 The definition of “occupancy certificate” in Section 2(zf) is as follows:

“(zf) "occupancy certificate" means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;”

The above definition recognizes that occupancy certificates are issued by a competent authority permitting the occupation of the building under local laws upon being satisfied that the building has provision for civic infrastructure such as water, sanitation or electricity.

51 Among the definitions provided in Section 2, clause (zr) stipulates that:

“(zr) words and expressions used herein but not defined in this Act and defined in any law for the time being in force or in the municipal laws or such other relevant laws of the appropriate Government shall have the same meanings respectively assigned to them in those laws”

In other words, those expressions and words which are used in the RERA but for which there is no definition in Section 2 are to have a meaning ascribed to them “in any law for the time being in force or in the municipal laws or such other relevant laws of the appropriate government”.

52 The above provisions of RERA are indicative of the fact that Parliament was conscious of the position that diverse activities relating to construction projects are governed by municipal and local legislation. There is an existence in the States of various regimes of town and country planning governed by State enactments and regulations have been framed under them. Likewise, municipal and local laws govern diverse aspects of construction activity in real estate projects including the application for development, nature and extent of permissible development on land, issuance of commencement certificates allowing the promoter to begin development of an immoveable property, completion certificates certifying the completion of the

construction project in accordance with the sanctioned plans and the grant of occupation permission to occupy the constructed areas.

53 All the definitions which we have adverted to clearly postulate the existence of State legislation which governs and regulates construction activity through municipal and local bodies. The RERA naturally has not attempted to supplant these State enactments which govern the permissible use of land for development, the applicable norms for construction activity, the nature and extent of development permissible on land falling within municipal and local areas and the process of carrying out construction from its initiation to completion. In not intruding into this area, the RERA has followed the distribution of legislative powers. Entry 5 of List II to the Seventh Schedule, as we have seen earlier, deals with local government, including the constitution and powers of municipal corporations and other local authorities for the purpose of local self-government or village administration. The control over development activities under municipal and local laws is governed by State legislation.

54 The second aspect of RERA which deserves emphasis is that its diverse provisions are regulated and enforced by the real estate regulatory authority which is constituted under Section 20 by the appropriate government. The appropriate government as noticed in Section 2(g) means the State government in respect of matters relating to the State. The appointment of the real estate regulatory authority is envisaged to be made by the appropriate government under Section 21. The power of removal is entrusted to the appropriate government under Section 26. The

appointment of officers and employees of the authority is entrusted to the appropriate government under Section 28. Section 32 requires the authority to make recommendations to the appropriate government or the competent authority, as the case may be, to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector. The authority is entrusted with regulatory functions to ensure compliance with the substantive norms envisaged from Sections 3 to 19. Section 3 requires the promoter to first register a real estate project with the real estate regulatory authority before advertising, marketing, booking, selling or offering for sale or inviting persons to purchase a plot, apartment or building in a real estate project. The authority receives applications for registration under Section 4 and it has a statutory role under Section 5 in regard to the grant of registration, in Section 6 for the extension of registration and in Section 7 for the revocation of registration. Upon the lapsing or revocation of the registration, the authority is entrusted with certain powers under Section 8. Likewise, in the sphere of regulating real estate agents, the authority is entrusted with the power of registration under Section 9. Chapter III of the RERA specifies the functions and duties of promoters. Section 11 requires the promoter upon the grant of registration to create a web-page on the website of the authority. Sections 12 and 13 impose positive obligations on the promoter. Section 14 requires the promoter to adhere to sanctioned plans, layouts and specifications as approved by the competent authority. Section 18 provides for the return of the amount received by the promoter and payment of compensation if the promoter has failed to complete and is unable to give possession of an apartment, flat or building. The rights and duties of allottees are

specified in Section 19. Significantly, Section 31 envisages the filling of complaints with the authority or an adjudicating officer in the event that there has been a violation or contravention of the provisions of the Act or its rules and regulations by a promoter, allottee or real estate agent. The authority has wide ranging powers under Sections 38 and 40 to impose a penalty or interest for a contravention of the obligations cast upon promoters, allottees and real estate agents.

55 Besides the above provisions, the RERA has provided for the establishment of a Real Estate Appellate Tribunal by the appropriate government in Chapter VII. Consistent with the provisions of Sections 43 to 57, the real estate regulatory authority has a vital role to play in regard to the imposition of penalties under Chapter VIII prescribes penalties for contravention of the provisions of the Act.

56 Besides the establishment of the real estate regulatory authority, the RERA has, in Section 71²⁹, contemplated the appointment of adjudicating officers for

²⁹ “**71. Power to adjudicate.**

(1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard: Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application: Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply

adjudging compensation under Sections 12, 14, 18 and 19. These adjudicating officers are to be appointed by the authority in consultation with the appropriate government.

57 Chapter IX provides for finance, accounts, audits and reports. Under Section 73, the Central government is empowered to make grants and loans to the authority upon due appropriation by Parliament. A similar power is entrusted to the State government under Section 74. Section 75 contemplates the constitution of a fund called the Real Estate Regulatory Fund by the appropriate government. Section 77 requires the preparation of a budget and maintenance of accounts and other records as well as preparation of an annual statement of accounts by the authority in such form as is prescribed by the appropriate government in consultation with the Comptroller and Auditor General of India. The annual report of the authority is under Section 78(2) required to be placed before each House of Parliament, or as the case may be, before the State legislature or Union Territory legislature. Section 82 entrusts to the appropriate government the statutory powers to supersede the authority. Section 83 empowers the appropriate government to issue directions to the authority. Section 84 entrusts a rule making power to the appropriate government. This review of the provisions of the RERA emphasizes the second facet of the law which is that the statutory duty to ensure the implementation of the legislation is entrusted to the appropriate government which in the case of the states means the state government.

with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections.”

58 Now, it is in this background that it becomes necessary to analyze the provisions of Sections 88 and 89 of the RERA. Section 88 stipulates that the application of other laws is not barred: the provisions of the legislation “shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force”. At the same time, Section 89 provides for overriding effect to the provisions of the RERA when it stipulates that it “shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force”. The interpretation of these provisions and their interplay will have an important bearing on the outcome of the present controversy. This is because, as we noticed earlier in this judgment, the State of West Bengal had originally supported its legislative authority over the subject governed by WB-HIRA on the ground that the state enactment falls within the ambit and purview of List II of the Seventh Schedule. However, though this submission was specifically pressed in the counter affidavit, it has been expressly given up in the oral and written submissions tendered before this Court by the State of West Bengal. The submission now of the State of West Bengal accepts that in essence and in substance, WB-HIRA contains a substantial overlap with the provisions of the RERA and is a law which the State legislature enacted in exercise of its legislative authority under Article 246(2) while legislating on subjects in the Concurrent List. The State of West Bengal submitted that WB-HIRA, like the RERA is enacted with reference to the subjects incorporated in Entries 6 and 7 of List III of the Seventh Schedule. Simply put, the submission of the State of West Bengal is four-fold: *firstly*, though there is a substantial overlap between the State and the Central enactments and both of them govern the same

subject matter and field, there is no constitutional prohibition on the State legislature enacting legislation on a subject in the Concurrent List which is virtually identical to central legislation in the same list; *secondly*, Section 88 of the RERA contains an expression that its provisions shall be in addition to, and not in derogation of any other law for the time in force; this being an indicator that Parliament contemplated that the RERA can co-exist with analogous State legislation; *thirdly*, the inconsistencies between WB-HIRA and RERA are of a minor nature and wherever the State enactment contains provisions at variance with the Central law, the former will have to yield to the latter, and *fourthly*, the provisions of Section 92 of the RERA demonstrate that where Parliament intended to repeal a specific State legislation – Maharashtra Act No II of 2014 - only that legislation was repealed.

59 While considering these submissions which have been articulated by Mr Rakesh Dwivedi, learned Senior Counsel, it becomes necessary to dwell on two lines of precedent of this Court. The first line of precedent analyses provisions analogous to Section 88 of the RERA and would shed light on what is the ambit of a provision which states that the statute is in addition to and not in derogation of any other law for the time being in force. The second line of precedent explores the meaning of the expression ‘in any other law for the *time being* in force’. Does this expression in Section 88 freeze the applicability of that provision to laws which were in force when the RERA enacted or does it also apply to laws which may be enacted subsequently?

H.3.1 Meaning of “is in addition to and not in derogation of any other law”

60 The first line of precedent will facilitate judicial evaluation of Section 88. In **M D Frozen Foods Exports Private Limited vs Hero Fincorp Limited**³⁰, a Bench of two judges of this Court analyzed three issues of which the first is of relevance to the present case. That issue was:

“11.1. (i) Whether the arbitration proceedings initiated by the respondent can be carried on along with the SARFAESI proceedings simultaneously”

The appellant in that case had borrowed monies from the respondent by creating a mortgage against deposit of title deeds. The account became a non-performing asset resulting in the lender invoking the arbitration clause of the agreement with the borrower. Prior to it, a notification was issued under which the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**SARFAESI Act**”) were applied to certain non-banking financial institutions, including the respondent. The respondent issued a notice under Section 13(2) of the SARFAESI Act. In the course of the arbitration proceedings, an interim order was passed from which proceedings were carried in appeal under Section 37 of the Arbitration and Conciliation Act 1996, resulting in the dispute travelling to this Court. Sections 35 and 37 of the SARFAESI Act are in the following terms:

“35. The provisions of this Act to override other laws.—
The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for

³⁰ (2017) 16 SCC 741

the time being in force or any instrument having effect by virtue of any such law.

37. Application of other laws not barred.—The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.”

61 Justice Sanjay Kishan Kaul adverted to the above definition in the course of the judgment. The Court noted the earlier decision in **Transcore vs Union of India**³¹ holding that by virtue of Section 37, the SARFAESI Act is in addition to and not in derogation of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act 1993 (“**RDDB Act**”). The “only twist” was that instead of the recovery process being under the RDDB Act, the Court was concerned with an arbitration proceeding. In this context, the Court observed:

“30. The only twist in the present case is that, instead of the recovery process under the RDDB Act, we are concerned with an arbitration proceeding. It is trite to say that arbitration is an alternative to the civil proceedings. In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have incorporated such a clause, the answer was given in the affirmative. [*HDFC Bank Ltd. v. Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815: (2013) 134 DRJ 566] That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act.”

³¹ (2008) 1 SCC 125

There was, in other words, no question of an election of remedies and the provisions of the SARFAESI Act provide a remedy in addition to the provisions of the Arbitration Act. SARFAESI proceedings, the Court held, are in the nature of enforcement proceedings, while arbitration is an “adjudicatory process”.

62 In **KSL and Industries Limited vs Arihant Threads Limited**³² (“**KSL and Industries**”), a three judge Bench of this Court considered a reference made by a two judge Bench following a difference of opinion on the interpretation of Section 34 of the RDDB Act. In that case, the High Court had set aside the order of the Debts Recovery Appellate Tribunal, in view of the bar contained in Section 22 of the Sick Industrial Companies (Special Provisions) Act 1985 (“**SICA**”). Section 32 of the SICA contained a provision giving overriding force notwithstanding anything inconsistent contained in any other law except the Foreign Exchange Regulation Act 1973 and the Urban Land (Ceiling and Regulation) Act 1976, among other instruments. Section 32(1) was as follows:

“32.Effect of the Act on other laws.—(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the memorandum or articles of association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.”

³² (2015) 1 SCC 166

The RDDB Act which was a later enactment of 1993 contained Section 34 giving it overriding effect:

“34. Act to have overriding effect.—(1) Save as provided under sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989).”

Now, sub-Section (1) of Section 34 gives overriding effect to the RDDB Act notwithstanding anything inconsistent contained in any other law for the time being in force. On the other hand, sub-Section (2) provides that the provisions of the Act and its rules would be in addition to and not in derogation of certain other named statutes. Adverting to the provisions of Section 34(2), Justice SA Bobde (as the learned Chief Justice then was) observed;

“36 [Ed.: Para 36 corrected vide Official Corrigendum No. F.3/Ed.B.J./61/2014 dated 25-11-2014.] . Sub-section (2) was added to Section 34 of the RDDB Act w.e.f. 17-1-2000 by Act 1 of 2000. There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist along with the other Acts. It is clearly not the intention of the legislature, in such a case, to annul or detract from the provisions of other laws. The term *“in derogation of”* means *“in abrogation or repeal of”*. *The Black's Law Dictionary* sets forth the following meaning for “derogation”:

“derogation.—The partial repeal or abrogation of a law by a later Act that limits its scope or impairs its utility and force.”

It is clear that sub-section (1) contains a non obstante clause, which gives the overriding effect to the RDDB Act. Sub-section (2) acts in the nature of an exception to such an overriding effect. It states that this overriding effect is in relation to certain laws and that the RDDB Act shall be in addition to and not in abrogation of, such laws. SICA is undoubtedly one such law.”

The Court held that the effect of sub-Section (2) was to preserve the powers of the authorities under the SICA and save the proceedings from being overridden by the RDDB Act. The Court held that both SICA and the RDDB Act were special laws within their own sphere:

“39. There is no doubt that both are special laws. SICA is a special law, which deals with the reconstruction of sick companies and matters incidental thereto, though it is general as regards other matters such as recovery of debts. The RDDB Act is also a special law, which deals with the recovery of money due to banks or financial institutions, through a special procedure, though it may be general as regards other matters such as the reconstruction of sick companies which it does not even specifically deal with. Thus the purpose of the two laws is different.”

The Court noticed that Section 34(2) of the RDDB Act specifically provides that its provisions would be in addition to and not in derogation of the other laws mentioned in it, including SICA. The expression ‘not in derogation’ was then construed in the following observations:

“49. The term “not in derogation” clearly expresses the intention of Parliament not to detract from or abrogate the provisions of SICA in any way. This, in effect must mean that Parliament intended the proceedings under SICA for reconstruction of a sick company to go on and for that purpose further intended that all the other proceedings

against the company and its properties should be stayed pending the process of reconstruction. While the term “proceedings” under Section 22 of SICA did not originally include the RDDB Act, which was not there in existence. Section 22 covers proceedings under the RDDB Act.”

Consequently, the Court answered the reference by holding that the provisions of SICA, in particular Section 22, shall prevail over the provisions for the recovery of debts in the RDDB Act.

63 To complete this trinity of judgments between 2015 and 2019, there is a three judge Bench decision of this Court in **Pioneer Urban Land and Infrastructure Limited vs Union of India**³³. This Court considered a challenge to the constitutional validity of the amendments made in 2018 to the IBC 2016, pursuant to a report of the Insolvency Law Committee. Under the amended provisions, allottees of real estate projects were deemed to be financial creditors, triggering the applicability of the Code to real estate developers. The three judge Bench considered, in the course of its decision, the provisions of the RERA. The Court adverted to the provisions of Sections 88 and 89 of the RERA on the one hand and to Section 238 of the IBC which is in the following terms:

“238. Provisions of this Code to override other laws.—The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

Justice RF Nariman speaking for the three judge Bench noted that

³³ (2019) 8 SCC 416

- (i) There is no provision analogous to Section 88 of the RERA in the IBC and the latter is meant to be a complete and exhaustive statement of the law insofar as its subject matter is concerned;
- (ii) While the non-obstante clause of RERA came into force on 1 May 2015, the non-obstante clause of IBC came into force on 1 December 2016; and
- (iii) The amendments to the IBC had come into force on 6 June 2018.

In this backdrop, the Court did not accept the submission that RERA being a special enactment would have precedence over the IBC which is a general enactment dealing with insolvency. In this backdrop, the Court observed:

“25...From the introduction of the Explanation to Section 5(8)(f) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. **The fact that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies.** Also, it is important to remember that as the authorities under RERA were to be set up within one year from 1-5-2016, remedies before those authorities would come into effect only on and from 1-5-2017 making it clear that the provisions of the Code, which came into force on 1-12-2016, would apply in addition to RERA.”

(emphasis supplied)

The Court noted the decision in **KSL & Industries** (supra) in which it was held that notwithstanding the non-obstante clause contained in the RDDDB Act which was later in time than the non-obstante clause in the SICA and the principle that the later Act would prevail over the earlier, this principle was departed from only because of the

of the presence of a provision, like Section 88 of the RERA, which was contained in the RDDB Act which made it clear that the Act was meant to be in addition and not in derogation of other statutes. Distinguishing the decision, the Court observed:

“27. In view of Section 34(2) of the Recovery Act, this Court held that despite the fact that the non obstante clause contained in the Recovery Act is later in time than the non obstante clause contained in the Sick Act, in the event of a conflict, the Recovery Act i.e. the later Act must give way to the Sick Act i.e. the earlier Act. Several judgments were referred to in which ordinarily a later Act containing a non obstante clause must be held to have primacy over an earlier Act containing a non obstante clause, as Parliament must be deemed to be aware of the fact that the later Act is intended to override all earlier statutes including those which contained non obstante clauses. This statement of the law was departed from in *KSL & Industries [KSL & Industries Ltd. v. Arihant Threads Ltd., (2015) 1 SCC 166 : (2015) 1 SCC (Civ) 462]* only because of the presence of a section like Section 88 of RERA contained in the Recovery Act, which makes it clear that the Act is meant to be in addition to and not in derogation of other statutes. In the present case, it is clear that both tests are satisfied, namely, that the Code as amended, is both later in point of time than RERA, and must be given precedence over RERA, given Section 88 of RERA.”

Therefore, the Court held that RERA and the IBC must be held to co-exist and in the event of a clash, RERA must give way to the IBC.

H.3.2 Meaning of “law for the time being in force”

64 The second line of precedent has been relied upon by Mr Rakesh Dwivedi on behalf of the State of West Bengal, as an aid to the construction of the expression “law for the time being in force”. In the decision of the Constitution Bench in

Sasanka Sekhar Maity vs Union of India³⁴, Justice AP Sen construed the provisions of the second proviso to Article 31-A(1) of the Constitution and the expression “any law for the time being in force”. The argument was that this expression must mean the West Bengal Estate Acquisition Act, 1953 only. Rejecting the submission, the Constitution Bench held:

“27. Such a construction, if we may say so, would create a serious impediment to any kind of agrarian reform. The ceiling on agricultural holdings, once fixed cannot be static, unalterable for all times. **The expression “any law for the time being in force” obviously refers to the law imposing a ceiling. Here it is the West Bengal Land Reforms (Amendment) Act, 1971 (President's Act 3 of 1971) and now the West Bengal Land Reforms (Amendment) Act, 1971 (W.B. Act 12 of 1972) which introduced Chapter II-B imposing a new ceiling on agricultural holdings of *rai-yats*. That is the law for the time being in force, and no land is being acquired by the State under Section 14-L within the ceiling limits prescribed therein.**

28. It will be noticed that the second proviso to Article 31-A(1) refers to the “ceiling limit applicable to him”, which evidently refers to the law in question and not earlier law, that is Section 6(1) of the West Bengal Estates Acquisition Act, 1953. It will be noticed that both Section 4(3) and Section 6(2) of the West Bengal Land Reforms Act, 1955 stood deleted by the West Bengal Land Reforms (Amendment) Act, 1971 (President's Act 3 of 1971) and thereafter by the West Bengal Land Reforms (Amendment) Act, 1972 with retrospective effect from February 12, 1971.”

(emphasis supplied)

65 In **Thyssen Stahlunion GMBH vs Steel Authority of India**³⁵, a two judge Bench of this Court considered the expression “for the time being in force” in the context of an arbitration agreement and agreed with the view of the High Courts of

³⁴ (1980) 4 SCC 716

³⁵ (1999) 9 SCC 334

Bombay and Madhya Pradesh, which had held that the expression not only refers to the law in force at the time when the arbitration was entered into but also to any law that may be in force in the conduct of the arbitration proceeding. Speaking for the bench, Justice DP Wadhwa held:

“35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. **Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal No. 61 of 1999) uses the expression “for the time being in force” meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions — one of the Bombay High Court and the other of the Madhya Pradesh High Court on the interpretation of the expression “for the time being in force” and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well.** The expression “unless otherwise agreed” as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Constructions in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Constructions that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of the respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that

any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions “unless otherwise agreed” and “law in force” it does give an option to the parties to agree that the new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after the coming into force of the new Act.”

(emphasis supplied)

66 The decision of a two judge Bench in **Municipal Corporation of Delhi vs Prem Chand Gupta**³⁶, considered Regulation 4(1) of the Services Regulations of 1959 which commenced with the expression “Unless otherwise provided in the Act or these regulations, the rules for the time being in force and applicable to government servants in the service of the Central Government shall, as far as may be, regulate the conditions of service of municipal officers and other municipal employees”. The Court rejected the submission that the rules for the time being in force would be those which were in existence when the Services Regulations of 1959 were promulgated and not any later rules. Justice SB Majmudar held that whenever the question of the regulation of conditions of service of municipal officers comes up for consideration, the relevant rules in force at that time have to be looked into. As such, the scope and ambit could not be frozen as of 1959. Hence, the phraseology “rules for the time being in force” would necessarily mean rules in force from time to time and not the rules in force only at a fixed point of time in 1959.

³⁶ (2000) 10 SCC 115

67 Another two judge Bench of this Court in **Yakub Abdul Razak Memon vs State of Maharashtra**³⁷, while construing the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and its interplay with Terrorist and Disruptive Activities (Prevention) Act, 1987, speaking through Justice P Sathasivam (as the learned Chief Justice was then), held:

“1554. Section 1(4) of the JJ Act was added by amendment with effect from 22-8-2006. In fact, this provision gives the overriding effect to this Act over other statutes. However, it reads that the Act would override “anything contained in any other law for the time being in force”. The question does arise as to whether the statutory provisions of the JJ Act would have an overriding effect over the provisions of TADA which left long back and was admittedly not in force on 22-8-2006. **Thus, the question does arise as what is the meaning of the law for the time being in force. This Court has interpreted this phrase to include the law in existence on the date of commencement of the Act having overriding effect and the law which may be enacted in future during the life of the Act having overriding effect.** (Vide Thyssen Stahlunion GmbH v. SAIL [(1999) 9 SCC 334 : AIR 1999 SC 3923] and MCD v. Prem Chand Gupta [(2000) 10 SCC 115 : 2000 SCC (L&S) 404] .)”

(emphasis supplied)

68 In **Union Territory of Chandigarh vs Rajesh Kumar Basandhi**³⁸, Justice Brijesh Kumar considered the expression “for the time being in force” in the *law lexicon* and held that it must be interpreted keeping in mind the context in which it is used:

“10. A perusal of the meaning of the expression “for the time being” by different authors, based on decided cases makes it

³⁷ (2013) 13 SCC 1

³⁸ (2003) 11 SCC 549

clear that it cannot be said that it must in every case indicate a single period of time. It may be for an indefinite period of time depending upon the context in which the phrase is used. It is also evident that generally it denotes an indefinite period of time, meaning thereby, the position as existing at the time of application of the rules, maybe, amended or unamended. Therefore, to come to a conclusion as to whether it is for one time or for indefinite period of time, the context, purpose and the intention of the use of the phrase will have to be seen and examined.”

69 Similarly, in **Department of Customs vs Sharad Gandhi**³⁹, a two judge Bench of this Court considered a case where the respondent had been discharged of offences under Sections 132 and 175 of the Customs Act, 1962. The Additional Chief Metropolitan Magistrate allowed an application for discharge holding that there was a complete bar with regard to prosecution under the Customs Act, 1962, and that the Collector of Customs only had the power to confiscate the goods and impose a penalty for a breach of Section 3 of the Antiquities and Art Treasurers Act, 1972. Amongst other issues, the Bench had to interpret the meaning of Section 30 of the Antiquities and Art Treasurers Act, 1972, which reads as follows:

“30. Application of other laws not barred.—The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Ancient Monuments Preservation Act, 1904 (7 of 1904) or the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or any other law for the time being in force.”

Justice KM Joseph, speaking for the two judge Bench, observed:

“39. **We would think that though the words “any other law for the time being in force” have been used, the context**

³⁹ (2020) 13 SCC 521

for the use of the provision is not to be overlooked. We have referred to the relevant provisions of the two specific enactments which show that the said legislation also deals with antiquities as it deals with cognate subjects, namely, ancient monuments and archaeological sites. The common genus is manifest. The legislative intention was to declare that the Antiquities Act should not result in the provision contained in allied or cognate laws being overridden upon passing of the Antiquities Act. Full play was intended for the provisions contained in relation to antiquities contained in the two enactments. Despite the passage of the Antiquities Act, a prosecution for instance would be maintainable if a case is otherwise made out under the two enactments in relation to antiquity. The Antiquities Act in other words is not to be in derogation of those provisions. They were to supplement the existing laws. It is therefore in the same context that we should understand the words “any other law for the time being in force”. For instance, there may be laws made by the State Legislatures which relate to antiquity. There may be any other law which deal with a subject with a common genus of which the specific law would be an integral part. It is all such laws which legislature intended to comprehend within the expression “any other law for the time being in force”. Take for example, a case where there is a theft of an antiquity. Can it be said that the prosecution under Section 379 would not be maintainable. The answer will be an emphatic No. Certainly, the prosecution will lie. The Sale of Goods Act, 1930 which relates to movable items generally will be applicable, to the extent that it is not covered by any provision in the Acts in question. The Contract Act, 1872 may continue to be applicable. But it is not the question of applying general laws that engage the attention of the legislature. **The intention behind Section 30 was as noted is to provide for any other law which deal with antiquity to continue to have force and declare its enforceability even after passing of the Antiquities Act. In that view of the matter we are of the view that the words “any other law for the time being in force” must be construed as ejusdem generis.**

(emphasis supplied)

70 These decisions indicate that the expression “any other law for the time being in force” does not necessarily mean, such laws as were in existence when the statutory provision was enacted. To the contrary, it widely considered to means not just the laws which were in existence when the statutory provision was enacted but also such laws which may come into existence at a later stage. On the other hand, another line of judicial precedent also suggests the meaning to be ascribed to the expression must bear color from the context in which it appears, and not devoid of it.

71 For instance, in **National Insurance Company Limited vs Sinitha**⁴⁰, in the context of a policy of insurance, the expression “for the time being in force” was held to mean provisions then existing. The decision related to Sections 144 and 163A of the Motor Vehicles Act, 1988, in which Section 163A was subsequently inserted. In the context of adjustment of compensation, a two judge Bench of this Court held that Section 144 would not override Section 163A because of the use of the expression “laws for the time being in force” would encompass only existing provisions of the Motor Vehicles Act, 1988, and not those inserted in the Act later. Speaking for the Bench, Justice JS Khehar (as the learned Chief Justice was then) observed:

“16. Section 144, it may be pointed out, is a part of Chapter X of the Motor Vehicles Act, 1988, which includes Section 140. Section 144 of the Act is being extracted herein:

“144.Overriding effect.—The provisions of this Chapter shall have effect notwithstanding anything contained in any other provision of this Act or of any other law for the time being in force.”

⁴⁰ (2012) 2 SCC 356

Even though Section 144 of the Act mandates that the provisions of Chapter X (which includes Section 140) have effect notwithstanding anything to the contrary contained in any other provision of the Act or in any other law for the time being in force, Section 144 of the Act would not override the mandate contained in Section 163-A for the simple reason that Section 144 provided for such effect over provisions “for the time being in force” i.e. the provisions then existing, but Section 163-A was not on the statute book at the time when Section 144 was incorporated therein. Therefore the provisions contained in Chapter X would not have overriding effect over Section 163-A of the Act.

17. As against the aforesaid, at the time of incorporation of Section 163-A of the Act, Sections 140 and 144 of the Act were already subsisting, as such, the provisions of Section 163-A which also provided by way of a non obstante clause, that it would have by a legal fiction overriding effect over all existing provisions under the Act as also any other law or instrument having the force of law “for the time being in force”, would have overriding effect, even over the then existing provisions in Chapter X of the Act because the same was already in existence when Section 163-A was introduced into the Act.”

This again indicates that it is the statutory context and scheme which will determine the nature and ambit of the expression “any other law for the time being in force”.

72 In the case of the RERA, the expression “law for the time being in force” is used in Section 89 as well as in Section 2(zr) and Section 18(2). Section 2(zr), as noticed earlier, stipulates that words and expression used in the Act, but not defined in it and defined in any law for the time being in force or in municipal laws or other relevant laws of the appropriate government, shall have the meaning assigned to them in those laws. Evidently, a law for the time being in force in Section 2(zr) is not frozen in point of time as on the date of the enactment of RERA. Likewise, Section

18(2) of the RERA imposes an obligation to the promoter to compensate allottees for the loss caused due to a defective title to the land and the provision stipulates that the claim for compensation shall not be barred by limitation provided “under any law for the time being in force”. However, in Section 89, “law for the time being in force” is used in general sense of all the provisions of the Act, *vis-à-vis*, provisions of other Acts.

H.3.3 Knitting it together

73 From our analysis of the provisions of RERA on the one hand and of WB-HIRA on the other, two fundamental features emerge from a comparison of the statutes. *First*, a significant and even overwhelmingly large part of WB-HIRA overlaps with the provisions of RERA. These provisions of the RERA have been lifted bodily, word for word and enacted into the State enactment. *Second*, in doing so, WB-HIRA does not complement the RERA by enacting provisions which may be regarded as in addition to or fortifying the rights, obligations and remedies created by the Central enactment. The subject of the provisions of the State enactment is identical, the content is identical. In essence and substance, WB-HIRA has enacted a parallel mechanism and parallel regime as that which has been entailed under the RERA. The State legislature has, in other words, enacted legislation on the same subject matter as the Central enactment. Not only is the subject matter identical but in addition, the statutory provisions of WB-HIRA are on a majority of counts identical to those of the RERA. Both sets of statutes are referable to the same entries in the

Concurrent List – Entries 6 and 7 of List III – and the initial effort of the State of West Bengal to sustain its legislation as a law regulating ‘Industry’ within the meaning of Entry 24 of List II has been expressly given up before this Court (as we have explained, for valid reasons bearing on the precedents of this Court).

74 In assessing whether this overlap between the statutory provisions of WB-HIRA and the RERA makes the former repugnant to the latter within the meaning of that expression in clause (1) of Article 254, it becomes necessary to apply the several tests which are a part of our constitutional jurisprudence over the last seven decades. Repugnancy can be looked at from three distinct perspectives. The first is where the provision of a State enactment is directly in conflict with a law enacted by Parliament, so that compliance with one is impossible along with obedience to the other. The second test of repugnancy is where Parliament through the legislative provisions contained in the statute has enacted an exhaustive code. The second test of repugnancy is based on an intent of Parliament to occupy the whole field covered by the subject of its legislation. In terms of the second test of repugnancy, a State enactment on the subject has to give way to the law enacted by Parliament on the ground that the regulation of the subject matter by Parliament is so complete as a code, so as to leave no space for legislation by the State. The third test of repugnancy postulates that the subject matter of the legislation by the State is identical to the legislation which has been enacted by Parliament, whether prior or later in point of time. Repugnancy in the constitutional sense is implicated not because there is a conflict between the provisions enacted by the State legislature

with those of the law enacted by Parliament but because once Parliament has enacted a law, it is not open to the State legislature to legislate on the same subject matter and, as in this case, by enacting provisions which are bodily lifted from and verbatim the same as the statutory provisions enacted by Parliament. The overlap between the provisions of WB-HIRA and the RERA is so significant as to leave no manner of doubt that the test of repugnancy based on an identity of subject matter is clearly established. As the decision in **Innoventive Industries** (supra) emphasizes, laws under this head are repugnant even if the rule of conduct prescribed by both the laws is identical. This principle constitutes the foundation of the rule of implied repeal. The present case is not one where WB-HIRA deals not with matters which form the subject matter of the Parliamentary legislation but with other and distinct matters of a cognate and allied nature. WB-HIRA, on the contrary, purports to occupy the same subject as that which has been provided in the Parliamentary legislation. The state law fits, virtually on all fours, with the footprints of the law enacted by Parliament. This is constitutionally impermissible. What the legislature of the State of West Bengal has attempted to achieve is to set up its parallel legislation involving a parallel regime.

75 But the submission which has been articulately presented before the Court on behalf of the State of West Bengal is that Section 88 of the RERA itself allows for the existence of State statutes by enacting Sections 88 and 89, which stipulate that its provisions shall be in addition to and not in derogation of the provisions of any other law for time being in force and override only inconsistent provisions. For the

purpose of the present discussion, we may accept the hypothesis of the State of West Bengal that the expression “any other law for the time being in force” does not, in the context of Section 88, imply the applicability of the provision only to laws which had been enacted before the RERA. Conceivably, as the judgments of this Court construing similar expressions indicate, the trend has been to broadly configure the meaning of the expression by extending it to laws which were in existence and those which may be enacted thereafter. In other contexts, such an interpretation has not been accepted but, for the purpose of the discussion, we will proceed on the hypothesis which has been put forth by the State of West Bengal that ‘law for the time being in force’ within the meaning of Section 88 would also include subsequent legislation. The submission is that since Section 88 allows for the existence of other laws by adopting the ‘in addition to and not in derogation of’ formula, Parliament did not intend to exclude State legislation even though it is identical to that which has been enacted by Parliament. This submission is also sought to be buttressed by adverting to Section 92 of the RERA, under which only the Maharashtra Act was repealed.

76 Now, in assessing the correctness of the submission, it is necessary to construe Section 88 in its proper perspective. Unless this is done, the Court would be doing violence to the intent of Parliament and to the constitutional principles which are embodied in Article 254. Parliament envisaged in Section 88 of the RERA that its provisions would be in addition to and not in derogation of other laws for the time being in force. True enough, this provision is an indicator of the fact that

Parliament has not intended to occupy the whole field so as to preclude altogether the exercise of legislative authority whether under other Central or State enactments. For instance, Section 71 of the RERA specifically contemplates (in the proviso to sub-Section (1)) that a complaint in respect of matters covered by Sections 12, 14, 18 and 19 is pending in the adjudicating *fora* constituted by the Consumer Protection Act, 1986. The person who has moved the consumer forum may withdraw the complaint and file an application before the adjudicating officer constituted under the RERA. The effect of Section 88 is to ensure that remedies which are available under consumer legislation, including Consumer Protection Act, 2019, are not ousted as a consequence of the operation of the RERA. Of course, it is also material to note that both sets of statutes, namely the Consumer Protection Act(s) and the RERA, have been enacted by the Parliament and both sets of statutes have to be therefore harmoniously construed. Section 88 of the RERA does not exclude recourse to other remedies created by cognate legislation. Where the cognate legislation has been enacted by a State legislature, Section 88 of the RERA is an indicator that Parliament did not wish to oust the legislative power of the State legislature to enact legislation on cognate or allied subjects. In other words, spaces which are left in the RERA can be legislated upon by the State legislature by enacting a legislation, so long as it is allied to, incidental or cognate to the exercise of Parliament's legislative authority. What the State legislature in the present case has done is not to enact cognate or allied legislation but legislation which, insofar as the statutory overlaps is concerned is identical to and bodily lifted from the Parliamentary law. This plainly implicates the test of repugnancy by setting up a

parallel regime under the State law. The State legislature has encroached upon the legislative authority of Parliament which has supremacy within the ambit of the subjects falling within the Concurrent List of the Seventh Schedule. The exercise conducted by the State legislature of doing so, is plainly unconstitutional.

77 The statutory overlaps between WB-HIRA and the RERA cannot be overlooked, as noted above. But quite apart from that, there is an additional reason why the test of repugnancy engrafted in clause (1) of Article 254 is attracted. This is because several provisions of the WB-HIRA are directly in conflict and dissonance with the RERA. Where a State enactment in the Concurrent List has enacted or made a statutory provision which is in conflict with those which have been enacted by Parliament, it may in a given case be possible to excise the provision of the State statute so as to bring it into conformity with the Parliamentary enactment. But the present case, as we shall demonstrate, involves a situation where valuable safeguards which are introduced by Parliament in the public interest and certain remedies which have been created by Parliament are found to be absent in WB-HIRA. This is indicated from the following provisions:

- (i) Section 2(n) of the RERA contains a statutory definition of the meaning of 'common areas'. Parliament has defined the expression to mean what is set out in sub-clause 1(i) to (iii) which includes open parking areas. The WB-HIRA contains a definition of the expression 'common areas' in Section 2(m). While this definition is *pari materia*, WB-HIRA has enacted the definition of the expression 'car parking area' in Section 1 to mean such area as may be

prescribed in exercise of the rule making power. The rules framed by the State government define the expression to mean an area either enclosed or uncovered or open excluding open car parking areas reserved as common areas and to exclude all types of car parking areas sanctioned by the competent authority;

- (ii) Section 2(y) of the RERA defines the expression 'garage' so as not to include an unenclosed or uncovered parking space such as open parking area. On the other hand, Section 2(x) of WB-HIRA defines the expression 'garage' to mean garage and property space as sanctioned by the competent authority;
- (iii) Section 6 of the RERA provides for an extension of a registration under Section 5 on an application by the promoter due to *force majeure*. The explanation exhaustively defines *force majeure* to mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the development of the real estate project. The provisions of Section 6 of the WB-HIRA, in contrast, while defining *force majeure* also incorporate "any other circumstances prescribed", thereby giving a wider discretion to the regulatory authority or the State to give extensions of registration to real estate projects in a manner which may prejudicially affect the interest of home buyers;
- (iv) Section 38(3) of the RERA empowers the real estate regulatory authority in a monopoly situation to make a *suo motu* reference to the Competition Commission of India. No such provision is made in the State enactment.

Hence, a valuable safeguard to protect home buyers in the RERA has been omitted. Section 38(3) of the RERA is in the following terms:

“(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that— (a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or (b) has effect of market power or monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India.”

- (v) Section 41 of the RERA is a pivotal provision under which the Central government is to establish a Central Advisory Council. The Minister of the Central government dealing with Housing is to be the *ex officio* Chairperson. The membership of the Central Advisory Council is stipulated in Section 41(3). Section 41 provides as follows:

“41. (1) The Central Government may, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Advisory Council. (2) The Minister to the Government of India in charge of the Ministry of the Central Government dealing with Housing shall be the *ex officio* Chairperson of the Central Advisory Council. (3) The Central Advisory Council shall consist of representatives of the Ministry of Finance, Ministry of Industry and Commerce, Ministry of Urban Development, Ministry of Consumer Affairs, Ministry of Corporate Affairs, Ministry of Law and Justice, Niti Aayog, National Housing Bank, Housing and Urban Development Corporation, five representatives of State Governments to be selected by rotation, five representatives of the Real Estate Regulatory Authorities to be selected by rotation, and any other Central Government department as notified. (4) The Central Advisory Council shall also consist of not more than ten members to represent the interests of real estate industry, consumers, real estate agents, construction labourers, non-governmental organisations and academic and research bodies in the real estate sector.”

The functions of the Central Advisory Council are provided in Section 42 of the RERA, which reads as follows:

“42. Functions of Central Advisory Council.

(1) The functions of the Central Advisory Council shall be to advise and recommend the Central Government,— (a) on all matters concerning the implementation of this Act; (b) on major questions of policy; (c) towards protection of consumer interest; (d) to foster the growth and development of the real estate sector; (e) on any other matter as may be assigned to it by the Central Government. (2) The Central Government may specify the rules to give effect to the recommendations of the Central Advisory Council on matters as provided under sub-section (1).”

WB-HIRA on the other hand, provides for the constitution of a State Advisory Council under Section 41, which is in the following terms:

“41. Establishment of State Advisory Council.- (1) The State Government may, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the State Advisory Council.

(2) The Minister to the Government of the State of West Bengal in charge of the Department dealing with Housing shall be the ex officio Chairperson of the State Advisory Council.

(3) The State Advisory Council shall consist of representatives of the Finance Department, Department of Industry, Commerce & Enterprises, Department of Urban Development and Municipal Affairs, Department of Consumer Affairs, Law Department, five representatives of the Real Estate Regulatory Authorities to be selected by rotations, and any other State Government department as notified.

(4) The State Advisory Council shall also consist of not more than ten members to represent the interests of real estate industry, consumers, real estate agents, construction labourers, non-governmental organisations and academic and research bodies in the real estate sector.”

Section 42 of WB-HIRA, which defines the functions of the State Advisory Council, is as follows:

“42. Functions of State Advisory Council.- (1) The functions of the State Advisory Council shall be to advise and recommend the State Government,-
 (a) on all matters concerning the implementation of this Act;
 (b) on major questions of policy;
 (c) towards protection of consumer interest;
 (d) to foster the growth and development of the real estate sector;
 (e) on any other matter as may be assigned to it by the State Government.
 (2) The State Government may specify the rules to give effect to the recommendations of the State Advisory Council on matters as provided under sub-section (1).”

The State legislature while enacting WB-HIRA has replaced the Central Advisory Council, which has a major policy making role, with the State Advisory Council. Though the functions of the State Advisory Council are similar, its power is to advise and recommend to the State government in distinct in contrast to the functions of the Central Advisory Council, which is to make policy recommendations to the Central government on the subjects contemplated in clauses (a) to (e) of Section 42. As a consequence, the advisory role of the Central government, based on the recommendations of the Central Advisory Council, has been completely eroded in the provisions of WB-HIRA;

- (vi) While Section 70 of the RERA contains a provision for compounding of offences, but WB-HIRA does not contain any such provision;

- (vii) Section 71(1) of the RERA provides that the regulatory authority shall appoint adjudicating officers for the purpose of adjudging compensation under Sections 12, 14, 18 and 19. The adjudicating officer is required to be a person who is or has been a District Judge. WB-HIRA does not contain any provision for appointment of adjudicating officers for the purpose of adjudging compensation. Under Section 40(3) of WB-HIRA, this power is entrusted to the regulatory authority and not to a judicial person or body. The fact that an appeal against the orders of the regulatory authority lie to the Appellate Tribunal and thereafter to the High Court cannot gloss over the fact that the valuable safeguard of appointing judicial officers as adjudicating officers for determining compensation under the RERA has not been enacted in WB-HIRA; and
- (viii) Section 80(2) of the RERA provides that no Court inferior to a Metropolitan Magistrate or JMFC shall try an offence punishable under the Act. No such provision is contained in WB-HIRA.

78 The above analysis indicates an additional reason why there is a repugnancy between WB-HIRA and RERA- the above provisions of the State enactment are directly in conflict with the Central enactment. Undoubtedly, as Article 254(1) postulates, the legislation enacted by the State legislature is void “to the extent of the repugnancy”. But the above analysis clearly demonstrates that in material respects, WB-HIRA has failed to incorporate valuable institutional safeguards and provisions intended to protect the interest of home-buyers. The silence of the State

legislature in critical areas, as noted above, indicates that important safeguards which have been enacted by Parliament in the public interest have been omitted in the State enactment. There is, in other words, not only a direct conflict of certain provisions between the RERA and WB-HIRA but there is also a failure of the State legislature to incorporate statutory safeguards in WB-HIRA, which have been introduced in the RERA for protecting the interest of the purchasers of real estate. In failing to do so, the State legislature has transgressed the limitations on its power and has enacted a law which is repugnant to Parliamentary legislation on the same subject matter.

H.4 Lack of Presidential Assent for WB-HIRA

79 Finally, another argument raised before us by the petitioner's was that WB-HIRA had not received the President's assent under Article 254(2) of the Constitution, which was necessary since it was going to occupy the same field as the RERA, a law which had been enacted by the Parliament. This becomes important since a Constitution Bench of this Court in **Rajiv Sarin v. State of Uttarakhand**⁴¹ ("**Rajiv Sarin**"), speaking through Justice Mukundam Sharma, has held the two requirements for repugnancy under Article 254 to be as follows:

"45. For repugnancy under Article 254 of the Constitution, there is a twin requirement, which is to be fulfilled: firstly, there has to be a "repugnancy" between a Central and State Act; and secondly, the Presidential assent has to be held as being non-existent. The test for determining such repugnancy is indeed to find out the dominant intention of both the legislations and whether such dominant intentions

⁴¹ (2011) 8 SCC 708

of both the legislations are alike or different. To put it simply, a provision in one legislation in order to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation, but such partial or incidental coverage of the same area in a different context and to achieve a different purpose does not attract the doctrine of repugnancy. In a nutshell, in order to attract the doctrine of repugnancy, both the legislations must be substantially on the same subject.”

(emphasis supplied)

80 Since we have already answered with the first requirement, the second remains. However, the State of West Bengal initially argued that WB-HIRA did not require presidential since it had been enacted under List II, but that argument has now been given up before this Court, as already noted above, and it is admitted that it comes under List III (the same as RERA). Further, it has also been clarified by us, rejecting their argument, that Sections 88 and 89 of the RERA did not implicitly permit the States to create their own legislation creating a parallel regime alongside the RERA which would have not required presidential assent. Hence, it is clear that WB-HIRA did not have presidential assent and was repugnant to RERA under Article 254.

81 Therefore, this issue of whether presidential assent was needed remains merely academic. Having said so, we note that issues related to Presidential assent under Article 254(2) have been settled by a Constitution Bench of this Court in **Rajiv Sarin** (supra), wherein it was held:

“Presidential assent and Article 254(2) of the Constitution

63. It is in this context, that the finding of this Court in Kaiser-I-Hind (P) Ltd. [(2002) 8 SCC 182] at para 65 becomes important to the effect that “pointed attention” of the President is required to be drawn to the repugnancy and the reasons for having such a law, despite the enactment by Parliament, has to be understood. It summarises the point as follows at pp. 215-16 as follows:

“65. The result of the foregoing discussion is:

1. It cannot be held that the summary speedier procedure prescribed under the PP Eviction Act for evicting the tenants, sub-tenants or unauthorised occupants, if it is reasonable and in conformity with the principles of natural justice, would abridge the rights conferred under the Constitution.

2. (a) Article 254(2) contemplates ‘reservation for consideration of the President’ and also ‘assent’. Reservation for consideration is not an empty formality. Pointed attention of the President is required to be drawn to the repugnancy between the earlier law made by Parliament and the contemplated State legislation and the reasons for having such law despite the enactment by Parliament.

(b) The word ‘assent’ used in clause (2) of Article 254 would in context mean express agreement of mind to what is proposed by the State.

(c) In case where it is not indicated that ‘assent’ is qua a particular law made by Parliament, then it is open to the Court to call for the proposals made by the State for the consideration of the President before obtaining assent.

3. Extending the duration of a temporary enactment does not amount to enactment of a new law. However such extension may require the assent of the President in case of repugnancy.”” **(emphasis supplied)**

As such, it is abundantly clear that the State of West Bengal would have had to seek the assent of the President before enacting WB-HIRA, where its specific repugnancy with respect to RERA and its reasons for enactment would have had to be specified.

Evidently, this was not done. However, since we have already held WB-HIRA to be repugnant to RERA, this issue becomes moot.

I Conclusion

82 Before the WB-HIRA, the State legislature had also enacted the WB 1993 Act. Upon receiving the assent of the President, the Act was published in the Calcutta Gazette, Extraordinary on 9 March 1994. Some of the salient provisions of the Act are detailed below:

- (i) Section 3 provides for registration of promoters who construct or intend to construct a building and for obtaining permission for construction;
- (ii) Section 4 provides for the validity of the certificate of registration and for cancellation;
- (iii) Section 5 provides for appeals;
- (iv) Section 6 provides for adjudication of disputes by an officer appointed by the State government for adjudication;
- (v) Section 7 provides that the promoter shall before taking any advance payment for deposit, which shall not be more than 40 per cent of the sale price, enter into a written agreement for sale which shall be registered;
- (vi) Section 8 restrains additions or alterations without the consent of the transferee and for rectification of defects;
- (vii) Section 9 contains a prohibition on a promoter creating a mortgage or charge without the consent of the purchaser after entering into an agreement;

- (viii) Section 10 requires the formation of a co-operative society;
- (ix) Section 11 provides for the promoter to convey title to the co-operative society;
- (x) Section 12 provides for insurance against loss or death;
- (xi) Section 13 provides for penalties;
- (xii) Section 14 provides for offences by companies;
- (xiii) Section 15 provides for rule making powers;
- (xiv) Section 16 provides for exemption to constructions by the State Government Housing Board and by the Housing and Urban Development Corporation; and
- (xv) Section 17 provides for repeals and the earlier legislation of 1972 is repealed.

The above provisions are repugnant to the corresponding provisions which are contained in the RERA. These provisions of the WB 1993 Act impliedly stand repealed upon the enactment of the RERA in 2016, in accordance with Sections 88 and 89 read with Article 254(1) of the Constitution. Hence, we clarify with abundant caution that our striking down of the provisions of WB-HIRA in the present judgment will not, in any manner, revive the WB 1993 Act, which was repealed upon the enactment of WB-HIRA since the WB 1993 Act is itself repugnant to the RERA, and would stand impliedly repealed.

83 For the above reasons, we have come to the conclusion that WB-HIRA is repugnant to the RERA, and is hence unconstitutional. We also hold and declare that as a consequence of the declaration by this Court of the invalidity of the provisions of WB-HIRA, there shall be no revival of the provisions of the WB 1993 Act, since it would stand impliedly repealed upon the enactment of the RERA.

84 Since its enforcement in the State of West Bengal, the WB-HIRA would have been applied to building projects and implemented by the authorities constituted under the law in the state. In order to avoid uncertainty and disruption in respect of actions taken in the past, recourse to the jurisdiction of this Court under Article 142 is necessary. Hence, in exercise of the jurisdiction under Article 142, we direct that the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation prior to the date of this judgment

85 The writ petition is accordingly stand allowed in the above terms.

86 Pending application(s), if any, stand disposed of.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[M R Shah]

New Delhi;
May 4, 2021

**IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION**

WRIT PETITION (Cr1.) No(s). 307 OF 2020

KERALA UNION OF WORKING JOURNALISTS

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

O R D E R

This Writ Petition instituted under Article 32 of the Constitution of India, seeks a writ of habeas corpus for the release of alleged detenu, namely, Sidhique Kappan son of Muhammed, who is stated to be a journalist and a member of the Petitioner Association-Kerala Union of Working Journalists.

The Writ Petition has been filed on the premise that the above stated detenu was taken into illegal custody on 5.10.2020 at 16.50 hours without serving any notice or order as envisaged under Section 107 of the Code of Criminal Procedure, 1973 (Cr.P.C.). The

Signature Not Verified
Digitally Signed by
Neelam Gulati
Date: 2024.04.28
22:28:50 IST
Reason:

alleged detenu and his associates were, at the time of detention, going to Hathras (U.P.) to report a gruesome case of rape and murder of a young girl.

The State of U.P. in its counter affidavit dated 20th November, 2020 has strenuously controverted the allegation of illegal detention. A supplementary affidavit has also been filed by the State of U.P. on 09.12.2020 explaining that the alleged detenu has been lawfully arrested; firstly, under Section 107/151 Cr.P.C. and thereafter in the FIR No. 199/2020 dated 07.10.2020 registered at Police Station Manth District Mathura under Sections 153A, 295A and 124A of the Indian Penal Code, Section 17, 14 of Unlawful Activity prevention Act, 1967 and Sections 65, 72, 76 of Information Technology Act, 2008.

At the outset, the Respondent State vehemently contested the maintainability of the petition by the Petitioner-Association. However, it may be noticed that during the pendency of these proceedings, the wife of the alleged detenu Mrs. Raihanath has also applied for intervention pleading immediate release of her husband. Hence the issue regarding maintainability of the petition filed by the Petitioner-Association as contended by the respondent has lost its significance.

Apart from the above, since the filing of the present Writ Petition, various events have taken place such as the completion of investigation, filing of charge sheet etc., which mandates this Court not to examine the aforesaid issue at this stage.

The Petitioner-Association subsequently moved an application for interim directions and to release Sidhique Kappan on bail owing to his deteriorating health condition. This application too has been hotly contested by the State of U.P., who has on our directions placed the medical reports of Sidhique Kappan on record. On perusal of these reports, we find that Sidhique Kappan had tested COVID-19 Positive on 21st April, 2021, was having fever (T-102F) and had also suffered an injury as he fainted and fell down in the bathroom for which intervention of a surgeon was suggested. The patient was referred to K.M. Medical College and the 'bed head ticket' reveals Sidhique Kappan as having multiple health issues like diabetes, heart ailment, blood pressure and bodily injury. However, the next set of medical reports and the

additional affidavit circulated by the State this morning show that he has tested COVID-19 Negative.

We have heard Mr. Wills Mathews, learned counsel appearing for the petitioner(s) and Mr. Tushar Mehta, learned Solicitor General appearing for the State of Uttar Pradesh. It may be noted that various legal issues were advanced before us, however the enquiry before this Court is limited to providing adequate health care to the accused, in line with the limited relief, ultimately sought by the counsel for the Petitioner. Accordingly, this Court is not called to examine detailed facts on merits.

From the records, it is clear that the accused was produced before the jurisdictional court after arrest. FIR was registered thereafter. Presently, the investigation against the alleged detenu is complete and a voluminous chargesheet running into over 5000 pages has been filed. In these circumstances, it would not be prudent for this Court to continue the present petition, any further.

Moreover, the alleged detenu has got alternative

remedies including the right to approach the competent court for the grant of bail and/or the High Court under Article 226 of the Constitution of India and/or under Section 482 Cr.P.C for redressal of his grievances. Still further, it may also be relevant to note that the co-accused of the alleged detenu have already adopted such a recourse and sought their bail before the Competent Court.

We are of the view that owing to the apparent precarious health condition of the arrestee, it is necessary to provide adequate and effective medical assistance to him and to allay all apprehension relating to his health, it would be in the interest of justice to shift Sidhique Kappan - the arrestee, either to Ram Manohar Lohia Hospital or to All India Institute of Medical Sciences (AIIMS) or any other Government Hospital in Delhi for the proper medical treatment. The needful shall in this regard be done at the earliest.

We deem it appropriate to issue the above direction even though Sh. Tushar Mehta, learned

Solicitor General has emphasised that adequate medical treatment is being provided as in the case of all other jail inmates and if need be further facility shall be extended to the arrestee. We state that the most precious fundamental 'right to life' unconditionally embraces even an undertrial. The consideration made herein is keeping in view the peculiar facts and circumstances of this case. Merely because the other jail inmates are receiving treatment similar to the arrestee need not deter us.

Needless to say, as soon as Sidhique Kappan recovers and the Doctors certify him fit to be discharged, he would be shifted back to Mathura Jail. Sidhique Kappan is meanwhile at liberty to avail appropriate remedy in accordance with law before the concerned courts for the grant of bail or to challenge the proceedings or for quashing the chargesheet. In case such petition/Application is filed by him, it shall be considered and decided by the concerned court on its own merits and in accordance with law.

It is clarified that we have not expressed any

views on the merits of the contentious issues raised by both sides.

With the above directions, the Writ Petition is disposed of.

The pending application(s), if any, shall stand disposed of.

.....CJI

.....J.
(SURYA KANT)

.....J.
(A.S. BOPANNA)

NEW DELHI
APRIL 28, 2021

ITEM NO.16 Court 1 (Video Conferencing) SECTION X

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Criminal) No(s). 307/2020

KERALA UNION OF WORKING JOURNALISTS Petitioner(s)

VERSUS

UNION OF INDIA & ORS. Respondent(s)

IA No. 111099/2020 - CLARIFICATION/DIRECTION
IA No. 111101/2020 - EXEMPTION FROM FILING O.T.
IA No. 111100/2020 - GRANT OF BAIL
IA No. 129673/2020 - INTERVENTION APPLICATION)

Date : 28-04-2021 This matter was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SURYA KANT
HON'BLE MR. JUSTICE A.S. BOPANNA

For Petitioner(s) Mr. Wills Mathews, Adv.
 Mr. Koshy John, Adv.
 Mr. Shree Pal Singh, AOR

For Respondent(s) Ms. Garima Prashad, AOR

 Mr. Tushar Mehta, SG
 Mr. Rajat Nair, Adv.
 Mr. Kanu Agrawal, Adv.
 Ms. Garima Prasad, Adv.
 Mr. B. V. Balaram Das, AOR

 Mr. Shree Pal Singh, AOR

UPON hearing the counsel the Court made the following
O R D E R

The Writ Petition is disposed of in terms of the signed order.

The pending application, if any, shall stand disposed of.

(NEELAM GULATI)
ASTT. REGISTRAR-cum-PS

(RAJ RANI NEGI)
DY. REGISTRAR

(Signed order is placed on the file)

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NOS. 1659-1660 of 2021
(@ SPECIAL LEAVE TO APPEAL NOS. 7965-7966/2020)**

RAHUL S SHAH

....APPELLANT (S)

VERSUS

JINENDRA KUMAR GANDHI & ORS.

....RESPONDENT(S)

WITH

**CIVIL APPEAL NOS. 1661-1662 of 2021
(@ SLP (C) NOS. 11859-11860/2020)**

WITH

**CIVIL APPEAL NOS. 1663-1664 of 2021
(@ SLP (C) NOS. 11792-11793/2020)**

O R D E R

1. Leave granted.

Signature Not Verified
Digitally signed by
Nidhi Ahuja
Date: 2024.04.23
17:48:51
Reason: [S]

The present appeals arise out of the common judgment and order dated 16th January, 2020 of the Karnataka High Court which

dismissed several Writ Petitions. The course of the litigation highlights the malaise of constant abuse of procedural provisions which defeats justice, i.e. frivolous attempts by unsuccessful litigants to putting up spurious objections and setting up third parties, to object, delay and obstruct the execution of a decree.

3. The third respondent (hereafter referred to as 'Narayanamma') had purchased a property measuring 1 Acre (Survey No. 15/2) of Deevatige Ramanahalli, Mysore Road, Bengaluru (hereafter referred to as 'suit property') under the sale deed dated 17.03.1960. The suit land was converted and got merged in the municipal limits of Bengaluru and was assigned with Municipal Corporation No. 327 and 328, Mysore Road, Bengaluru. Narayanamma sold 1908 square yard of the suit property in Municipal Corporation (Survey No. 327) to 2nd and 3rd respondents (hereafter referred to 'Jitendra' and 'Urmila') under a sale deed dated 13.05.1986. This was demarcated with the sketch annexed to the sale deed. The adjacent portion of property, Survey No. 327 was sold to Shri Moolendra Kumar Gandhi and Smt. Baby Gandhi by another sale deed dated 13.05.1986. This property was also demarcated in the sketch and

clearly shows its dimensions and boundaries annexed to the sale deed. Therefore, the first two respondents, Shri Moolendra Kumar Gandhi and Smt. Baby Gandhi became absolute owners of the suit property with the totally admeasuring of 3871 square yards. Thus, Narayanamma had sold about 34,839 square feet of the property out of 1 Acre land (43,860 square feet) owned by her. Subsequently, after the sale of the major portion of the said property to the first two respondents and their brother, Narayanamma who is the mother of A. Ramachandra Reddy the fourth respondent (hereafter called “the vendors”) filed a suit¹ for declaration that the two sale deeds in favour of the first two respondents (also called “purchasers” or “decree-holders”) as well as against Shri Moolendra Kumar Gandhi etc. were void. The vendors and Shri Anjan Reddy (deceased respondent no. 8) on 25.03.1991 executed a registered partition deed. This document did not advert to the sale deed executed in favour of the purchasers and Shri Moolendar Kumar Gandhi and Smt. Baby Kumari Gandhi. The purchasers were restrained by an injunction

¹ O.S. No. 986/1987

from entering the property which Narayanamma claimed was hers.

4. During the pendency of the suit for declaration, the first purchasers filed two suits² against the vendors for possession. During the pendency of these suits on 11.02.2000 by two separate sale deeds Shri Dhanji Bhai Patel and Shri Govind Dhanji Patel purchased 7489 square feet and 7650 square feet respectively, out of the residue of the property owned by Narayanamma. While so, during the pendency of the suits instituted by the purchasers, the vendors again sold the suit property i.e. the land to the present appellant (Rahul Shah) and three others (Respondents no. 5-7) by four separate sale deeds.³In the possession suits the vendors filed counter claims (dated 18.04.1998). During the pendency of proceedings the purchasers sought for transfer and mutation of property in their names which were declined by the Municipal Corporation; this led to their approaching the High Court in Writ Petition No. 19205/1992 which

² O.S. Nos. 9077/ 1996 and 9078/1996

³ Dated 09.11.2001, 12.12.2001, 05.12.2002 and 20.10.2004

was disposed of with a direction⁴ that after adjudication of the injunction suit (filed by the vendors) the *khata* be transferred.

5. The proceedings in the injunction suit filed by the vendors and the other two suits filed by the purchasers were clubbed together. The City Civil Judge, Bangalore by a common judgment dated 21.12.2006 allowed and decreed the suits for possession preferred by the purchasers and dismissed the vendor's suit for injunction. The decree holders preferred execution proceedings.⁵ They filed applications under Order XXI Rule 97 of the Code of Civil Procedure (CPC) since the judgment debtors/vendors had sold the property to the appellant and respondents no. 4 to 7. The appellant i.e. a subsequent purchaser filed objections.

6. During the pendency of the proceedings the front portion of the suit property bearing Municipal Corporation No. 327, Mysore road, Bangalore became the subject matter of the acquisition for the Bangalore Metro Project. The decree holders (the first two respondents) preferred objections to the proposed acquisition and further claimed the possession. In the meanwhile, aggrieved by the dismissal of the suit and decreeing the suit for possession,

⁴ Dated 05.11.1998

⁵ Execution Case Nos. 458-459/2007

Narayanamma filed first appeals in the High Court⁶. In these proceedings it was brought to the notice of the High Court that the suit properties had been sold to the appellant and respondents no. 4 to 7. By an order⁷ the High Court directed the vendors to furnish particulars with respect to the sale, names of the purchaser and area sold etc. By common judgment dated 22.10.2009 the High Court dismissed all the appeals pending before it. The Special Leave Petition preferred by the vendors⁸ was also dismissed by this Court on 23.07.2010.

7. Apparently, during the pendency of execution proceedings before the trial Court the vendors again sold the properties in favour of Shri P. Prem Chand, Shir Parasmal, Shri Kethan S. Shah & Ors. and Shri Gopilal Ladha & Shri Vinay Maheshwari by separate sale deeds⁹. This was brought to the notice of the High Court which had dismissed the appeal preferred by the vendors.

8. During the pendency of the proceedings before the High Court Narayanamma, the appellant and respondents no. 4 to 7 filed indemnity bonds claiming that there was no dispute with

⁶ R.F.A. No. 661-663/ 2007

⁷ Dated 10.04.2008

⁸ S.L.P. (C) Nos. 16349-13651/2010

⁹ Dated 09.11.2001, 12.12.2001, 05.12.2002 and 20.10.2004

respect to the suit property and claimed the compensation in respect of portions that were acquired. These were brought to the notice of the High Court which passed an order in W.P. No. 9337/2008. The court considered all the materials and held that the compensation could not have been dispersed to the vendors, the appellant and Respondents no. 4 to 7. The High Court issued directions to them to deposit the amounts. An appeal was preferred by the appellant and the said respondents, against that order, which was rejected by the Division Bench.¹⁰ Consequently, an enquiry was held and order was passed by the Land Acquisition Officer on 01.08.2011 directing the appellant, the vendor and others to redeposit the amounts. By an order passed in another Writ Petition No. 2099/2011¹¹ the High Court held that the decree holder/purchasers were entitled to transfer of *khata* of property in their names and directed to hold an inquiry against the Revenue Officer. Since the orders of the High Court, with respect to the deposits of amounts, were not complied with, contempt proceedings were taken.

¹⁰ Dated 28.10.2009

¹¹ Dated 17.07.2013

9. The High Court in another order dated 19.04.2013 directed Narayanamma and respondents no. 4 to 7 to deposit the amounts. That order in contempt proceedings (C.C.C. No. 280/2011) was challenged before this Court in a special leave petition¹² which was dismissed on 05.11.2014. Thereafter, apparently in compliance with the High Court's direction for transfer of *khata* the municipal and revenue records reflect the names of the decree-holder/purchasers.

10. The execution proceedings initiated by the decree holders resulted in the court requiring parties to lead evidence, in view of the obstruction by the appellant and respondents no. 4 to 7, by its order dated 23.04.2010. When obstruction proceedings were pending under Order XXI Rule 97, the judgment debtor i.e. the vendors initiated criminal proceedings in 2016 against the decree holders; these were stayed by the High Court on 20.06.2016 and later quashed on 16.03.2017. The judgment debtors had alleged forgery of certain documents. The High Court directed appointment of Court Commissioner to identify and measure the property. At the time of disposal of the criminal proceedings High

¹² SLP (C) No. 18031/2013

Court directed that the Commissioner's report along with the objections of the Judgment debtors ought to be forwarded to the Executing Court.

11. In the meanwhile, by an order the Executing Court had appointed the Taluka Surveyor of BBMP as the Court Commissioner and directed him to visit the spot and survey and fix the boundaries of decretal property. Recall of these orders was sought by the judgment debtors; they also sought for reference to forensic examination by a Handwriting Expert of the sale documents. These two review applications were dismissed; and on 13.06.2017 the Executing Court declined the application for forensic examination of documents and also rejected the obstructers' resistance to execution.

12. All these orders led to initiation of five writ petitions on behalf of the appellant, and the vendors etc. Three First appeals¹³ were preferred by obstructers challenging the decision of the Executing Court dated 15.02.2017. By impugned common order all these Writ Petitions and appeals were dismissed.

¹³ R.F.A. Nos. 441, 468 and 469/2017

13. It is argued by Mr. Shailesh Madiyal on behalf of the appellant (Rahul Shah) that the impugned order has the effect of diluting the order of the Executing Court dated 23.04.2010 with respect to survey of the entire property. It was pointed out by the counsel for the appellant that there were disputes with respect to boundaries and identity of the properties as between parties. Referring to the order, it was submitted that the Court had noticed that the High Court in earlier Writ Petitions had directed the Special Land Acquisition Officer to hold an enquiry and if necessary refer the matter to Civil Court under Section 30 of the Land Acquisition Act. In view of all these disputes, questions especially related to the boundaries and the imprecise nature of the extent and location of the disputed properties, the impugned order should be interfered with and the reliefs sought by the appellant be granted. Learned Counsel submitted that subsequently by order dated 31.10.2014 the Executing Court erroneously held that Sketch Exhibit P-26 was drawn by Revenue Authorities whereas in fact it was introduced by handwritten sketch given by the decree holders.

14. Learned counsel submitted that decree holder's efforts in all the proceedings were to confuse the identity of the property and therefore had sought clubbing of both execution cases; this request was rejected by the Executing Court after concluding that the property sought to be executed in two cases were different and further that rights claimed too were distinct.

15. Learned counsel for the appellant in the second set of petitions, i.e. SLP (C) No. 11859-11860 of 2020 and SLP (C) No. 11792-11793 of 2020, on the other hand urged that the High Court as well as the Executing Court fell into error in holding that what was sought by the obstructer (i.e. the appellant Gopilal Ladha) was far in excess of what was left after decree holders had purchased and therefore the conveyances had overlapped.

16. Mr. Arunava Mukherjee appearing for the second set of appellants also reiterated the submissions of Mr. Shailesh Madiyal that the decree holders had intentionally confused the identity of the property. He highlighted that the High Court acted in error in rejecting the appellants' request for subjecting documents to forensic examination by handwriting experts. It was submitted that this aspect was completely overlooked because the

appellants' had raised serious doubts with respect to the genuineness and authenticity of the signatures of the documents.

17. The respondents urged that this Court should not interfere with the findings of the High Court. Learned counsel reiterated that numerous proceedings were taken out and that the judgment debtors had sold the very same property three times over – at least two times after the decree holders purchased their portions of the property and during the pendency of the suits filed by them. The judgment debtors had sought a declaration that the sale deeds executed in favour of the decree holders were not genuine and lost. Thereafter, the judgment debtor and some of the obstructers succeeded in collecting compensation in respect of the portion of the property that had been acquired. Ultimately, those amounts had to be disbursed by the Court orders. The judgment debtors/ vendor even sought forensic examination and initiated the criminal proceedings that were quashed by the High Court. The High Court took note of all these circumstances and passed a just order, requiring the appointment of a Court Commissioner to identify and measure the properties. While doing so the Executing Court has been asked to take into

consideration all the materials on record including the reports submitted by the previous Court Commissioner Mr. Venkatesh Dalwai.

Discussion and conclusions:

18. It is quite evident from the above discussion that the vendor and her son (judgment debtors) after executing the sale deed in respect of a major portion of the property, questioned the transaction by a suit for declaration. The decree holders also filed a suit for possession. During the pendency of these proceedings, two sets of sale deeds were executed. The vendors' suit was dismissed – the decree of dismissal was upheld at the stage of the High Court too. On the other hand, the purchasers' suit was decreed and became the subject matter of the appeal. The High Court dismissed the first appeal; this Court dismissed the Special Leave Petition. This became the background for the next stage of the proceedings, i.e. execution. Execution proceedings are now being subsisting for over 14 years. In the meanwhile, numerous applications including criminal proceedings questioning the very same documents that was the subject matter of the suit were

initiated. In between the portion of the property that had been acquired became the subject matter of land acquisition proceedings and disbursement of the compensation. That became the subject matter of writ and contempt proceedings. Various orders of the Executing Court passed from time to time, became the subject matter of writ petitions and appeals - six of them, in the High Court. All these were dealt with together and disposed of by the common impugned order.

19. A perusal of the common impugned order shows that High Court has painstakingly catalogued all proceedings chronologically and their outcomes. The final directions in the impugned order is as follows:

(a) the other challenge by the JDrs and the Obstructors having been partly favoured, the impugned orders of the Executing Court directing Delivery Warrant, are set at naught, and the matter is remitted back for consideration afresh by appointing an expert person/official as the Court Commissioner for accomplishing the identification & measurement of the decreetal properties with the participation of all the stake-holders, in that exercise subject to all they bearing the costs & fees thereof, equally;

(b) it is open to the Executing Court to take into consideration the entire evidentiary material on record

hitherto including the Report already submitted by the Court Commissioner Shri Venkatesh Dalwai,

(c) the amount already in deposit and the one to be deposited by the Obstructors in terms of orders of Co-ordinate Benches of this Court mentioned in paragraph 8 supra shall be released to the parties concerned, that emerge victorious in the Execution Petitions;

(d) the JDrs shall jointly pay to the DHrs collectively an exemplary cost of Rs. 5,00,000/- (Rupees five lakh) only

in each of the Execution Petitions within a period of eight weeks, regardless of the outcome of the said petitions; and, if, the same is not accordingly paid, they run the risk of being excluded from participation in the Execution Proceedings, in the discretion of the learned judge of the Court below; and,

(e) the entire exercise including the disposal of the Execution Petitions shall be accomplished within an outer

limit of six months, and the compliance of such accomplishment shall be reported to the Registrar General of this Court.

No costs qua obstructors.

**Sd/-
JUDGE**

20. The contentions of the Special Leave Petition mainly centre around one or the other previous orders of the Executing Court with regard identification of the property and boundary etc and the subjecting documents to forensic examination. As is evident

from the reading of the final order, the High Court has adopted a fair approach requiring the Executing Court to appoint a Court Commissioner to verify the identity of the suit properties and also consider the materials brought on record including the reports of the previous local commission. In the light of this, the arguments of the present appellants are unmerited and without any force. The Court also finds that the complaint that documents ought to be subjected to forensic examination, is again insubstantial. The criminal proceedings initiated during the pendency of the execution proceedings – in 2016 culminated in the quashing of those proceedings. The argument that the documents are not genuine or that they contain something suspicious ex-facie appears only to be another attempt to stall execution and seek undue advantage. As a result, the High Court correctly declined to order forensic examination. This Court is of the opinion that having regard to the totality of circumstances the direction to pay costs quantified at Rs. 5 lakh (to be complied by the judgment debtor) was reasonable, given the several attempts by the decree holder to ensure that the fruits of the judgment secured by them

having been thwarted repeatedly. As a result, the direction to pay costs was just and proper.

21. The High Court has directed the Executing Court to complete the process within six months. That direction is affirmed. The parties are hereby directed to cooperate with the Executing Court; in case that court finds any obstruction or non-cooperation it shall proceed to use its powers, including the power to set down and proceed ex-parte any party or impose suitably heavy costs. Therefore, in light of the above observations these appeals are liable to be dismissed.

22. These appeals portray the troubles of the decree holder in not being able to enjoy the fruits of litigation on account of inordinate delay caused during the process of execution of decree. As on 31.12.2018, there were 11,80,275 execution petitions pending in the subordinate courts. As this Court was of the considered view that some remedial measures have to be taken to reduce the delay in disposal of execution petitions, we proposed certain suggestions which have been furnished to the learned counsels of parties for response. We heard Mr. Shailesh

Madiyal, learned counsel for the petitioner and Mr. Paras Jain, learned counsel for the respondent.

23. This court has repeatedly observed that remedies provided for preventing injustice are actually being misused to cause injustice, by preventing a timely implementation of orders and execution of decrees. This was discussed even in the year 1872 by the Privy Council in ***The General Manager of the Raja Durbhunga v. Maharaja Coomar Ramaput Sing***¹⁴ which observed that the actual difficulties of a litigant in India begin when he has obtained a decree. This Court made a similar observation in ***Shub Karan Bubna @ Shub Karan Prasad Bubna v Sita Saran Bubna***¹⁵, wherein it recommended that the Law Commission and the Parliament should bestow their attention to provisions that enable frustrating successful execution. The Court opined that the Law Commission or the Parliament must give effect to appropriate recommendations to ensure such amendments in the Code of Civil Procedure, 1908, governing the adjudication of a suit, so as to ensure that the process of adjudication of a suit be continuous from the stage of initiation to

¹⁴ (1871-72) 14 Moore's I.A. 605

¹⁵ (2009) 9 SCC 689

the stage of securing relief after execution proceedings. The execution proceedings which are supposed to be handmaid of justice and sub-serve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice.

24. In respect of execution of a decree, Section 47 of CPC contemplates adjudication of limited nature of issues relating to execution i.e., discharge or satisfaction of the decree and is aligned with the consequential provisions of Order XXI. Section 47 is intended to prevent multiplicity of suits. It simply lays down the procedure and the form whereby the court reaches a decision. For the applicability of the section, two essential requisites have to be kept in mind. *Firstly*, the question must be the one arising between the parties and *secondly*, the dispute relates to the execution, discharge or satisfaction of the decree. Thus, the objective of Section 47 is to prevent unwanted litigation and dispose of all objections as expeditiously as possible.

25. These provisions contemplate that for execution of decrees, Executing Court must not go beyond the decree. However, there is steady rise of proceedings akin to a re-trial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a

decree in their favour. Experience has shown that various objections are filed before the Executing Court and the decree holder is deprived of the fruits of the litigation and the judgment debtor, in abuse of process of law, is allowed to benefit from the subject matter which he is otherwise not entitled to.

26. The general practice prevailing in the subordinate courts is that invariably in all execution applications, the Courts first issue show cause notice asking the judgment debtor as to why the decree should not be executed as is given under Order XXI Rule 22 for certain class of cases. However, this is often misconstrued as the beginning of a new trial. For example, the judgement debtor sometimes misuses the provisions of Order XXI Rule 2 and Order XXI Rule 11 to set up an oral plea, which invariably leaves no option with the Court but to record oral evidence which may be frivolous. This drags the execution proceedings indefinitely.

27. This is anti-thesis to the scheme of Civil Procedure Code, which stipulates that in civil suit, all questions and issues that may arise, must be decided in one and the same trial. Order I and Order II which relate to Parties to Suits and Frame of Suits with the object of avoiding multiplicity of proceedings, provides for joinder

of parties and joinder of cause of action so that common questions of law and facts could be decided at one go.

28. Order I Rule 10(2) empowers the Court to add any party who ought to have been joined, whether as a plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit. Further, Order XXII Rule 10 provides that in cases of assignment, creation or devolution of any interest during the pendency of the suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come to be devolved.

29. While CPC under Rules 30 to 36 of Order XXI provides for execution of various decrees, the modes of execution are common for all. Section 51 of CPC lists the methods of execution as by delivery of property; by attachment and sale; by arrest and detention in civil prison; by appointing a receiver or in any other manner as the nature of relief granted may require. Moreover, Order XL Rule 1 contemplates the appointment of the Receiver by the Court. In appropriate cases, the Receiver may be given possession, custody and/or management of the property immediately after the decree is passed. Such expression will

assist in protection and preservation of the property. This procedure within the framework of CPC can provide assistance to the Executing Court in delivery of the property in accordance with the decree.

30. As to the decree for the delivery of any immovable property, Order XXI Rule 35 provides that possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

31. As the trial continues between specific parties before the Courts and is based on available pleadings, sometimes vague description of properties raises genuine or frivolous third-party issues before delivery of possession during the execution. A person who is not party to the suit, at times claims separate rights or interests giving rise to the requirement of determination of new issues.

32. While there may be genuine claims over the subject matter property, the Code also recognises that there might be frivolous or instigated claims to deprive the decree holder from availing the benefits of the decree. Sub-rule (2) of Rule 98 of Order XXI

contemplates such situations and provides for penal consequences for resistance or obstruction occasioned without any just cause by the judgment debtor or by some other person at his instigation or on his behalf, or by the transferee, where such transfer was made during the pendency of the suit or execution proceedings. However, such acts of abuse of process of law are seldom brought to justice by sending the judgment debtor, or any other person acting on his behalf, to the civil prison.

33. In relation to execution of a decree of possession of immovable property, it would be worthwhile to mention the twin objections which could be read. Whereas under Order XXI Rule 97, a decree holder can approach the court pointing out about the obstruction and require the court to pass an order to deal with the obstructionist for executing a decree for delivering the possession of the property, the obstructionist can also similarly raise objections by raising new issues which take considerable time for determination.

34. However, under Order XXI Rule 99 it is a slightly better position, wherein a person, other than the judgment debtor, when is dispossessed of immoveable property by the decree holder for

possession of such property, files an application with objections. Such objections also lead to re-trial, but as the objector is already dispossessed, the execution of the decree is more probable and expeditious. In Order XXI Rule 97 the obstructionist comes up with various objections that ideally should have been raised at the time of adjudication of suit. Such obstructions for execution could be avoided if a Court Commissioner is appointed at the proper time.

35. Having considered the abovementioned legal complexities, the large pendency of execution proceedings and the large number of instances of abuse of process of execution, we are of the opinion that to avoid controversies and multiple issues of a very vexed question emanating from the rights claimed by third parties, the Court must play an active role in deciding all such related issues to the subject matter during adjudication of the suit itself and ensure that a clear, unambiguous, and executable decree is passed in any suit.

36. Some of the measures in that regard would include that before settlement of issues, the Court must, in cases, involving delivery of or any rights relating to the property, exercise power under Order XI Rule 14 by ordering production of documents upon

oath, relating to declaration regarding existence of rights of any third party, interest in the suit property either created by them or in their knowledge. It will assist the court in deciding impleadment of third parties at an early stage of the suit so that any future controversy regarding non-joinder of necessary party may be avoided. It shall ultimately facilitate an early disposal of a suit involving any immovable property.

37. It also becomes necessary for the Trial Court to determine what is the status of the property and when the possession is not disputed, who and in what part of the suit property is in possession other than the defendant. Thus, the Court may also take recourse to the following actions:

a) Issue commission under Order XXVI Rule 9 of CPC.

A determination through commission, upon the institution of a suit shall provide requisite assistance to the court to assess and evaluate to take necessary steps such as joining all affected parties as necessary parties to the suit. Before settlement of issues, the Court may appoint a Commissioner for the purpose of carrying out local investigation recording exact description and demarcation of the property including the nature and occupation

of the property. In addition to this, the Court may also appoint a Receiver under Order XL Rule 1 to secure the status of the property during the pendency of the suit or while passing a decree.

b) Issue public notice specifying the suit property and inviting claims, if any, that any person who is in possession of the suit property or claims possession of the suit property or has any right, title or interest in the said property specifically stating that if the objections are not raised at this stage, no party shall be allowed to raise any objection in respect of any claim he/she may have subsequently.

c) Affix such notice on the said property.

d) Issue such notice specifying suit number etc. and the Court in which it is pending including details of the suit property and have the same published on the official website of the Court.

38. Based on the report of the Commissioner or an application made in that regard, the Court may proceed to add necessary or proper parties under Order I Rule 10. The Court may permit

objectors or claimants upon joining as a party in exercise of power under Order I Rule 10, make a joinder order under Order II Rule 3, permitting such parties to file a written statement along with documents and lists of witnesses and proceed with the suit.

39. If the above suggested recourse is taken and subsequently if an objection is received in respect of “suit property” under Order XXI Rule 97 or Rule 99 of CPC at the stage of execution of the decree, the Executing Court shall deal with it after taking into account the fact that no such objection or claim was received during the pendency of the suit, especially in view of the public notice issued during trial. Such claims under Order XXI Rule 97 or Rule 99 must be dealt strictly and be considered/entertained rarely.

40. In ***Ghan Shyam Das Gupta v. Anant Kumar Sinha***¹⁶, this Court had observed that the provisions of the Code as regards execution are of superior judicial quality than what is generally available under the other statutes and the Judge, being entrusted exclusively with administration of justice, is expected to do better. With pragmatic approach and judicial interpretations, the Court must not allow the judgment debtor or any person instigated or

¹⁶ AIR 1991 SC 2251

raising frivolous claim to delay the execution of the decree. For example, in suits relating to money claim, the Court, may on the application of the plaintiff or on its own motion using the inherent powers under Section 151, under the circumstances, direct the defendant to provide security before further progress of the suit. The consequences of non-compliance of any of these directions may be found in Order XVII Rule 3.

41. Having regard to the above background, wherein there is urgent need to reduce delays in the execution proceedings we deem it appropriate to issue few directions to do complete justice. These directions are in exercise of our jurisdiction under Article 142 read with Article 141 and Article 144 of the Constitution of India in larger public interest to subserve the process of justice so as to bring to an end the unnecessary ordeal of litigation faced by parties awaiting fruits of decree and in larger perspective affecting the faith of the litigants in the process of law.

42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below-mentioned directions:

1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order X in relation to third
2. party interest and further exercise the power under Order XI Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third party interest in such properties.
3. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property.
4. After examination of parties under Order X or production of documents under Order XI or receipt of commission report, the Court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

5. Under Order XL Rule 1 of CPC, a Court Receiver can be appointed to monitor the status of the property in question as *custodia legis* for proper adjudication of the matter.
6. The Court must, before passing the decree, pertaining to
7. delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.
8. In a money suit, the Court must invariably resort to Order XXI Rule 11, ensuring immediate execution of decree for payment of money on oral application.
9. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

10. The Court exercising jurisdiction under Section 47 or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

11. The Court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

12. The Court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to Sub-rule (2) of Rule 98 of Order XXI as well as grant compensatory costs in accordance with Section 35A.

13. Under section 60 of CPC the term “...in name of the judgment- debtor or by another person in trust for him or on his behalf” should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

14. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

15. The Executing Court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the concerned Police Station to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the Court, the same must be dealt stringently in accordance with law.

16. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to

the Court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the Executing Courts.

43. We further direct all the High Courts to reconsider and update all the Rules relating to Execution of Decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 of CPC, within one year of the date of this Order. The High Courts must ensure that the Rules are in consonance with CPC and the above directions, with an endeavour to expedite the process of execution with the use of Information Technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable.

44. The appeals stand dismissed.

.....CJI.
[S.A. BOBDE]

.....J.
[L. NAGESWARA RAO]

.....J.
[S. RAVINDRA BHAT]

**New Delhi,
April 22, 2021.**

Civil Appeal No. 1327 of 2021

**M/s. Reliance Energy Ltd.
(Formerly BSES Ltd.) through its M.D. Respondent (s)**

WITH

Civil Appeal No. 1328 of 2021
Civil Appeal No. 1329 of 2021
Civil Appeal No. 2537 of 2016
Civil Appeal No. 1408 of 2021
Civil Appeal No. 1508 of 2021
Civil Appeal No. 1509 of 2021

JUDGMENT

L. NAGESWARA RAO, J.

For the sake of convenience, we are referring to the facts of Civil Appeal No.1328 of 2021.

Civil Appeal No. 1328 of 2021

1. By an order of assessment dated 31.01.2005, the Assessing Officer restricted the eligible deduction under Section 80-IA of the Income Tax Act, 1961 (hereinafter “the Act”) to the extent of ‘business income’ only. On 23.03.2006, the Commissioner of Income-Tax (Appeal)-I (hereinafter “the Appellate Authority”) partly allowed the Appeal filed by the Assessee and reversed the order of the Assessing Officer on

the issue of the extent of deduction under Section 80-IA of the Act. The Income Tax Appellate Tribunal (hereinafter “the Tribunal”), upheld the decision of the Appellate Authority on the issue of deduction under Section 80-IA. The High Court refused to interfere with the Tribunal’s order as far as the issue on deduction under Section 80-IA is concerned. Therefore, this Appeal by the Revenue.

2. This Appeal pertains to the assessment year 2002-03 for which the income-tax return was filed by the Assessee on 31.10.2002 declaring the total income as ‘NIL’. The return was subsequently revised on 06.12.2002 and thereafter, on 30.03.2004. At the time of the assessment proceedings, the Assessee submitted a revised computation of income by revising its claim of deduction under Section 80-IA of the Act.

3. The Assessee is in the business of generation of power and also deals with purchase and distribution of power. The Assessee-Company generated power from its power unit located at Dahanu. In respect of deduction under Section 80-IA of the Act, the Assessee was asked to explain as to why the deduction should not be restricted to business income, as had been the stand of the Revenue for the assessment year 2000-01. The Assessee had revised its claim under Section 80-IA of the Act to Rs. 546,26,01,224/-, having admitted that there was an error in calculation of income-tax depreciation.

The Assessing Officer considered the revised claim of the Assessee under Section 80-IA and determined the amount eligible for deduction under Section 80-IA at Rs. 492,78,60,973/- against the Assessee's claim of Rs. 546,26,01,224/-. However, the Assessing Officer stated in the assessment order that the actual deduction allowable shall be to the extent of 'income from business' as per provisions of Section 80AB of the Act. The 'business income' of the Assessee was computed at Rs. 355,74,73,451/- and the 'gross total income' at Rs. 397,37,70,178/-. Inclusion of 'income from other sources' of Rs. 41,62,96,727/- in the 'gross total income' and deduction claimed under Chapter VI-A of the Act against such 'gross total income' was not accepted by the Assessing Officer. The Assessing Officer rejected the claim of the Assessee for allowing deduction under Section 80-IA of the Act, along with other deductions available to the Assessee, to the extent of 'gross total income' and restricted the deduction allowed under Section 80-IA at Rs.354,00,75,084/-, by limiting the aggregate of deductions under Sections 80-IA and 80-IB of the Act to 'business income' of the Assessee.

4. The Assessing Officer rejected the contention of the Assessee that Section 80AB of the Act is not applicable. It was held that Section 80AB of the Act makes it clear that for

the purposes of deduction in respect of certain incomes, deduction had to be given on the income of the nature specified in the relevant section and allowed against income of that nature alone. The Assessing Officer elaborated on this point by stating that 'income from business' alone had to be considered for allowing any deduction computed on 'income from business' and using the same analogy, deduction computed on 'income from other sources' should be allowable against 'income from other sources' only. As the deduction under Section 80-IA of the Act pertains to profits and gains from a business undertaking, the deduction is allowable only against 'income from business'. It was held by the Assessing Officer that deduction computed under Section 80-IA of the Act could not be allowed against any source other than business. The Assessing Officer also relied upon the words 'that nature' and 'shall alone' in Section 80AB of the Act to hold that deduction under a relevant section has to be given to the extent of the income from that particular source only on which deduction is available. In the matter before us, this would mean that deduction under Section 80-IA of the Act has to be allowed only to the extent of 'income from business'.

5. It was argued by the Assessee before the Appellate Authority that the conclusion of the Assessing Officer on

deduction under Section 80-IA of the Act being restricted to 'business income' needs to be set aside. The Assessee contended that the observation of the Assessing Officer that deduction under a particular section is permissible only against income under that particular head was erroneous. Deductions related to various incomes under various sections of Chapter VI-A have to be quantified in accordance with the respective sections. The Assessee urged before the Appellate Authority that the deductions so quantified under various sections under Chapter VI-A have to be aggregated and allowed against the 'gross total income'. Finally, the submission of the Assessee before the Appellate Authority was that restricting the deduction under Section 80-IA of the Act to the extent of 'business income' was unjustified. With reference to Section 80AB, the Assessee contended that the operation of the said section related only to quantification of deduction on the basis of net income.

6. The Appellate Authority partly allowed the Appeal filed by the Assessee by an order dated 23.03.2006 and reversed the finding of the Assessing Officer on the issue of deduction under Section 80-IA of the Act for the reasons stated hereinafter. In respect of Section 80AB of the Act, the Appellate Authority referred to the background of insertion of the said section with effect from 01.04.1981. The Appellate

Authority referred to Circular No. 281 dated 22.09.1980 of the Central Board of Direct Taxes (CBDT) wherein the reason for introduction of Section 80AB was explained. The Supreme Court in the case of ***Cloth Traders (P) Ltd. v. Additional CIT, Gujarat-I¹*** held that deduction under Section 80M of the Act, which deals with deduction in respect of certain inter-corporate dividends, was allowable on the gross amount of the dividends received. It was decided to undo the decision of this Court as it was contrary to the legislative intent, which was that deduction under Section 80M was to be allowed on the dividend income as computed under the Act, i.e., on the net income after deduction of admissible expenses. The Appellate Authority proceeded to hold that Section 80AB places a ceiling on the quantum of deductions in respect of incomes contained in Part-C of Chapter VI-A. Such deductions are to be computed on the net eligible income, which will be deemed to be included in the gross total income. The Appellate Authority observed that Section 80AB is limited to determining the quantum of deductible income included in the gross total income. Following a decision of the Income Tax Appellate Tribunal, Mumbai dated 25.04.2003 in ***Royal Cushion Vinyl Products Ltd. v. Dy. Commissioner of Income Tax,***

¹ (1979) 3 SCC 538

Mumbai (ITA No. 770/MUM/98), the Appellate Authority set aside the order of the Assessing Officer on this count. The Appellate Authority directed the Assessing Officer not to restrict the deduction admissible under Section 80-IA of the Act to income under the head 'business'. The Assessing Officer was further directed to aggregate the deduction under Section 80-IA of the Act with the other deductions available to the Assessee and then to allow deductions of such aggregate amount to the extent of 'gross total income'. The order of the Appellate Authority was affirmed by the Tribunal and the High Court on this issue. Aggrieved thereby, the Revenue has come in Appeal.

7. The contention on behalf of the Revenue before us is that the Assessing Officer was right in holding that the deduction under Section 80-IA of the Act should be restricted to 'business income' only. Mr. Arijit Prasad, learned Senior Counsel appearing on behalf of the Revenue, submitted that Section 80AB of the Act contemplates deductions in respect of incomes against income of the nature specified in the relevant section. He further submitted that Section 80-IA(5) makes it clear that the determination of quantum of deduction under sub-section (1) of Section 80-IA should be on the basis that the source of income from the eligible business was the only source of income of an assessee and

therefore, the deduction so determined should be allowed only against 'business income'. According to him, the phrase '*derived ... from*' in sub-section (1) of Section 80-IA of the Act indicates that the computation of deduction is restricted only to the profits and gains from the eligible business. He relied upon the judgment of this Court in ***Cambay Electric Supply Industrial Co. Ltd. v. CIT***², followed in ***Synco Industries Ltd. v. Assessing Officer, Income Tax, Mumbai & Anr.***³ and ***Pandian Chemicals Ltd. v. Commissioner of Income Tax, Madurai***⁴.

8. In response, the Assessee supported the order passed by the Appellate Authority which was upheld by the Tribunal and the High Court. It is the argument of Mr. Ajay Vohra, learned Senior Counsel appearing on behalf of the Assessee, that Section 80AB of the Act is with reference to computation of deduction on the basis of net income. He submitted that there is no indication in sub-section (5) of Section 80-IA that the deduction under sub-section (1) is restricted to 'business income' only. On the other hand, according to him, sub-section (5) deals with determination of the quantum of deduction by treating eligible business as the only source of income of the Assessee. Sub-section (5), therefore, is

2 (1978) 2 SCC 644

3 (2008) 4 SCC 22

4 (2003) 5 SCC 590

concerned with computation of the deduction, which is at a stage prior to allowing the deduction so computed. He submitted that there is no dispute that the computation of deduction is only from the eligible business. The claim of the Assessee, as accepted by the Appellate Authority, is that there is no restriction on taking into account income from any other source while allowing the deduction computed under Section 80-IA, subject to the aggregate of all deductions under Chapter VI-A not exceeding the 'gross total income'. He relied upon judgments of this Court in ***CIT (Central), Madras v. Canara Workshops (P) Ltd., Kodialball, Mangalore***⁵ and ***Synco Industries*** (supra) to argue that sub-section (5) of Section 80-IA of the Act does not restrict permissible deduction under sub-section (1) to be allowed against 'business income' only. The learned Senior Counsel for the Assessee relied upon the judgment of the Bombay High Court in ***Commissioner of Income-tax v. Tridoss Laboratories Ltd.***⁶ to argue that the Appeal should not be allowed.

9. The controversy in this case pertains to the deduction under Section 80-IA of the Act being allowed to the extent of 'business income' only. The claim of the Assessee that deduction under Section 80-IA should be allowed to the

5 (1986) 3 SCC 538

6 [2010] 328 ITR 448 (Bombay)

extent of 'gross total income' was rejected by the Assessing Officer. It is relevant to reproduce Section 80AB of the Act which is as follows:

“80AB. Deductions to be made with reference to the income included in the gross total income. —

Where any deduction is required to be made or allowed under any section included in this Chapter under the heading “C. — Deductions in respect of certain incomes” in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income.”

As stated above, Section 80AB was inserted in the year 1981 to get over a judgment of this Court in ***Cloth Traders (P) Ltd.*** (supra). The Circular dated 22.09.1980 issued by the CBDT makes it clear that the reason for introduction of Section 80AB of the Act was for the deductions under Part C of Chapter VI-A of the Act to be made on the net income of the eligible business and not on the total profits from the eligible business. A plain reading of Section 80AB of the Act

shows that the provision pertains to determination of the quantum of deductible income in the 'gross total income'. Section 80AB cannot be read to be curtailing the width of Section 80-IA. It is relevant to take note of Section 80A(1) which stipulates that in computation of the 'total income' of an assessee, deductions specified in Section 80C to Section 80U of the Act shall be allowed from his 'gross total income'. Sub-section (2) of Section 80A of the Act provides that the aggregate amount of the deductions under Chapter VI-A shall not exceed the 'gross total income' of the Assessee. We are in agreement with the Appellate Authority that Section 80AB of the Act which deals with determination of deductions under Part C of Chapter VI-A is with respect only to computation of deduction on the basis of 'net income'.

10. Sub-section (1) and sub-section (5) of Section 80-IA

which are relevant for these Appeals are as under:

"80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.—

(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing

the total income of the assessee, a deduction of an amount equal to hundred per cent. of the profits and gains derived from such business for ten consecutive assessment years.

** * * **

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

11. The essential ingredients of Section 80-IA (1) of the Act are:

- a) the 'gross total income' of an assessee should include profits and gains;
- b) those profits and gains are derived by an undertaking or an enterprise from a business referred to in sub-section (4);
- c) the assessee is entitled for deduction of an amount equal to 100% of the profits and gains derived from such business for 10 consecutive assessment years; and
- d) in computing the 'total income' of the Assessee, such deduction shall be allowed.

12. The import of Section 80-IA is that the 'total income' of an assessee is computed by taking into account the allowable deduction of the profits and gains derived from the 'eligible business'. With respect to the facts of this Appeal, there is no dispute that the deduction quantified under Section 80-IA is Rs.492,78,60,973/-. To make it clear, the said amount represents the net profit made by the Assessee from the 'eligible business' covered under sub-section (4), i.e., from the Assessee's business unit involved in generation of power. The claim of the Assessee is that in computing its 'total income', deductions available to it have to be set-off against the 'gross total income', while the Revenue contends that it is only the 'business income' which has to be taken into account for the purpose of setting-off the deductions under Sections 80-IA and 80-IB of the Act. To illustrate, the 'gross total income' of the Assessee for the assessment year 2002-03 is less than the quantum of deduction determined under Section 80-IA of the Act. The Assessee contends that income from all other heads including 'income from other sources', in addition to 'business income', have to be taken into account for the purpose of allowing the deductions available to the Assessee, subject to the ceiling of 'gross total income'. The Appellate Authority was of the view that

there is no limitation on deduction admissible under Section 80-IA of the Act to income under the head 'business' only, with which we agree.

13. The other contention of the Revenue is that sub-section (5) of Section 80-IA refers to computation of quantum of deduction being limited from 'eligible business' by taking it as the only source of income. It is contended that the language of sub-section (5) makes it clear that deduction contemplated in sub-section (1) is only with respect to the income from 'eligible business' which indicates that there is a cap in sub-section (1) that the deduction cannot exceed the 'business income'. On the other hand, it is the case of the Assessee that sub-section (5) pertains only to determination of the quantum of deduction under sub-section (1) by treating the 'eligible business' as the only source of income. It was submitted by Mr. Vohra, learned Senior Counsel, that the final computation of deduction under Section 80-IA for the assessment year 2002-03 as accepted by the Assessing Officer, was arrived at by taking into account the profits from the 'eligible business' as the 'only source of income'. He submitted that, however, sub-section (5) is a step antecedent to the treatment to be given to the deduction under sub-section (1) and is not concerned with the extent to which the computed deduction be allowed. To explain the interplay

between sub-section (5) and sub-section (1) of Section 80-IA, it will be useful to refer to the facts of this Appeal. The amount of deduction from the 'eligible business' computed under Section 80-IA for the assessment year 2002-03 is Rs. 492,78,60,973 /-. There is no dispute that the said amount represents income from the 'eligible business' under Section 80-IA and is the only source of income for the purposes of computing deduction under Section 80-IA. The question that arises further with reference to allowing the deduction so computed to arrive at the 'total income' of the Assessee cannot be determined by resorting to interpretation of sub-section (5).

14. It will be useful to refer to the judgment of this Court relied upon by the Revenue as well as the Assessee. In ***Synco Industries*** (supra), this Court was concerned with Section 80-I of the Act. Section 80-I(6), which is in *pari materia* to Section 80-IA(5), is as follows:

“ 80-I(6) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an industrial undertaking or a ship or the business of a hotel or the business of repairs to ocean-going vessels or other powered craft to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under sub-section (1) for the assessment year immediately succeeding the initial assessment year or any

subsequent assessment year, be computed as if such industrial undertaking or ship or the business of the hotel or the business of repairs to ocean-going vessels or other powered craft were the only source of income of the assessee during the previous years relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.”

It was held in **Synco Industries** (supra) that for the purpose of calculating the deduction under Section 80-I, loss sustained in other divisions or units cannot be taken into account as sub-section (6) contemplates that only profits from the industrial undertaking shall be taken into account as it was the only source of income. Further, the Court concluded that Section 80-I(6) of the Act dealt with actual computation of deduction whereas Section 80-I(1) of the Act dealt with the treatment to be given to such deductions in order to arrive at the total income of the assessee. The Assessee also relied on the judgment of this Court in **Canara Workshops (P) Ltd., Kodialball, Mangalore** (supra) to emphasize the purpose of sub-section (5) of Section 80-IA. In this case, the question that arose for consideration before this Court related to computation of the profits for the purpose of deduction under Section 80-E, as it then existed, after setting off the loss incurred by the assessee in the

manufacture of alloy steels. Section 80-E of the Act, as it then existed, permitted deductions in respect of profits and gains attributable to the business of generation or distribution of electricity or any other form of power or of construction, manufacture or production of any one or more of the articles or things specified in the list in the Fifth Schedule. It was argued on behalf of the Revenue that the profits from the automobile ancillaries industry of the assessee must be reduced by the loss suffered by the assessee in the manufacture of alloy steels. This Court was not in agreement with the submissions made by the Revenue. It was held that the profits and gains by an industry entitled to benefit under Section 80-E cannot be reduced by the loss suffered by any other industry or industries owned by the assessee.

15. In the case before us, there is no discussion about Section 80-IA(5) by the Appellate Authority, nor the Tribunal and the High Court. However, we have considered the submissions on behalf of the Revenue as it has a bearing on the interpretation of sub-section (1) of Section 80-IA of the Act. We hold that the scope of sub-section (5) of Section 80-IA of the Act is limited to determination of quantum of deduction under sub-section (1) of Section 80-IA of the Act by treating 'eligible business' as the 'only source of income'.

Sub-section (5) cannot be pressed into service for reading a limitation of the deduction under sub-section (1) only to 'business income'. An attempt was made by the learned Senior Counsel for the Revenue to rely on the phrase '*derived ... from*' in Section 80-IA (1) of the Act in respect of his submission that the intention of the legislature was to give the narrowest possible construction to deduction admissible under this sub-section. It is not necessary for us to deal with this submission in view of the findings recorded above. For the aforementioned reasons, the Appeal is dismissed qua the issue of the extent of deduction under Section 80-IA of the Act.

Civil Appeal No. 1327 of 2021, Civil Appeal No. 1329 of 2021, Civil Appeal No. 2537 of 2016, Civil Appeal No. 1408 of 2021 and Civil Appeal No. 1508 of 2021 are disposed of in terms of the above judgment.

Civil Appeal No. 1509 of 2021 is de-tagged as the questions arising therein are not related to the aforementioned issue.

.....J.
[L. NAGESWARA RAO]

.....J.
[VINEET SARAN]

**New Delhi,
April 28th 2021.**

A.F.R

Court No. - 73

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438
CR.P.C. No. - 4002 of 2021

Applicant :- Prateek Jain

Opposite Party :- State Of U.P. And 2 Others

Counsel for Applicant :- Avnish Kumar Srivastava, Priyanka Sharma

Counsel for Opposite Party :- G.A., Vidya Prakash Singh

Hon'ble Siddharth, J.

1. As per Resolution dated 07.04.2021 of the Committee of this Court for the purpose of taking preventive and remedial measures and for combating the impending threat of Covid-19, this case is being heard by way of virtual mode.
2. Heard Sri Avnish Kumar Srivastava, learned counsel for the applicant and learned A.G.A for State through video conferencing.
3. The instant anticipatory bail application has been filed with a prayer to grant an anticipatory bail to the applicant, **Prateek Jain**, in Case Crime No. 1906 of 2020 under Section 420, 467, 468, 471, 506, 406 IPC, Police Station- Sihani Gate, District- Ghaziabad.
4. Prior notice of this bail application was served in the office of Government Advocate and as per Chapter XVIII, Rule 18 of the Allahabad High Court Rules and as per direction dated 20.11.2020 of this Court in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 8072 of 2020, Govind Mishra @ Chhotu Versus State of U.P., hence, this anticipatory bail application is being heard. Grant of further time to the learned A.G.A as per Section 438 (3) Cr.P.C. (U.P. Amendment) is not required.
5. There are allegations against the applicant that he along with other co-accused persons is director of a builder company. The applicant applied for a flat being constructed by the company and paid Rs. 3,25,000/- by means of a cheque as the booking amount. Thereafter he took loan and paid total amount

of Rs. 27,27,875/-. He has not been given possession of flat.

6. Learned counsel for the applicant submits that he is not the director of the builder company in dispute. He is only related to the other directors and hence he has been falsely implicated in this case. On account of demonitization and the slump caused in the business of real estate the present dispute arose. The informant has remedy under the Real Estate (Regulation and Development) Act, 2016.

7. Learned A.G.A. has opposed the prayer for anticipatory bail of the applicant. He has submitted that in view of the seriousness of the allegations made against the applicant, she is not entitled to grant of anticipatory bail. The apprehension of the applicant is not founded on any material on record. Only on the basis of imaginary fear, anticipatory bail cannot be granted.

8. Since the application has been heard through video conferencing and the connectivity was not very good, the Court could not gather the complete submissions raised at the Bar. However, keeping in view the mandate of Section 438(5) Cr.P.C., which requires disposal of anticipatory bail application within 30 days and also considering the spread of second wave of novel corona virus, the hearing of this bail application does not deserves to be adjourned in the larger interest of justice. Due to lack of proper technical support the cause of justice cannot be allowed to suffer.

9. After considering the rival contentions, this Court before proceeding further, considers it appropriate to go through the Section 438 Cr.P.C, U.P. Amendment of 2019, which is as follows:-

"438. Direction for grant bail to person apprehending arrest.--(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely--

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of

any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer,

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of [Section 437](#), as if the bail were granted under that section.

Explanation.--The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with

a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application;

(6) Provisions of this section shall not be applicable,--

(a) to the offences arising out of,--

(i) the [Unlawful Activities \(Prevention\) Act, 1967](#);

(ii) the [Narcotic Drugs and Psychotropic Substances Act, 1985](#);

(iii) the [Official Secret Act, 1923](#);

(iv) the [Uttar Pradesh Gangsters and Anti-Social Activities \(Prevention\) Act, 1986](#).

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

10. A perusal of the aforesaid provisions re-enacted in the Cr.P.C in the State of Uttar Pradesh in the year 2019 regarding the grant of anticipatory bail, this Court finds that the section proceeds on the assumption that whenever an anticipatory bail application is filed before the Sessions Court or the High Court, it would be heard promptly and interim order shall be passed as per Section 438(2) Cr.P.C. Where the Court grants an interim order it shall cause a notice of application served on the public prosecutor as per Section 438(3) Cr.P.C granting him not less than 7 days time, to seek instruction. After affording opportunity of hearing to the public prosecutor, the application shall be heard by the Court. After hearing the public prosecutor and the

applicant, the Court may either confirm, modify or cancel the interim order as per Section 438(4) Cr.P.C. Section 438(5) Cr.P.C further provides that the High Court or the Court of Session shall finally dispose of such an application within 30 days of filing of the same.

11. In this Court, the anticipatory bail applications are filed after due service of notice in the office of Government Advocate, as per Chapter XVIII, Rule - 18 of Allahabad High Court Rules. The aforesaid rule provides that no bail application shall be placed before the Court unless two days have elapsed prior to the presentation of the application before the Court.

12. There is no provision in the Rules of Court regarding filing and entertainment of anticipatory bail application.

13. However all the anticipatory bail applications are being filed before this court in accordance with the provision of Chapter XVIII, Rule 18 of the Rules of Court after serving prior notice of the same on the Government Advocate. Therefore, the requirement of granting time to the Government Advocate to obtain instructions within seven days, where the Court grants an interim order in an anticipatory bail application, is not in the interest of speedy justice.

14. The anticipatory bail applications are being listed before the court after more than two days invariably. Most of the anticipatory bail applications are being put up before the Court after more than a week, or even after more than a month. There is sufficient time for Government Advocate to obtain instructions in anticipatory bail applications. The unnecessary complication of passing interim order and then final order in the anticipatory bail application can be avoided in case the office of Government Advocate is vigilant and it obtains instructions within two days of the receipt of notice of the anticipatory bail applications.

15. Directions in this regard have already been issued by this Court in Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C No. 8072 of 2020 on 20.11.2020 to the Government Advocate and the Advocate General of the State.

16. Hitherto, the anticipatory bail applications were being considered on the

basis of the considerations given in Section 438(1) Cr.P.C., which are as follows-

- (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
- (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (iii) a condition that the person shall not leave India without the previous permission of the Court;
- (iv) such other condition as may be imposed under sub-section (3) of section 437 Cr.P.C., as if the bail were granted under that section.

17. However, the legislature was conscious of the fact that no straight jacket formula can be prescribed for grant of anticipatory bail to an accused therefore under Section 438(1) Cr.P.C., it provided that the Court may, after taking into consideration, “*inter alia*”, the conditions given in Sections 438(1), (i), (ii), (iii) and (iv) Cr.P.C for grant or rejection of anticipatory bail application.

18. In the aforesaid section the words “*inter alia*” are very important. They grant liberty to the Court to exercise its descretion in a particular case according to the facts and circumstances of the case, regarding grant or rejection of anticipatory bail.

19. The Apex Court in the case of *Gurubaksh Singh Sibbia, etc., vs. State of Punjab, 1980 AIR 1632* was also conscious of the fact that the future is so unpredictable that no fixed criteria can be laid down for the grant or rejection of anticipatory bail of an accused by the High Court or the Court of Session. It was held by the Apex Court that the High Court and the Court of Session are competent to deal with the case as per their knowledge and experience. It further held that the legislature conferred vide descretion on the High Court and the Court of Session to grant anticipatory bail because it felt that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and the Courts were given free hand in this regard.

Departing from the terms of Sections 437 and 439 Cr.P.C., Section 438(1) Cr.P.C., provides descretion to this Court in the grant or rejection of anticipatory bail application.

20. Section 438(2) Cr.P.C provides for the conditions to be imposed while granting anticipatory bail in cases, the Court deems fit. However, the conditions are not exhaustive and leave it open for the Court to impose other conditions apart from the conditions given in the section aforesaid. Section 438(5) Cr.P.C., clearly provides that the application for grant of anticipatory bail shall be decided within 30 days of the filing of application. Section 438(7) provides that if an application for grant of anticipatory bail has been filed by any person before the High Court, no such application shall be entertained by the Sessions Court. Therefore, as per the doctrine of selection of remedies, when an application for grant of anticipatory bail is made to this Court, it expressly bars entertainment of the same by the Court of Session. The aforesaid section does not leaves any room for any controversy regarding filing of anticipatory bail application either before the High Court or before the Court of Session as per 438 (7) Cr.P.C, U.P. Amendment. A literal construction of the aforesaid section 438(7) Cr.P.C shows that there is no requirement of giving any special or compelling reason to approach this Court for grant of anticipatory bail without approaching the Court of Session. Once a person has choosen to approach this Court praying for grant of anticipatory bail, by operation of law, his opportunity to approach the Sessions Court gets extinguished. Therefore, he incurs disadvantage by choosing to abdicate his remedy before the Court of Session. Where the statute clearly provides the option for choosing a remedy and the applicant chooses one such remedy he cannot be compelled to disclose reasons why he has choosen such a remedy, when the statute does not requires the same to be stated.

21. The Apex Court in the case of *Sushila Aggarwal vs. State (NCT of Delhi)*- 2020 SCC Online SC 98, has also held that whether to grant an anticipatory bail or reject the same is a matter of descretion of the Court and it is for the Court to decide, on the basis of the facts and circumstances of the

case, what course is to be adopted. No formula has been laid down by the five Judges Bench of the Hon'ble Supreme Court regarding grant or denial of anticipatory bail.

22. The legislature, in its wisdom, left it open for the Court to apply the law of anticipatory bail as per the facts of the case and the circumstances involved therein.

23. The law is a dynamic concept and it is required to be interpreted as per the requirements of time. With the change in the requirements of time, the interpretation and application of law is required to be adopted with change. The law of anticipatory bail is founded only on the apprehension of arrest. The apprehension may be of pre-recording or post-recording stage of the FIR. However, the pre-requisite condition of apprehension of arrest is survival of the accused. Only when the accused would be protected from apprehension of death the apprehension of his arrest would arise. Article 21 of the constitution of India provides for protection of life and personal liberty of every citizen of the country. The protection of life is more important than the protection of personal liberty of a citizen. Unless the right to life is protected the right to personal liberty would be of no consequence. It is clear that the right to life is more precious and sacrosanct than the right to personal liberty which is sought to be protected by way of grant of anticipatory bail to an accused by the Court. If the right to life is not protected and permitted to be violated or imperiled, the right to personal liberty, even if protected by the Court, would be of no avail. If an accused dies on account of the reasons beyond his control when he could have been protected from death by the Court, the grant or refusal of anticipatory bail to him would be an exercise in futility. Hence, the apprehension of death on account of reasons like the present pandemic of novel corona virus can certainly be held to be a ground for grant of anticipatory bail to an accused.

24. The second wave of novel corona virus has given rise to apprehension of death of an accused. If he is arrested and subjected to the subsequent procedures of detention in lock-up, production before the Magistrate, grant or rejection of bail or incarceration in jail, etc., the apprehension to his life will

certainly arise. During the compliance of procedures provided under Cr.P.C. or any special act, an accused will definitely come in contact with number of persons. He will be arrested by police, confined in lock-up, produced before the Magistrate and if his bail application is not granted promptly, he will be sent to jail for an indefinite period till his bail is granted by the Higher Court. The accused may be suffering from the deadly infections of corona virus, or police personnels, who have arrested him, kept him in lock-up, produced him before the Magistrate and then took him to jail may also be infected persons. Even in jail large number of inmates have been found to be infected. There is no proper testing, treatment and care of the persons confined in jails.

25. The Apex Court in the case of *Kerala Union of Working Journalists vs. Union of India and Others* in a recent order dated 28.04.2021 passed in *Writ Petition (CRL) No. 307 of 2020* had held that the fundamental right to life unconditionally embraces even an undertrial.

26. In view of arrestee in that case being a journalist, the matter was raised before the Hon'ble Supreme Court when he was found to be suffering from Corona virus infection and other ailments. Hon'ble Supreme Court directed the arrestee journalist to be transferred to the hospital at Delhi from the hospital at Mathura for proper medical treatment. Number of such arrestees are there who are suffering from the deadly infection of novel corona virus but they cannot approached the Court on account of limitations of resources.

27. The Apex Court in the case of *Suo Motu Writ Petition (C) No. 1/2020 In Re: Contagion of Covid 19 Virus in Prisons* has considered the measures for de-congestion of the jails on account of threat of spread of infection of novel corona virus and by the order dated 07.05.2021 has held as follows:-

“5. An unprecedented surge in Covid-19 during the last few weeks has resulted in a steep spike in the number of people who are affected by Covid-19. In the present situation there is a serious concern about the spread of Covid-19 in overcrowded prisons where there is lack of proper sanitation, hygiene and medical facilities.

6. Mr. Colin Gonsalves, learned Senior Counsel appearing for the Applicant submitted that the High Powered Committees which have been constituted

pursuant to the orders passed by this Court on 25.03.2020 should be directed to release all those prisoners who have been released last year on regular bail. Such of those inmates who have been granted parole last year should be granted 90 days parole by this Court. He requested that all orders of the High-Powered Committees shall be put on the website of the Governments. Mr. Gonsalves argued that the Standard Operating Procedure (SOP) formulated by the National Legal Services Authority for release of prisoners should be taken into account by the High-Powered Committees.

7. The learned Attorney General submitted that prisons need to be decongested by release of some prisoners in view of the grim situation. He submitted that the High-Powered Committees may be permitted to adopt the procedure that was followed earlier and release the prisoners on the basis of the guidelines formulated by them last year. The learned Attorney General requested for relaxation of handcuffing of the prisoners as during the present outbreak of Covid-19 there is a great danger of spread of the virus to the police personnel who have to hold the hands of the accused while being escorted. The learned Solicitor General of India and Ms. Aishwarya Bhati, learned Additional Solicitor General also supported the learned Attorney General. A further request was made on behalf of the Union of India that the Commissioner of Police, Delhi be made a member of the High-Powered Committee to be constituted by the Delhi Government.

8. We may notice that India has more than four lakh prison inmates. It is observed that some of the prisons in India are overburdened and are housing inmates beyond optimal capacity. In this regard, we may notice that the requirement of de congestion is a matter concerning health and right to life of both the prison inmates and the police personnel working. Reduction of impact of Covid-19 requires this Court to effectively calibrate concerns of criminal justice system, health hazards and rights of the accused. From limiting arrests to taking care of Covid-19 Patients, there is a requirement for effective management of pandemic from within the prison walls so as to defeat this deadly virus.

9. As a first measure, this Court, being the sentinel on the quivive of the

fundamental rights, needs to strictly control and limit the authorities from arresting accused in contravention of guidelines laid down by this Court in Arnesh Kumar v. State of Bihar (supra) during pandemic. It may be relevant to quote the same:

11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do

not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clause under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of institution of the case with a copy of the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A Cr.P.C be served on the accused within two weeks from the date of

institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A IPC or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine.

10. Second, the rapid proliferation of the virus amongst the inmates of congested prisons is a matter of serious concern. The High-Powered Committees constituted by the State Governments/Union Territories shall consider release of prisoners by adopting the guidelines (such as inter alia, SOP laid down by NALSA) followed by them last year, at the earliest. Such of those States which have not constituted High Powered Committees last year are directed to do so immediately. Commissioner of Police Delhi shall also be a member of the High-Powered Committee, Delhi.

11. Third, due to the immediate concern of the raging pandemic, this court has to address the issue of de-congestion. We find merit in the submission of Mrs. Colin Gonsalves, learned Senior Counsel appearing on behalf of the applicant, that the High Powered Committee, in addition to considering fresh release, should forthwith release all the inmates who had been released earlier pursuant to our order 23.03.2020, by imposing appropriate conditions.

Such an exercise is mandated in order to save valuable time.

12. Fourth, further we direct that, those inmates who were granted parole, pursuant to our earlier orders, should be again granted a parole for a period of 90 days in order to tide over the pandemic.

13. Fifth, the fight against the pandemic is greatly benefitted by transparent administration. In this regard, our attention was drawn to example of Delhi, wherein the prison occupancy is updated in websites. Such measures are required to be considered by other States and should be adopted as good practice. Moreover, all the decisions of High-Powered Committees need to be published on respective State Legal Service Authorities/State Governments/High Courts websites in order to enable effective dissemination of information.

14. Overcrowding of prisons is a phenomenon, plaguing several countries including India. Some prisoners might not be willing to be released in view of their social background and the fear of becoming victims of the deadly virus. In such extraordinary cases, the authorities are directed to be considerate to the concerns of the inmates. The authorities are directed to ensure that proper medical facilities are provided to all prisoners who are imprisoned. The spread of Covid-19 virus should be controlled in the prisons by regular testing being done of the prisoners but also the jail staff and immediate treatment should be made available to the inmates and the staff. It is necessary to maintain levels of daily hygiene and sanitation required to be improved. Suitable precautions shall be taken to prevent the transmission of the deadly virus amongst the inmates of prisons. Appropriate steps shall be taken for transportation of the released inmates of the prisons, if necessary, in view of the curfews and lockdown in some States.

28. The above observations and directions of the Apex Court show the concern about the over crowding of jails and in case this Court, ignoring the same, passes order which will result in over crowding of jails again it would be quite paradoxical. Counsel for the State has not given any assurance of protection of the accused persons, who are in jail and may be sent to jail, regarding their protection from contracting the infection of novel corona virus.

29. The right to life guaranteed under Article 21 of the Constitution of India is paramount and by mere implication in a case of alleged commission of non-bailable offence, right to life of an accused person can not be put to peril. The allegations may be serious against an accused but the presumption of innocence in his favour cannot be dispelled only on the basis of the allegation. An accused who has not been subjected to trial and not even police investigation has been completed against him in many cases, cannot be compelled to surrender and obtain regular bail in the current circumstances. Even in cases where the police report has been submitted under Section 173(2) Cr.P.C., and summons/ warrants have been issued against him, such an accused is also required to be protected till the threat of novel corona virus to his life is minimized or eradicated and normal functioning of the Courts are restored. Keeping in view the inadequate medical facilities for treating the large number of persons getting infected day by day, common accused cannot be left unprotected from the threat to his life on account of his arrest by police or surrender before the Court as per the normal procedure applicable to accused persons in normal times.

30. Extraordinary times require extraordinary remedy and desperate times require remedial remedy. Law should be interpreted likewise. The established parameters for grant of anticipatory bail like the nature and gravity of accusation, the criminal antecedent of the applicant, the possibility of fleeing from justice and whether accusation has been made for injuring and humiliating the applicant by getting him arrested have now lost significance on account of present situation of the country and the State on account of spread of second wave of novel corona virus.

31. There is also threat of spread of third wave of novel corona virus looming large over the entire country and it is uncertain when the aforesaid wave will abate and normal functioning of the Courts would be restored. Therefore, the apprehension of an accused being infected with novel corona virus before and after his arrest and the possibility of his spreading the same while coming into contact with the police, Court and jail personnels or vice-versa can be considered to be a valid ground for grant of anticipatory bail to an accused.

The conventional and well settled grounds for grant of anticipatory bail to an accused implicated for alleged commission of non-bailable offence can be considered after the normal conditions in the society and the courts are restored then the anticipatory bail application of the accused persons shall be considered on ordinary parameters like in ordinary times. The experts are of the view that the third wave is likely to come in the month of September, 2021 and it is uncertain when the normal functioning of the Court would be restored. In such uncertain times it would be against the requirement of Article 14 of the constitution of India, which provides equality before law and equal protection of law, to leave an accused unprotected from arrest and suffer the consequences of being infected with novel corona virus. The Apex Court while hearing the case regarding the preparation of the Government to deal with spread of novel corona virus has cautioned the Government to prepare itself for the third wave of the same which may come.

32. The informant/ complainant may take objection to the relief being granted to the applicant and may be dissatisfied from the observations made in this judgment in favour of accused. However, they should not lose sight of the fact that only when the accused would be alive he would be subjected to the normal procedure of law of arrest, bail and trial. The law presumes him to be innocent till the offence alleged against him is proved beyond doubt before the Competent Court. In civil cases the object of grant of injunction is the preservation of subject matter of dispute between the parties. During the pendency of suit the subject matter of suit is protected from any loss, change of nature, decay, etc. Similarly, now the situation has arisen which calls for protection of an accused from infection of novel corona virus and death till the police investigation and, if required, trial is concluded against him. This Court is only granting limited protection to the applicant in view of the mandate of Articles 14 and 21 of the constitution of India. The only remedy available to the person who is implicated for commission of non-bailable offence, against his arrest, is to resort to the remedy of anticipatory bail and it can be granted to an accused on the consideration that the situation at present is not conducive to his subjection to normal procedure of arrest and bail

provided under the Criminal Procedure Code.

33. The Election Commission, the Higher Courts and the Government failed to fathom the disastrous consequences of permitting the elections in few States and the Panchayat elections in the State of Uttar Pradesh. The infection of novel corona virus, which had not reached the village population in its first wave of novel corona virus spread in the last year, has now spread to the villages. The State Government is having tough time in controlling the spread of novel corona virus in urban areas and it would be very difficult to conduct the test, detect and treat the village population found suffering from novel corona virus. The State lacks preparation and resources for the same at present. On account of the recent panchayat elections in the State large number of FIR's have been lodged in the villages. Even otherwise the crime rate in the village is quite high in the State. Keeping in view the overall situation of the villages after the Panchayat elections large number of accused persons may be infected and their infection may not have been detected.

34. In view of the above facts and circumstances and after finding that the apprehension to life in the current scenario is a ground for grant of anticipatory bail to an accused, this Court hereby directs that the applicant, in case of his arrest, shall be enlarged on anticipatory bail for the limited period, till 03 of January, 2022 on the following conditions:-

1. The applicant shall, at the time of execution of the bond, furnish his address and mobile number and shall not change the residence till the conclusion of investigation/ trial without informing the Investigating Officer of the police/ the Court concerned of change of address and the reasons for the same before changing the same.
2. The applicant shall not leave the country during the currency of trial/investigation by police without prior permission from the concerned trial Court.
3. The applicant shall not obstruct or hamper the police investigation and not play mischief with the evidence collected or yet to be collected by the Investigating Officer of the police;
4. The applicant shall surrender his passport, if any, to the concerned

Court/Investigating Officer forthwith. His passport will remain in custody of the concerned Court/ Investigating Officer till the investigation is completed. In case he has no passport, he will file his affidavit before the Court/ Investigating Officer concerned in this regard.

5. That the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

6. The applicant shall maintain law and order.

7. The applicant shall file an undertaking to the effect that he shall not seek any adjournment before the trial court on the dates fixed for evidence and when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law to ensure presence of the applicant.

8. In case, the applicant misuses the liberty of bail, the Court concerned may take appropriate action in accordance with law and judgment of Apex Court in the case of *Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98* and the Government Advocate/informant/complainant can file bail cancellation application.

9. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court, default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of her bail and proceed against him in accordance with law.

10. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

11. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

12. The applicant is warned not to get himself implicated in any crime and should keep distance from the informant and not to misuse the liberty granted hereby. Any misuse of liberty granted by this Court would be viewed

seriously against the applicant in further proceedings.

35. This anticipatory bail application is being allowed on account of special conditions and on special ground. The normal grounds, settled for the grant of anticipatory bail, have not been considered by this Court and it would be open for the applicant to approach this Court again, if so advised, in changed circumstances.

36. The anticipatory bail application is *allowed*.

Order date :- 10.05.2021

Rohit

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.216 OF 2015

Kalabhai Hamirbhai Kachhot Appellant

Versus

State of Gujarat Respondent

W I T H

CRIMINAL APPEAL NO. 453 OF 2021
[Arising out of S.L.P.(Crl.)No.3227 of 2015]

A N D

CRIMINAL APPEAL NO.290 OF 2018

J U D G M E N T

R. Subhash Reddy, J.

1. Leave granted in S.L.P.(Crl.)No.3227 of 2015.
2. All these criminal appeals are filed against the common judgment dated 09.05.2014 passed by the High Court of Gujarat at

Ahmedabad in Criminal Appeal Nos.405 of 2010 and 459 of 2010, as such, they are heard together and disposed of by this common judgment.

3. Criminal Appeal No.290 of 2018 is filed by accused no.1 – Vajashibhai Ramshibhai Kachhot; Criminal Appeal arising out of S.L.P.(Crl.)No.3227 of 2015 is filed by accused no.2 – Mulubhai Markhibhai Nandaniya; and Criminal Appeal No.216 of 2015 is filed by accused no.3 – Kalabhai Hamirbhai Kachhot. For the sake of convenience, the appellants in the above appeals shall be referred to as accused nos.1 to 3 hereafter.

4. The aforesaid appellants were the accused in FIR no.I-215/2006 dated 11.11.2006 on the file of Keshod Police Station, which was registered for the offences punishable under Sections 302, 326, 324 and 34 of Indian Penal Code (IPC) and Section 135 of the Bombay Police Act, in which chargesheet was filed on 07.02.2007 in the court of First Class Magistrate, Keshod. As much as the offences were triable by Sessions Court, the case was committed to the Court of Additional Sessions Judge, Junagadh and the accused were tried for the aforesaid offences in Sessions Case No.14 of 2007. All the accused were convicted for the offences under Section 302 read with 34, IPC and Section 135(1) of the Bombay Police Act. Accused no.1 –

Vajashibhai Ramshibhai Kachhot – was found guilty for offence punishable under Section 302 read with 34, IPC and was sentenced to undergo life imprisonment and to pay fine of Rs.10,000/- and in default, to undergo further S.I. for 12 months. He was also found guilty for offence punishable under Section 324, IPC and was sentenced to pay fine of Rs.3000/- and in default, to undergo further S.I. for six months. He was also found guilty for the offence punishable under Section 135(1) of the Bombay Police Act and was sentenced to undergo S.I. for four months and to pay fine of Rs.100 and in default, to undergo further S.I. for ten days. Accused no.2 – Mulubhai Markhibhai Nandaniya – was found guilty for offence punishable under Section 302 read with 34, IPC and was sentenced to undergo R.I. for life and to pay fine of Rs.10000/- and in default, to further undergo S.I. for 12 months. He was also found guilty for offence punishable under Section 135(1) of Bombay Police Act and was sentenced to undergo S.I. for four months and to pay fine of Rs.100/- and in default, to further undergo S.I. for ten days. Accused no.3 – Kalabhai Hamirbhai Kachhot – was found guilty for offence punishable under Section 302 read with 34, IPC and was sentenced to undergo R.I. for life and to pay fine of Rs.10000/- and in default, to further undergo S.I. for 12 months. He was also found guilty for

offence punishable under Section 135(1) of Bombay Police Act and was sentenced to undergo S.I. for four months and to pay fine of Rs.100/- and in default, to further undergo S.I. for 10 days. The learned Sessions Judge has acquitted the original accused nos.2 and 3 of the charges under Sections 326 and 324 read with 34, IPC. Against the judgment and order of conviction passed by the learned Sessions Court, accused nos.1 and 3 filed Criminal Appeal No.459 of 2010 and accused no.2 filed Criminal Appeal No.405 of 2010 before the High Court.

5. The High Court, by the impugned common judgment, while confirming the conviction, has partly allowed the appeals and ordered that all the sentences imposed against the accused shall run concurrently and, by extending the benefit of Section 428 of the Code of Criminal Procedure, also ordered that the period of detention of the accused as under-trial prisoners be set off against the sentence.

6. On 10.11.2006, one Rajshibhai Maldebhai Karangiya, resident of Bamnasa Ghed, Taluka Keshod, gave complaint before the Sub-inspector 'B' Division, Junagadh stating that he lives at Bamnasa Ghed with his family and is engaged in agricultural work and lives in the orchard situated in sim of village Akha. In his complaint, he has stated that at about 5:00 p.m. on 10.11.2006 Rajshibhai Maldebhai

Karangiya; Mitesh Hardasbhai and Gokalbhai Karsanbhai went to Keshod for some work on Gokalbhai's Hero Honda motorcycle. Gokalbhai was riding the motorcycle. While returning, when they reached near to orchard of Kalabhai at about 7:15 p.m., Vajashibhai Ramshibhai, Mulubhai Markhibhai and Kalabhai Hamirbhai Kachhot were waiting with axe and knives. In order to stop Rajshibhai Maldebhai Karangiya, Mulubhai gave axe blow, which hit on Gokalbhai's head, due to which Rajshibhai Maldebhai Karangiya, Miteshbhai Hardasbhai and Gokalbhai fell down from the motorcycle. Thereafter the three accused have attacked the deceased Gokalbhai with knives and when Rajshibhai Maldebhai intervened, Vajashibhai gave knife blow on the head of Rajshibhai Maldebhai Karangiya. It is also alleged that Vajshibhai hit knife blow on the back side of head on ear and hit Mitesh on left shoulder. Gokalbhai became unconscious. The three accused then ran away towards Akha on Kalabhai's motorcycle. Thereafter, relatives of the deceased and injured were called and they were shifted to Government Hospital where Gokalbhai was declared dead and Rajshibhai Maldebhai and Miteshbhai were given medical treatment. It is also stated that the reason behind the incident is that six months earlier to the date of incident there was a quarrel between Vajshibhai and Mulubhai with Gokalbhai. He has

stated in the complaint that the present incident is consequence of such rivalry between the accused and the deceased.

7. Based on the abovesaid complaint, crime was registered and after necessary investigation, chargesheet was filed before the Addl. Sessions Judge, Junagadh. Learned Sessions Judge framed charges against the accused. When the accused pleaded not guilty to the charges and claimed trial, they were tried for the offences alleged against them.

8. To prove the charges framed against the accused, prosecution has examined, in all, 32 witnesses and marked 61 documents and at the end of the trial, after recording the statement of the accused under Section 313, Cr.PC and after hearing the arguments of prosecution and defence, learned Additional Sessions Judge held appellant-accused were guilty for the offences and awarded sentence, as narrated above. Aggrieved by the judgment of conviction and sentence imposed on the appellant-accused, the accused nos.1 and 3 have preferred Criminal Appeal No.459 of 2010 and original accused no.2 has preferred Criminal Appeal No.405 of 2010 before the High Court. The High Court, while confirming the conviction, has extended the benefit of Section 428, Cr.PC and allowed the appeals partly by common judgment, only to the extent indicated above.

9. We have heard Sri Harin P. Raval, learned senior counsel appearing for the appellant in Criminal Appeal No.216 of 2015; Sri D.N. Ray, learned counsel appearing for the appellant in Criminal Appeal No.290 of 2018; and Sri Nachiketa Joshi, learned counsel appearing for the appellant in Criminal Appeal arising out of S.L.P. (Crl.)No.3227 of 2015 and Ms. Vishakha, learned counsel appearing for the respondent-State.

10. Sri Harin Raval, learned senior counsel has contended that the conviction of the appellant-accused is mainly based on the testimony of PW-18 and PW-19, who are the injured eye witnesses. It is submitted that if their depositions are scrutinized closely, there are major contradictions. It is submitted that they are the chance witnesses and their evidence is not trustworthy to base the conviction of the appellant-accused. Further, it is submitted that there is no mention about the nature of injuries in the postmortem report and the motorcycle used in the crime was not recovered. It is further contended that though it is the case of the prosecution that there was a head injury caused by the accused on the deceased, there is no corresponding medical injury in the postmortem Report of the deceased. It is submitted that the medical records including postmortem report are not reliable and the prosecution has failed to

prove the case beyond reasonable doubt. He has thus requested to extend the benefit of doubt to the accused and set aside their conviction. In support of his arguments, learned counsel has relied on the judgments of this Court in the case of **Anand Ramachandra Chougule etc. v. Sidarai Laxman Chougala & Ors.**¹; **Akula Veera Venkata Surya Prakash @ Babi v. Public Prosecutor, High Court of Andhra Pradesh**²; and **Mohinder Singh & Anr. v. State of Punjab & Ors.**³.

11. Learned counsel Sri D.N. Ray appearing for the appellant in Criminal Appeal No.290 of 2018 has contended that though a fatal injury was attributed on the deceased, caused by one of the appellants, there were no blood marks on PWs-18 and 19 who are stated to be injured witnesses and were travelling on the same motorcycle of the deceased. Further, it is submitted that the deceased and injured were taken in Maruti car but there were no traces of blood in the car. No blood was also found on PWs-18 and 19 and injuries suffered by them are superficial. It is further submitted that the alleged incident happened at about 07:30 p.m. in the month of November, as such, there was no possibility of identifying the accused

1 (2019) 8 SCC 50

2 (2009) 15 SCC 246

3 (2004) 12 SCC 311

in the darkness. Further it is submitted that no injury was found on the head of the deceased as per the doctor's deposition. It is further submitted that the alleged motive, that an amount of Rs.15000/- was payable to the deceased, was no basis to record the guilt of the accused as the said incident was about eight months earlier to the date of the incident.

12. Shri Nachiketa Joshi, learned counsel appearing for the appellant in the Criminal Appeal arising out of S.L.P.(Crl.)No.3227 of 2015, while adopting the arguments of Sri Harin Raval and Sri D.N. Ray, has contended that though there is no acceptable evidence on record, the appellant was convicted for the offences alleged. He has submitted that if overall evidence is taken into consideration, the charges framed against the accused are not proved beyond reasonable doubt and even the High Court has not considered the grounds raised by the appellant-accused in proper perspective and dismissed the appeals.

13. Per contra, Ms. Vishakha, learned counsel appearing for the respondent-State has submitted that there are concurrent findings of conviction against the appellants. It is submitted that the trial court itself has considered at length, the oral and documentary evidence on record and has come to conclusion that the appellants were guilty for

the offences alleged and there are no grounds to interfere with the same. It is further submitted that accused nos.1 and 3 were found with knives and accused no.2 caused the injury on the deceased by hitting on his head with axe when, all three were travelling on motorcycle. It is submitted that murder of the deceased was committed by injuring PWs-18 and 19 with the common intention, as such, they were rightly found guilty by the Sessions Court. Further, learned counsel, by referring to the deposition of PW-21 who was the person first to reach the place of occurrence, i.e., the brother of the deceased, has submitted that postmortem report indicates the injury on the lower back side of the head. Further, submitting that the identity of the accused cannot be questioned as all are known to each other and are of the same village. She has further submitted that the medical and ocular evidence supports the case of the prosecution, to prove the case against the accused. The learned counsel has lastly contended that discrepancies, if any, in the depositions are minor and same will not affect the case of the prosecution. The learned counsel placed reliance on the judgments of this Court in the case of **Mohar & Anr. v. State of U.P.**⁴ and **State of Uttar Pradesh v. Naresh & Ors.**⁵.

4 (2002) 7 SCC 606

5 (2011) 4 SCC 324

14. In reply, Sri Harin Raval, learned senior counsel and Sri D.N. Ray, learned counsel appearing for the appellant-accused have submitted that the alleged incident has occurred at about 07:30 p.m. on 10.11.2006 and even according to evidence, PWs-18 and 19 remained at the site of the occurrence for about 45 minutes, which is unusual. It is submitted that in a situation like this, PWs-18 and 19, who suffered injuries, should have made an attempt to shift the deceased to the nearest hospital immediately. Referring to the deposition of PWs-18 and 19 in cross-examination, it is submitted that such injuries suffered by PWs-18 and 19, can be self-inflicted. Further reiterating that the discrepancies noticed in the depositions are major, hence, benefit of doubt has to go to the appellants and prayed for acquittal of the accused.

15. Having heard the learned counsel on both sides, we have perused the judgment of the trial court as well as that of the High Court and other material placed on record.

16. Upon close scrutiny of the evidence on record and the findings recorded by the trial court, as confirmed by the High Court, we do not find any merit in the submissions of the learned counsel for the appellant-accused, to interfere with the conviction recorded by the trial Court, as confirmed by the High Court.

17. To prove the charges framed against the appellants, the prosecution has examined 32 witnesses and marked 61 documents as exhibits, during the trial. Among the other witnesses examined on behalf of the prosecution, Rajshibhai Maldebhai Karangiya, who was with the deceased at the time of incident, was examined as PW-18. In his deposition he has stated that the incident occurred at about 07:30 in the evening on Bamnasa-Akha road on 10.11.2006. On that day, he, along with Miteshbhai and Gokalbhai (deceased), went to Keshod on Hero Honda motorcycle at about 05:00 O'clock in the evening. Gokalbhai was driving the motorcycle and thereafter at about 06:45 p.m. Gokalbhai's brother Vajshibhai made a phone call to Gokalbhai and stated that he wants motorcycle to go for some other work and requested him to come back if his work is completed. Therefore, they proceeded from Keshod to Village Bamnasa and when they reached near the farm of Kalabhai – a policeman, Vajshibhai Ramshibhai armed with knife, Mulubhai Markhibhai armed with axe and Kalabhai Hamirbhai armed with knife were standing across the road to stop them. When Gokalbhai slowed down the vehicle, Mulubhai Markhibhai gave axe blow on the head of Gokalbhai and, therefore, they fell down from the motorcycle and thereupon the accused started giving blows with axe and knife to Gokalbhai haphazardly. Further it

is also deposed that when he and Mitesh tried to interfere, they also suffered injuries. Thereafter he made a phone call to Masaribhai at Bamnasa from his mobile and requested him to come to the place of incident with vehicle. Therefore, after sometime, Rajubapu Bavaji came with Maruti van and Samat Govind and Vajsi Karsan were with Rajubapu. Even as per the say of this witness the reason for the incident is the altercation, between Gokalbhai and Vajashibhai with regard to rent of Rs.15000/-, which occurred six months prior to the occurrence, of which complaint was lodged in Junagadh Police Station. Other person, who was with the deceased on the day of occurrence was Mitesh Hardas Kachhot – PW-19, has also deposed on similar lines as that of PW-18. The testimony of PWs-18 and 19 who were with the deceased on the day of occurrence and who were travelling on the same motorcycle, is quite natural and trustworthy. Though it is the contention of the learned counsel for the appellant-accused that as the incident happened in the month of November it was not possible to identify the assailants in the darkness, at the same time it is clear from the evidence on record that the headlight of the vehicle was 'on' and it is evident from the record and *panchnama* of the place of occurrence that there was a light which was there on the Vadi. It is further to be noticed that the accused as well as the

witnesses are of the same village, which appears to be a small village and usually the persons residing in the village meet frequently, there will not be any difficulty in identifying the persons. Therefore, as far as the identification of the accused is concerned, the same is well supported by the evidence on record. The prosecution also examined Dr. Nikhilkumar Buch – PW-1 – who has deposed that he was on duty in Civil Hospital, Junagadh on 10.11.2006. On that day at about 10:40 hrs. in the night, injured Rajshi Malde was brought to him by his nephew Hitesh Hardas, for treatment with the complaint and stated that Vajshi Ramshi attacked him and gave knife blow. The witness doctor has issued injury certificate which is exhibited as Exh.18. Dr. Prafulaben Mohanlal Dhabariya was examined as PW-2, who has performed postmortem of the deceased. The said witness has found the following injuries on the person of the deceased :

- “i) There was one cut, incised wound which was transverse, in mid way of left thigh. It was upto skin and muscle. It was elliptical in shape and 5 inch long, 1 and ½ inch wide and ¾ inch deep.
- ii) There was cut incised wound over left chest, left 6th inter-coastal space starting from mid clavicular line and was going downwards and laterally. It is 2 and ½ inch long, ¾ inch wide and penetrates the cavity. The wound track is tapering and infiltrated with blood. There is no exit wound. It penetrates the rear and left ventricular wall.

- iii) There was incised wound at the level of the hair line over the neck posteriorly measuring 3 inch long starting from $\frac{1}{2}$ inch from the midline on the left and extending transversely to the right. The wound is $\frac{1}{2}$ inch wide, cuts through skin, muscles and grazes the cervical vertebra. Bleeding noted.
- iv) There was was incised wound over right side of neck below above injury laterally measuring 1 x $\frac{1}{2}$ x $\frac{1}{2}$ inch long x wide x deep.
- v) There was incised wound parallel to above $\frac{1}{2}$ " below it measuring 1" x $\frac{1}{2}$ " x $\frac{1}{2}$ ".
- vi) There was incised wound just above right scapula at base of neck starting 1" lateral to the vertebral margin and extending laterally and transversely and upwards. It is 2" long, 1" wide and penetrates the chest cavity. The wound is tapering upwards. It penetrates the right upper lung lobe.
- vii) There was incised wound over right scapula region medially measuring 1"x $\frac{1}{2}$ " x $\frac{1}{2}$ " cutting through skin and muscle, next to vertebral margin, transverse.
- viii) There was incised wound over right scapula region about centrally and transversely measuring 1 $\frac{1}{2}$ " x 1" x $\frac{1}{2}$ ".
- ix) There was incised wound over right chest just below right scapula vertically and at border of scapular measuring 1 $\frac{1}{2}$ " x 1" x $\frac{1}{2}$ " cutting through skin and muscle.
- x) There was incised wound lateral to above wound, also parallel to above wound, 2" distant from it and measuring 1 $\frac{1}{2}$ "x 1" x $\frac{1}{2}$ " cutting through skin and muscle.

- xi) There was incised wound and lateral and parallel to above, 2" distant from it, measuring 1 ½ "x 1"x 1/2" cutting through skin and muscle.
- xii) There was incised wound over right back, 10th intercostal space transverse, measuring 2"x1" x ½".
- xiii) There was incised wound over left scapula, at the base, vertical wound measuring 2" x 1" x ½" deep cutting through skin and muscle.
- xiv) Incised wound at level of T12, transverse wound measuring 3 ½ "x 1" and cutting through skin, muscles and grazing bone.
- xv) Incised wound at level of L2, transverse wound measuring 1 ½ "x 1" x ½" cutting through skin and muscle.
- xvi) Incised wound at level of L5-S1 transverse wound measuring 3" x ½" and cutting through skin, muscles and grazing bone.
- xvii) Incised wound over sacral region, vertical, midline measuring 1" x1/2" x ½", muscle deep.
- xviii) Incised wound over sacral region, vertical, midline measuring 1"x ½" x ½", 2" below above wound muscle deep.
- xix) Incised incised wound about 1" below injury no 16, lateral to it measuring 1" x ½ "x 1/2".

In his deposition, with reference to abovesaid injuries, he has also opined that all the injuries are ante-mortem. The injuries which are referred to, are stated to have been enclosed in the postmortem note.

Sri Jagdishbhai Sarmanbhai Kamaliya, who was the *panch* witness of

the *panchmana* of the dead body, was examined as PW-5. Sri Hardasbhai Bhikhabhai Bhetariya was examined as PW-6 who was *panch* witness to the scene of offence. The prosecution has also examined Masharibhai Govindbhai Karangiya as PW-20. In his deposition he has stated that on the date of incident when he was at his field, he received a phone call of Rajshi Malde at about 07:30 in the evening stating the incident and assault on them and he was informed to come with Maruti van of Rajubapu and thereafter he has gone to village on his motorcycle. As he could not meet Rajubapu, he contacted Rajubapu on phone and requested him to come with his Maruti van to the field of Kalabhai immediately which is situated on the road of Aakha. He has clearly stated in his deposition that when he reached the spot, he has noticed the injuries on Miteshbhai and Rajashi Malde and Gokalbhai was lying in bleeding condition. He has also stated that there was a lamp in the field of Kalabhai, light of which was falling on the road. The brother of the deceased was examined as PW-21. In his deposition he has also stated that as Gokalbhai has taken the Hero Honda motorcycle and as the same was required by him to go out of station on the motorcycle, he made a phone call to Rajashi on his mobile no.9825921960 through the coin drop box phone from the shop of Nathubhai in the village. Even this

witness has stated that the reason for the incident is that Gokalbhai unloaded the soil in the field of Vajashibhai Ramshi through his tractor and the amount of Rs.15000/- towards rent thereof was outstanding from him. It is stated that as there was discord in this regard, the incident has occurred, which resulted in the murder of Gokalbhai. Sri Rajeshbhai Jethabhai Parmar who has investigated the crime, was examined as PW-31. He also clearly stated in detail in his deposition regarding the incident.

18. The submission of the learned counsels, that there was no head injury, as deposed by PWs-18 and 19 on the deceased and also as per the postmortem report, as such the deposition of PWs-18 and 19 is to be discarded, cannot be accepted for the reason that the postmortem report indicates injury on the lower back side of the head. An attempt was made to assault the deceased with an axe. We cannot expect that it has to be hit on the centre of the head. It has fallen on the lower back side of the head, same is evident from the postmortem report. At this stage, it is to be noted, that the attack was made on the deceased and injured, when they were moving on motor cycle. As such, it cannot be said that merely because there is no injury on the centre of the head, the testimony of PWs-18 and 19 is to be discarded. The doctor who has conducted the postmortem, has also clearly stated

in his deposition that all injuries which were noticed on the deceased were ante mortem. If the entire evidence of all the witnesses is examined with reference to medical and other evidence on record, it is clear that the prosecution has proved the guilt of the accused beyond reasonable doubt. All the accused have committed the crime with a common intention. It is clear from the record that the role attributed to accused nos.1, 2 and 3 is fully supported by the injured witnesses as well as the deposition of investigation officer. Though the key witness, were cross-examined at length, nothing adverse was elicited. If the testimony of PW-20, i.e., Masharibhai is examined, same is fully supported by the evidence of PW-18, 19 and 21. It is clear from the evidence on record that their testimony is natural and trustworthy and so far as PWs-18 and 19 are concerned it cannot be said that they are the chance witnesses. Even the injuries sustained by PWs-18 and 19 are not self-inflicted as per the opinion of the medical expert. Further, it is also clear from the opinion of the doctor who was examined, that all the injuries were possible with *muddammal* knife and axe. It is further to be noticed that serological report from which the blood group was found on the cloths of the deceased and that of the accused nos.1 and 2 is the same. Even with regard to the presence of accused no.3, it is also clear considering the entire oral

evidence on record that his presence on the spot is also proved beyond reasonable doubt.

19. We also do not find any substance in the argument of the learned counsel that there are major contradictions in the deposition of PWs-18 and 19. The contradictions which are sought to be projected are minor contradictions which cannot be the basis to discard their evidence. The judgment of this Court in the case of **Mohar**⁴ relied on by the learned counsel for the respondent-State supports the case of the prosecution. In the aforesaid judgment, this Court has held that convincing evidence is required, to discredit an injured witness. Para 11 of the judgment reads as under :

“11. The testimony of an injured witness has its own efficacy and relevancy. The fact that the witness sustained injuries on his body would show that he was present at the place of occurrence and has seen the occurrence by himself. Convincing evidence would be required to discredit an injured witness. Similarly, every discrepancy in the statement of a witness cannot be treated as fatal. A discrepancy which does not affect the prosecution case materially cannot create any infirmity. In the instant case the discrepancy in the name of PW 4 appearing in the FIR and the cross-examination of PW 1 has been amply clarified. In cross-examination PW 1 had clarified that his brother Ram Awadh had three sons: (1) Jagdish, PW 4, (2) Jagarnath, and (3) Suresh. This witness, however, stated that Jagarjit had only one name. PW 2 Vibhuti, however, stated that at the time of occurrence the son of Ram Awadh, Jagjit @ Jagarjit was milching a cow and he was

also called as Jagdish. Balli (PW 3) mentioned his name as Jagjit and Jagdish. PW 4 also gave his name as Jagdish.”

Learned counsel for the respondent-State has also relied on the judgment of this Court in the case of **Naresh & Ors.**⁵. In the aforesaid judgment, this Court has held that the evidence of injured witnesses cannot be brushed aside without assigning cogent reasons. Paragraphs 27 and 30 of the judgment which are relevant, read as under :

“**27.** The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide *Jarnail Singh v. State of Punjab* [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] , *Balraje v. State of Maharashtra* [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] and *Abdul Sayeed v. State of M.P.* [(2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262])

... ..

... ..

30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

“9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.”

[**Ed.:** As observed in *Bihari Nath Goswami v. Shiv Kumar Singh*, (2004) 9 SCC 186, p. 192, para 9.]

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide *State v. Saravanan* [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580 : AIR 2009 SC 152], *Arumugam v. State* [(2008) 15 SCC 590 : (2009) 3 SCC (Cri) 1130 : AIR 2009 SC 331] , *Mahendra Pratap Singh v. State of U.P.* [(2009) 11 SCC 334 : (2009) 3 SCC (Cri) 1352] and *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra* [(2010) 13 SCC 657 : JT (2010) 12 SC 287] .”

Further, in the case of **Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra**⁶, this Court has considered the effect of the minor contradictions in the depositions of witnesses while appreciating the evidence in criminal trial. In the aforesaid judgment it is held that only contradictions in material particulars and not minor contradictions can be a ground to discredit the testimony of the witnesses. Relevant portion of Para 42 of the judgment reads as under:

“42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW 2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness.
... ..”

20. By applying the aforesaid ratio, as laid down by this Court coupled with the evidence on record, we are clearly of the view that

6 (2000) 8 SCC 457

the prosecution has proved the case against all the appellant-accused beyond reasonable doubt. The omissions like not seizing the motorcycle and also not seizing the gold chain of one of the victims, by itself, is no ground to discredit the testimony of key witnesses who were examined on behalf of the prosecution, whose say is consistent, natural and trustworthy.

21. In that view of the matter, we are fully in agreement with the view taken by the trial court in recording the conviction against the appellants, as confirmed by the High Court. Therefore, no interference is called for with the concurrent findings recorded against the appellants. As discussed earlier it is also clear that there was a quarrel between the deceased about six months earlier to the incident and one accused regarding payment of rent of tractor. Further it is brought on record that there was animosity between them which is the motive for the crime. As such, the prosecution has established, beyond reasonable doubt, that all the accused have committed the offence with a common intention and participated in committing the crime. The trial court as well as the High Court has not committed any error in law or on facts, as such, the same are required to be upheld by this Court. As far as the judgments relied on by the learned counsel for the appellants are concerned, having regard to the

facts of the case and the evidence on record, we are of the view that the abovesaid judgments would not render any assistance to support the case of the appellants.

22. For the aforesaid reasons, we do not find any merit in these appeals, same are accordingly dismissed.

.....J.
[Ashok Bhushan]

.....J.
[R. Subhash Reddy]

New Delhi.
April 28, 2021.

Reportable

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

**Criminal Appeal No 452 of 2021
(Arising out of SLP(CrI) No 1795 of 2021)**

Patan Jamal Vali

.... Appellant

Versus

The State of Andhra Pradesh

....Respondent

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

This judgment has been divided into the following sections to facilitate analysis:

A Factual Background

B Proceedings before this Court

C Analysis

C.1 Intersectionality: The Different Hues of Identity

C.2 Disability and Gender: Twin Tales of Societal Oppression

C.3 The 'Caste' that is Difficult to Cast Away: Protection of Members of
Scheduled Castes and Scheduled Tribes

C.4 Section 3(2)(v) of SC & ST Act

C.5 Punishment under Section 376 of the IPC

D Conclusion and Summary of Findings

Signature Not Verified
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Chetan Kumar
Date: 2024.04.27
19:35:56 IST
Reason: 

A Factual Background

1 Leave granted.

2 This appeal arises from a judgment of a Division Bench of the High Court of Andhra Pradesh dated 3 August 2019. The High Court has affirmed the conviction of the appellant for offences punishable under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989¹ and Section 376(1) of the Indian Penal Code.

3 The appellant has been sentenced to suffer imprisonment for life for each of the above offences, the substantive sentences being directed to run concurrently. In addition, the appellant has been sentenced to pay a fine of Rs. 1,000 for each of the offences and in default to suffer imprisonment of six months.

4 The appellant was residing in Gajulapalli village and was engaged in carrying out manual work for two years prior to the incident. PW2 who is blind since birth used to live with her mother (PW1) and brother (PW3). PW3 and LW5 are the sons of PW1. They were also engaged in manual work together with the appellant, at the same place. The appellant, according to the prosecution, lived in the same village and regularly visited the house of PW1 due to his acquaintance with her sons.

¹ "SC & ST Act"

5 At about 9 am on 31 March 2011, PW1 was attending to her household chores at a public tap which was within a distance of fifty feet and her sons were cutting fire wood in the vicinity. The appellant is alleged to have enquired about her sons when PW1 replied that her spouse and sons were chopping fire wood and asked him to wait for a while. After half an hour, on hearing the voice of her daughter (PW2) in distress, she rushed to the house and found that the door was locked from inside. Upon raising an alarm her husband and sons rushed to the house. The appellant opened the door and tried to escape but was apprehended at the spot. Upon entering the house, PW1 observed that PW2 was lying on the ground in a nude condition and was bleeding from her genitals. The clothes of PW2 were torn and stained with blood. Upon enquiry, PW2 is alleged to have stated that the appellant came to the house and enquired about her brothers; he locked the door and fell on her, gagged and raped her.

6 The case of the prosecution is that at 10 am, the Sub-Inspector of Police (PW9), Mahanandi Police Station, who received a call from PW4, a cousin of PW1, rushed to the scene of the occurrence. By that time, the Circle Inspector of Police, Nandyal Rural Police Station had also arrived and the villagers handed over the appellant to him. PW1 furnished a written report to the police which was registered as Crime No 28/2011. PW11 sent the victim to the Government Hospital where she was examined by PW10, the Civil Surgeon at the District Hospital. The medical examination revealed that PW2 was blind. The medical report of the examination of PW2 has been extracted in the judgment of the Sessions Judge and the High Court and reads as follows:

“(1) Contusion of 1 x 1 cm on left cheek, red in colour, (2) Pubic Hair develop, breast develop (3) Axillary Hair developed. On examination of vagina is lacerated at 4-00 O' clock position, bleeding present. 3 swabs and slides taken from Hymeneal Orifice Vaginal canal and near cervix, vaginal wall sutured with 10 Chromicatgut, hair and nail clippings taken and she issued the wound certificate under Ex.P.6 and gave her final opinion under Ex.P.8 after receiving the report from A.P.F.S.L. and she opined that the evidence is suggestive of penetration of male genital parts.”

7 Charges were framed against the appellant under Section 376(1) of the Penal Code and Section 3(2)(v) of the SC & ST Act. To substantiate its case, the prosecution examined eleven witnesses, PWs 1 to 11 in addition to which, it relied on exhibits P1 to P12 and MOs 1 to 8. On the closure of the evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973. By a judgment dated 19 February 2013 the Special Judge for the Trial of Cases under the SC - ST (POA) Act - Cum - VIth Additional District and Sessions Judge convicted the appellant for offences under Section 3(2)(v) of the SC & ST Act and Section 376(1) of the Penal Code. Based primarily on the testimonies of PW1, PW2 and PW3 the learned Sessions Judge held that:

- (i) The appellant had access to PW2 since he was acquainted with her brothers and was regularly visiting the house where she lived with her family;
- (ii) The evidence of PW1 and PW2 was corroborated by PW3, the brother of PW2;
- (iii) The narration of the incident by PW1 was duly corroborated by an independent witness and neighbour, PW5;

- (iv) The oral testimony of the witnesses established that the appellant was apprehended at the scene of occurrence and when PW1 who was accompanied by PW3 and PW4 opened the door of the house, the appellant was apprehended while attempting to escape and PW2 was found bleeding from her injuries lying in a nude condition on the ground;
- (v) PW2 who was blind by birth had identified the appellant by his voice which was familiar to her since the appellant was regularly visiting the house;
- (vi) PWs 1,3,4,5 apprehended the appellant handed him over to PW11 and the appellant was taken to Mahanandi Police Station;
- (vii) PW5 is the neighbour whose house was opposite to that of PW1 and was a natural witness. PW4 though related to PW1 had also corroborated the testimony of PW1;
- (viii) The clothes of PW2 had been duly seized;
- (ix) The narration of the incident by PW2 was trustworthy and was duly corroborated by PW1 and PW3; and
- (x) The oral testimony was consistent with the medical evidence and the deposition of PW10, the doctor at the government hospital who deposed in that regard.

The Sessions Judge, in coming to the conclusion that an offence under Section 3(2)(v) was established observed thus:

“39. Coming to the facts of the present case P.W.11 in the cross examination stated that P.W.1 and P.W.2 did not state before him that since P.W.2 belongs to scheduled caste, accused committed the offence. The learned defence counsel argued that in view of the evidence of P.W.11, the prosecution failed to prove that the accused committed the offence on the

ground that the victim belongs to scheduled caste. I do not find any merit in the above argument for the reason that Ex. P.1 discloses that the victim belongs to Madiga of Scheduled Caste. P.W.1 the mother of the victim girl is an illiterate village rustic woman simply because she has not mentioned in the report or in the statement to the police that accused did commit the offence on the ground that the victim belong to scheduled caste is no way fatal to the case of the prosecution to establish the guilt of the accused for the offence under section 3 (2) (v) of SC/ST (POA) Act.

40. It is needless to say that if the victim belongs to upper caste than the caste of the accused, particularly in village atmosphere, I am of the considered view that he would not have done the act and dared to pounce upon her, and commit the offence of rape at her own house at about 9.30 am in morning when her mother was working near the house at public tap and her house is situated in the residential locality. This court is of the view that as the victim girl is helpless, blind and belongs to scheduled caste, so that the accused developed evil eye on her and taken advantage of her loneliness committed the heinous crime of rape against her. Hence I am not convinced with the argument of the learned defence counsel and this court held that the accused committed the act of rape on the victim un-married girl of 19 years at the time of the incident and blind by birth and he did commit the act on the ground that she belongs to scheduled caste and on the impression that she cannot do anything against him. Hence, the prosecution has established the guilt of the accused for the offence under section 3 (2) (v) of SC/ST (POA) Act.”

On the aspect of sentence, the Sessions Judge observed:

“When questioned about the quantum of sentence in respect of the. offence under section 376 (1) IPC, the accused pleaded to take lenient view stating that he is a poor person and eking out his livelihood by doing coolie work.

In view of the facts and circumstances of the case that it is a heinous crime of rape committed against a blind un-married girl of 19 years of age, I am not inclined to exercise my discretion to give lesser punishment to the accused as it is not a fit case to take a lenient view.

The accused is sentenced to undergo **life imprisonment** and to pay a fine of Rs.1,000/- i/d SI for 6 months for the offence punishable under section 376 (1) of IPC and also sentenced to undergo **life imprisonment** and to pay a fine of Rs.1,000 /-

i/d SI for 6 months for the offence under section 3 (2) (v) of SC/ ST (POA) Act. Sentences shall run concurrently for the whole life. M.O.1 to M.O.8 shall be destroyed after the expiry of appeal time.”

8 The High Court by its judgment dated 3 August 2019 affirmed the conviction and sentence imposed by the Sessions Court. The High Court has held that the testimonies of PW1, the mother of PW2; and of PW2 were consistent and duly corroborated by PW3, the brother of PW2 and by PW4 and PW5. The High Court adverted to the medical evidence and, in particular, the deposition of PW10. The prosecution was held to have established its case beyond reasonable doubt.

9 Before the High Court, it was urged that the ingredients of the offence under Section 3(2)(v) were not established as the offence was not committed “on the ground” that PW2 belongs to a Scheduled Caste. The High Court declined to accede to the submission, observing:

“Section 3(2)(v) of the Act provides that the offence gets attracted if it is committed against a person knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such members. Even otherwise still the offence under Section 376(1) I.P.C. is made out.”

B Proceedings before this Court

10 On 19 February 2021, this Court at the preliminary hearing of the Special Leave Petition adverted to the submissions of the learned Counsel appearing on behalf of the appellant and passed the following order:

“2 Mr Harinder Mohan Singh, learned counsel appearing on behalf of the petitioner, has adverted to the findings contained in paragraph 39 of the judgment of the Sessions Court dated 19 February 2013 (Annexure P-12). Learned counsel submits that in view of the expression “on the ground

that such person is a member of a Scheduled Caste or a Scheduled Tribe" in Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, which has been interpreted in the decisions of this Court, an offence under this provision has not been established. Hence, the imposition of a sentence of life imprisonment in respect of an offence under Section 376 of the Indian Penal Code 1860 was not in accordance with law.

3 Issue notice, confined to the aforesaid submission, returnable in six weeks.

4 Liberty to serve the Standing Counsel for the State of Andhra Pradesh, in addition."

11 Notice has been issued by this Court confined to the above submission. However, before we proceed to analyse the submission, we are unequivocally of the view that the offence under Section 376(1) has been proved beyond reasonable doubt. The testimonies of PW1, the mother of PW2 and of PW 2, who was sexually assaulted, are clear and consistent. The oral account has been corroborated by the evidence of PW3, PW4 and PW5. The medical evidence, more particularly, the deposition of PW10 clearly establishes that PW2 was sexually assaulted. The appellant was apprehended at the spot in close proximity of the commission of the offence. The offence under Section 376 has been established beyond reasonable doubt. This Court shall now proceed to deal with the question of the conviction and sentence under the SC & ST Act.

C Analysis

C.1 Intersectionality: The Different Hues of Identity

12 The experience of rape induces trauma and horror for any woman regardless of her social position in the society. But the experiences of assault are

different in the case of a woman who belongs to a Scheduled Caste community and has a disability because the assault is a result of the interlocking of different relationships of power at play. When the identity of a woman intersects with, *inter alia*, her caste, class, religion, disability and sexual orientation, she may face violence and discrimination due to two or more grounds. Transwomen may face violence on account of their heterodox gender identity. In such a situation, it becomes imperative to use an intersectional lens to evaluate how multiple sources of oppression operate cumulatively to produce a specific experience of subordination for a blind Scheduled Caste woman.

13 A movement for recognition of discrimination and violence emanating from the effects of the interaction of multiple grounds was pioneered by African American women in United States. Kimberly Crenshaw has been credited for coining the term intersectionality. In her seminal work on the subject, she describes the principle with the help of the following hypothetical:

“Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.”²

In her article, Crenshaw argues that sex discrimination and race discrimination statutes, as well as the judicial opinions in the United States that she studied are

² K. Crenshaw, *Demarginalizing The Intersection Of Race And Sex: A Black Feminist Critique Of Anti-Discrimination Doctrine, Feminist Theory, And Anti-Racist Policies*, University of Chicago Legal Forum, Vol. 4 (1989) 149 (“**Crenshaw, Demarginalizing Intersection of Race and Sex**”).

narrowly tailored and address the claims of the most privileged within the targeted group. She states:

“With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. I want to suggest further that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. **In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.**”³ (emphasis added)

She further highlights the intersectional nature of gender violence, where she states that: “[t]he singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror.”

14 Intersectionality can be defined as a form of “oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone...”⁴ While the model of intersectionality was initially developed to highlight the experiences of African-American women, there is a growing recognition that an intersectional lens is useful for addressing the specific set of lived experiences of those individuals who have faced violence and discrimination on multiple grounds. A single axis approach to violence and discrimination renders invisible such minority

³ Id at p. 146.

⁴ Mary Eaton, *Homosexual Unmodified: Speculations on Law’s Discourse, Race, and Construction of Sexual Identity*, in *LEGAL INVERSIONS: LESBIANS, GAY MEN AND THE POLITICS OF THE LAW*, Didi Herman and Carl Stychin eds. (Philadelphia: Temple University Press 1995), p. 46.

experiences within a broader group since it formulates identity as “totemic” and “homogenous”.⁵ Laws tend to focus on a singular identity due to the apparent clarity a monistic identity provides in legal analysis where an individual claiming differential treatment or violence can argue that “but for” that identity, they would have been treated in the same way as a comparator. Therefore, their treatment is irrational and unjustified.⁶ However, such essentialization of experiences of identity groups creates a problem where intersectional discrimination or violence has occurred. This is because the evidence of discrete discrimination or violence on a specific ground may be absent or difficult to prove.⁷ Nitya Iyer has argued that law based on single axis models forces claimants to ignore their own lived reality and “caricaturize themselves so that they fit into prefabricated, rigid categories”.⁸ Their claim will fail if they are not able to simplify their story to accord with the dominant understanding of how discrimination or violence on the basis of a given characteristic occurs.⁹

15 It is important to note that an analysis of intersectionality does not mean that we see caste, religion, class, disability and sexual orientation as merely “add ons” to the oppression that women may face. This is based on the assumption that gender oppression is oppressive in the same way for all women, only more so for women suffering marginalization on other grounds. However, an

⁵ Ben Smith, *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*, *The Equal Rights Review*, Vol. 16 (2016) 74 (“**Smith, Intersectional Discrimination**”).

⁶ *Ibid*, 83.

⁷ *Ibid*, 81.

⁸ Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, *Queen’s Law Journal*, Vol. 19 (1993–1994) 179.

⁹ *Ibid*.

intersectional analysis requires us to consider the distinct experience of a sub-set of women who exist at an intersection of varied identities. This is not to say that these women do not share any commonalities with other women who may be more privileged, but to equate the two experiences would be to play down the effects of specific socio-economic vulnerabilities certain women suffer. At its worse it would be to appropriate their pain to claim a universal subjectivity.

16 There is a fear that intersectionality would open a Pandora's box of "endless new discrete identity categories for every possible permutation of identity"¹⁰. We can avoid this trap by eschewing an identity-based conception of intersectionality in favour of a systems-based conception. Specifically, as Gauthier De Beco argues, instead of focusing on identity-categories, the intersectionality enquiry should focus on "co-constituted structures of disadvantage that are associated with two or more identity-categories at the same time".¹¹ By exhibiting attentiveness to the 'matrix of domination'¹² created by the intersecting patterns at play, the Court can more effectively conduct an intersectionality analysis. A legal analysis focused on delineating specific dimensions of oppression running along a single axis whether it be caste, disability or gender fails to take into account the overarching matrix of domination that operates to marginalise an individual. The workings of such a structure have

¹⁰ **Smith, Intersectional Discrimination**, *supra* n. 5, p. 84.

¹¹ Gauthier de Boco, *Harnessing the Full Potential of Intersectionality Theory in Human Rights Law: Lessons from Disabled Children's Right to Education in* INTERSECTIONALITY AND HUMAN RIGHTS LAW (Shreya Atrey & Peter Dunne, Hart Publishing 2020).

¹² PH Collins, *The Difference That Power Makes: Intersectionality and Participatory Democracy*, 8(1) *Revista de Investigaciones Feministas* (2017), p. 22, noting: "Intersectionality's emphasis on intersecting systems of oppression suggests that different forms of domination each have their own power grid, a distinctive "matrix" of intersecting power dynamics."

been aptly stated by a woman with visual impairment (due to Albinism) in the following words:

“I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discriminating against me. I do not fit into discrete boxes of grounds of discrimination.

Even when only one ground of discrimination seems to be relevant, it affects me as a whole person”¹³

17 Intersectionality merely urges us to have “an open-textured legal approach that would examine underlying structures of inequality”¹⁴. This requires us to analyse law in its social and economic context allowing us to formulate questions of equality as that of “power and powerlessness” instead of difference and sameness.¹⁵ The latter being a conceptual limitation of single axis analysis, it may allow certain intersectional claims to fall through the cracks since such claims are not unidirectional in nature.

18 Intersectional analysis requires an exposition of reality that corresponds more accurately with how social inequalities are experienced. Such contextualized judicial reasoning is not an anathema to judicial inquiry. It will be useful to note the comments of Justice L’Heureaux-Dubé and Justice McLachlin in the Canadian Supreme Court’s judgment in **R. v. S (RD)**¹⁶ that, “[j]udicial inquiry into the factual, social and psychological context within which litigation arises is

¹³ D. Pothier, *Connecting Grounds of Discrimination to Real People’s Real Experiences*, 13(1) Canadian Journal of Women and the Law (2001), p. 39, 51.

¹⁴ **Smith, Intersectional Discrimination**, *supra* n. 5, p. 84.

¹⁵ *Ibid.*

¹⁶ (1997) 3 S.C.R. 484 at 506-507.

not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality...this process of enlargement is not only consistent with impartiality; it may also be seen as its essential pre-condition.”

19 Single axis models of oppression are a consequence of how historically movements aiming for legal protection of marginalized populations developed. Most political liberation struggles have been focused on a sole characteristic like anti-caste movements, movements by persons with disabilities, feminism and queer liberation. Many such movements have not been able to adequately address the intra-group diversity leading to a situation where the needs of the relatively privileged within the group have received more than a fair share of spotlight. When these liberation struggles were adopted in law, the law also developed into mutually exclusive terrains of different statutes addressing different marginalities failing to take into account the intersectional nature of oppression.

20 In India, the fundamental guarantees under the Constitution provide for such a holistic analysis of discrimination faced by individuals. One of us (Justice DY Chandrachud), in **Navtej Johar v. Union of India**¹⁷ applied the intersectional lens to Article 15(1) of the Constitution. In doing so, Justice DY Chandrachud observed that:

“36. This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination

¹⁷ (2018) 10 SCC 1.

meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ('Sex plus') and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. **This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics."**
(emphasis supplied)

21 Noting how the discrimination caused by intersecting identities amplifies the violence against certain communities (gendered/religious/otherwise), the Justice J.S Verma Committee appointed in the aftermath of the Nirbhaya incident to suggest reforms in Indian criminal law, observed that:

"34. We believe that while certain measures may have been taken over a period of time but they have been too far and too few and they certainly have not attempted to restructure and transform society and its institutions. If there has to be a society which is based on equality of gender, we must ensure that not only does a woman not suffer on account of gender but also not suffer on account of caste or religion in addition. Thus a woman may suffer a double disadvantage – a) because she is a woman, and b) because she belongs to a caste/tribe/community/religion which is disadvantaged, she stands at a dangerous intersection if poor."¹⁸

¹⁸ Justice JS Verma (Retd.), Justice Leila Seth (Retd.) & Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law, 23 January 2013, p. 38 ("**JS Verma Committee Report**").

22 While intersectionality has made considerable strides in the field of human rights law and anti-discrimination law, it has also emerged as a potent tool to understand gender-based violence. In 1991, Crenshaw applied the concept of intersectionality to study violence against women of colour. She showed how race, gender, poverty, immigrant status and being from a linguistic minority interacted to place these women in violent relationships.¹⁹

23 To deal with cases of violence against women from intersectional backgrounds, Shreya Atrey proposes the model of intersectional integrity. She notes:

“Intersectional gender violence is about: (i) rejecting violations of bodily and mental integrity when perpetrated based on people’s multiple and intersecting identities (intersectionality); and (ii) recognizing that violence should be understood as a whole taking into account unique and shared patterns of violations yielded by intersections of gender, race, caste, religion, disability, age, sexual orientation etc(integrity).”²⁰

24 She points out that a failure to consider violence perpetrated based on multiple identities results in an inaccurate portrayal of the violence at issue which may impact the ability to obtain relief. On the other hand, a comprehensive appraisal of the intersectional nature of the violence can translate into an appropriate legal response.²¹

¹⁹ K Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 *Stanford Law Review* 1241 (1991), 1246-50.

²⁰ Shreya Atrey, *Lifting as We Climb: Recognising Intersectional Gender Violence in Law*, 5 *Oñati Socio-legal Series* 1512 (2015), 1519-20.

²¹ *Id* at 1531.

25 The above analysis stresses on the need for the Court to address and unpack the qualitative impact of the various identities an individual might have on the violence, discrimination or disadvantage being faced by them in the society.

C.2 Disability and Gender: Twin Tales of Societal Oppression

26 For many disabled women and girls in India, the threat of violence is an all-too-familiar fixture of their lives, contracting their constitutionally guaranteed freedom to move freely and curtailing their ability to lead full and active lives. This threat of violence can translate into a nagging feeling of powerlessness and lack of control, making the realization of the promises held by Parts III and IV of our Constitution a remote possibility for women with disabilities.

27 In saying so, we do not mean to subscribe to the stereotype that persons with disabilities are weak and helpless, incapable of charting the course of their lives or to deprive them of the agency and bodily autonomy that we all possess and are entitled to exercise. Such a negative presumption of disability translating into incapacity would be inconsistent with the forward-thinking conceptualization of disabled lives embodied in our law and, increasingly, albeit slowly, in our social consciousness. As Saptarshi Mandal notes, in critiquing the fashion in which the Punjab and Haryana High Court dealt with the testimony of a mentally disabled and partially paralyzed prosecutrix²², stamping a prosecutrix with the badge of

²² **Samitri and Ors. v. State of Haryana**, 2010 SCC OnLine P&H 2245.

complete helplessness, merely on the basis of disability, is an inapposite course of action. He notes:

“the entire rationale behind the conviction of the accused turned on sympathy for the helpless prosecutrix and her inability to physically resist the aggressor. Even if one agrees with the judge that there cannot be a single standard of burden of proof for the disabled and the able-bodied, a differentiated scale of burden of proof must be based on the concept of vulnerability, not victimhood.”²³

28 Instead, our aim is to highlight the increased vulnerability and reliance on others that is occasioned by having a disability which makes women with disabilities more susceptible to being at the receiving end of sexual violence. As the facts of this case make painfully clear, women with disabilities, who inhabit a world designed for the able-bodied, are often perceived as “soft targets” and “easy victims” for the commission of sexual violence. It is for this reason that our legal response to such violence, in the instant case as well as at a systemic level, must exhibit attentiveness to this salient fact.

29 As the analysis by the Sessions Judge and High Court makes clear, a critical feature of this case is the fact that PW2 is blind since birth. It would be overly simplistic and reductionist to reduce her personality to her disability alone. Equally, however, the Court has to exhibit sensitivity to the heightened risk of violence and abuse that she was rendered susceptible to, by reason of her disability. We would like to utilize the facts of this case as a launching point to explore a disturbing trend that this case brings into sharp focus and is

²³ Saptarshi Mandal, *The Burden of Intelligibility: Disabled Women's Testimony In Rape Trials*, Indian Journal of Gender Studies, 20 No. 1 (2013): 1-29, p. 20 (“**Mandal, Disabled Women Testimony in Rape Trials**”).

symptomatic of – that of sexual violence against women and girls with disabilities and to set in motion a thought process for how the structural realities resulting in this state of affairs can be effectively addressed. In this part of the judgment, we will first highlight the unique reasons that make these women more vulnerable to being at the receiving end of sexual violence, with the help of some illustrations. Thereafter, we will outline some challenges that are faced by such women in accessing the criminal justice system generally and the judicial system in particular. We will then outline some measures that can be taken to lower the barriers faced by them. We will finally conclude by outlining the judicial approach which should be adopted for assessing their testimony.

Unique vulnerability of women and girls with disabilities

30 An April 2018 report by Human Rights Watch, titled ‘Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India’²⁴ offers a thoroughgoing assessment of the problem of sexual violence against women with disabilities. The report documents the stories of 17 survivors of sexual violence – 8 girls and 9 women – who live with a spectrum of physical, sensory, intellectual and psychosocial disabilities.²⁵

²⁴ Human Rights Watch, “*Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India*”, available at <https://www.hrw.org/report/2018/04/03/invisible-victims-sexual-violence/access-justice-women-and-girls-disabilities>, 3 April 2018 (“**HRW Report**”).

²⁵ HRW Report, *supra* n. 24, p. 12.

31 As the report points out, women and girls with different disabilities face a high risk of sexual violence:

“Those with physical disabilities may find it more difficult to escape from violent situations due to limited mobility. Those who are deaf or hard of hearing may not be able to call for help or easily communicate abuse, or may be more vulnerable to attacks simply due to the lack of ability to hear their surroundings. Women and girls with disabilities, particularly intellectual or psychosocial disabilities, may not know that non-consensual sexual acts are a crime and should be reported because of the lack of accessible information. As a result, they often do not get the support they need at every stage of the justice process: reporting the abuse to police, getting appropriate medical care, and navigating the court system.”²⁶

32 In India, no disaggregated data is maintained on the extent of violence against women and girls with disabilities. This poses a formidable obstacle to understanding the problem better and designing suitable solutions. As Rashida Manjoo, the United Nations Special Rapporteur on violence against women, noted, this lack of data “renders the violence committed against women with disabilities invisible.”²⁷

33 The HRW report points to two studies that quantify the scale of this problem. A 2004 survey in Orissa conducted in 12 districts with 729 respondents found that nearly all of the women and girls with disabilities surveyed were beaten at home, and 25 percent of women with intellectual disabilities had been raped.²⁸

²⁶ *Id* at p. 4.

²⁷ UN Human Rights Council, “*Report of the Special Rapporteur on violence against women, its causes and consequences*,” Rashida Manjoo,” A/HRC/26/38/Add.1. available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-38-Add1_en.doc, 1 April 2014, para 72.

²⁸ S. Mohapatra and M. Mohanty, “*Abuse and Activity Limitation: A Study on Domestic Violence Against Disabled Women*” in Odisha,” available at

In the same vein, a 2011 study found that 21 percent of the 314 women with disabilities surveyed had faced emotional, physical or sexual violence from someone other than their intimate partner.²⁹

34 The HRW Report brings to light several harrowing examples of circumstances in which a survivor's disability was exploited by those perpetrating sexual violence. To illustrate, the report describes the story of a woman with low vision from Bhubaneswar, Odisha who alleged that she was raped in June, 2013. The report notes:

“The police did not help ...get legal aid. The staff of the [residential shelter home] helped her to find a lawyer, but the lawyer they found was not free of cost. It has been tough for her to continue with the lawyer. This has affected the progress of the case.”³⁰

Interaction of disabled survivors of sexual violence with the criminal justice system and the judiciary

35 In the wake of the Nirbhaya rape incident that shocked the conscience of the nation, Indian criminal law underwent a series of changes. The Justice J.S. Verma Committee, set up to suggest amendments to the law, attached special emphasis to creating an enabling environment to enable women with disabilities to report cases of sexual violence and to obtain suitable redress. As the Committee noted:

<http://swabhiman.org/userfiles/file/Abuse%20and%20Activity%20Limitation%20Study.pdf>, 2004 referred in HRW Report, *supra* n. 24, at footnote 19.

²⁹ CREA, “*Count Me In! Violence Against Disabled, Lesbian, and Sex-working Women in Bangladesh, India, and Nepal*”,

<http://www.creaworld.org/sites/default/files/The%20Count%20Me%20In%21%20Research%20Report.pdf>, 2011 referred in HRW Report, *supra* n. 24, at footnote 20.

³⁰ HRW Report, *supra* n. 24, p. 8.

“6. A special procedure for protecting persons with disabilities from rape, and requisite procedures for access to justice for such persons is also an urgent need. Amendments to the Code of Criminal Procedure, which are necessary, have been suggested.”³¹

36 The Committee’s suggestions translated into changes in the Indian Penal Code and the Criminal Procedure Code. Some key changes were as follows:

- (i) When the victim of the offences specified in the provision is either permanently or temporarily mentally or physically disabled, the FIR shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of a special educator or an interpreter, as the case may be.³² Such information may also be video-graphed.³³
- (ii) The same accommodations, as outlined above, have also been made as regards the recording of confessions and statements.³⁴ Further, as regards those who are physically and mentally disabled, such a statement shall be considered a statement in lieu of examination-in-chief, obviating the need for it to be recorded at the time of trial.
- (iii) The amendments also sought to put in place a framework to enable victims with disabilities to participate in a test identification parade. In such cases, a judicial magistrate will oversee the procedure to ensure the witness is

³¹ JS Verma Committee Report, *supra* n. 18 .

³² CrPC, Section 154(1) proviso 2, (a).

³³ CrPC, Section 154(1) proviso 2, (b).

³⁴ CrPC, Section 164 (5A) (a), provisos 1 and 2.

supported in identifying the accused with a means they find comfortable.³⁵

This process must be video-graphed.³⁶

37 Further, guidance issued by the Union Ministry of Health and Family Welfare notes the challenges faced by survivors with disabilities in reporting cases given the barriers to communication, their dependency on caretakers, their complaints not being taken seriously and the lack of an appropriate environment which encourages them to express their grievances and complaints.³⁷ In addition, unfamiliar and stressful court environments pose a heightened challenge, during protracted cases, for such women. Lack of information about their entitlements under the law, as well as the right to seek legal representation, compels them to be mute and helpless spectators.³⁸

38 Certain concerns have also been highlighted by the Committee on the Rights of Persons with Disabilities in its concluding observations on the initial report on India. These include lack of measures to identify, prevent and combat all forms of violence against persons with disabilities; lack of disaggregated statistical data in National Crime Records Bureau on cases of gender-based violence against women and girls with disabilities, including violence inflicted by intimate partners; limited availability of accessible shelters for women with

³⁵ CrPC, Section 54A, proviso 1.

³⁶ CrPC, Section 54A, proviso 2.

³⁷ Ministry of Health and Family Welfare, Guidelines and Protocols: Medico-legal care for survivors/victims of sexual violence, 16 May 2019, *available at* <https://main.mohfw.gov.in/sites/default/files/953522324.pdf>, p. 14.

³⁸ HRW Report, *supra* n. 24, p. 7.

disabilities who are victims of violence; and lack of effective remedies for persons with disabilities facing violence, including rehabilitation and compensation.³⁹

39 While changes in the law on the books mark a significant step forward, much work still needs to be done in order to ensure that their fruits are realized by those for whose benefit they were brought. In this regard, we set out below some guidelines to make our criminal justice system more disabled-friendly.

- (i) The National Judicial Academy and state judicial academies are requested to sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. This training should acquaint judges with the special provisions, concerning such survivors, such as those outlined above. It should also cover guidance on the legal weight to be attached to the testimony of such witnesses/survivors, consistent with our holding above. Public prosecutors and standing counsel should also undergo similar training in this regard. The Bar Council of India can consider introducing courses in the LL.B program that cover these topics and the intersectional nature of violence more generally;
- (ii) Trained special educators and interpreters must be appointed to ensure the effective realization of the reasonable accommodations embodied in the Criminal Law Amendment Act, 2013. All police stations should maintain a database of such educators, interpreters and legal aid providers, in order to facilitate easy access and coordination;

³⁹ Committee on the Rights of Persons with Disabilities, *“Concluding Observations on the Initial Report Of India”*, GE.19-18639(E) available at <https://digitallibrary.un.org/record/3848327?ln=en>, 29 October 2019, para 34.

- (iii) The National Crimes Record Bureau should seriously consider the possibility of maintaining disaggregated data on gender-based violence. Disability must be one of the variables on the basis of which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken;
- (iv) Police officers should be provided sensitization, on a regular basis, to deal with cases of sexual violence against women with disabilities, in an appropriate way. The training should cover the full life cycle of a case involving a disabled survivor, from enabling them to register complaints, obtain necessary accommodations, medical attention and suitable legal representation. This training should emphasize the importance of interacting directly with the disabled person concerned, as opposed to their care-taker or helper, in recognition of their agency; and
- (v) Awareness-raising campaigns must be conducted, in accessible formats, to inform women and girls with disabilities, about their rights when they are at the receiving end of any form of sexual abuse.

40 We hasten to add that these suggestions are not a reflection of the manner in which the investigation, enquiry and trial were conducted in the instant case. They simply represent our considered view on the systemic reforms needed to ensure that cases such as the instant one are dealt with in the most appropriate way.

Testimony of disabled prosecutrix:

41 Another feature of the case that we would like to dwell on relates to the testimony of the prosecutrix, PW2. In his judgment, the Sessions Judge noted as follows:

“21. **Identification of the accused by the victim girl:-** It is needless to say that identifying the accused basing on the voice is weak type of evidence. Coming to the present facts and circumstances of the case, P.W.2 is blind by birth as the access of the accused to victim proved by the prosecution she can easily identify the accused by hearing his voice. Moreover, P.W.1, P.W.3, P.W.4 and P.W.5 and some others caught hold the accused when he opened the door of the house of P.W.1, on the date of the incident and the evidence of the police officials also corroborates with the witnesses who caught hold of the accused and handed over him to P.W.11 and on the instructions of P.W. 11, the accused was taken to Mahanandi Police Station. It was suggested to P.W.2 that her statement that she identified the accused with his voice is false. In view of the categorical evidence of P.W.1, P.W.3, P.W.4, so also the admission made by the accused in 313 Cr.P.C examination that he used to visit the house of P.W.1 to call the brothers of the victim for doing coolie work, the above suggestion has no legs to stand. The above evidence would amply prove that the victim has successfully identified the accused and her evidence cannot be doubted simply because she is a blind girl.”

42 In the High Court, the defense sought to cast doubt on the testimony of the prosecutrix by arguing that she would have been unable to identify the accused due to her disability. While the above plea was not pressed by the appellant in this Court, we would like to take this opportunity to affirm the conclusion of the Sessions Judge and to clarify the position of law on this point.

43 There have been instances where the testimony of a disabled prosecutrix has not been considered seriously and treated at an equal footing as that of their

able-bodied counterparts. One such instance is the judgment of this Court in **Mange v. State of Haryana**⁴⁰, where the testimony of a thirteen year-old girl who was deaf and mute was not recorded and the conviction was confirmed on the account of an eye witness and supported by medical evidence. This Court in affirming the conviction noted that the non-examination of the prosecutrix was not a major infirmity in the prosecution's case "apart from being a child witness, she was also deaf and dumb and no useful purpose would have been served by examining her." We are of the considered view that presumptions of such nature which construe disability as an incapacity to participate in the legal process reflect not only an inadequate understanding of how disability operates but may also result in a miscarriage of justice through a devaluation of crucial testimonies given by persons with disabilities. The legal personhood of persons with disabilities cannot be premised on societal stereotypes of their supposed "inferiority", which is an affront to their dignity and a negation of the principle of equality.

44 A survey and analysis of High Court judgments by Saptarshi Mandal indicates that the testimony of the disabled witnesses is devalued by not recording the testimony of the prosecutrix at all; or recording it without adherence to correct legal procedure, thereby rendering it ineffectual; dismissal of the testimony for its lack of intelligibility or for not being supported by the condition of her body.⁴¹

⁴⁰ (1979) 4 SCC 349.

⁴¹ Mandal, Disabled Women Testimony in Rape Trials, *supra* n. 23, p. 6.

45 This kind of a judicial attitude stems from and perpetuates the underlying bias and stereotypes against persons with disabilities. We are of the view that the testimony of a prosecutrix with a disability, or of a disabled witness for that matter, cannot be considered weak or inferior, only because such an individual interacts with the world in a different manner, vis-a-vis their able-bodied counterparts. As long as the testimony of such a witness otherwise meets the criteria for inspiring judicial confidence, it is entitled to full legal weight. It goes without saying that the court appreciating such testimony needs to be attentive to the fact that the witness' disability can have the consequence of the testimony being rendered in a different form, relative to that of an able-bodied witness. In the case at hand, for instance, PW2's blindness meant that she had no visual contact with the world. Her primary mode of identifying those around her, therefore, is by the sound of their voice. And so PW2's testimony is entitled to equal weight as that of a prosecutrix who would have been able to visually identify the appellant.

C.3 The 'Caste' that is Difficult to Cast Away: Protection of Members of Scheduled Castes and Scheduled Tribes

46 Social movements in India for securing justice to those who have suffered centuries of caste-based discrimination paved way for the enactment of the SC & ST Act in 1989 to prevent commission of atrocities against members of the Scheduled Caste and Scheduled Tribe⁴² communities. The Act also falls within

⁴² "SC & ST"

the purview of Article 17 of the Constitution, which prohibits untouchability. The

Statement of Objects and Reasons of the Act states the following:

“1. Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.

2. Because of the awareness created amongst the Scheduled Castes and the Scheduled Tribes through spread of education, etc., they are trying to assert their rights and this is not being taken very kindly by the others. When they assert their rights and resist practices of un-touchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. **When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty.** Occupation and cultivation of even the government allotted land by the Scheduled Castes and the Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests of late, **there has been an increase in the disturbing trend of commission of certain atrocities** like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and Scheduled Tribes and **rape of women belonging to the Scheduled Castes and the Scheduled Tribes.** Under the circumstances, the existing laws like the protection of Civil Rights Act, 1955 and the normal provisions of the Indian Penal Code have been found to be inadequate to check these crimes. A special legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

3. The term 'atrocities' has not been defined so far. It is considered necessary that not only the term 'atrocities' should be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. It is also proposed to enjoining, on the States and the Union territories to take specific preventive and punitive measures to protect the Scheduled Castes and the Scheduled Tribes from

being victimised and where atrocities are committed, to provide adequate relief and assistance to rehabilitate them.”

(emphasis added)

47 While the Statement of Objects and Reasons of the Act specifically mentions commission of rapes against SC & ST women as a form of atrocity committed against the SC & ST communities, it does not specifically articulate the distinct disadvantage women of these communities face on account of casteism, patriarchy and poverty at the same time. Shreya Atrey notes that while the anti-caste movements began in early 1900s and saw active participation of SC & ST women, their oppression was imagined only on the basis of caste rather than patriarchy⁴³. On the other hand, the mainstream feminist movement also failed to take into consideration the specific forms of oppression that SC & ST women face not only at the hands of upper caste men but also upper caste women. To reframe the words of the Combahee River Collective Statement, a classic text in US anti-racist feminism - the SC & ST women *struggled together with* SC & ST men against casteism, while they also *struggled with* men about sexism.⁴⁴ Adrija Dey in her work has specifically highlighted that class, caste, geography and religion play a pivotal role in how gender violence is perceived and how punishments are meted out in the criminal justice system.⁴⁵ How pervasive sexual violence is against women from SC & ST community is emphatically stated by V. Geetha in extract her book titled ‘Undoing Impunity’:

⁴³ SHREYA ATREY, *INTERSECTIONAL DISCRIMINATION*, Oxford University Press) 2019, p. 69.

⁴⁴ Combahee River Collective, *The Combahee River Collective Statement*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY, Barbara Smith ed., (New York: Kitchen Table/Women of Color Press, 1983; reprint, New Brunswick, N.J.: Rutgers University Press 2000) 267. The original quote read, “We struggle together with Black men against racism, while we also struggle with Black men about sexism.”

⁴⁵ A. Dey. ‘Others’ Within the ‘Others’: An Intersectional Analysis of Gender Violence in India, *Gender Issues* 36, 357–373 (2019).

“As for sexual violence, Dalit women activists understood it to be part of a continuum of violence that Dalit women experienced: in a life-world where food, water, clean living spaces are routinely denied to Dalit women, where their labour was exploited, and no protection available in their places of work, where to be in bondage to a landlord or petty trader was commonplace, and at all times they are viewed as sexually available, and humiliated in their bodily being, sexual violence emerged as not an exceptional act of violence, but the most concentrated expression of a fundamental animus against Dalits”⁴⁶

48 The above discussion highlights the social and economic context in which sexual violence against women from SC & ST communities occurs. This contextualized legal analysis has to be adopted by the Court which is sensitive to the nature of evidence that is likely to be produced in a case where various marginalities intersect. In the present case, a distinct individualized experience for PW2 is created on account of her gender, caste and disability due to her association with wider groups that face a societal disadvantage.

C.4 Section 3(2)(v) of SC & ST Act

49 Section 3(2)(v) of the SC and ST Act as it stood at the material time read as follows:

“ 3. Whoever not being a member of a Scheduled Caste or Scheduled Tribe ...

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;”

⁴⁶ V. Geetha, UNDOING IMPUNITY: SPEECH AFTER SEXUAL VIOLENCE, (Zubaan, 2016), Chapter 11.

50 Under Section 3(2)(v), an enhanced punishment of imprisonment for life with fine is provided where

- (i) The offence is committed by a person who is not a member of a Scheduled Caste or Scheduled Tribe;
- (ii) The offence arises under the Penal Code and is against a person or property and is punishable with imprisonment for a term of ten years or more; and
- (iii) The offence is committed “on the ground that such person is a member of a Scheduled Caste or Scheduled Tribe” or such property belongs to such a person.

The key words are “on the ground that such person is a member of a SC or ST”. The expression “on the ground” means “for the reason” or “on the basis of”. The above provision (as it stood at the material time prior to its amendment, which will be noticed later) is an example of a statute recognizing only a single axis model of oppression. As we have discussed above, such single axis models require a person to prove a discrete experience of oppression suffered on account of a given social characteristic. However, when oppression operates in an intersectional fashion, it becomes difficult to identify, in a disjunctive fashion, which ground was the basis of oppression because often multiple grounds operate in tandem. Larrisa Behrendt, an aboriginal legal scholar from Australia, has poignantly stated the difficulty experienced by women facing sexual assault, who are marginalised on different counts, to identify the source of their oppression:

“When an Aboriginal woman is the victim of a sexual assault, how, as a black woman, does she know whether it is because she is hated as a woman and is perceived as inferior or if she is hated because she is Aboriginal, considered inferior and promiscuous by nature?”⁴⁷

51 Being cognizant of the limitation of Section 3(2)(v) – as it stood earlier - in dealing with matters of intersectionality, we are however bound to apply the standard that has been laid down in the law. The expression “on the ground” was considered in a two-judge Bench judgment of this Court in **Dinesh Alias Buddha v. State of Rajasthan**⁴⁸, where the Court speaking through Justice Arijit Pasayat held:

“15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. **It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste.**”

52 The Court held that in the absence of evidence to that effect, the offence under Section 3(2)(v) would not stand established. This principle was subsequently followed in a two judge Bench judgment of this Court in **Ramdas and Others v. State of Maharashtra**⁴⁹ where it was held that merely because a woman belongs to the SC & ST community, the provisions of the SC & ST Act would not be attracted in a case of sexual assault. This Court observed that there

⁴⁷ Larissa Behrendt, *Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse*, 1 Australian Feminist Law Journal 1, (1993), p. 35.

⁴⁸ (2006) 3 SCC 771.

⁴⁹ (2007) 2 SCC 170.

was no evidence to prove the commission of offence under Section 3(2)(v) of the SC & ST Act.

53 The contours of the terms “on the ground of” have been explicated by this Court in the following cases. In **Ashrafi v. State of Uttar Pradesh**⁵⁰, a two judge Bench of this Court held that conviction under Section 3(2)(v) of the SC & ST Act cannot be sustained because the prosecution could not prove that the rape was committed only on the ground that the woman belonged to the SC & ST community. This Court speaking through Justice R Banumathi held:

“9.The evidence and materials on record do not show that the Appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. **In the absence of evidence proving intention of the Appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the Appellant Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained.**” (emphasis added)

54 In another judgment of this Court in **Khuman Singh v. State of MP**⁵¹, Justice R Banumathi speaking for this Court held :

“As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to “Khangar”-Scheduled Caste is not disputed. **There is no evidence to show that the offence was committed only on the ground that the**

⁵⁰ (2018) 1 SCC 742 (“**Ashrafi**”).

⁵¹ Criminal Appeal 1283 of 2019 decided on 27 August 2019 (“**Khuman Singh**”).

victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable.”

..

(emphasis supplied)

55 In the above two extracts, this Court has interpreted Section 3(2)(v) to mean that the offence should have been committed “**only** on the ground that the victim was a member of the Scheduled Caste.” The correctness of this exposition. Is debatable. The statutory provision does not utilize the expression “only on the ground”. Reading the expression “only” would be to add a restriction which is not found in the statute. The statute undoubtedly uses the words “on the ground’ but the juxtaposition of “the” before “ground” does not invariably mean that the offence ought to have been committed only on that ground. To read the provision in that manner will dilute a statutory provision which is meant to safeguard the Scheduled Castes and Scheduled Tribes against acts of violence which pose a threat to their dignity. As we have emphasized before in the judgment, an intersectional lens enables us to view oppression as a sum of disadvantage resulting from multiple marginalized identities. To deny the protection of Section 3 (2) (v) on the premise that the crime was not committed against an SC & ST person solely on the ground of their caste identity is to deny how social inequalities function in a cumulative fashion. It is to render the experiences of the most marginalized invisible. It is to grant impunity to perpetrators who on account of their privileged social status feel entitled to commit atrocities against socially and economically vulnerable communities. This is not to say that there is no requirement to establish a causal link between the harm suffered and the ground,

but it is to recognize that how a person was treated or impacted was a result of interaction of multiple grounds or identities. A true reading of Section 3(2)(v) would entail that conviction under this provision can be sustained as long as caste identity is one of the grounds for the occurrence of the offence. In the view which we ultimately take, a reference of these decisions to a larger bench in this case is unnecessary. We keep that open and the debate alive for a later date and case.

56 If the evidence in this case was sufficient to establish the commission of the offence on the ground that PW2 was a member of a Scheduled Caste, a fresh look at the judgments in **Ashrafi** (supra) and **Khuman Singh** (supra) would have been warranted. However, a close look at the evidence would demonstrate that the prosecution has not led evidence to prove the ingredients of section 3(2)(v). Unfortunately, there has been a serious gap in the evidence on that count. In the present case, PW11 who was the Investigating Officer deposed:

“PW 1 and PW2 did not state before me that since she belongs to Schedule Caste the accused committed the offence. Part 1 C.D does **not** disclose in specific that the accused was handed over to the Circle. 'Inspector of police. Witness adds by the time he reached the scene of offence the Sub Inspector and Circle inspector of police were present and the witnesses present there handed over to the accused to them in turn he instructed them to take the accused to Mahanandi Police Station. It is not true to suggest that my statement that the accused was handed over to Sub Inspector of police or Circle Inspector of police is false as accused was not present at the scene of offence.”

57 The Sessions Judge noticed the deposition of PW11. However, the Sessions Judge noted that Exhibit P-1 disclosed that PW 2 belongs to a Scheduled Caste. The Sessions Judge also observed in paragraph 39 of the

judgment that PW1, who is the mother of PW2 is an “illiterate village rustic woman” and merely because she did not mention in the report or statement to the police that the accused committed the offence on the ground that PW2 belonged to the Scheduled Caste is not fatal to the case of the prosecution under Section 3(2)(v) of the SC & ST Act. The Sessions Judge has also made observations in that regard in paragraph 40 of the judgment which has been extracted earlier where he stated that the accused would not have dared to commit the crime if PW2 belonged to an upper caste community particularly in a village atmosphere. In appeal, the submission that the ingredients of the offence under Section 3(2)(v) were not established was specifically urged before the High Court. The submission was dismissed with the observation that “even otherwise still the offence under Section 376(1) of the Penal Code is made out”. Both the Sessions Judge as well as the High Court have failed to notice the crucial ingredient of Section 3(2)(v) (as it stood at the material time prior to its substitution by Act 1 of 2016)⁵².

⁵² Section 3(2)(v) of the SC & ST Act, prior to its amendment, read:

“(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, (v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member shall be punishable with imprisonment for life and with fine”

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, w.e.f 26 January 2016, amended Section 3(2)(v) and currently states:

“(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, (v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property [knowing that such person is a member of a Scheduled Caste or Scheduled Tribe or such property belongs to such member] shall be punishable with imprisonment for life and with fine”.

58 The issue as to whether the offence was committed against a person on the ground that such person is a member of a SC or ST or such property belongs to such member is to be established by the prosecution on the basis of the evidence at the trial. We agree with the Sessions Judge that the prosecution's case would not fail merely because PW1 did not mention in her statement to the police that the offence was committed against her daughter because she was a Scheduled Caste woman. However, there is no separate evidence led by the prosecution to show that the accused committed the offence on the basis of the caste identity of PW2. While it would be reasonable to presume that the accused knew the caste of PW2 since village communities are tightly knit and the accused was also an acquaintance of PW2's family, the knowledge by itself cannot be said to be the basis of the commission of offence, having regard to the language of Section 3(2)(v) as it stood at the time when the offence in the present case was committed. As we have discussed above, due to the intersectional nature of oppression PW2 faces, it becomes difficult to establish what led to the commission of offence – whether it was her caste, gender or disability. This highlights the limitation of a provision where causation of a wrongful act arises from a single ground or what we refer to as the single axis model.

59 It is pertinent to mention that Section 3(2)(v) was amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which came into effect on 26 January 2016. The words “*on the ground of*” under Section 3(2) (v) have been substituted with “*knowing that such person is a member of a Scheduled Caste or Scheduled Tribe*”. This has

decreased the threshold of proving that a crime was committed on the basis of the caste identity to a threshold where mere knowledge is sufficient to sustain a conviction. Section 8 which deals with presumptions as to offences was also amended to include clause (c) to provide that if the accused was acquainted with the victim or his family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise. The amended Section 8 reads as follows:

“8. Presumption as to offences. - In a prosecution for an offence under this Chapter, if it is proved that

(a) the accused rendered [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;

(b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

[(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.]”

60 The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, “high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration” and recommends inclusion of provisions of SC & ST Act while registering cases of

gendered violence against women from SC & ST communities⁵³. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of “on the ground” under Section 3(2)(v) as “only on the ground of”. The current regime under the SC & ST Act, post the amendment, has facilitated the conduct of an intersectional analysis under the Act by replacing the causation requirement under Section 3(2)(v) of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these.

61 However, since Section 3(2) (v) was amended and Clause (c) of Section 8 was inserted by Act 1 of 2016 with effect from 26 January 2016 these amendments would not be applicable to the case at hand. The offence in the present case has taken place before the amendment, on 31 March 2011. Therefore, we hold that the evidence in the present case does not establish that the offence in the present case was committed on the ground that such person is a member of a SC or ST. The conviction under Section 3(2)(v) would consequently have to be set aside.

⁵³ Parliament Standing Committee Report on Atrocities Against Women and Children, 15 March 2021, 107 *available at* https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/15/143/230_2021_3_14.pdf.

C.5 Punishment under Section 376 of the IPC

62 Mr Harinder Mohan Singh, learned Counsel has submitted that as a sequel to the setting aside of the conviction under Section 3(2)(v), the imposition of a sentence of imprisonment for life for the offence under section 376 needs to be modified. In this context, learned Counsel relied upon the provisions of Section 376(1).

63 Now Section 376(1), as it stood at the material time prior to its substitution by Act 13 of 2013, was substituted by the Criminal Law (Amendment) Act 1983 (Act 43 of 1983) with effect from 25 December 1983. Section 376(1) as substituted by the amendment read as follows :

“376. Punishment to rape: (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.”

Essentially, the submission which has been urged on behalf of the appellant is that under Section 376(1) as it then stood, Parliament had made provisions for:

- (i) A minimum sentence of seven years;

- (ii) The imposition of a sentence of imprisonment for a term of less than seven years for adequate and special reasons to be recorded by the Court;
- (iii) A term of imprisonment extending to ten years; and
- (iv) A term of imprisonment for life.

In the context of (iii) and (iv) above, the words used in Section 376(1) were “but which may be for life or for a term which may extend to ten years”.

64 On behalf of the appellant it has been urged that in the present case the Sessions Judge proceeded to impose a term of imprisonment for life on the basis that an offence under Section 3(2)(v) was established. If it is held that the offence under Section 3(2)(v) has not been established, the Sessions Judge, it was urged, erred in taking the view that the court was not inclined to exercise its discretion “to give lesser punishment to the accused”. In other words, it was submitted that the Sessions Judge proceeded on the basis that a sentence of imprisonment for life was the norm and there was a discretion to award a lesser punishment, which is erroneous.

65 In evaluating the submission, it is necessary to note that the Sessions Judge came to the conclusion that the appellant was guilty of an offence under Section 3(2)(v) of the SC and ST Act and, independent of that, also of an offence punishable under Section 376(1) of the Penal Code. In considering the sentence to be imposed in respect of the two distinct offences, the Sessions Judge held that:

- (i) A sentence of imprisonment for life should be imposed for the offence under Section 376(1); and
- (ii) A sentence of imprisonment for life would have to be imposed for the offence under Section 3(2)(v) of the SC and ST Act.

66 For the reasons which we have indicated earlier we have come to the conclusion that the ingredients of the offence under Section 3(2)(v) of the SC and ST Act were not established. The issue which survives for consideration is as to whether the punishment of imprisonment for life in respect of the offence under Section 376(1) should have been imposed.

67 On a plain reading of Section 376(1), as it stood after its insertion with effect from 25 December 1983 by Act 43 of 1983, it is evident that a sentence of imprisonment for life is one of the sentences contemplated by the provision. The Criminal Law Amendment Act 1983 was introduced with the aim of bringing widespread amendments to the laws of rape in the country, making it difficult for the offenders to escape conviction. The stated object and purpose of the Act was:

“There have been pressing demands inside and outside Parliament for the amendment of the law relating to rape so that it becomes more difficult for the offenders to escape conviction and severe penalties are imposed on those convicted. [...]

2. [...] The changes proposed in the Bill have been formulated principally on the basis of the following considerations:-

[...]

(3) **minimum punishments for rape should be prescribed;**”

Pursuant to the above-mentioned objective, Section 376(1) provided that except for cases covered by sub-Section (2), a person committing rape shall be punished with imprisonment of either description for a term which shall not be less than seven years. However, the proviso stipulated that the court may for ‘adequate and special reasons’ to be mentioned in the judgment impose a sentence of imprisonment for a term of less than seven years. The minimum sentence of seven years could, in other words, be reduced to a lesser term only for adequate and special reasons to be recorded in the judgment. This Court has time and again noted that adequate and special reasons depend on the facts and circumstances of each case. These special and adequate reasons are an exception to the rule and must be used sparingly and interpreted strictly as held by this Court in **State of Madhya Pradesh v. Bala**⁵⁴. Section 376(1) however also stipulated that the term of imprisonment “may be for life or for a term of ten years”.

68 Subsequently, in 2013, post the Nirbhaya case, the Criminal Law Amendment Act 2013 was brought into force which amended Section 376(1). The Parliament sought to take a tougher stand on crime against women and limited the discretion of the judiciary regarding imposition of sentences for offences involving rape by providing a minimum punishment of seven years and a maximum punishment of life imprisonment, without any exceptions for reduction of sentence. In 2018, Section 376 has been further amended by the Criminal Law

⁵⁴ (2005) 8 SCC 1.

Amendment Act 2018 (Act 22 of 2018) by which the minimum punishment has been enhanced to ten years, with the maximum punishment remaining the same.

69 Having detailed the amendments in Section 376 by the Parliament, we are cognizant that we must apply the law as it was at the time of occurrence of the crime. The range of punishment within which we must exercise our judicial discretion is the imposition of a minimum punishment of 7 years (or less on existence of adequate and special reasons), or 10 years or imprisonment for life. In determining the appropriate sentence, this Court has consistently laid down that we must of necessity be guided by all the relevant facts and circumstances including

- (i) The nature and gravity of the crime;
- (ii) The circumstances surrounding the commission of the sexual assault;
- (iii) The position of the person on whom the sexual assault is committed;
- (iv) The role of the accused in relation to the person violated; and
- (v) The possibility of the rehabilitation of the offender.

The above factors are relevant for the determination of the quantum of punishment as held in **Ravji v. State of Rajasthan**⁵⁵, **State of Karnataka v. Krishnappa**⁵⁶, and **State of Punjab v. Prem Sagar**⁵⁷ among others.

⁵⁵ (1996) 2 SCC 175.

⁵⁶ (2000) 4 SCC 75.

⁵⁷ (2008) 7 SCC 550.

70 In addition to these factors, we must also be alive to the intersectional identity of PW2 and the underlying societal factors within which the offence was committed. PW2 is a woman who is blind since birth and is a member of a Scheduled Caste. These intersectional identities placed her in a uniquely disadvantageous position. The Chhattisgarh Pradesh High Court in **Tekan v. State of Madhya Pradesh (Now Chhattisgarh)**⁵⁸ dealt with the conviction of a person accused of raping a blind woman on multiple occasions, on the promise of marriage. The High Court was acutely aware of the misuse of the woman's disability by the accused and sentenced him to 7 years of rigorous imprisonment. The conviction and sentence were later upheld by this Court⁵⁹. This Court also dealt with the question of compensation to be paid to the prosecutrix and the physical disadvantage accruing to her on account of her disability. In doing so, Justice M Y Eqbal, speaking for the two-judge bench, noted:

"15. Coming to the present case in hand, victim being physically disadvantaged, she was already in a socially disadvantaged position which was exploited maliciously by the accused for his own ill intentions to commit fraud upon her and rape her in the garb of promised marriage which has put the victim in a doubly disadvantaged situation and after the waiting of many years it has worsened. It would not be possible for the victim to approach the National Commission for Women and follow up for relief and rehabilitation. Accordingly, the victim, who has already suffered a lot since the day of the crime till now, needs a special rehabilitation scheme." **(emphasis supplied)**

71 Similarly, we are also aware of the disadvantage faced by women (and persons generally) belonging to the Scheduled Castes and Scheduled Tribes. As

⁵⁸ 2014 Cri LJ 1409. Physical disability has been considered as an aggravating factor in sentencing by other High Courts as well. See, for e.g., **Rabindrayan Das v. State**, 1992 Cri LJ 269, Orissa High Court.

⁵⁹ (2016) 4 SCC 461.

explained above, it is difficult and, in our opinion, artificial to delineate the many different identities of an individual which overlap to place them in a disadvantaged position of power and create the circumstances for heinous offences such as rape to occur. At this point, it would be relevant to note that a series of decisions of this Court rendered by three-judge benches⁶⁰ and two-judge benches⁶¹, have stated that “*socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy*”. However, it is necessary to understand the context in which this finding was made. In all of these cases, the Court was dealing with the plea of mitigation of sentence awarded by the High Courts or the lower courts on the ground of existence of ‘adequate and special reasons’ *on account of the accused* being a member of the scheduled caste/tribe; belonging to a rural background; or being illiterate. It is on this count that the Court rejected such a plea given the heinous nature of the crime of rape and the gravity of the criminal act. In our opinion, these judgments do not bar us from taking a holistic view of the various intersectional identities which form a vital part of the facts and circumstances of the act and speak to the nature of the crime.

72 In the present case, several circumstances bearing on the sentence must be borne in mind. First, PW2, who was subjected to a sexual assault was blind since birth. Second, the appellant was known to the brothers of PW2, including PW3. The appellant used to visit the house in which PW2 resided with her

⁶⁰ **State of Karnataka v. Krishnappa** (2000) 4 SCC 75; **State of Madhya Pradesh v. Basodi** (2009) 12 SCC 318.

⁶¹ **State of Karnataka v. Raju** (2007) 11 SCC 490; **State of Rajasthan v. Vinod Kumar**, (2012) 6 SCC 770; **State of Madhya Pradesh v. Santosh Kumar** (2006) 6 SCC 1.

parents and brothers. Bereft of eye-sight, PW2 was able to identify the appellant by his voice with which she was familiar. Third, shortly before entering the home of PW2, the appellant enquired of PW1 where her sons were, when he was told that they were not at home. PW1 proceeded with her chores at a public water tap. Taking advantage of the absence of the members of the family from the family home, the appellant entered the house and subjected PW2 to a sexual assault. PW1 has deposed that when she entered the house together with PW3, PW4 and PW5 she found PW2 in a nude condition on the ground bleeding from the injuries sustained on her genitals. The nature and circumstances in which the offence has been committed would leave no manner of doubt that the appellant had taken advantage of the position of the PW2 who was blind since birth. He entered the house, familiar as he was with members of the family, in their absence and subjected PW2 to a sexual assault. PW2 belongs to a Scheduled Caste. The prosecution has not led evidence to prove that the offence, as we have noticed, was committed on the ground that she belongs to a Scheduled caste within the meaning of section 3(2)(v) of the SC and ST Act. This is a distinct issue. But the fact that PW2 belonged to a Scheduled Caste is not a factor which is extraneous to the sentencing process for an offence under Section 376. It is in that context, that we must read the observations of the Sessions Judge with a robust common sense perception of ground realities. The appellant was 27 years old, a mature individual who was working as a coolie together with the brothers of PW2 for a couple of years. The nature and gravity of the offence in the present case is serious in itself and it is compounded by the position of PW2 who was a visually disabled woman. A heinous offence has been committed on a woman belonging

to Scheduled Caste. The imposition of a sentence of imprisonment for life cannot be faulted.

D Conclusion and Summary of Findings

73 For the above reasons we have come to the conclusion that the conviction under Section 376(1) and the sentence imposed by the Sessions Judge must be affirmed. In the circumstances we order as follows:

- (i) The conviction of the appellant for an offence under Section 3(2)(v) of the SC and ST Act and the sentence imposed in respect of the offence is set aside and the appeal allowed to that extent; and
- (ii) The conviction of the appellant for an offence punishable under Section 376(1) of the Penal Code and the sentence of imprisonment for life is upheld. The fine of Rs 1,000/- and default imprisonment of six months imposed by the Sessions Judge and affirmed by the High Court shall also stand confirmed.

74 The appeal is disposed of in the above terms.

75 Pending application(s), if any, stand disposed of.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[M R Shah]

**New Delhi;
April 27, 2021**

Reportable

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

Civil Appeal Nos. 3766-3767 of 2020

Neena Aneja & Anr.

.... Appellants

Versus

Jai Prakash Associates Ltd.

.... Respondent

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

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A Background

1. On being enacted by Parliament, the Consumer Protection Act 2019¹ was published in the Gazette of India on 9 August 2019². By S.O. 2351(E) dated 15 July 2020, the material provisions of the Act of 2019 were notified to come into force on 20 July 2020. By S.O. 2421(E) dated 23 July 2020 several other provisions were brought into force, with effect from 24 July 2020. The appellants instituted a consumer case³ before the National Consumer Disputes Redressal Commission⁴ on 18 June 2020. The consumer case was instituted under the provisions of the erstwhile legislation, the Consumer Protection Act 1986⁵. The NCDRC by its order dated 30 July 2020 dismissed the consumer case on the ground that after the enforcement of the Act of 2019, its pecuniary jurisdiction has been enhanced from rupees one crore to rupees ten crores. The appellants' review petition was also dismissed by the NCDRC on 5 October 2020. In the present case, the claim of Rs. 2.19 crores is below the enhanced pecuniary jurisdiction of the NCDRC.

2. The complainants in the consumer case are in appeal.

3. The issue which arises in the appeals is whether a complaint which was filed and registered under the Act of 1986, before the new Act of 2019 came into force, has to be entertained under the provisions of the erstwhile legislation. In anticipation of the enforcement of the Act of 2019, an administrative notice was

¹ "Act of 2019"

² The Act was published in the Gazette of India Extraordinary, Part II, Section 1, No. 54 dated 9 August 2019

³ Consumer Case no.566 of 2020 (NCDRC)

⁴ "NCDRC"

⁵ "Act of 1986"

issued by the NCDRC on 17 July 2020 to allow the functioning of its registry for fresh filings on 18 July 2020, since the new law was to come into force on 20 July 2020. The appellants are also aggrieved by the fact that contrary to the position taken in its case, other Benches of the NCDRC have admitted complaints instituted before 20 July 2020. This grievance apart, the issue which arises in the appeals would turn upon a construction of Section 107 of the Act of 2019, among other provisions of the new legislation, and its interplay with Section 6 of the General Clauses Act 1897⁶. The analysis of the Court, despite the new legislation, will not proceed on a clean slate for there is precedent which holds the field. That both sides rely upon the line of precedent in the unfolding of their cases makes the interpretational task intricate. Our task will be to bring a solution that has a sense of cohesion, while harmonizing precedential learning with justice.

4. A brief narration of the facts would assist with context. Upon the payment of an advance of Rs.3.50 lacs on 25 November 2011 by the appellants, the respondent provisionally allotted a residential unit in a real-estate project described as KRESCENT Homes admeasuring a super built area of 114.27 square metres which was being developed by the respondent at Jaypee Greens, Noida. The total consideration was fixed at Rs.56.45 lacs and possession was intended to be conveyed within a period of 42 months from the execution of the agreement of the provisional allotment letter. The appellants have stated that between December 2011 till date, they have paid an amount of Rs. 53.84 lacs out of the total consideration of Rs.56.45 lacs.

⁶ “General Clauses Act”

5. On 13 June 2017 and 27 April 2020, the appellant sought a refund of the consideration together with interest at 18 per cent. On 18 June 2020, the appellants instituted a consumer complaint before the NCDRC for refund with interest. The consumer complaint has been dismissed by an order dated 30 July 2020 for want of pecuniary jurisdiction. A single member Bench of the NCDRC held that following the enforcement of the Act of 2019 on 20 July 2020, the limits of its pecuniary jurisdiction stands enhanced from rupees one crore to rupees ten crores and the complaint instituted by the appellants is consequently not maintainable. The appellants instituted a petition seeking a review of the order. The review petition was dismissed on 5 October 2020 leading to the institution of the appeal before this Court.

6. Section 21 of the Act of 1986 provided for the jurisdiction of the NCDRC:

“Jurisdiction of the National Commission. — Subject to the other provisions of this Act, the National Commission shall have jurisdiction—

(a) to entertain—

(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees **one crore**; and

(ii) appeals against the orders of any State Commission; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.” (***emphasis supplied***)

7. Under the Act of 1986, the enhancement of the pecuniary limits of the jurisdiction of the NCDRC to rupees one crore came in substitution of rupees twenty lacs with effect from 15 March 2003 as a result of Act 62 of 2002. Earlier the limit of rupees twenty lacs was substituted by Act 50 of 1993 for rupees ten lacs with effect from 18 June 1993.

8. Under Section 11, the jurisdiction of the District Commission to entertain original complaints was rupees twenty lacs⁷. Under Section 17, the State Consumer Disputes Redressal Commission⁸ had jurisdiction to entertain complaints where the value of the goods and services or compensation if any claimed exceeds rupees twenty lacs but does not exceed rupees one crore⁹.

9. The Act of 2019 was enacted by Parliament taking into account the experience which was gained in the administration of the earlier legislation and to meet new developments in the market place for products and services. The Statement of Objects and Reasons accompanying the introduction of the Bill in Parliament elucidates the rationale for the new law:

“Statement of Objects and Reasons

The Consumer Protection Act, 1986 (68 of 1986) was enacted to provide for better protection of the interests of consumers and for the purpose of making provision for establishment of consumer protection councils and other authorities for the settlement of consumer disputes, etc. Although, the working of the consumer dispute redressal agencies has served the purpose to a considerable extent under the said Act, the disposal of cases has been fast due to

⁷ The pecuniary limits were enhanced from rupees one lac to rupees five lacs by Act 50 of 1983 with effect from 18 June 1993. The limits were enhanced from rupees five lacs to rupees twenty lacs by Act 62 of 2002 with effect from 15 March 2003.

⁸ “SCDRC”

⁹ By Act 62 of 2002, these limits had been enhanced from the previous limits of rupees five lacs – rupees 20 lacs

various constraints. Several shortcomings have been noticed while administering the various provisions of the said Act.

2. Consumer markets for goods and services have undergone drastic transformation since the enactment of the Consumer Protection Act in 1986. The modern market place contains a plethora of products and services. The emergence of global supply chains, rise in international trade and the rapid development of e-commerce have led to new delivery systems for goods and services and have provided new options and opportunities for consumers. Equally, this has rendered the consumer vulnerable to new forms of unfair trade and unethical business practices. Misleading advertisements, tele-marketing, multi-level marketing, direct selling and e-commerce pose new challenges to consumer protection and will require appropriate and swift executive interventions to prevent consumer detriment. Therefore, it has become inevitable to amend the Act to address the myriad and constantly emerging vulnerabilities of the consumers. In view of this, it is proposed to repeal and reenact the Act.

3. Accordingly, a Bill, namely, the Consumer Protection Bill, 2018, was introduced in Lok Sabha on the 5th January, 2018 and was passed by that House on the 20th December, 2018. While the Bill was pending consideration in Rajya Sabha, the Sixteenth Lok Sabha was dissolved and the Bill got lapsed. Hence, the present Bill, namely, the Consumer Protection Bill, 2019.

4. The proposed Bill provides for the establishment of an executive agency to be known as the Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers; make interventions when necessary to prevent consumer detriment arising from unfair trade practices and to initiate class action including enforcing recall, refund and return of products, etc. This fills an institutional void in the regulatory regime extant. Currently, the task of prevention of or acting against unfair trade practices is not vested in any authority. This has been provided in a manner that the role envisaged for the CCPA complements that of the sector regulators and duplication, overlap or potential conflict is avoided.

5. The Bill envisages provisions for product liability action on account of harm caused to consumers due to a defective product or by deficiency in services. Further, provision of "Mediation" as an Alternate Dispute Resolution Mechanism has also been provided.

6. The Bill provides for several provision aimed at simplifying the consumer dispute adjudication process of the

Consumer Disputes Redressal Agencies, *inter alia* relating to enhancing the pecuniary jurisdiction of the Consumer Disputes Redressal Agencies; increasing minimum number of Members in the State Consumer Disputes Redressal Commissions and provisions for consumers to file complaints electronically, etc.

7. The Bill seeks to achieve the above objectives.”

10. Section 28(1) provides for the establishment of a District Consumer Disputes Redressal Commission¹⁰ in every district, subject to its establishment by a notification of the State Government¹¹. The jurisdiction of the District Commission in terms of Section 34 is to entertain complaints where the value of goods and services paid as consideration does not exceed one crore rupees. Section 42 provides for the establishment of a SCDRC in each State. The pecuniary limits of the original jurisdiction of the SCDRC under Section 47(1)(a) is to entertain original complaints where the value of goods and services paid as consideration exceeds rupees one crore but does not exceed rupees ten crores. Section 53 provides for the establishment of the NCDRC. Section 58(1)(a) contains the pecuniary limits of the jurisdiction of the NCDRC, which in the case of original complaints is where the value of goods and services paid as consideration exceeds rupees ten crores.

¹⁰ “**District Commission**”

¹¹ 28. (1) The State Government shall, by notification, establish a District Consumer Disputes Redressal Commission, to be known as the District Commission, in each district of the State: Provided that the State Government may, if it deems fit, establish more than one District Commission in a district.

(2) Each District Commission shall consist of—

(a) a President; and

(b) not less than two and not more than such number of members as may be prescribed, in consultation with the Central Government.

11. Section 107 contains the repeal and savings provision, which is in the following terms:

“107. Repeal and savings-

(1) The Consumer Protection Act, 1986 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(3) The mention of particular matters in sub-section (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.”

In terms of sub-section (1) of Section 107, the Act of 1986 stands repealed. Sub-section (2) is prefaced with a *non obstante* provision. Under sub-section (2) anything done or any action taken or purported to have been done or taken under the repealed legislation is deemed to have been done or taken under the corresponding provision of the new legislation, insofar as it is not inconsistent with the latter provisions. Sub-section (3) of Section 107 stipulates that the specification of the matters contained in sub-section (2) does not prejudice or affect the general application of Section 6 of the General Clauses Act (with regard to the effect of repeal). Having repealed, the Act of 1986, the new legislation has also made transitional provisions in Section 31¹², Section 45¹³ and

¹² 31. Transitional provision: Any person appointed as President or, as the case may be, a member of the District Commission immediately before the commencement of this Act shall hold office as such as President or, as the case may be, as member till the completion of his term for which he has been appointed.

¹³ 45. Transitional provision: Any person appointed as President or, as the case may be, a member of the State Commission immediately before the commencement of this Act shall hold office as such, as President or member, as the case may be, till the completion of his term.

Section 56¹⁴ for the continuance of persons appointed as members of the District Commission, the SCDRC and the NCDRC under the erstwhile legislation.

¹⁴ 56. Transitional provision: The President and every other member appointed immediately before the commencement of section 177 of the Finance Act, 2017 shall continue to be governed by the provisions of the Consumer Protection Act, 1986 and the rules made thereunder as if this Act had not come into force.

B Submissions

B.1 Submissions of the appellants

12. Mr P Vinay Kumar, learned Counsel appearing on behalf of the appellants urged the following submissions in support of the appeal:

- (i) Section 107(3) of the Act of 2019 gives full effect to the provisions of Section 6 of the General Clauses Act, which means that nothing in the repeal of the earlier legislation will affect pending proceedings which may continue as if the new legislation has not been enacted. Under the Act of 2019, the jurisdiction has been conferred on the SCDRC to hear complaints under the new Act. In order to vest the SCDRC with jurisdiction to hear complaints which were instituted before the NCDRC under the old Act, a specific provision for transferring the proceedings was required- which has not been provided. This is not the case where a statute has been amended by enhancement of pecuniary jurisdiction but involves the repeal of an old statute in which event a provision for transferring the cases to the new forum is essential;
- (ii) The new Act of 2019 affects substantive and vested rights and must necessarily be prospective; and
- (iii) The new legislation does not contain any provision for its retrospective operation.

A. Elaborating on the first limb of submissions, learned counsel urged that in several decisions of this Court, Section 6 of the General Clauses Act was

applied by the Court in order to save existing proceedings. In the present case, the law makers have specifically incorporated the applicability of Section 6 of the General Clauses Act, by making a provision in Section 107(3) of the Act of 2019. The question of examining the existence of vested rights arises only where there is a doubt over a savings provision or when Section 6 has not been made specifically applicable. In such cases, the Court has to scrutinize whether a vested right had arisen under the repealed statute, in which event the pending proceedings would be saved. However, where Section 6 is applicable, it covers a wider field so as to save not only vested rights but all rights covered by clauses (a) to (e) of Section 6.

- B. The next limb of the submissions is that substantial changes have been made in the provisions for appeal contained in the Act of 2019. For instance, the second proviso to Section 19 of the Act of 1986 required an aggrieved person to either deposit 50 per cent of the amount awarded by the SCDRC or Rs 25,000, whichever is less. However, in the Act of 2019, the second proviso to Section 51(1) stipulates that an appeal shall not be entertained by the NCDRC unless the appellant has deposited 50 per cent of the amount required under the order of the SCDRC. This provision substantially affects the vested right of a litigant and is not merely procedural in nature. In **Garikapati Veeraya v. N Subbiah Choudhry**¹⁵, the Constitution Bench of this Court has held that a right of appeal is not a mere matter of procedure but is a substantive right and that the institution

¹⁵ “**Garikapati**”; 1957 SCR 488

of a suit carries with it the implication that all rights of appeal then in force are preserved. Such a vested right can only be taken away either expressly or by necessary implication. Hence, the relevant date is the date of the institution of the suit and not when the case comes for hearing or for decision. In the present case, the earlier legislation was in force when the complaint was filed and hence the rights and obligations which accrued on that date would stand saved. As a result of the Act of 2019, a statutory appeal which was provided to the complainant to the Supreme Court against an order of the NCDRC has been taken away by stipulating that matters which will lie before the SCDRC will only be amenable to appeal before the NCDRC. From the thirty one Sections in the Act of 1986, the Act of 2019 has legislated for one hundred and seven Sections which in itself indicates that the change is not merely procedural, but substantial.

- C. The third limb of submissions is that there is no provision for transfer of pending cases in the new Act of 2019. Under Section 47 of the Act of 2019 of the new legislation, the jurisdiction of the SCDRC is to entertain complaints under the Act of 2019 above a certain value. The jurisdiction to entertain complaints under the erstwhile legislation could only have been conferred by an express statutory provision that transferred complaints filed under the old Act from the NCDRC to the SCDRC. Any direction for the transfer of existing cases would entail disturbing thousands of cases pending before the NCDRC and SCDRCs across the country. This would cause serious hardship and prejudice to consumers and a waste of judicial time invested till date. A similar question was dealt with by the NCDRC in

its Judgment 8 April 2011 in **Southfield Paints and Chemicals Pvt. Ltd. v. New India Assurance Co. Ltd.**¹⁶ which construed Amending Act 62 of 2002 by which the pecuniary limits of jurisdiction were enhanced with effect from 15 March 2003. Relying on the earlier decision in **Premier Automobiles Ltd. v. Dr Manoj Ramachandran**¹⁷, the NCDRC held that the amendments enhancing the pecuniary jurisdiction were prospective in nature. The legislature must be considered to be aware of this precedent.

D. Finally, it was urged that the Act of 2019 came into force on July 2020 while the complaint in the present case was instituted before the NCDRC on 18 June 2020. The dismissal of the complaint for want of pecuniary jurisdiction is in contravention of the administrative notice dated 17 July 2020 of the NCDRC. The administrative directions were complied with by other Benches of the NCDRC which have admitted a number of complaints instituted under the Consumer Protection Act 1986.

E. In sum and substance, therefore, it has been urged that:

- (i) Section 107 of the Act of 2019 read with Section 6 of the General Clauses Act saves pending legal proceedings; hence the complaint which was filed before the enforcement of the new legislation should be allowed to proceed before the NCDRC under the Act of 1986;
- (ii) The relevant date is the date of the institution of the complaint and not the date when the matter is heard or decided;

¹⁶ Consumer Case No. 286 of 2000 (NCDRC)

¹⁷ Revision Petitions Nos 400 to 402 of 1993 (NCDRC)

- (iii) The new legislation affects substantive rights of appeal to the NCDRC by making a deposit of 50 per cent of the decretal amount mandatory;
- (iv) In the absence of an express provision, the new legislation must operate prospectively; and
- (v) In the absence of a provision for transfer of pending cases, complaints which were instituted prior to the enforcement of the Act of 2019 should not be disturbed.

B.2 Submissions of the respondent

13.

A. Mr Krishnan Venugopal, learned Senior Counsel appearing on behalf of the respondent, supported the reasoning of the NCDRC and urged the following submissions:

- (i) The Statement of Objects and Reasons underlying the enactment of the Act of 2019 indicates that:
 - (a) The new legislation has been enacted to strengthen the remedies available to consumers;
 - (b) The legislature was conscious of the delays in the disposal of cases under the erstwhile legislation; and
 - (c) While enacting the new law, a conscious decision was taken to enhance the pecuniary limits of the jurisdiction of the District Commission, SCDRC and NCDRC to ensure that the

large proportion of cases can be resolved in the *fora* situated close to the complainants;

- (ii) The purpose of the Act of 2019, as envisaged in the Statement of Objects and Reasons, is further emphasized under Section 2(9)(iv) of the Act of 2019 under which consumer rights have been defined to include "the right to be heard and be assured that consumer interests will receive due consideration at appropriate *fora*";
- (iii) Sections 28, 42 and 53 provide for the establishment of the District Commission, SCDRC and NCDRC. Under Section 58(1)(a), the NCDRC is empowered to entertain complaints where the value of goods or services paid as consideration exceeds rupees ten crores. The expression 'entertain' has been construed in a broad and comprehensive sense to mean 'to adjudicate upon' in the decision of this Court in **Nusli Neville Wadia v. Ivory Properties**¹⁸;
- (iv) The basic principle of law is that when a statute is repealed, everything stands obliterated. Section 107(2) of the Act of 2019 covers concluded transactions while Section 107(3) preserves the application of Section 6 of the General Clauses Act. Section 6 is prefaced with the words "unless a different intention appears". Clause (c) of Section 6 is substantive in nature while clause (e) applies to pending proceedings. The precedents of this Court would indicate that Section 6(e) has been interpreted as extending to substantive proceedings, but a pure matter of procedure is excluded.

¹⁸"**Nusli Neville**"; (2020) 6 SCC 557: at paras 35 and 36

A change of forum, like matters of evidence and civil procedure is a pure matter of procedure. Section 6(e) would hence not be applicable where a new legislation results in a change of forum;

- (v) Where a law takes away a right of action or appeal, it is treated as a substantive alteration and does not apply to pending actions. A mere change in forum is to be distinguished from a substantive alteration. The Act of 2019 is a law which repeals the earlier legislation and created a new hierarchy of courts and it must, consequentially, be treated as retroactive;
- (vi) The right of appeal is a substantive right which accrues at the date of the institution of a proceeding. An amendment taking away this right imposes a substantive alteration and is therefore construed to be prospective. This principle does not apply where there is only a change of forum;
- (vii) The Act of 2019 does not abrogate existing rights. On the contrary, it preserves and provides for an additional right of appeal where, as a result of the legislation, a complaint which could earlier be filed before the NCDRC has to be filed before the SCDRC. A complaint before the SCDRC would have to be instituted before the District Commission. The right to appeal is therefore strengthened and not truncated;
- (viii) Section 34 empowers the District Commission with jurisdiction "to entertain complaints" and a similar provision has been made in Section 47(1)(a) pertaining to the SCDRC and Section 58(1)(a)

pertaining to the NCDRC. This expression emphasizes that it applies at every point of time when a matter is entertained for adjudication or for consideration on merits;

- (ix) The Act of 2019 abolished the old hierarchy of *fora* under the Act of 1986 and established adjudicatory *fora* afresh. The case pending before one of the *fora* governed by the Act of 1986 ceases to be pending because the Act of 2019 has, by its repeal, abolished the existing adjudicatory bodies. Sections 28, 42 and 53 established new adjudicatory bodies afresh under the Act of 2019. This is evident from the provisions of Section 31, 45 and 56 under which judicial personnel of the erstwhile *fora* were permitted to continue under the Act of 2019;
- (x) The Act of 2019 indicates a contrary intent within the meaning of Section 6 of the General Clauses Act; and
- (xi) The principle that a repeal of a statute obliterates the effects and consequence of the earlier legislation, is subject to three exceptions:
 - (a) Concluded transactions continue to be governed by the old law;
 - (b) Where a right of appeal or of action is abrogated or in a situation where clogs are imposed on the right, such rights continue to be preserved notwithstanding the repeal; and
 - (c) Where a substantive liability or a right is imposed or conferred, this would be treated as prospective. On the other

hand, the consistent view under Section 6 (e) is that it does not apply to a mere change of forum.

B. The sum and substance of the submissions which were urged by Mr Krishnan Venugopal, learned Senior Counsel is that where a law provides for a change in forum, this is treated as a matter of procedure and not of substance. The Act of 2019 is not a legislation merely enhancing the limits of the pecuniary jurisdiction by an amendment to the Act of 1986. On the contrary, the Act of 2019 is a completely new law, which abolished the hierarchy of tribunals under the erstwhile Act of 1986 and created a new adjudicatory hierarchy. As a matter of interpretation, the Act of 2019 clearly indicates an intention to the contrary as a result of which pending proceedings will not continue before the forums which existed under the Act of 1986. In other words, the limits of pecuniary jurisdiction which have been defined under the Act of 2019 will apply to all pending actions and a transfer of existing cases would be required in those cases where the jurisdiction to entertain the complaint lies within the pecuniary limits of the newly established forum. In support of his submissions, Mr Venugopal relied on a line of precedent which would be discussed while analyzing the rival contentions.

14. The rival submissions are now considered.

C Position of law on change of forum: An analysis of precedent

C.1 Venugopala Reddiar (1943- Federal Court 3 judges)

15. The discussion on the law begins with the decision of the Federal Court in **Venugopala Reddiar v. Krishnaswami Reddiar, alias Raja Chidambara Reddiar**¹⁹ which considered the validity of a pending proceeding when the court had lost territorial jurisdiction. Before 1937, when Burma was a part of British India, it was permissible under Section 17 of the Civil Procedure Code to include immovable property situated in Burma as a part of the subject matter of a suit. The principal respondent instituted a suit for the recovery of certain properties. A large portion of these properties was situated in Rangoon, Burma. The suit had been instituted before the Trichinopoly Court. After Burma ceased to be a part of India on 1 April 1937, the contesting defendants objected to the jurisdiction of the Court to deal with the Burma property. The Trial Judge upheld the objection that it no longer had jurisdiction over property situated in Burma. This was reversed by a Division Bench of the Madras High Court. The Division Bench held that Article 10 of the Government of India (Adaptation of Indian Laws) Order 1937 provided that the powers exercisable by any authority, which in the view of the High Court would include a Court, before the separation came into force should continue to be exercised until a contrary provision was passed by the legislature. The High Court also held that a right to continue a duly instituted suit was in the nature of a vested right which cannot be taken away except by a clear legislative intent.

¹⁹ AIR 1943 FC 24

Justice Srinivasa Varadachariar summed up the legal principle at page 48 by observing:

“..The true position, as we have already stated, is not whether there is an express provision permitting the continuance of pending proceedings, but whether there is any clear indication against the continuance of pending proceedings to their normal termination.”

In an earlier part of the judgment, the Court noted that paragraph (e) of sub-Section (2) of Section 38 of the Interpretation Act, 1889 provides that any legal proceedings in respect of any right acquired or accrued under the repealed enactment may “continue as if the repealing Act had not been passed”. Noting that the interpretation of this paragraph is not free from difficulty, Justice Varadachariar observed that the view has sometimes been taken that what is saved is a substantive right acquired under the repealed enactment and that the paragraph cannot be invoked in cases where the substantive right is not taken away by the repealing Act but the mere forum for, or the method of enforcing it is changed. On the other hand, the Court noted, it has been maintained that a right to obtain a relief in a suit pending at the time when the repealing enactment comes into operation is itself in the nature of a substantive right. Of the three grounds which had weighed with the High Court in affirming the jurisdiction of the Trial Court, the Federal Court rested its decision on the principle contained in the ruling of the Privy Council in **Colonial Sugar Refining Company Ltd. v. Irving**²⁰ which held that a right to appeal is a substantive right whose amendment would generally be prospective:

“As regards the general principles applicable to the case there was no controversy. On the one hand, it was not

²⁰ (1905) AC 369

disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is: was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to Their Lordships that the question does not admit of doubt. **To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, Their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.”** (emphasis supplied)

The principle enunciated by the Privy Council in **Colonial Sugar Refining** was reiterated.

C.2 Kiran Singh v. Chaman Paswan (1954- Supreme Court 4 judges)

16. In **Kiran Singh v. Chaman Paswan**²¹, the appellant's suit for recovery of land on the basis of the eviction of the defendants was dismissed by the Subordinate Judge which was affirmed in appeal. When the matter was taken up in second appeal to the Punjab High Court, an objection to the valuation of the plaint was raised by the stamp reporter and the correct valuation was determined on which the plaintiffs paid additional court fees. On the revised valuation, the plaintiffs raised the plea that the appeal from the decree of the Subordinate

²¹ AIR 1954 SC 340

Judge would not lie to the District Court but to the High Court and that accordingly the second appeal should be heard as a first appeal against the judgment of the District Court. Following the Full Bench decision, the High Court held that the appeal to the District Court was competent and its decision should be reversed only if prejudice were shown on merits. In appeal, this Court noted that on a plaint valuation, the appeal would lie to the District Court whereas on the valuation as determined by the High Court, it was held that it was competent to entertain the appeal. On this basis, it was argued the decision of the District Court was a nullity. This Court rejected the contention that the decree was a nullity, holding that an objection to the pecuniary jurisdiction shall not be entertained by an Appellate Court unless there has been a consequent failure of justice. Dealing with the argument that a prejudice had been caused to the appellants in that by reason of the undervaluation, their appeal was heard by a Court of inferior jurisdiction while they were entitled to a first appeal before the High Court, this Court held:

“11. It is next contended that even treating the matter as governed by Section 11 of the Suits Valuation Act, there was prejudice to the appellants, in that by reason of the undervaluation, their appeal was heard by a court of inferior jurisdiction, while they were entitled to a hearing by the High Court on the facts. It was argued that the right of appeal was a valuable one, and that deprivation of the right of the appellants to appeal to the High Court on facts must therefore be held, without more, to constitute prejudice. This argument proceeds on a misconception. **The right of appeal is no doubt a substantive right, and its deprivation is a serious prejudice; but the appellants have not been deprived of the right of appeal against the judgment of the Subordinate Court. The law does provide an appeal against that judgment to the District Court, and the plaintiffs have exercised that right. Indeed, the undervaluation has enlarged the appellants' right of appeal, because while they would have had only a right of one appeal and that to the High Court if the suit had**

been correctly valued, by reason of the undervaluation they obtained right to two appeals, one to the District Court and another to the High Court. The complaint of the appellants really is not that they had been deprived of a right of appeal against the judgment of the Subordinate Court, which they have not been, but that an appeal on the facts against that judgment was heard by the District Court and not by the High Court. This objection therefore amounts to this that a change in the forum of appeal is by itself a matter of prejudice for the purpose of Section 11 of the Suits Valuation Act.

.....

15. So far, the definition of “prejudice” has been negative in terms — that it cannot be mere change of forum or mere error in the decision on the merits. What then is positively prejudice for the purpose of Section 11? That is a question which has agitated courts in India ever since the enactment of the section. It has been suggested that if there was no proper hearing of the suit or appeal and that had resulted in injustice, that would be prejudice within Section 11 of the Suits Valuation Act. Another instance of prejudice is when a suit which ought to have been filed as an original suit is filed as a result of undervaluation on the small cause side. The procedure for trial of suits in the Small Cause Court is summary; there are no provisions for discovery or inspection; evidence is not recorded in extenso, and there is no right of appeal against its decision. The defendant thus loses the benefit of an elaborate procedure and a right of appeal which he would have had if the suit had been filed on the original side. It can be said in such a case that the disposal of the suit by the Court of Small Causes has prejudicially affected the merits of the case. No purpose, however, is served by attempting to enumerate exhaustively all possible cases of prejudice which might come under Section 11 of the Suits Valuation Act. The jurisdiction that is conferred on appellate courts under that section is an equitable one, to be exercised when there has been an erroneous assumption of jurisdiction by a subordinate court as a result of overvaluation or under valuation and a consequential failure of justice. It is neither possible nor even desirable to define such a jurisdiction closely, or confine it within stated bounds. It can only be predicated of it that it is in the nature of a revisional jurisdiction to be exercised with caution and for the ends of justice, whenever the facts and situations call for it. Whether there has been prejudice or not is, accordingly, a matter to be determined on the facts of each case.” **(emphasis supplied)**

17. Therefore, this court made a clear distinction between amendments impacting a substantive right of appeal and amendments which merely alter the forum where such an appeal could be urged. The latter could not be construed as having caused a prejudice as it was not substantive in nature.

C.3 Garikapati (1957- Supreme Court Constitution Bench)

18. In **Garikapati** (*supra*), Chief Justice S R Das speaking for the Constitution Bench, formulated the legal principles which govern this area of interpretative jurisprudence. The decision in **Garikapati** (*supra*) is the locus classicus on subject of the substantive right of appeal vis-à-vis pending proceedings. The five principles which were enunciated in paragraph 23 of the decision are extracted below:

“23.....:

- (i) **That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.**
- (ii) The right of appeal is not a mere matter of procedure but is a substantive right.
- (iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.
- (iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.
- (v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.” **(emphasis supplied)**

The Constitution Bench clarified that the right of appeal is a vested right which cannot be taken away, absent a statutory enactment to the effect. It was also clarified that the right to appeal would vest, once the suit is instituted.

C.4 Mohd. Idris (1965- Supreme Court Constitution Bench)

19. In **Mohd. Idris v. Sat Narain**²², a Constitution Bench of this Court considered whether a pending application filed on 27 May 1952 under the UP Agriculturist Relief Act for redemption of a mortgage was rendered incompetent upon the passing of the UP Zamindari Abolition and Land Reforms (Amendment) Act 1953 which was brought into force with retrospective effect on 1 July 1952. The question, as Justice M Hidayatullah (as the learned Chief Justice then was) formulated was, “whether the right of the plaintiff to continue the suit under the old law was in any way impaired”. Dealing with the provisions of Section 6 of the UP General Clauses Act 1897 (which is *pari materia* to the corresponding provisions of the General Clauses Act), the Court held:

“7...The question is whether a different intention appears in either the Abolition Act or the Amending Act 16 of 1953, for otherwise the old proceeding could continue before the Munsif. There is nothing in the Abolition Act which takes away the right of suit in respect of a pending action. If there be any doubt, it is removed when we consider that the U.P. Agriculturist Relief Act was repealed retrospectively from July 1, 1952 only and it is not, therefore, possible to give the repeal further retrospectivity so as to affect a suit pending from before that date. **The jurisdiction of the Assistant Collector was itself created from July 1, 1952 and there is no provision in the Abolition Act that pending cases were to stand transferred to the Assistant Collector for disposal. Such provisions are commonly found in a statute which takes away the jurisdiction of one court and confers it on another. From these two circumstances it is to be inferred that if there is at all any expression of**

²² “**Mohd. Idris**”; AIR 1966 SC 1499

intention, it is to keep Section 6 of the General Clauses Act applicable to pending litigation. The doubt, if any be left, is further removed if we consider a later amending Act, namely, amending Act 18 of 1956. By that Act Schedule II, which created the jurisdiction of the Assistant Collector in suits for ejectment of *asamis* was replaced by another Schedule. The entry relating to suits for ejectment of *asamis*, however, remained the same. But Section 23 of the amending Act of 1956 created a special saving which reads as follows:

“23. *Saving.*—(i) Any amendment made by this Act shall not effect the validity, invalidity, effect or consequence of anything already done or suffered, or any right, title obligation or liability already acquired, accrued or incurred or any jurisdiction already exercised, and any proceeding instituted or commenced before any court or authority prior to the commencement of this Act shall, notwithstanding any amendment herein made, continue to be heard and decided by such court or authority.

(ii) An appeal, review or revision from any suit or proceeding instituted or commenced before any court or authority prior to the commencement of this Act shall, notwithstanding any amendment herein made, lie to the Court or authority to which it would have laid if instituted or commenced before the said commencement.”

The addition of this section clearly shows that by the conferral of the jurisdiction upon the Assistant Collector it was not intended to upset litigation pending before appropriate authorities when the Abolition Act came into force. Section 23 in terms must apply to the present case, because if it had remained pending before the Munsif, till 1956, it is clear, the jurisdiction of the Munsif would not have been ousted. Although it was not pending before the Munsif it was pending before the appellate court when the 1956 Amendment Act was passed. It follows, therefore, that to such a suit the provisions of Schedule II read with Section 200 of the Abolition Act cannot be applied because the legislature has in 1956 said expressly what was implicit before, namely, that pending actions would be governed by the old law as if the new law had not been passed. In our judgment, therefore, the proceedings before the Munsif were with jurisdiction because they were not affected by the passing of the Abolition Act or the amending Act, 1953, regard being had to the provisions of Section 6 of the U.P. General Clauses Act in the first instance and more so in view of the provisions of Section 23 of the amending Act, 1956 which came before the proceedings between the parties had finally terminated. The

appeal must, therefore, fail. It will be dismissed with costs.”
(emphasis supplied)

20. The Constitution Bench relied on the absence of a provision for transfer of pending actions under the repealing legislation to save the proceedings at the old forum. The Constitution Bench observed that provisions of transfer of pending cases are commonly found in such legislations. It is pertinent to mention that the subsequent repealing legislation materially altered the position of the parties. The mortgagee appellants were resisting their ejectment from the suit land by the respondent mortgagor in a suit for redemption of mortgage on the ground that they have become *asamis* or *sirdars* under the repealing legislation and their ejectment can only take place in accordance with the provisions of the new Act. Hence, the effect of the repeal was not a mere change in forum. Further, a subsequent amendment to the repealing legislation made it clear that the pending proceedings would be concluded at the earlier forum where they had been instituted and under the repealed legislation.

C.5 Manujendra Dutt (1966 Supreme Court- 2 judges)

21. In **Manujendra Dutt v. Purnedu Prosad Roy Chowdhury**²³, a two judge Bench of this Court consisting of Chief Justice K Subba Rao and Justice J M Shelat dealt inter alia with the jurisdiction of the Controller under the Calcutta Thika Tenancy Act 1949, after the deletion of Section 29 by Amending Act 6 of 1953, in respect of proceedings pending before him on that date. The High Court had taken the view that in spite of the deletion of Section 29, the jurisdiction of

²³ “**Manujendra Dutt**” ; (1967) 1 SCR 475

the Controller in respect of matters pending before him on the date of the coming into force of the Amending Act was saved. The submission which was urged before this Court was that since it was only by reason of Section 29 that the suit had been transferred to the Controller, the deletion of that Section from the legislation had the effect of depriving the Controller of its jurisdiction and hence the judgment and order, though confirmed by the Subordinate Judge and by the High Court, was without jurisdiction. Repealing this contention, Justice J M Shelat held:

“4...Though Section 29 was deleted by the amendment Act of 1953 the deletion would not affect pending proceedings and would not deprive the Controller of his jurisdiction to try such proceedings pending before him at the date when the amendment Act came into force. Though the amendment Act did not contain any saving clause, under Section 8 of the Bengal General Clauses Act, 1899, the transfer of the suit having been lawfully made under Section 29 of the Act its deletion would not have the effect of altering the law applicable to the claim in the litigation. There is nothing in Section 8 of the amending Act of 1953 suggesting a different intention and therefore the deletion would not affect the previous operation of Section 5 of the Calcutta Thika Tenancy Act or the transfer of the suit to the Controller or anything duly done under Section 29. That being the correct position in law the High Court was right in holding that in spite of the deletion of Section 29 the Controller still had the jurisdiction to proceed with the said suit transferred to him.” (emphasis supplied)

22. The above extract indicates that the Amending Act did not contain a savings clause under Section 8 of the Bengal General Clauses Act 1899. Despite the absence of a savings clause, the Court held that the deletion of Section 29 did not have the effect of altering the law applicable to the claim in the litigation and there was nothing in the amending Act to indicate a contrary intention. At this stage, it may be necessary to note that the second issue involved was the right of

the *thika* tenant as defined by the Act to the notice provided under the deed of lease. On this aspect, the decision in **Manujendra Dutt**(*supra*) has been overruled in the seven judge Bench decision in **V Dhanapal Chettiar v. Yesodai Ammal**²⁴. It is pertinent to mention that the decision in **Manujendra Dutt**(*supra*), was concerned with the provisions of the repealing Act that impacted a substantive right of litigants which was affected by virtue of the repeal and a resulting change in forum. This Court's position, in interpreting Section 6 of the General Clauses Act, 1897 was clearly in favour of saving all substantive rights, including vested rights, that were acquired or accrued prior to the repeal. Under the unamended Act, the suit was transferred to the Controller under Section 29, which was deleted by the Amending Act. In this context the Court held that on account of Section 8 of the Bengal General Clauses Act, the deletion would not affect the transfer of the suit or anything duly done under Section 29 (paragraph 5). This Court's decision hence may not be relevant in interpreting Section 6(e) of the General Clauses Act, rather it is useful for interpreting Section 6(b) of the General Clauses Act which protects "anything duly done or suffered" under the repealed enactment.

C.6 New India Assurance (1975- Supreme Court 3 judges)

23. The first decision of this Court that interpreted a mere change in forum, that did not impact any other substantive or vested right of the litigant, was a three judge bench decision of this Court in **New India Assurance Company**

²⁴ (1979) 4 SCC 214

Limited v. Smt Shanti Mishra²⁵. This case involved the jurisdiction of the Motor Vehicles Tribunal vis-à-vis the City Civil Court, in the case of a fatal accident. The accident had occurred on 11 September 1966 which gave rise to a cause of action for the legal heirs to claim compensation under the Fatal Accidents Act 1855. Under Article 82 of the Limitation Act 1963, a limitation of two years from the occurrence of the accident was stipulated. But in the meantime, a claims tribunal under Section 110 of the Motor Vehicles Act 1939 was constituted by the State government on 18 March 1967 following which an application was filed by the claimant under Section 110A on 8 July 1967. Both the tribunal and the High Court overruled the objection of the insurer to jurisdiction. In appeal, Justice NL Untwalia speaking for the three judge Bench held:

“5.....It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions “arising out of an accident” occurring in sub-section (1) and “over the area in which the accident occurred”, mentioned in sub-section (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred. To that extent there was no difficulty in giving the answer in a simple way...” (emphasis supplied)

Dealing with the bar of limitation under Section 110A(3), this Court held that it could be said that strictly speaking the bar would not operate in relation to an application for compensation arising out of an accident which had occurred prior to the

²⁵**“New India Assurance”**; (1975) 2 SCC 840

constitution of the Tribunal. However, in directing the institution of claims before the Tribunal, this Court held:

“10. Apropos the bar of limitation provided in Section 110-A(3), one can say, on the basis of the authorities aforesaid that strictly speaking, the bar does not operate in relation to an application for compensation arising out of an accident which occurred prior to the constitution of the claims tribunal. **But since in such a case there is a change of forum, unlike the fact of the said cases, the reasonable view to take would be that such an application can be filed within a reasonable time of the constitution of the tribunal, which ordinarily and generally, would be the time of limitation mentioned in sub-section (3). If the application could not be made within that time from the date of the constitution of the tribunal, in a given case, the further time taken in the making of the application may be held to be the reasonable time on the facts of that case for the making of the application or the delay made after the expiry of the period of limitation provided in sub-section (3) from the date of the constitution of the tribunal can be condoned under the proviso to that sub-section. In any view of the matter, in our opinion, the jurisdiction of the civil court is ousted as soon as the claims tribunal is constituted and the filing of the application before the tribunal is the only remedy available to the claimant. On the facts of this case, we hold that the remedy available to the respondents was to go before the claims tribunal and since the law was not very clear on the point, the time of about four months taken in approaching the tribunal after its constitution can be held to be either a reasonable time or the delay of less than 2 months could well be condoned under the proviso to sub-section (3) of Section 110-A.**”

(emphasis supplied)

The above decision conclusively held that a change of forum generally operates retrospectively, irrespective of whether the cause or right of action had accrued earlier. It directed that once the change in forum had been effected, the litigant would have to be directed to the new forum.

C.7 Maria Cristina (1978- Supreme Court- 2 judges)

24. A subsequent decision of a two judge Bench of this Court in **Maria Cristina De Souza v. Amria Zurana Pereira Pinto**²⁶, enunciated the law relating to change of forum vis-à-vis the right of appeal. In that case, a suit was instituted in 1960 under the Portuguese Civil Procedure Code and decreed against the appellants in 1968. The appellants lodged an appeal before the Court of the Judicial Commissioner. Following the liberation of Goa in 1961, the Code of Civil Procedure 1908 was extended to the territories of Goa, Daman and Diu with effect from 15 June 1966 by Act 30 of 1965 and the corresponding provision and the corresponding Portuguese Code were repealed. The legislative assembly of Goa enacted the Goa, Daman and Diu Civil Courts Act 1965 under which the suit which was pending before the Court at Margao was transferred to and decreed by the Senior Civil Judge. Since the suit was of a value exceeding Rs 10 lacs an appeal lay directly to the High Court which under Section 2(f) meant the Judicial Commissioner's Court. Justice V D Tulzapurkar, speaking for the two judge Bench held:

"5. On the question as to where the appeal could be lodged we are clearly of the view that the forum was governed by the provisions of the Goa, Daman and Diu (Extension of Code of Civil Procedure, 1908 and Arbitration Act, 1940) Act, 1965 (Central Act 30 of 1965) read with the provisions of the Goa, Daman and Diu civil court Act, 1965 (Goa Act 16 of 1965) both of which came into force simultaneously on June 15, 1966 and the appeal was required to be filed in the Judicial Commissioner's Court. Under the Central Act 30 of 1965 with effect from June 15, 1966 the provisions of the Indian Civil Procedure Code were extended to the Union Territories of Goa, Daman and Diu and the corresponding provisions of the Portuguese Code were repealed while under the Goa Act 16 of 1965 the instant suit which was pending before the

²⁶"**Maria Cristina**"; (1979) 1 SCC 92

Comarca Court at Margao was continued and decreed by corresponding Court of the Senior Civil Judge, who ultimately decreed it on March 8, 1968. Under the Indian Civil Procedure Code read with Section 22 of the Goa Act since the property involved in the suit was of the value exceeding Rs 10,000 the appeal clearly lay to the Judicial Commissioner's Court. **The contention that since the right of appeal had been conferred by Portuguese Code, the forum where it could be lodged was also governed by the Portuguese Code cannot be accepted. It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the *lis* is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof.** This position has been made clear by clauses (b) and (c) of the proviso to Section 4 of the Central Act 30 of 1965 which substantially correspond to clauses (c) and (e) of Section 6 of the General Clauses Act, 1897. This position, has also been settled by the decisions of the Privy Council and this Court (vide *Colonial Sugar Refining Company Ltd. v. Irving* [1905 AC 369] and *Garikapatti Veeraya v. N. Subbiah Choudhury* [1957 SCR 488] **but the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which has arisen under a repealed Act, will have to be lodged in a forum provided for by the repealing Act. That the forum of appeal, and also the limitation for it, are matters pertaining to procedural law** will be clear from the following passage appearing at p. 462 of *Salmond's Jurisprudence* (12th Edn.):

"Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but *in what courts* and *within what time* I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfil their functions."

It is true that under clause (c) of the proviso to Section 4 of Central Act 30 of 1965 (which corresponds to Section 6(e) of the General Clauses Act, 1897) it is provided that a remedy or legal proceeding in respect of a vested right like a right to an appeal may be instituted, continued or enforced as if this Act (meaning the repealing Act) had not been passed. **But this provision merely saves the remedy or legal proceeding in respect of such vested right which it is open to the litigant to adopt notwithstanding the repeal but this provision has nothing to do with the forum where the**

remedy or legal proceeding has to be pursued. If the repealing Act provides new forum where the remedy or the legal proceeding in respect of such vested right can be pursued after the repeal, the forum must be as provided in the repealing Act. We may point out that such a view of Section 6 (e) of the General Clauses Act, 1897 has been taken by the Rajasthan High Court in the case of *Purshotam Singh v. Narain Singh and State of Rajasthan* [AIR 1955 Raj 203] . It is thus clear that under the repealing enactment (Act 30 of 1965) read with Goa Enactment (Act 16 of 1965) the appeal lay to the Judicial Commissioner's Court and the same was accordingly filed in the proper Court.” (emphasis supplied)

25. The decision in **Maria Cristina** (*supra*) makes a distinction between a right of appeal, which is a substantive right that is vested in a litigant on the commencement of the *lis* in the court of first instance and the forum where an appeal can be lodged which “is indubitably a procedural matter”. Hence, in the view of the Court, the appeal would have to be lodged in a forum provided by the repealing Act though the right had arisen under the repealed Act. These observations of the Court must be read together with the subsequent observation that if the repealing act provides a new forum where the remedy or the legal proceeding in respect of such vested right can be pursued after the repeal, the forum must be as provided in the repealing Act. The decisions in **New India Assurance**(*supra*) and **Maria Cristina** (*supra*) further the interpretation that a change in forum is indubitably in the realm of procedural law that applies retrospectively, unless the statute provides otherwise. The necessary corollary of these decisions, is that the forum for determination of a *lis*, whether in the case of an appeal [**Maria Cristina** (*supra*)] or in situations where the right of action had accrued [**New India Assurance** (*supra*)] is in the realm of procedural law.

C.8 Hitendra Vishnu Thakur (1994- Supreme Court 2 judges)

26. In **Hitendra Vishnu Thakur v. State of Maharashtra**²⁷, one among the questions analyzed in a two judge Bench decision of this Court was whether clause (bb) of Section 20(4) of the Terrorist and Disruptive Activities (Prevention) Act 1987²⁸ introduced by an amending legislation governing Section 167(2) of the Code of Criminal Procedure²⁹ was in the realm of procedural law and if so, whether it would apply to pending cases. Dr Justice AS Anand (as he then was) held that amending Act 43 of 1993 was procedural and retrospective; and that clauses (b) and (bb) of Section 20(4) of the TADA would apply to cases which were pending investigation on the date when it came into force. In that context, the principles of law, that aligned with the position in **New India Assurance**(*supra*) and **Maria Cristina**(*supra*), were formulated in the following terms:

“26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) **Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.**

²⁷ “**Hitendra Vishnu Thakur**”; (1994) 4 SCC 602

²⁸ “**TADA**”

²⁹ “**CrPC**”

(iii) **Every litigant has a vested right in substantive law but no such right exists in procedural law.**

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.” **(emphasis supplied)**

C.9 Sudhir G Angur (2005- Supreme Court 3 judges)

27. In **Sudhir G Angur v. M Sanjeev**³⁰, a three judge Bench of this Court considered the impact of a change in procedural law to pending proceedings before a particular forum. In this case, the Mysore Code was repealed in 2003 and the Code of Civil Procedure, 1908 was to apply. This Court held that the relevant court was under a duty to take notice of the change in law relating to forum and apply it to a pending proceeding. In doing so, Justice SN Variava approved the following exposition of law of the Bombay High Court in **Shiv Bhagwan Moti Ram Saroji v. Onkarmal Ishar Das**³¹:

“11. In our view, Mr G.L. Sanghi is also right in submitting that it is the law on the date of trial of the suit which is to be applied. In support of this submission, Mr Sanghi relied upon the judgment in *Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass* [AIR 1952 Bom 365 : 54 Bom LR 330] wherein it has been held that **no party has a vested right to a particular proceeding or to a particular forum. It has been held that it is well settled that all procedural laws are retrospective unless the legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date when the suit or proceeding comes on for trial or disposal. It has been held that a court is bound to take notice of the change in the law and is bound to administer the law as it was when**

³⁰ “**Sudhir G Angur**”; (2006) 1 SCC 141

³¹ (1952) 54 Bom LR 330

the suit came up for hearing. It has been held that if a court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations. As stated above, the Mysore Act now stands repealed. It could not be denied that now the Court has jurisdiction to entertain this suit.” (**emphasis supplied**)

C.10 Ramesh Kumar Soni (2013- Supreme Court 2 judges)

28. It is trite law to state that all procedural law is retrospective, unless a contrary legislative intention can be observed. A two judge Bench in **Ramesh Kumar Soni v. State of Maharashtra**³² considered a case where an FIR was registered under the provisions of Sections 408, 420, 467, 468 and 471 of the Indian Penal Code. On the date of the registration of the case, the offences were triable by the Magistrate of the First Class in terms of the First Schedule of the CrPC. As a result of Madhya Pradesh Act 2 of 2008, the First Schedule to the CrPC was amended. As a consequence, offences under Sections 467, 468 and 471 were triable by a Court of Sessions instead of a JMFC. Consequent to the amendment, the JMFC committed the case to the Sessions Court. A reference was made to the High Court on whether the amendment would apply retrospectively and whether cases pending before the JMFC and committed to the Sessions Court should be tried de novo by the Sessions Judge or should be remanded back to the Magistrate for further trial. A Full Bench of the Madhya Pradesh High Court held that cases pending before the JMFC on 22 February 2008 were unaffected by the amendment and were triable by the JMFC since the

³²“**Ramesh Kumar Soni**”; (2013) 14 SCC 696

amending Act did not contain a clear indication that such cases would be made over to the Court of Sessions. Justice TS Thakur (as the learned Chief Justice then was) speaking for the two judge Bench observed that the Madhya Pradesh Amendment had shifted the forum of trial from the Court of the Magistrate of the First Class to the Court of Sessions. The issue was whether the amendment to the forum was prospective or would govern cases that were pending on the date of the amendment. This Court noted that:

“9. Having said so, we may now examine the issue from a slightly different angle. The question whether any law relating to forum of trial is procedural or substantive in nature has been the subject-matter of several pronouncements of this Court in the past. We may refer to some of these decisions, no matter briefly.”

After advertng to the decisions in **New India Assurance(supra)**, **Hitendra Vishnu Thakur(supra)** and **Sudhir G Angur(supra)**, the Court observed:

“14. The amendment to the Criminal Procedure Code in the instant case has the effect of shifting the forum of trial of the accused from the Court of the Magistrate, First Class to the Court of Session. Apart from the fact that as on the date the amendment came into force no case had been instituted against the appellant nor had the Magistrate taken cognizance against the appellant, any amendment shifting the forum of the trial had to be on principle retrospective in nature in the absence of any indication in the Amendment Act to the contrary. The appellant could not claim a vested right of forum for his trial for no such right is recognized. The High Court was, in that view of the matter, justified in (*sic not*) interfering with the order passed by the trial court.”

This Court noted that the Full Bench of the High Court had however relied upon *inter alia* the decision in **Manujendra Dutt(supra)**. This decision was distinguished on the ground that the suit had been instituted and concluded and no

vested right could be claimed for a particular forum for litigation. This Court consequently overruled the judgment of the Full Bench of the High Court, though prospectively, since many cases which had sent back from the Sessions Court to the JMFC may have in the meantime been concluded or would have reached an advanced stage. An exception to those cases was made as a change of forum at that stage would cause unnecessary and avoidable hardship to the accused, if they were committed to the Sessions Court for trial after the amendment and the view of this Court. However, the principle of change of forum being procedural, generally retrospective and applicable to pending proceedings was upheld.

C.11 Dhadi Sahu (1992 Supreme Court 2 judges)

29. Now, in this backdrop, it becomes necessary to consider the 1992 decision of a two judge Bench of this Court in **Commissioner of Income Tax, Orissa v. Dhadi Sahu**³³ and several decisions which adverted to it. This was a case where the assessee had preferred appeals to the Income Tax Appellate Tribunal. The Tribunal allowed the appeals and set aside the penalties holding that in view of the amendment made to Section 274(2) of the Income Tax Act 1961 with effect from 1 April 1971, the Inspecting Assistant Commissioner³⁴ lost his jurisdiction. The power of the Income Tax Officer to impose a penalty under Section 271 was subject to Section 274. As a result of the amending Act which came into force on 1 April 1971, the amount of income allegedly concealed had to exceed twenty-five thousand rupees. The effect of this amendment was that the Assistant Commissioner did not have jurisdiction over the assessee as the concealed

³³ "**Dhadi Sahu**"; 1994 Suppl. (1) SCC 257

³⁴ "**IAC**"

amount was lesser than the minimum amount prescribed by the subsequent amendment. Justice Yogeshwar Dayal speaking for the two judge Bench premised the judgment on "the general principle of law" that a change of forum does not affect pending actions unless a contrary intent is shown:

"18. It may be stated at the outset that the general principle is that a law which brings about a change in the forum does not affect pending actions unless intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change-over of proceedings, from the court or the tribunal where they are pending to the court or the tribunal which under the new law gets jurisdiction to try them."

This Court held that the amending Act did not make any provision that references validly pending before IAC shall be returned without passing any final order if the amount of income in respect of which particulars have been concealed did not exceed rupees twenty five thousand. This, in the view of the Court, supported the inference that the IAC continued to have jurisdiction to impose a penalty on pending references. The previous operation of Section 274(2) as it stood before 1 April 1971 and anything done under it, continued to have effect under Section 6(b) for the General Clauses Act enabling the IAC to pass orders imposing a penalty in a pending reference. If the reference was made before 1 April 1971, it would be governed by Section 274(2) as it stood before that date and the IAC would continue to have jurisdiction. However, in paragraph 21 of the decision, this Court observed:

"21. It is also true that no litigant has any vested right in the matter of procedural law but where the question is of change of forum it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated

in the tribunal or the court of first instance and unless the legislature has by express words or by necessary implication clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different tribunals or forums.”

30. This Court then adverted to the decision in **Manujendra Dutt**(*supra*) and **Mohd. Idris**(*supra*) and observed that "amending an Act does not show that the pending proceedings before the court on reference abate". Therefore, the decision of the two judge Bench in **Dhadi Sahu**(*supra*) held that a litigant had a crystallized right to a forum when proceedings have been initiated and are pending. Such a right vested, in the view of the Court, is distinct from a pure procedure to be followed before the forum concerned. In taking this view, the two judge Bench in **Dhadi Sahu**(*supra*) did not consider a three judge bench decision in **New India Assurance**(*supra*) as well as a previous co-ordinate Bench decision in **Maria Cristina**(*supra*), which relied on common law jurisprudence and Section 6 of the General Clauses Act to hold that a change in forum is purely a procedural matter which operates retrospectively in the absence of a contrary legislative mandate. The latter principle has since been followed in the decisions in **Hitendra Vishnu Thakur**(*supra*); **Sudhir G Angur**(*supra*); **Ranbir Yadav v. State of Bihar**³⁵; **Kamlesh Kumar v. State of Jharkhand**³⁶ and **Ramesh Kumar Soni**(*supra*).

³⁵ (1995) 4 SCC 392

³⁶ (2013) 15 SCC 460

C.12 Ambalal Sarabhai (2001- Supreme Court 2 judges)

31. **Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co.**³⁷ is a two judge Bench decision which considered the impact of an amendment to the Delhi Rent Control Act made with effect from 1 December 1988 which excluded the jurisdiction of the Rent Controller with respect to tenancies fetching a monthly rent exceeding 3500 rupees. The Rent Controller had been moved by the landlord who sought a decree of eviction on the ground of subletting, but prior to the amendment. The tenant contended that the Civil Court alone had jurisdiction after the amendment. In this backdrop, Justice AP Misra speaking for the two judge Bench adverted to the provisions of Section 6 of the General Clauses Act and observed:

“26. As a general rule, in view of Section 6, the repeal of a statute, which is not retrospective in operation, does not prima facie affect the pending proceedings which may be continued as if the repealed enactment were still in force. In other words, such repeal does not affect the pending cases which would continue to be concluded as if the enactment has not been repealed. In fact when a lis commences, all rights and obligations of the parties get crystallized on that date. The mandate of Section 6 of the General Clauses Act is simply to leave the pending proceedings unaffected which commenced under the unrepealed provisions unless contrary intention is expressed. We find clause (c) of Section 6, refers the words “any right, privilege, obligation ... *acquired or accrued*” under the repealed statute would not be affected by the repealing statute. **We may hasten to clarify here, mere existence of a right not being “acquired” or “accrued” on the date of the repeal would not get protection of Section 6 of the General Clauses Act.**

27. At the most such a provision can be said to be granting a privilege to the landlord to seek intervention of the Controller for eviction of the tenant under the Statute. Such a privilege is not a benefit vested in general but is a benefit granted and may be enforced by approaching the Controller in the manner

³⁷ “**Ambalal Sarabhai**”; (2001) 8 SCC 397

prescribed under the statute. On filing the petition of eviction of the tenant the privilege accrued with the landlord is not effected by repeal of the Act in view of section 6(c) and the pending proceeding is saved under Section 6(e) of the Act.”
(emphasis supplied)

32. This Court noted that a pending proceeding would be saved under Section 6(e) of the General Clauses Act only if it is in relation to a right, privilege or obligation that has been acquired or accrued under Section 6(c) of the Act. It is pertinent to mention that the landlord under the amended act would have lost his right to evict the tenant on the ground of sub-letting since the Rent Control Act ceased to be applicable to premises where the monthly rent exceeded Rs. 3500. Further, pursuant to the amendment, not only was his right of action before the Rent Controller terminated but also the landlord was relegated to common law remedies. The amendment substantially affected the right of action of the landlord and did not merely change the forum. It was in this context, that this Court held that a right had accrued to the landlord to continue the eviction proceeding under the unamended Rent Control Act.

33. The Court observed that there are two sets of cases, one where Section 6 of the General Clauses Act is applicable and the other where it is not applicable. In cases where Section 6 is not applicable, the Court would have to scrutinize and determine whether a vested right had accrued to a person under a repealed statute in which event pending proceedings would have to be saved. However, where Section 6 is applicable, it is not merely a vested right but all those covered by clauses (a) to (e) of Section 6 which are saved and, in such cases, the

pending proceedings would be continued as if the statute had not been repealed. In the context of Section 6(c) of the General Clauses Act, the Court observed that the expression "any right accrued" is wide enough to include the landlord's rights to evict a tenant in a proceeding was pending when the repealing legislation came into force. Pending proceedings before the Rent Controller would, therefore, continue to be proceeded with as if the repealed act was still in force. It is pertinent to mention that the decision in **Ambalal Sarabhai**(*supra*) only saved pending proceedings that were coupled with a vested right (in the event of non-applicability of Section 6 of the General Clauses Act) or with any rights that had accrued under Section 6(c)-(e) of General Clauses Act.

C.13 HP State Electricity (2013- Supreme Court 2 judges)

34. The principle of a crystallized right to a forum when proceedings are pending, as propounded in **Dhadi Sahu**(*supra*), was subsequently referred to in several decisions of this Court, including a two judge bench decision in **Himachal Pradesh State Electricity Regulatory Commission v Himachal Pradesh State Electricity Board**³⁸. The Commission which was constituted under an Act of 1998 determined the tariff applicable for electricity in the State. Subsequently, while discharging its regulatory functions, the Commission opined that a part of the tariff had not been complied with. In pursuance of its notice, the Board was subjected to a penalty upon which an appeal was filed under Section 27 of the Act of 1998. During the pendency of the appeal the earlier Act was repealed and the Electricity Act 2003 came into force. When the appeals were taken up by the Single Judge, the Commission raised preliminary objection on maintainability on

³⁸ "**HP State Electricity**"; (2014) 5 SCC 219

the ground that after the constitution of an Appellate Tribunal under the 2003 legislation, it would be the Appellate Tribunal which would have jurisdiction and the High Court had no jurisdiction to hear the appeal. The High Court held that even after the enforcement of the new legislation in 2003, it continued to have jurisdiction. The judgment of the High Court was assailed on the ground that the appeal was not maintainable before it, upon a separate forum being constituted. Section 185 contained a repeal and savings provision. Justice Dipak Misra (as the learned chief Justice then was) speaking for a two judge Bench held that "a right of appeal as well as forum is a vested right" unless it is taken away by the legislature either by express provision or by necessary intention. The Court held:

"25. At this stage, we may state with profit that it is a well-settled proposition of law that enactments dealing with substantive rights are primarily prospective unless they are expressly or by necessary intention or implication given retrospectivity. The aforesaid principle has full play when vested rights are affected. In the absence of any unequivocal expose, the piece of legislation must exposit adequate intendment of legislature to make the provision retrospective. **As has been stated in various authorities referred to hereinabove, a right of appeal as well as forum is a vested right unless the said right is taken away by the legislature by an express provision in the statute by necessary intention.**

26...No doubt right to appeal can be divested but this requires either a direct legislative mandate or sufficient proof or reason to show and hold that the said right to appeal stands withdrawn and the pending proceedings stand transferred to different or new appellate forum. Creation of a different or a new appellate forum by itself is not sufficient to accept the argument/contention of an implied transfer. Something more substantial or affirmative is required which is not perceptible from the scheme of the 2003 Act." **(emphasis supplied)**

35. Hence, the conclusion of the High Court that it had jurisdiction to hear the appeal was held to be "absolutely flawless" by observing that "a right of appeal as

well as forum is a vested right unless the said right is taken away by the legislature by an express provision in the statute by necessary intention”.

C.14 Videocon International (2015- Supreme Court 2 judges)

36. A two judge Bench of this Court in **Videocon International Limited v. Securities and Exchange Board of India**³⁹ dealt with the Appellate provisions contained in the Security and Exchange Board of India Act 1992. Following the insertion of Chapter 6B with effect from 25 January 1995, the remedy of an appeal was provided to the Securities Appellate Tribunal under Section 15 T to a person aggrieved by an order of the Board or by an Adjudicating Officer. Section 15 Z provided an appeal to the High Court against an order of the SAT on any question of fact or law. Section 15 Z was amended with retrospective effect from 29 October 2002 to provide an appeal against the orders of the SAT to the Supreme Court on any question of law. The forum of the second appellate remedy was changed from the High Court to the Supreme Court. Appeals against the order of the SAT which had been passed before 29 October 2002 (the date of amendment) were filed before the High Court which held that such appeals which have been instituted before the enforcement of amended Section 15 Z would not be affected by the amendment and that it would continue to have jurisdiction to hear and dispose of the appeals. The Amending Act had a repeal and savings provision in Section 32 which was in the following terms:

“32. Repeal and saving.—(1) The Securities and Exchange Board of India (Amendment) Ordinance, 2002 (Ord. 6 of 2002), is hereby repealed.

³⁹ “**Videocon International**”; (2015) 4 SCC 33

(2) Notwithstanding the repeal of the Securities and Exchange Board of India (Amendment) Ordinance, 2002 (Ord. 6 of 2002), *anything done or any action taken under the principal Act as amended by the said Ordinance, shall be deemed to have been done or taken under the principal Act, as amended by this Act.*"

37. The judgment of the High Court was assailed, citing the decisions in **Hitendra Vishnu Thakur**(*supra*) and **Maria Cristina**(*supra*) amongst others, and it was urged that the amendment by which the appellate forum was changed from the High Court to the Supreme Court must be treated as merely procedural. On the other hand, the Respondent relied on the decision in **Dhadi Sahu**(*supra*) and **Ambalal Sarabhai**(*supra*). Justice JS Khehar (as the learned Chief Justice then was) examined whether the amendment "envisaged a mere change of forum"⁴⁰.

38. In this context, this Court noted that while under the un-amended Section 15 Z, an appeal lay before the High Court "on any question of fact or law arising out of such order" the amendment had curtailed and restricted the right of appeal since the appeal to this Court would now lie "on any question of law arising out of such order". Consequently, this Court noted:

⁴⁰ "38. First and foremost, we shall determine the veracity of the contention advanced at the hands of the learned counsel for the appellant, that the remedy of second appeal provided for in the unamended Section 15-Z of the SEBI Act remained unaffected by the amendment of the said provision; and on the basis of the above assumption, the learned counsel's submission, that the present controversy relates to an amendment which envisaged a mere change of forum. Insofar as the instant aspect of the matter is concerned, it would be pertinent to mention, that a right of appeal can be availed of only when it is expressly conferred. When such a right is conferred, its parameters are also laid down. A right of appeal may be absolute i.e. without any limitations. Or, it may be a limited right. The above position is understandable, from a perusal of the unamended and amended Section 15-Z of the SEBI Act. Under the unamended Section 15-Z, the appellate remedy to the High Court, against an order passed by the Securities Appellate Tribunal, was circumscribed by the words "... on any question of fact or law arising out of such order". The amended Section 15-Z, while altering the appellate forum from the High Court to the Supreme Court, curtailed and restricted the scope of the appeal, against an order passed by the Securities Appellate Tribunal, by expressing that the remedy could be availed of "... on any question of law arising out of such order". It is, therefore apparent, that the right to appeal, is available in different packages, and that, the amendment to Section 15-Z, varied the scope of the second appeal provided under the SEBI Act."

“41.... Accordingly, by the amendment, the earlier appellate package stands reduced, because under the amended Section 15-Z, it is not open to an appellant, to agitate an appeal on facts. That being the position, it is not possible for us to accept the contention advanced at the hands of the learned counsel for the appellant, that the amendment to Section 15-Z of the SEBI Act, envisages only an amendment of the forum, where the second appeal would lie. In our considered view, the amendment to Section 15-Z of the SEBI Act, having reduced the appellate package, adversely affected the vested appellate right of the litigant concerned....”

While noting that this position would be subject to an amendment providing to the contrary, this Court held that Section 32 which provided the repeal and savings clause did not indicate a contrary intent. Hence, the appellate remedy which was available prior to the amendment of Section 15 Z would, in the view of this Court continue to be available despite the amendment. Moreover, this Court held that neither the date of filing the appeal nor its hearing was of any relevance since the right to an appellate remedy becomes vested when the *lis* is initiated. The contention of the appellant that in the absence of a savings clause the pending proceedings could not be deemed to have been saved was rejected by placing reliance on the decision in **Ambalal Sarabhai**(*supra*):

“44.... In the judgment rendered by this Court in *Ambalal Sarabhai Enterprises Ltd. case* [*Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal and Co.*, (2001) 8 SCC 397] , it was held, that the general principle was, that a law which brought about a change in the forum, would not affect pending actions, unless the intention to the contrary was clearly shown. Since the amending provision herein does not so envisage, it has to be concluded, that the pending appeals (before the amendment of Section 15-Z) would not be affected in any manner...

Furthermore, the instant contention is wholly unacceptable in view of the mandate contained in Sections 6(c) and (e) of the General Clauses Act, 1897. While interpreting the aforesaid provisions this Court has held, that the amendment of a statute, which is not retrospective in operation, does not affect

pending proceedings, except where the amending provision expressly or by necessary intendment provides otherwise. Pending proceedings are to continue as if the unamended provision is still in force. This Court has clearly concluded, that when a lis commences, all rights and obligations of the parties get crystallised on that date, and the mandate of Section 6 of the General Clauses Act, simply ensures, that pending proceedings under the unamended provision remain unaffected....”

As regards the decisions *inter alia* in **Hitendra Vishnu Thakur**(*supra*) and **Maria Cristina**(*supra*), this Court held that the principle that the forum is a procedural matter and that an amendment which alters the forum would apply retrospectively cannot be doubted but "the same is not an absolute rule". On this aspect, the Bench relied upon the decision in **Dhadi Sahu**(*supra*) in support of the principle that an amendment of a forum would not necessarily be an issue of procedure.

“45. Having concluded in the manner expressed in the foregoing paragraphs, it is not necessary for us to examine the main contention, advanced at the hands of the learned counsel for the appellant, namely, that the amendment to Section 15-Z of the SEBI Act, contemplates a mere change of forum of the second appellate remedy. Despite the aforesaid, we consider it just and appropriate, in the facts and circumstances of the present case, to delve on the above subject as well. In dealing with the submission advanced at the hands of the learned counsel for the appellant, on the subject of forum, we will fictionally presume, that the amendment to Section 15-Z by the Securities and Exchange Board of India (Amendment) Act, 2002 had no effect on the second appellate remedy made available to the parties, and further that, the above amendment merely alters the forum of the second appeal, from the High Court (under the unamended provision), to the Supreme Court (consequent upon the amendment). **On the above assumption, the learned counsel for the appellant had placed reliance on the decisions rendered by this Court in Maria Cristina De Souza Sodder [Maria Cristina De Souza Sodder v. Amria Zurana Pereira Pinto, (1979) 1 SCC 92] , Hitendra Vishnu Thakur [Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087] and Thirumalai Chemicals Ltd. [Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458] cases to**

contend, that the law relating to forum being procedural in nature, an amendment which altered the forum, would apply retrospectively. Whilst the correctness of the aforesaid contention cannot be doubted, it is essential to clarify, that the same is not an absolute rule. In this behalf, reference may be made to the judgments relied upon by the learned counsel for the respondent, and more importantly to the judgment rendered in *Dhadi Sahu* case [*CIT v. Dhadi Sahu*, 1994 Supp (1) SCC 257] , wherein it has been explained, that an amendment of forum would not necessarily be an issue of procedure. It was concluded in the above judgment, that where the question is of change of forum, it ceased to be a question of procedure, and becomes substantive and vested, if proceedings stand initiated before the earlier prescribed forum (prior to the amendment having taken effect). This Court clearly declared in the above judgment, that if the appellate remedy had been availed of (before the forum expressed in the unamended provision) before the amendment, the same would constitute a vested right. However, if the same has not been availed of, and the forum of the appellate remedy is altered by an amendment, the change in the forum, would constitute a procedural amendment, as contended by the learned counsel for the appellant. Consequently even in the facts and circumstances of the present case, all such appeals as had been filed by the Board, prior to 29-10-2002, would have to be accepted as vested, and must be adjudicated accordingly.” (emphasis supplied)

The conclusion of this Court was held to be in accordance with the mandate of Section 6 of the General Clauses Act. The appeals which had been filed by SEBI before the High Court were therefore held to be maintainable.

C.15 SEBI v. Classic Credit (2018- Supreme Court 2 judges)

39. We have already noticed the earlier decision of Justice J S Khehar in **Videocon International** (supra). Subsequent to the aforesaid decision, in **Securities and Exchange of Board of India v. Classic Credit Limited**⁴¹, a two

⁴¹ (2018) 13 SCC 1

judge bench of this Court, speaking through Justice Khehar, considered a claim for transfer of pending proceedings under the SEBI Act 1992. At the time when the complaints were filed under Section 26(2), the accused was required to be tried by a Metropolitan Magistrate (or a JMFC). Section 24(1) as it existed prior to the amendment read as follows:

“24. Offences.—(1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(2) If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both.”

40. After the amendment Section 24(1) envisaged a punishment for a term of imprisonment which may extend to ten years or with fine which may extend to rupees 25 crores. As a result of the amendment of Section 26(2) it came to be stipulated that no court inferior to that of a Court of Sessions shall try any offence punishable under the Act. After the 2002 amendment all pending cases before the Metropolitan Magistrate or JMFC were committed to the Court of Sessions on the assumption that the amending Act retrospectively altered the forum for trial. When the issue of jurisdiction was being considered by the Bombay High Court, SEBI sought to rely upon a judgment of the Delhi High Court which had concluded that the amendment to Section 26 brought about only a change in forum and was only procedural. The Bombay High Court took a view contrary to

the judgment of the Delhi High Court. During the pendency of the appeals before this Court, the SEBI Act was amended again by the omission of 26(2) and the insertion of Section 26 A to E from 18 July 2013. SEBI argued that since the impact of 2002 amendment had again been altered, all the pending cases would be required to be tried by a Special Court in terms of the 2014 Amendment.

Section 26-B provided as follows:

“26-B. Offences triable by Special Courts.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act committed prior to the date of commencement of the Securities Laws (Amendment) Act, 2014 or on or after the date of such commencement, shall be taken cognizance of and tried by the Special Court established for the area in which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned.”

41. SEBI argued before this Court that a change of the forum for trial was a matter of mere procedure and would therefore be retrospective, there being no express or implied intent either in the 2002 and 2014 Amendments that the amendments were intended to be of prospective effect. Justice JS Khehar speaking for the two judge Bench of this Court adverted to the decisions *inter alia* in **New India Assurance**(*supra*), **Ramesh Kumar Soni**(*supra*) and **Hitendra Vishnu Thakur**(*supra*), and observed in that context:

“49...In our considered view, the legal position expounded by this Court in a large number of judgments including *New India Insurance Co. Ltd. v. Shanti Misra* [New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840] ; *SEBI v. Ajay Agarwal* [SEBI v. Ajay Agarwal, (2010) 3 SCC 765 : (2010) 2 SCC (Cri) 491] and *Ramesh Kumar Soni v. State of M.P.* [Ramesh Kumar Soni v. State of M.P., (2013) 14 SCC 696 : (2014) 4 SCC (Cri) 340] , is clear and unambiguous, namely, that procedural amendments are presumed to be retrospective in nature, unless the amending statute expressly or impliedly provides otherwise. And also, that

generally change of “forum” of trial is procedural, and normally following the above proposition, it is presumed to be retrospective in nature unless the amending statute provides otherwise. This determination emerges from the decision of this Court in *Hitendra Vishnu Thakur v. State of Maharashtra* [*Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087] ; *Ranbir Yadav v. State of Bihar* [*Ranbir Yadav v. State of Bihar*, (1995) 4 SCC 392 : 1995 SCC (Cri) 728] and *Kamlesh Kumar v. State of Jharkhand* [*Kamlesh Kumar v. State of Jharkhand*, (2013) 15 SCC 460 : (2014) 6 SCC (Cri) 489] , as well as, a number of further judgments noted above.”

42. The above observations indicate the clear view of this Court that:

- (i) In the absence of a contrary intent express or implied, procedural amendments are presumed to be retrospective;
- (ii) A change in the forum of a trial is a procedural matter; and
- (iii) Since a change of forum is procedural, a statute which brings about the change is presumed to be retrospective in the absence of a contrary intent.

43. Hence, the Court went on to observe that it had "also no doubt ...that change of "forum" being procedural the amendment of the “forum” would operate retrospectively, irrespective of whether the offence allegedly committed by the accused was committed prior to the amendment"⁴².

44. However, the Bench was conscious of the contrary view in **Dhadi Sahu**(*supra*) and the conflicting interpretations in the decisions in **Manujendra Dutt**(*supra*), **Mohd. Idris**(*supra*), **Ambalal Sarabhai**(*supra*), **Ramesh Kumar Soni**(*supra*) and **Videocon International**(*supra*) (which the Bench adverted to in

⁴² At para 50, page 68

paragraphs 51 to 53 of its decision). Dealing with this line of authority, Chief Justice J S Khehar observed:

“54. From a perusal of the conclusions drawn in the above judgments, we are inclined to accept the contention that change of “forum” could be substantive or procedural. It may well be procedural when the remedy was yet to be availed of but where the remedy had already been availed of (under an existing statutory provision), the right may be treated as having crystallized into a vested substantive right.”

The view which was formulated by the Court was that where a remedy has been availed of prior to the amendment then unless the amending provision mandates either expressly or by necessary implication, the transfer of proceedings to the forum introduced by the amendment, the forum as it existed prior to the amendment would continue to have jurisdiction:

“55. In the latter situation referred to (and debated) in the preceding paragraph, where the remedy had been availed of prior to the amendment, even according to the learned counsel for the private parties, unless the amending provision by express words, or by necessary implication, mandates the transfer of proceedings to the “forum” introduced by the amendment the “forum” postulated by the unamended provision, would continue to have the jurisdiction to adjudicate upon pending matters (matters filed before amendment). In view of the above, we are of the considered view, that no vested right can be claimed with reference to “forum”, where the court concerned, had not taken cognizance and commenced trial proceedings, in consonance with the unamended provision.”

Where, however, proceedings had already commenced before the amendment, a change in the forum of the trial would not affect pending actions unless a contrary intent is shown. This Court then scrutinized whether the amendments which were made in 2002 and 2014 expressed a contrary intent. The Court held that Section 26, as amended in 2002, left no room for doubt that the erstwhile forum ceases to

have adjudicating authority and the newly created forum - the Court of Sessions would deal with all pending matters as well. As a result, the 2002 Amendment "diverted jurisdiction" from the Metropolitan Magistrates and JMFCs to try offences under the SEBI Act after the amendment became operational. Similarly, the 2014 Amendment grouped all offences together by providing that they would be tried by a Special Court whether committed prior to or after the amendment; no segregation being permissible. By the 2014 amendment, the function of taking cognizance had been vested with the Special Courts. This Court held that all pending matters where cognizance had been taken and proceedings had commenced before the Court of Sessions would not be affected. In conclusion, this Court observed:

"79. In view of the consideration recorded hereinabove, we are of the view, that the "forum" for trial earlier vested in the Court of Metropolitan Magistrate (or Judicial Magistrate of the First Class) was retrospectively amended, inasmuch as, the "forum" of trial after the 2002 Amendment Act was retrospectively changed to the Court of Session. In this view of the matter, the trials even in respect of offences allegedly committed before 29-10-2002 (the date with effect from which the 2002 Amendment Act became operational), whether in respect whereof trial had or had not been initiated, would stand jurisdictionally vested in a Court of Session. And likewise, trials of offences under the SEBI Act, consequent upon the 2014 Amendment Act (which became operational, with effect from 18-7-2013) would stand jurisdictionally transferred for trial to a Special Court, irrespective of whether the offence under the SEBI Act was committed before 29-10-2002 and/or before 18-7-2013 (the date with effect from which the 2014 Amendment Act became operational), and irrespective of the fact whether trial had or had not been initiated."

Accordingly, the view of the Delhi High Court in transferring pending proceedings was affirmed while that taken by the Bombay High Court was set aside.

C.16 Swapna Mohanty (2018- Supreme Court 2 judges)

45. A two judge Bench of this Court in **Swapna Mohanty v. State of Odisha**⁴³ dealt with the provisions of Section 24 B of the Orissa Education Act 1969. The State Education Tribunal obtained jurisdiction to decide appeals in respect of colleges only from the date on which they were admitted to grant-in-aid. The appeal was filed in August 2002 before the College was admitted to grant-in-aid in February 2004 and the issue examined was whether the Director of Higher Education had competence to hear the appeal after the college was admitted to grant-in-aid. Justice L Nageswara Rao speaking for the two judge Bench held that the Director continued to have jurisdiction to decide the appeal which was filed before him prior to the admission of the college to grant-in-aid “as there is no provision in the Orissa Education Act providing for a change-over of all proceedings to the Tribunal”.⁴⁴ In arriving at this conclusion, the two judge Bench relied on the judgment in **Dhadi Sahu**(*supra*).

C.17 Om Prakash Agarwal (2018- Supreme Court 2 judges)

46. In **Om Prakash Agarwal v. Vishan Dayal Rajpoot**⁴⁵, a two judge Bench of this Court considered the provisions of the UP Civil Laws (Amendment) Act 2015 under which, with effect from 7 December 2015, Sections 9 and 21 of the Bengal, Agra and Assam Civil Courts Act 1887 and Section 15 of the Provincial Small Cause Courts Act 1887 were amended. By the amendment, the limit of the

⁴³ (2018) 17 SCC 621

⁴⁴ Para 9

⁴⁵ (2019) 14 SCC 526

pecuniary jurisdiction of the Small Cause Courts was increased from rupees twenty-five thousand to rupees one lakh. Although, the pecuniary jurisdiction was enhanced to rupees one lakh, the suit which was pending before the Additional District Judge continued to proceed without objection by the parties. A decree for eviction and for arrears of rent was passed. In the revision before the High Court, one of the grounds raised was that in view of the UP Civil Laws (Amendment) Act 2015, the Court of the Additional District Judge ceased to have jurisdiction to try a suit between a lessor and lessee of a value of upto one lakh from 1 December 2015 and the assumption of jurisdiction was invalid. Accepting the submission, the High Court allowed the revision and remanded the suit for a fresh decision before the Small Cause Courts. The suit which was instituted under Section 15(2) by the lessor for eviction of the lessee was filed initially before the Small Cause Court, Firozabad since the valuation was Rs. 21,175. Subsequently, following the amendment, the valuation was enhanced to Rs 27,775 and the suit was transferred to the Court of the District Judge. On these facts, the main issue was whether after 7 December 2015, the Court of the Additional District Judge where the suit was pending could still have pecuniary jurisdiction to decide the suit or whether it should be transferred back to the Small Causes Court. By UP Act 37 of 1972, an amendment had been made in Section 25 of the Bengal, Agra and Assam Civil Courts Act 1887 so as to empower the State government to confer upon any District Judge or Additional District Judge the power of a Judge of the Small Causes Court for the trial of suits irrespective of value by a lessor for the eviction of a lessee.

47. Justice Ashok Bhushan speaking for the two judge Bench observed that the expression “irrespective of their value” used in Section 25 as amended was with the clear intent that irrespective of value, cases filed by the lessee for the eviction of the lessee should be treated as small causes cases. By a subsequent amendment, the Small Causes Court presided over by the Civil Judge, became empowered to decide cases up to a value of twenty-five thousand rupees while those above would be taken cognizance of by the Additional District Judge. The Court held:

“54...When a small cause suit not exceeding value of Rs 1 lakh is cognizable by the Court of Small Causes, obviously, no other court can take cognizance. The Additional District Judge to whom small causes suit in question was transferred since its valuation was more than of Rs 25,000 was not competent to take cognizance of the suit after the U.P. Civil Laws (Amendment) Act, 2015 w.e.f. 7-12-2015, when the suit in question became cognizable by the Small Cause Court i.e. the Court of Civil Judge, Senior Division.”

C.18 Delhi High Court Bar Association (1993- Delhi HC- DB)

48. We will now advert to a few High Court decisions which have come to varying conclusions due to the ambiguity introduced in the position of law by **Dhadi Sahu**(*supra*) vis-à-vis **Maria Cristina**(*supra*) and **New India Assurance**(*supra*) by creating an exception to the rule that a change of forum is purely a procedural matter. In **Delhi High Court Bar Association v. Court of Delhi**⁴⁶, the original jurisdiction of the High Court was increased from Rs. 1 lakh to Rs. 5 lakhs. The appellants in that case sought to question the transfer of proceedings from the High Court to the lower court. The High Court noted that the Amending Act’s object was to reduce the burden on the High Court and

⁴⁶ ILR (1994) 1 Del 271

speedy disposal of cases. The High Court held that change of forum is a procedural matter and not a vested right. A Division Bench of the High Court speaking through Justice DP Wadhwa noted the ambiguity created by **Dhadi Sahu**(*supra*) and applied the principle in **New India Assurance**(*supra*) and **Maria Cristina**(*supra*) to direct transfer of pending proceedings as a change of forum owing to amendments to the pecuniary jurisdiction is a change in procedural law that is usually retrospective:

“29. In *New India Insurance Co. Ltd. v. Smt. Shanti Misra* ((1975) 2 SCC 840 : AIR 1976 S.C. 237)(9) the Supreme Court did express the opinion that change of forum is a change of procedural law and not a substantive law. In *Maria Cristina De Souza Sodder v. Amria Zurana Percira Pinto*, (1979) 1 SCC 92 (10), the court held that right of appeal though was a substantive right and got vested in the litigant no sooner the lis was commenced in the court of the first instance and such right would not be affected by any repeal of an enactment conferring such right unless the repealing Act either expressly or by necessary implication took away such right. **The court also said that the forum where such appeal could be lodged was a procedural matter and therefore the appeal the right to which had arisen under the repealing Act would have to be lodged in a forum provided for by the repealing Act.** In *Mithilesh Kumari v. Prem Behari Khare*, (1989) 2 SCC 95 : AIR 1989 S.C. 1247 (11), the Supreme Court said that even vested right could be taken away and said that where remedy is barred the right became unenforceable. **The decision of the Supreme Court in *Commissioner of Income Tax, Orissa v. Shri Dhadi Sahu*, JT 1992 (6) S.C. 714, would appear to be somewhat in conflict with its earlier decision but this judgment though holds that forum of appeal is a vested right to be followed before a particular forum and that right becomes vested when the proceedings are initiated but that vested right would not continue if the legislature by express words or by necessary implications so indicates.** The Full Bench of the Punjab High Court in *Gordhan Das Baldev Das v. The Governor General in Council*, AIR 1952 Punjab 103 (FB) (12), had also said that such a vested right of appeal to a particular forum could be taken away by a later statute if the intention of the legislature was clearly manifested in the later Act.” (emphasis supplied)

C.19 Mahendra Jain (2008- Bombay HC-DB)

49. In **Mahendra Panmal Duggad Jain v. Bhararilal Panmal Duggad Jain**⁴⁷, a controversy arose before the Bombay High Court where an amendment was made to Section 26 of the Bombay Civil Court Act, 1869, which increased the pecuniary jurisdiction of the District Court from Rs. 50,000 to Rs. 2 lakhs. Consequently, the Registrar of the Bombay High Court transferred an appeal which was pending when the amendment came into force to the District Court. The applicants applied to the District Court for re-transferring the appeal to the High Court contending that the appeals filed and entertained by the High Court prior to the amendment coming into force on 13 January 1999 were not liable to be transferred to the District Court. Their application was rejected and the applicants filed an application of re-transfer of the appeal before the High Court. The High Court placed reliance on Section 7(b) of the Bombay General Clauses Act to hold that the amendment would not affect the proceedings initiated before the High Court. The High Court held that unless a clear legislative intent can be discerned, the absence of a savings clause would not warrant transfer of cases to a new forum. Although, the High Court noted that the right to forum is in the realm of procedural law and would not entitle a litigant who has instituted suit in a trial court before the amending act came into force to insist that their appeal may also be heard and decided by the forum prescribed under the unamended provisions.

Justice R.C. Chavan observed:

“19...In view of the provisions of section 7(b) of the Bombay General Clauses Act the repeal of part of section 26 of Bombay Civil Courts Act, relating to the reference to the sum

⁴⁷ (2008) 4 Mah LJ 803

of Rs. Fifty Thousand, would not affect the proceedings which had already commenced or had been initiated in the High Court. We may, however, add that right to forum being in the realm of adjectives or procedural law would not entitle the suitor who had filed suit in the trial Court before Amending Act came into force to insist that even his appeal may be heard and decided by the forum prescribed under the unamended provisions. This question has already been concluded by the Full Bench in *Vilas Vasant Mahajan v. Central Bank of India*. However, unless clear legislature intent can be discerned to indicate that even pending matters were required to be transferred to the new forum, mere absence of a saving clause like one in the form of section 19 of the Amending Act of 1977, would not warrant transfer of cases to the new forum.”

C.20 Vallabhaneni (2004- Andhra Pradesh HC- 5 judges)

50. In **Vallabhaneni Lakshmana Swamy v. Valluru Basavaiah**⁴⁸ was a case where the A.P. Civil Court (Amendment) Act 1989 raised the pecuniary jurisdiction to entertain the appeal at the District Court from Rs. 30,000 to Rs. 1 lakh. By a further amendment the pecuniary jurisdiction was raised to Rs. 3 lakhs. The High Court held that the amendment would be applicable prospectively. The High Court further held that in case of suits which were filed earlier to the amendment and were pending as on the date the amendment came in force, the appeal in relation to those suits would be filed before a forum created under the amended Act depending on the pecuniary limits. If the appeal has been presented before the date of the amended Act coming into force and the appeals were pending as on the said date, the amendment would not have any effect on such pending appeals. The judgement of the High Court was premised on the principle that when the right to appeal and forum are inextricable, they both

⁴⁸ (2004) 5 ALD 807

become substantive rights and travel together. The Special Bench of the High Court observed:

“96. if the forum is changed and the right of the appeal in the forum are so inextricable that they cannot be separated by clear cut measure. It has to be that the right of appeal as well as the forum are both substantive rights and therefore, they only apply to the cases in future and not applied to the pending cases.”

C.21 Gobardhan Lal Soneja (1991- Patna HC- FB)

51. In **Gobardhan Lal Soneja v. Binod Kumar Sinha**⁴⁹, the Patna High Court relied on the decision in *New India Assurance* to hold that the transfer of pending proceedings from the Sub-Judge to the Munsif after pecuniary jurisdiction is altered by an amendment, is a valid exercise of power and there is no vested right to a forum. The Full Bench of the High Court observed:

“11...The Supreme Court in the *New India Assurance Co. Ltd.* (supra) considered the effect of section 110A of the Motor Vehicles Act, 1939 by which Claims Tribunals were constituted for filing claims arising out of motor vehicle accidents: The question was whether with regard to the claims for compensation arising out of an accident which took place after introduction of section 110A, a suit will lie or a claim therefor shall have to be filed before the Claims Tribunal. It was held by the Supreme Court that by section 110A there was no change in law, but merely change of forum i.e. the change of adjectival or procedural law and not substantive law. It was observed. “It is well established proposition that such change of law operates retrospectively and the person has to go to new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action, but not a vested right of forum”. It may be noticed that the language of section 19 is not such as to interpret it that the Munsif and Additional Munsif were given jurisdiction to hear suits of higher value which were filed after the amendment of that section. For this reason also, it must be held that the application of section 19 will be retrospective in the sense that it will apply to the

⁴⁹ (1991) 2 PLJR 783

pending suits. This proposition of law has been laid down in the New India Assurance Co. Ltd., (*supra*).”

C.22 Y.B. Ramesh (2010- Karnataka HC- SJ)

52. The Karnataka High Court in **Y.B. Ramesh v. Varalakshmi**⁵⁰, held that a subsequent amendment to pecuniary jurisdiction is said to have divested the concerned forum of its authority to hear the matter. The Single Judge of the High Court relied on the decision in **Sudhir G Angur**(*supra*) and observed:

“9. The main argument addressed by the learned Counsel for the petitioner is that as on the date of filing of the suit, the Court has no jurisdiction and hence, the plaint has to be rejected under Order 7, Rule 11(d) of CPC. The issue regarding law to be applied in determining the jurisdiction of the Court, i.e., the law as existing on the date of institution of the suit or on the date on which, the suit came up for hearing has to be applied. The Hon'ble Supreme Court in a judgment cited *supra* (Sudhir G Angur), held as under:

“In our view Mr. G.L. Sanghi is also right in submitting that it is the law on the date of trial of the suit which is to be applied. In support of this submission, Mr. Sanghi relied upon the judgment in *Shiv Bhagwan Mod Ram Saraoji v. Onkarmal Ishar Dass*, AIR 1952 Bom. 365, wherein it has been held that no party has a vested right to a particular proceeding or to a particular forum. It has been held that it is well-settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date when the suit or proceeding comes on for trial or disposal. It has been held that a Court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a Court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations. As stated above, the Mysore Act now stands repelled. It could not be denied that now the Court has jurisdiction to entertain this suit”.

10. In view of the pronouncement of law by the Hon'ble Supreme Court, the petitioner is not entitled for any relief.

⁵⁰ (2010) 6 Kant LJ 43

Further, even if it is held that the Civil Judge (Junior Division) has no pecuniary jurisdiction to entertain the suit, at the most, the Court can return the plaint to the plaintiff to present before the appropriate Court. In view of the amendment to the Civil Courts Act, the Civil Judge (Junior Division), Magadi is the Competent Court to try the suit and hence, I.A. No. 1 filed by the petitioner cannot be entertained.”

C.23 Conclusion on the position of law

53. In considering the myriad precedents that have interpreted the impact of a change in forum on pending proceedings and retrospectivity- a clear position of law has emerged: a change in forum lies in the realm of procedure. Accordingly, in compliance with the tenets of statutory interpretation applicable to procedural law, amendments on matters of procedure are retrospective, unless a contrary intention emerges from the statute. This position emerges from the decisions in **New India Assurance**(*supra*), **Maria Cristina**(*supra*), **Hitendra Kumar Thakur**(*supra*), **Ramesh Kumar Soni**(*supra*) and **Sudhir G Angur**(*supra*). More recently, this position has been noted in a three judge Bench decision of this Court in **Manish Kumar v. Union of India**⁵¹. However, there was a deviation by a two judge bench decision of this Court in **Dhadi Sahu**(*supra*), which overlooked the decision of a larger three judge bench in **New India Assurance**(*supra*) and of a co-ordinate two judge bench in **Maria Cristina**(*supra*). The decision in **Dhadi Sahu**(*supra*) propounded a position that “*no litigant has any vested right in the matter of procedural law but where the question is of change of forum it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The*

⁵¹ Writ Petition (C) No. 26 of 2020, decided on 19 January 2021 (Supreme Court of India)

right becomes vested when the proceedings are initiated in the tribunal.” In taking this view, the two judge bench did not consider binding decisions. **Dhadi Sahu**(*supra*) failed to consider that the saving of pending proceedings in **Mohd. Idris**(*supra*) and **Manujendra Dutt**(*supra*) was a saving of vested rights of the litigants that were being impacted by the repealing acts therein, and not because a right to forum is accrued once proceedings have been initiated. Thereafter, a line of decisions followed **Dhadi Sahu**(*supra*), to hold that a litigant has a crystallized right to a forum once proceedings have been initiated. A litigant’s vested right (including the right to an appeal) prior to the amendment or repeal are undoubtedly saved, in addition to substantive rights envisaged under Section 6 of the General Clauses Act. This protection does not extend to pure matters of procedure. Repeals or amendments that effect changes in forum would ordinarily affect pending proceedings, unless a contrary intention appears from the repealing or amending statute.

54. It is relevant to note in this context that the decision in **Ambalal Sarabhai**(*supra*) saved proceedings in relation to a benefit which although not vested, accrued to the landlord to evict the tenant by virtue of a proviso to a Section which accorded protection to the tenant from ejection. This Court reasoned that since the right of the landlord flows from a Section which protects the tenant, it cannot be enlarged into a vested right. However, **Ambalal Sarabhai**(*supra*) did not enunciate an absolute proposition that the right to institute proceedings at a particular forum is an accrued right, let alone a vested right. The dictum that a change of forum is a procedural matter is not altered by the decision of this Court in **Ambalal Sarabhai**(*supra*) which sought to

differentiate between vested rights and accrued rights, the latter being protected under Section 6(c) of the General Clauses Act, the proceedings in relation to which are protected under Section 6(e).

55. Now, it is in this backdrop, that we have to analyze the impact of the Act of 2019 upon pending cases which were filed before the *fora* constituted under the Act of 1986.

D Legislative Scheme of the jurisdictional provisions

56. Some of the salient aspects of the Act of 2019 insofar as they pertain to the jurisdictional provisions need to be visited. The pecuniary limits of the original jurisdiction of the District Commission under Section 34(1) is to entertain complaints where the value of the goods or services paid as consideration does not exceed a crore of rupees.

57. An appeal lies to the SCDRC from an order of the District Commission under Section 41. The second proviso to Section 41 stipulates that an appeal shall not be entertained of a person who is required to pay any amount under the order of the District Commission, unless the appellant has deposited 50 per cent of the decretal amount.

58. The SCDRC has, under Section 47(1)(a)(i), original jurisdiction to entertain complaints subject to a pecuniary limit of not less than one crore rupees and not exceeding rupees ten crores. The SCDRC has an appellate jurisdiction under Section 47(1)(a)(iii), revisional jurisdiction under Section 47(1)(b) and review jurisdiction under Section 50.

59. Section 51 provides an appeal to the NCDRC from an order passed by the SCDRC in the exercise of its original jurisdiction to hear a complaint [referable to sub-clauses (i) and (ii) of clause (a) of Section 47 (1)]. As in the manner of an appeal before the SCDRC against an order of the District Commission, the second proviso to Section 51 provides that an appeal shall not be entertained at the behest of a person who is required to pay any amount unless 50 per cent of

the amount has been deposited. Under sub-Section (2) of Section 51, an appeal before the NCDRC against an order of the SCDRC lies on a substantial question of law.

60. The original jurisdiction of the NCDRC under Section 58(a)(1) is to entertain complaints where the value of the goods or services paid as consideration exceeds rupees ten crores and complaints against unfair contracts of a similar value. The NCDRC is vested with an appellate jurisdiction under Section 51, a revisional jurisdiction under Section 58(1)(b) and a review jurisdiction under Section 60. An appeal against an order of the NCDRC passed in the exercise of its original jurisdiction lies to this Court under Section 67. The second proviso of Section 67 requires a pre-deposit of 50 per cent of the amount ordered by the NCDRC.

61. Under the earlier Act of 1986, the pecuniary limit of the jurisdiction of (i) the District Commission was up to rupees 20 lacs under Section 11(1); (ii) the SCDRC between rupees twenty lacs and rupees one crores under Section 17(1); and (iii) the NCDRC above rupees one crore under Section 21. The requirement of pre-deposit for filing an appeal before the SCDRC against an order of the District Commission was 50 per cent of the amount or twenty-five thousand rupees, whichever is less (Section 15). A similar pre deposit was required for appeals to the NCDRC against orders of the SCDRC (second proviso to Section 19). An appeal before the NCDRC against an order of the SCDRC (Section 19) was not circumscribed by the requirement that it must raise a substantial question

of law. In Section 51(2) of the Act of 2019, an appeal to the NCDRC lies on a substantial question of law.

E Legislative intendment underlying Section 107 of the Act of 2019

62. Section 107(1) of the Act of 2019 repeals the Act of 1986. In **State of Rajasthan v. Mangilal Pindwal**⁵², this Court accepted the principle that the effect of a repeal, in the absence of a savings clause or a general savings statute, is that "a statute is obliterated" subject to the exception that it exists in respect of transactions past and closed. Section 107 (2) has saved "the previous operation" of any repealed enactment or "anything duly done or suffered thereunder to the extent that it is not inconsistent with the provisions of the new legislation". Finally, Section 107(3) indicates that the mention of particular matters in sub-Section (2) will not prejudice or affect the general application of Section 6 of the General Clauses Act.

63. Section 6 of the General Clauses Act provides governing principles with regard to the impact of the repeal of a central statute or regulation. These governing principles are to apply, "unless a different intention appears". Clause (c) of Section 6 *inter alia* stipulates that a repeal would not affect "any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed". The right to pursue a validly instituted consumer complaint under the Act of 1986 is a right which has accrued under the law which was repealed. Clause (e) of Section 6 stipulates that the repeal will not affect, *inter alia*, any

⁵² (1996) 5 SCC 60

"legal proceeding or remedy" in respect of any such right...as aforesaid". Any such legal proceedings may be continued as if the repealing legislation had not been passed. Clause (c) of Section 6 has the effect of preserving the right which has accrued. Clause (e) ensures that a legal proceeding which has been initiated to protect or enforce "such right" will not be affected and that it can be continued as if the repealing legislation has not been enacted. The expression such a right in clause (e) evidently means the right which has been adverted to in clause (c). The plain consequence of clause (c) and clause (e), when read together is two-fold: *first*, the right which has accrued on the date of the institution of the consumer complaint under the Act of 1986 (the repealing law) is preserved; and *second*, the enforcement of the right through the instrument of a legal proceeding or remedy will not be affected by the repeal.

64. Having stated the above position, we need to harmonize it with the principle that the right to a forum is not an accrued right, as discussed in **Part C** of this judgement. Simply put, while Section 6(e) of the General Clauses Act protects the pending legal proceedings for the enforcement of an accrued right from the effect of a repeal, this does not mean that the legal proceedings at a particular forum are saved from the effects from the repeal. The question whether the pending legal proceedings are required to be transferred to the newly created forum by virtue of the repeal would still persist. As discussed, this Court in **New India Assurance**(*supra*) and **Maria Christina**(*supra*) has held that forum is a matter pertaining to procedural law and therefore the litigant has to pursue the legal proceedings at the forum created by the repealing act, unless a contrary intention appears. This principle would also apply to pending proceedings, as

observed in **Ramesh Kumar Soni**(*supra*), **Hitendra Kumar Thakur**(*supra*) and **Sudhir G Angur**(*supra*). In this backdrop, what is relevant to ascertain is whether a contrary intent to the general rule of retrospectivity has been expressed under the Act of 2019 to continue the proceedings at the older forum.

65. Now, in considering the expression of intent in the repealing enactment in the present case, it is apparent that there is no express language indicating that all pending cases would stand transferred to the *fora* created by the Act of 2019 by applying its newly prescribed pecuniary limits. In deducing whether there is a contrary intent, the legislative scheme and procedural history may provide a relevant insight into the intention of the legislature.

66. The Act of 2019, as indicated by its long title, is enacted to provide "for protection of the interests of consumers". The Statement of Objects and Reasons took note of the tardy disposal of cases under the erstwhile legislation. Thus, the necessity of inducing speed in disposal was to protect the rights and interests of consumers. The Act of 2019 has taken note of the evolution of consumer markets by the proliferation of products and services in light of global supply chains, e-commerce and international trade. New markets have provided a wider range of access to consumers. But at the same time, consumers are vulnerable to exploitation through unfair and unethical business practices. The Act has sought to address "the myriad and constantly emerging vulnerabilities of the consumers". The recurring theme in the new legislation is the protection of consumers which is sought to be strengthened by procedural interventions such as strengthening

class actions and introducing mediation as an alternate forum of dispute resolution.

67. In this backdrop, something specific in terms of statutory language - either express words or words indicative of a necessary intendment would have been required for mandating the transfer of pending cases. One can imagine the serious hardship that would be caused to the consumers, if cases which have been already instituted before the NCDRC were required to be transferred to the SCDRCs as a result of the alteration of pecuniary limits by the Act of 2019. A consumer who has engaged legal counsel at the headquarters of the NCDRC would have to undertake a fresh round of legal representation before the SCDRC incurring expense and engendering uncertainty in obtaining access to justice. Likewise, where complaints have been instituted before the SCDRC, a transfer of proceedings would require consumers to obtain legal representation before the District Commission if cases were to be transferred. Such a course of action would have a detrimental impact on the rights of consumers. Many consumers may not have the wherewithal or the resources to undertake a fresh burden of finding legal counsel to represent them in the new forum to which their cases would stand transferred.

68. It would be difficult to attribute to Parliament, whose purpose in enacting the Act of 2019 was to protect and support consumers with an intent that would lead to financial hardship, uncertainty and expense in the conduct of consumer litigation. Ironically, the objection which has been raised in the present case to the continued exercise of jurisdiction by the NCDRC in regard to the consumer

complaint filed by the appellant is by the developer who is the respondent herein. It is a developer who opposed the continuation of the proceedings before the NCDRC on the ground that under the new consumer legislation the pecuniary limits of the jurisdiction exercisable by the NCDRC have been enhanced and the complaint filed by the appellant which was validly instituted under the erstwhile law should be transferred to the SCDRC. Such a course of action will result in thousands of cases being transferred across the country, from the NCDRC to the SCDRCs and from the SCDRCs to the District Commission.

69. Data drawn from annual reports of the Union Ministry of Consumer Affairs indicates pendency from financial year 2015-16 to financial year 2019-20:

Report for FY 2015-16 (figures as on 31.12.2015)⁵³

Commissions/Forums	Cases filed since inception	Cases disposed of since inception	Cases Pending	% of Disposal
NCDRC	98,952	88,893	10,059	89.83
SCDRC	6,97,964	6,01,216	96,748	86.14
District Forums	36,59,486	33,73,529	2,85,957	92.19
Total	44,56,402	40,63,638	3,92,764	91.19

Report for FY 2016-17 (figures as on 31.12.2016)⁵⁴

⁵³ https://consumeraffairs.nic.in/sites/default/files/file-uploads/annualreports/1535004604_AR_2015-16.pdf, page 34

⁵⁴ https://consumeraffairs.nic.in/sites/default/files/file-uploads/annualreports/1535004643_AR_2016-17.pdf, page 47

Commissions/Forums	Cases filed since inception	Cases disposed of since inception	Cases Pending	% of Disposal
NCRC	1,06,711	94,581	12,130	88.63
SCDRC	7,28,526	6,27,289	1,01,237	86.10
District Forums	38,53,422	35,51,649	3,01,773	92.17
Total	46,89,280	42,74,136	4,15,144	91.15

Report for FY 2017-18 (figures as on 29.01.2018)⁵⁵

Commissions/Forums	Cases filed since inception	Cases disposed of since inception	Cases Pending	% of Disposal
NCRC	1,17,430	1,00,419	17,011	85.51
SCDRC	7,57,887	6,49,606	1,08,281	85.71
District Forums	40,62,476	37,59,249	3,03,227	92.54
Total	49,37,793	45,09,274	4,28,519	91.32

Report for FY 2018-19 (figures as on 31.03.2019)⁵⁶

Commissions/Forums	Cases filed since	Cases disposed of	Cases Pending	% of Disposal

⁵⁵ https://consumeraffairs.nic.in/sites/default/files/file-uploads/annualreports/1535004742_AR_2017-18.pdf , page 49

⁵⁶ <https://consumeraffairs.nic.in/sites/default/files/file-uploads/annualreports/> . , page 41

	inception	since inception		
NCDRC	1,28,152	1,08,112	20,040	84.36
SCDRC	8,29,477	7,11,507	1,17,970	85.78
District Forums	41,59,692	38,38,473	3,21,219	92.28
Total	51,17,321	46,58,092	4,59,229	91.03

Report for FY 2019-20 (figures as on 31.10.2019)⁵⁷

Commissions/Forums	Cases filed since inception	Cases disposed of since inception	Cases Pending	% of Disposal
NCDRC	1,33,148	1,11,932	21,216	84.07
SCDRC	9,44,841	8,19,685	1,25,156	86.75
District Forums	43,05,234	39,62,438	3,42,796	92.04
Total	53,83,223	48,94,055	4,89,168	90.91

The above data indicates that as on 31 October 2019, 21,216 cases were pending before the NCDRC and 1,25,156 cases were pending before the SCDRC. Many of these cases would have to be transferred if the view which the developer propounds is upheld. This will seriously dislocate the interests of consumers in a manner which defeats the object of the legislation, which is to protect and promote their welfare. Clear words indicative of either an express

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https://consumeraffairs.nic.in/sites/default/files/file-uploads/annualreports/1596167686_Annual%20Report%202019-20.pdf page 45

intent or an intent by necessary implication would be necessary to achieve this result. The Act of 2019 contains no such indication. The transitional provisions contained in Sections 31, 45 and 56 expressly indicate that the adjudicatory personnel who were functioning as Members of the District Commission, SCDRC and NCDRC under the erstwhile legislation shall continue to hold office under the new legislation. Such provisions are necessary because persons appointed to the consumer *fora* under the Act of 1986 would have otherwise demitted office on the repeal of the legislation. The legislature cannot be attributed to be remiss in not explicitly providing for transfer of pending cases according to the new pecuniary limits set up for the *fora* established by the new law, were that to be its intention. The omission, when contextualized against the statutory scheme, portends a contrary intention to protect pending proceedings through Section 107(2) of the Act of 2019. This intention appears likely, particularly in light of previous decisions of the NCDRC which had interpreted amendments that enhanced pecuniary jurisdiction, with prospective effect. The NCDRC, in **Southfield Paints and Chemicals Pvt. Ltd. v. New India Assurance Co. Ltd.**⁵⁸ construed amending Act 62 of 2002 by which the pecuniary limits of jurisdiction were enhanced with effect from 15 March 2003 as prospective by relying on its earlier decision in **Premier Automobiles Ltd. v. Dr Manoj Ramachandran**⁵⁹, where the NCDRC held that the amendments enhancing the pecuniary jurisdiction are prospective in nature [albeit on a reliance of the principle in **Dhadi Sahu**(*supra*)]. Parliament would be conscious of this governing principle and yet chose not to alter it in its application to the consumer *fora*.

⁵⁸ Consumer Case No. 286 of 2000 (NCDRC)

⁵⁹ Revision Petitions Nos 400 to 402 of 1993 (NCDRC)

70. It is accepted, that in defining the jurisdiction of the District Commission, Section 34 of the Act of 2019 entrusts the jurisdiction to “entertain” complaints. A similar provision is contained in Section 47 and Section 58 in regard to the SCDRC and NCDRC. The expression “entertain” has been considered in a two judge Bench decision of this Court in **Hindusthan Commercial Bank Ltd. v. Punnu Sahu (Dead) Through Legal Representatives**⁶⁰, in the context of the provisions of Order XXI Rule 90 of the CPC. The Court has accepted that the expression “entertain” means to adjudicate upon or proceed to consider on merits. In **Nusli Neville**(*supra*), while considering the provisions of Section 9A of the CPC as inserted by a Maharashtra Amendment, a two judge Bench followed the exposition in **Hindusthan Commercial Bank**(*supra*). Undoubtedly, the expression “entertain” has been construed in the context of Section 9A of the Code of Civil Procedure, as amended in Maharashtra, by a three judge Bench of this Court in **Nusli Wadia**(*supra*) to mean “to adjudicate upon or to proceed to consider on merits”. Sections 34, 47 and 58 similarly indicate that the respective consumer *fora* can entertain complaints within the pecuniary limits of their jurisdiction. These provisions will undoubtedly apply to complaints which were instituted after the Act of 2019 came into force. However, the mere use of the word “entertain” in defining jurisdiction is not sufficient to counteract the overwhelming legislative intention to ensure consumer welfare and deliberately not provide for a provision for transfer of pending proceedings in the Act of 2019 or under Section 106 of the Act of 2019 which is a power to remove difficulties for a period of two years after the commencement of the Act of 2019.

⁶⁰ “**Hindusthan Commercial Bank**”; (1971) 3 SCC 124

F Summation

71. For the above reasons, we have come to the conclusion that proceedings instituted before the commencement of the Act of 2019 on 20 July 2020 would continue before the *fora* corresponding to those under the Act of 1986 (the National Commission, State Commissions and District Commissions) and not be transferred in terms of the pecuniary jurisdiction set for the *fora* established under the Act of 2019. While allowing the appeals, we issue the following directions:

- (i) The impugned judgment and order of the NCDRC dated 30 July 2020 and the review order dated 5 October 2020, directing a previously instituted consumer case under the Act of 1986 to be filed before the appropriate forum in terms of the pecuniary limits set under the Act of 2019, shall stand set aside;
- (ii) As a consequence of (i) above, the National Commission shall continue hearing the consumer case instituted by the appellants;
- (iii) All proceedings instituted before 20 July 2020 under the Act of 1986 shall continue to be heard by the *fora* corresponding to those designated under the Act of 1986 as explained above and not be transferred in terms of the new pecuniary limits established under the Act of 2019; and
- (iv) The respondent shall bear the costs of the appellant quantified at Rupees Two lakhs which shall be payable within four weeks.

72. The appeals are allowed in the above terms.
73. Pending application(s), if any, stand disposed of.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[M R Shah]

New Delhi;
March 16, 2021.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO(S). 292 OF 2021
(Arising out of SLP(Crl.) No(s).8498 of 2019)

SUMETI VIJ**...APPELLANT(S)****VERSUS****M/S PARAMOUNT TECH FAB
INDUSTRIES****...RESPONDENT(S)****WITH**

CRIMINAL APPEAL NO(S). 293 OF 2021
(Arising out of SLP(Crl.) No(s).8564 of 2019)

J U D G M E N T**Rastogi, J.**

1. Leave granted.
2. The appellant is aggrieved by the judgment dated 30th April, 2019 passed by the High Court of Himachal Pradesh holding the appellant guilty of offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act") after

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 Nidhi Ahuja
 Date: 2024.03.09
 15:38:24 IST
 Reason:

reversal of the finding of acquittal returned by the learned trial Judge by its judgment dated 28th September, 2012.

3. The brief facts of the case which emanates from the record are that the appellant accused approached the complainant-respondent in its factory at Moginand and expressed her desire to purchase non-woven fabric from the complainant. On the basis of order placed by the appellant, non-woven fabric was sold to the appellant vide invoice No.120 dated 01st October, 2010 and invoice No.135 dated 16th October, 2010 amounting to Rs.5,07,062/- and Rs.5,10,000/- which was delivered through public carrier truck bearing Nos. HR-38G-5607 and HP-71-0693 to the appellant accused and in lieu thereof, a cheque bearing No.323930 dated 15th October, 2010 and No.323935 dated 01st November, 2010 were issued by the appellant in the name of the complainant from her account of the Punjab National Bank, Karnal in order to meet the legal existing and enforceable liabilities. The cheques on presentation were returned vide memo dated 19th October, 2010 and 10th November, 2010 from Punjab National Bank, Karnal with a note of "insufficient funds" in the account of the appellant. Two legal notices dated 29th October, 2010 and 19th November, 2010 were sent by the complainant to

the appellant on two addresses. The notices were duly served but the appellant neither responded to the notices nor made any payment in furtherance thereto within the statutory period hence, two separate complaints were filed by the complainant-respondent under Section 138 of the Act against the appellant-accused.

4. The complainant-respondent recorded the preliminary evidence before the learned trial Judge and thereafter, the appellant-accused was directed to be summoned for committing an offence punishable under Section 138 of the Act. After the presence of the appellant had been secured, the learned trial Judge put notice of accusation, vis-a-viz the accused, for an offence allegedly committed by her under Section 138 of the Act whereto she pleaded not guilty and claimed trial.

5. The complainant in order to prove its case against the appellant-accused, has examined three witnesses and placed reliance on the documentary evidence which were duly exhibited and referred to in detail by the learned trial Judge in para 3 of its judgment. On conclusion of recording of complainant's evidence, the statement of the appellant-accused was recorded under

Section 313 of the Code of Criminal Procedure (hereinafter referred to as the “Code”) by the learned trial Judge wherein the appellant-accused claimed innocence and pleaded false implication in the case however, did not lead any evidence in defence.

6. On perusal of the evidence on record, the learned trial Judge returned a finding that the complainant failed to establish that the material/goods were delivered to the appellant in lieu of which, the cheques were issued, and in the absence of burden being discharged by the complainant, the onus to disprove or rebut the presumption could not be shifted to the appellant as referred under Section 139 of the Act. Accordingly, the trial court returned the finding of acquittal of the appellant, which was the subject matter of challenge in appeal before the High Court at the instance of the complainant.

7. The High Court on reappraisal of the evidence on record affirmed that the primary burden was discharged by the complainant that the cheques were issued by the appellant in lieu of the material supplied, and documentary evidence duly exhibited was placed on record to substantiate the claim, and it

was for the appellant-accused to discharge her burden to rebut in defence as required under Section 139 of the Act. In the instant case, the appellant only recorded her statement under Section 313 of the Code. However, no evidence was recorded to disprove or rebut the presumption in defence. Taking into consideration the overall material on record while setting aside the finding of acquittal recorded by the trial Judge, held that the appellant was guilty of committing an offence under Section 138 of the Act and consequently, awarded appropriate punishment of fine/sentence by the impugned judgment dated 30th April, 2019, which is the subject matter of challenge in appeals before us.

8. Learned counsel for the appellant submitted that the complainant was not able to prove that the material/goods were ever sent or received by the appellant and in terms of the complaint, the burden was on the complainant to prove that the material/goods were received by the appellant, against which the cheques were received as security and even though the appellant has not placed any evidence to disprove or rebut the presumption in defence, still the complainant has to discharge its burden and has to stand on his own legs. In the absence of the prima-facie burden being discharged by the complainant, mere issuance of

the cheques by the appellant would not have been sufficient to justify that the cheques were issued in discharge of any debt or other liability. In support of his submission, learned counsel for the appellant has placed reliance on the judgment of this Court in ***K. Prakashan vs. P.K. Surenderan***¹ and ***Indus Airways Private Limited and Others Vs. Magnum Aviation Private Limited and Another***².

9. Learned counsel for the appellant further submits that the appellant was able to succeed in creating a doubt in the mind of the court below with regard to the non-existence of the debt or liability, and the learned trial court had returned the finding based on the material available on record. Unless it was found to be perverse or unsustainable, or a case of non-consideration of any relevant material, the High Court was not justified in reversing and setting aside the finding of acquittal recorded by the trial court merely on the ground that the view expressed by the High Court is more plausible with what being expressed by the trial court in its judgment dated 28th September, 2012.

1 (2008) 1 SCC 258

2 (2014) 12 SCC 539

10. Learned counsel for the appellant further submits that the finding recorded by the High Court in the impugned judgment is contrary to the settled principles of law as considered by this Court in appreciating the mandate of Sections 118(a), 138 and 139 of the Act. In consequence thereof, the finding of guilt which has been recorded by the High Court in the impugned judgment is unsustainable in law, and has to be set aside.

11. Per contra, learned counsel for the complainant-respondent while supporting the finding recorded by the High Court in the impugned judgment submitted that there was sufficient material available on record to justify that these cheques were issued with reference to the invoices after delivery of goods, which were duly exhibited, and cheques were issued in lieu thereof. In the sequence of facts, the cheques issued by the appellant, on due presentation to the bank got dishonoured on the ground of “insufficient funds”. The statutory notice was issued to the appellant, who failed to respond. The complaints were filed by placing all documentary evidence in support of the complaint duly exhibited, and three witnesses in support thereof were examined, and was able to establish and discharge the burden of proof. It was for the appellant to come forward with her defence,

and prove to the contrary as envisaged under Section 139 of the Act.

12. In the instant case, the appellant has only recorded her statement under Section 313 of the Code, and has not adduced any evidence to rebut the presumption that the cheques were issued for consideration. Once the facts came on record remained un rebutted and supported with the evidence on record with no substantive evidence of defence of the appellant to explain the incriminating circumstances appearing in the complaint against her, no error has been committed by the High Court in the impugned judgment, and the appellant has been rightly convicted for the offence punishable under Section 138 of the Act and needs no interference of this Court.

13. The object of introducing Section 138 and other provisions of Chapter XVII in the Act appears to be to enhance the acceptability of cheques in the settlement of liabilities. The drawer of the cheque be held liable to prosecution on dishonour of cheque with safeguards provided to prevent harassment of honest drawers. Section 138 primarily relates to a civil wrong and the amendment made in the year 2000 specifically made it

compoundable. The burden of proof was on the accused in view of presumption under Section 139 of the Act and the standard of proof was of “preponderance of probabilities”. The N.I. Act including a cheque carrying a presumption of consideration in terms of Sections 118(a) and 139 of the Act which is related to the purpose referred to and reads as under:-

“118 Presumptions as to negotiable instruments. —Until the contrary is proved, the following presumptions shall be made:—

(a) **of consideration** —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

.....

139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”

14. There is a mandate of presumption of consideration in terms of the provisions of the Act and the onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act, which reads as under:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any

amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 8 [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

15. The scope of Section 139 of the Act is that when an accused has to rebut the presumption, the standard of proof for doing so is that of “preponderance or probabilities” which has been examined by a three-Judge Bench of this Court in **Rangappa vs. Sri Mohan**³, which reads as under:-

³ (2010) 11 SCC 441

“26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in *Krishna Janardhan Bhat* [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof.”

16. It is well settled that the proceedings under Section 138 of the Act are quasi-criminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.

17. Likewise, under Section 139 of the Act, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced by the

accused which on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved. In ***Rohitbhai Jivanlal Patel vs. State of Gujarat and Another***⁴, this Court has examined the scope of Sections 138 and 139 of the Act, which reads as under:-

“**15.** So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 of the NI Act is concerned, apparent it is that the appellant-accused could not deny his signatures on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs 3 lakhs each. The said cheques were presented to the bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The trial court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e. the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the appellant-accused to establish a probable defence so as to rebut such a presumption.

.....

17. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasised that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged under Sections 118 and 139 of the NI Act. This Court stated the principles in *Kumar Exports* [*Kumar Exports v. Sharma Carpets*, (2009) 2 SCC 513]

4 (2019) 18 SCC 106

“20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, therefore, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.”

It was further considered by this Court in ***Uttam Ram vs. Devinder Singh Hudan and Another***⁵.

18. In the case at hand, elucidating from the principles, the complainant was able to prove that the appellant placed the order for purchasing non-woven fabric which was sold vide invoice No. 120 dated 01st October, 2010 and invoice No. 135 dated 16th October, 2010 amounting to Rs.5,07,062/- and Rs.5,10,000/- which was delivered through public carrier truck bearing Nos. HR-38G-5607 and HP-71-0693 and in lieu thereof, the cheques bearing No.323930 dated 15th October, 2010 and No.323935 dated 01st November, 2010 in favour of the complainant were issued by appellant in order to discharge her liability. On the cheques being presented for encashment to the State Bank of India, Branch Kala Amb, the same were dishonoured on the ground of “insufficient funds” in the account of the appellant and the same were returned vide memo dated 19th October and 10th November, 2010 by Punjab National Bank, Karnal.

5 (2019) 10 SCC 287

19. Thereafter, two separate legal notices were served by the complainant which were duly received by the appellant and even after receiving the said notices, the appellant neither responded to the notices nor made any payment within the statutory period of fifteen days and only thereafter, two separate complaints were filed by the complainant under Section 138 of the Act against the appellant-accused.

20. There was no response by the appellant at any stage either when the cheques were issued, or after the presentation to its banker, or when the same were dishonoured, or after the legal notices were served informing the appellant that both the cheques on being presented to its banker were returned with a note that it could not be honoured because of “insufficient funds”.

21. That apart, when the complainant exhibited all these documents in support of his complaints and recorded the statement of three witnesses in support thereof, the appellant has recorded her statement under Section 313 of the Code, but failed to record evidence to disprove or rebut the presumption in support of her defence available under Section 139 of the Act.

The statement of the accused recorded under Section 313 of the Code is not a substantive evidence of defence, but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case of the accused. Therefore, there is no evidence to rebut the presumption that the cheques were issued for consideration.

22. The judgment on which learned counsel for the appellant has placed reliance i.e. **K. Prakashan vs. P.K. Surenderan**⁶ may not be of any assistance for the reason that in the case dealing under Section 138 of the Act, the prosecution has to prove the case and these cases being quasi-criminal in nature are to be proved on the basis of the principles of “preponderance of probabilities”, and not on the principles as being examined in the criminal case to prove the guilt of the accused beyond reasonable doubt. So far as other case cited by the learned counsel for the appellant i.e. **Indus Airways Private Limited and Others Vs. Magnum Aviation Private Limited and Another**⁷, there was sufficiency of material on record to justify that the cheques were issued as advance payment for purchase of goods, and one of the

⁶ (2008) 1 SCC 258

⁷ (2014) 12 SCC 539

terms and conditions of the contract was that the entire payment would be made to the supplier in advance. However, much within the time, the supplier-complainant received the letter from the purchasers cancelling the purchase orders and requested the supplier to return both the cheques. The supplier pursuant thereto, sent response asking the purchasers as to when the supplier could collect the payment, and only thereafter, the supplier sent a legal notice to the purchasers and filed a complaint under Section 138 of the Act. In the given circumstances, it was observed by this Court that the complainant had failed even prima-facie that there was a legally enforceable debt or other liability subsisting on the date of drawal of the cheque as contemplated under Section 138 of the Act. This judgment would not be of any help to the appellant in the instant case.

23. When the matter was earlier heard on 01st March, 2021, we directed the learned counsel for the appellant to seek instructions whether his client is ready to make payment of the stated cheque amount in both the criminal appeals i.e. Rs.5,07,062/- and Rs.5,10,000/- and posted the matter for further hearing on 05th March, 2021. Learned counsel for the

appellant on instructions, informed that his client is not willing to discharge the stated amount, and wants to argue the case on merits. After hearing the counsel for both the parties, we reserved the order on 05th March, 2021 and still afforded an opportunity that by 06th March, 2021 evening, the appellant can still reconsider her instructions as noticed by us in the order of 01st March, 2021. It has been informed to us that the appellant is interested to get the outcome of the present appeals on merits.

24. In the given circumstances, the High Court, in our view, has not committed any error in recording the finding of guilt of the appellant and convicting her for an offence being committed under Section 138 of the Act under its impugned judgment, which in our considered view, needs no further interference. Consequently, the appeals are without any substance, and are accordingly dismissed.

25. The bail bonds stand cancelled and the appellant shall either pay the fine, or serve the sentence in compliance with the judgment dated 30th April, 2019 passed by the High Court of Himachal Pradesh.

26. Pending application(s), if any, shall stand disposed of.

.....J.
(INDU MALHOTRA)

.....J.
(AJAY RASTOGI)

NEW DELHI
March 09, 2021

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 989 OF 2005
IN
ARBITRATION PETITION NO. 36 OF 2004

M/s.Satish K. Narang & Co.)
B-11/2096, Rock View Apartment,)
Vasant Kunj, New Delhi 110 070.) **..... Appellant**

VERSUS

Jamnadas Morarje Secs.Ltd.)
Member(s) Clg. No. 330,)
204, Stock Exchange Tower,)
Dalal Street, 2nd Floor, Mumbai) **..... Respondent**

Mr.Kunal Kumbhat, a/w. Ms.Rachana Kumbhat, i/b. Ms.Sunanda Kumbhat for the Appellant.

Mr.Simil Purohit, a/w. Mr.Vishal Paltabiraman, i/b. M/s.Purohit & Co. for the Respondents.

CORAM: R. D. DHANUKA AND
V. G.BISHT, JJ.

RESERVED ON : 19th MARCH, 2021
PRONOUNCED ON : 4th MAY 2021

JUDGMENT (Per R. D. Dhanuka, J.) :-

. By this appeal filed under section 37 of the Arbitration and Conciliation Act, 1996 (for short ‘Arbitration Act’), the appellant has impugned the judgment dated 2nd May, 2005 passed by the learned Single Judge dismissing the arbitration petition filed by the appellant under section 34 of the Arbitration and Conciliation Act, 1996. Some

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of the relevant facts for the purpose of deciding this appeal are as under:-

2. The appellant was the original petitioner/claimant before the learned Single Judge and also before the arbitral tribunal. The respondent herein was the original respondent before the learned Single Judge as well as in the arbitral proceedings. It was the case of the appellant that the appellant is an investor whereas the respondent is a corporate member of the Bombay Stock Exchange Limited and is carrying on business as share, stock and finance broker.

3. On 3rd August, 1994, the appellant purchased 1000 shares of Prakash Tubes Ltd. through the respondent. On 27th August, 1994, 200 shares of the said company were returned to the respondent as the same were returned by the said company Prakash Tubes Ltd. on the ground that the signature differed. On 12th August, 1995, 100 shares were returned by the respondent after rectification along with 75 bonus shares on the said 100 shares to the appellant. It is the case of the appellant that the respondent was right to return 100 shares plus 75 bonus shares of the said Prakash Tubes Ltd. to the appellant.

4. It is the case of the appellant that on 4th January, 1995, the

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appellant purchased 100 shares of Brook Bond Ltd. through the respondent. On 23rd January, 1995, the respondent delivered 50 shares of the said Brook Bond Ltd. to the appellant and did not deliver the balance 50 shares of the said company. It is the case of the appellant that on 4th May, 1994, the appellant purchased 1,00,000 shares of Torrent Gujarat Bio Tech Ltd. through the respondent. On 24th November, 1994, the appellant returned 100 shares to the respondent with objection memo of the said company Torrent Gujarat Bio Tech Ltd. The respondent however did not return those 100 shares after rectification of the objection to the appellant.

5. It is the case of the appellant that on 30th March, 1995, though the respondent had sold 100 shares of Atlantic Spinning on behalf of the appellant, the respondent did not give credit of the sale proceeds of those shares to the appellant. The respondent sent a statement of account of the appellant for the period between 27th March, 1995 and 11th August, 1995. According to the appellant, the statement of account showed the difference of Rs.3,100/- in settlement nos. 5527 and 7453. The last transaction between the appellant and the respondent was on 6th December, 1995. On 29th May, 1996, the respondent sent a letter to the appellant for reconciliation of the statement of accounts. It is the case of the appellant that on 25th June, 1996, the appellant forwarded

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his reconciliation statement to the respondent. According to the appellant, during the period between 17th September, 1996 and 14th October, 1998, the appellant sent various reminders to the respondent for payment due to the appellant. The respondent however did not make any payment due to the appellant.

6. On 26th March, 1998, the SEBI called upon the Bombay Stock Exchange to amend its bye laws to include the applicability of the Limitation Act, 1963. On 31st March, 1998, the Governing Board of the Bombay Stock Exchange passed a resolution thereby adopting the instructions of the SEBI and resolved to amend the bye-laws. On 29th August, 1998, the bye-laws of the Bombay Stock Exchange were amended. The provisions with respect to the limitation were added by amending the bye law no.252. The amendment were two fold i.e. claim against defaulter members and the claim between the members and non-members.

7. It is the case of the respondent that as far as the claim against the defaulters are concerned, the bye-law prescribed a period of six months from the date the claim arises or becomes due. However, the arbitral tribunal was granted sufficient power to condone delay as provided under section 5 of the Limitation Act. Bye-law 252(2) of the amended

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bye-law provided that the provisions of the Limitation Act, 1963 were applicable.

8. On 7th June, 2002, the Governing Board of the Bombay Stock Exchange passed a resolution and once again amended the bye-law 252(2) by the said amendment. It was provided that the claim has to be received by the exchange within a period of six months from the date of transaction. The said amendment empowers the Governing Board to appoint the committee to settle all claims and differences amicably. It was provided that the time taken by the Investor's Grievances Redressal Committee (IGRC) would be excluded while computing the period of limitation. It was also provided that all transactions done prior to the date on which the bye-laws came into effect, the limitation period of six months shall be computed from the date on which the bye-laws came into effect. SEBI granted its approval to the said amendment on 4th June, 2003.

9. It is an undisputed position that on 29th April, 1999, the appellant made a complaint which was referred to the IGRC against the respondent member. On 29th August, 1999, the respondent replied to the said complaint dated 29th April, 1999. It is the case of the appellant that the respondent for the first time in the said reply to the complaint

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indicated that there was a dispute between the parties. On 17th September, 1999, a meeting came to be held by the said IGRC. On 29th September, 1999, the IGRC directed the parties to go for arbitration. On 29th September 2000, 30th September 2000 and 4th November, 2000, the appellant addressed letters seeking help of the Bombay Stock Exchange for the registration of the dispute between the appellant and the respondent.

10. On 1st July, 2002, the appellant lodged a statement of claim against the respondent. According to the arbitral award, the date of the reference was 26th October, 2002. On 31st October, 2002, the respondent filed a reply and the counter claim and raised a plea of limitation in respect of the claims made by the appellant. The appellant filed a rejoinder on 10th February, 2003. The respondent filed sur-rejoinder on 11th March, 2003. During the period between 19th December, 2002 and 5th May, 2003, the matter was heard by the arbitral tribunal. On 27th June, 2003, the learned arbitrator rejected the claim made by the appellant on the ground of limitation. The learned arbitrator held that the claim of the appellant was time barred on 13th June, 2003. The appellant ought to have filed their claim on or before 28th August, 2001. The appellant applied for rectification of the said award before the learned arbitrator.

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11. By an order dated 21st July, 2003, the learned arbitrator made few corrections in the said arbitral award dated 27th June, 2003. The appellant filed the petition under section 34 of the Arbitration Act impugning the said award dated 27th June, 2003 before the learned Single Judge. The learned Single Judge dismissed the said arbitration petition by a judgment dated 2nd May, 2005. The appellant preferred this appeal under section 37 of the Arbitration Act against the said judgment dated 2nd May, 2005.

12. Mr.Kunal Kumbhat, learned counsel for the appellant invited our attention to various documents annexed to the appeal paper-book and submits that the disputes between the parties arose during the period between 1994-1995 which was referred to the arbitration. The last transaction between the parties took place on 6th December, 1995. The respondent had forwarded reconciliation statement to the appellant on 29th May, 1996. The appellant reconciled the statement of account and forwarded their reconciliation statement to the respondent on 25th June, 1996. The appellant had called upon the respondent to return 175 shares of Surya Roshni Ltd., 50 shares of Brook Bond Ltd., 100 shares of Torrent Gujarat Bio Tech Ltd., 100 shares of Atlantic Spinning and demanded payment of Rs.3,100/- as difference in settlement nos. 5527 and 7453.

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13. It is submitted that during the period between 1996 to 1998, the appellant had exchanged about 12 correspondences with the respondent and had repeatedly requested for return of those shares and the amount. All those correspondences were placed before the arbitral tribunal. The respondent had neither denied the liability nor returned the said shares and the amount demanded by the appellant. He submits that even in the reply to the complaint filed by the appellant before the IGRC, the respondent had not specifically denied the claim of the appellant but had only contended that there was serious dispute between the appellant and the respondent.

14. In the minutes of the meeting dated 29th April, 1999, issued by the IGRC, it was observed that the respondent member wanted to oppose the claim only on the technical point such as limitation etc. He submits that the said IGRC directed the parties to go for arbitration only on 29th September, 2000. The appellant had accordingly lodged a statement of claim before the learned arbitrator on 1st July, 2002. The respondent did not deny the claim of the appellant on merits but only raised an issue of limitation in the written statement filed before the learned arbitrator. He submits that the learned arbitrator passed an award which was patently illegal on the ground of limitation.

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15. It is submitted by the learned counsel that the arbitration between the appellant and the respondent was filed as a statutory arbitration under the rules, bye-laws and regulations of the Bombay Stock Exchange. When the transaction took place between the parties in the year 1995-96, none of the rules, bye-laws and/or regulations of the Bombay Stock Exchange prescribed any limitation period for reference of a dispute to arbitration. He submits that though section 43 of the Arbitration Act provided that the provisions of the Limitation Act, 1963 would be applicable to the arbitration proceedings, in view of section 2(4) of the Arbitration Act, section 43 which provided for applicability of the provisions of the Limitation Act, 1963 was specifically excluded to statutory arbitration. The law of limitation thus could not be applied by the respondent or by the learned arbitrator in view of the specific exclusion to the applicability of the provisions of the Limitation Act, 1963 in case of statutory arbitration.

16. Learned counsel for the appellant invited our attention to the impugned judgment delivered by the learned Single Judge. He submits that the learned Single Judge has upheld the arguments of the appellant that the arbitral reference 2002 was not barred by the law of limitation. The said finding rendered by the learned Single Judge has not been challenged by the respondent. He submits that though on the date of

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the transaction between the parties, the period of limitation was not applicable, in view of section 2(4) of the Arbitration Act, the learned arbitrator applied the amended bye-laws 252 of the Bombay Stock Exchange from the date of enactment of the said bye-laws to the transaction between the parties and held the claims made by the petitioner as barred by law of limitation.

17. It is submitted that the learned arbitrator was bound to decide the dispute on the basis of the arbitration agreement between the parties and the provisions of law applicable on the date of transaction and not subsequent amendment to the bye-laws of the Bombay Stock Exchange. The rejection of the substantial claims of the appellant by means of a post facto amendment of bye-laws and by applying it to all past disputes in the absence of any such specific provision in the bye-laws and in the absence of any authority which is entrusted with the framing of such delegated legislation would clearly be against the clear legislative intent of section 2(4) of the Arbitration and Conciliation Act, 1996. Such amendment which is brought into effect on the later date could not have been applied to the earlier transaction and to place the appellant in disadvantage situation.

18. The learned Single Judge in paragraph (1) at page 83 of the

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paper-book has opined that if there was no period of limitation laid down for making a reference to arbitration, under the Bombay Stock Exchange bye-laws, the arbitration must be invoked within a reasonable period of time is contrary to the legislative intent and section 2(4) of the Arbitration Act. He submits that the learned Single Judge failed to take cognizance that the Arbitration Act, 1940 which governs all the arbitrations, specifically excludes the application of Limitation Act to statutory arbitrations under section 46 of the said Act. The learned arbitrator has not dealt with the said aspect in the impugned judgment.

19. Learned counsel strongly placed reliance on the judgment of Division Bench of this Court in case of **Savita Khandu Berali vs. Nagar Agricultural Sale & Ors., AIR 1957 Bom.178** and would submit that this Court in the said judgment has categorically held that the Limitation Act cannot be applied to statutory arbitration by analogy. Learned counsel for the appellant placed reliance on the judgment of this Court in case of **Ashalata Lahoti vs. Hiralal Liladhar, 1999 (1) Bom C.R. 293** and in case of **R.C.Goenka vs. Chase Trading Co., & Anr., 2002 (3) Bom C.R. 201**. He also placed reliance on the judgment of this Court in case of **Marwadi Shares & Finance Ltd. vs. Minal Kinaksinh Thakore & Ors.,** delivered on 7th January, 2014 in

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Arbitration Petition Nos. 485 of 2013 and 486 of 2013.

20. Learned counsel for the appellant placed reliance on the judgment of Madras High Court delivered on 25th April, 2018 in case of **The Project Director, Project Implementation Unit & Anr. vs. K.Periyasamy & Ors. in W.A.Nos. 308 to 312 of 2016** and other connected matters and in particular paragraphs 20 to 34 in support of his submission that in view of the provisions of section 2(4) applicable to the statutory arbitrations, the provisions of the Limitation Act, 1963 could not be applied to the transactions already held prior to the amendment of the bye-laws of the Bombay Stock Exchange and more particularly bye-law 252 w.e.f. 29th August, 1998.

21. It is submitted by the learned counsel that the arbitral tribunal has applied the amended bye-law 252 of the Bombay Stock Exchange from the date of enactment of the said bye-law which never formed part of the rules, regulations and bye-laws by which the transaction in question were governed. It was beyond the authority of the arbitral tribunal to apply the provisions of bye-laws 252 to the past transactions which were governed by section 2(4) of the Arbitration Act which expressly excluded the provisions of the Limitation Act to the statutory arbitrations. He submits that the rules, regulations and bye-laws of the

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Bombay Stock Exchange clearly provided that a broker, shares a fiduciary relation with his client and carries out all the transactions as an agent. Since the shares in respect of which the arbitration shall be instituted still lie in trust of the respondent, the question of limitation did not arise.

22. It is submitted that the learned Single Judge failed to appreciate and came to the conclusion erroneously that since there was a debit entry in the statement of account of the appellant, the shares could not have been in the custody of the respondents. He submits that though there were debit entries in the statement of accounts of the appellant, but the debit entries were only pertaining to the part of the shares partly received by the appellant and those debit entries could not be inferred as debit entries for all the shares purchased by the appellant from the respondent.

23. It is submitted that there was continuous cause of action in view of the respondent having failed to pay the sale proceeds of the shares to the appellant or to deliver the shares lying in trust with the respondent and thus the question of commencement of the limitation would not arise. He submits that though all the original documents were filed by the appellant before the arbitral tribunal, the arbitral tribunal

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simplicitor rejected the claims made by the appellant only on the ground of limitation and did not consider those claims on merits.

24. It is submitted by the learned counsel that the findings of the arbitral tribunal that the cause of auction arose in January 1995 is totally erroneous. The learned Single Judge erroneously held that the cause of action for making a reference to arbitration accrues on the date on which the cause of action for filing a suit arises. The respondent had not denied any time prior to filing of the arbitration that the transaction had not taken place or that the shares had not been transferred to the appellant. The cause of action thus never arose as the respondent had not made denial to the demand of the appellant. He submits that the respondent by their letter dated 24th August, 1999, had merely stated that there was some dispute with the appellant and the matter be sent for arbitration. Since there was no refusal on the part of the respondent, the dispute never arose.

25. It is submitted by the learned counsel that the learned Single Judge did not consider the submission of the appellant that the shares of the appellant were lying with the respondent in a fiduciary relation, which continued until the delivery of the shares was effected over by the respondent to the appellant. It could not be held that the agency

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had been terminated and the claims made by the appellant were beyond the period of limitation. The findings recorded by the learned Single Judge that the cause of action arose in January 1995 are without assigning any reason whatsoever.

26. It is submitted by the learned counsel that the letter dated 29th May, 1996, could not be construed as denial of the liabilities by the respondent as the respondent had neither at any point of time denied that the appellant had purchased the shares for which the appellant was seeking delivery nor the respondent had stated that they had delivered those shares. The findings of the learned Single Judge that the debit entry is a conclusive proof of delivery of the shares is completely fallacious and unacceptable. The transaction in the year 1994-95 took place physically and not online.

27. It is submitted by the learned counsel that the period taken before IGRC i.e. between 29th April, 1999 and 29th September, 2000 is required to be excluded. He submits that even if the provisions of the Limitation Act, 1963 were made applicable, the period of three years would commence only after 29th September, 2000 when the IGRC directed the parties to refer their disputes to arbitration. The statement of claim was already filed by the appellant on 26th October, 2002. The

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claim thus filed by the claimant was within the period of limitation.

28. Mr.Purohit, learned counsel for the respondent on the other hand submits that it is not the case of the respondent that the said amendment brought to the bye-law of the Bombay Stock Exchange in the year 1998 was made effective with retrospective effect. He submits that since the appellant had invoked the arbitration agreement after the date of the said amendment to bye-law of the Bombay Stock Exchange in the year 1998, the provisions of the said bye-law stood apply to the said claims filed by the appellant after the date of the amendment. He submits that it is an undisputed position that last transaction between the appellant and the respondent took place on 6th December, 1995. The respondent sent the last statement of account to the appellant on 29th May, 1996 contending that the respondent had to recover Rs.18,379/- from the appellant. During the period between 17th September, 1996 to 14th October, 1998, the appellant had sent various reminders to the respondent.

29. On 29th August, 1998, the bye-laws of the Bombay Stock Exchange were amended including bye-law no. 252. It is submitted that the appellant had made a complaint to IGRC only on 29th April, 1999. The IGRC had already directed both the parties to proceed

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further for arbitration. The appellant had filed statement of claim only in the month of July 2002 which was *ex-facie* barred by law of limitation according to the learned counsel for he respondent.

30. It is submitted that the cause of action as far as the appellant is concerned, commenced in or around 1996. The respondent had vide its letter dated 29th May, 1996 had denied their liability to the appellant. He submits that the statute of the limitation is procedural. It is submitted that merely because there was no limitation period prescribed prior to 29th August, 1998, it did not give any vested right in the appellant prior to 1998. In support of this submission, learned counsel placed reliance on the judgment of Allahabad High Court in case of ***Mt.Begam Sultan vs. Sarvi Begam, AIR 1926 Allahabad 93*** and in particular on pages 93 and 94. He submits that the law of limitation is applicable to an application for making a claim at the time when the application is made.

31. It is submitted that the amendment to the bye-laws brought in the year 1998 was in line with the provisions of the Limitation Act, 1963. The said amendment has not extinguished the right of the parties. In support of the submission that no vested right was created in favour of the appellant even by virtue of section 2(4) of the Arbitration Act, the

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learned counsel placed reliance on the judgment of Supreme Court in case of ***Ramprasad Dagaduram vs. Vijaykumar Motilal Hirakhanwala & Ors., AIR 1967 SC 278 and*** in particular paragraphs 11 and 13. He also placed reliance on the judgment of Allahabad High Court in case of ***The Allahabad Bank Ltd. vs. Rane Sheo Ambar Singh & Ors., AIR 1976 Allahabad 447*** and in particular paragraphs 11 to 13 of the said judgment.

32. It is submitted by the learned counsel that since in this case by virtue of the amendment to bye-law 252 of the Bombay Stock Exchange, the unlimited period of limitation applicable to the transaction in view of section 2(4) of the Arbitration Act was curtailed by providing the prescribed period of limitation under the provisions of Limitation Act, 1963, the limitation would commence from the date when the said amendment to bye-law 252 of the bye-law of the Bombay Stock Exchange was made. He submits that three years period of limitation thus would have commenced from 29th August, 1998. Even if the time period taken before the IGRC to hear the complaint made by the appellant is excluded, the claim made by the appellant before the arbitral tribunal would be still time barred.

33. Learned counsel for the respondent placed reliance on the

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judgment of Supreme Court in case of ***R.C. Jall Parsi vs. Union of India and another, AIR 1962 SC 1281*** and in particular paragraph 5.

He submits that right to sue has no connection with the period of limitation and such right is not taken away by the said amendment to bye-law 252 inserted in the year 1998.

34. Learned counsel for the respondent placed reliance on the judgment of Supreme Court in case of ***Vinod Gurudas Raikar vs. National Insurance Co. Ltd. & Ors., AIR 1991 SC 2156*** and in particular paragraphs 2 to 11 in support of the submission that the mere right existing on the date of the repeal of statute, to take advantage of the provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause i.e. section 6 of the General Clauses Act. Learned counsel submitted that since the appellant in this case had not invoked arbitration agreement and had not filed statement of claim prior to the date of amendment to bye-law 252 of the bye-laws of the Bombay Stock Exchange, no right of any nature whatsoever was vested in the appellant. The limitation period thus prescribed by the said amendment to bye-law 252 of the Bombay Stock Exchange would apply to the past transaction also however w.e.f. from the date of such amendment.

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35. It is submitted that the appellant did not invoke the arbitration agreement nor did file statement of claim even within the period of limitation prescribed under the amended bye-law 252 and thus the claim made by the appellant was *ex-facie* barred by law of limitation. The appellant had reasonable time of three years to invoke arbitration agreement and to file statement of claim before the arbitral tribunal which the appellant admittedly failed. The accrual of the cause of action and the initiation of the arbitral proceedings are two different aspects. If the appellant would have taken recourse to the remedy by invoking the arbitration agreement and by filing statement of claim before the date of amendment to bye-law 252 of the Bombay Stock Exchange, the appellant would have vested right only in that event. Even otherwise, the law of limitation is a matter of procedure, it does not create a vested right.

36. Learned counsel for the respondent placed reliance on the judgment of this Court in case of ***Gopaldas Ganpatdas and others vs. Tribhuwan and others, AIR 1921 Bom 40*** and in particular relevant paragraph on pages 40 and 41. Learned counsel distinguished the judgment of this Court in case of ***R.C. Goenka*** (supra) on the ground that the petitioner in that matter had availed of the remedy before the amendment of the bye-law of the Bombay Stock Exchange and had

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withdrawn the said proceedings before amendment. The issue before the learned Single Judge in the said matter was whether the issue of limitation is a procedural law or not? The parties had obtained liberty to file claim after the amendment to bye-law 252 of the bye-law of the Bombay Stock Exchange to file claim in the line with the bye-law of the Bombay Stock Exchange.

37. Learned counsel for the respondent distinguished the judgment of this Court in case of **Marwadi Shares & Finance Ltd.** (supra) on the ground that this court in the said judgment had considered the rights of the parties to file an appeal as substantive right which is not the case in this matter. In that matter, the original proceedings were already filed prior to the date of amendment to the bye-law of the Stock Exchange.

38. It is submitted by the learned counsel that even in the statement of the account submitted by the respondent to the appellant, the respondent had demanded the amount from the appellant and thus it was clear that the cause of action had started even from such date of receipt of such statement of account from the respondent to the appellant.

39. Learned counsel for the respondent distinguished the judgment

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of this Court in case of **Ashalata Lahoti** (supra) on the ground that it was not the case of the respondent that 1998 amendment to bye-law 252 of the Bye-laws of the Bombay Stock Exchange does apply with retrospective effect.

40. Mr.Kumbhat, learned counsel for the appellant in rejoinder invited our attention to ground (d) raised in the appeal memo and would submit that the findings rendered by the learned Single Judge that the cause of action accrued in the month of January 1995 has been impugned by the appellant. He submits that since there was no refusal on the part of the respondent to pay the dues of the appellant till 24th August, 1999 when for the first time the respondent raised the dispute, the invocation of the arbitration and filing a statement of claim by the appellant was within the period of limitation. He submits that none of the judgments relied upon by the respondent before this Court have dealt with the issue of limitation in case of statutory arbitration under section 2(4) of the Arbitration Act.

41. Learned counsel for the appellant distinguished the judgment of Allahabad High Court in case of **Mt.Begam Sultan** (supra) on the ground that there was a distinct provisions of limitation at the relevant period in that matter. In this case, in view of section 2(4) of the

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Arbitration Act, no period of limitation was at all applicable in view of there being a statutory arbitration between the parties under the bye-laws of the Bombay Stock Exchange. Learned counsel for the appellant distinguished the judgment of Supreme Court in case of **Ramprasad Dagaduram** (supra) on the ground that the facts before the Hon'ble Supreme Court were different.

42. Learned counsel distinguished the judgment of Allahabad High Court in case of **The Allahabad Bank Ltd.** (supra) and would submit that in that case the provisions of the Limitation Act, 1908 were referred. The legislature in its wisdom has provided for a specific period of limitation in that matter. No such specific provisions of limitation was applicable by virtue of section 2(4) of the Arbitration Act. The period of limitation prescribed for the first time in the year 1998 was admittedly not applicable with retrospective effect. Such period of limitation introduced for the first time in the year 1998 could not apply to the cause of action having arisen prior to the date of such amendment.

43. Learned counsel for the appellant distinguished the judgment of Supreme Court in case of **Vinod Gurudas Raikar** (supra) on the ground that the period of limitation under the unamended Limitation Act and

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amended Limitation Act were the same. He relied upon section 6(c) of the General Clauses Act, 1897. Learned counsel distinguished the judgment of this Court in case of **Gopaldas Ganpatdas and others** (supra) on the ground that in the said judgment this Court had considered the retrospective effect of section 48 of the Code of Civil Procedure, 1882 in regard to the decree passed prior to the date of coming into force of the new Code. The said judgment does not state that on the amendment of the provisions relating to the period of limitation, the said provision would apply with retrospective effect. Learned counsel for the appellant distinguished the judgment of Supreme Court in case of **R.C. Jall Parsi** (supra) on the ground that the facts before the Supreme Court in the said judgment were different.

44. Learned counsel for the appellant relied upon following judgments:-

- (1) Judgment of Madras High Court delivered on 25th April, 2018 in case of **The Project Director, Project Implementation Unit & Anr. vs. K.Periyasamy & Ors. in W.A.Nos. 308 to 312 of 2016 and other connected matters.**
- (2) Judgment of this court in case of **Savitra Khandu Beradi vs. Nagar Agricultural Sale & Ors., AIR 1957 Bom. 178.**
- (3) Judgment of Supreme Court in case of **T.N. Generation and**

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Distbn. Corpn. Ltd. Vs. PPN Power Gen. Co. Pvt. Ltd., (2014) 11 SCC 53 dealing with the identical issue.

45. Mr. Purohit, learned counsel for the respondent in his sur-rejoinder arguments would submit that section 2(4) of the Arbitration Act came into effect only in the year 1996 when the said Arbitration Act was enacted. He submits that by virtue of the said amendment to the bye-law 252 of the Bombay Stock Exchange, the provisions of the Limitation Act, 1963 were made applicable to the transaction governed by those bye-laws. Section 2(4) of the Arbitration Act was already in the statute on the date of amendment to bye-law 252 of the Bombay Stock Exchange and thus no contrary intention appears in the said amendment to bye-law 252 carried out in the year 1998. The said amendment to bye-law 252 in the year 1998 does not have any exception to the Act that the past transaction in respect of which no proceedings were filed prior to the date of the amendment to the bye-law 252 would not be governed by the said amendment.

REASONS AND CONCLUSION :-

46. The questions that fell for consideration of this Court are as under :-

(a) Whether any period of limitation was applicable to the

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transactions in question prior to 29th August, 1998 or thereafter in view of Section 2(4) read with Section 43 of the Arbitration and Conciliation Act, 1996 ?

(b) What is the effect of the amendment to Bye-law 252(2) amended by the Stock Exchange, Mumbai providing that the provisions of Limitation Act, 1963 would be applicable ?

(c) Whether any vested rights had accrued in favour of the appellant by virtue of Section 2(4) of the Act even though no arbitral proceedings were filed by the appellant prior to 29th August, 1998 ? If amended provision of Bye-law 252(2) of the Bye-laws inserted on 29th August, 1998 applies to the transactions in question with effect from the date of such amendment, whether the appellant had filed arbitral proceedings within the period of three years from the date of such amendment ?

47. We shall now deal with the aforesaid questions fell for consideration of this Court. The undisputed facts are as under :-

The last transaction between the appellant and the respondent was on 6th December, 1995. The respondent had sent a letter to the

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appellant on 29th May, 1996 for reconciliation of the statement of accounts. On 25th June, 1996, the appellant had forwarded its reconciliation statement to the respondent. According to the statement of accounts submitted by the respondent to the appellant, the respondent were entitled to recover the sum of Rs.18,379/- from the appellant.

48. It was the case of the appellant that during the period between 17th September, 1996 and 18th October, 1998, there was exchange of correspondence between the parties. On 29th August, 1998 Bye-law 252(2) was amended providing that the provisions of Limitation Act, 1963 would be applicable. The appellant made a complaint to the Investment Grievance Redressal Cell on 29th April, 1999. The Investment Grievance Redressal Cell directed the parties to go to arbitration on 29th September, 2000. The statement of claim was filed by the appellant on 26th October, 2002 with the Stock Exchange, Mumbai.

49. In the statement of claim filed by the appellant, it was the case of the appellant that various shares were purchased by the appellant through the respondent broker which were either not delivered by the respondent or the sale price was not paid to the appellant. There was

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the difference of Rs.3,100/- in two statements of account of the respondent. Various letters were addressed by the appellant to the respondent for payment.

50. In the written statement filed by the respondent, the respondent raised a plea of limitation and also denied the claims made by the appellant on merits. The respondent relied upon Articles 2, 3 and 4 of the Schedule to the Limitation Act, 1963. The respondent also relied upon the Bye-laws 252(2) of the Stock Exchange, Mumbai which came into force on 29th August, 1998. It was contended that the law of limitation did not apply to the arbitral proceedings under the Bye-laws before the amendment of 1998. The cause of action thus arose before the amendment to the Bye-laws came into force on 29th August, 1998. The said amendment to Bye-law 252(2) did not apply with retrospective effect. The last account statement was received by the appellant from the respondent on 29th May, 1996. It was contended that limitation period is reduced from unlimited period to three years. Section 30 of the Limitation Act will be applicable and there was no question of non-applicability of limitation after the amendment.

51. The arbitral tribunal in the impugned award recorded various reasons while dismissing the claims made by the appellant. It is held

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by the arbitral tribunal that it is an admitted fact that the last transaction took place on 6th December, 1995 much before the amendment of Bye-laws of the Bombay Stock Exchange when the limitation was made applicable to the Bombay Stock Exchange transaction as and from 29th August, 1998. Prior to the said amendment the rules specifically provided that the law of limitation does not apply. It was the case of the appellant before the arbitral tribunal that since the transactions were prior to 29th August, 1998, no limitation was applicable and the claim could be filed at any time in future.

52. It is held by the arbitral tribunal that if the argument of the appellant would be accepted, it would lead to absurdity. Any claim prior to the date of amendment will not become time barred at any time and the appellant can file claim by filing application on any day while all claims claimed after the date of amendment would become time barred on the expiry of three years from the date of amendment. The arbitral tribunal held that time cannot be unlimited for the appellant as transaction was prior to the amendment of Bye-laws of the Stock Exchange making Limitation Act applicable to the transaction under Rules, Regulations and Bye-laws. The arbitral tribunal accordingly held that the claims made by the appellant on 26th October, 2002 were time barred. The appellant ought to have filed their claim on or before

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28th August, 2001.

53. The arbitral tribunal corrected the said award by a rectification order dated 21st July, 2003. In the award at various places the date of 13th June, 2003 mentioned was corrected as 26th October, 2002. Similarly, the date of filing of statement of claim mentioned as 12th January, 2003 was corrected to 26th October, 2002. The learned Single Judge held that even if no period of limitation was laid down in the Bye-laws, there would be an obligation on the part of the petitioners to invoke the arbitration clause within a reasonable time from the date of accrual of the cause of action to the petitioner. The cause of action accrued in the month of January 1995 when according to the petitioner, the petitioner was entitled to receive the delivery of the shares purchased by the petitioner but was refused by the respondent.

54. It is held that even in cases where there is no period of limitation prescribed, justice demands that the litigant must make his claim without any undue delay. Inaction on the part of the claimant for a long time in lodging a claim may make it unjust to uphold his claim. The requirement of making a reference without any undue delay applies with full force in relation to commercial litigation because most of the time, the commercial litigation is based on documents and

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accounts which are required to be maintained by the parties in the ordinary course of business. These documents which are required to be maintained cannot be kept for unlimited time and the need for destruction of the record after lapse of a particular period is also recognized by various laws. It may workout to the prejudice of the other side because in a given case the claim may be made after the other side has destroyed its record for the relevant period. It is in the public interest that the claim has to be filed within reasonable time when no period of limitation is prescribed to institute proceedings or enforcement of the claim.

55. The learned Single Judge also noticed that the only explanation given by the appellant for not approaching the Investment Grievance Redressal Cell till 1999 was that the respondent did not deny their liability specifically. It is held by the learned Single Judge that the letter dated 29th May, 1996 from the respondent to the appellant makes the position absolutely clear which was in response to the statement of account dated 28th May, 1996 sent by the petitioner to the respondent. According to the said statement of account sent by the respondent there was a debit of Rs.18,379/- in the account of the appellant.

56. Both the parties through their learned counsel relied upon several

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judgments in support of their rival contentions. Learned Single Judge of this Court in case of **Ashalata Lahoti** (supra) held that the Bye-laws framed under Section 9 of the Securities Contracts Act are statutory in nature and in view of Sections 46 and 37 of the Arbitration Act are not covered by Limitation Act. It is held that insofar as the dispute between a member and a member is concerned, Bye-laws had been framed whereby limitation to refer a dispute is three months. It is however, no answer to contend that the principle of laches should be read into the Act. Once the parties sign an Agreement to refer a dispute to arbitration and make no provisions for raising disputes within a specific period, the question of reading limitation into it will not arise. It is for the Exchanges to consider amending the Bye-laws in manner like dispute between members and members and providing for a suitable period of limitation. It is not in dispute that in the year 1998 Bye-laws 252(2) was amended so as to provide the period of limitation to the arbitration under the Stock Exchange Bye-laws.

57. A learned Single Judge of this Court in case of **R.C. Goenka** (supra) while dealing with a petition under Section 34 of the Arbitration and Conciliation Act, 1996 impugning the arbitral award rejecting the claim on the ground of limitation considered a situation where the transactions were effected before the bye-laws of Stock

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Exchange came to be amended. The earlier statement of claim was filed in the month of November 1997 and was withdrawn on 5th August, 1998. Fresh reference was filed on 6th November, 1998 i.e. after amendment of Bye-law 252(2) inserting the provision of Limitation Act, 1963 in the Bye-laws. The arbitral tribunal rejected the claim on the ground of limitation. The learned Single Judge in the said judgment held that there was no provision for limitation in the contract as a term until 29th August, 1998 except for disputes arising from contracts between members and members.

58. It was held that there is nothing in the said bye-laws to hold that the said provision will also apply to the contract which were entered into and to which contracts Bye-law 252(2) was not incorporated as a term of the contract. Only those contracts which have been entered into after Bye-law 252(2) came into force will be governed by the provision of limitation becoming applicable as term of the contract. This Court held that the said amendment would not apply with retrospective effect. These Bye-laws are statutory in character. It is not the case of the respondent that the said Bye-law 252(2) introduced and came into effect on 29th August, 1998 applied with retrospective effect to the transactions prior to the date of such amendment. The said judgment thus would not assist the case of the appellant.

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59. A learned Single Judge of this Court in case of **Marwadi Shares & Finance Ltd.** (supra) had dealt with a petition under Section 34 of the Arbitration Act impugning the order passed by the Appellate bench of the Stock Exchange, Mumbai dismissing the appeal filed by the petitioner on the ground of limitation. In that case, the learned Arbitrator had made an award on 1st November, 2011. On 2nd November, 2011, the petitioner had made an application under Section 33 *inter-alia* praying for corrections in the said award. The said application was decided by the learned Arbitrator on 5th March, 2012. The petitioner had thereafter filed an appeal on 12th April, 2012 before the Appellate Bench of the Bombay Stock Exchange Limited. There was delay of three days in filing the appeal. The said application for condonation of delay was rejected by the Appellate Bench on the ground that SEBI circular and subsequent amendments by Bombay Stock Exchange, the Bye-laws and Regulations had taken away the powers of the Appellate Bench to condone delay. In that context, the learned Single Judge of this Court (one of us R. D. Dhanuka, J.) held that right of appeal is a vested right which can be taken away only by a subsequent enactment if it so provides expressly or by necessary indenment and not otherwise.

60. This Court held that the right of appeal is not a mere matter of

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procedure but is a substantive right which is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the original cause of action commences and although it may be actually exercised when adverse judgment is pronounced. Such a right has to be governed by the law prevailing on the date of original cause of action and not as per the bye-law that prevails at the time of its decision or at the date of filing of an appeal. The petitioner had already filed proceedings before the learned Arbitrator. The vested right of filing an appeal against the impugned award, if any and the right to file an application for condonation of delay on showing sufficient cause on the date of filing the original proceedings would be continued. In our view, the said judgment would not assist the case of the appellant. In this case, the appellant had not filed any arbitral proceedings prior to the date of the amendment to Bye-law 252(2) w.e.f. 29th August, 1998 but filed the proceedings much later. No right had been thus accrued in favour of the appellant.

61. This Court in case of **Savitra Khandu Beradi** (supra) relied upon by the learned counsel for the appellant had considered an issue whether the Indian Limitation Act applies to claims referred for adjudication under the procedure prescribed in Section 54 of the Bombay Co-operative Societies Act or not. This Court held that a

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proceeding before the arbitrator is not a suit, appeal or application and in terms Section 3 can have no application. Expiry of the period of limitation prescribed for a suit does not destroy the right. It only bars the remedy. In our view, the said judgment would not apply to the facts of this case and would not advance the case of the appellant in view of the appellant not having filed any claim prior to the amendment to Bye-law 252(2).

62. Madras High Court in case of ***The Project Director, National Highways Authority of India*** (supra) relied upon by the appellant considered the issue as to whether provisions of Limitation Act, 1963 in particular Article 137 applies to the statutory arbitration under Section 3-G(5) of the National Highways Act, 1956 or not. Section 3-G(5) of the National Highways Act, 1956 provided that ‘subject to the provision of that code, the provision of Arbitration and Conciliation Act, 1996 was applied to every arbitration under this Act’. The Madras High Court adverted to and applied the principles laid down in the judgment of this Court in case of ***Savitra Khandu Beradi*** (supra) and also judgment of Supreme Court in case of ***Tamil Nadu Generation and Distribution Corporation Limited v/s. PPN Power Generating Company Private Limited, (2014) 11 SCC 53*** and held that the provision of the Limitation Act and more particularly Article 137

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would apply to an application for a reference to arbitration under Section 3-G(5) of the National Highways Act, 1956.

63. In view of the fact that it is not the case of the respondent that the said Bye-law 252(2) of the Bye-laws framed by the Stock Exchange, Mumbai applied with retrospective effect, the judgment of Madras High Court in case of ***The Project Director, National Highways Authority of India*** (supra) would not assist the case of the appellant. The question now arises for consideration of this Court is, as to what is the effect of amendment of Bye-law 252(2) amended by the Stock Exchange, Mumbai providing that the provision of Limitation Act, 1963 would be applicable.

64. Allahabad High Court in case of ***Mt. Begam Sultan*** (supra) relied upon by the learned counsel for the respondent held that the law of limitation applicable to a suit or the proceeding is the law in force at the date of the institution of the suit or the proceeding unless there is a distinct provision to the contrary. It is held that there was no vested right in the decree holder to wait for an indefinite period of time in order to apply for execution. Supreme Court in case of ***Ramprasad Dagaduram*** (supra) has held that the respondent had no vested right in the law of procedure for enforcement of mortgage though the period of

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limitation was abridged for the enforcement of the mortgage by Article 132 of the Indian Limitation Act, 1908. Such abridgment did not take away any vested right.

65. In our view, Mr. Purohit, learned counsel for the respondent is right in his submission that since the appellant had not filed any arbitral proceedings prior to the date of amendment to Bye-law 252(2) inserting the provision of Limitation Act, 1963 to arbitral proceedings, no right had been vested in favour of the appellant. The principles of law laid down by the Supreme Court in case of **Ramprasad Dagaduram** (supra) and the judgment of Allahabad High Court in case of **Mt. Begam Sultan** (supra) would apply to the facts of this case.

66. Allahabad High Court in case of **The Allahabad Bank Ltd.** (supra) has held that if the Limitation Act, 1963 did not prescribe any period of limitation for an application than it was an unlimited period. If the Act of 1963 prescribed any period of limitation for such an application, than it will be a case where the period of limitation is shorter than the period of limitation prescribed by the Limitation Act, 1908 and the application in that case would be required to be made within a period of 90 days after the commencement of the Limitation Act, 1963. In our view, the principles laid down by the Allahabad High

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Court in the said judgment apply to the facts of this case.

67. In view of Section 2(4) of the Arbitration and Conciliation Act, 1996, period of limitation was not applicable to the transactions entered into between the appellant and the respondent prior to 29th August, 1998 when the provisions of Limitation Act, 1963 were extended to the arbitral proceedings under the Stock Exchange Bye-laws. However, there would be no merit in the contention of the appellant that even after applicability of the provisions of the Limitation Act, appellant would be continued to be governed by no period of limitation in view of Section 2(4). In our view, since the period of limitation was prescribed by inserting Article 252(2) amended on 29th August, 1998, the appellant ought to have filed arbitral proceedings within three years from the date of amendment to Article 252 (2) of the Bye-laws framed by the Stock Exchange, Mumbai which are statutory bye-laws. The alleged rights if any in favour of the appellant in view of Section 2(4) of the Arbitration Act to file claim without period of limitation stood abrogated in view of the amendment to Bye-law 252(2). The appellant would be thereafter governed by the amended Bye-law 252(2) for filing any claim in respect of cause of action having arisen prior to the date of amendment.

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68. The question now that arises for consideration is that if the provisions of Limitation Act, 1963 apply to the transactions in question, whether the proceedings were filed by the appellant within a period of three years from 29th August, 1998 or not ?

69. In this respect, it would be apposite to refer to a judgment of the Supreme Court in case of **Vinod Gurudas Raikar** (supra) relied upon by the learned counsel for the respondent. The Supreme Court in the said judgment had considered a Civil Appeal arising out of the order passed by the High Court dismissing the appeal arising out of the order passed by the Motor Accident Claim Tribunal. The Accident had taken place on 22nd January, 1989. The Motor Vehicle Act, 1988 came into force on 1st July, 1989. The period of limitation for filing a claim petition both under the old Act and the new Act was six months. The limitation period of six months expired on 22nd July, 1989 under the unamended provision. The claim petition was however filed on 15th March, 1990 with a prayer for condonation of delay. The Motor Accident Claim Tribunal rejected the claim on the ground that in view of provision of sub-Section 3 of Section 166 of the Motor Vehicles Act, 1988, delay of more than six months could not be condoned. The High Court also dismissed the appeal filed by the claimant.

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70. Under the proviso to sub-Section 3 of Section 166 of the Motor Vehicles Act, 1988, maximum period of delay which could be condoned was six months which expired on 22nd January, 1990. The Supreme Court held that it is true that the appellant earlier could have filed an application for condonation of even more than six months after the expiry of limitation but can this be treated to be a right which the appellant had acquired. It is held that it would be treated to be a right. So far as the period of limitation for commencing a legal proceeding is concerned, it is adjudicable in nature and has to be governed by the Motor Vehicles Act, 1988 subject to two conditions. If under the repealing Act the remedy suddenly stands barred as a result of a shorter period of limitation, the same cannot be held to govern the case, otherwise the result will be to deprive the suitor of an accrued right. The second exception is where the new enactment leaves a claimant with such a short period for commencing the legal proceeding so as to make it impracticable for him to avail of the remedy.

71. The Supreme Court adverted to the earlier judgment in case of ***New India Insurance Co. Ltd. v/s. Smt. Shanti Misra, AIR 1976 SC 237***. It is held in that matter that a period of two years was available to the respondent for instituting a suit for recovery of damages when the husband of the respondent had expired. In March, 1967, the claims

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tribunal under Section 110 of the Motor Vehicles Act, 1939 was constituted, barring the jurisdiction of Civil Court and prescribed 60 days as the period of limitation. The respondent had filed an application in July 1967. It was held that not having filed a suit before March 1967, the only remedy of the respondent was by way of an application before the tribunal. It was held that new law of limitation providing for a shorter period cannot certainly extinguish a vested right of action. In view of the change of the law, it was held that the application could be filed within a reasonable time after the constitution of the tribunal and that the time of about four months taken by the respondent in approaching the tribunal after its constitution could be held to be either reasonable time for the delay of about two months can be condoned under proviso to Section 110-A(3).

72. The Supreme Court held that the period of limitation for lodging the claim under the old as well as the new Act was same six months which expired three weeks after coming in force of the new Act. It would be open to the appellant to file his claim within this period or even later by 22nd July, 1989 with a prayer to condone the delay. His rights to claim for compensation was not affected at all with substitution of one Act with another. Since, the period of limitation remained the same, there was no question of the appellant being taken

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by surprise. In this background, the appellant's further default has to be considered. It is held that having actually initiated the proceedings when the old Act covered the field the claimant could say that his right which had accrued on the date of filing of the petition could not be taken away. The present case is different. The right or privilege to claim benefit of a provision for condonation of delay can be governed by the law in force at the time of delay. In our view, the principles laid down by the Supreme Court in case of **Vinod Gurudas Raikar** (supra) applies to the facts of this case.

73. If the appellant would have filed the arbitration proceedings under the unamended Bye-laws and if such rights would have been taken away by amendment subsequently with retrospective effect, the appellant could have urged that such rights which are vested in him in view of the appellant already having filed proceedings for recovery of his claim cannot be taken away. In this case, admittedly the period of limitation which was not applicable prior to 29th August, 1998 was restricted to a period of three years w.e.f. 29th August, 1998. The appellant admittedly not having filed the statement of claim prior to the date of such amendment, the case of the appellant would be governed by the period of limitation prescribed by the provision to Bye-law 252(2) framed by the Stock Exchange, Mumbai.

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74. It is not the case of the alleged rights vested, if any in the appellant having been taken away by amendment to Bye-law 252(2) of the Stock Exchange, Mumbai. We are thus not inclined to accept the submission of Mr. Kumbhat, learned counsel for the appellant that though the period of limitation was introduced w.e.f. 29th August, 1998, the case of the appellant would be continued to be governed by the unamended provision and would have indefinite period of limitation even after 29th August, 1998 even though no such arbitral proceedings were filed by the appellant till the date of amendment.

75. Supreme Court in case of **R.C. Jall Parsi** (supra) held that the statute of limitation assumes the existence of a cause of action and does not define it or create one. This Court in case of **Gopaldas Ganpatdas and others** (supra) held that Act of limitation being a law of procedure governs all the proceedings to which in terms are applicable from the moment of its enactment, except so far as its operation is expressly excluded or postponed. The Act of limitation, like other laws relating to procedure, applies immediately to all the steps taken after they have come into force, except when some provision is made to the contrary. In our view, the principle laid down by this Court in the said judgment would apply to the facts of this case. The Act of limitation being a law of procedure, the amendment inserted by Bye-law 252(2) would apply

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to the past transactions also however, w.e.f. the date of such amendment.

76. Supreme Court in case of ***Syed Yousuf Yar Khan and Ors. v/s. Syed Mohammed Yar Khan and Ors., AIR 1967 SC 1318*** considered a situation where the period of limitation prescribed for the suit by the corresponding law in Hyderabad was an unlimited period. Section 30 enabled the plaintiff to institute a suit within a period of two years after 1st April, 1951. The Part B States (Laws) Act, 1951 while extending the Indian Limitation Act, 1908 to Hyderabad allowed the plaintiff reasonable time to institute the suit for recovery of the property. The extension of the Indian Limitation Act, 1908 to Hyderabad and the consequential change in law prescribing a shorter period of limitation did not confiscate the existing cause of action and must be recorded as an alteration in the law of procedure for the enforcement of the cause of action.

77. It is held that the Court must therefore apply the normal rule that law of limitation applicable to the suit is the law in force at the date of the institution of the suit. The suit is therefore governed by the Indian Limitation Act, 1908. The plaintiffs not having instituted the suit within two years after 1st April, 1951 therefore could not avail

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themselves of all the benefit of Section 30 of the unamended provision to Section 30 of the Limitation Act, 1908. The Supreme Court accordingly held that the suit was barred by law of limitation.

78. In our view, the principles of law laid down by the Supreme Court in the said judgment squarely apply to the facts of this case. The unlimited period of limitation prescribed prior to the date of amendment to Bye-law 252(2) was reduced by a shorter period of limitation by three years. Such amendment did not confiscate the existing cause of action but was only as and by way of alternative in the law of procedure for the enforcement of the cause of action. In our view, the provision of limitation applicable on the date of filing such arbitral proceedings would apply and not prior to the date of applicability of the provision of limitation since the appellant had not filed the arbitral proceedings prior to the date of such amendment.

79. Division Bench of this Court in the case of ***M/s. Delton Electricals Vs. Maharashtra State Electricity Distribution Company Limited & Ors., 2017 SCC OnLine Bom 9000*** adverted to various judgments of the Supreme Court and Privy Council in which it has been held that the Courts have expressed at least three reasons for supporting the existence of statutes of limitation; (1) that long dormant

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claims have more of cruelty than justice in them; (2) that a defendant might have lost the evidence to disprove a stale claim; and (3) that persons with good causes of action should pursue them with reasonable diligence. A reference is also made to Halsbury, 4th Edn., Vol.28 Paragraph 605 and the judgment of the Supreme Court in the case of ***Nav Rattanmal and Ors. v. State of Rajasthan AIR 1961 SC 1704*** in which it was held that the Statutes of Limitation have been considered as Statutes of Repose and Statutes of Peace. The generally accepted basis for such statutes is that they are designed to effectuate a beneficent public purpose.

80. This Court also considered the judgment of the Supreme Court in the case of ***Khadi Gram Udyog Trust Vs. Ram Chandraji Virajman Mandir, Sarasiya Ghat, Kanpur, (1978) 1 SCC 44*** in which it was held that though a debt may be time- barred, it would still be a debt due. The right remains untouched and if a creditor has any means of enforcing his right other than by action or set-off, he is not prevented from doing so. This Court also considered the judgment of the Supreme Court in the case of ***Punjab National Bank and Ors. v. Surendra Prasad Sinha 1993 Supp. (1) SCC 499 at page 503- 504*** in which it was held that the rules of limitation are not meant to destroy the rights of parties. Section 3 of the Limitation Act only bars the remedy but

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does not destroy the right which the remedy relates to. There are good reasons for supporting the existence of defence of limitation. One is that long dormant claims have more of cruelty than justice in them; that a defendant might have lost the evidence to disprove a stale claim and that persons with good causes of action should pursue them with reasonable diligence.

81. If the arguments of the learned counsel for the appellant is accepted that even after insertion of period of limitation under Bye-law 252 (2) of the Bombay Stock Exchange w.e.f. 29th August 1998, the appellant would still file his claim after any number of years, the respondent who has defence of limitation will lose his right of defence. The evidence that he would rely upon in such defence of period of limitation may be rendered nugatory and may be destroyed due to long duration during which the appellant had not filed the arbitration proceedings for recovery of the alleged dues. The whole purpose of enactment of the Limitation Act in public interest to dismiss the stale claims would be frustrated in such an event.

82. There is no substance in the submission made by the learned counsel for the appellant that the respondent had never denied the liability till the complaint was filed by the appellant before Investor's

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Grievances Redressal Cell. There is also no substance in the submission made by the learned counsel for the appellant that no period of limitation would apply on the ground that there was fiduciary relation between the appellant and the respondent and that broker had acted as an agent of the appellant.

83. The appellant had placed reliance on various correspondence during the period between 1996 and 1998 in support of the plea that limitation period was extended in view of correspondence exchanged between the parties. In our view, limitation once starts does not stop unless there is acknowledgment of the liability or there is part payment and that also only if liability is acknowledged or part payment is made within the period of limitation.

84. Learned Single Judge has rightly held that by letter dated 29th May 1996 addressed by the respondent to appellant, the respondent had made its position absolutely clear. The respondent in the said letter had stated that the statement of account submitted by the appellant was incorrect and that the statement of account would actually show debit entry of Rs.18,379/- as enclosed and forwarded to the appellant by the respondent. The next submission of the learned counsel for the appellant that learned Single Judge has upheld the

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arguments of the appellant that the arbitral reference filed in 2002 was not barred by law of limitation is factually incorrect.

85. A perusal of Section 30 of the Limitation Act, 1963 makes it clear that any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of seven years next after the commencement of the said Act, 1963 or within the period prescribed for such suit by the Indian Limitation Act, 1908 whichever period expires earlier. The said provision though takes cognizance of the hardship which may be caused to the litigant due to shorter period of limitation prescribed under the Limitation Act, 1963, then the period prescribed under the Indian Limitation Act, 1908 in Section 30 (a) of the said Limitation Act, 1963, safeguards are provided to such litigant. We are not inclined to accept the submission of the learned counsel for the appellant that by virtue of Section 2(4) read with Section 43 of the Arbitration and Conciliation Act, 1996, there would be no period of limitation even after amendment to Bye-Law 252(2) framed by the Stock Exchange, Mumbai.

86. There is no dispute in the proposition canvassed by the learned counsel for the appellant that till such time, the said Bye-law 252 (2)

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was inserted, in view of Section 2(4) of the Arbitration and Conciliation Act, 1996, no limitation was applicable to the statutory arbitrations and more particularly it were governed by Bye-laws, Rules and Regulations of Bombay Stock Exchange. There is no merit in the submission of the learned counsel for the appellant that there was continuous cause of action in view of the respondent having failed to pay the sale proceeds of the shares to the appellant or to deliver the shares lying in the trust with the respondent. In our view, this submission of the learned counsel for the appellant is contrary to Bye-law 252 (2) brought into effect w.e.f. 29th August 1998.

87. Since this Court is of the view that limitation period of three years in this case would commence w.e.f. 29th August 1998, a question that arise for consideration is whether within the period of three years from 29th August 1998, the appellant had filed the claim before the Stock Exchange, Mumbai or not. It is not in dispute that the statement of claim was filed by the appellant on 1st July 2002. It is not in dispute that complaint filed by the appellant before the Investor's Grievances Redressal Cell was pending during the period between 29th April 1999 and 29th September 2000. In our view, time taken before the Investor's Grievances Redressal Cell for deciding the said complaint filed by the appellant is required to be excluded

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for the purpose of computation of limitation. Even after the said period is excluded, statement of claim filed by the appellant in 26th October 2002 was ex facie barred by law of limitation. Cause of action would not commence only from the date of rejection of complaint by the Investor's Grievances Redressal Cell for the purpose of filing statement of claim for the first time.

88. Cause of action had already commenced w.e.f. 29th September 1998. Admittedly, there was no part payment made by the respondent during this period. In our view, there was no acknowledgment of liability after commencement of the period of limitation i.e. 29th August 1998 till expiry of 3 years thereafter. The period of limitation between 29th August 1998 and the date of filing complaint by the appellant with the Investor's Grievances Redressal Cell i.e. 29th April 1999 has to be excluded while computing the period of limitation of three years. The balance period after disposal of complaint by IGRC also has to be considered.

89. It is not in dispute that when Bye-law 252 (2) was amended extending the period of limitation to the arbitrations governed by the Bye-laws of Stock Exchange, Mumbai, Section 2(4) of the Arbitration and Conciliation Act was already in the Statute. No contrary intention

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appears in the said amendment. The said amendment does not have any exception to the Arbitration Act that the past transactions prior to the date of such amendment where no proceedings were filed would not be governed by the said amendment.

90. The arbitral Tribunal has rendered various findings of facts after considering the pleadings, documents and the Bye-laws, Rules and Regulations framed by the Stock Exchange, Mumbai. Learned Single Judge while deciding the petition under Section 34 of the Arbitration and Conciliation Act, 1996 rightly did not interfere with the findings of facts and did not re-appreciate the evidence. The appellant did not make out any case for interference with the award rendered by the learned Single Judge. Scope of Section 37 of the Arbitration and Conciliation Act, 1996 is very limited. The appellant cannot expand the scope of Section 37 of the Arbitration and Conciliation Act, 1996 by advancing various arguments which are not advanced before the learned Single Judge while arguing the application under Section 34 of the Arbitration and Conciliation Act, 1996. We do not find any infirmity in the impugned award rendered by the arbitral Tribunal and also in the impugned judgment rendered by the learned Single Judge. Appeal is devoid of merit.

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91. We accordingly pass the following order :-

- (i) Appeal No.989 of 2005 is dismissed.
- (ii) There shall be no order as to costs.

(V.G. BISHT, J.)

(R.D. DHANUKA, J.)

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL Nos. 843-844 OF 2021
(Arising out of SLP (C) No. 1531-32/ 2021)

BHARAT SANCHAR NIGAM LTD. & ANR.

...APPELLANTS

Versus

M/S NORTEL NETWORKS INDIA PVT. LTD.

...RESPONDENT

J U D G M E N TINDU MALHOTRA, J.

Leave granted.

1. The present Appeals raise two important issues for our consideration : (i) the period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**the 1996 Act**"); and (ii) whether the Court may refuse to make the reference under Section 11 where the claims are *ex facie* time-barred?
2. (a) The factual matrix in which the present issues have arisen for our consideration is the issuance of a tender notification by the Appellant-Company [hereinafter referred to as "**BSNL**"] inviting bids for planning, engineering, supply, insulation, testing and commissioning of GSM based cellular mobile network in the southern region covering the Kerala, Karnataka, Tamil Nadu, Andhra Pradesh Circles, and the Chennai telephone district. In the tender process, the Respondent-Company [hereinafter referred to as "**Nortel**"] was awarded the purchase order. On completion of the Works under

the purchase order, BSNL deducted / withheld an amount of Rs.99,70,93,031 towards liquidated damages and other levies.

- (b) Nortel *vide* communication dated 13.05.2014 raised a claim for payment of the said amount.

BSNL *vide* letter dated 04.08.2014 rejected the claim of Nortel.

- (c) After a period of over 5 ½ years, Nortel *vide* letter dated 29.04.2020 invoked the arbitration clause, and requested for appointment of an independent arbitrator, wherein it was contended that the dispute of withholding the aforesaid amounts, would fall within the ambit of arbitrable disputes under the agreement.

- (d) BSNL *vide* reply dated 09.06.2020 contended that the request for appointment of an arbitrator could not be entertained, since the case had already been closed on 04.08.2014, and as per Section 43 of the 1996 Act, the notice invoking arbitration was time barred.

- (e) Nortel filed an application under Section 11 of the 1996 Act before the Kerala High Court for appointment of an arbitrator. The High Court *vide* Order dated 13.10.2020 referred the disputes to arbitration.

- (f) BSNL filed a review petition before the High Court, which was dismissed *vide* Order dated 14.01.2021.

- (g) The present Civil Appeal has been filed by BSNL to challenge the Orders dated 13.10.2020 and 14.01.2021 respectively.

- (h) This Court appointed Mr. Arvind Datar, Senior Advocate as *Amicus Curiae* to assist the Court on the legal issues which have arisen for consideration.

3. We have heard Mr. R.D. Agrawala, Senior Advocate for the Appellants, Mr. Neeraj Kumar Jain, Senior Advocate for the Respondent, and the learned *Amicus Curiae*, Mr. Arvind Datar, Senior Advocate.

4. Submissions on behalf of BSNL

BSNL submitted that the cause of action for invoking arbitration arose on 04.08.2014 when the claim made by Nortel was rejected by making deductions from the Final Bill. It was contended that Nortel had slept over its alleged rights for over 5 ½ years, before issuing the notice of arbitration on 29.04.2020. From 04.08.2014 till 29.04.2020, Nortel did not take any action whatsoever. Consequently, the notice invoking arbitration had become legally stale, non-arbitrable and unenforceable. The High Court had erroneously proceeded on the premise of mere existence of a valid arbitration agreement, without considering that such an agreement was inextricably connected with the existence of a live dispute.

Even though limitation was a mixed question of fact and law, and is ordinarily to be decided by the arbitral tribunal, in cases where the invocation of the arbitration agreement is *ex facie* time barred, the Court must reject the request for appointment of an arbitrator. The limitation for invoking arbitration, and seeking appointment of an arbitrator is at par with a civil action, and would be covered by Article 137 of the Schedule to the Limitation Act, 1963. An action taken by a claimant must necessarily fall within the statutory period of 3 years from the date on which the right to apply accrues.

Section 11(6A) uses the phrase “examination of the existence of an arbitration agreement”, which would imply that the power conferred upon the Court is not a formal exercise, but requires a certain degree of examination before making the reference.

5. Submissions on behalf of Nortel

It was submitted that the amendment to Section 11 by the Arbitration and Conciliation (Amendment) Act, 2015 provides for a limited scope of enquiry at the pre-reference stage which is restricted only to the “existence” of an arbitration agreement under sub-section (6A) of Section 11. In view of the doctrine of *kompetenz-kompetenz*, the objection with respect to the claims being allegedly time barred, could be decided by the arbitral tribunal. The High Court rightly limited the enquiry at the pre-reference stage to the “existence” of the arbitration agreement.

The distinction between the limitation for filing an application u/S. 11, and with respect to the underlying claims does not survive post the 2015 Amendment, since the role of the Court is only limited to examine the existence of the arbitration agreement between the parties.

The starting point of limitation for initiating a proceeding under Section 11 is the expiry of 30 days’ from the date of issuing notice of arbitration on 29.04.2020. The cause of action was, therefore, a continuing one. The High Court had rightly held that the issue of limitation must be decided by the arbitral tribunal.

6. Discussion on First issue

The 1996 Act has been framed for expeditious resolution of disputes, and various provisions have been incorporated in the Act to ensure that the arbitral proceedings are conducted in a time-bound manner. Various time lines have been provided in the 1996 Act such as :

- (i) Section 8 provides that an application for reference of disputes to arbitration, shall be filed not later than submitting the first statement on the substance of the dispute;

- (ii) Section 9(2) provides that where a Court passes an order for any interim measure of protection, the arbitral proceedings shall be commenced within a period of 90 days' from the date of such order;
 - (iii) Section 13 provides that where a challenge is made against an arbitrator, the same must be raised within 15 days' from the constitution of the tribunal, or after becoming aware of any circumstances mentioned in sub-section (3) of Section 12;
 - (iv) Section 16 (2) provides that a plea that the tribunal does not have jurisdiction, shall be raised not later than the submission of the statement of defence;
 - (v) Section 34(3) provides a maximum period of 120 days' after the receipt of the signed award, to file objections before the Court¹
7. The 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 to incorporate further provisions for expeditious disposal of arbitral proceedings : (i) Section 11 has been amended to insert sub-section (13) which provides that an application made either before the Supreme Court, or the High Court, or person or institution designated by such Court, shall be disposed of as expeditiously as possible, and an endeavour shall be made to dispose of the petition within a period of 60 days' from the date of service of the notice on the opposite party; (ii) Section 29A mandates that the arbitral proceedings must be completed within a period of 12 months from the date of completion of pleadings; (iii) Section 34 was amended to insert sub-section (6) which provides that an application under Section 34 shall be disposed of expeditiously within a period of 1 year from the date on which the notice of filing objections is served upon the other party.

¹ *Dakshin Haryana Bijli Vitran Nigam Ltd. v. M/s Navigant Technologies Pvt. Ltd.*, C.A. No. 791 / 2021 decided on 02.03.2021.

Some of these provisions have been held to be mandatory, such as Sections 8 and 34(3); while others like Section 34(6) have been held to be directory².

8. Contemporaneous with the 2015 amendments to the Arbitration Act 1996, the Commercial Courts Act, 2015 was enacted to provide for speedy disposal of high value commercial disputes, which provided for setting up Commercial Divisions or Commercial Appellate Division in High Courts, and Commercial Courts at the district level.

Section 13 of the Commercial Courts Act provides that an appeal under Section 37 of the Arbitration Act, 1996 shall be filed before the Commercial Appellate Court or Commercial Appellate Division, as the case may be within a period of 60 days' from the date of judgment.

Section 14 further provides that the Commercial Appellate Court or Commercial Appellate Division shall endeavour to decide the appeals within a period of 6 months' from the date of filing of such appeal.

9. To decide the issue of limitation for filing an application under Section 11, we must first examine whether the Arbitration Act, 1996 prescribes any period for the same.

Section 11 does not prescribe any time period for filing an application under sub-section (6) for appointment of an arbitrator. Since there is no provision in the 1996 Act specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Limitation Act, 1963, as per Section 43 of the Arbitration Act, which provides that the Limitation Act shall apply to arbitrations, as it applies to proceedings in Court.

“43. – Limitations

² State of Bihar & Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti (2018) 9 SCC 472.

(1) The Limitation Act, 1963 (36 of 1963) shall apply to arbitrations, as it applies to proceedings in Court.”

In **Consolidated Engineering v. Principal Secretary, Irrigation**,³ this

Court held that :

“45. Learned counsel for the appellant contended that Section 43 of the AC Act makes applicable the provisions of the Limitation Act only to arbitrations, thereby expressing an intent to exclude the application to any proceedings relating to arbitration in a court. The contention of the appellant ignores and overlooks Section 29(2) of the Limitation Act and Section 43(1) of the AC Act. Sub-section (1) of Section 43 of the Act provides that the Limitation Act shall apply to arbitrations *as it applies to proceedings in court*. The purpose of Section 43 of the AC Act is not to make the Limitation Act inapplicable to proceedings before court, but on the other hand, make the Limitation Act applicable to arbitrations. As already noticed, the Limitation Act applies only to proceedings in court, and but for the express provision in Section 43, the Limitation Act would not have applied to arbitration, as arbitrators are private tribunals and not courts. Section 43 of the AC Act, apart from making the provisions of the Limitation Act, 1963 applicable to arbitrations, reiterates that the Limitation Act applies to proceedings in court. Therefore, the provisions of the Limitation Act, 1963 apply to all proceedings under the AC Act, both in court and in arbitration, except to the extent expressly excluded by the provisions of the AC Act.”

(emphasis supplied)

10. Since none of the Articles in the Schedule to the Limitation Act, 1963 provide a time period for filing an application for appointment of an arbitrator under Section 11, it would be covered by the residual provision Article 137 of the Limitation Act, 1963.

Article 137 of the Limitation Act, 1963 provides :

THIRD DIVISION – APPLICATIONS			
	Description of application	Period of limitation	Time from which period begins to run
137.	Any other application for which no period of limitation is provided elsewhere in this division	Three years	When the right to apply accrues

11. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days’ from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s) / dispute(s) to

³ (2008) 7 SCC 169.

be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

- 12.** The period of limitation for filing a petition seeking appointment of an arbitrator/s cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognized even under Section 20 of the Arbitration Act 1940. Reference may be made to the judgment of this Court in **C. Budhraja v. Chairman, Orissa Mining Corporation Ltd.**⁴ wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Paragraph 26 of this judgment reads as follows :

“26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Major (Retd.) Inder Singh Rekhi v. DDA [(1988) 2 SCC 338] , Panchu Gopal Bose v. Board of Trustees for Port of Calcutta [(1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [(1999) 2 SCC 571] also make this position clear.”

⁴ (2008) 2 SCC 444.

13. Various High Courts have taken the view that Article 137 of the Limitation Act would be applicable to an application under Section 11 of the Arbitration Act.

The question of the applicability of Article 137 to applications under Section 11 of the 1996 Act came up for consideration before the Bombay High Court in **Leaf Biotech v. Municipal Corporation Nashik**⁵ wherein it was held that the period of limitation for an application u/S. 11 would be governed by Article 137 of the Limitation Act.

Subsequently, in **Deepdharshan Builders Pvt. Ltd. v. Saroj**⁶ the Bombay

High Court framed the following issue :

“(ii) Whether Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application filed under Section 11(6) of the Arbitration Act and if applies whether Section 5 of the Limitation Act, 1963 would be applicable to this arbitration application and if Section 5 applies to this arbitration application, whether the applicant has made out a sufficient cause for condonation of delay in filing this arbitration application?”

The Bombay High Court held that :

“42. In my view, since the proceedings under Section 11(6) of the Arbitration Act are required to be filed before the High Court, Article 137 of the Schedule to the Limitation Act, 1963 would apply to such application filed under Section 11(6) of the Arbitration Act. In my view, since Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application under Section 11(6) of the Arbitration Act, Section 5 of the Limitation Act, 1963 would also apply to the arbitration application filed under Section 11(6) of Arbitration Act

46. It is not in dispute that under Section 20 of the Arbitration Act, 1940, an application was required for taking the arbitration agreement on record and for appointment of an arbitrator in accordance with the arbitration agreement before a Court. Since the said proceedings under Section 20 were required to be filed before an appropriate Court, the provisions of Article 137 of the Limitation Act, 1963 were applicable to such proceedings filed before such appropriate Court. In my view, since the proceedings under Section 11(6) or Section 11(9) of the Arbitration Act for seeking appointment of arbitral tribunal are also now required to be filed before the High Court or the Hon'ble Supreme Court, as the case may be. Article 137 of the Schedule to the Limitation Act, 1963 would apply. It is not in dispute that no other Article of Schedule to the Limitation Act, 1963 provides for any other period of limitation for filing an arbitration application filed under Section 11(6) or Section 11(9) of the Arbitration Act respectively.

47. It is not in dispute that Article 137 of the Schedule to the Limitation Act, 1963, such application has to be filed within three years from the date when the right to apply accrues. In my view, under Article 137 of the Limitation Act, 1963, application

⁵ 2010 (6) Mh LJ 316.

⁶ (2019) 1 AIR Bom R 249.

for appointment of an arbitrator under Section 11(6) or Section 11(9) of the Arbitration Act before the High Court or the Hon'ble Supreme Court would apply from the date when a notice invoking an arbitration agreement is received by other side and other side refuses to the name suggested by the opponent or refusing to suggest any other name in accordance with the provisions of Section 11 or the agreed procedure prescribed in the arbitration agreement within the time contemplated therein or specifically refuses to appoint any arbitrator in the event of such other party being an appointing authority.

48. In my view, the limitation prescribed under Article 137 of the Schedule to the Limitation Act, 1963 which applies to an application under Section 11(6) or Section 11(9) of the Arbitration Act filed before the High Court or before the Hon'ble Supreme Court cannot be mixed up with the period of limitation applicable to the claims prescribed in various other Articles of the Schedule to the Limitation Act, 1963. Both these periods of limitation i.e. one applicable to the claims being made and another being applicable to the application under Section 11(6) or Section 11(9) of the Arbitration Act to which Article 137 of the Schedule to the Limitation Act, 1963 applies, are two different periods of limitation and cannot be made applicable to each other."

The special leave petition (SLP (C) No. 305 / 2019) against the said

Judgment was dismissed *vide* Order dated 16.02.2019.

14. Other decisions of High Courts on the applicability of Article 137 are

Prasar Bharti v. Maa Communication⁷ and ***Golden Chariot v. Mukesh***

Panika⁸ passed by the Delhi High Court. The SLP filed in the case of Golden Chariot was dismissed *vide* Order dated 31.01.2019 in SLP(C) No. 3658 / 2019.

15. The reasoning in all these judgments seems to be that since an application under Section 11 is to be filed in a court of law, and since no specific Article of the Limitation Act, 1963 applies, the residual Article would become applicable. The effect being that the period of limitation to file an application under Section 11 is 3 years' from the date of refusal to appoint the arbitrator, or on expiry of 30 days', whichever is earlier.

16. In ***Geo Miller & Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan***

Nigam Ltd.,⁹ a three-judge bench held that on a reading of sub-sections (1)

7 2010 (115) DRJ 438 (DB).

8 2018 SCC OnLine Del 10050, SLP (C) No. 40627 / 2018 against this decision was dismissed on 31.01.2019.

9 (2020) 14 SCC 643, 649.

and (3) of Section 43 of the 1996 Act, the provisions of the Limitation Act, 1963 would be applicable to the Arbitration Act.

Paragraph 14 of this judgment reads as :

“14. Sections 43(1) and (3) of the 1996 Act are in pari materia with Sections 37(1) and (4) of the 1940 Act. It is well-settled that by virtue of Article 137 of the First Schedule to the Limitation Act, 1963 the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a court under the 1940 Act (see *State of Orissa v. Damodar Das* [*State of Orissa v. Damodar Das*, (1996) 2 SCC 216]) as well as the 1996 Act (see *Grasim Industries Ltd. v. State of Kerala* [*Grasim Industries Ltd. v. State of Kerala*, (2018) 14 SCC 265 : (2018) 4 SCC (Civ) 612]) is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises.”

- 17.** Given the vacuum in the law to provide a period of limitation under Section 11 of the Arbitration and Conciliation 1996, the Courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues. However, this is an unduly long period for filing an application u/S. 11, since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time bound period. The 1996 Act has been amended twice over in 2015 and 2019, to provide for further time limits to ensure that the arbitration proceedings are conducted and concluded expeditiously. Section 29A mandates that the arbitral tribunal will conclude the proceedings within a period of 18 months. In view of the legislative intent, the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act.

It would be necessary for Parliament to effect an amendment to Section 11, prescribing a specific period of limitation within which a party may move the court for making an application for appointment of the arbitration under Section 11 of the 1996 Act.

- 18.** Applying the aforesaid law to the facts of the present case, we find that the application under Section 11 was filed within the limitation period prescribed

under Article 137 of the Limitation Act. Nortel issued the notice of arbitration *vide* letter dated 29.04.2020, which was rejected by BSNL *vide* its reply dated 09.06.2020. The application under Section 11 was filed before the High Court on 24.07.2020 i.e. within the period of 3 years of rejection of the request for appointment of the arbitrator.

Discussion on Second issue

- 19.** We will now discuss the second issue which has arisen for consideration i.e. whether the Court while exercising jurisdiction under Section 11 is obligated to appoint an arbitrator even in a case where the claims are *ex facie* time-barred.

To determine this issue, we would have to examine the scope of jurisdiction under Section 11 of the Act.

Legislative History of Section 11

Pre-amendment position

Under the principal Act, the legislative scheme under Section 11 was that if the parties had agreed on a procedure for appointment of the arbitrator, the appointment had to be made in accordance with that procedure. Absent an agreement between the parties, the default power of appointment in a domestic arbitration would be exercised by the Chief Justice of the High Court, or person, or institution, designated by him. In the case of an international commercial arbitration, the default power would be exercised by the Chief Justice of India, or the person, or institution, designated by him¹⁰.

The object of conferring the power of appointment on the highest judicial authority was to give credibility to the procedure of appointment.

- 20.** In ***SBP & Co. v. Patel Engineering Ltd.***,¹¹ a seven-Judge constitution bench of this Court considered the scope of Section 11 of the 1996 Act, and held that the scheme of the Act required the Chief Justice, or his designate, to

¹⁰ Section 11(9) of the 1996 Act.

¹¹ (2005) 8 SCC 618.

decide whether there is an arbitration agreement in terms of Section 7, before exercising the default power for making the appointment of the arbitrator. The

scope of power at the pre-reference stage would be as follows:

“**33.** Section 8 of the Arbitration Act, 1940 enabled the court when approached in that behalf to supply an omission. Section 20 of that Act enabled the court to compel the parties to produce the arbitration agreement and then to appoint an arbitrator for adjudicating on the disputes. It may be possible to say that Section 11(6) of the Act combines both the powers. May be, it is more in consonance with Section 8 of the old Act. But to call the power merely as an administrative one, does not appear to be warranted in the context of the relevant provisions of the Act. First of all, the power is conferred not on an administrative authority, but on a judicial authority, the highest judicial authority in the State or in the country. No doubt, such authorities also perform administrative functions. An appointment of an Arbitral Tribunal in terms of Section 11 of the Act, is based on a power derived from a statute and the statute itself prescribes the conditions that should exist for the exercise of that power. In the process of exercise of that power, obviously the parties would have the right of being heard and when the existence of the conditions for the exercise of the power are found on accepting or overruling the contentions of one of the parties it necessarily amounts to an order, judicial in nature, having finality subject to any available judicial challenge as envisaged by the Act or any other statute or the Constitution. Looked at from that point of view also, it seems to be appropriate to hold that the Chief Justice exercises a judicial power while appointing an arbitrator.

..
39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.

...
47. (iv) The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators.”

21. Subsequently, in **National Insurance Co. Ltd. v. Boghara Polyfab Pvt.**

Ltd.,¹² the Court classified the preliminary issues to be decided by the Chief Justice of India, / Chief Justice of a High Court, as the case may be, under Section 11, and those which must be decided by the arbitrator, into three categories :

- (i) issues which the Chief Justice, or his designate are bound to decide are whether the party making the application has approached the appropriate High Court; whether there is an arbitration agreement; and whether the party who has made the application, is a party to the agreement;
- (ii) issues which the Chief Justice may decide at the threshold are : as to whether the claim is a dead or long-barred claim, or a live claim; whether the parties have concluded the contract / transaction by recording satisfaction of their mutual rights and obligations, or the party has received the final payment without objection;
- (iii) issues which must be left to the arbitral tribunal to decide are whether the claim made falls within the arbitration clause (for example, a matter which is reserved for final decision of a departmental authority, and is “excepted” or excluded from arbitration); merits of the claims involved.

22. In **Union of India & Ors. v. Master Construction Co.**¹³ this Court held that the issue whether a discharge voucher, or no claims certificate, or settlement agreement had been obtained by fraud, coercion, duress, or undue influence, must be determined by the appointing authority at the Section 11 stage, when a *prima facie* determination as to whether such a dispute was raised *bonafide* and genuine must be made. If the dispute *prima facie* appears

¹² (2009) 1 SCC 267.

¹³ (2011) 12 SCC 349.

to be lacking in credibility, the matter would not be referred to arbitration. A bald plea of fraud, coercion, duress, or undue influence was not sufficient, unless the party who sets up such a plea was able to *prima facie* establish it, by placing material on record.

23. Post-amendment position

The 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 which came into force with effect from 23.10.2015. The said amendment was based on the recommendations of the 246th Report of the Law Commission of India.

The 2015 Amendment Act made three significant changes :

- (i) It replaced the Chief Justice of the High Court as the appointing authority for exercising the default power of appointment in the case of domestic arbitrations, by the concerned High Court; and, in respect of international commercial arbitrations, the default power would be exercised by the Supreme Court, in place of the Chief Justice of India.
- (ii) It inserted sub-section (6A) and (6B) in Section 11, which reads as :

“11. Appointment of arbitrators.–

...

(6A) The Supreme Court, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court, or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.”

Sub-section (6A) by a non-obstante clause provided that notwithstanding any judgment, decree or order of any court, the scope of examination at the Section 11 stage, would be confined to the existence of the arbitration agreement.

The effect of the amendment was that if the existence of the arbitration agreement was not in dispute, all other issues would be left for the arbitral tribunal to decide. This was in reinforcement of the

doctrine of *kompetenz-kompetenz*, which empowers the tribunal to rule on its own jurisdiction, including any objections with respect to the validity of the arbitration agreement; and thereby minimize judicial intervention at the pre-reference stage.

- (iii) Sub-section (6B) was inserted to provide that the designation of any person or institution, by either the Supreme Court or High Court, as the appointing authority under Section 11, would not be regarded as a delegation of judicial power.

The amendments to Section 11 were brought in to legislatively overrule the line of judgments including ***SBP & Co., Boghara Polyfab, Master Construction***, etc., which had enlarged the scope of power of the appointing authority to decide various issues at the pre-reference stage.

24. Sub-section (6A) came up for consideration in the case of ***Duro Felguera SA v. Gangavaram Port Ltd.***¹⁴, wherein this Court held that the legislative policy was to minimize judicial intervention at the appointment stage. In an application under Section 11, the Court should only look into the existence of the arbitration agreement, before making the reference. Post the 2015 amendments, all that the courts are required to examine is whether an arbitration agreement is in existence —nothing more, nothing less.

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, *notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.*”

(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if

14 (2017) 9 SCC 729.

the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

...

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

25. In *Mayavati Trading Company Private Ltd. v. Pradyut Dev Burman*¹⁵, a

three-judge bench held that the scope of power of the Court under Section 11

(6A) had to be construed in the narrow sense. In paragraph 10, it was opined

as under :

"**10.** This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, SA [Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729]"

26. In *Uttarakhand Purv Sainik Kalyan Nigam v. Northern Coal Field*

Limited,¹⁶ this Court took note of the recommendations of the Law

Commission in its 246th Report, the relevant extract of which reads as :

"**7.6.** The Law Commission in the 246th Report [Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law Commission of India (August 2014), p. 20.] recommended that:

"**33.** ... the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal."

¹⁵ (2019) 8 SCC 714.

¹⁶ (2020) 2 SCC 455.

In view of the legislative mandate contained in the amended Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the *kompetenz-komptenz* principle. The doctrine of *kompetenz-komptenz* implies that the arbitral tribunal is empowered, and has the competence to rule on its own jurisdiction, including determination of all jurisdictional issues. This was intended to minimise judicial intervention at the pre-reference stage, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by the parties.

27. The 2019 Amendment to Section 11

Section 11 has been further amended by the Arbitration and Conciliation (Amendment) Act, 2019 to promote institutionalization of arbitration in India.

The 2019 Amendment Act has deleted sub-section (6A) in Section 11.

However, the amended to Section 11 is yet to be notified. Consequently, sub-section (6A) continues to remain on the statute book, and governs the scope of power under Section 11 for the present.

The notification giving effect to the provisions of the 2019 Amendment Act which have been brought into force, reads as :

“

MINISTRY OF LAW AND JUSTICE
(Department of Legal Affairs)
NOTIFICATION

New Delhi, the 30th August, 2019

S.O. 3154(E). — In the exercise of the powers conferred by sub-section (2) of section 1 of the Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019), the Central Government hereby appoints the 30th August, 2019 as the date on which the provisions of the following sections of the said Act shall come into force:—

- (1) section 1;
- (2) section 4 to section 9 [both inclusive];
- (3) section 11 to section 13 [both inclusive];
- (4) section 15.

[F.No. H-11018/2/2017-Admn.-III(LA)]
Dr. RAJIV MANI, Jt. Secy. and Legal Adviser

”

28. The reference to “Section 11” in clause (3) of the Notification dated 30.08.2019 pertains to Section 11 of the Amendment Act [and not the principal Act of 1996]. The amendment to Section 11 in the 2019 Amendment Act finds place in Section 3 of the 2019 Amendment Act, which reads as :

“ **3. Amendment of section 11.** – In section 11 of the principal Act, -

(i)

(ii)

(iii)

(iv)

(v) sub-sections (6A) and (7) shall be omitted

”

29. After the amendment by the 2019 Amendment to Section 11 is notified, it will result in the deletion of sub-section (6A), and the default power will be exercised by arbitral institutions designated by the Supreme Court, or the High Court, as the case may be.

It is relevant to note that sub-section (6B) in Section 11, has not been amended by the 2019 Amendment Act. Sub-section (6B) provides that the designation of any person, or institution by the Court, shall not be regarded as a delegation of “judicial power”. Consequently, it would not be open for the person or institution designated by the Court to exercise any judicial power, and adjudicate on any issue, including the issue of validity of the agreement, or the arbitrability of disputes.

The amendment to sub-section (8) of Section 11 by the 2019 Amendment [which is also yet to be notified], provides that the arbitral institution will be empowered to : (a) seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12, to secure the appointment of an independent and impartial arbitrator; and (b) ensure that the arbitrator has the qualifications required by the arbitration agreement.

30. Issue of Limitation

Limitation is normally a mixed question of fact and law, and would lie within the domain of the arbitral tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of ‘jurisdiction’ pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.

31. Admissibility issues however relate to procedural requirements, such as a breach of pre-arbitration requirements, for instance, a mandatory requirement for mediation before the commencement of arbitration, or a challenge to a claim or a part of the claim being either time-barred, or prohibited, until some pre-condition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim.

32. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some pre-condition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.

33. In *Swisbrough Diamond Mines (Pty) Ltd. & Ors. v. Kingdom of Lesotho*¹⁷, the Singapore Court of Appeal distinguished between “jurisdiction” and “admissibility” in paragraphs 207 and 208, which read as :

“**207.** Jurisdiction is commonly defined to refer to the “power of the tribunal to hear a case”, whereas admissibility refers to “whether it is appropriate for the tribunal to hear it” : *Waste Management, Inc. v. United Mexican States* ICSID Case No. ARB (AF) / 98 / 2, Dissenting Opinion of Keith Highet (8 May 2000) at [58]. To this, Zachary Douglas adds

¹⁷ [2019] 1 SLR 263.

clarity to this discussion by referring to “jurisdiction” as a concept that deals with “the existence of [the] adjudicative power” of an arbitral tribunal, and to “admissibility” as a concept dealing with “the exercise of that power” and the suitability of the claim brought pursuant to that power for adjudication:[Zachary Douglas, *The Press*, 2009] at paras 291 and 310.

208. The conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic hygiene pursuant to a pedantic hair-spitting endeavour. This distinction has significant practical import in investment treaty arbitration because a decision of the tribunal in respect of jurisdiction is reviewable by the supervisory courts at the seat of the arbitration (for non-ICSID arbitrations) or before an ICSID ad hoc committee pursuant to Art 52 of the ICSID Convention (for ICSID arbitrations,) whereas a decision of the tribunal on admissibility is not reviewable : see Jan Paulsson, “Jurisdiction and Admissibility” in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (Gerald Aksen et al, eds) (ICC Publishing, 2005) at p 601, Douglas at para 307, Waibel at p 1277, paras 257 and 257 and 258, Hanno Wehland, “Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules” in *ICSID Convention after 50 Years : Unsettled Issues* (Crina Baltag, ed) (Kluwer Law International, 2016) at pp 233-234, and Chin Leng at p 124.”

- 34.** The judgment in *Lesotho* (supra) was followed by in *BBA & Ors. v. BAZ & Anr.*,¹⁸ wherein the Court of Appeal held that statutory time bars go towards admissibility. The Court held that the “tribunal versus claim” test should be applied for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. The “tribunal versus claim” test asks whether the objection is targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and should not be raised at all).

Applying the “tribunal versus claim” test, a plea of statutory time bar goes towards admissibility as it attacks the claim. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense.

- 35.** The issue of limitation which concerns the “admissibility” of the claim, must be decided by the arbitral tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.

18 [2020] SGCA 53.

36. In a recent judgment delivered by a three-judge bench in **Vidya Drolia v. Durga Trading Corporation**¹⁹, on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out “manifestly *ex facie* non-existent and invalid arbitration agreements, or non-arbitrable disputes.” The *prima facie* review at the reference stage is to cut the deadwood, where dismissal is bare faced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject matter is not arbitrable, that reference may be refused.

In paragraph 144, the Court observed that the judgment in **Mayavati Trading** had rightly held that the judgment in **Patel Engineering** had been legislatively overruled.

Paragraph 144 reads as :

“144. As observed earlier, Patel Engg. Ltd. explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. Mayavati Trading (P) Ltd., in our humble opinion, rightly holds that Patel Engg. Ltd. has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd. has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11 of the Uncitral Model of law of arbitration on which the Arbitration Act was drafted and enacted.”

(emphasis supplied)

While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the *prima facie* test to screen and knockdown *ex facie* meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are *ex facie* time barred and dead, or there is no subsisting dispute.

Paragraph 148 of the judgment reads as follows :

¹⁹ (2021) 2 SCC 1.

“**148.** Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in *Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)]*, it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”

In paragraph 154.4, it has been concluded that :

“**154.4.** Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

(emphasis supplied)

In paragraph 244.4 it was concluded that :

“**244.4.** The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.

37. The upshot of the judgment in ***Vidya Drolia*** is affirmation of the position of law expounded in ***Duro Felguera*** and ***Mayavati Trading***, which continue to hold the field. It must be understood clearly that ***Vidya Drolia*** has not resurrected the pre-amendment position on the scope of power as held in ***SBP & Co. v. Patel Engineering*** (supra).

It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if

there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

38. Applying the law to the facts of the present case, it is clear that this is a case where the claims are *ex facie* time barred by over 5 ½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 04.08.2014. The notice of arbitration was invoked on 29.04.2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable Section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

39. The present case is a case of deadwood / no subsisting dispute since the cause of action arose on 04.08.2014, when the claims made by Nortel were rejected by BSNL. The Respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the Final Bill by making deductions.

In the notice invoking arbitration dated 29.04.2020, it has been averred that:

“ Various communications have been exchanged between the Petitioner and the Respondents ever since and a dispute has arisen between the Petitioner and the Respondents, regarding non payment of the amounts due under the Tender Document.”

The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters,²⁰ or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that : “where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” There must be a clear notice invoking arbitration setting out the “particular dispute”²¹ (including claims / amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

In the present case, the notice invoking arbitration was issued 5 ½ years after rejection of the claims on 04.08.2014. Consequently, the notice invoking arbitration is *ex facie* time barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case.

40. Conclusion

Accordingly, we hold that :

- (i) The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator;
It has been suggested that the Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an

²⁰ S.S.Rathore v. State of Madhya Pradesh (1989) 4 SCC 582.

Union of India & Ors. v. Har Dayal (2010) 1 SCC 394.

CLP India Private Limited v. Gujarat Urja Vikas Nigam Limited & Anr. (2020) 5 SCC 185.

²¹ Section 21 of the Arbitration and Conciliation Act, 1996.

application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings;

- (ii) In rare and exceptional cases, where the claims are *ex facie* time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.

41. In view of the aforesaid, the present Civil Appeals are allowed, and the impugned orders dated 13.10.2020 and 14.01.2021 passed by the High Court are set aside. The application filed under Section 11 by the Respondent before the High Court is consequently dismissed.

We record our appreciation and gratitude to Mr. Arvind Datar, Senior Advocate, for having rendered his valuable assistance as *Amicus* at short notice.

.....J.
(Indu Malhotra)

.....J.
(Ajay Rastogi)

New Delhi;
March 10, 2021

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 825 OF 2021
 (@ Special Leave Petition (Civil) No.8718 of 2020)

PRAVIN ELECTRICALS PVT. LTD.

... APPELLANT

VERSUS

GALAXY INFRA AND ENGINEERING
 PVT. LTD.

... RESPONDENT

J U D G M E N T**R.F. Nariman, J.**

1. Leave granted.
2. This appeal arises out of a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of a Sole Arbitrator for adjudication of disputes between the parties. The Respondent, Galaxy Infra and Engineering Pvt. Ltd., is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Village Arra Gadh, Post Office Dharhara, Dist. Vaishali, P.S. Hajipur, Bihar and is in the business of providing consultancy services. The Appellant,

Pravin Electricals Pvt. Ltd., operates in key industrial and commercial retail sectors and provides services for electrical supplies etc.

3. On 26th May, 2014, an online tender was invited by Chief Engineer, South Bihar Power Distribution Company Ltd. (hereinafter referred to as “SBPDCL”) for appointment of implementing agencies for execution of a Scheme, on turnkey basis, for strengthening, improvement and augmentation of distribution systems capacities of 20 towns in Bihar. The Appellant submitted its technical and financial bid and was declared the L1 bidder and was awarded the work on 22nd September, 2014. It is the case of the Respondent that it had made substantial efforts under a Consultancy Agreement dated 7th July, 2014, to facilitate the Appellant in getting the aforesaid contract for which it was entitled to commission. It is then alleged that the Appellant sent an email dated 15th July, 2014 to the Respondent with a draft agreement attached for comments and confirmation. On the same day, the Respondent sent its reply stating that certain terms were not acceptable. In emails that have surfaced for the first time in this Court dated 22nd July,

2014 and 25th July, 2014, the Respondent argued that, in point of fact, all differences between the parties were ironed out and a Final Consultancy Agreement was agreed upon through correspondence between the parties.

4. The Respondent alleged that it had raised an invoice on 27th September, 2014, for payment of Rs.28.09 lakhs as an advance for consultancy charges including service tax. It is important to note that the said invoice was addressed to one M/s Process Construction and Technical Services Pvt. Ltd. (hereinafter referred to as "Process") and makes reference to an agreement entered into between the Respondent and Process. Also, on 24th April, 2016, the Respondent alleged that it raised yet another invoice on the Appellant. This invoice was also addressed to Process and makes reference to an agreement between the Respondent and Process. Ledger accounts that were produced in the normal course of business by the Respondent reflects transactions with Process and not the Appellant. Finally, vide an email dated 30th June, 2017, the Respondent attached the final invoice to the Appellant claiming an amount of Rs.5.54 crores under the alleged Consultancy Agreement dated 7th July, 2014.

This was followed up by a demand-cum-legal notice dated 9th March, 2018, seeking payment of Rs.5,54,14,318/- from the Appellant as being due under the alleged Consultancy Agreement dated 7th July, 2014. Vide its reply dated 22nd March, 2018, the Appellant recorded its surprise on receiving such demand notice and flatly denied that any agreement dated 7th July, 2014, was ever entered into between the parties. The Appellant further requested the Respondent to provide a copy of the alleged Agreement dated 7th July, 2014 and payment details referred to in the legal notice.

5. On 26th April, 2018, the Respondent invoked Article 14 of the alleged Consultancy Agreement dated 7th July, 2014, in which they nominated one Kameshwar Choudhary as Sole Arbitrator to adjudicate differences between the parties. On 3rd May, 2018, the Appellant denied execution of the Agreement dated 7th July, 2014 and, therefore, stated that the matter could not be referred to arbitration. We are informed that on 14th May, 2018, the Respondent's Advocates finally supplied a copy of the alleged Agreement dated 7th July, 2014 to the Appellant.

6. On 7th September, 2018, the Respondent then filed a petition under Section 11(6) of the 1996 Act for appointment of a Sole Arbitrator on the basis of the alleged Agreement dated 7th July, 2014. The Delhi High Court vide an order dated 28th November, 2018, directed the Respondent to produce the original of the Consultancy Agreement dated 7th July, 2014. The Appellant was then directed to produce Mr. M.G. Stephen, Managing Director of the Appellant, before the Registrar (Judicial) on 7th December, 2018, so that he can carry with him documents which bear his original signature at the contemporaneous time. The Registrar (Judicial) was also directed to obtain specimen signatures of Mr. M.G. Stephen. The original of the Agreement together with the aforesaid signatures of Mr. M.G. Stephen was then to be sent to the CFSL for obtaining a report. The report was then received and by an order dated 20th September, 2019, the High Court directed that copies of the report be given to the learned counsel for the parties. Finally, on 30th September, 2019, the learned counsel for the Appellant submitted that he had instructions to contest the matter after which the impugned judgment dated 12th May, 2020 was passed.

7. Vide the impugned judgment, the learned Single Judge of the Delhi High Court referred to the alleged Consultancy Agreement dated 7th July, 2014 and the correspondence between the parties, including the correspondence between SBPDCL and the Respondent herein. After going through the aforesaid, the learned Single Judge then held:

“39. Learned counsel for the petitioner has drawn the attention of the Court to various emails which indicate that a Consultancy Agreement was executed between the parties on 07.07.2014. In the said agreement, the parties agreed on the percentage of fee that the petitioner would get in case the respondent succeeded in getting the tender from SBPDCL. On 15.07.2014 the respondent had sent an email with a soft copy of the agreement suggesting a certain percentage of the consultancy fee. Subsequent emails are also placed on record which show that payment terms were being discussed between the parties. Email dated 30.06.2017 is also on record by which a final invoice was sent by the petitioner clearly making a reference to the Agreement dated 07.07.2014. None of these documents have been denied by the respondent. Learned counsel for the petitioner has also pointed out that the respondent even made payments in accordance with the terms of the Agreement. As per the payment terms, Rs.25 Lakhs was payable on receipt of LOI by the respondent from SBPDCL. Admittedly on 22.09.2014, LOI was awarded to the respondent and on the petitioner raising an invoice for Rs.25 Lakhs on 27.09.2014, respondent actually made payment on 29.09.2014. Counsel for the petitioner has also shown the email dated 27.09.2014 whereby the respondent had asked the petitioner to raise the

invoice on its letterhead. These documents in my view clearly indicate that the parties had entered into an Agreement pursuant to which the parties had acted. The petitioner had assisted the respondent in the award of the LOI and the respondent had initially made payments in terms of the said agreement dated 07.07.2014. Learned counsel for the Petitioner is also right in submitting that on 15.07.2014, the respondent had itself sent an email containing a Draft Consultancy Agreement which contained Article 14, which was the Arbitration Clause. The parties were thus ad idem regarding submission of disputes to Arbitration.

40. The fact that there was an Agreement between the parties is also fortified by the fact that the information sent by the Department to the respondent regarding award of the Contract to the respondent was also sent to the petitioner vide email dated 22.09.2014. Draft letter of acceptance sent by the Department to the petitioner through email dated 25.09.2014 was sent by the petitioner to the respondent on the same day, by an email.

41. Learned counsel for the respondent in my view is not correct in its contention that since a draft agreement was emailed by the respondent, there was no executed agreement dated 07.07.2014. From the email dated 15.07.2014, it is apparent that the respondent had executed an Agreement prior to 15.07.2014. Petitioner had categorically stated in the email dated 15.07.2014 that the payment terms in the draft agreement were different and there is no document on record filed by the respondent evidencing denial of the contents of this email.

42. In so far as the argument that the invoices were raised on PCTSPL and not on the petitioner is concerned, petitioner is correct in its submission that PCTSPL was only a sub-contractor of the respondent.

Petitioner had not raised the invoice on its own will. Counsel for the petitioner has pointed out the email dated 24.09.2019 sent by PCTSPL to the respondent i.e. Mr. Manoj Panikar to Mr. Stephen whereby PCTSPL had emailed the draft invoice to the respondent and sought confirmation whether it could be sent to the petitioner and finally, the revised draft invoice was sent to the petitioner on 27.09.2019 by PCTSPL.

43. The contention of the respondent that it was PCTSPL which had made payments to the petitioner and this was on account of their own inter se business relationships has no merit. The invoice placed on record clearly shows that this was with respect to the contract awarded to the respondent by the Department with which admittedly PCTSPL had no direct relationship. This itself is indicative of the fact that dehors the addressee of the invoices, the same were with respect to the contract given by the department to the respondent and for which the petitioner was a consultant.

44. In so far as the contention of the respondent that the Consultancy Agreement dated 07.07.2014 did not have the signatures of Mr. M.G. Stephen and therefore, cannot be accepted as an agreement between the parties, is without merit. As mentioned in the earlier part of the judgment, it is not mandatory for an Arbitration Agreement that it must be signed by the parties. The Supreme Court in case of *Caravel Shipping Services Pvt. Ltd. vs. M/s. Premier Sea Foods (2019) 11 SCC 461*, has clearly held as under:

“8. In addition, we may indicate that the law in this behalf, in *Jugal Kishore Rameshwardas v. Goolbai Hormusji*, AIR 1955 SC 812, is that an arbitration agreement needs to be in writing though it need not be signed. The fact that the

arbitration agreement shall be in writing is continued in the 1996 Act in Section 7(3) thereof. Section 7(4) only further adds that an arbitration agreement would be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4). This does not mean that in all cases an arbitration agreement needs to be signed. The only pre-requisite is that it be in writing, as has been pointed out in Section 7(3)."

45. In my view, the documents placed on record by the petitioner clearly evidence that there exists an Arbitration Agreement between the parties as contained in the draft agreement exchanged by email dated 07.07.2014. The present case squarely falls within the ambit of Section 7(4)(b) of the Act. The inevitable result is that the parties must be referred to Arbitration for adjudication of their disputes."

Accordingly, Justice G.S. Sistani, a former Judge of the Delhi High Court was appointed as the Sole Arbitrator to adjudicate the dispute between the parties.

8. Shri Shyam Divan, learned Senior Advocate, appearing on behalf of the Appellant, has argued that the alleged Consultancy Agreement dated 7th July, 2014 is a concocted document. This is clear from the CFSL report dated 29th September, 2019, on which he relied very heavily. This being the case, since the alleged Consultancy Agreement itself had no existence, there was no arbitration agreement between the parties, as a result of

which the High Court judgment fell to the ground. He also argued that this is the only case of its kind in which a formal signed agreement is alleged to have been entered into between the parties, after which negotiations take place and a draft agreement is referred to. The very fact that negotiations have taken place after such alleged agreement shows that such alleged agreement does not in fact exist. He also went on to argue that the agreement is notarized at Faridabad, Haryana, when the parties are from Mumbai and Bihar respectively. He has also produced documents to show that the so-called Notary's license had expired way before notarization allegedly took place on 7th July, 2014. He argued that once the case that is pleaded between the parties is found to be incorrect, the Respondent cannot now be allowed to rely upon documents produced here for the first time to show that even apart from the pleaded case namely, the Consultancy Agreement dated 7th July, 2014, yet, an agreement is made out in correspondence between the parties after the said date. He attacked the Delhi High Court judgment arguing that the findings that were made qua invoices being raised and payments being made are wholly

incorrect in that such invoices were raised and payments were made only by Process under a separate agreement entered into between the Respondent and Process. He also stated that if the pleadings of this case are perused, Process has been described by the Respondent as a Joint Venture partner with the Appellant in one place, then described as a private company who has common directors with the Appellant; and then finally described as a Sub-Contractor only in the written submissions filed before Delhi High Court, which last appealation has been accepted by the High Court completely wrongly. Even in the Counter Affidavit filed before this Court, yet another plea is taken that Process is the lead partner of the Appellant. For all these reasons, the learned Senior Advocate submits that the judgment under appeal ought to be set aside.

9. Shri Dhruv Mehta, learned Senior Advocate appearing on behalf of the Respondent, has taken us through all the correspondence again in order to show that even if the Consultancy Agreement dated 7th July, 2014 is not relied upon, yet, an arbitration clause exists in that the draft agreement that was exchanged between the parties culminated in a final agreement on 25th July, 2014. In

any case, if the correspondence between SBPDCL and the Respondent is to be seen with CCs being marked to the Appellant, it is clear that the Respondent acted as a go-between and successfully obtained the bid for the Appellant having earned its commission thereon. He argued that the judgment under appeal does not require interference in that the CFSL report was also inconclusive and that the correspondence referred to by the learned Single Judge of the High Court would clearly show that the *dramatis personae* in this case interacted with each other and that, but for the efforts of his client, Pravin Electricals Pvt. Ltd. would never have got the bid. He relied upon a number of judgments of this Court to buttress his submissions.

10. Having heard learned counsel for both the parties, it is important to first set out the relevant provisions of the Arbitration and Conciliation Act, 1996:

8. Power to refer parties to arbitration where there is an arbitration agreement. —

- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person

claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

11. Appointment of arbitrators. —

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(6) Where, under an appointment procedure agreed upon by the parties, —

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

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(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to 3 the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

11. Sections 8 and 11 were amended pursuant to a detailed Law Commission Report being the 246th Law Commission Report on Arbitration. The history of the law prior to 2015 is set out in the aforesaid Report and the changes made therein are reflected by this Court in its judgment in **Mayavati Trading (P) Ltd. v. Pradyut Deb Burman**, (2019) 8 SCC 714 as under:

“9. The 246th Law Commission Report dealt with some of these judgments and felt that at the stage of a Section 11(6) application, only “existence” of an arbitration agreement ought to be looked at and not other preliminary issues. In a recent judgment of this Court, namely, *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209, this Court adverted to the said Law Commission Report and held:

“8. The case law under Section 11(6) of the Arbitration Act, as it stood prior to the Amendment Act, 2015, has had a chequered history.

9. In *Konkan Railway Corpn. Ltd. v. Mehul Construction Co.*, (2000) 7 SCC 201 (Konkan Railway 1), it was held that the powers of the Chief Justice under Section 11(6) of the 1996 Act are

administrative in nature, and that the Chief Justice or his designate does not act as a judicial authority while appointing an arbitrator. The same view was reiterated in *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388 (Konkan Railway 2).

10. However, in *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618, a seven-Judge Bench overruled this view and held that the power to appoint an arbitrator under Section 11 is judicial and not administrative. The conclusions of the seven-Judge Bench were summarised in para 47 of the aforesaid judgment. We are concerned directly with sub-paras (i), (iv) and (xii), which read as follows: (SCC pp. 663-64)

‘(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(xii) The decision in *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388 is overruled.'

11. This position was further clarified in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 as follows: (SCC p. 283, para 22)

'22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* (supra) This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

- (a) Whether the party making the application has approached the appropriate High Court.
- (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.'

12. As a result of these judgments, the door was wide open for the Chief Justice or his designate to decide a large number of preliminary aspects which could otherwise have been left to be decided by the arbitrator under Section 16 of the 1996 Act. As a result, the Law Commission of India, by its Report No. 246 submitted in August 2014, suggested that various sweeping changes be made in the 1996 Act. Insofar as *SBP & Co.* (supra) and *Boghara Polyfab* (supra) are concerned, the Law Commission examined the matter and recommended the addition of a new sub-section, namely, sub-section (6-A) in Section 11. In so doing, the Law Commission recommendations which are relevant and which led to the introduction of Section 11(6-A) are as follows:

'28. The Act recognises situations where the intervention of the Court is envisaged at the pre-arbitral stage i.e. prior to the

constitution of the Arbitral Tribunal, which includes Sections 8, 9, 11 in the case of Part I arbitrations and Section 45 in the case of Part II arbitrations. Sections 8, 45 and also Section 11 relating to “reference to arbitration” and “appointment of the Tribunal”, directly affect the constitution of the Tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the “conduct” of arbitrations. Section 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the “conduct” of the arbitration in the same way as these other provisions. It is in this context the Commission has examined and deliberated the working of these provisions and proposed certain amendments.

29. The Supreme Court has had occasion to deliberate upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of Section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a “judicial” or an “administrative” power — which obfuscates the real issue underlying such nomenclature/description as to

- the scope of such powers — i.e. the scope of arguments which a court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not — i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable, etc.; and which of these it

should leave for decision of the Arbitral Tribunal.

- the nature of such intervention — i.e. would the court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the Arbitral Tribunal.

30. After a series of cases culminating in the decision in *SBP & Co. v. Patel Engg. Ltd.* (supra), the Supreme Court held that the power to appoint an arbitrator under Section 11 is a “judicial” power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by Raveendran, J. in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* (supra), where the Supreme Court laid down as follows: (SCC p. 283, para 22)

‘22.1. The issues (first category) which Chief Justice/his designate will have to decide are:

- (a) Whether the party making the application has approached the appropriate High Court?
- (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement?

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide are:

(a) Whether the claim is a dead (long barred) claim or a live claim?

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(a) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?

(b) Merits of any claim involved in the arbitration.”

31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of Section 11, should also apply to Sections 8 and 45 of the Act — since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.

32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin-*

Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234, (in the context of Section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.

33. It is in this context, the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator,

under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator.'

13. Pursuant to the Law Commission recommendations, Section 11(6-A) was introduced first by Ordinance and then by the Amendment Act, 2015. The Statement of Objects and Reasons which were appended to the Arbitration and Conciliation (Amendment) Bill, 2015 which introduced the Amendment Act, 2015 read as follows:

'Statement of Objects and Reasons

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely—

- (i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;
- (ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;
- (iii) an application for appointment of an arbitrator shall be disposed of

- by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;
- (iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;
 - (v) to provide that the Arbitral Tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;
 - (vi) to provide that a model fee schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of Arbitral Tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;
 - (vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast-track procedure and the award in such cases shall be made within a period of six months;

- (viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;
- (ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and leads to expeditious disposal of cases.'

14. A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in *Patel Engg. Ltd.*, (supra) and *Boghara Polyfab* (supra) required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Sections 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator."

12. The need for reference to any other case law is obviated by a recent Three-Judge Bench judgment in **Vidya Drolia v. Durga Trading Corporation**, (2021) 2 SCC 1. This Three-Judge Bench judgment arose out of a reference made to 3 learned Judges in

Vidya Drolia v. Durga Trading Corporation, (2019) 20 SCC

406. Sanjiv Khanna, J. speaking for the Court set out the question that arose before the Court as follows:

“1. This judgment decides the reference to three Judges made vide order dated 28-2-2019 in *Vidya Drolia v. Durga Trading Corpn.*, (2019) 20 SCC 406, as it doubts the legal ratio expressed in *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, (2017) 10 SCC 706 that landlord-tenant disputes governed by the provisions of the Transfer of Property Act, 1882, are not arbitrable as this would be contrary to public policy.

2. A deeper consideration of the order of reference reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely:

2.1. (i) Meaning of non-arbitrability and when the subject-matter of the dispute is not capable of being resolved through arbitration.

2.2. (ii) The conundrum — “who decides” — whether the court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability.

2.3. The second aspect also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”).

13. The Bench then went into the Law Commission's 246th Report as follows:

124. In order to appreciate the effect of the amendments made by Act 3 of 2016, it would be appropriate to refer to the Law Commission's 246th Report which had given reasons for amendments to Sections 8 and 11 of the Arbitration Act, including insertion of sub-section (6-A) to Section 11. The said reasons read as under:

"24. Two further sets of amendments have been proposed in this context. *First*, it is observed that a lot of time is spent for appointment of arbitrators at the very threshold of arbitration proceedings as applications under Section 11 are kept pending for many years. In this context, the Commission has proposed a few amendments. The Commission has proposed changing the existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court" and has expressly clarified that delegation of the power of "appointment" (as opposed to a finding regarding the existence/nullity of the arbitration agreement) shall not be regarded as a judicial act. This would rationalise the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialised, external persons or institutions. The Commission has further recommended an amendment to Section 11(7) so that decisions of the High Court (regarding existence/nullity of the arbitration agreement) are final where an arbitrator has been *appointed*, and as such

are non-appealable. The Commission further proposes the addition of Section 11(13) which requires the Court to make an endeavour to dispose of the matter within sixty days from the service of notice on the opposite party.

The Law Commission's Report specifically refers to the decision of this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234, a decision relating to transnational arbitration covered by the New York Convention.

14. Dealing with “prima facie” examination under Section 8, as amended, the Court then held:

134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of “plainly arguable” case in *Shin-Etsu Chemical Co. Ltd.* are of importance and relevance. Similar views are expressed by this Court in *Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) 8 SCC

wherein the test applied at the pre-arbitration stage was whether there is a “good arguable case” for the existence of an arbitration agreement.

15. The parameters of review under Sections 8 and 11 were then laid down thus:

138. In the Indian context, we would respectfully adopt the three categories in *Boghara Polyfab (P) Ltd.* The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject-matter of the dispute affects third-party rights, have erga omnes effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions of the State; and whether the subject-matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable. [Ozlem Susler, "The English Approach to Competence-Competence" Pepperdine Dispute Resolution Law Journal, 2013, Vol. 13.]

140. Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral

Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes.

16. The Court then examined the meaning of the expression “existence” which occurs in Section 11(6A) and summed up its discussion as follows:

146. We now proceed to examine the question, whether the word “existence” in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word “existence”. However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of “existence” requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim

rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

147. We would proceed to elaborate and give further reasons:

147.1. In *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209, this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to “existence” and “validity” of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof: (SCC p. 238)

“29. This judgment in *United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd.*, (2018) 17 SCC 607 is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did “exist”, so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the

arbitration clause that is contained in the sub-contract would not “exist” as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with “existence”, as opposed to Section 8, Section 16 and Section 45, which deal with “validity” of an arbitration agreement is answered by this Court's understanding of the expression “existence” in *Hyundai Engg. case*, as followed by us.”

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

147.2. The court at the reference stage exercises judicial powers. “Examination”, as an ordinary expression in common parlance, refers to an act of looking or considering something carefully in order to discover something (as per Cambridge Dictionary). It requires the person to inspect closely, to test the condition of, or to inquire into carefully (as per Merriam-Webster Dictionary). It would be rather odd for the court to hold and say that the arbitration agreement exists, though *ex facie* and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable. The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a will.

147.3. Most scholars and jurists accept and agree that the existence and validity of an arbitration agreement are the same. Even Stavros Brekoulakis accepts that validity, in terms of substantive and

formal validity, are questions of contract and hence for the court to examine.

147.4. Most jurisdictions accept and require prima facie review by the court on non-arbitrability aspects at the referral stage.

147.5. Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in *Patel Engg. Ltd.* The object and purpose behind the two provisions is identical to compel and force parties to abide by their contractual understanding. This being so, the two provisions should be read as laying down similar standard and not as laying down different and separate parameters. Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence. Section 8 states that the judicial review at the stage of reference is prima facie and not final. Prima facie standard equally applies when the power of judicial review is exercised by the court under Section 11 of the Arbitration Act. Therefore, we can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, “existence of an arbitration agreement”.

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute “hands off” approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of

competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In *Subrata Roy Sahara v. Union of India*, (2014) 8 SCC 470, this Court has observed: (SCC p. 642, para 191)

“191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and

continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a “Code of Compulsory Costs”.”

147.9. Even in *Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729, Kurian Joseph, J., in para 52, had referred to Section 7(5) and thereafter in para 53 referred to a judgment of this Court in *M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.*, (2009) 7 SCC 696 to observe that the analysis in the said case supports the final conclusion that the memorandum of understanding in the said case did not incorporate an arbitration clause. Thereafter, reference was specifically made to *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618 and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 to observe that the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Para 48 in *Duro Felguera* specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Para 59 is more restrictive and requires the court to see whether an arbitration agreement exists — nothing more, nothing less. Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties — nothing more, nothing less. Reference to decisions in *Patel Engg. Ltd.* and *Boghara Polyfab (P) Ltd.* was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not

go into and finally decide different aspects that were highlighted in the two decisions.

147.10. In addition to *Garware Wall Ropes Ltd.* case, this Court in *Narbheram Power & Steel (P) Ltd.* [Oriental Insurance Co. Ltd. v. Narbheram Power & Steel (P) Ltd., (2018) 6 SCC 534] and *Hyundai Engg. & Construction Co. Ltd.* [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607] , both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond and not covered by the arbitration agreement. The Court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in *Vulcan Insurance Co. Ltd.* [Vulcan Insurance Co. Ltd. v. Maharaj Singh, (1976) 1 SCC 943] Similarly, in *PSA Mumbai Investments Pte. Ltd.* [PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525] , this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the Arbitral Tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knock down ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage.

17. The Bench finally concluded:

153. Accordingly, we hold that the expression “existence of an arbitration agreement” in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading “Who Decides Arbitrability?” can be crystallised as under:

154.1. Ratio of the decision in *Patel Engg. Ltd.* on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or

sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

155. Reference is, accordingly, answered.

18. Ramana, J. in a separate concurring opinion, after referring to the case law, summed up his conclusions as follows:

244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?

19. The 246th Law Commission Report not only discussed the changes that are to be made bearing in mind the difficulties that

arose earlier, but also provided for amendments that were to be made to Sections 8 and 11. This was provided as follows:

“Amendment of Section 8

5. In section 8 of the Act,

(i) In sub-section (1), after the words “substance of the dispute, refer” add “to arbitration, such of” and after the words “the parties to” add “the action who are parties to the” and after the word “arbitration” add the word “agreement”.

(ii) after sub-section (1), add “*Provided* that no such reference shall be made only in cases where –

(i) the parties to the action who are not parties to the arbitration agreement, are necessary parties to the action;

(ii) the judicial authority finds that the arbitration agreement does not exist or is null and void.

Explanation 1: If the judicial authority is prima facie satisfied about the existence of an arbitration agreement, it shall refer the parties to arbitration and leave the final determination of the existence of the arbitration agreement to the arbitral tribunal in accordance with section 16, which shall decide the same as a preliminary issue;

Explanation 2: Any pleading filed in relation to any interim application which has been filed before the judicial authority shall not be treated to be a statement on the substance of the dispute for the purpose of this section.”

[NOTE: The words “such of the parties... to the arbitration agreement” and proviso (i) of the amendment have been proposed in the context of the

decision of the Supreme Court in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.*, (2003) 5 SCC 531, – in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are necessary parties to the action – and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be 44 final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.]”

(iii) In sub-section (2), after the words “duly certified copy thereof” add “or a copy accompanied by an affidavit calling upon the other party to produce the original arbitration agreement or duly certified copy thereof in a circumstance where the original arbitration agreement or duly certified copy is retained only by the other party.”

xxx

Amendment of Section 11

7. In section 11,

(i) In sub-section (4), sub-clause (b), after the words “by the” delete “Chief Justice” and add words “High Court” and after the words “designated by” delete the word “him” and add the word “it”.

(ii) In sub-section (5), after the words “by the” delete “Chief Justice” and add words “High Court” and after the words “designated by” delete the word “him” and add the word “it”.

(iii) In sub-section (6), sub-clause (c), after the words “may request the” delete “Chief Justice” and add words “High Court” and after the words “designated by” delete the word “him” and add the word “it”.

(iv) after sub-section (6), insert sub-section “(6A) An appointment by the High Court or the person or institution designated by it under sub-section (4) or sub-section (5) or sub-section (6) shall not be made only if the High Court finds that the arbitration agreement does not exist or is null and void,

Explanation 1: If the High Court is prima facie satisfied regarding the existence of an arbitration agreement, it shall refer the parties to arbitration and leave the final determination of the existence of the arbitration agreement to the arbitral tribunal in accordance with section 16, which shall decide the same as a preliminary issue.

Explanation 2: For the removal of any doubt, it is clarified that reference by the High Court to any person or institution designated by it shall not be regarded as a delegation of judicial power.

Explanation 3: The High Court may take steps to encourage the parties to refer the disputes to institutionalised arbitration by a professional Indian or International Arbitral Institute.

[NOTE: The proposed section 11 (6A) envisages the same process of determination as is reflected in the proposed amendment to section 8. Explanation 2 envisages that reference by the High Court to any person or institution designated by it shall not be regarded as a delegation of judicial power. Explanation 3 has been inserted with the hope and expectation that High Courts would encourage the parties to refer the disputes to institutionalize arbitration by a professional Indian or international arbitral institute.]

(v) In sub-section (7), after the words “or sub-section (6)” add the words “or subsection (6A)” and after the words “to the” delete the words “Chief Justice or the” and add the words “High Court is final where an arbitral tribunal has been appointed or a” and after the words “person or institution” add the words “has been” and after the words “designated by” delete the words “him is final” and insert the words “the High Court, and no appeal, including letters patent appeal, shall lie against such order.”

[NOTE: This amendment ensures that

a) an affirmative judicial finding regarding the existence of the arbitration agreement; and (b) the administrative act of appointing the arbitrator are final and non-appealable.]

Section 37, which is the appeal provision, was also sought to be amended as follows:

Amendment of Section 37

20. In section 37,

(i) In sub-section (1), renumber sub-clause “(a)” as sub-clause “(b)” and insert sub-clause “(a) refusing to refer the parties to arbitration under section 8;”

(ii) In sub-section (1), renumber sub-clause “(b)” as sub-clause “(d)” and insert sub-clause “(c) refusing to appoint an arbitrator or refusing to refer such appointment to a person or institution designated by it under section 11, in the case of an arbitration other than an international commercial arbitration”.

[NOTE: Sub-sections (a) and (c) have been added to provide for appeal in cases of orders refusing to refer parties to arbitration under section 8 (mirroring the existing provision in section 50) and to provide an appeal where the High Court refuses to appoint an arbitrator respectively.]

(iii) In sub-section (3), after the words “No second appeal” add the words “, including letters patent appeal,”

[NOTE: This amendment is clarificatory and reduces the scope of the party to file an LPA.]

20. It will be seen that when Parliament enacted the 2015 amendment pursuant to the Law Commission Report, it followed the Scheme of the Law Commission’s Report qua Section 8 and Section 37 by enacting the words “..... *unless it finds that prima facie no valid arbitration agreement exists.....*” in Section 8(1) and the insertion of sub-clause (a) in Section 37(1) providing an appeal in an order made under Section 8, which refuses to refer

parties to arbitration. However, so far as Section 11(6) and Section 11(6A) are concerned, what was recommended by the Law Commission was not incorporated. Section 11(6A) merely confines examination of the Court to the existence of an arbitration agreement. Section 11(7) was retained, by which no appeal could be filed under an order made under Section 11(6) read with Section 11(6A), whether the Court's determination led to a finding that the arbitration agreement existed or did not exist on the facts of a given case. Concomitantly, no amendment was made to Section 37(1), as recommended by the Law Commission.

21. However, by a process of judicial interpretation, **Vidya Drolia** (supra) has now read the "prima facie test" into Section 11(6A) so as to bring the provisions of Sections 8(1) and 11(6) r/w 11(6A) on par. Considering that Section 11(7) and Section 37 have not been amended, an anomaly thus arises. Whereas in cases decided under Section 8, a refusal to refer parties to arbitration is appealable under Section 37(1)(a), a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 is not appealable. In the light of what has

been decided in **Vidya Drolia** (supra), Parliament may need to have a re-look at Section 11(7) and Section 37 so that orders made under Sections 8 and 11 are brought on par qua appealability as well.

22. We now come to the facts of the present case. It is first important to set out the CFSL report dated 29th September, 2019, in which the CFSL found:

“Result of Examination:

It has not been possible to express any opinion regarding the authorship of questioned signatures marked A-1 to A-6 in comparison with the standard signatures marked A-1 to A-11 and S-1 to S-16 attributed to M.G. Stephen, due to the reason that the model of both the sets of signatures are different, hence, technically not comparable.”

23. Since, the CFSL did not express an opinion either way, it became incumbent upon the learned Single Judge to determine as to whether the Agreement dated 7th July, 2014 could have been entered into given the surrounding circumstances of the case. As Shri Divan rightly points out, there are no negotiations which lead upto the 7th July, 2014 Agreement that are on record. Secondly, negotiations that take place take place only after 7th

July, 2014 in which a draft agreement is deliberated upon between the same parties. It would stretch incredulity to state that on the same subject matter negotiations and a draft agreement would be spoken about after a final signed agreement has been agreed upon between the parties. Secondly, he rightly points out that the Agreement is notarized in Faridabad, Haryana, with no explanation worth the name when a contract is to be executed in Bihar by one of the parties whose registered office is in Bihar and the other party whose registered office is in Mumbai. Thirdly, the Notary who is said to have notarized the Agreement was not licensed to do so the same, his license having expired earlier, a fact that is accepted even by the Respondents.

24. Even otherwise, some of the learned Single Judge's conclusions are plainly incorrect and against the record. The learned Single Judge holds:

"39. Admittedly on 22.09.2014, LOI was awarded to the respondent and on the petitioner raising an invoice for Rs.25 Lakhs on 27.09.2014, respondent actually made payment on 29.09.2014. Counsel for the petitioner has also shown the email dated 27.09.2014 whereby the respondent had

asked the petitioner to raise the invoice on its letter head.....”

25. This is plainly incorrect in view of the correspondence and pleadings between the parties, as an invoice was raised on Process, Process making payment on 29th September, 2014 and not the Appellant. Equally, the finding that a draft Consultancy Agreement was sent on 15th July, 2014 containing an arbitration clause, parties being *ad idem* regarding submission of the disputes to arbitration is also plainly incorrect in view of the fact that on the same day, an email was sent back in which various terms were disputed, there being no concluded contract between the parties. Also, the finding that Process was a sub-contractor of the Respondent, is contrary to the pleadings between the parties which, as we have seen, had ranged from Process being a joint venture partner of the Appellant to Process having common Directors with the Appellant, and to Process thereafter being described as the lead partner. Sub-contractor-ship is not pleaded at all by the Respondent, the aforesaid arising only from written submissions made before the learned Single Judge.

26. The allegation that the Consultancy Agreement of 7th July, 2014 had a signature that may not be that of Mr. M.G. Stephen was brushed aside stating that an arbitration agreement need not be signed by the parties. That is entirely besides the point. Mr. M.G. Stephen has sworn to an affidavit filed before the High Court that the signatures appearing on the 7th July, 2014 agreement are not his signatures, as a result of which the Appellant cannot be said to have entered into an agreement at all on 7th July, 2014. Again, in paragraph 45, the learned Single Judge's finding that there exists an arbitration agreement between the parties as contained in the "draft agreement" exchanged by email dated 7th July, 2014, is incorrect for two reasons. The draft agreement sent by email was exchanged on 15th July, 2014 and not on 7th July, 2014. Secondly, the email in reply to the email of 15th July, 2014 shows that there was no concluded contract between the parties. Also, the pleading with which the parties went to Court was that there was a concluded contract between the parties on 7th July, 2014. There was no pleading worthy of the name that on 15th July, 2014, a draft agreement was exchanged between

the parties, as a result of which a concluded contract emanated therefrom.

27. The facts of this case remind one of ***Alice in Wonderland***. In Chapter II of Lewis Carroll's classic, after little Alice had gone down the Rabbit hole, she exclaims "Curiouser and curiouser!" and Lewis Carroll states "(she was so much surprised, that for the moment she quite forgot how to speak good English)". This is a case which eminently cries for the truth to out between the parties through documentary evidence and cross-examination. Large pieces of the jigsaw puzzle that forms the documentary evidence between the parties in this case remained unfilled. The emails dated 22nd July, 2014 and 25th July, 2014 produced here for the first time as well as certain correspondence between SBPDCL and the Respondent do show that there is some dealing between the Appellant and the Respondent qua a tender floated by SBPDCL, but that is not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause. Given the inconclusive nature of the finding by CFSL together with the signing of the agreement in

Haryana by parties whose registered offices are at Bombay and Bihar qua works to be executed in Bihar; given the fact that the Notary who signed the agreement was not authorised to do so and various other conundrums that arise on the facts of this case, it is unsafe to conclude, one way or the other, that an arbitration agreement exists between the parties. The prima facie review spoken of in **Vidya Dhrolia** (supra) can lead to only one conclusion on the facts of this case - that a deeper consideration of whether an arbitration agreement exists between the parties must be left to an Arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same. For all these reasons, we set aside the impugned judgment of the Delhi High Court in so far as it conclusively finds that there is an Arbitration Agreement between the parties. However, we uphold the ultimate order appointing Justice G.S. Sistani, a retired Delhi High Court Judge as a Sole Arbitrator. The learned Judge will first determine as a preliminary issue as to whether an Arbitration Agreement exists between the parties, and go on to decide the merits of the case only if it is first found that such an agreement

exists. It is clarified that all issues will be decided without being influenced by the observations made by this court which are only *prima facie* in nature. The appeal is allowed in the aforesaid terms.

..... J.
(R.F. Nariman)

..... J.
(B.R. Gavai)

..... J.
(Hrishikesh Roy)

New Delhi.
March 08, 2021.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 810 OF 2021
(ARISING OUT OF SLP(CIVIL) NO.15982 OF 2020)

AMWAY INDIA ENTERPRISES PVT. LTD.

... APPELLANT

VERSUS

RAVINDRANATH RAO SINDHIA & ANR.

... RESPONDENTS

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.
2. This appeal arises out of a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 [**“Arbitration Act”**] by the respondents in the Delhi High Court for appointment of a sole arbitrator. The brief facts of the case are noted in the impugned order dated

Signature Not Verified
Digitally Signed By
Jayant Kumar Arora
Date: 2024.03.04
16:01:48
Reason: [S]

03.12.2020 thus:

“2. The facts of the case, as noted from the petition are, in the year 1998, the petitioners were appointed as Distributor for

respondent for undertaking sale, distribution and marketing of its products in India and were registered as Amway Business Owner (ABO)/ Amway Direct Seller (ADS), in the name of the sole proprietorship 'Sindhia Enterprises' with ABO No. 141935. According to the petitioners, they have set up a vast Line of Sponsorship in the respondent Company, and nurtured and supported close to 1500 ADSs, who have now set up their own networks, and are in the category of Silver/ Gold/ Platinum/ Sapphire/ Emerald. From 2015, the renewal process for existing ADSs became automatic, each year, without payment of any fee. The respondent issued a Code of Ethics and Rules of Conduct in 2015 to govern the terms of the relationship between the respondent and the ADSs. The respondent also started promoting registration of Preferred Customers (PCs) directly through the respondent's website, as customers of the concerned ADS.

3. On the requirement of the respondent, necessary documents were executed by the petitioners including contract for distributorship, setting out the terms and conditions of the distributorship, and to inter alia confirm the Code of Ethics and Rules of Conduct, Legal Entity Authorisation Form (LEAF) etc. Since then, the contract of the petitioners has been renewed from time to time. The petitioners recorded client volume/sales from their ABO account. The petitioners have also received income on the sales generated by them for the months of January to March, 2019 by the respondent. However, in April, 2019, upon logging into the respondent's website, the petitioners noted that they could not access their ABO account, or view their LoS. They could only access their account as a PC. Accordingly, between April, 2019 and December, 2019, the petitioners raised a query with their Major Accounts Manager, who informed them that their account had been reclassified as a 'PC' account, since they have not complied with the criteria of are corded re-sale related purchase in the last 12 months. The petitioners learnt that this was a criteria in the fresh set of Terms and Conditions issued by the respondent in December, 2016, which was mandatorily required to be accepted by all ADSs, by clicking on the 'By clicking here you agree to abide by the new Terms & Conditions' button, immediately upon logging in on the respondent's website, to proceed further to their account.

According to the petitioner, this requirement was never communicated to the petitioners in the past, nor was any notice of termination issued by the respondent. This criterion is also in violation of the Direct Selling Guidelines dated September 09, 2016.

4. The petitioners made repeated requests to restore their ABO account. The petitioners attempted to resolve the aforesaid disputes and differences amicably by mutual discussions with the representatives of the respondent from April till December, 2019. However, the respondent has failed to consider the petitioners' request for restoration of their ADS account. On June 26, 2020, the petitioners referred the matter for redressal and review to Mr. Jon Sherk, Vice President and Deputy General Counsel of Amway Global in January, 2020. The petitioners were communicated about the rejection of their request for restoration of their ADS account on June 26, 2020. According to the petitioners, the respondent has now, with effect from July, 2020 notified a new Code of Ethics & Rules of Conduct wherein the respondent has now been given benefit of a 2 year period for establishing sales, in accordance with the DSG, and carved a provision for restoration of the ADS account. Accordingly, the petitioners caused issuance of notice invoking arbitration dated July 28, 2020 to the respondent invoking the arbitration clause, Clause 12 of the Terms and Conditions enclosed with the Amway Direct Seller Application Form (Form-SA-88-ID), which is reproduced as under:

"12. Dispute Settlement. The parties shall endeavour to settle any dispute or difference arising out of or in connection with the Direct Seller Contract through mutual discussions within 30 days of such dispute arising. The Direct Seller agrees that in the event it is not satisfied by any decision of Amway, or in the event that any issue raised by the Direct Seller has remained unresolved for a period of more than two months, and / or during the subsistence of this agreement or upon or after its termination, any issue or dispute that the Direct Seller may have regarding the interpretation or operation of the clauses of this arrangement or any

issues arising there from shall be referred to Grievance Redressal Committee set up by the company. Any dispute, difference or claim remaining unresolved post reference to the Grievance Redressal committee discussions shall be submitted to binding arbitration under the provisions of the Indian Arbitration and Conciliation Act, 1996. The venue of such arbitration shall be at New Delhi and the award of the Arbitrator shall be final and binding on all Parties. Subject to the above, courts at New Delhi shall alone have jurisdiction in relation to the Direct Seller Contract and matters connected here to.”

5. The respondent replied vide letter dated August 20, 2020 wherein the respondent communicated that the name of the Arbitrator as recommended by the petitioners was not acceptable by it and sought time to respond with the name of another Arbitrator. However, the respondent has till the filing of the petition failed to issue any follow up reply further to its reply dated August 20, 2020 even after expiry of 30 days’ time.”

3. The main plea taken by the learned counsel appearing on behalf of the appellant, Amway India Enterprises Pvt. Ltd., in the Delhi High Court was that a petition before the High Court is not maintainable as the dispute relates to an international commercial arbitration, being covered by Section 2(1)(f)(i) of the Arbitration Act inasmuch as the respondents are husband and wife who are both nationals of and habitually resident in the United States of America. This plea was turned down by the impugned judgment stating:

“23. Even the judgment of the Supreme Court in the case of *TDM Infrastructure (P) Ltd. v. UE Development India (P)*

Ltd., (2008) 14 SCC 271 is not applicable in the facts of this case, which have been noted above. Rather, the learned counsel for the petitioners is justified in relying upon the judgment in the case of **Larsen & Toubro Ltd. – SCOMI Engineering Bhd v. MMRDA, (2019) 2 SCC 271**, wherein the Supreme Court was concerned with a consortium consisting of an Indian company and a foreign company and the Court took note of the fact that the office of an unincorporated entity, i.e. the consortium, being in Mumbai, as one of the factors for arriving at the conclusion that the arbitration proceedings would not be *international commercial arbitration*. No doubt a sole proprietorship has no separate legal identity but in the case in hand, two individuals, husband and wife, by joining together as a proprietorship have taken a single Distributorship. The Code of Ethics and Rules of Conduct issued by the respondent under Clause 3.17.1 contemplates and recognises that a husband and wife shall operate their Distributorship as single entity. The proprietorship is an association or body of individuals with central management in India.

24. The plea of Ms. Kumar that the petitioners being individuals and habitual residents of USA, the case shall be covered by Section 2 (1) (f) (i) of the Act of 1996 is not appealing in view of my conclusion in the above paragraph.”

4. It was held that since the central management and control of this association or body of individuals is exercised only in India under Section 2(1)(f)(iii), the dispute is not an international commercial arbitration, as a result of which the High Court has jurisdiction under Section 11(6) to appoint an arbitrator. Justice Brijesh Sethi, a retired Judge of the Delhi High Court was, therefore, appointed as sole arbitrator.

5. Shri Parag Tripathi, learned Senior Advocate appearing on behalf of the appellant, has argued that his predecessor's plea in the High Court was incorrectly turned down in that this case is really governed by Section 2(1)(f)(i) and not by Section 2(1)(f)(iii). Once it is found that a party to an arbitration agreement is an individual who is a national of, or habitually resident in, any country other than India, it is not necessary to go to any other sub-clauses of Section 2(1)(f), and as it is clear that the respondents, who applied to the High Court under Section 11(6), are individuals who are nationals of and habitually resident in the USA, would fall under Section 2(1)(f)(i), the High Court would have no jurisdiction, such petition having to be filed only under Section 11(6) read with Section 11(9) to the Supreme Court.

6. Ms. Manmeet Arora, learned counsel appearing on behalf of the respondents, has supported the judgment under appeal, and has referred to various documents which, according to her, make it clear that the respondents, husband and wife, would have to be pigeonholed under "association or body of individuals" under Section 2(1)(f)(iii) and not under Section 2(1)(f)(i).

7. The question lies in a very narrow compass. As rightly contended by Ms. Arora, the documentary evidence in this case would be decisive of whether the requirements of sub-clause (i) to Section 2(1)(f) have been met, in which case it is unnecessary to go to sub-clause (iii), as under Section 2(1)(f), “at least one of the parties” must fall under sub-clauses (i) to (iv) of Section 2(1)(f).

8. In a document entitled “Code of Ethics of Amway Direct Sellers”, under “Rules of Conduct”, it is stipulated as follows:

“2.1.17 Legal Entity Authorisation Form” (LEAF) means the document that must, in addition to the Direct Seller Contract, be completed by a Direct Seller required to or electing to operate an Amway Business in the name of an applicable legal entity.”

xxx xxx xxx

“3.1 Application and Starter Guide: In order to be considered for an Amway distributorship, an individual(s) must, in his/her/their own name(s) or on behalf of a legal entity, submit a signed, completed Direct Seller Application(in Form SA-88-ID), together with all required supporting documentation.

A distributorship may be taken up in individual capacity or as a sole proprietorship concern, partnership firm or company. Amway reserves the right to require that Applicants having Non-Resident Indian (NRI), Person of Indian Origin (PIO) or Overseas Citizen of India (OCI) status operate distributorships via certain types of legal entities.”

xxx xxx xxx

“3.14 Legal Entity Distributorships: A Direct Seller may own and operate his or her Distributorship as a sole proprietary concern or registered partnership firm or limited liability

company (LLC), provided it complies with certain requirements and conditions. ...”

xxx xxx xxx

“3.14.5 The sole business of the legal entity must be the operation of an Amway Distributorship. No other business may be conducted by such an entity.”

xxx xxx xxx

“3.17 Husband and Wife Distributorships: If both husband and wife wish to become Direct Sellers, they must be sponsored together for a single Distributorship. Husbands and wives may not be sponsored in different Lines of Sponsorship. Husbands and wives may not sponsor each other. If one spouse is already a Direct Seller, the other spouse, upon electing to become a Direct Seller, must join the same Distributorship as his or her spouse.

3.17.1 A husband and wife shall operate their Distributorship as a single entity. Therefore, each is held accountable for the actions of the other so far as the Rules of Conduct are concerned regardless of whether a husband or wife is active in the distributorship or not.”

xxx xxx xxx

“4.13 Franchises and Territories: No Direct Seller shall represent to anyone that there are exclusive franchises or territories available under the Amway Sales and Marketing Plan.

No Direct Seller shall represent that he or she, or anyone else has the authority to grant, sell, assign, or transfer such franchises or to assign or designate territories. No Direct Seller or Sponsor may state or imply that he or she has a given territory, nor that any other Direct Seller is operating outside his territory.

Amway Direct Sellers have no territorial limits. They can operate anywhere within India.”

xxx xxx xxx

“4.16 Exporting Amway Products: Amway Direct Sellers must sell Amway products and/or sponsor prospective Amway Direct Sellers within India only. No Direct Seller may export, or

knowingly sell to others who exports, Amway Products from India, or from any other country in which Amway has established operations, into any country regardless of whether or not Amway is doing business in that country.

For important legal reasons, including trade names and trademark protections; local laws on product registration, packaging, labelling ingredient content and formulation, product liability; customs and tax laws; and literature content or language requirements. Amway must limit the resale of Amway Products by Direct Sellers to only other Direct Sellers or retail customers located within country in which the Direct Seller legitimately buys the Amway Products and is authorised to do business. The term “products” includes, without limitation, all literature, sales aids, and any other items obtained by a Direct Seller from Amway or from his sponsor or Platinum.

4.16.1 Exporting Rule: Personal Use

Globally, Amway’s Rules and Commercial Principles include prohibitions on exporting and importing Amway products from one market to another. Amway Direct Sellers may, however, take Amway products across borders for personal use, with the following limitations:

- The Amway Direct Seller is visiting another country and personally places the product order in that country.
- The Amway Direct Seller physically picks up/receives the products in one country and personally carries the products to another country. There may be no couriers, shipping companies, or freight forwarders involved.
- If the Amway Direct Seller has a Multiple Business in the country visited, the order cannot be placed as a customer order for an overseas customer.
- The products are for the Amway Direct Sellers personal use only.
- The products may not be resold, distributed, or given away under any circumstances.
- The products ordered must not be available in the Amway Direct Seller’s home market.

- Durables (e.g. water treatment systems, air treatment systems) may not be carried from one market to another under any circumstances.
- The Amway Direct Seller order must not be for more than a reasonable amount of product: under 300 USD annually.
- The personal use exclusion may not be used as a business-building strategy.”

9. In what is referred to as the “Legal Entity Authorisation Form”, what was filled up was “Legal Entity Authorisation Form: Sole Proprietor”. The said form which was filled in by the respondents reads as follows:

**“LEGAL ENTITY AUTHORISATION FORM:
SOLE PROPRIETORSHIP**

Where an Amway Independent Business (“**Amway Business**”) will be operated in India via a Sole Proprietorship (the “**Entity**”) held by a Resident Indian, Non-Resident Indian (“**NRI**”), Person of Indian Origin (“**PIO**”) or Overseas Citizen of India (“**OCI**”), the Sole Proprietorship must, through the sole proprietor (the “**Sole Proprietor**”), complete this Legal Entity Authorisation Form for Amway Business Owners (the “**Entity Agreement**”) and submit it to Amway India Enterprises Pvt. Ltd. (“**AIE**”). The Sole Proprietor must agree to remain and ensure that the Entity remains in full compliance with the Rules of Conduct for Amway Business Owners. This Entity Agreement shall become effective if and when AIE signs the completed form. This Entity Agreement incorporated into and forms an integral part of the Amway Distributor Agreement, which includes any and all documents incorporated therein (the “**ABO Contract**”). In the event of any conflict, the terms and conditions of this Entity Agreement shall prevail.

xxx xxx xxx

In consideration for AIE's agreement to allow the undersigned Entity to operate the Amway Business identified by ADA No. [REDACTED], the undersigned agree as follows.

1. The Sole Proprietor and, if applicable, the Authorized Representative of the Entity is/are:

Name: RAVINDRANATH RAO SINDHIA

Address: 443 4th MAIN, 12th CROSS
W.C.R. II STAGE, BANGALORE
560086

Phone Number: [REDACTED]

Identification Document & Number: [REDACTED]

Name: INDUMATHI SINDHIA

Address: 443 4th MAIN, 12th CROSS
W.C.R. II STAGE, BANGALORE
56 0086

Phone Number: [REDACTED]

Identification Document & Number: [REDACTED]

2. It is hereby certified that the following information about the Entity is true and complete.

- A. Full name of Entity:

SINDHIA ENTERPRISES

- B. Date when the Entity was organized: 31-JULY-1998

- C. Principal office address of the Entity:

443, 4th MAIN, 12th CROSS
W.C.R. II STAGE, RAJAJINAGAR
BANGALORE 560086, KARNATAKA

“5. The Sole Proprietor agrees that :

A. The sole purpose of the Entity is to own and operate the Amway Business identified above, unless AIE expressly allows the Entity to own and operate more than one Amway business. Neither the Entity nor the Sole Proprietor will own or operate any other business or business interest.

xxx xxx xxx

C. Any NRI, PIO or OCI investment in the Entity, if and as applicable, has been made on a non-repatriatable basis in accordance with applicable foreign exchange laws of India.

xxx xxx xxx

G. The Entity shall, in accordance with the laws of India and for all matters connected to the Amway Business, exclusively use a duly authorised Indian rupee bank account which, if applicable, operates on a non-repatriatable basis.

H. The Sole Proprietor shall be responsible for his or her, and the Entity's, compliance with the Amway Rules of Conduct and the applicable laws with respect to the operation of the Amway Business by the Entity, including foreign exchange laws. Any violation of the aforesaid entitles AIE to terminate the ABO Contract and the Entity Agreement.

xxx xxx xxx”

10. Under “authorised signature”, the entity's name was filled in as Sindhia Enterprises and the proprietor was filled in as Ravindranath Rao Sindhia (respondent no. 1 herein). This was done pursuant to an application again filed in a printed form, given by the appellant to the respondents, which reads as follows:

Amway
Amway India Enterprises Pvt. Ltd.,
First Floor, Elegance Tower, Plot No. 8, Non Hierarchical
Commercial Centre, Jasola, New Delhi - 110 025
Contact No. : 080-3941-6600
Website: www.amway.in

BLUE COPY - TO BE HANDLED OVER TO AMWAY INDIA ENTERPRISES
YELLOW COPY - TO BE RETAINED BY AGENT

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DISTRIBUTOR APPLICATION Please fill in English. Applicants should be 18 years of age and above. All Sections in red colour are mandatory. The application form shall not be accepted without complete information & documents.

APPLICANT INFORMATION (Mandatory information) How would you be operating your Amway Distributorship?

☐ Individual ☒ Sole Proprietorship* ☐ Partnership firm* ☐ Private Limited Company* Please tick (✓) your category. (*Please provide relevant documentation.)

SINDHIA ENTERPRISES
(Kindly give the entity name formatted solely for Amway Business. Not for individual joining)

Name of the Primary Applicant / First Authorised Representative (in case of entity)
RAVINDRAMATH RAO **SINDHIA**
First Name Surname

Name of the Co-applicant / Second Authorised Representative (in case of entity)
INDUMATHI **SINDHIA**
First Name Surname

Date of Birth of Primary Applicant **DD MM YYYY** Date of Birth of Co-applicant **DD MM YYYY**

Name of the Primary Applicant as desired on ID card (max. 38 characters including space) **RAVINDRAMATH SINDHIA** Name of the Co-applicant as desired on ID card (max. 38 characters including space) **INDUMATHI SINDHIA**

Do you, the principal applicant, have your primary Amway business in another country. If (yes) please fill the following information.

Distributor Name **RAVINDRAMATH SINDHIA** Distributor Number **721823** Country **VSA**

11. A reading of the application form as filled in, together with the Code of Ethics, would show that a distributorship may be taken up either in individual capacity, a sole proprietorship concern, partnership firm, or company. When it comes to a husband and wife's distributorship, they are entitled not to two, but to a single distributorship, it being made clear under clause 3.17 of the Code of Ethics that they are to operate only as a single entity. The form that was filled in made it clear that the respondents applied to become a distributor as a sole proprietorship, it being made clear that the husband, Ravindranath Rao Sindhia, was the sole proprietor / "primary applicant", the wife, Indumathi Sindhia, being a "co-applicant".

12. However, Ms. Arora argued, from a reading of the Code of Ethics and correspondence between the parties, that there was no international flavour whatsoever to the transaction as the business that is to be conducted can be conducted only in India, an exception being made only for personal use under clause 4.16.1. Most importantly, the address of the so-called sole proprietorship in all the correspondence between the parties was the address of the Bangalore office of the sole proprietorship.

13. Ms. Arora also strongly relied upon the judgment of this Court in **Larsen & Toubro Ltd.–SCOMI Engineering Bhd v. MMRDA**, (2019) 2 SCC 271. This Court was concerned with an agreement between the MMRDA, an Indian company, and a consortium of Larsen and Toubro, an Indian company together with Scomi Engineering Bhd, a Malaysian company. The argument that was pressed in the appeal before this Court was that since a Malaysian company was involved, it would be a body corporate which is incorporated in a country other than India, which would attract the provisions of Section 2(1)(f)(ii) of the Arbitration Act. This Court repelled the aforesaid argument, stating:

“9. Under the general conditions of contract, the “contractor”, in Clause 1.1.2.3 is defined as meaning an individual, firm, company, corporation, joint venture or *Consortium*, *whether*

incorporated or not. “Bidder” is also defined under Clause 1.1.2.10 as meaning an individual, firm, company, corporation, joint venture or *Consortium* which could submit a bid. What is important to notice is that the contract was signed by the employer viz. MMRDA and by the contractor under the head sub-clauses (A) and (B) in which L&T India signed as ‘A’ and Scomi Engineering Bhd has signed as ‘B’. When we come to the consortium agreement that is entered into between the Indian company and the Malaysian company as aforesaid, we find in the definition clause that “Consortium” shall mean L&T and Scomi Engineering Bhd, acting in collaboration, for the purpose of this agreement and shall be called “the L&T-SEB” Consortium “unincorporated”. The contract is defined in Sub-Clause 6 as meaning, “the contract to be entered by the Consortium with the employer for the execution of the Project”. Under Sub-Clause 7, “the lead Member of the Consortium” or “Consortium Leader” shall mean L&T, that is, the Indian Company. Under Sub-Clause 8, the “Supervisory Board” (hereinafter referred to as “the SB”) shall mean a Board constituted under Clause 11 of the GCC. When we come to Clause 11.2, it is clear that the Members of this Supervisory Board will consist of four members, two appointed by each Member. One of the Members nominated by the Consortium leader and agreed to by all members shall then act as the Chairman of the Supervisory Board, which is, by Clause 11.5, to decide on various matters relating to the execution of the contract. Clause 21.1(g) provides that the Consortium leader shall lead all arbitration proceedings.

xxx xxx xxx

11. It is important, at this juncture, to refer to an order made by the High Court of Bombay dated 20-10-2016 [*L&T Ltd. v. MMRDA*, 2016 SCC OnLine Bom 13348] which, as has been stated earlier, arises between the self-same parties, under the same contract. An interim award made by the arbitrators qua different claims arising under the same contract had made it clear that the claim could be filed only in the name of the Consortium and not separately, as was contended by Shri Jain's client. The preliminary issue framed on this count was “whether the claimants are entitled to file this claim as Claimant

1 and Claimant 2 or only as the Consortium of L&T and Scomi Engineering Bhd?” The High Court of Bombay agreed with the interim award of the arbitrators, and held as follows: (*L&T Ltd. case [L&T Ltd. v. MMRDA, 2016 SCC OnLine Bom 13348]* , SCC OnLine Bom para 10)

“10. Considering the terms and conditions of the contract as well as the decision cited by Mr. Ankhad, in my opinion, in the facts and circumstances of the present case, it is not open for the petitioners to rely upon their independent identities while dealing with the respondent and that they will have to deal with the respondent as a Consortium only. Therefore, there is no infirmity in the impugned order. For the same reason the present petition as filed would also not been maintainable. Hence, the same is dismissed.”

12. Shri Gopal Jain did not dispute the fact that this judgment was final inter-partes as no appeal has been preferred. Therefore, to stress the fact that it pertains only to “this claim” and would therefore, not apply to a different set of claims under the arbitration clause is not an argument that appeals to us.

13. It is clear, as has been held by the judgment [*L&T Ltd v. MMRDA, 2016 SCC OnLine Bom 13348*] of the High Court of Bombay, and which is binding inter-partes, that it is not open for the petitioner to rely upon their status as independent entities *while dealing with the respondent* and they will have to deal with the respondent as a Consortium only.

14. This being the case, it is clear that the unincorporated “association” referred to in Section 2(1)(f)(iii) would be attracted on the facts of this case and not Section 2(1)(f)(ii) as the Malaysian body cannot be referred to as an independent entity following the judgment [*L&T Ltd. v. MMRDA, 2016 SCC OnLine Bom 13348*] of the High Court of Bombay.

xxx xxx xxx

18. This being the case, coupled with the fact, as correctly argued by Shri Divan, that the Indian company is the lead partner, and that the Supervisory Board constituted under the consortium agreement makes it clear that the lead partner really

has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation.”

14. This case is distinguishable on facts, inasmuch as a final judgment between the parties made it clear that it would not be open for the consortium to rely upon their status as independent entities while dealing with MMRDA. This being the case, the consortium was held to be an association of persons falling under Section 2(1)(f)(iii), and that since the lead member is to lead arbitral proceedings, the central management and control of the consortium being exercised by Larsen and Toubro in India, it was held that Section 2(1)(f)(iii) would not be attracted on the facts of that case.

15. By way of contrast, we have seen how the respondents have themselves applied to become distributors of Amway products in India as a sole proprietorship concern under the relevant forms issued by the appellant, read with the Code of Ethics referred to hereinabove. In **Ashok Transport Agency v. Awadhesh Kumar**, (1998) 5 SCC 567, this Court

has clearly held that a sole proprietary concern is equated with the proprietor of the business as follows:

“6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business “insofar as the nature of such case permits”. This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case.

7. In the present case A.C. Basu, Proprietor of Ashok Transport Agency, had died before the date of the institution of the suit and on the date of the institution of the suit, the proprietary concern was not in existence. Only the legal representatives of A.C. Basu could be sued with regard to any cause of action arising against A.C. Basu in connection with the proprietary business. We find it difficult to understand how the provisions of Rule 4 Order XXX CPC, could be extended to such a case.”

16. In this view of the matter, the argument that there is no international flavour to the transaction between the parties has no legs to stand on. Indeed, an analysis of Section 2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in Section 2(1)(f) carry on business in India through a business office in India. This being the case, it is clear that the Delhi High Court had no jurisdiction to appoint an arbitrator in the facts of this case.

17. Ms. Arora made an impassioned plea to this Court to use its power under Article 142 of the Constitution to straightaway appoint an arbitrator, now that the matter is before this Court. We are afraid we cannot countenance such a suggestion as the respondents would have to now follow the drill of Section 11(6) read with Section 11(9) of the Arbitration Act.

18. The appeal is allowed, and the judgment under appeal is set aside.

.....J.
(R.F. Nariman)

.....J.
(B.R. Gavai)

New Delhi;
March 04, 2021.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI**Company Appeal (AT) (Insolvency) No. 704 of 2020**

[Arising out of Order dated 06th July, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - IV in C.P. (IB) No. 2579/MB.IV/2019]

IN THE MATTER OF:

Kishanlal Likhmichand Bothra,

(Erstwhile Director of Bothra Metal and Alloys Ltd.)

House No. 1078, Sector 15,

Panchkula – 134113, Haryana

...Appellant

Versus

Canara Bank,

(Financial Creditor Syndicate Bank

amalgamated w.e.f. 01.04.2020)

Having its Registered Office At: -

No. 112, JC Road,

Bangalore – 560002, Karnataka,

Also At:

(Branch office of erstwhile Syndicate Bank)

Stressed Asset Management Branch,

Maker Tower “F”, 2nd Floor, Cuffe Parade,

Colaba, Mumbai - 400005

...Respondent

Present:

For Appellant: Mr. Navneet Dugar, Advocate.

For Respondent: Mr. Rohan Agrawal, Mr. Prakash Shinde and

Almira Lasrado, Advocates.

ORDER
(Virtual Mode)

24.03.2021 Heard. This Appeal has been filed by the Appellant- Erstwhile Director of Bothra Metals and Alloys Ltd-Corporate Debtor.

2. Syndicate Bank had filed Application C.P. (IB) No. 2579/MB.IV/2019 before the Adjudicating Authority (NCLT) Mumbai Bench - IV against the Corporate Debtor. Syndicate Bank is now amalgamated with the Respondent- Canara Bank.

3. The Application was filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC in short). The Financial Creditor Bank referred to the financial assistance provided to the Corporate Debtor by way of Cash Credit, Letter of Credit, Term Loan and Forward Cover. The Corporate Debtor had executed necessary documents. The Financial Creditor claimed that there was total debt due and outstanding against the Corporate Debtor to the extent of Rs. 61,47,52,521.59/-.

4. The Application was heard by the Adjudicating Authority. After hearing both the sides, the Adjudicating Authority admitted the Application and hence the present Appeal.

5. The Appeal claims and Learned Counsel for the Appellant is arguing that in the present matter, the date of NPA is 3rd December, 2015 and Application under Section 7 was filed on 04th July, 2019 which was more than three years from the date of NPA. According to the Learned Counsel under Article 137 of the Limitation Act, 1963 the period of Limitation is three years

and the Application filed beyond period of three years should have been dismissed.

6. In support of such submission the Learned Counsel for the Appellant is relying on the Judgment in the matter of “*B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates*”, MANU/SC/1160/2018 and “*Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (I) Ltd*”, 2019 SCC Online SC 1239. The Learned Counsel submits that if these Judgments are considered, if in 3 years of N.P.A Section 7 application is not filed, and application under Section 5 of Limitation Act is not there the Application would be time barred.

7. The Learned Counsel for the Respondent is submitting that the Corporate Debtor had raised issue of limitation before the Adjudicating Authority and that the Adjudicating Authority after considering the balance-sheets which were brought on record and the OTS Proposals which were admittedly given by the Corporate Debtor, concluded that the debt was not time-barred. Learned Counsel submits that there are various Judgments of the Hon’ble High Courts as well as Hon’ble Supreme Court which show that debt acknowledged in the books of accounts or balance-sheets can be treated as acknowledgments for extension of limitation under Section 18 of Limitation Act, 1963.

8. The Learned Counsel for the Appellant accepts that the Appellant has not filed copy of the Application under Section 7 of IBC which was filed before the Adjudicating Authority. It is also accepted that even the copies of balance-sheets which were filed before the Adjudicating Authority and which are
Company Appeal (AT) (Ins.) No. 704 of 2020

considered by Adjudicating Authority have not been filed in this Appeal. The Learned Counsel for the Respondent claims that these documents have purposely not been filed as they are against the Corporate Debtor and thus kept back.

9. We have seen the copy of the Reply-Affidavit which was filed by the Corporate Debtor before the Adjudicating Authority. The copy is at Annexure –A filed by the present Respondent-Bank along with Reply of the Respondent (Diary No. 22006). The Learned Counsel for the Respondent points out Paragraph 19 of that Reply filed by the Corporate Debtor where clearly the Corporate Debtor accepted that principal amount due and in default reflecting in their accounts was Rs. 41.67 Crores. It is stated that this is admittedly more than Rs. 1 lakh. It is stated that the debt due has been accepted.

10. The Corporate Debtor further stated in the Reply in Paragraph 30 as under:

“30. I say and submit that the Corporate Debtor further say that they are trying to settle with Financial Creditor since the date they have declared the Debtors account as NPA. The debtor have submitted various OTS plans dated. 02.07.2018, 26.03.2019, 19.08.2019 and Resolution Plans dated 20.11.2018, 12.02.2019 to the Financial Creditor which has replied negatively nor have put any effort to modify the plan and consider it in favour of Corporate Debtor at any time and it is beyond the law of mediation because any dispute can be settled outside the court if the Financial Creditor behaves positively with the Corporate Debtor. OTS Plans and Resolution Plans marked and annexed to as “Annexure –L to L-4.”

11. Perusal of the Impugned Order shows that the Adjudicating Authority considered this defence taken by the Corporate Debtor and the Adjudicating Authority in Paragraphs 10 and 13 of the Impugned Order observed as under:

“10. Upon perusal of the documents on record, it is seen that there is acknowledgment of debt in the balance sheet of the corporate debtor all along. It is well-settled through various judgments of the Hon’ble Supreme Court now that an acknowledgment in the balance sheet of the company satisfies the requirements of Section 18 of the Limitation Act, 1963, leading to a fresh period of limitation commencing from each such acknowledgement. Further, the reply also makes it clear that there is a debt due and payable to the Financial Creditor, which remains unsatisfied. Therefore, the aspect of limitation raised as one of the defences by the Corporate Debtor does not hold water.

.....

13. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount of one lakh rupees stipulated under Section 4 (1) of the IBC at the relevant time. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.”

12. As regards limitation, reference may be made to the Judgment in the matter of *“Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Co-Operative bank Ltd and Anr.”* Civil Appeal No. 9198 Of 2019 passed by the Hon’ble

Supreme Court of India on 22nd March, 2021. Hon'ble Supreme Court of India discussed the various Judgments passed by the Hon'ble Supreme Court of India with regard to limitation and which are now being relied on by the Learned Counsel for the Appellant and observed in Paragraphs 66, 88 and 92 of the Judgment as under:

“66. Similarly under Section 18 of the Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.

.....

88. An Adjudicating Authority under the IBC is not a substitute forum for a collection of debt in the sense it cannot reopen debts which are barred by law, or debts, recovery whereof have become time barred. The Adjudicating Authority does not resolve disputes, in the manner of suits, arbitrations and similar proceedings. However, the ultimate object of an application under Section 7 or 9 of the IBC is the realization of a 'debt' by invocation of the Insolvency Resolution Process. In any case, since the cause of action for initiation of an application, whether under Section 7 or under Section 9 of the IBC, is default on the part of the Corporate Debtor, and the provisions of the Limitation Act 1963, as far as may be, have been applied to proceedings under the IBC, there is no reason why Section 14 or 18 of the Limitation Act would not apply for the purpose of computation of the period of limitation.

.....

92. In other words, the provisions of the Limitation Act would apply *mutatis mutandis* to proceedings under the IBC in the NCLT/NCLAT. To quote Shah J. in *New India Sugar Mill Limited v. Commissioner of Sales Tax, Bihar*, “It is a recognised rule of interpretation of statutes that expression used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature”.

13. Considering the above Judgment of the Hon’ble Supreme Court of India, we have no difficulty to state that Section 18 of the Limitation Act is applicable to proceedings under IBC and that if there is acknowledgment of debt in the balance-sheets or the OTS Proposal, the period of limitation would get extended if the acknowledgment is made before the period of limitation expires. Reference may be made to the Judgment in the matter of “*Mahabir Cold Storage Vs. Commissioner of Income Tax*, (1991) 188 ITR 91 and Judgment in the matter of “*A.V. Murthy Vs. B.S. Nagabasavanna*” (2002) 2 SCC 642 where Hon’ble Supreme Court considered entries in Books of Accounts/Balance Sheets and observed that entries in such records may amount to Acknowledgment of debt.

14. Considering the findings recorded by the Adjudicating Authority based on balance-sheets and even keeping in view the admitted dates when OTS Proposals were made by the Corporate Debtor, we do not find that Appellant is able to demonstrate that the Adjudicating Authority committed any error when the Adjudicating Authority concluded that the debt was not time-barred and admitted the Application.

15. There is no substance in the Appeal. The Appeal is dismissed.

[Justice A.I.S. Cheema]
Member (Judicial)

[Mr. V.P. Singh]
Member (Technical)

Basant B./md/

REPORTABLE**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO. 9198 OF 2019**

SESH NATH SINGH & ANR.

.....Appellant(s)

versus

BAIDYABATI SHEORAPHULI CO-OPERATIVE
BANK LTD AND ANR.

.....Respondent(s)

J U D G M E N T**Indira Banerjee, J.**

This appeal under Section 62 of the Insolvency and Bankruptcy Code 2016, hereinafter referred to as the 'IBC', is against a judgment and order dated 22nd November 2019, passed by the National Company Law Appellate Tribunal (NCLAT), dismissing Company Appeal (AT) (Insolvency) No.672 of 2019, filed by the Appellants, challenging an order dated 25th April 2019, of the National Company Law Tribunal (NCLT), Kolkata Bench, admitting the application filed by the Respondent No.1 as Financial Creditor, under Section 7 of the IBC being CP(IB) No.1202/KB/2018, thereby initiating

the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, Debi Fabtech Private Ltd.

2. The Corporate Debtor was *inter alia* engaged in the business of export of textile and garments. On or about 8th February 2012, the Corporate Debtor requested the Financial Creditor for cash credit facility of Rs.1,00,00,000/- (Rupees One Crore).

3. By a letter of sanction dated 15th February, 2012, the Financial Creditor granted Cash Credit Facility of Rs.1,00,00,000/- to the Corporate Debtor, after which a Cash Credit Account No.482 was opened in the name of the Corporate Debtor. The Corporate Debtor duly executed a hypothecation agreement with the Financial Creditor on 17th February, 2012.

4. According to the Financial Creditor, in May 2012 itself the Corporate Debtor defaulted in repayment of its debt to the Financial Creditor, in terms of cash credit facility granted by the Financial Creditor to the Corporate Debtor. The said Cash Credit Account No.482 became irregular. The Financial Creditor declared the said Account of the Corporate Debtor a Non Performing Asset (NPA) on 31st March 2013.

5. On or about 18th January 2014, the Financial Creditor issued notice to the Corporate Debtor under Section 13(2) of the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 hereinafter referred to, in short as the 'SARFAESI Act', calling upon the Corporate Debtor to discharge in full, its outstanding liability of Rs.1,07,88,536.00 inclusive of interest as on 28.09.2013 to the Financial Creditor within sixty days from the date of notice, failing which action would be taken under Section 13(4) of the said Act.

6. The Corporate Debtor made a representation dated 3.3.2014 to the Financial Creditor under Section 13(3A) of the SARFAESI Act objecting to the notice under Section 13(2) of the SARFAESI Act.

7. By a letter dated 15th July 2014, the Financial Creditor rejected the aforesaid representation of the Corporate Debtor and once again requested Corporate Debtor to clear the outstanding amount of Rs.1,07,88,536.00 as claimed in the notice dated 18th January 2014 under Section 13(2) of the SARFAESI Act, within 15 days from the date of receipt of the said letter, with further interest and other charges till date of payment and to regularize the Cash Credit Account No.482 in order to avail better services from the Financial Creditor.

8. On 13th December 2014, the Financial Creditor issued a notice being Ref No. HC/1180/14-15 dated 13.12.2014 to the Corporate Debtor under Section 13(4)(a) of the SARFAESI Act, calling upon the

Corporate Debtor to handover peaceful possession of the secured immovable assets as detailed in the schedule, failing which the Financial Creditor would be forced to seek the assistance of the District Magistrate, Hooghly for taking possession of the aforesaid secured assets.

9. On or about 19th December 2014, the Corporate Debtor filed writ application in the Calcutta High Court under Article 226 of the Constitution of India being W.P. No.33799 (W) of 2014 *inter alia* challenging the said notices issued by the Financial Creditor under Section 13(2) and 13(4) of the SARFAESI Act.

10. While the said writ petition was pending in the High Court, the Authorized Officer of the Financial Creditor issued a notice dated 24th December 2014, notifying the Corporate Debtor, the guarantors and the public in general, that the Authorized Officer of the Financial Creditor had taken possession of the secured assets of the Corporate Debtor, as specified in the Schedule to the said notice, on 24th December 2014, under Section 13(4) of the SARFAESI Act.

11. On 11th May 2017, the District Magistrate Hooghly issued an order under the SARFAESI Act for possession by the Financial Creditor of the assets of the Corporate Debtor hypothecated to the Financial Creditor.

12. On 24th July 2017, the High Court passed an interim order restraining the Financial Creditor from taking steps against the Corporate Debtor under the SARFAESI Act until further orders. The High Court was of the *prima facie* view that the Financial Creditor being a Cooperative Bank, it could not invoke the provisions of the SARFAESI Act. It appears that the Writ Petition is still pending consideration in the High Court.

13. On or about 10th July 2018, the Financial Creditor filed an application in the Kolkata Bench of NCLT for initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor under Section 7 of the IBC.

14. Notice of the petition under Section 7 of the IBC was duly served on the Corporate Debtor. The Corporate Debtor appeared through one Sesh Nath Singh, being the Appellant No.1, and opposed the petition. On behalf of the Corporate Debtor, it was contended that the Writ Petition filed by the Corporate Debtor, challenging the maintainability of the proceedings under the SARFAESI Act, was pending adjudication in the High Court.

15. The maintainability of the application under Section 7 of IBC was also opposed before the NCLT, on the purported ground that a Special Officer had been appointed as Administrator over the Financial Creditor, only to hold elections. Such Special Officer could

not, therefore, initiate any proceeding on behalf of the Financial Creditor. The Corporate Debtor did not oppose the application under Section 7 of the IBC in the NCLT on the ground of the same being barred by limitation.

16. By an order dated 25th April 2019, the Kolkata Bench of NCLT admitted the application filed by the Financial Creditor under Section 7 of IBC, initiated the CIRP, appointed Mr. Animesh Mukhopadhyay as Insolvency Resolution Professional (IRP) and declared a moratorium for the purposes referred to under Section 14 of the IBC.

17. Being aggrieved by the order dated 25th April, 2019 passed by the Kolkata Bench of NCLT, the Corporate Debtor filed an appeal before the NCLAT under Section 61 of the IBC, contending that the application filed by the Financial Creditor should not have been entertained, the same being barred by limitation.

18. It was only in appeal before the NCLAT, that the Corporate Debtor, for the first time contended, that the account of the Corporate Debtor had been declared NPA on 31st March, 2013 whereas the application under Section 7 of IBC had been filed on 27th August, 2018, after almost five years and five months from the date of accrual of the cause of action, and was therefore barred by limitation.

19. After considering the submissions of learned counsel, the NCLAT dismissed the appeal, with the observation that the ground of limitation had been taken by the Corporate Debtor for the first time, in the appeal. There was no finding of the Adjudicating Authority on this issue.

20. The NCLAT examined the issue of limitation and held that the Respondent had *bona fide*, within the period of limitation, initiated proceedings against the Corporate Debtor under the SARFAESI Act and was thus entitled to exclusion of time under Section 14(2) of the Limitation Act. The NCLAT, after exclusion of the period of about three years and six months till the date of the interim order of the High Court, during which the Financial Creditor had been proceeding under SARFAESI Act, found that the application of the Financial Creditor, under Section 7 of the IBC, was within limitation. The appeal was accordingly dismissed.

21. As pointed out by Mr. Sai Deepak appearing for the Financial Creditor, the Financial Creditor had, in its application filed in the NCLT under Section 7 of the IBC, enclosed a synopsis of relevant facts and significant dates, with supporting documents, which included the date of sanction of the loan, the date when the Cash Credit Account was declared NPA, the dates of the Demand Notice under Section 13(2) of the Act and the notice under Section 13(4), notice of date of possession under Section 13(4), the date on which possession order

was issued by the District Magistrate, Hooghly, West Bengal and the date of the interim order of the High Court.

22. The relevant dates reveal that the Cash Credit Account of the Corporate Debtor was declared NPA with effect from 31st March, 2013. Proceedings under the SARFAESI Act commenced on 18th January 2014, when a Demand Notice was issued under Section 13(2) of the SARFAESI Act. In other words, proceedings were initiated under the SARFAESI Act, 2002, approximately 9 months and 18 days after the date of accrual of the right to issue. The proceedings under the SARFAESI Act, 2002 were stayed by the Calcutta High Court, by an order dated 24th July 2017, on the ground of want of jurisdiction. About 11 months thereafter, while the writ petition filed by the Corporate Debtor was still pending in the High Court, and the interim stay of SARFAESI Act proceedings still continuing, the Financial Creditor initiated the application under Section 7 of the IBC.

23. Mr. Siddhartha Dave appearing on behalf of the Appellant submitted that the application of the Financial Creditor, under Section 7 of IBC, was barred by limitation and should have been dismissed on that ground.

24. Mr. Dave argued that the judgment and order under appeal was contrary to the law as declared by a larger Bench of the NCLAT in Company Appeal (AT) (Insolvency) No. 1121 of 2019 titled ***Ishrat Ali***

v. Cosmos Cooperative Bank Limited and Anr., where the NCLAT held that in an application under Section 7 of the IBC, the applicant is not entitled to the benefit of Section 14 of the Limitation Act, 1963 in respect of proceedings under the SARFAESI Act.

25. In the aforesaid case, the NCLAT held:-

"21. An action taken by the 'Financial Creditor' under Section 13(2) or Section 13(4) of the 'SARFAESI Act, 2002' cannot be termed to be a civil proceeding before a Court of first instance or appeal or revision before an Appellate Court and the other forum. Therefore, action taken under Company Appeal (AT) (Insolvency) No. 1121 of 2019 Section 13(2) of the 'SARFAESI Act, 2002' cannot be counted for the purpose of exclusion of the period of limitation under Section 14(2) of the Limitation Act, 1963.

In an application under Section 7 relief is sought for resolution of a 'Corporate Debtor' or liquidation on failure. It is not a money claim or suit. Therefore, no benefit can be given to any person under Section 14(2), till it is shown that the application under Section 7 was prosecuting with due diligence in a court of first instance or of appeal or revision which has no jurisdiction.

22. The decision rendered in "Sesh Nath Singh & Ors. v. Baidyabati Sheoraphuli Cooperative Bank Ltd." (Supra) thereby cannot be held to be a correct law laid down by the Bench.

23. In the present case, the account of the 'Corporate Debtor' was classified as NPA on 30th March, 2014. Thereafter, on 6th December, 2014, Demand Notice under Section 13(2) of the 'SARFAESI Act, 2002' was issued by the Respondent- 'Cosmos Co-operative Bank Ltd.' The Bank also initiated Arbitration under Section 84 of the Multi-State Cooperative Societies Act on 4th December, 2015. The Bank had also taken possession of the movable assets under Section 13(4) of the 'SARFAESI Act, 2002' as back as on 16th January, 2017.

24. In the circumstances, instead of remitting the case to the Bench, we hold that application under Section 7 filed by the 'Cosmos Co- Company Appeal (AT) (Insolvency) No. 1121 of 2019 Operative Bank Limited' was barred by limitation. We, accordingly, set aside the impugned order dated 23rd September, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai."

26. Mr. Dave submitted that the account of Corporate Debtor with the Financial Creditor had been declared Non-Performing Asset (NPA)

on 31st March, 2013. The cause of action thus accrued on 31st March 2013. The period of 3 years expired on 31st March, 2016. Mr. Dave argued that the application under Section 7 of the IBC, filed before the NCLT on 10th July, 2018, after five years and three months from the date of declaration of the account of the Corporate Debtor as NPA, was fatally time barred.

27. Mr. Dave further submitted that the Financial Creditor had not filed any application before the NCLT under Section 5 of the Limitation Act. The delay in filing the application under Section 7 of the IBC, could not, therefore, have been condoned.

28. Mr. Dave submitted that if the Corporate Debtors were unsuccessful before the High Court, the Financial Creditor which is in possession of the secured property, would be free to deal with it in a manner prescribed by law, to secure the defaulted amount. However, if the Financial Creditor is permitted to proceed with its time barred claim before the NCLT, the Corporate Debtor would have to contest proceedings in two different Forums, for the same defaulted amount. In the context of his submissions, Mr. Dave referred to the judgment of this Court in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited***¹,

29. Mr. Dave drew our attention to a recent judgment of this Court

1. (2018) 1 SCC 353

dated 21st January, 2021 in Civil Appeal 4221 of 2020 in **M/s. Reliance Asset Reconstruction Company Limited v. M/s. Hotel Poonja International Private Limited²**, where this Court observed:-

“In Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited reported in (2019) 12 SCC 697, this Court followed its earlier judgment in Mobilox Innovations Private Ltd. (supra) and observed as hereunder:-

“In a recent judgment of this Court in Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353, this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked.....”

30. Mr. Dave emphatically argued that the NCLT/NCLAT considering an application under Section 7 of the IBC, not being a forum for recovery of debt, Section 14 of the Limitation Act would not apply, as held by the larger Bench of NCLAT in **Ishrat Ali's** case.

31. Mr. Dave finally argued that, in any case, Section 14 of the Limitation Act could only be attracted, if any earlier proceedings initiated by the applicant were dismissed for want of jurisdiction, or other cause of like nature. Referring to the Explanation in section 14(2) of the Limitation Act, Mr. Dave argued that, since the proceedings initiated by the Financial Creditor under SARFAESI Act were still pending, it was not open to the Financial Creditor to take the benefit of Section 14(2) of the Limitation Act, 1963. The explanation in Section 14 of the Limitation Act, is extracted hereinbelow:

*“Explanation: for the purposes of this section,-
(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;”*

32. The IBC was enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of *inter alia* corporate persons in a time-bound manner, for maximisation of the value of assets of such corporate bodies, to promote entrepreneurship, availability of credit and to balance the interests of all stakeholders.

33. Prior to enactment of IBC, there was no single law in India that dealt with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy of companies were to be found in the Sick Industrial Companies (Special Provisions) Act, 1985, hereinafter referred to in short as “SICA”, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, now known as the Recovery of Debts and Bankruptcy Act, 1993, and hereinafter referred to as the “Debt Recovery Act”, the SARFAESI Act, and the Companies Act, 2013.

34. These statutes provided for multiple forums, such as the Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies was handled by the High Courts under the provisions of Sections 271 and 272 of the Companies Act, 2013 corresponding to Sections 433, 434 and 439 of the Companies Act, 1956. Individual bankruptcy and

insolvency was dealt with under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, which have been repealed by the IBC.

35. As stated in its Object and Reasons, the objective of the IBC is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner, for maximization of the value of the assets of such persons, to promote entrepreneurship, availability of credit and to balance the interest of all the stakeholders. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also ease business, and facilitate more investments leading to higher economic growth and development. The IBC seeks to designate the NCLT and DRT as the Adjudicating Authorities for resolution of insolvency, liquidation and bankruptcy.

36. Section 6 of the IBC provides that, when any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor, in such manner as provided in Chapter II of the IBC. The *sine qua non* for initiation of the corporate insolvency resolution process is the occurrence of default.

37. Section 7 of the IBC provides as follows:

“7. Initiation of corporate insolvency resolution process by financial creditor.—(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government,] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6-A) of Section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3):

Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.”

38. A financial creditor may either by itself or jointly with other financial creditors, as may be notified by the Government, file an application for initiation of the corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority, when a default has occurred. The trigger point for an application under Section 7 of the IBC is the occurrence of a default. The restrictions stipulated in the three provisos to Section 7 are not applicable in this case.

39. As observed by this Court (*Rohinton Nariman, J.*) in ***Innoventive Industries Limited v. ICICI Bank and Another***³, the scheme of the IBC is to ensure that when a default takes place, in the sense that the debt becomes due and is not paid, the insolvency

3. (2018) 1 SCC 407

resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt, once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. The Code gets triggered the moment default is of rupees one lakh or more (Section 4).

40. In ***Innoventive Industries Limited*** (supra), this Court further held that a debt may not be due if it is not payable in law or in fact. In the case of a corporate debtor, who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor, to satisfy itself that a default has occurred. It is of no matter that the debt is disputed, so long as the debt is, “due” i.e. payable, unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the Adjudicating Authority that the Adjudicating Authority may reject an application and not otherwise.

41. The judgment of this Court in ***Mobilox Innovations Private Limited*** (supra) was rendered in the context of an application for initiation of Corporate Insolvency Resolution Process by an operational creditor, under Section 9 of the IBC.

42. Noticing the difference between Section 7 and Section 9 of the IBC, this Court held:-

51. *It is clear, therefore, that once the operational creditor has filed an*

application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

43. In enacting the IBC, the legislature has, in its wisdom, differentiated between an application for initiation of corporate insolvency resolution process by a financial creditor, which is filed under Section 7 of the IBC, and an application for initiation of insolvency resolution process by an operational creditor, which is under Section 9 of the IBC, set out hereinbelow:-

9. Application for initiation of corporate insolvency resolution process by operational creditor.—(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of Section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

- (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

44. Under Section 9(5)(i)(d) of the IBC, the Adjudicating Authority has to reject an application made by an operational creditor, if notice of dispute has been received by the operational creditor and there is no record of dispute in the information utility. There is no such provision in section 7 of the IBC.

45. The Limitation Act 1963, has been enacted to consolidate and amend the law of limitation of suits and other proceedings and for purposes connected therewith. The Limitation Act applies to “suits and other proceedings and for purposes connected therewith” as stated in its preamble. The expression “other proceedings” are necessarily proceedings arising out of and/or related to suits.

46. In ***K. Venkateswara Rao And Anr. v. Bekkam Narasimha Reddi & Ors***⁴, this Court held that the Limitation Act did not apply to an election petition under the Representation of People Act, 1950, which is a complete Code. In ***Nityananda M. Joshi and Others v. The Life Insurance Corporation of India and others***⁵, a three Judge Bench of this Court speaking through Sikri, J. held that Article 137 of the Limitation Act only contemplates applications to Courts.

47. Various statutes have, however, adopted the provisions of the Limitation Act, by incorporation or reference, either in its entirety or to a limited extent. For example, Section 37 of the Arbitration Act,

⁴ AIR 1969 SC 872

⁵ (1969) 2 SCC 199

1940 provided that all the provisions of the Indian Limitation Act, 1908 would apply to arbitrations as they applied to proceedings in Court. Section 433 of the Companies Act, 2013 provides that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.

48. The insolvency Committee of the Ministry of Corporate Affairs, Government of India, in a report published in March 2018, stated that the intent of the IBC could not have been to give a new lease of life to debts which were already time barred. Thereafter Section 238A was incorporated in the IBC by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Act 26 of 2018), with effect from 6th June 2018. Section 238A provides as follows:-

“238A. The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.”

49. The language and tenor of Section 238A is significant. The Section reads that the provisions of the Limitation Act, 1963 shall, **as far as may be**, apply to proceedings or appeals *inter alia* before the NCLT/NCLAT.

50. Section 238 gives overriding effect to the IBC, notwithstanding anything inconsistent therewith contained in any other law, for the time being in force, or any instrument having effect, by virtue of any

such law.

51. There is no specific period of limitation prescribed in the Limitation Act, 1963 for an application under the IBC before the NCLT. An application for which no period of limitation is provided anywhere else in the Schedule, is governed by Article 137 of the Schedule to the Limitation Act. Under Article 137 of the Schedule to the Limitation Act, the period of limitation prescribed for such an application is three years from the date of accrual of the right to apply.

52. There can be no dispute with the proposition that the period of limitation for making an application under Section 7 or 9 of the IBC is three years from the date of accrual of the right to sue, that is, the date of default. In ***Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. And Anr.***⁶, this Court held:-

“6. The present case being “an application” which is filed under Section 7, would fall only within the residuary Article 137.”

53. Section 5 of the Limitation Act provides that any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period of limitation, if the appellant or the applicant satisfies the Court, that he had sufficient cause for not preferring the appeal or making the application within such period. The explanation

6. (2019) 10 SCC 572

in Section 5 of the Limitation Act clarifies that, the fact that the appellant or the applicant may have been misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period, may be sufficient cause within the meaning of this Section.

54. In ***B.K. Educational Services Private Limited v. Parag Gupta and Associates***⁷, this Court held:-

“42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “The right to sue”, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.”

55. In ***Radha Export (India) Private Limited v. K.P. Jayaram and Anr.***⁸, this Court referred to ***B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates*** (supra) and held the application under Section 7 of the IBC to be barred by limitation.

56. In ***Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. and another***⁹, this Court held that limitation of three years as provided by Article 137 of the Limitation Act, which commenced from the date of the default, was extendable under Section 5 of the Limitation Act.

7. (2019) 11 SCC 633

8. (2020) 10 SCC 538

9. (2020) 15 SCC 1

57. The issues involved in this appeal are:-

- (i) Whether delay beyond three years in filing an application under Section 7 of IBC can be condoned, in the absence of an application for condonation of delay made by the applicant under Section 5 of the Limitation Act, 1963?
- (ii) Whether Section 14 of the Limitation Act, 1963 applies to applications under Section 7 of the IBC? If so, is the exclusion of time under Section 14 is available, only after the proceedings before the wrong forum terminate?

58. For the sake of convenience, and to avoid prolixity and unnecessary repetition, all the aforesaid issues are dealt with together. Section 238A of the IBC provides that the provisions of the Limitation Act shall, as far as may be, apply to proceedings before the Adjudicating Authority(NCLT) and the NCLAT.

59. It is well settled by a plethora of judgments of this Court as also different High Courts and, in particular, the judgment of this Court in ***B.K. Educational Services Private Limited v. Parag Gupta Associates and Ors.*** (supra) the NCLT/NCLAT has the discretion to entertain an application/appeal after the prescribed period of limitation. The condition precedent for exercise of such discretion is the existence of sufficient cause for not preferring the appeal and/or the application within the period prescribed by limitation.

60. In ***Ramlal Motilal and Chhotelal v. Rewa Coalfields Ltd.***¹⁰ this Court affirmed the view taken by Madras High Court in ***Krishna v. Chattappan***¹¹ and held that Section 5 of the Limitation Act gives the Courts a discretion, which is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood. The expression 'sufficient cause' should be construed liberally to advance substantial justice, as held by this Court, *inter alia*, in ***Shakuntla Devi Jain vs. Kuntal Kumar***¹² and in ***State of West Bengal v. Administrator, Howrah Municipality and Others***¹³.

61. The condition precedent for condonation of the delay in filing an application or appeal, is the existence of sufficient cause. Whether the explanation furnished for the delay would constitute 'sufficient cause' or not would depend upon facts of each case. There cannot be any straight jacket formula for accepting or rejecting the explanation furnished by the applicant/appellant for the delay in taking steps. Acceptance of explanation furnished should be the rule and refusal an exception, when no negligence or inaction or want of bona fides can be imputed to the defaulting party.

62. It is true that a valuable right may accrue to the other party

10. AIR 1962 SC 361

11. 1890 ILR Mad 269

12. AIR 1969 SC 575

13. (1972) 1 SCC 366

by the law of limitation, which should not lightly be defeated by condoning delay in a routine manner. At the same time, when stakes are high, the explanation should not be rejected by taking a pedantic and hyper technical view of the matter, causing thereby irreparable loss and injury to the party against whom the lis terminates. The courts are required to strike a balance between the legitimate rights and interests of the respective parties.

63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.

64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would

have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the Court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation Act as of right, without making an application.

65. As observed above, Section 238A makes the provisions of the Limitation Act applicable to proceedings under the IBC before the Adjudicating authority and the Appellate Authority (NCLAT) 'as far as may be'. Section 14(2) of the Limitation Act which provides for exclusion of time in computing the period of limitation in certain circumstances, provides as follows:

"14. Exclusion of time of proceeding bona fide in court without jurisdiction.

—

(1)

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such

proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

66. Similarly under Section 18 of the Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires.

67. As observed above, Section 238A of the IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before the NCLT and the NCLAT. The IBC does not exclude the application of Section 6 or 14 or 18 or any other provision of the Limitation Act to proceedings under the IBC in the NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in the NCLT/NCLAT, to the extent feasible.

68. We see no reason why Section 14 or 18 of the Limitation Act, 1963 should not apply to proceeding under Section 7 or Section 9 of the IBC. Of course, Section 18 of the Limitation Act is not attracted in this case, since the impugned order of the NCLAT does not proceed on the basis of any acknowledgment.

69. In ***M/s. Reliance Asset Reconstruction Company Ltd.*** (supra), the petition under Section 7 of the IBC, filed by the Financial Creditor in July 2018 was found, on facts, to be hopelessly barred by limitation, as the account of the Corporate Debtor had been declared NPA in 1993, after which recovery proceedings had been initiated, a Recovery Certificate issued in 2003 and amended in 2001. This Court found that the documents relied upon by the Financial Creditor to claim the benefit of Section 18 of the Limitation Act, could not be construed as admission or acknowledgment of liability.

70. Section 14 (2) of the Limitation Act provides that in computing the period of limitation for any application, the time during which the petitioner had been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance, or of appeal or revision, against the same party, for the same relief, shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it. The conditions for exclusion are that the earlier proceedings should have been for the same relief, the proceedings should have been prosecuted diligently and in good faith and the proceedings should have been prosecuted in a forum which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it.

71. In ***State of Goa v. Western Builders***¹⁴, this Court held that Section 14 of the Limitation Act would apply to an application for setting aside of an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 by virtue of Section 43 of the said Act, which made the Limitation Act applicable to arbitrations as it applies to proceedings in Court. This Court found that in the absence of any provision in the Arbitration and Conciliation Act, 1996 excluding the applicability of Section 14, a party was legitimately entitled to exclusion of the time spent in *bona fide* prosecution of proceedings with due diligence in a wrong forum. Distinguishing the earlier judgment of this Court in ***Union of India v. Popular Construction Co.***¹⁵, the Court held that exclusion of time under Section 14 of the Limitation Act in computation of limitation was different from condonation of delay under Section 5 of the said Act.

72. In ***Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Ors.***¹⁶, a three-Judge Bench of this Court unanimously held that in the absence of any provision in the Arbitration and Conciliation Act, 1996 which excluded the applicability of Section 14 of the Limitation Act, there was no reason why Section 14 of the Limitation Act should not apply to an application for setting aside an arbitral award. This Court held:

“19. A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside

14 (2006) 6 SCC 239

15 (2001) 8 SCC 470

16 (2008) 7 SCC 169

the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court.

20. *Section 29(2) of the Limitation Act inter alia provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period of limitation prescribed by the Schedule, the provisions of Section 3 shall apply as if such period was the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 shall apply only insofar as, and to the extent, they are not expressly excluded by such special or local law. When any special statute prescribes certain period of limitation as well as provision for extension up to specified time-limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act. However, merely because it is held that Section 5 of the Limitation Act is not applicable to an application filed under Section 34 of the Act for setting aside an award, one need not conclude that provisions of Section 14 of the Limitation Act would also not be applicable to an application submitted under Section 34 of the Act of 1996.*

21. *Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:*

- (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
- (2) The prior proceeding had been prosecuted with due diligence and in good faith;*
- (3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;*
- (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;*
- (5) Both the proceedings are in a court.*

22. *The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded."*

73. In his separate concurring judgment Raveendran, J. said:-

"52. *Section 14 of the Limitation Act relates to exclusion of time of proceeding bona fide in court without jurisdiction.*

.....

53. *Sub-section (3) of Section 34 of the AC Act prescribes the period of limitation for filing an application for setting aside an award as three months from the date on which the applicant has received the arbitral award. The proviso thereto vests in the court discretion to extend the period of limitation by a further period not exceeding thirty days if the court is satisfied that the applicant was prevented by sufficient cause for not making the application within three months. The use of the words "but not thereafter" in the proviso makes it clear that even if a sufficient cause is made out for a longer extension, the extension cannot be beyond thirty days. The purpose of proviso to Section 34(3) of the AC Act is similar to that of Section 5 of the Limitation Act which also relates to extension of the period of limitation prescribed for any application or appeal. It vests a discretion in a court to extend the prescribed period of limitation if the applicant satisfies the court that he had sufficient cause for not making the application within the prescribed period. Section 5 of the Limitation Act does not place any outer limit in regard to the period of extension, whereas the proviso to sub-section (3) of Section 34 of the AC Act places a limit on the period of extension of the period of limitation. Thus the proviso to Section 34(3) of the AC Act is also a provision relating to extension of period of limitation, but differs from Section 5 of the Limitation Act, in regard to*

period of extension, and has the effect of excluding Section 5 alone of the Limitation Act.”

74. As held by this Court in **Commissioner, M.P. Housing Board and Ors. v. Mohanlal & Co.**,¹⁷, Section 14 of the Limitation Act has to be interpreted liberally to advance the cause of justice. Section 14 would be applicable in cases of mistaken remedy or selection of a wrong forum.

75. There can be little doubt that Section 14 applies to an application under Section 7 of the IBC. At the cost of repetition, it is reiterated that the IBC does not exclude the operation of Section 14 of the IBC. The question is whether prior proceedings under the SARFAESI Act do not qualify for the exclusion of time under Section 14, inasmuch as they are not civil proceedings in a Court, as argued by Mr. Dave.

76. Even if it were to be held that the benefit of Section 14 would be available to an applicant under IBC, for proceedings initiated *bona fide* and prosecuted with due diligence under the SARFAESI Act, another question raised in this appeal is, whether exclusion of time under Section 14 of the Limitation Act, would only be available if the proceedings which could not be entertained for defect of jurisdiction, or other cause of a like nature, had ended, in view of the Explanation at the end of Section 14, which says that for the purposes of the said Section, the day on which the earlier proceeding was instituted and

17. (2016) 14 SCC 199

the day on which it ended shall both be counted for exclusion of time. Much emphasis has been placed by Mr. Dave on the explanation at the end of Section 14, to argue that the Financial Creditor would not be entitled to the benefit of Section 14 of the Limitation Act since the proceedings under the SARFAESI Act are still pending, as also the writ petition in the High Court.

77. Section 14 of the Limitation Act is to be read as a whole. A conjoint and careful reading of Sub-Sections (1), (2) and (3) of Section 14 makes it clear that an applicant who has prosecuted another civil proceeding with due diligence, before a forum which is unable to entertain the same on account of defect of jurisdiction or any other cause of like nature, is entitled to exclusion of the time during which the applicant had been prosecuting such proceeding, in computing the period of limitation. The substantive provisions of Sub-sections (1), (2) and (3) of Section 14 do not say that Section 14 can only be invoked on termination of the earlier proceedings, prosecuted in good faith.

78. In ***Bihta Co-operative Development Cane Marketing Union Ltd. and Anr. v. Bank of Bihar and Ors.***¹⁸, this Court held that the explanation must be read so as to harmonize with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section.

79. As held in ***S. Sundaram Pillai and Others v. V.R. Pattabiraman and Others***¹⁹, it is well settled that an explanation added to a statutory provision is not a substantive provision in any sense of the term but is meant to explain or clarify certain ambiguities, which may have crept into statutory provisions.

80. In ***Sundaram Pillai*** (supra), this Court referred to *Sarathi's Interpretation of Statutes; Swarup's Legislation and Interpretation, Interpretation of statutes (5th edition) by Bindra* as also various judgments of this Court including those referred to above and held:-

“53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—

“(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.”

81. In our considered view, Explanation (a) cannot be construed in a narrow pedantic manner to mean that Section 14 can never be

invoked until and unless the earlier proceedings have actually been terminated for want of jurisdiction or other cause of such nature. Explanation (a), which is clarificatory, only restricts the period of exclusion to the period between the date of initiation and the date of termination. An applicant cannot claim any further exclusion.

82. To cite an example, if a party were to file a suit in a wrong forum, to enforce payment of money secured by a mortgage or charge upon immovable property, for which the prescribed period of limitation is twelve years, after expiry of three years from the date of accrual of the right to sue, and then file an application under Section 7 of the IBC after dismissal of the suit for want of jurisdiction, that application under Section 7 of the IBC would be time barred since such party would not be entitled to exclusion of any period of time beyond the date of institution and date of termination of the earlier proceeding. If after exclusion of the time between the initiation and termination of the proceedings instituted *bona fide* and in good faith and prosecuted with due diligence, an application was still beyond three years, Section 14 would not help save limitation.

83. To cite another example, if civil proceedings were initiated in a wrong forum in good faith and prosecuted with due diligence, but after the proceedings ended, time was wasted by making frivolous, meritless applications, the applicant would only be entitled to exclusion of time from the date of initiation till the end of the

proceedings initiated in good faith and *bona fide* and pursued diligently, and no more. The applicant would not be entitled to exclusion of any further time spent in pursuing frivolous further proceedings, or otherwise.

84. To sum up, Section 14 excludes the time spent in proceeding in a wrong forum, which is unable to entertain the proceedings for want of jurisdiction, or other such cause. Where such proceedings have ended, the outer limit to claim exclusion under Section 14 would be the date on which the proceedings ended.

85. In the instant case, the proceedings under the SARFAESI Act may not have formally been terminated. The proceedings have however been stayed by the High Court by an interim order, on the *prima facie* satisfaction that the proceedings initiated by the financial creditor, which is a cooperative bank, was without jurisdiction. The writ petition filed by the Corporate Debtor was not disposed of even after almost four years. The carriage of proceedings was with the Corporate Debtor. The interim order was still in force, when proceedings under Section 7 of the IBC were initiated, as a result of which the Financial Creditor was unable to proceed further under the SARFAESI Act.

86. In the instant case, even if it is assumed that the right to sue accrued on 31.3.2013 when the account of Corporate Debtor was

declared NPA, the financial creditor initiated proceedings under SARFAESI Act on 18th January 2014, that is the date on which notice under Section 13(2) was issued, proceeded with the same, and even took possession of the assets, until the entire proceedings were stayed by the High Court by its order dated 24th July 2017. The proceedings under Section 7 of the IBC were initiated on 10th July 2018.

87. In our view, since the proceedings in the High Court were still pending on the date of filing of the application under Section 7 of the IBC in the NCLT, the entire period after the initiation of proceedings under the SARFAESI Act could be excluded. If the period from the date of institution of the proceedings under the SARFAESI Act till the date of filing of the application under Section 7 of the IBC in the NCLT is excluded, the application in the NCLT is well within the limitation of three years. Even if the period between the date of the notice under Section 13(2) and date of the interim order of the High Court staying the proceedings under the SARFAESI Act, on the *prima facie* ground of want of jurisdiction is excluded, the proceedings under Section 7 of IBC are still within limitation of three years.

88. An Adjudicating Authority under the IBC is not a substitute forum for a collection of debt in the sense it cannot reopen debts which are barred by law, or debts, recovery whereof have become time barred. The Adjudicating Authority does not resolve disputes, in

the manner of suits, arbitrations and similar proceedings. However, the ultimate object of an application under Section 7 or 9 of the IBC is the realization of a 'debt' by invocation of the Insolvency Resolution Process. In any case, since the cause of action for initiation of an application, whether under Section 7 or under Section 9 of the IBC, is default on the part of the Corporate Debtor, and the provisions of the Limitation Act 1963, as far as may be, have been applied to proceedings under the IBC, there is no reason why Section 14 or 18 of the Limitation Act would not apply for the purpose of computation of the period of limitation.

89. To quote V. Sudhish Pai from his book '*Constitutional Supremacy - A Revisit*' "*Judgments and observations in judgments are not to be read as Euclid's theorems or as provisions of statute. Judicial utterances/pronouncements are in the setting of the facts of a particular case. To interpret words and provisions of a statute it may become necessary for judges to embark upon lengthy discussions, but such discussion is meant to explain not define. Judges interpret statutes, their words are not to be interpreted as statutes.*"

90. As observed above, unlike statutes like the Arbitration Act, 1940 and the Arbitration and Conciliation Act 1996, which make the provisions of the Limitation Act, as they apply to Court proceedings, also applicable to arbitration proceedings, Section 238A of the IBC

makes the Limitation Act applicable to proceedings in NCLT/NCLAT 'as far as may be' and/or in other words, to the extent they may be applied.

91. Legislature has in its wisdom chosen not to make the provisions of the Limitation Act verbatim applicable to proceedings in NCLT/NCLAT, but consciously used the words 'as far as may be'. The words 'as far as may be' are not meant to be otiose. Those words are to be understood in the sense in which they best harmonise with the subject matter of the legislation and the object which the Legislature has in view. The Courts would not give an interpretation to those words which would frustrate the purposes of making the Limitation Act applicable to proceedings in the NCLT/NCLAT 'as far as may be'.

92. In other words, the provisions of the Limitation Act would apply *mutatis mutandis* to proceedings under the IBC in the NCLT/NCLAT. To quote Shah J. in ***New India Sugar Mill Limited v. Commissioner of Sales Tax, Bihar***²⁰, "It is a recognised rule of interpretation of statutes that expression used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature".

93. As held by this Court in ***Busching Schmitz Private Ltd. v. P.T. Menghani***²¹, the Court should adopt an object oriented ap-

20 AIR 1963 SC 1207 (P.1213)

21 AIR 1977 SC 1569

proach keeping in mind the principle that legislative futility is to be ruled out so long as interpretative possibility permits. Needless to mention that the object oriented approach cannot be carried to the extent of doing violence to the plain language used, by rewriting the section or substituting words in place of the actual words used by Legislature.

94. The use of words 'as far as may be', occurring in Section 238A of the IBC tones down the rigour of the words 'shall' in the aforesaid Section which is normally considered as mandatory. The expression 'as far as may be' is indicative of the fact that all or any of the provisions of the Limitation Act may not apply to proceedings before the Adjudicating Authority (NCLT) or the Appellate authority (NCLAT) if they are patently inconsistent with some provisions of the IBC. At the same time, the words 'as far as may be' cannot be construed as a total exclusion of the requirements of the basic principles of Section 14 of the Limitation Act, but permits a wider, more liberal, contextual and purposive interpretation by necessary modification, which is in harmony with the principles of the said Section.

95. If, in the context of proceedings under Section 7 or 9 of the IBC, Section 14 were to be interpreted with rigid and pedantic adherence to its literal meaning, to hold that only civil proceedings in Court would enjoy exclusion, the result would be that an applicant would not even be entitled to exclusion of the period of time spent in

bona fide invoking and diligently pursuing an earlier application under the same provision of IBC, for the same relief, before an Adjudicating Authority, lacking territorial jurisdiction. This could not possibly have been the legislative intent.

96. In our considered opinion, the judgment of the NCLAT in the case of **Ishrat Ali** is unsustainable in law. The proceedings under the SARFAESI Act, 2002 are undoubtedly civil proceedings. In **S.A.L. Narayan Rao and Anr. v. Ishwarlal Bhagwandas and Anr.**²², the Constitution Bench of this Court held:-

".....The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed. But the whole area of proceedings, which reach the High Courts is not exhausted by classifying the proceedings as civil and criminal. There are certain proceedings which may be regarded as neither civil nor criminal. For instance, proceeding for contempt of court, and for exercise of disciplinary jurisdiction against lawyers or other professionals, such as Chartered Accountants may not fall within the classification of proceedings, civil or criminal. But there is no warrant for the view that from the category of civil proceedings, it was intended to exclude proceedings relating to or which seek relief against enforcement of taxation laws of the State."

97. On a parity of reasoning, there is no rationale for the view that the proceedings initiated by a secured creditor against a borrower under the SARFAESI Act for taking possession of its secured assets,

were intended to be excluded from the category of civil proceedings. In this context, reference may be made to the judgment of this Court in ***United Bank of India v. Satyawati Tandon and Ors.***²³ cited by Mr. Deepak Sai, where this Court observed:

“11. The Government of India accepted the recommendations of the two Committees and that led to enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “the SARFAESI Act”), which can be termed as one of the most radical legislative measures taken by Parliament for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction. For the first time, the secured creditors have been empowered to take steps for recovery of their dues without intervention of the courts or tribunals.”

98. Even though Section 13 of the SARFAESI Act enables a secured creditor to enforce security interest created in its favour, without the intervention of the Court or Tribunal, the SARFAESI Act does not exclude the intervention of Courts and/or Tribunals altogether. Some relevant provisions of the SARFAESI Act are set out hereinbelow:

*“14. **Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.**—(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the District Magistrate shall, on such request being made to him—*
(a) take possession of such asset and documents relating thereto; and
(b) forward such asset and documents to the secured creditor: Provided that any application by the secured creditor shall be accompanied by an

23. (2010) 8 SCC 110

affidavit duly affirmed by the authorised officer of the secured creditor, declaring that—

- (i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;*
- (ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;*
- (iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;*
- (iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount; (v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;*
- (vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;*
- (vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;*
- (viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;*
- (ix) that the provisions of this Act and the rules made thereunder had been complied with:*

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets within a period of thirty days from the date of application:

Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days. Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act. (1A) The District Magistrate or the Chief

Metropolitan Magistrate may authorise any officer subordinate to him,—
(i) to take possession of such assets and documents relating thereto; and
(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate¹ [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any court or before any authority.

17. Application against measures to recover secured debts.—*(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measure had been taken:*

.....

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section

(4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-

section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(4A) Where—

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under subsection (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

18. Appeal to Appellate Tribunal.—*(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed]to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.*

Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower: Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less: Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

99. The Chief Metropolitan Magistrate or the Judicial Magistrate, as the case may be, exercising powers under Section 14 of the SARFAESI Act, functions as a Civil Court/Executing Court. Proceedings under the SARFAESI Act would, therefore, be deemed to be civil proceedings in a Court. Moreover, proceedings under the SARFAESI Act under Section 13(4) are appealable to the DRT under Section 18 of the SARFAESI Act. Mr. Dave's argument that proceedings under the SARFAESI Act would not qualify for exclusion under Section 14 of the Limitation Act, because those proceedings were not conducted in a Civil Court, cannot be sustained.

100. Another civil proceeding whether in a Court of first instance or of appeal or revision, against the party, for the same relief, would have to be construed to include any civil Proceeding in a forum, whether of first instance, or appellate, or revisional, against the same party for similar relief, more so, having regard to the language and tenor of Section 238A of the Limitation Act which applies the provisions of the Limitation Act "as far as may be", to proceedings in the NCLT/NCLAT.

101. In our considered view, keeping in mind the scope and ambit of proceedings under the IBC before the NCLT/NCLAT, the expression 'Court' in Section 14(2) would be deemed to be any forum for a civil proceeding including any Tribunal or any forum under the

SARFAESI Act.

102. In any case, Section 5 and Section 14 of the Limitation Act are not mutually exclusive. Even in a case where Section 14 does not strictly apply, the principles of Section 14 can be invoked to grant relief to an applicant under Section 5 of the Limitation Act by purposively construing 'sufficient cause'. It is well settled that omission to refer to the correct section of a statute does not vitiate an order. At the cost of repetition it is reiterated that delay can be condoned irrespective of whether there is any formal application, if there are sufficient materials on record disclosing sufficient cause for the delay.

103. In our considered opinion, the NCLAT rightly refused to stay the proceedings before the NCLT. The judgment and order of the NCLT does not warrant interference. This appeal is accordingly dismissed.

.....].
[INDIRA BANERJEE]

.....].
[HEMANT GUPTA]

NEW DELHI
March 22, 2021

IA(IBC)64/KOB/2021

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

I.A.(IBC) No. 64/KOB/2021

In

IBA No.52/KOB/2019

(Under Section 60(5) of IBC 2016 and Rule 11 of NCLT Rules, 2016)

Date of decision: 20th April, 2021

CORAM

HON'BLE MR. ASHOK KUMAR BORAH, MEMBER (JUDICIAL)

Applicant:

K. SATHEESH BABU RAJESH
NANDANAM, SMRRAM 111 SAW MILL ROAD
KURKANCHERI,
THRISSUR-680007.

Versus

Respondents:

Mr. George Varkey,
Resolution Professional of Propyl Packaging Limited
Residing at Building No.110
Ground floor, Surabhi Nagar,
Kakkanad, Kochi-682030.

Parties/Counsel appeared (through Video Conferencing)

For applicant	: Mr. Shivshankar R. Panicker, Advocate
For Respondent	: Mr. Vinod PV, Advocate along with RP.

ORDER

This application has been filed under Section 60(5) of Insolvency
and Bankruptcy Code, 2016 and Rule 11 of NCLT Rules by M.K.Satheesh Babu

IA(IBC)64/KOB/2021

Rajesh who is a promoter of Corporate Debtor M/s Prlopyl Packaging, seeking following reliefs:

- (a) Direct the respondent to accept the Expression of Interest of the Applicant as Prospective Resolution Applicant under Section 240A of IBC since Corporate Debtor is a deemed MSME.*
- (b) Direct the Respondent and Committee of Creditors to relax the eligibility criterion requirement of minimum tangible net worth of Rs. 10 crores for the applicant/promoter of Corporate Debtor.*
- (c) Direct the Respondent to register Corporate Debtor as an MSME in the light of Gazette Notification No. S.O 2119€ dated June 26th 2020 regarding MSME.*

2. The facts in brief are as follows:

This Tribunal admitted an application filed by M/s Prayag Polytech Private Limited (Operational Creditor) vide IBA No. 52/KOB/2019 and directed to initiate Corporate Insolvency Resolution Process against the Corporate Debtor -M/s Propyl Packaging Limited, vide order dated 14.2.2020. The applicant being the Promotor Director of the company was keen in restarting the business operations of the unit and intend to submit a Resolution Plan. However, the eligibility criterion specified in the invitation to submit Expression of Interest prescribed Minimum “Tangible Net Worth of INR 10 Crores” for an individual who submits the Expression of Interest. Hence the expression of interest submitted by the applicant to the respondent Resolution Professional on 17.1.2021 has not been accepted. The applicant states that as pe the Government

IA(IBC)64/KOB/2021

of India Gazette Notification No. SO. 2119-E dated 26th June, 2020 for implementation of the upward revision in the definition and criteria of MSME(s) and that the applicant will come within the purview of micro small or medium enterprises if the investment is upto Rs. 50 crores and turn over is upto Rs.250 crores. It is further stated that the applicant is not a wilful defaulter and is not ineligible under Section 29A of IBC to apply as a Prospective Resolution Applicant of the Corporate Debtor under Section 240A of IBC. In this connection, the applicant has referred to a decision of the Hon'ble NCLAT in *Saravana Global Holdings Ltd. Vs. Bafna Pharmaceuticals Limited and others (CA(AT)(Insolvency) No.,203 of 2019 decided on 4.7.2019)*. In view of the above judgment, if the Corporate Debtor is an MSME, it is not necessary for the promoters to compete with other Resolution Applicants to regain the control of the Corporate Debtor. The applicant is ready and willing to submit a Resolution Plan which will maximise the value of assets of the Corporate Debtor and will ensure that the unit does not go into liquidation. In view of the above, the Resolution Professional should register the Corporate Debtor as an MSME and consider the Resolution Plan submitted by the applicant.

3. The Respondent Resolution Professional filed a counter affidavit stating that after the admission of the matter, the applicant invited Expression of Interest to submit the Resolution Plan on 18.9.2020, 3.1.2021, 24.02.2021 to which in the last EOI respondent received three Expression of Interests (EOI) from the

IA(IBC)64/KOB/2021

prospective resolution applicants which includes the EOI submitted by the promotor/applicant herein. The eligibility criteria for submission of the Resolution Plan approved by the Committee of Creditors in the meeting held on 16.9.2020 are as under:

(a) In case Resolution Applicant is a company or LLP or individual his Tangible Net worth must be Rs. 10 crores as per the latest Financial Statement certified by a Chartered Accountant: and

(b) In case Resolution Applicant is a Financial Institution or Asset Restructuring Company, its Minimum Assets under Management or Committee Fund for deployment must be Rs. 50 crores.

On verification of the EOI submitted by the prospective resolution applicants, it was found that the EOI submitted by the applicant does not meet the eligibility criteria as the applicant has submitted the EOI in the name of Corporate Debtor and he did not submit the net worth certificate to prove his net worth of Rs. 10 crores. In order to rectify this mistake the applicant was intimated vide email dated 15.3.2021, however he has neither corrected the defect nor submitted the net worth certificate meeting the required eligibility criteria. Since the applicant made a request for waiving the eligibility criteria, the same was placed before the Committee of Creditors on 25.1.2021. The Committee did not agree with the request of the applicant and directed to proceed with the eligibility criteria already fixed. Even though the suspended director/applicant was permitted to attend the COC, he did not attend the same meeting. Since the applicant did not

qualify the eligibility criteria, the respondent published the provisional list of prospective resolution applicants on 15.3.2021. With respect to the prayer to register the Corporate Debtor as an MSME, in the light of Gazette Notification No.2119-E dated 26th June, 2020 regarding MSME, the respondent stated that since the Corporate Debtor meets the statutory requirements and revision in the MSME criteria and it was issued after the commencement of CIRP, the RP shall act according to the direction of this Tribunal.

4. I have heard the learned counsel for the applicant and the respondent Resolution Professional and have meticulously gone through the documents produced on record. The points to be considered are whether (a) The applicant is eligible to submit the Resolution Plan in the name of the Corporate Debtor, and (b) Whether the applicant is eligible to submit the Resolution Plan in view of the Govt. of India Gazette Notification dated 26th June, 2020?

5. As rightly pointed out by the learned counsel for the Resolution Professional, as per the IBBI Regulations, the Corporate Debtor cannot submit a Resolution Plan in the CIR Process. When this issue was argued, the learned counsel for the applicant stated that the applicant is ready to submit the Resolution Plan in the name of the applicant in his individual capacity.

6. Regarding the second issue, it is relevant to quote the Notification SO. 2119-E issued by the Ministry of Micro Small and Medium Enterprises, in which

the classification of enterprises and how to become a micro, small and medium enterprise are given as under:

Classification of enterprises. - An enterprise shall be classified as a micro, small or medium enterprise on the basis of the following criteria, namely:--

- (i) a micro enterprise, where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;
- (ii) (ii) a small enterprise, where the investment in plant and machinery or equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees; and
- (iii) (iii) a medium enterprise, where the investment in plant and machinery or equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

Becoming a micro, small or medium enterprise. -- (1) Any person who intends to establish a micro, small or medium enterprise may file Udyam Registration online in the Udyam Registration portal, based on self-declaration with no requirement to upload documents, papers, certificates or proof. (2) On registration, an enterprise (referred to as —Udyam in the Udyam Registration portal) will be assigned a permanent identity number to be known as —Udyam Registration Number. (3) An e-certificate, namely, —Udyam Registration Certificate shall be issued on completion of the registration process.

7. The Resolution Professional stated that considering the revised criteria laid down by the MSME as per Notification dated 26.6.2020, the Corporate Debtor qualified as a MSME under the revised norms. However, the notification was issued after admission of the application for initiation of CIRP considering the covid 19 pandemic in the country. The Resolution Professional further states that the Corporate Debtor meets the statutory requirements and revision in the MSME criteria and the Resolution Professional is ready to accept

the Resolution Plan from the applicant, if a direction to that effect is granted by this Tribunal.

8. At this juncture, it is relevant to mention the decision of the Hon'ble NCLAT in the matter *Saravana Global Holdings (supra)* the relevant portion of the order reads thus:

20. The 'Committee of Creditors' is to consider the feasibility, viability and such other requirements as has been specified by the Board. If it proposes maximisation of the assets and is found to be feasible, viable and fulfil all other requirements as specified by the Board, the company being MSME, it is not necessary for the 'Committee of Creditors' to follow all the procedures under the 'Corporate Insolvency Resolution Process'. For example, if case is settled before the constitution of the 'Committee of Creditors' or in terms of Section 12A on the basis of offer given by Promoter, in such case, all other procedure for calling of application of 'Resolution Applicant' etc. are not followed. If the Promoter satisfy all the creditors and is in a position to keep the 'Corporate Debtor' as a going 10 Company Appeal (AT) (Insol.) No. 203 of 2019 concern, it is always open to 'Committee of Creditors' to accept the terms of settlement and approve it by 90% of the voting shares. The same principle can be followed in the case of MSME.

21. The Parliament with specific intention amended the provisions of the 'I&B Code' by allowing the Promoters of 'MSME' to file 'Resolution Plan'. The intention of the legislature shows that the Promoters of 'MSME' should be encouraged to pay back the amount with the satisfaction of the 'Committee of Creditors' to regain the control of the 'Corporate Debtor' and entrepreneurship by filing 'Resolution Plan' which is viable, feasible and fulfils other criteria as laid down by the 'Insolvency and Bankruptcy Board of India'.

22. Therefore, we hold that in exceptional circumstances, if the 'Corporate Debtor' is MSME, it is not necessary for the Promoters to compete with other 'Resolution Applicants' to regain the control of the 'Corporate Debtor'.

9. In *Swiss Ribbons Pvt.Ld. and Another Vs. Union of India and others -2019 SCC Online SC 73*, the Hon'ble Apex Court made it clear that I&B Code

envisages maximisation of value of Assets of the Corporate Debtor so that they are efficiently runs as going concerns and in turn will promote entrepreneurship. The liquidation can be ordered as a last resort if there is no Resolution Plan and the Resolution Plans submitted are not fulfilling the criteria laid down therein.

10. In view of the above, considering the facts situation and since the Corporate Debtor qualifies as a MSME under the revised norms, this **application is disposed of** with the following order:

- (i) The applicant shall submit the Expression of Interest/Resolution Plan in his individual capacity within two weeks from today.
- (ii) If the applicant submits the EOI/RP in his individual capacity, the Resolution Professional shall register the Corporate Debtor as an MSME, provided he produces the certificate of Registration as an MSME under the “Udhayam Registration” of the Ministry of Micro Small and Medium Enterprises. After considering the Expression of Interest of the applicant, the Respondents shall publish the list of Prospective Resolution Applicants, without further delay.

Dated the 20th day of April, 2021

Sd/-
(**Ashok Kumar Borah**)
Member (Judicial)

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI
(APPELLATE JURISDICTION)**

Company Appeal (AT) (CH) (Insolvency) No. 23 of 2021

Under section 61 of Insolvency & Bankruptcy Code)

**(Arising out of Order dated 24.02.2021 in IA No.1094 of 2020 in C.P.(IB) No.153/7/HDB/2019
passed by the Hon'ble National Company Law Tribunal, Bench-I, Hyderabad**

In the matter of:

M/s Renganayaki Agencies,
Successful Resolution Applicant
Represented by Mr.S.Nadesan
"Aachi Illam", No.10/12,
D Silva Road, I Cross Street,
Mylapore, Chennai 600 004

....Appellant

V

Sreenivasa Rao Ravinuthala
Resolution Professional
For Samyu Glass Private Limited
Plot No.6, 3rd Floor, Kavuri Hills,
Phase-1, Jubilee Hills, Hyderabad
Present:

...Respondent

For Appellant : Mr.R.Vidhya Shankar, Advocate
For Resolution Professional : Mr.Aneesh, V., Advocate

J U D G E M E N T

(VIRTUAL MODE)

Venugopal M. J

INTRODUCTION:

The 'Appellant'/Successful Resolution Applicant has filed the present 'Appeal' being dissatisfied with the order dated 24.02.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) in IA No. 1094 /2020 in CP No. 153/7/HDB/2019 (filed by the

‘Appellant/Applicant/Resolution Professional’) under section 36 of the I & B Code, 2016 read with Regulation 39 (4) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

2. Earlier, the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) while passing the impugned order dated 24.02.2021 had among other things at paragraph 3 and 4 observed the following:

3. “The Resolution Professional has compared both the Resolution Plan submitted by M/s. KALS Group and Mr. Chava Suresh Babu. The Resolution Plan submitted by both the Resolution Applicants were almost equally placed except for the fact that M/s. KALS Group has scored in terms of faster payment of the amount for resolving the Corporate Debtor. However, as both the resolution plans are almost placed equally in terms of the resolution amount payable by the perspective Resolution Applicants and farther unsuccessful Resolution Applicants has filed several interlocutory applications for consideration of their plan. Taking into consideration the almost similarly placed resolution plans and claims and counter claims made by both the Resolution Applicants, we are of the view that there is a need for further pursuance of the Resolution Plan and with the very hope that the Corporate Debtor may fetch better value that what has been offered by the Resolution Applicants. In this case, even though the resolution plan of M/s. KALS Group has been approved with 100% voting in favour of it by the COC, in view of very meagre difference between both the Resolution Plans, we are of the view that there is scope for further improvement of the resolution amount to be payable by the Resolution Applicants.

4. We therefore, accordingly direct the COC to take fresh bids from the existing two Resolution Applicants and submit a fresh resolution plan for our consideration within a period of one month.”

and disposed of the application with above directions.

APPELLANT’S CONTENTIONS:

5. Challenging the validity, legality of the impugned order dated 24.02.2021 in IA No. 1094 /2020 in CP No. 153/7/HDB/2019 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad), the Learned Counsel for the ‘Appellants’ submits that the Adjudicating Authority had committed an error in considering the fact that the ‘Resolution Plan’ of the ‘unsuccessful Resolution Applicants’ were rejected by the ‘Committee of

Creditors’ since they had not met the 66% criteria and were denied the right to a second vote by an order dated 17.02.2020, could be given a new lease of life, in the application of the ‘Interim Resolution Professional’ for the sanction of the Appellant’s plan.

6. The Learned Counsel for the Appellant contends that the ‘Adjudicating Authority’ upon satisfaction that the ‘Sanctioned Plan’ was compliant with the requirements of section 30(2) of the I & B Code, 2016, was duty bound to sanction the ‘Resolution Plan’ of the Appellant and in fact, had exceeded its jurisdiction by issuing directions in the ‘impugned order’ to ‘rebid’ in an endeavour to maximise the value.

7. It is represented on behalf of the Appellant/Successful Resolution Applicant that the ‘Adjudicating Authority’ in the ‘impugned order’ had not rendered a finding that the sanctioned plan was found wanting in regard to any of the requirements under section 30(2) of the I & B Code, 2016.

8. The primordial submission of the Learned Counsel for the Appellant is that the Respondent/Resolution Professional had certified that the ‘Sanctioned Plan’ was compliant with all the requirements of the I & B Code, 2016 and Regulations and as such, the ‘Adjudicating Authority’ was statutorily obligated to sanction of the ‘Scheme of Appellant’.

9. The Learned Counsel for the Appellant takes a stand that an ‘Adjudicating Authority’ cannot trespass into the ‘Commercial Wisdom’ of the ‘Committee of Creditors’ and indeed, has a restricted power, of course, within the four corners of section 30(2) of the I & B Code, 2016.

10. The Learned Counsel for the Appellant refers to the decision in *Shrawan Kumar Agarwal Consortium & others V Rituraj Steel Private Limited & ors* reported in (2020) 160 SCL 210 wherein a question arose ‘whether the Adjudicating Authority has exceeded its jurisdiction in passing orders rebidding, despite the approval of the Resolution Plan by the ‘Committee of Creditors’ with a vote share of 84.70%’? and it was held that a direction for rebidding, despite approval of a Resolution Plan by the Committee of Creditors was not valid in Law and that any direction for maximisation of value of the Corporate Debtor also amounts to an interference in the business decision of the Committee of Creditors.

11. The Learned Counsel for the Appellant submits that the Adjudicating Authority in IA No. 1188/2020 in IA No. 1094/2020 in CP (IB) 153/7/HDB/2019

(Filed by the Applicant/Resolution Applicant under section 60(5) of the I & B Code, 2016 on 17.02.2021 passed an order by coming to the conclusion that there cannot be any interference with the decision of the 'Committee of Creditors' and rejected the plan of the 'Unsuccessful Resolution Applicants'. However, few days later i.e., 24.02.2021 an order in IA No. 1094/2020 in CP (IB) 153/7/(HDB)/2019 was passed for 'rebidding' as per the impugned order.

12. It is the version of the Appellant that by means of an order dated 17.02.2021 in IA No. 1188/2020, the Adjudicating Authority had held that the 'Unsuccessful Resolution Applicants' cannot modify their plans and propose additional plan amounts after the voting was concluded by the Committee of Creditors.

13. The grievance of the Appellant is that its plan was approved with an overwhelming 100% of votes and there was no reason commercially or in Law for rejection of its plan by the 'Adjudicating Authority'. In short, the Adjudicating Authority had revived a stale Resolution Plan and directed a fresh bid to be conducted while passing the impugned order dated 24.02.2021 in IA No. 1094/2020 in CP (IB) No. 153/7/HDB/2019.

14. The Learned Counsel for the Appellant brings to the notice of this 'Tribunal' in the present case, the 'Committee of Creditors' with 100% voting share had approved the 'Resolution Plan' submitted by KALS Group and projects a plea that it is the Commercial decision of the Committee Creditors in approving or rejecting a certain Resolution Plan.

RESPONDENT' SUBMISSIONS:

15. The Learned Counsel for Respondent submits that the Adjudicating Authority by passing the impugned order had exceeded its jurisdiction showered on it, under the I & B Code, 2016, by ignoring the decision of the Hon'ble Supreme Court in K. Sashidhar v Indian Overseas Bank reported in (2019) SCC Online SC 257.

16. The Learned Counsel for the Respondent contends that the Adjudicating Authority while directing the 'Committee of Creditors' to invite 'fresh bids' had completely lost site of the fact that the other unsuccessful resolution applicants (Mr. Suresh Babu Chava in with Devi Innoventures LLP, secured only 55.58% of the total voting share of the 'Financial Creditors' whereas the Appellant (Successful Resolution Applicant" had secured 100% of the total voting shares of the 'Financial Creditors'.

17. The Learned Counsel for the Respondent points out that the Adjudicating Authority had contradicted its own previous orders passed in IA Nos. 1187,& 1188 /2020 filed by the unsuccessful resolution applicants (Mr. Suresh Babu Chava in with Devi Innoventures LLP). Therefore, a plea is taken on the side of the Respondent that the impugned order is untenable in Law.

HON'BLE SUPREME COURT JUDGMENT:

18. At this juncture, this Tribunal, pertinently points out the judgment of the Hon'ble Supreme Court of India dated 10.03.2021 in Civil Appeal No. 2943-2944/2020 with Civil Appeal Nos.3138-3139 of 2020, Civil Appeal No.2949-2950 of 2020, Civil Appeal No.847-848/2021 (D.No.24125 of 2020) in the matter of Kalpraj Dharamshi & Anr. V. Kotak Investment Advisors Ltd. & Anr. Whereby and where under at Paragraphs 155 to 159, it is observed as follows:

Para 155. "It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.

156. No doubt, it is sought to be urged, that since there has been a material irregularity in exercise of the powers by RP, NCLAT was justified in view of the provisions of clause (ii) of sub-section(3) of Section 61 of the I&B Code to interfere with the exercise of power by RP. However, it could be seen, that all actions of RP have the seal of approval of CoC. No doubt, it was possible for RP to have issued another Form 'G', in the event he found, that the proposals received by it prior to the date specified in last Form 'G' could not be accepted. However, it has been the consistent stand of RP as well as CoC, that all actions of RP, including acceptance of resolution plans of Kalpraj after the due date, albeit before the expiry of timeline specified by the I&B Code for completion of the process, have been consciously approved by CoC. It is to be noted, that the decision of CoC is taken by a thumping majority of 84.36%. The only creditor voted in favour of KIAL is Kotak Bank, which is a holding company of KIAL, having voting rights of 0.97%. We are of the considered view, that in view of the paramount importance given to the decision of

CoC, which is to be taken on the basis of 'commercial wisdom', NCLAT was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%.

157. It is further to be noted, that after the resolution plan of Kalpraj was approved by NCLT on 28.11.2019, Kalpraj had begun implementing the resolution plan. NCLAT had heard the appeals on 27.2.2020 and reserved the same for orders. It is not in dispute, that there was no stay granted by NCLAT, while reserving the matters for orders. After a gap of five months and eight days, NCLAT passed the final order on 5.8.2020. It could thus be seen, that for a long period, there was no restraint on implementation of the resolution plan of Kalpraj, which was duly approved by NCLT. It is the case of Kalpraj, RP, CoC and Deutsche Bank, that during the said period, various steps have been taken by Kalpraj by spending a huge amount for implementation of the plan. No doubt, this is sought to be disputed by KIAL. However, we do not find it necessary to go into that aspect of the matter in light of our conclusion, that NCLAT acted in excess of jurisdiction in interfering with the conscious commercial decision of Coc.

158. It is also pointed out, that in pursuance of the order dated 5.8.2020 passed by NCLAT, CoC has approved the resolution plan of KIAL on 13.8.2020. However, since we have already held, that the decision of NCLAT dated 5.8.2020 does not stand the scrutiny of law, it must follow, that the subsequent approval of the resolution plan of KIAL by CoC becomes non-est in law. For, it was only to abide by the directions of NCLAT. We are of the view that nothing would turn on it. The decision of CoC dated 13/14.2.2019 is a decision, which has been taken in exercise of its 'commercial wisdom'. As such, we hold, that the decision taken by CoC dated 13/14.2.2019, which is taken in accordance with its 'commercial wisdom' and which is only approved by NCLT, will prevail. Further, NCLAT was not justified in interfering with the stated decision taken by CoC.

159. In that view of the matter, we find, that Civil Appeal Nos.2943-2944 of 2020 filed by Kalpraj: Civil Appeal Nos.2949-2950 of 2020 filed by RP and Civil Appeal Nos.3138-3139 of 2020 filed by Deutsche Bank deserve to be allowed. It is ordered accordingly. The order passed by NCLAT dated 5.8.2020 is quashed and set aside and the orders passed by NCLT dated 28.11.2019 are restored and maintained”

APPRAISAL:

19. On a careful consideration of the submissions advanced on either side, this ‘Tribunal’ after going through the impugned order dated 24.02.2021 in IA No. 1094/2020 in CP (IB) No. 7/HDB/2019 inter alia to the effect that ... “we are of the view that there is a need for further pursuance of the resolution plan and with the very hope that the Corporate Debtor may fetch better value that what has been offered by the Resolution Applicants. In this case, even though the Resolution Plan M/s. KALS Group has been approved with 100% voting in favour of it by the Committee of Creditor in view of the very meagre difference between both the resolution plant, we are of the view that there is scope for further improvement of the Resolution amount to be payable by the Resolution Applicants’ and the direction issued to the Committee of Creditors to take fresh bids from the existing two Resolution Applicants to submit a Resolution Plan for its consideration within a period one month” are clearly unsustainable in view of the recent judgment of the Hon’ble Supreme Court in Kalpraj Dharamshi & Anr. V. Kotak Investment Advisors Ltd. & Anr dated 10.03.2021, which squarely applies to the facts of the present case. Viewed in that perspective, this Tribunal interferes with the impugned order dated 24.02.2021 passed by the Adjudication Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) In I A No. 1094/2020 in CP No (IB) No. 153/7/HDB/2019 and sets aside the same, in furtherance of substantial cause of justice. Consequently, the Appeal succeeds.

CONCLUSION:

In fine, the instant Comp App (AT) (CH) (INS) No. 23/2021 is allowed. No costs. The 'Adjudicating Authority' (National Company Law Tribunal, Bench-I, Hyderabad) is to approve the 'Resolution Plan' approved by the "Committee of Creditors' with 100% voting in favour of 'KALS Group'. I A No. 53/2021 (stay application) I A No. 54/2021 (for urgent hearing) are closed.

(Justice Venugopal M.)
Member(Judicial)

19th April, 2021

(V. P. Singh)
Member(Technical)

KM

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**Company Appeal (AT) (Insolvency) No. 172 of 2020**

[Arising out of Order dated 13 December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in Company Petition (IB) No. 252/NCLT/AHM/2019]

IN THE MATTER OF:

**Tek Travels Private Limited
Plot No. 183, Udyog Vihar Phase 1
Sector 20, Gurugram – 122008
Haryana**

...Appellant**Versus**

**Altius Travels Private Limited
1, Mudra Apartments
Near Stadium Petrol Pump, Navrangpura
Ahmedabad – 380014, Gujarat**

...Respondent**Present:**

For Appellant : Mr Rachit Kohli, Advocate

**For Respondent : Mr Malak Bhatt, Mr Rajat Bector & Mr Shivankar,
Advocates.**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This appeal emanates from the Order dated 13 December 2019 passed by the Adjudicating Authority in Company Petition (IB) No. 252/NCLT/AHM/2019, whereby the Application filed by Appellant under Section 9 of the I&B Code 2016 was rejected on the ground of maintainability for want of proper Authorisation, which is of the year 2013 when I&B Code 2016 was not in existence. The parties are represented by their original status in the Company Petition for the sake of convenience.

Appellants Contention;

2. The Applicant/Appellant filed an Application under Section 9 of the I&B Code 2016 (in short 'code'), which was dismissed on the ground that the Authorisation annexed with the application was of the year 2013, i.e. before the Insolvency & Bankruptcy Code, 2016 came into force.

3. It is contended that there is no specific provision neither in the Code nor under the Rules and Regulations made thereunder, which mandates authorisation post-enactment of the Insolvency & Bankruptcy Code 2016. Instead of deciding the Section 9 Application on merit, the Learned Adjudicating Authority rejected the application as not maintainable for want of proper Authorisation, which happens to be of 2013 when the I&B Code was not in existence.

4. The Appellant contends that the Adjudicating Authority should have granted the liberty to rectify the defects if any. However, the Learned Adjudicating Authority failed to provide an opportunity of being heard to the Appellant either on account of principles of natural justice or account of non-compliance of the proviso to Section 9(5) (ii)(a) of the Code.

Respondent's Contention

5. The Respondent/Corporate Debtor contends that the Application filed by the Operational Creditor under Section 9 of the Code is based on a Board Resolution passed by the Appellant Company in the year 2013, which limits itself to recovery proceedings on behalf of the Appellant. The Authorisation

contemplated under the Insolvency and Bankruptcy Code could only be of the post-enactment of the Code.

6. It is stated that the Appellant was not at all entitled to be granted seven days under the proviso to Section 9(5) (ii) (a) of the Code to rectify the defects in the Application concerning the issue of Authorisation. The proper and specific Authorisation forms the basis of entire proceedings under the Code. Since Authorisation goes to the root of the matter, the same cannot be treated as a 'curable defect' that can be rectified within seven days. An incomplete or improper authorisation vitiates the entire proceedings at the inception itself. The period provided under the proviso to Section 9(5) (ii) for curing a defect is only concerning the sufficient details of the Company and about mistakes in the Application filed under Section 9 of the Code. An invalid authorisation vitiates the very foundation of Application and cannot be cured in Section 9 (5) (ii) of the Code.

Discussions and Finding:

7. The present Appeal arises out of the Order dated 13 December 2019 against the dismissal of the Application filed under Section 9 of the Code. The Authorisation annexed with the application was of the year 2013, i.e. much before the Insolvency and Bankruptcy Code 2016.

8. The Adjudicating Authority has rejected the Application only on maintainability ground without deciding the Application on merit. The question that arises for our consideration is as follows;

1. Whether Authorisation for filing a petition under Section 9 of the Code before the commencement of the Code can be treated as a valid authorisation?

2. Whether Adjudicating Authority instead of dismissal of the Petition should have given the opportunity to rectify the defects as per proviso to Section 9 (5) (ii)(a) of the Code?

Issue No's 1 and 2;

9. The Adjudicating Authority has dismissed the Petition because the Authorisation to file the Petition is of 2013, whereas the Insolvency and Bankruptcy Code came into existence in 2016. The Appellant contends that the Adjudicating Authority should have granted the liberty to the Appellant to rectify the defects if any. It is also contended that neither the Code nor any Rules and Regulations made thereunder mandates the authorisation post the enactment of the I&B Code.

10. The Learned Counsel for the Appellant has placed reliance on the decision of this Tribunal in the case of Ramesh Murji Patel v Aramex India Pvt Ltd. Company Appeal (AT) (Ins)No 1447 of 2019 wherein it is held that; ***'authorisation letter, even if, issued prior to the enactment of I&B Code can be looked into for the purpose of entertaining an Application under Section 7 or 9 of the Code'.***

11. The Learned Counsel for the Appellant also placed reliance on the judgement of this Tribunal in case of Palogics Infrastructure Private Limited v ICICI Bank, Company Appeal (AT) (Ins) No 30 of 2017 wherein it is held that;

"36. In so far as, the present case is concerned, the 'Financial Creditor'-Bank has pleaded that by Board's Resolutions dated 30th May, 2002 and 30th October, 2009, the Bank authorised its officers to do needful in the legal proceedings by and against the Bank. If general Authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor' / 'Operational Creditor'! 'Corporate Applicant', mere use of word 'Power of. Attorney' while delegating such power will not take away the Authority of such officer and 'for all purposes it is to be treated as an 'authorisation' by the 'Financial Creditor'! 'Operational Creditor'! 'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I&B Code'.

37. As per Entry 5 & 6 (Part I) of Form No. 1, 'Authorized Representative' is required to write his name and address and position in relation to the 'Financial Creditor'/Bank. If there is any defect, in such case, an application under section 7 cannot be rejected and the applicant is to be granted seven days' time to produce the Board Resolution and remove the defect.'

(verbatim copy)

12. It is pertinent to mention that this Appellate Tribunal has already taken the view that if the Adjudicating Authority finds any defect in the Application filed under Section 7 or 9 of the Code, then instead of rejecting the Application, the Applicant should be granted seven days' time to remove the defect.

13. Further, in case of Rajendra Narottamdas Sheth v Smt Heenaben Rajendra Kumar Sheth Company Appeal (AT) (insolvency) No 621 of 2020 this Appellate Tribunal has held that;

"we do not find any substance in the argument that as such general power of attorney was executed before coming into force of insolvency and bankruptcy code hence, the said chief manager did not have Authority. In our view, it is general power of attorney and not confined to any particular Act or Acts. We do not find any defect on this account with the application under section 7 of IBC."

(Emphasis supplied, verbatim copy)

14. In the case of Ramesh Murji Patel(supra) and Rajendra Narottamdas Sheth (supra), this Appellate Tribunal has already taken the view that if Authorisation is prior to the enactment of the Code, then it can not be treated as a defect in the Application and 'authorisation letter, even if, issued prior to the enactment of I&B Code can be looked into for the purpose of entertaining an Application under Section 7 or 9 of the Code.

15. In order to ascertain the mandatory conditions of Section 9(5)(ii)(a) of the Code, it is necessary to go through the statutory provision of the Code.

Section 9 of the Insolvency and Bankruptcy Code 2016 is reads as under;

“9. Application for initiation of corporate insolvency resolution process by Operational Creditor.—

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of Section 8, **the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.**

(2) **The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.**

(5) **The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—**

- (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—
 - (a) the application made under sub-section (2) is complete;
 - (b) there is no 3[payment] of the unpaid operational debt;
 - (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
 - (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and
 - (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.
- (ii) **reject the application and communicate such decision to the operational creditor and the corporate debtor, if—**

(a) the application made under sub-section (2) is incomplete;

(b) there has been 4[payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

16. Thus it is clear that if Applications filed under Section 9 of the Code is found incomplete, then Adjudicating Authority in compliance of proviso to Section 9 (5) (ii)(a) of the Code is obliged to issue notice on the applicant and provide an opportunity to rectify that the defects within seven days, failing which petition can be rejected.

17. In the instant case, the Adjudicating Authority noticed that the Authorisation was much before the commencement of the I&B Code, and only on this basis, the Application under Section 9 of the Code was rejected without allowing the applicant to rectify the mistakes, is against the statutory provision of the Code.

18. The Learned Counsel for the Respondent argues that the Appellant was not at all entitled opportunity to rectify the defect in compliance with Section

9(5)(ii)(a) of the Code because Authorisation forms the foundation of entire proceedings under the I&B Code. Since the authorisation issue goes to the root of the matter, the same cannot be treated as a "curable defect". An incomplete or improper authorisation vitiates the entire proceedings at inception, rendering legal action devoid of Authority.

19. The Learned Counsel for the Respondent further placed reliance on the direction of Hon'ble Delhi High Court in the case of Nibro Ltd v National Insurance Company, AIR 1991 Delhi 25 wherein it is held that the question of the Authority to institute a suit or a claim on behalf of the Company cannot be termed as a technical matter.

20. It is pertinent to mention that the Insolvency and Bankruptcy Code is a self-contained Code. It has made provision for providing an opportunity to rectify the defects of application, and in any position, it can not be denied.

21. In case of *Surendra Trading Co. v. Juggilal Kamlapat Jute Mills Co. Ltd.*, (2017) 16 SCC 143 : 2017 SCC OnLine SC 1208 : (2018) 2 SCC (Civ) 730 at page 149 Hon'ble Supreme Court of India has held that the time provided for rectifying the defection application under Section 9 (5) of the Code is directory in nature and in the given circumstances the tribunal can provide time more than 7 days to rectify the defect. Hon'ble Supreme Court has held that;

"5. One of the conditions, with which we are concerned, is that application under sub-section (2) has to be complete in all respects. In other words, the adjudicating Authority has to satisfy that it is not defective. In case the adjudicating Authority, after the scrutiny of the application, finds that there

are certain defects therein and it is not complete as per the provisions of sub-section (2), in that eventuality, the proviso to sub-section (5) mandates that before rejecting the application, the adjudicating Authority has to give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice.

6. *Sub-section (5) of Section 9, thus, stipulates two time periods. Insofar as the adjudicating Authority is concerned, it has to take a decision to either admit or reject the application within the period of fourteen days. Insofar as defects in the application are concerned, the adjudicating Authority has to give a notice to the applicant to rectify the defects before rejecting the application on that ground and seven days' period is given to the applicant to remove the defects.*

22. *Let us examine the question from another lens. The moot question would be as to whether such a rejection would be treated as rejecting the application on merits thereby debarring the applicant from filing fresh application or it is to be treated as an administrative order since the rejection was because of the reason that defects were not removed and application was not examined on merits. In the former case it would be travesty of justice that even if the case of the applicant on merits is very strong, the applicant is shown the door without adjudication of his application on merits. If the latter alternative is accepted, then rejection of the application in the first instance is not going to serve any purpose as the applicant would be permitted to file fresh application, complete in all aspects, which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.*

23.2. *When the application is listed before the adjudicating Authority, it has to take a decision to either admit or reject the*

application. For this purpose, fourteen days' time is granted to the adjudicating Authority. If the application is rejected, the matter is given a quietus at that level itself. However, if it is admitted, we enter the third stage.

24. *Further, we are of the view that the judgments cited by NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating Authority has to pass the Order is not mandatory but directory in nature would equally apply while interpreting the proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.*

25. *Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.*

28. *In fine, these appeals are allowed and that part of the impugned judgment of NCLAT which holds **the proviso to sub-section (5) of Section 7 or the proviso to sub-section (5) of Section 9 or the proviso to sub-section (4) of Section 10 to remove the defects within seven days as mandatory and on failure, applications to be rejected, is set aside.** No costs."*

(Verbatim copy,

22. In the instant case, we find that the Adjudicating Authority has dismissed the Petition for want of proper Authorisation. However, the Adjudicating Authority has not considered providing an opportunity to the

Applicant to rectify the defects. In contrast, proviso to Section 9(5)(ii)(a) of the Code makes it mandatory to provide an opportunity to the applicant for rectifying the defects of the application. In the circumstances stated above, we are of the considered opinion that the Adjudicating Authority has erred in dismissing the Application for want of Authorisation, without even providing an opportunity to rectify the defects in compliance with Section 9(5)(ii)(a) of the Code.

23. In fine, the Appeal is allowed, and impugned Order is set aside. No Order as to Costs. The Adjudicating Authority is directed to decide the application afresh at the earliest in the light of the directions above.

[Justice Anant Bijay Singh]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
19th APRIL, 2021

pks

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**Company Appeal (AT) (Ins.) No. 1020 of 2020****IN THE MATTER OF:****M/s. Solutions Business Centre LLP**D-2, Lower Ground Floor, Southern Park,
Saket, New Delhi- 110017**...Appellant.****Versus****1. Renu Kumar**Ro A-10/7. Vasant Kunj,
New Delhi – 110057**2. Rajit Kumar**Ro A-10/7. Vasant Kunj,
New Delhi – 110057**3. Mr. Abhishek Dutta,****RP for M/s. Solutions Business Center Pvt. Ltd.**IBBI/IPA-002/IP-N00617/2018-19/11856
Aureus Law Partners, S-151, 1st Floor,
Greater Kailash – II, New Delhi - 110048**...Respondents.****Present:****For Appellant: Mr. Raja Chatterjee and Mr. Piyush Sachdev,
Advocates.****For Respondent: Ms. Haripriya Padmanabha, Ms. Pooja Dhar,
Advocates for R-1&R-2.****Mr. Abhishek Dutta, Syli Petiwale and
Astha Srivastava, Advocates for R-3 (RP)****ORDER
(Virtual Mode)****16.04.2021**

Heard.

2. This Appeal has been filed against Order passed in I.A. No. 3218, 1248/2020 in IB-475/ND/2018. The Order reads as under:

“IA No. 1248/2020:

Learned Counsel Mr. Chatterjee states that reply has been filed on 26.10.2020 which has not come on Court file. RoC was directed to file Reply with respect to the issue raised in this application on 18th September, 2019. Though, this application was filed later but the issue was already agitated. ROC has filed reply with respect to the issue in this application in CA No. 297/2019 which will be referred. The same reply has also been filed by ROC in CA No. 196/2019. At this stage, when hearing argument, it is required and hence, the following person are directed to remain present on the next date of hearing being Ex.-Directors Mr. Ajay Vij, Ms. Parul Khurana and Partners of LLP Mr. Naveen Gambhir, Neeraj Gambhir, Mr. Pankaj Gambhir, Ms. Shaloo Gambhir, Ms. Geeta Gambhir, Ms. Lovleen Gambhir.

IA No. 3218/2020:

Application filed by Liquidator.

List both the applications on 24.11.2020.”

(Emphasis Supplied)

3. It is stated that Corporate Insolvency Resolution Process was initiated against the Company. It is stated, there is dispute with regard to the Company being converted into LLP and in that context, the Adjudicating Authority had called the persons. The I.A. concerned is yet to be decided.

4. If in a matter, the Adjudicating Authority finds it necessary to hear the particular side or particular person in order to give them opportunity to respond, it is more appropriate to give option to the concerned parties/person to appear in person or through Advocate.

5. It is stated that the disputes with regard to how LLP was formed, are still being considered by the Adjudicating Authority.

6. It not being Criminal Case or Contempt Proceeding we would only modify the portion of Impugned Order emphasized above with underline in Impugned Order to say that “the following persons (who are part of the Appellant) to remain present in person or through Advocate on the next date of hearing”

With such modification, we dispose of the Appeal.

[Justice A.I.S. Cheema]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

Basant B./md.

National Company Law Appellate Tribunal, New Delhi**Principal Bench****COMPANY APPEAL (AT) (Insolvency) No. 178 of 2021**

(Arising out of Order dated 09th December, 2020 passed by National Company Law Tribunal, Guwahati Bench, Guwahati in IA No. 45 of 2020 in Company Petition (IB) No.- 04/GB/2020

IN THE MATTER OF:

Ms. AKJ Fincap Limited
Through its Authorised Representative
Registered Office at: C – 8,
Greater Kailash – I,
New Delhi – 110048
Email: aftabktr@gmail.com

.....Appellant**Versus**

Bank of India
Registered Head Office at:
C – 5, G Block, Bandra Kurla Complex
Bandra East, Mumbai – 400051

Also at:
Guwahati SME Branch, Killa Building
1st Floor, Christian Basti, GS Road, Guwahati
PO Dispur and District Kamrup (M)
Pin – 781005
Email: subratadutta.guwahati@gmail.com

...Respondent**WITH****COMPANY APPEAL (AT) (Insolvency) No. 179 of 2021**

(Arising out of Order dated 18th March, 2020 passed by National Company Law Tribunal, Guwahati Bench, Guwahati in Company Petition (IB) No.- 04/GB/2020

IN THE MATTER OF:

Ms. AKJ Fincap Limited
Through its Authorised Representative
Registered Office at: C – 8,
Greater Kailash – I,
New Delhi – 110048
Email: aftabktr@gmail.com

.....Appellant**Versus**

Bank of India
Registered Head Office at:
C – 5, G Block, Bandra Kurla Complex
Bandra East, Mumbai – 400051

Also at:
Guwahati SME Branch, Killa Building
1st Floor, Christian Basti, GS Road, Guwahati
PO Dispur and District Kamrup (M)
Pin – 781005
Email: subratadutta.guwahati@gmail.com

...Respondent

Appellant: Mr. Abhinav Hansaria, Advocate.
Respondent: Mr. Nipun Dave and Mr. Aditya Kumar, Advocate.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 09.12.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Guwahati Bench, Guwahati) in I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020 filed by *M/s. AKJ Fincap Limited*, Appellant herein, *inter alia* seeking setting aside of the ex-parte Order dated 18.03.2020, preferred these Appeals. The Adjudicating Authority dismissed the IA on the ground that the Tribunal *has no power to review or set aside its own Company Petition Admission Order as per settled proposition of law.*

2. An Application was filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in Short the ‘**IBC**’) filed by M/s. Bank of India (the ‘Financial Creditor’) and an ex-parte Order was passed by the Adjudicating Authority on 18.03.2020 observing that Notice was served on the ‘Corporate Debtor’, but there was no appearance.

Company Appeal (AT) (Insolvency) No. 178 of 2021

With

Company Appeal (AT) (Insolvency) No. 179 of 2021

Submissions on behalf of the Learned Counsel for the Appellant:

3. Learned Counsel submitted that the Section 7 Application came up for hearing for the very first time on 10.02.2020 and Notice was issued to the Appellant returnable on 25.02.2020; on 25.02.2020 the Adjudicating Authority observed that the Notice sent to the Appellant, had returned with an endorsement 'insufficient address' and directed issuance of fresh Notice and also directed the Respondent to serve copy of the same upon the Appellant and the matter was posted for Hearing on 18.03.2020. While so, on 15.03.2020, the Adjudicating Authority had directed that apart from matters which require urgent Hearing, it would not take up matters listed from 16.03.2020 to 27.03.2020 on account of the Covid situation; the Appellant became aware of the pendency of the Section 7 Application only when the Counsel came across the same on the website; the Appellant was proceeded ex-parte on 18.03.2020 solely on the basis of the submissions of the Respondent that the Notice has been served upon them; aggrieved by that Order the Appellant filed I.A. No. 45 of 2020 seeking a direction to set aside the ex-parte Order, which was taken up for Hearing on 07.10.2020 and a Notice was issued to the Respondent to file their Reply; on 11.11.2020 the matter was listed again for hearing on 25.11.2020 and the I.A. was dismissed without considering the provisions under Rule 49(2) of the NCLT Rules, 2016.

4. Learned Counsel for the Appellant strenuously argued that the Adjudicating Authority has the power to set aside this ex-parte Order, but

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has erroneously dismissed the I.A. on the ground that the Order dated 18.03.2020 dealt with '*Admission of the Application*' filed under Section 7.

Submissions on behalf of the Learned Counsel for the Respondent:

5. Learned Counsel appearing for the Respondent contended that service was effected twice by e-mail; that the address mentioned in Company Master Data is C – 8, Greater Kailash – 1, New Delhi, South Delhi – 110048 IN, is the same address mentioned in the Memo of Parties provided in this Appeal; that the 'Corporate Debtor' was dodging receipt of Notice; that the Appellant had never disclosed as to when, according to them service was actually effected upon them, which itself demonstrates that they are deliberately avoiding service; that though the Appellant was set ex-parte on 18.03.2020, they are not precluded from arguing the matter and filing brief Written Submissions in support of their arguments and that the Appellant was aware of the fact that Section 7 Application was listed on 18.03.2020 but did not chose to appear and therefore the Learned Adjudicating Authority has rightly passed the ex-parte Order.

Assessment:

6. The Learned Counsel for the Appellant drew our attention to the Notice dated 15.03.2020 whereby the Learned Adjudicating Authority had noted that the matters listed from 16.03.2020 to 27.03.2020 would be adjourned except for those which required urgent Hearing on a request made by the concerned parties.

7. Annexure-3 is the postal receipt and postal track report filed as proof of service on the 'Corporate Debtor' in compliance with the Order dated

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10.02.2020, passed by the Learned Adjudicating Authority. A perusal of this Annexure shows that the Notice sent on 21.02.2020 to the registered address was not delivered on account of 'insufficient address'. On 25.02.2020 fresh Notice was ordered to be issued on furnishing correct address of the Appellant and the matter was posted to 18.03.2020. The Order dated 18.03.2020 is reproduced as hereunder;

"Mr. S. Dutta, advocate appearing for the FC is present and filed service affidavit stating that the service of notice on the CD is affected through speed post and also through email dated 28.02.2020. Service is held sufficient. None appeared for the CD. Cd is set ex-parte.

2. Call on for hearing on 31.03.2020."

8. While dismissing the I.A. preferred by the Appellant herein seeking to set aside the ex-parte Order 18.03.2020, the Learned Adjudicating Authority has observed as follows;

"11. We have heard both the sides and perused the records. The respondent herein i.e. the learned Counsel for the FC has informed that they had also sent the copy of the petition to the respondent (petitioner here) through email. Further, in the Reply Affidavit on behalf of the FC/respondent to this application, it is stated that the notice has been duly served upon the applicant herein at the correct and recorded address of the applicant that had been reflected in the Master Data of the applicant Company procured from the Ministry of Corporate Affairs which has been annexed as Annexure – IAB.1 at page 283 of the Section 7 petition. Hence, the contention of the applicant that notice was not served upon the applicant is correct.

*12. After perusal of the records, finding that there was no response at all from the side of the present applicant even after service of notice at the address recorded in the applicant Company Master Data, this Tribunal admitted the main **Company Petition being***

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CP (IB) NO.04/GB/2020 by passing an ex-parte Order on 18.03.2020.

13. It is pertinent to mention here that the CD has conveniently omitted to deal with the receipt of the notice sent by the FC to the email of the CD to suit their convenience. As per law laid down by the Hon'ble Supreme Court as well as by various High Courts, service of notice to email and/or whatsapp is considered as valid mode of service and, therefore, there is no force in the contentions raised by the applicant/CD and the applicant/CD has not approached this Tribunal with clean hands.

14. This Tribunal, being a Quasi-Judicial Authority, has no power to review or set aside its own Company Petition Admission Order as per settled proposition of Law. Hence, the prayer made in this IA to set aside the Order of Admission of the Application filed under Section 7 of the IBC by this Bench on 18.03.2020, is not legally sustainable and accordingly stands rejected."

(Emphasis Supplied)

9. Learned Adjudicating Authority has dismissed the I.A. on the ground that they do not have powers to review or set aside the Order of Admission under Section 7. At this juncture, we find it relevant to reproduce Rule 49(2) of the NCLT Rules, 2016;

"49. Ex-parte Hearing and disposal.-

(1)

(2) Where a petition or an application has been heard ex-parte against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an order setting aside the ex-parte hearing as against him upon such terms as it thinks fit."

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Company Appeal (AT) (Insolvency) No. 179 of 2021

10. From the aforementioned Order dated 18.03.2020 reproduced in Para 7, it is evident that no Order of Admission has been passed and it was only an Order setting the Appellant herein ex-parte.

11. Having regard to the fact that 18.03.2020 falls during the Covid-19 period and the restrictions imposed by the Government read together with the Notice issued by the Learned Adjudicating Authority on 15.03.2020 that matters posted during the period 16.03.2020 to 27.03.2020 would be adjourned, except for urgent matters, keeping in view Principles of Natural Justice, we are of the considered opinion that an opportunity may be given to the Appellant herein to file his Reply and take part in the proceedings. Further, it is an admitted fact that the Appellant before the Adjudicating Authority is a guarantor of Agnipa Energo Private Limited whose Petition is already pending before the Adjudicating Authority. Therefore, the Order setting the Appellant herein ex-parte is set aside. Though we are of the considered view that the Adjudicating Authority had the power to set aside an ex-parte Order provided, it is satisfied that there was sufficient cause with respect to service of Notice, as provided in Rule 49(2) of the NCLT Rules, 2016, it is noted that the Appellant herein is silent about the service of Notice which was affected upon them by e-mail. Hence, we find it a fit case to impose costs of Rs. 25,000/- on the Appellant to be paid to the Respondent before the next date of Hearing.

12. In the result, this Appeal is allowed and the Order of the Adjudicating Authority is set aside. Both parties are directed to appear before the Learned Adjudicating Authority on 26th April, 2021 and the Appellant shall pay to the

Company Appeal (AT) (Insolvency) No. 178 of 2021

With

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Respondent the costs on or before 26th April, 2021. Keeping in view the timelines provided for in the Code, Learned Adjudicating Authority shall dispose of the Application as expeditiously as practicable.

13. *Company Appeal (AT) (Insolvency) No. 179 of 2021* has been filed against the Impugned Order dated 18.03.2020 passed by the Adjudicating Authority in CP (IB) No. 04/GB/2020 with a delay of 334 days. For reasons cited in I.A. No. 412 of 2021, the Application seeking condonation of delay is allowed. As *Company Appeal (AT) (Insolvency) No. 178 of 2021* is allowed and the Order of the Learned Adjudicating Authority in I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020 is set aside, this Appeal is disposed of as infructuous.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
16th April, 2021

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Company Appeal (AT) (Insolvency) No. 178 of 2021
With
Company Appeal (AT) (Insolvency) No. 179 of 2021

National Company Law Appellate Tribunal, New Delhi**Principal Bench****COMPANY APPEAL (AT) (Insolvency) No. 178 of 2021**

(Arising out of Order dated 09th December, 2020 passed by National Company Law Tribunal, Guwahati Bench, Guwahati in IA No. 45 of 2020 in Company Petition (IB) No.- 04/GB/2020

IN THE MATTER OF:

Ms. AKJ Fincap Limited
Through its Authorised Representative
Registered Office at: C – 8,
Greater Kailash – I,
New Delhi – 110048
Email: aftabktr@gmail.com

.....Appellant**Versus**

Bank of India
Registered Head Office at:
C – 5, G Block, Bandra Kurla Complex
Bandra East, Mumbai – 400051

Also at:
Guwahati SME Branch, Killa Building
1st Floor, Christian Basti, GS Road, Guwahati
PO Dispur and District Kamrup (M)
Pin – 781005
Email: subratadutta.guwahati@gmail.com

...Respondent**WITH****COMPANY APPEAL (AT) (Insolvency) No. 179 of 2021**

(Arising out of Order dated 18th March, 2020 passed by National Company Law Tribunal, Guwahati Bench, Guwahati in Company Petition (IB) No.- 04/GB/2020

IN THE MATTER OF:

Ms. AKJ Fincap Limited
Through its Authorised Representative
Registered Office at: C – 8,
Greater Kailash – I,
New Delhi – 110048
Email: aftabktr@gmail.com

.....Appellant**Versus**

Bank of India
Registered Head Office at:
C – 5, G Block, Bandra Kurla Complex
Bandra East, Mumbai – 400051

Also at:
Guwahati SME Branch, Killa Building
1st Floor, Christian Basti, GS Road, Guwahati
PO Dispur and District Kamrup (M)
Pin – 781005
Email: subratadutta.guwahati@gmail.com

...Respondent

Appellant: Mr. Abhinav Hansaria, Advocate.
Respondent: Mr. Nipun Dave and Mr. Aditya Kumar, Advocate.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 09.12.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Guwahati Bench, Guwahati) in I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020 filed by *M/s. AKJ Fincap Limited*, Appellant herein, *inter alia* seeking setting aside of the ex-parte Order dated 18.03.2020, preferred these Appeals. The Adjudicating Authority dismissed the IA on the ground that the Tribunal *has no power to review or set aside its own Company Petition Admission Order as per settled proposition of law.*

2. An Application was filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in Short the ‘**IBC**’) filed by M/s. Bank of India (the ‘Financial Creditor’) and an ex-parte Order was passed by the Adjudicating Authority on 18.03.2020 observing that Notice was served on the ‘Corporate Debtor’, but there was no appearance.

Company Appeal (AT) (Insolvency) No. 178 of 2021

With

Company Appeal (AT) (Insolvency) No. 179 of 2021

Submissions on behalf of the Learned Counsel for the Appellant:

3. Learned Counsel submitted that the Section 7 Application came up for hearing for the very first time on 10.02.2020 and Notice was issued to the Appellant returnable on 25.02.2020; on 25.02.2020 the Adjudicating Authority observed that the Notice sent to the Appellant, had returned with an endorsement 'insufficient address' and directed issuance of fresh Notice and also directed the Respondent to serve copy of the same upon the Appellant and the matter was posted for Hearing on 18.03.2020. While so, on 15.03.2020, the Adjudicating Authority had directed that apart from matters which require urgent Hearing, it would not take up matters listed from 16.03.2020 to 27.03.2020 on account of the Covid situation; the Appellant became aware of the pendency of the Section 7 Application only when the Counsel came across the same on the website; the Appellant was proceeded ex-parte on 18.03.2020 solely on the basis of the submissions of the Respondent that the Notice has been served upon them; aggrieved by that Order the Appellant filed I.A. No. 45 of 2020 seeking a direction to set aside the ex-parte Order, which was taken up for Hearing on 07.10.2020 and a Notice was issued to the Respondent to file their Reply; on 11.11.2020 the matter was listed again for hearing on 25.11.2020 and the I.A. was dismissed without considering the provisions under Rule 49(2) of the NCLT Rules, 2016.

4. Learned Counsel for the Appellant strenuously argued that the Adjudicating Authority has the power to set aside this ex-parte Order, but

Company Appeal (AT) (Insolvency) No. 178 of 2021

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has erroneously dismissed the I.A. on the ground that the Order dated 18.03.2020 dealt with 'Admission of the Application' filed under Section 7.

Submissions on behalf of the Learned Counsel for the Respondent:

5. Learned Counsel appearing for the Respondent contended that service was effected twice by e-mail; that the address mentioned in Company Master Data is C – 8, Greater Kailash – 1, New Delhi, South Delhi – 110048 IN, is the same address mentioned in the Memo of Parties provided in this Appeal; that the 'Corporate Debtor' was dodging receipt of Notice; that the Appellant had never disclosed as to when, according to them service was actually effected upon them, which itself demonstrates that they are deliberately avoiding service; that though the Appellant was set ex-parte on 18.03.2020, they are not precluded from arguing the matter and filing brief Written Submissions in support of their arguments and that the Appellant was aware of the fact that Section 7 Application was listed on 18.03.2020 but did not chose to appear and therefore the Learned Adjudicating Authority has rightly passed the ex-parte Order.

Assessment:

6. The Learned Counsel for the Appellant drew our attention to the Notice dated 15.03.2020 whereby the Learned Adjudicating Authority had noted that the matters listed from 16.03.2020 to 27.03.2020 would be adjourned except for those which required urgent Hearing on a request made by the concerned parties.

7. Annexure-3 is the postal receipt and postal track report filed as proof of service on the 'Corporate Debtor' in compliance with the Order dated

10.02.2020, passed by the Learned Adjudicating Authority. A perusal of this Annexure shows that the Notice sent on 21.02.2020 to the registered address was not delivered on account of 'insufficient address'. On 25.02.2020 fresh Notice was ordered to be issued on furnishing correct address of the Appellant and the matter was posted to 18.03.2020. The Order dated 18.03.2020 is reproduced as hereunder;

"Mr. S. Dutta, advocate appearing for the FC is present and filed service affidavit stating that the service of notice on the CD is affected through speed post and also through email dated 28.02.2020. Service is held sufficient. None appeared for the CD. Cd is set ex-parte.

2. Call on for hearing on 31.03.2020."

8. While dismissing the I.A. preferred by the Appellant herein seeking to set aside the ex-parte Order 18.03.2020, the Learned Adjudicating Authority has observed as follows;

"11. We have heard both the sides and perused the records. The respondent herein i.e. the learned Counsel for the FC has informed that they had also sent the copy of the petition to the respondent (petitioner here) through email. Further, in the Reply Affidavit on behalf of the FC/respondent to this application, it is stated that the notice has been duly served upon the applicant herein at the correct and recorded address of the applicant that had been reflected in the Master Data of the applicant Company procured from the Ministry of Corporate Affairs which has been annexed as Annexure – IAB.1 at page 283 of the Section 7 petition. Hence, the contention of the applicant that notice was not served upon the applicant is correct.

*12. After perusal of the records, finding that there was no response at all from the side of the present applicant even after service of notice at the address recorded in the applicant Company Master Data, this Tribunal admitted the main **Company Petition being***

Company Appeal (AT) (Insolvency) No. 178 of 2021

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CP (IB) NO.04/GB/2020 by passing an ex-parte Order on 18.03.2020.

13. It is pertinent to mention here that the CD has conveniently omitted to deal with the receipt of the notice sent by the FC to the email of the CD to suit their convenience. As per law laid down by the Hon'ble Supreme Court as well as by various High Courts, service of notice to email and/or whatsapp is considered as valid mode of service and, therefore, there is no force in the contentions raised by the applicant/CD and the applicant/CD has not approached this Tribunal with clean hands.

14. This Tribunal, being a Quasi-Judicial Authority, has no power to review or set aside its own Company Petition Admission Order as per settled proposition of Law. Hence, the prayer made in this IA to set aside the Order of Admission of the Application filed under Section 7 of the IBC by this Bench on 18.03.2020, is not legally sustainable and accordingly stands rejected."

(Emphasis Supplied)

9. Learned Adjudicating Authority has dismissed the I.A. on the ground that they do not have powers to review or set aside the Order of Admission under Section 7. At this juncture, we find it relevant to reproduce Rule 49(2) of the NCLT Rules, 2016;

"49. Ex-parte Hearing and disposal.-

(1)

(2) Where a petition or an application has been heard ex-parte against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an order setting aside the ex-parte hearing as against him upon such terms as it thinks fit."

10. From the aforementioned Order dated 18.03.2020 reproduced in Para 7, it is evident that no Order of Admission has been passed and it was only an Order setting the Appellant herein ex-parte.

11. Having regard to the fact that 18.03.2020 falls during the Covid-19 period and the restrictions imposed by the Government read together with the Notice issued by the Learned Adjudicating Authority on 15.03.2020 that matters posted during the period 16.03.2020 to 27.03.2020 would be adjourned, except for urgent matters, keeping in view Principles of Natural Justice, we are of the considered opinion that an opportunity may be given to the Appellant herein to file his Reply and take part in the proceedings. Further, it is an admitted fact that the Appellant before the Adjudicating Authority is a guarantor of Agnipa Energo Private Limited whose Petition is already pending before the Adjudicating Authority. Therefore, the Order setting the Appellant herein ex-parte is set aside. Though we are of the considered view that the Adjudicating Authority had the power to set aside an ex-parte Order provided, it is satisfied that there was sufficient cause with respect to service of Notice, as provided in Rule 49(2) of the NCLT Rules, 2016, it is noted that the Appellant herein is silent about the service of Notice which was affected upon them by e-mail. Hence, we find it a fit case to impose costs of Rs. 25,000/- on the Appellant to be paid to the Respondent before the next date of Hearing.

12. In the result, this Appeal is allowed and the Order of the Adjudicating Authority is set aside. Both parties are directed to appear before the Learned Adjudicating Authority on 26th April, 2021 and the Appellant shall pay to the

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With

Company Appeal (AT) (Insolvency) No. 179 of 2021

Respondent the costs on or before 26th April, 2021. Keeping in view the timelines provided for in the Code, Learned Adjudicating Authority shall dispose of the Application as expeditiously as practicable.

13. *Company Appeal (AT) (Insolvency) No. 179 of 2021* has been filed against the Impugned Order dated 18.03.2020 passed by the Adjudicating Authority in CP (IB) No. 04/GB/2020 with a delay of 334 days. For reasons cited in I.A. No. 412 of 2021, the Application seeking condonation of delay is allowed. As *Company Appeal (AT) (Insolvency) No. 178 of 2021* is allowed and the Order of the Learned Adjudicating Authority in I.A. No. 45 of 2020 in CP (IB) No. 04/GB/2020 is set aside, this Appeal is disposed of as infructuous.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
16th April, 2021

ha

Company Appeal (AT) (Insolvency) No. 178 of 2021
With
Company Appeal (AT) (Insolvency) No. 179 of 2021

National Company Law Appellate Tribunal**New Delhi****Company Appeal (AT) (Ins) No.583 of 2020**

[Arising out of Impugned Order dated 19.03.2020 passed by the Adjudicating Authority/National Company Law Tribunal, Ahmadabad Bench in I.A. No. 593/2019 in Company Petition (IB) No. 172/AHM/2018]

IN THE MATTER OF:

**Office of the Asst. State Tax Commissioner
State Tax Department, Government of Maharashtra**

Through

Sales Tax Officer,
Cabinet No. 370, 3rd Floor,
Goods and Service Tax Bhavan,
Airport Road, Yerwada,
Pune-6

.... Appellant

Versus

1. **Shri Parthiv Parikh
Resolution Professional,
M/s. Jaihind Projects Ltd.
9, Vinati Apartments
Panchwati Second Lane,
Ambawadi, Ahmedabad-380006. Respondent No.1**
2. **SKE Projects Private Limited,
B-403, Ankit Residency,
Opp. Sarkar School, New CG Road,
Chandkheda, Ahmedabad-380015. Respondent No.2**
3. **Jaihind Projects Limited,
3rd Floor, Venus Altanits,
Nr. Reliance Petrol Pump,
Nr. Prahladnagar Garden,
Ahmedabad-380015. Respondent No.3**
4. **Parixit Irrigation Limited,
Survey No. 214/1-214/2,
Virpura Bus Stop, P.O. Iyava**

**Taluka: Sanand,
Ahmedabad-382170.**

...Respondent No. 4

Judgment
(Date: 26.3.2021)

{Per: Dr.Alok Srivastava, Member (T)}

1. This appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called IBC) by the Appellant, who is aggrieved by the order of National Company Law Tribunal, Ahmedabad Bench, the Adjudicating Authority in IA 572/2019 in C.P. (IB) No. 172/AHM/2018.

2. The fact of the case as presented and argued by both the parties is that the Corporate Debtor(Respondent No.3) is a company registered with the Maharashtra SalesTax Department having TIN 27490008360V. In the course of its business, the Corporate Debtor defaulted in payment of State Tax and thereby created a liability of Rs.5,62,29,528/- (Five Crores Sixty Two Lakhs Twenty Nine Thousand and Five Hundred and Twenty Eight only) in accordance with the extant Maharashtra Value Added Tax Act, 2002 provisions which was due and payable to the Appellant. On an application filed by an Operational Creditor M/s. SKE Projects Private Limited (Respondent No.2) under Section 9 of IBC against

the Corporate Debtor Jaihind Projects Ltd. (Respondent No. 3) Case No.CP(IB) No. 172/AHM/2018 was taken up for consideration by the Adjudicating Authority. This application was allowed as a result of which Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor and Premnarayan Ramanand Tripathi was appointed as Interim Resolution Professional. In pursuant to the CIRP, the Interim Resolution Professional issued a public notice on 2.11.2018. Subsequently, Parthiv Parikh was appointed as Resolution Professional on 23.01.2019 replacing earlier Interim Resolution Professional.

3. The Appellant has claimed that he was unaware of these proceedings and the insolvency proceedings against Respondent No.3 came to his knowledge only when the Joint Commissioner of Sales Tax forwarded the order of the Adjudicating Authority dated 30.09.2019 to him. In order to secure the interest of the State Tax Department, the Appellant filed a claim in Form B for Rs.5,62,29,528/- on 20.12.2019. This claim was rejected by the Resolution Professional vide email dated 31.12.2019 on the ground of delay in filing the claim and as the Resolution Plan had been submitted for approval to the Adjudicating Authority after approval by the Committee of Creditors.

4. As the Appellant was not satisfied with the rejection of his claim, he sent an email on 10.02.2020 to erstwhile IRP Premanarayan Tripathi for condoning delay in filing claim and accepting his claim as Operational Creditor. As he was no longer handling the CIRP, the erstwhile IRP forwarded this request to the Resolution Professional for necessary action. The Resolution Professional through an email dated 18.2.2020 rejected the claim. Thereafter, the Appellant filed appeal under Section 60(5) of the IBC (IA No.154 of 2020) on 21.2.2020 before the Adjudicating Authority. As the Adjudicating Authority was already considering the Resolution Plan submitted by the RP earlier, the IA No. 154 of 2020 was dismissed vide order dated 17.3.2020. Subsequently, through order dated 19.03.2020 in IA No.593 of 2019 in CP(IB) 172 of 2018 the Adjudicating Authority approved the Resolution Plan submitted by Respondent No. 4.

5. During the course of hearing, this Tribunal, vide order dated 25.8.2020, permitted the Appellant to implead the Successful Resolution Applicant as a necessary party in the appeal. Accordingly, M/s Parixit Irrigation Ltd., the Successful Resolution Applicant, was joined as Respondent no. 4 in the appeal.

6. Reply to the Appeal Memo were filed by Respondent No. 1 and Respondent No. 4 and written submissions were filed by the Appellant, Respondent Nos. 1 and 4. Learned Counsels of the parties were provided ample opportunity for advancing their oral arguments.

7. The Ld. Counsel for Appellant has argued that the initiation of CIRP and the public notice inviting claims were not in his knowledge. He got to know of the CIRP through a communication of his superior officer, the Joint Commissioner of State Tax. On receiving such information, although at a late stage, the Appellant filed the claim before the Resolution Professional in Form 'B' relating to the operational debt for an amount of Rs.5,62,29,528/- on 20.12.2019 which was rejected by the Resolution Professional on the ground of delay in filing the claim as also for reason that the Resolution Plan has already been submitted to the Adjudicating Authority for approval. He has contended that it is a statutory claim and should have been considered by the RP so that government would not have been denied its just claim. He has adverted to Regulation 12(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016 to claim that it is permissible for the creditor to file its claim belatedly. Further he has contended that since the Resolution Plan was under the consideration of the Adjudicating Authority when the claim was filed, it would have been fair to consider it. Moreover, the statutory dues of state tax was included in the books of account of the Corporate Debtor which should have been considered for inclusion in the Resolution Plan even if no formal claim was filed. He cited the order of the NCLT, Delhi Principal Bench dated 05.12.2018 in the case State Bank of India v ARGL Ltd. (CA No. 1220(PB)/2018 in I.A. No. (IB)531(PB)/2017) in support of his arguments. He has also claimed that the Adjudicating Authority made a unilateral change in the proposed Resolution Plan as approved by the COC by directing other financial creditors to contribute amounts on pro rata basis to the Axis Bank. In support he has cited the law as expounded by the Hon'ble Apex Court in the two cases viz. **Committee of Creditors of Essar Steel v. Satish Kumar Gupta 2019 (16) SCC 319** and **K. Sashidhar v. Indian Overseas Bank and Ors. 2019 SCCOnLine SC 257.**

8. In reply, the Ld. Counsel of the Respondent No. 1 has opposed the acceptance of Appellant's claim at such a late stage

pleading that it would completely upset the progress of the CIRP which was nearing completion when the said claim was preferred. According to him the CIRP, as stipulated in IBC, is a time-bound, result-oriented process which should be taken to its logical conclusion. If claims continue to be accepted even after the period specified in the Public Notice issued in accordance with the provisions of the IBC, and the extended time period of ninety days provided in Regulation 12(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has lapsed, there would be no end to such claims being preferred. This could become a never ending process and the CIRP will not reach its logical conclusion. This is certainly not the expressed objective of the IBC. He has also stated that the Resolution Plan as approved by the COC was under the active consideration of the Adjudicating Authority for approval when the claim of Appellant was submitted to the RP and RP and the Adjudicating Authority have acted in consonance with provisions of law by rejecting the said claim.

9. The Ld. Counsel of the Successful Resolution Applicant (Respondent No. 4) has supported the arguments made by the Ld. Counsel for Respondent No. 1. He has, in addition, pointed out

that in the present case the CIRP had already taken more time than the time period of 330 days that is envisaged in IBC and the Respondent No. 4 will have to bear irreplaceable loss in case there are further delays. He has prayed that he be allowed to start working in accordance with the approved Resolution Plan to save the Corporate Debtor from further deterioration, which is presently a going concern.

10. The IBC stipulates that CIRP is a time-bound process meant for resolution of the Corporate Debtor, which is in the throes of insolvency. If no successful Resolution Applicant can be found during the CIRP period, the Corporate Debtor, which is otherwise operational as a going concern, will go into liquidation. This would mean corporate death of the Corporate Debtor, a situation which must be avoided. Sincere efforts for successful resolution of the Corporate Debtor should, therefore, be undertaken to revive and strengthen the financial and economic condition of the Corporate Debtor, so that it continues to function as a useful economic entity in the economy saving precious human and monetary capital.

11. Section 29 of the IBC provides for preparation of information memorandum as may be specified by the Insolvency and

Bankruptcy Board of India for formulating a resolution plan.
Section 29(1) of the IBC is reproduced hereunder:-

“29. Preparation of Information Memorandum. -

xxxxxxx

(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The Resolution professional shall provide to the resolution applicant access to all the relevant information in physical and electronic form, provided such resolution applicant undertakes

–

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation. – For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which

shall include the financial position of the corporate debtor and any other matter of the corporate debtor as may be specified.”

12. Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 outlines the process for submission of the Information Memorandum and contents to be included therein to each member of the Committee of Creditors within two weeks of IRP’s appointment. It is to be noted that Regulation 36(2)(d) mentions that the Information Memorandum shall contain ‘*a list of creditors containing the name of creditors, the amounts claimed by them, the amounts of their claims admitted and the security interest, if any, in respect of such claims;*’ among other particulars.

13. Further, in the same Regulations, very clear timeline has been prescribed under Regulation 12(2) for submission of claim with proof by financial and corporate debtor, quite obviously to enable the potential resolution applicants to submit realistic and workable resolution plans after due diligence, and which can be taken up further for finalisation. The relevant regulation is reproduced hereunder:

“12. Submission of proof of claims. –

xxxxxx

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

Xxxxxx ”

The purpose of issuing public notice is to make all the interested parties/stakeholders aware of the initiation of the CIRP of the Corporate Debtor and the information memorandum which is issued subsequently, after the collection and collation of claims of the operational and financial creditors is to provide the Resolution Applicant all relevant information so that the applicant can make a legally and financially sound Resolution Plan for the Corporate Debtor as is required under Section 29 of the IBC. Such Resolution Plan has to be submitted to the Resolution Professional under Section 30 of IBC, which is considered by the Committee of Creditors for approval and the final approval of the Resolution Plan is provided by the Adjudicating Authority under Section 31 of the IBC. It is quite logical to say that these actions have to be taken

with alacrity so that the successful Resolution Applicant, if any, can take the reins of the management of the Corporate Debtor in good time for its proper management and consequent revival.

14. In the present case the Operational Creditor - State Tax Department, Government of Maharashtra submitted its claim on 20.12.2019, more than about one year and one month after the invitation of claims through public notice on 2.11.2018. The extended time period for submission of claims with proof is ninety days from the date of initiation of the insolvency resolution process. This period also expired on 31.01.2019. It is undisputed that the RP had filed the Resolution Plan as approved by the Committee of Creditors to the Adjudicating Authority, much before the said claim was preferred before the RP, and the Adjudicating Authority was actively considering the Resolution Plan for necessary approval. After rejection of claim of Appellant by RP, its appeal was filed before the Adjudicating Authority on 21.02.2020 under Section 60(5) of the IBC.

15. Thus, it is clear that much water had flown under the bridge from the date of issue of public notice (on 02.11.2018) and the extended time period of ninety days as provided under Regulation

12(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Resolution Plan as approved by the COC was submitted to the Adjudicating Authority for necessary approval under Section 30. Any interruption in the CIR Process at this stage by including a delayed claim/s would have meant setting the clock back and sending matter back to COC & RP. It cannot be ruled out that if the claim of the Operational Creditor State Tax Department, Government of Maharashtra was accepted at such a late stage, there could have been other such applicants too, who would have demanded accommodation on the same ground allowing late submission of their claims once this window would have opened. It would be trite to emphasise the fact that this would have meant complete disruption of the CIRP and the timelines stipulated therein. Delay would defeat Resolution as this would have resulted in the CIRP and approval of successful Resolution Plan to continue for an indefinite period of time, which is certainly not the intention of IBC. A real hazard in such an event could be liquidation, and corporate death, of an otherwise functional and corporate debtor, with which Resolution Plan approved is set to come out of the Red

16. The order of NCLT, New Delhi Principal Bench cited by the Ld. Counsel of the Appellant in *State Bank of India v ARGL Ltd.* does not hold relevance in the present case as it relates to withdrawal of a successful (and approved resolution plan) on very different grounds and that too, upon recommendation/approval of the COC.

17. We have perused ratio of judgments in the two cases viz. **Committee of Creditors of Essar Steel v. Satish Kumar Gupta** and **K. Sashidhar v. Indian Overseas Bank and Ors.** (*supra*) cited by the Ld. Counsel of Appellant. These relate to the role of resolution applicants, resolution professionals, the Committee of Creditors that are constituted under the IBC, and the jurisdiction of the National Company Law Tribunal and the National Company Law Appellate Tribunal qua resolution plans. These Judgments are not helpful in the facts of the matter.

18. The relevant portion of the judgment in **COC of Essar Steel case** is reproduced below:-

“99. So far as Civil Appeal No. 7266 of 2019 and Civil Appeal No. 7260 of 2019 are concerned, the resolution professional has rejected the claim of the Appellants on the ground of non-

availability of duly stamped agreements in support of their claim and the failure to furnish proof of making payment of requisite stamp duty as per the Indian Stamp Act despite repeated reminders having been sent by the resolution professional. The application filed by the Appellants before the NCLT came to be dismissed by an order dated 14.02.2019 on the ground of non-prosecution. The subsequent restoration application filed by the appellants then came to be rejected by the NCLT through judgment dated 08.03.2019 on two grounds: one, that the applications could not be entertained at such a belated stage; and two, that notwithstanding the aforementioned reason, the claim had no merit in view of the failure to produce duly stamped agreements. The impugned NCLAT judgment, at paragraphs 93 and 94, upheld the finding of the NCLT and the resolution professional. In view of these concurrent findings, the claim of the Appellants therefore requires no interference. Further, the submission of the Appellants that they have now paid the requisite stamp duty, after the impugned NCLAT judgment, would not assist the case of the Appellants at this belated stage. These appeals are therefore dismissed.”

The ratio in the **K. Sashidhar v. Indian Overseas Bank and Ors.** is also on the same lines. Quite clearly, the ratio in these judgments do not support the case of the Appellant. Moreover, the Appellant has not explicitly raised the issue of awarding a larger amount to Axis Bank in the Appeal and has raised it only at the stage of oral arguments. Appellant is not a party affected by the alleged change

directed by the Adjudicating Authority. This matter has been dealt by the Adjudicating Authority in the Impugned Order in accordance with the provisions of the statute. The Appellant can't be given relief on a matter that has not been prayed for in the appeal.

19. It is also worth noting that the successful Resolution Applicant had objected to the IA No. 154/2020 filed by the Operational Creditor during the course of its hearing by the Adjudicating Authority inter-alia pointing out that he had already submitted a big amount of the Earnest Money more than a year ago and that for one reason or the other, the Resolution Plan though filed on 24.9.2019 could not be approved by the adjudicating Authority due to filing of number of applications by the Resolution Professional as well as dissenting creditors.

20. In the light of the aforementioned discussion, we find that Adjudicating Authority has dealt with the issue of approval of the resolution plan submitted by the Resolution Professional and, inter alia, rejecting the claim of the Appellant in accordance with the requirements of the statute, and in keeping with the overall objective and scheme of the IBC. The order of the Adjudicating Authority provides sufficient and cogent reasons for dismissing IA

NO. 154/2020 filed by the Appellant under Section 60(5) on 21.02.2020. It has, thereafter, gone ahead with the approval of successful resolution Plan by passing order in IA No.593/2019 in CP(IB) (172)/2018 while considering all the legal provisions and facts of the case. We, therefore, find no ground and reason for interfering with the Impugned Order and consequently dismiss the appeal.

21. The appeal is thus dismissed with no order as to costs.

(Justice AIS Cheema)
Member (Judicial)

(Dr.Alok Srivastava)
Member(Technical)

New Delhi
_____March, 2020

REPORTABLEIN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTIONCIVIL APPEAL NO. 3395 OF 2020JAYPEE KENSINGTON BOULEVARD APARTMENTS
WELFARE ASSOCIATION & ORS. APPELLANT(S)

VERSUS

NBCC (INDIA) LTD. & ORS. RESPONDENT(S)

WITH

CIVIL APPEAL No.3396 of 2020, T.C (C) Nos. 234, 235, 236, 237, 238,
239, 240, 241, 242, 243 of 2020, Civil Appeal No. 1056 of 2021 @
SLP(C) No. 5144 of 2021@ Diary No. 18129 of 2020, Civil Appeal No.
1057 of 2021 @ SLP(C) No. 10543 of 2020 and Diary No. 20274 of
2020JUDGMENTDinesh Maheshwari, J.Introductory

Permission to file special leave petition(s) and leave granted in
respective Petition(s) for Special Leave to Appeal.

2. This batch of civil appeals, special appeals and transfer cases
essentially relate to the resolution plan¹ in the corporate insolvency

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DEEPAK SINGH
Date: 2024.03.24
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Reason:

resolution process² under the Insolvency and Bankruptcy Code, 2016³

1 Hereinafter, at some places, it has also been referred to as 'the plan'.

2 'CIRP' for short.

3 Hereinafter also referred to as 'the Code' or 'IBC'.

concerning the corporate debtor, Jaypee Infratech Limited⁴, whose activities do impact a large number of persons/entities, including the buyers of flats/apartments⁵ in its real estate development projects.

2.1. As shall be noticed hereafter, CIRP in relation to the corporate debtor JIL has been entangled in various disputes in the past and even when the resolution plan submitted by the resolution applicant, NBCC (India) Limited⁶ has been approved by the Committee of Creditors⁷ by a substantial majority of 97.36% of voting share of the financial creditors, several disputes/objections have come up from various stakeholders and role players, voicing the concerns of their own, like dissenting financial creditors, dissatisfied homebuyers, displeased land providing agency, disillusioned creditor of a wholly-owned subsidiary of the corporate debtor and disappointed minority shareholders. Apart from all these, the holding company of the corporate debtor, namely, Jaiprakash Associates Limited⁸ and its stakeholders have several questions over the resolution process in question and are particularly concerned with the sum of INR 750 crores, which was deposited by JAL pursuant to the orders passed by this Court in the first round of litigation.

3. Looking to a multiload of issues arising from variegated propositions/objections put forward by different parties, it appears appropriate to draw a brief outline and sketch of the matter at the outset.

4 Hereinafter also referred to as 'JIL'.

5 Hereinafter generally referred to as 'the homebuyers'.

6 Hereinafter also referred to as 'NBCC'.

7 'CoC' for short.

8 Hereinafter also referred to as 'JAL'.

Brief outline and sketch

4. The cases involved in this batch have got assimilated in this Court in the following circumstances:

4.1. The corporate insolvency resolution process in relation to the corporate debtor JIL got initiated on 09.08.2017 when the National Company Law Tribunal⁹, Allahabad Bench admitted the petition filed by one of the financial creditors, IDBI Bank Limited, under Section 7 of the Code. However, when the Interim Resolution Professional¹⁰ invited claims in this CIRP, the treatment of homebuyers became an issue contentious, because they were treated only as 'other creditors', not at par with financial and operational creditors.

4.2. The aforesaid position led to the proceedings in this Court, which were dealt with in a batch of petitions led by **Writ Petition (Civil) No. 744 of 2017: Chitra Sharma and Ors. v. Union of India and Ors.**¹¹ wherein, several orders were passed by this Court from time to time, *inter alia*, with directions to JAL, the holding company of JIL, for making deposits in the Court, particularly looking to the claim of refund being made by some of the homebuyers. While finally disposing of the matters on 09.08.2018, this Court took note of several factors, including the nature of projects, interests of a large number of homebuyers and unanimity amongst all the concerned that liquidation of the corporate debtor shall not be in the

9 Hereinafter also referred to as 'the Adjudicating Authority' or 'NCLT'. As shall be noticed, the matter before the Allahabad Bench was later on transferred to the New Delhi Bench of the Tribunal. These expressions 'the Tribunal' or 'NCLT' or 'the Adjudicating Authority' refer to the said transferee Bench too, as per the given context.

10 'IRP' for short.

11 Final judgment therein has since been reported as **(2018) 18 SCC 575**.

interest of any stakeholder. This Court also took note of the fact that even the statutorily extended period for concluding the CIRP was over but, there had been a relevant supervening event where, by way of an Amendment Ordinance that came into force on 06.06.2018, the doubts about the status of homebuyers were removed and they were expressly recognised as financial creditors. Having regard to the facts and circumstances, this Court issued a slew of directions for ensuring complete justice in the cause, while exercising its powers under Article 142 of the Constitution of India, by providing for further extended period for conclusion of CIRP; for constitution of CoC afresh; and permitting the IRP to invite fresh expressions of interest for the submission of resolution plans. This Court also provided that the amount of INR 750 crores, *‘which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon’* be transferred to NCLT, which would abide by the directions as may be issued by NCLT.

4.3. While the proceedings thus restored by this Court were pending, further question cropped up as to the manner of reckoning the voting percentage of homebuyers in CoC. Two members of NCLT differed in their opinion and the matter was referred to the third member. In the meantime, IDBI Bank sought exclusion, of the period of pendency of the application for such clarification as to the voting percentage, from the period of 270 days for completion of CIRP. While this application was pending, NCLT called upon the concerned parties to file reply on the

necessity to proceed further with the CIRP, for considering the resolution plan received from the bidder, subject to the outcome of the pending application. The orders passed by NCLT in relation to these aspects were challenged before the National Company Law Appellate Tribunal, New Delhi¹². The Appellate Authority, by its judgment dated 30.07.2019, provided for exclusion of 90 days for the purpose of counting the total period of 270 days and disposed of the appeals with some more observations. This gave rise to further appeals in this Court, led by **Civil Appeal No. 8437 of 2019 [@ D No. 27229 of 2019]: *Jaiprakash Associates Limited and Anr. v. IDBI Bank Ltd. and Anr.***¹³, which were decided on 06.11.2019. Therein, this Court found that delay in completion of CIRP was attributable to the process of law and neither the homebuyers nor any other financial creditor was to be blamed for pendency of the proceedings; and under the plenary powers, this Court passed yet further orders so as to ensure that an attempt was made for revival of the corporate debtor by submission of revised resolution plans.

4.4. Running parallel to the proceedings noticed hereinabove, there had been another set of proceedings involving two issues: one, relating to an application filed by IRP before the Adjudicating Authority seeking orders for avoidance of the certain transactions, whereby several parcels of land were put under mortgage with the lenders of JAL, the holding company of JIL; and second, involving the claim of two of the lender

12 Hereinafter also referred to as 'the Appellate Authority' or 'NCLAT'.

13 Final judgment therein has since been reported as **(2020) 3 SCC 328**.

banks of JAL to be included in the category of financial creditors of JIL. These two aspects eventually came up for adjudication of this Court in another batch of appeals led by **Civil Appeal Nos. 8512-8527 of 2019: *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited etc. etc.***, which were decided on 26.02.2020¹⁴. This Court held that six out of seven transactions in question were preferential within the meaning of Section 43 of the Code and the directions by NCLT for avoidance of such transactions were upheld. On the second issue, this Court held that the applicant banks were not the financial creditors of the corporate debtor JIL and the respective orders passed in that regard by NCLT were restored.

4.5. We shall be dilating on the relevant attributes of the aforesaid previous rounds of litigation at the appropriate stage and juncture hereafter. Suffice it to notice for the purpose of brief outline that the resolution plans submitted by two applicants were put to vote of the Committee of Creditors and finally, the resolution plan submitted by NBCC (India) Limited was approved by the CoC on 17.12.2019, by a vast majority of over 97% of voting share of the financial creditors. Thereafter, on 19.12.2019, the Interim Resolution Professional moved an application before the National Company Law Tribunal, Allahabad Bench, being C.A. No. 5 of 2020 in CP (IB) No. 77/ALD/2017, for submission and approval of the resolution plan in terms of Section 30(6) read with Sections 31 and

¹⁴ Final judgment therein has since been reported as ***Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd. and Ors.***: (2020) 8 SCC 401.

60(5) of the Code and Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016¹⁵. Later on, the proceedings pending before the Allahabad Bench of the National Company Law Tribunal were transferred to its Principal Bench at New Delhi wherein, several objections/suggestions/propositions were submitted by different stakeholders, going for or against the resolution plan or even off on a tangent.

4.6. By its order dated 03.03.2020, the Adjudicating Authority (NCLT), proceeded to approve the resolution plan with some modifications and certain directions while accepting some of the objections like those of the dissenting financial creditor bank and the land providing agency but while rejecting some other, including those of the holding company of JIL and while leaving a few propositions open for adjudication in the appropriate forum¹⁶.

4.7. The resolution applicant NBCC preferred an appeal against the aforesaid order dated 03.03.2020 before the National Company Law Appellate Tribunal, New Delhi, being Company Appeal (AT) (Insolvency) No. 465 of 2020 wherein the Appellate Authority, while issuing notice to the unrepresented parties, made an interim order dated 22.04.2020 that the approved resolution plan may be implemented subject to the outcome of appeal but at the same time, also provided that IRP may constitute an

¹⁵ Hereinafter also referred to as 'the CIRP Regulations'.

¹⁶ A few typographical errors in this order dated 03.03.2020 were corrected by NCLT by its order dated 17.03.2020.

‘Interim Monitoring Committee’ comprising of the successful resolution applicant (NBCC) and three major institutional financial creditors, who were the members of CoC.

4.8. As against the aforesaid order dated 22.04.2020, six associations of homebuyers in the real estate development projects of the corporate debtor and a few individual homebuyers approached this Court seeking permission to maintain their appeals under Section 62 of the Code. Notices were issued on the prayers so made, returnable on 06.08.2020.

4.9. On 06.08.2020, it was urged before us that several appeals against the said order dated 03.03.2020 were pending before NCLAT; and the parties agreed that those appeals may be withdrawn to this Court and be heard alongwith the aforesaid appeals of the associations and homebuyers to avoid the likelihood of further delay in the matter. Acceding to the request, we had withdrawn the mentioned appeals for analogous hearing with the matters pending before us. By way of interim, while staying the operation of the impugned order dated 22.04.2020, we had provided that the IRP shall continue to manage the affairs of the subject company i.e., JIL. Accordingly, the appeals pending before the NCLAT, being Company Appeal (AT) (Insolvency) Nos. 486, 488, 475, 478, 480, 489, 506, 547, 544 and 630 of 2020 have been transferred to this Court and are registered as transferred cases. Further to this, three more matters have been filed directly in this Court, with the respective petitioners/appellants having different sets of grievances against the

NCLT's order dated 03.03.2020. A few impleadment/intervention applications have also been filed in these matters with the applicants seeking to project their own propositions/viewpoints and/or objections in relation to the resolution plan in question.

5. It is, therefore, apparent that the resolution plan, as approved by the CoC on 17.12.2019 and the order dated 03.03.2020, as passed by the Adjudicating Authority (NCLT) in approval of the resolution plan with certain directions and modifications, are the pivots of the present litigation and a subsidiary of these pivots is the interim order dated 22.04.2020, as passed by NCLAT in the appeal filed by the resolution applicant NBCC, providing for composition of an 'Interim Monitoring Committee' while implementing the resolution plan.

The parties and their respective roles and interests in the matter

6. For what has been noticed in the outline, and in view of the adjudication required of various issues raised and different reliefs claimed in these matters, with several parties carrying different roles and status, worthwhile it would be to narrate, in brief, the relevant particulars of the key parties involved, with their feasible classification in terms of their respective interests.¹⁷

6.1. The main parties before us in this batch, in terms of their respective stands, contentions and viewpoints vis-à-vis the aforementioned pivots could be broadly divided in two categories. One

¹⁷ This introduction of persons/entities is to broadly co-relate the parties with the points to be taken up for determination; and is not intended to be an exhaustive list of the parties involved.

category is of the parties who stand for the resolution plan, as approved by the CoC but who state grievance against a few parts of the aforesaid orders dated 03.03.2020 and 22.04.2020, insofar as providing for modification of the resolution plan and modified mechanism for its implementation. The other category is of the parties who carry grievances against the resolution plan for one or more of its prescriptions or omissions; and/or who are dissatisfied with the order dated 03.03.2020 insofar as their objections have either been rejected or not taken into account; and/or who are dissatisfied with the order dated 22.04.2020 for the reasons different than those of the parties of first part.

The parties standing for the resolution plan

7. The two entities who need not, as such, be aligned with any of the other contesting parties but for practical purposes, stand for the resolution plan as approved by CoC are: (i) the corporate debtor company in whose relation the resolution plan has been adopted and approved; and (ii) the Interim Resolution Professional. They may be introduced as under:

7.1. *Jaypee Infratech Limited (JIL):*

It is the corporate debtor company in whose relation CIRP has been taken up and the resolution plan has been made and approved. This company was essentially set up as a special purpose vehicle¹⁸ after its holding company Jaiprakash Associates Limited (JAL) was awarded the rights for construction of an Expressway from Noida to Agra; and a

18 'SPV' for short.

Concession Agreement¹⁹ was entered into with the Yamuna Expressway Industrial Development Authority²⁰. With setting up of this company JIL, apart from other projects, housing plans were envisaged for construction of real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur. A substantial mass of disputes in the present matters has its roots in the dealings of this company JIL with the real estate development projects as also in its dealings with the homebuyers and the lending institutions.

7.2. *The Interim Resolution Professional Anuj Jain (IRP):*

He is the Interim Resolution Professional in CIRP concerning JIL. He has taken steps and proceedings from time to time as envisaged by the Code, including dealing with the claims of a variety of creditors; making an application for avoidance of certain transactions as being preferential, which was finally dealt with and accepted by this Court in the aforementioned judgment dated 26.02.2020; presenting the resolution plans for voting by CoC; and submitting the approved resolution plan to the Adjudicating Authority. In relation to the order dated 03.03.2020 as passed by NCLT, the appeal filed by him before NCLAT, essentially questioning the jurisdiction of NCLT to modify the resolution plan and to change the mode of payment to the dissenting financial creditors, being Company Appeal (AT) (Insolvency) No. 486 of 2020, stands transferred to

19 'CA' for short.

20 'YEIDA' for short.

this Court and is registered as T.C. (C) No. 234 of 2020. He is respondent in almost all other cases.

8. The major set of parties who stand for the approved resolution plan and seek its implementation while stating objections/grievances against the modification parts of the order dated 22.04.2020 as passed by NCLAT and the order dated 03.03.2020 as passed by NCLT are the following:

8.1. *NBCC (India) Limited (NBCC):*

NBCC (India) Limited is the resolution applicant and had prepared the resolution plan for JIL, which was approved by a majority of 97.36% of the voting share of the CoC. NBCC seeks setting aside of those parts of the order dated 03.03.2020 where the NCLT has modified some of the terms of resolution plan and/or has issued certain directions. The appeal filed by this company, being Company Appeal (AT) (Insolvency) No. 475 of 2020, stands transferred to this Court and is registered as T.C. (C) No. 236 of 2020. This company is also the respondent in various other appeals/petitions and has comprehensively opposed the objections raised against the resolution plan.²¹

8.2. *IDBI Bank Limited:*

This bank is standing in the capacity of an institutional financial creditor of the corporate debtor JIL. The corporate insolvency resolution process in relation to the corporate debtor JIL, which has culminated in

²¹ This company has introduced itself in its resolution plan as “Navratna” status Central Public Sector Enterprise, under the aegis of Ministry of Housing and Urban Affairs, Government of India, having diversified its areas of operation in various segments including real estate.

the approval of the resolution plan submitted by NBCC, got initiated pursuant to an application moved by this bank under Section 7 of the Code before the NCLT. This bank leads a set of nine institutional financial creditors including itself, who have voted in favour of the resolution plan in question; and stands in support of the resolution plan while opposing the contentions urged on behalf of the parties on the other side.

8.3. *Jaypee Kensington Boulevard Apartments Welfare Association and 5 others:*

They are the associations of homebuyers who have invested in the housing projects floated by JIL. They are appellants in Civil Appeal No. 3395 of 2020²², questioning the order dated 22.04.2020 as passed by NCLAT and essentially submit that the resolution plan as approved by NCLT deserves to be implemented.

8.4. *Ishwar Jha and 6 others:*

They are individual homebuyers of the flats in the development projects initiated by JIL. They are appellants in Civil Appeal No. 3396 of 2020²³, questioning the order dated 22.04.2020 as passed by NCLAT and they also essentially submit that the resolution plan as approved by NCLT deserves to be implemented without further delay.

8.5. *Krishna Dev Mishra and 2 others:*

They are also individual homebuyers of the flats in the development projects initiated by JIL. They are applicants of I.A. No. 87967 of 2020 in Civil Appeal No. 3395 of 2020 and similarly submit that

22 @ Civil Appeal Diary No. 14741 of 2020.

23 @ Civil Appeal Diary No. 15061 of 2020.

the resolution plan as approved by NCLT deserves to be implemented without further delay.

8.6. *Major General Praveen Kumar and Colonel V.S. Gaur:*

They are the homebuyers who have moved applications for impleadment/intervention in Civil Appeal No. 3395 of 2020, being I.A. Nos. 73323 of 2020 and 73330 of 2020 respectively, essentially seeking directions to NBCC to complete the remaining works on priority basis in Tower Nos. 5 to 12 and 14 to 16 in Kensington Park – 1, Jaypee Greens, Noida so that the possession of flats could be handed over to the buyers.

The objectors

9. The persons/entities who carry grievance/s against the resolution plan for one reason or the other; and/or who are dissatisfied with the order passed by the NCLT and/or by the NCLAT, may be grouped with reference to the objections/propositions they stand for.

10. The first set of objectors consists of such persons/entities who otherwise belong to the class of 'homebuyers' but have their own grievances in relation to the resolution plan and the subsequent orders.

This set of parties could be introduced as follows:

10.1. *Wish Town Home Buyers Welfare Society:*

This is a society of homebuyers in the projects of JIL who seeks implementation of the projects but carries reservations on some of the terms of the resolution plan, where the requisite compensation in relation to the delayed implementation of the projects by JIL has not been

provided, particularly in terms of Section 18 of the Real Estate (Regulation and Development) Act, 2016²⁴. It has also been suggested that the plan of another resolution applicant Suraksha Realty was far better than that of NBCC. This society also has the grievance that NBCC has failed to specify in the resolution plan the treatment and utilisation of the sum of INR 750 crores received from JAL as also 758 acres of land that had come to JIL after the judgment of this Court dated 26.02.2020. This society had filed Company Appeal (AT) (Insolvency) No. 506 of 2020 before NCLAT against the said order dated 03.03.2020 that stands transferred to this Court and is registered as T.C. (C) No. 243 of 2020. This society has also moved an application, I.A. No. 72707 of 2020 in Civil Appeal No. 3395 of 2020 with the submissions against continuation of NBCC in the proposed 'Interim Monitoring Committee'.

10.2. *Jaypee Aman Owners Welfare Association:*

This is an association of homebuyers in one of the projects of JIL namely, Jaypee Greens Aman in Sector 151 Noida. This association maintains that in substance, 'Project Aman' stands completed; that Offer of Possession²⁵ has already been issued to the allottees of 22 Towers; that delayed penalty ought to be allowed in relation to Tower Nos. 23 and 24 for which, OOP has been issued by IRP; and that IRP ought to take steps for OOP for flats in Tower Nos. 25 and 27 for which, the application for Occupancy Certificate²⁶ has already been moved. This association is

24 Hereinafter also referred to as 'RERA'.

25 'OOP' for short.

26 'OC' for short.

aggrieved of the projected date/s of completion and proportional increase in delay, as provided in the resolution plan. As against the said order dated 03.03.2020, this association had filed Company Appeal (AT) (Insolvency) No. 480 of 2020 before NCLAT that stands transferred to this Court and is registered as T.C. (C) No. 240 of 2020.

10.3. *Ashish Mohan Gupta & Anr.:*

These are the homebuyers who seek to oppose the resolution plan while raising questions over the proceedings of the Committee of Creditors as also on various other grounds, which may be running common to the grounds urged by the homebuyers/associations who are objecting to the plan and its approval. They had filed Company Appeal (AT) (Insolvency) No. 489 of 2020 before NCLAT that stands transferred to this Court and is registered as T.C. (C) No. 242 of 2020.

10.4. *Jaypee Orchard Resident Welfare Society:*

This is another society of homebuyers in the projects of JIL who seeks implementation of the projects of JIL but has its own reservations on the terms of the resolution plan where the requisite compensation in relation to the delayed implementation of the projects by JIL has not been provided in terms of RERA. This society has not filed the appeal before NCLAT but in view of other appeals having been withdrawn to this Court, has preferred the petition for special leave to appeal, being SLP Diary No. 18129 of 2020 in this Court, seeking to challenge the said order dated 03.03.2020.

10.5. *Ishwar Kewalramani and 76 Others:*

These are the applicants of another impleadment application being I.A. No. 88795 of 2020 in Civil Appeal No. 3395 of 2020; they are homebuyers of the projects undertaken by JIL and are aggrieved by the order dated 03.03.2020 insofar as NCLT has failed to specify the use of 758 acres of unencumbered land now available with JIL; and another grievance is that NBCC has violated the statutory provisions by not providing compensation to the homebuyers due to delayed possession.

10.6. *Ashok Chandra:*

He is another homebuyer who has moved I.A. No. 84309 of 2020 in Civil Appeal No. 3395 of 2020 and seeks direction to determine adequate and fair amount of compensation to be paid to the homebuyers due to the unreasonable delay in completion. He has also suggested that different mechanism is required to be provided for dealing with the CIRP in question, in displacement of the resolution plan of NBCC.

11. Other objectors to the resolution plan and the order of NCLT dated 03.03.2020 could be broadly sub-divided into three: one being the holding company of the corporate debtor JIL and the persons/entities related with these companies; second being the dissenting institutional financial creditor of the corporate debtor JIL; and third being the other stakeholders.

12. In the first sub-sect of objectors, the main parties before us are as follows:

12.1. *Jaiprakash Associates Limited (JAL):*

It is the holding company of the corporate debtor JIL; it had approximately 71.64% equity shareholding in JIL as on 31.03.2017. This company had deposited the sum of INR 750 crores as per the orders passed by this Court in the case of **Chitra Sharma** (supra). Apart from a few other objections, this company JAL is seeking refund of INR 750 crores with accrued interest; and it is contended that the said amount is not the property of the corporate debtor JIL and it cannot be utilised for the CIRP of JIL. This holding company had filed Company Appeal (AT) (Insolvency) No. 478 of 2020 before NCLAT against the said order dated 03.03.2020 that stands transferred to this Court and is registered as T.C. (C) No. 238 of 2020.

12.2. *Pankaj Sharma and 3 others:*

They are homebuyers of the projects being developed by JAL and are similarly contending that the said sum of INR 750 crores with accrued interest cannot be utilised for the CIRP of the corporate debtor JIL. They too had filed an appeal before NCLAT against the said order dated 03.03.2020, being Company Appeal (AT) (Insolvency) No. 544 of 2020 that stands transferred to this Court and is registered as T.C. (C) No. 237 of 2020.

12.3. *Knights Court Social Welfare Association:*

This is an association representing the homebuyers in the 'Knights Court' project of JAL who are aggrieved by the fact that the project has

been left incomplete by JAL and who are equally aggrieved by the provision made in the resolution plan of JIL for utilisation of the said amount of INR 750 crores. This association has directly challenged the said order of NCLT dated 03.03.2020 in this Court by way of Special Leave Petition (Civil) No. 10543 of 2020.

12.4. *Manoj Gaur, suspended MD of corporate debtor JIL:*

He is the suspended Managing Director of the corporate debtor JIL and has also stated himself to be the Executive Chairman of JAL. He has been arrayed as third respondent in the appeal filed by IRP. It is also noticed that he, along with the holding company JAL, filed an impleadment application (I.A. No. 1508 of 2020) in the appeal filed by NBCC that was allowed by NCLAT on 15.07.2020 and that is how he became the seventh respondent in the appeal of NBCC. According to his submissions, the IRP failed to ensure that the resolution plan did not contravene the law for the time being in force; and that approval by CoC leaves much to be desired. Several of the stipulations and prescriptions in the resolution plan of NBCC are put to question by him.

13. The second sub-sect of objectors to the resolution plan consists of the institutional financial creditor of the corporate debtor JIL, being *ICICI Bank Limited*.

13.1. The directions issued by NCLT in modification of the resolution plan in regard to the claim of this bank for payment, in its capacity as the dissenting financial creditor of JIL, is one of the major grounds of

challenge by the persons/entities standing in favour of the resolution plan in question. This bank has also objected to the clauses in the resolution plan in regard to the treatment of the said sum of INR 750 crores. In its another capacity as the lender of JAL and having mortgage over the land of JIL in security of such lending to JAL, this bank has levied another challenge to the resolution plan in regard to the release of its security interest. This bank had challenged the said order dated 03.03.2020 before NCLAT in Company Appeal (AT) (Insolvency) Diary No. 21936 of 2020 and has moved Transfer Petition (C) Diary No. 20274 of 2020 in this Court, seeking transfer of its appeal before NCLAT for analogous hearing with the present batch of matters.

14. The third sub-sect of the objectors to the resolution plan comprises of different entities/persons, mostly carrying their own claims/grievances. They are as follows:

14.1. *Yamuna Expressway Industrial Development Authority:*

This Authority, constituted under Section 3 of the Uttar Pradesh Industrial Area Development Act, 1976²⁷ was initially called Taj Expressway Industrial Development Authority²⁸; subsequently it was renamed as Yamuna Expressway Industrial Development Authority²⁹ by a notification dated 11.07.2018. It had been the land provider for execution of various projects by JAL/JIL under the Concession Agreement. The provisions in the resolution plan for dealing with the available parcels of

27 Hereinafter also referred to as the 'U.P. Act of 1976'.

28 'TEA' for short.

29 'YEIDA' for short.

land and for meeting with the contingent liability (as regards payment of additional compensation towards acquisition of land) are the main areas of concern of this Authority, who had filed its objections to the resolution plan. The directions issued in modification of the resolution plan in regard to YEIDA is also one of the major grounds of challenge by the persons/entities standing in favour of the resolution plan.

14.2. *YES Bank Limited:*

This bank is the financial creditor of a wholly-owned subsidiary of JIL, being Jaypee Healthcare Limited³⁰. This bank asserts that the assets of JHL, said to be mortgaged with it, are not within the purview of CIRP of JIL to be disposed by NBCC; and it seeks modifications in the resolution plan accordingly. This bank filed an appeal before NCLAT against the said order dated 03.03.2020, being Company Appeal (AT) (Insolvency) No. 488 of 2020 that stands transferred to this Court and is registered as T.C. (C) No. 235 of 2020.

14.3. *Rajesh Gupta and 2 others:*

These three persons, said to have entered into respective agreements with the corporate debtor, carry their own grievance against the prescription in the resolution plan where the resolution applicant has reserved its right to cancel such agreements/sub-lease deeds. They seek direction for entering into sale deed/s of plot/s in Jaypee Greens Wish Town or for refund. They had also filed an appeal before NCLAT against the said order dated 03.03.2020, being Company Appeal (AT)

³⁰ 'JHL' for short.

(Insolvency) No. 547 of 2020 that stands transferred to this Court and is registered as T.C. (C) No. 241 of 2020.

14.4. *Raman Prakash Mangala and 29 others:*

They are minority shareholders of JIL and their assertion is that the resolution plan approved by CoC ought to consider the interests of minority shareholders by giving fair market value of the equity shares held by them. Their appeal against the order dated 03.03.2020 before NCLAT, being Company Appeal (AT) (Insolvency) No. 630 of 2020, also stands transferred to this Court and is registered as T.C. (C) No. 239 of 2020.

14.5. *Gyanendra Kumar Raveendra:*

He is also a minority shareholder of JIL and has moved an application for impleadment in Civil Appeal No. 3395 of 2020, being I.A. No. 89429 of 2020. He is similarly aggrieved by the action of NBCC to extinguish the right of the minority shareholders without giving them a 'fair value' of their shares.

Points for determination

15. Having drawn a brief sketch and outline of the matter and having introduced the principal parties to this litigation with their respective interests, we may now indicate the major points, which arise for determination in view of diverse propositions advanced before us, coupled with the stipulations in the resolution plan in question and the modifications ordered by NCLT and NCLAT by way of the orders impugned. The principal points calling for determination in this batch are:

A. What is the extent of, and limitations over, the powers and jurisdiction of the Adjudicating Authority while dealing with the resolution plan approved by the Committee of Creditors?

B. As to whether approval of the resolution plan of NBCC is vitiated because of simultaneous voting over two resolution plans in the Committee of Creditors?

C. (i) As to whether the Adjudicating Authority has erred in not approving the stipulations in the resolution plan for meeting with the contingent liability of additional amount of land acquisition compensation; and has also erred in modifying these stipulations?

(ii) As to whether the Adjudicating Authority has erred in not approving the mechanism provided in the resolution plan for transfer, of the concessionaire's rights and obligations under the Concession Agreement with YEIDA, to the SPVs proposed to be incorporated; and has also erred in modifying the relevant stipulations?

(iii) As to whether the Adjudicating Authority has erred in not approving the reliefs and concessions sought for in the resolution plan in relation to YEIDA?

D. As to whether the Adjudicating Authority has erred in not approving the treatment of dissenting financial creditor like ICICI Bank Limited in the resolution plan, as being not in

accord with Section 30(2)(b) of the Code read with Regulation 38(1)(b) of the CIRP Regulations; and has erred in modifying the terms of resolution plan and in directing payment to the dissenting financial creditor in monetary terms?

E. As to whether the Adjudicating Authority has erred in modifying the step provided in the resolution plan in regard to the fixed deposit holders and in directing the resolution applicant to make provision towards the dues of unclaimed fixed deposit holders also?

F. (i) As to whether the resolution plan unauthorisedly purports to deal with the assets of Jaypee Healthcare Limited?

(ii) As to whether the Adjudicating Authority has erred in assuming that YES Bank Limited had agreed for constitution of a committee to take forward the disinvestment process of Jaypee Healthcare Limited?

G. As to whether the stipulation in the resolution plan for cancellation of certain agreements/sub-leases is unfair and the Adjudicating Authority has erred in not modifying the same?

H. As to whether the minority shareholders are entitled to state their claims/objections despite having not approached

the Adjudicating Authority; and as to whether the resolution plan does not provide fair treatment to the minority shareholders?

I. (i) As to whether, after approval of the resolution plan of NBCC by the Committee of Creditors, where homebuyers as a class assented to the plan, any individual homebuyer or any association of homebuyers could maintain a challenge to the resolution plan and could be treated as a dissenting financial creditor or an aggrieved person?

(ii) As to whether the stipulations in the resolution plan stand in violation of the provisions of the Real Estate (Regulation and Development) Act, 2016?

(iii) As to whether the resolution plan is violative of the requirements of CIRP Regulations?

(iv) As to whether any housing project which has been completed or is nearing completion ought to be kept out of the purview of the resolution plan?

J. (i) As to whether the amount of INR 750 crores, which was deposited by JAL pursuant to the orders passed by this Court in the case of **Chitra Sharma**, and accrued interest thereupon, is the property of JAL and stipulation in the resolution plan concerning its usage by JIL or NBCC is impermissible?

(ii) As to whether any amount is receivable by JIL and/or its homebuyers from JAL; and the accounts between JAL and JIL need reconciliation?

K. (i) As to whether Clause 23 of Schedule 3 of the resolution plan providing for extinguishment of security interest of lenders of JAL could not have been approved by the Adjudicating Authority?

(ii) As to whether adequate provision is required to be made in the resolution plan as regards utilisation of the land bank of 758 acres, that has become available to JIL in terms of the judgment dated 26.02.2020 by this Court?

L. What should be the appropriate orders on the other issues raised by the resolution applicant seeking clarification/directions?

M. As to whether the Appellate Authority was justified in providing for an Interim Monitoring Committee for implementation of the resolution plan in question during the pendency of appeals?

N. What should be the final order and relief?

Relevant factual and background aspects

16. For determination of the points so arising, we need to examine the relevant provisions contained in IBC and CIRP Regulations and apply the same to the process related with consideration and approval of the

resolution plan in question; and to the terms, prescriptions and stipulations of the impugned resolution plan as also to the modifications, as ordered (or as declined) by the Adjudicating Authority (NCLT) in the impugned order dated 03.03.2020. However, in the given set of facts and circumstances, before examining the relevant provisions and before dilating on the relevant features of the resolution plan and the order impugned, it is expedient to take note of the crucial background aspects relating to the present CIRP and key attributes of the orders passed by this Court in previous rounds of litigation concerning this very CIRP.

17. For a clearer picture of the subject matter of this litigation, a few glimpses of the relevant history shall be apposite.

17.1. By way of a notification dated 24.04.2001, the Government of Uttar Pradesh, in exercise of its powers under Section 3 of the U.P. Act of 1976, proceeded to set up Taj Expressway Industrial Development Authority ('TEA') for anchoring development of Taj Expressway Project, being that of a six-lane 160 km long Super Expressway with service roads and associated facilities connecting Noida and Agra, passing through a so-called virgin area along the river Yamuna.

17.2. At the initial stages, the said Taj Expressway Industrial Development Authority invited bids for selecting the entity for execution of the project. In this process, ultimately, the company known as Jaiprakash Industries Limited came out as the successful bidder. This company,

Jaiprakash Industries Limited, is now named as Jaiprakash Associates Limited ('JAL').

17.3. After the said bidding process, a Concession Agreement dated 07.02.2003 was executed between the principal TEA and the successful bidder Jaiprakash Industries Limited, who came to be referred to as the "concessionaire". Various terms and stipulations of this Concession Agreement form the subject matter of one segment of dispute in the present litigation, as discussed at the relevant stages hereafter. At the present stage, worthwhile it is to notice that under this CA, the concessionaire was to be provided land for constructing Expressway and its allied facilities; and was also to be provided other land for development. In this regard, the concessionaire was given lease of Expressway land with a right to collect toll from the users of the road for 36 years; and the land adjacent to the road was provided to the concessionaire for commercial exploitation on a lease for 90 years. As regards premium for the land being so transferred, the stipulations in the CA had been to the effect that such premium shall be equivalent to acquisition cost plus a lease rent of INR 100 per hectare per year. In Clause 18.1 of CA, it was also agreed to between the parties that in case the concessionaire and TEA would consider it necessary to transfer the rights and obligations of concessionaire to a special purpose vehicle ('SPV'), the concessionaire would do so in a reasonable time for which, documents as may be required shall be executed amongst the

concessionaire, the TEA and the SPV. For accomplishment of the project, the Government of Uttar Pradesh proceeded to acquire land for laying of the Expressway; and also proceeded to acquire additional land along the road for development of the same for commercial, amusement, industrial, institutional and residential purposes.

17.4. Coming on the heels of this project and in terms of the said Clause 18.1 of CA, the corporate debtor Jaypee Infratech Limited ('JIL') was set up as a special purpose vehicle by the concessionaire and thereafter, the rights and obligations under CA were transferred to JIL by way of an assignment agreement dated 19.10.2007 and deed of agreement dated 27.11.2007. In this manner, the corporate debtor JIL came to be accepted as the concessionaire. Later on, by way of a notification dated 11.07.2008, Taj Expressway Industrial Development Authority was renamed as Yamuna Expressway Industrial Development Authority ('YEIDA'). The net result of the dealings aforesaid has been that the rights and obligations under the said Concession Agreement dated 07.02.2003 now relate to the corporate debtor JIL as the concessionaire and YEIDA as the land providing agency.

17.5. As noticed, the corporate debtor JIL was set up as the SPV by the original concessionaire JAL; and JAL had approximately 71.64% equity shareholding in JIL as on 31.03.2017. Admittedly, JAL had been the holding company of JIL. When JIL was set up as an SPV for the purpose of execution of the project/s under the said CA, finances were obtained

from a consortium of banks against the partial mortgage of land acquired and a pledge of 51% of the shareholding held by JAL. Accordingly, JIL took up those two projects; the Expressway was laid and JIL also started developing real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur.

17.6. However, JIL defaulted in several of its obligations, including those in completion of the real estate projects as proposed and in payment of dues of the lender financial institutions.

18. The default on the part of JIL in payment of its dues led the lender bank, IDBI Bank Limited, instituting a petition under Section 7 of the Code before the NCLT, for initiation of the corporate insolvency resolution process against JIL. The applicant bank alleged that JIL had committed a default in repayment of its dues to the tune of INR 526.11 crores. JIL filed its objections to the petition but later on, withdrew the objections and furnished its consent for resolution plan under the provisions of the Code.

18.1. In view of the above, on 09.08.2017, NCLT initiated the CIRP in respect of JIL. An order of moratorium was issued under Section 14 of the Code by which, the institution of suits and continuation of pending proceedings, including execution proceedings, were prohibited and an Interim Resolution Professional was appointed. On 14.08.2017, IRP, in pursuance of the order of NCLT, called for submissions of claims by financial creditors in Form-C, by operational creditors in Form-B, by the workmen and employees in Form-E and by other creditors in Form-F. On

16.08.2017, the Insolvency and Bankruptcy Board of India³¹ made an amendment to its Regulations whereby, Regulation 9(a) was inserted to include the claims by other creditors; and then, on 18.08.2017, the Board released a press note that the homebuyers could fill in Form-F, as they could not be treated at par with financial and operational creditors.

19. The aforesaid position led to several petitions in this Court, particularly by the aggrieved homebuyers. As noticed, those petitions were dealt with by this Court as a batch, led by the case of **Chitra Sharma** (supra). Several orders were passed by this Court in the said batch of petitions from time to time, *inter alia*, to the effect that IRP was permitted to take over the management of JIL and was directed to ensure that necessary provisions were made to protect the interests of homebuyers. Various orders were also made with directions to JAL, as holding company of JIL, for making deposits in the Court, particularly looking to the claim of refund being made by some of the homebuyers. While finally disposing of the matters, this Court took note of the interests of homebuyers as also the creditors of JAL and JIL; and also took note of the status of proceedings and the statutory provisions as then obtaining, including the fact that the statutory period of 180 days, and even the extended period of 90 days, for concluding the CIRP had come to an end but then, by way of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, which came into force on 06.06.2018, the doubts about the status of homebuyers were removed and they were expressly

³¹ Hereinafter also referred to as 'the Board'.

recognised as financial creditors of the corporate debtor. In the given set of facts and circumstances, this Court provided a reprieve to the CIRP in question while making further orders in the interests of homebuyers and other creditors.

19.1. The proceedings and the orders passed by this Court in the said case of **Chitra Sharma** are of material bearing in the present case and, therefore, may be usefully recounted in necessary details.

Orders and directions in the case of Chitra Sharma

20. As noticed, this Court was moved in the case of **Chitra Sharma** (supra) essentially for the reason that a large number of homebuyers, who had invested in the real estate projects proposed by JAL and JIL, were feeling distressed in the wake of the proposed CIRP concerning JIL and who were likely to be left in the lurch because, at the given stage, while IBC recognised three categories of stakeholders namely, (i) corporate debtors; (ii) financial creditors; and (iii) operational creditors but, the homebuyers, otherwise having a direct and substantial interest in CIRP with investment of lifetime, were being treated only as 'other creditors'. In the given scenario, on being moved, this Court issued notice on 04.09.2017 in the said batch of petitions; the proceedings before the NCLT at Allahabad were stayed until further orders; a copy of the proceedings was ordered to be served on the office of the learned Attorney General for India; and the applications for impleadment and intervention were allowed.

20.1. Thereafter, on 11.09.2017, while dealing with an application moved by IDBI Bank Limited for vacation of the ad-interim order dated 04.09.2017, several facets of the matter and ramifications of the stay order passed by this Court were projected with reference to the scheme of the provisions contained in the Code. On the other hand, it was argued on behalf of the homebuyers that they were of lower and middle income groups, who had invested their life savings with JIL and JAL and their interests were required to be protected. It was argued that if CIRP was restored, there should be a representative from the homebuyers or the Court may appoint someone on CoC to espouse the interests of the homebuyers.

20.1.1. Taking note of the submissions so made and in order to safeguard the interests of stakeholders, this Court modified the earlier order dated 04.09.2017 and issued material directions, *inter alia*, to the effect that: (i) IRP shall take over the management of JIL and formulate interim resolution plan with necessary provision to protect the interests of homebuyers; (ii) Mr. Shekhar Naphade, learned senior counsel along with Ms. Shubhangi Tuli, AOR shall participate in the meetings of CoC to espouse the cause of the homebuyers and to protect their interests; the Director or Managing Director of JIL or JAL on the date of institution of insolvency proceedings as also on the date of order, except the nominee Directors of lending institutions, shall not leave the country without prior permission of the Court; and all the suits and proceedings against JIL

shall remain stayed in terms of Section 14(1)(a) of the Code. In addition, this Court also directed JAL to deposit a sum of INR 2,000 crores and provided that if any assets or property of JAL had to be sold for the purpose, that should be done after obtaining prior approval of this Court. For its relevance, the aforesaid order dated 11.09.2017, carrying significant observations and material directions of this Court, which are of bearing on a substantial part of the present litigation, could be extracted, *in extenso*, as under: -

“All the applications for intervention/impleadment are allowed.

IA No. 87575 of 2017 in SLPs (C) Nos. 24001- 24002 of 2017 (D. Nos. 27277, 27579 and 27624 of 2017)

The present interlocutory application has been filed by the IDBI Bank Ltd. in the special leave petitions which have been registered as SLPs (C) Nos. 24001 and 24002 of 2017.

This is an application for vacating/modification of the order dated 4-9-2017. On that day, this Court while issuing notice, had passed the following order:

“2. In the meantime the impugned order(s) passed by the National Company Law Tribunal, Allahabad shall remain stayed until further orders. A copy of the special leave petition be served on the office of learned Attorney General for India. All applications for impleadment/intervention stand allowed.”

Mr K.K. Venugopal, learned Attorney General for India appearing for Respondents 1 and 2 submitted that the order passed by this Court on 4-9-2017 needs to be vacated or modified because the consequence of the stay would be that the Management of Respondent 3, Jaypee Infratech Ltd. would stand restored. This was not a consequence intended by this Court. It is urged by him that if the erstwhile Management of the said company continues, it will affect the rights of the creditors and the consumers as well.

In the course of the hearing, we have been informed that after the order of stay was passed by this Court, the Interim Resolution Professional (IRP) has handed over records to Respondent 3, Jaypee Infratech Ltd. (“JIL”). It is submitted by Mr K.K. Venugopal, learned Attorney General that some time should be granted to the

IRP to formulate at least a preliminary scheme so that the interest of all stakeholders is protected. He has also shown his concern for the interest of the homebuyers.

Dr Abhishek Manu Singhvi, learned Senior Counsel appearing for IDBI Bank Ltd., (Respondent 6 in the writ petition) submits that under the statutory scheme, the IRP has to take over otherwise the letter and spirit of the Act is likely to be affected.

The learned counsel appearing for the homebuyers, in contra, submits that they belong to the lower and middle income group and have invested life savings with JIL and with its holding company, Jai Prakash Associates Ltd. ("JAL"). It has been assiduously urged that the investments of flat purchasers are with JIL and JAL and, therefore, the interest of the purchasers may be protected. It is also argued that if the IRP is restored, there should be a representative from the homebuyers or this Court may appoint someone on this Committee of Creditors and espouse the interests of the homebuyers.

Having heard the learned counsel for the parties at length, in modification of the order dated 4-9-2017, we issue the following directions:

- a) The IRP shall forthwith take over the Management of JIL. The IRP shall formulate and submit an interim resolution plan within 45 days before this Court. The interim resolution plan shall make all necessary provisions to protect the interests of the homebuyers;
- b) Mr Shekhar Naphade, learned Senior Counsel along with Ms Shubhangi Tuli, Advocate-on-Record, shall participate in the meetings of the Committee of Creditors under Section 21 of the Insolvency and Bankruptcy Code, 2016 to espouse the cause of the homebuyers and protect their interests;
- c) The Managing Director and the Directors of JIL and JAL shall not leave India without the prior permission of this Court;
- d) JAL which is not a party to the insolvency proceedings, shall deposit a sum of Rs 2000 crores (Rupees two thousand crores) before this Court on or before 27-10-2017. For the said purpose, if any assets or property of JAL have to be sold, that should be done after obtaining prior approval of this Court. Any person who was a Director or Managing Director of JIL or JAL on the date of the institution of the insolvency proceedings against JIL as well as the present Directors/Managing Director shall also not leave the country without prior permission of this Court. The foregoing restraint shall not apply to nominee Directors of lending institutions (IDBI/ICICI/SBI);**

e) All suits and proceeding instituted against JIL shall in terms of Section 14(1)(a) remain stayed as we have directed the IRP to remain in Management.

Be it clarified that we have passed this order keeping in view the provisions of the Act and also the interest of the homebuyers.

IA stands disposed of accordingly.

The matter be listed at 2.00 p.m. on 13-11-2017.

The prior date given by this Court i.e. 10-10-2017 stands cancelled.”

(emphasis in bold supplied)

20.1.2. It could be readily noticed that in formulating the directions aforesaid, this Court initiated steps to protect the interests of homebuyers essentially for the reason that, at the given stage, homebuyers were not regarded as financial creditors and they were not represented in the CoC. Significantly, while evolving a workable and protective mechanism, this Court also took note of the crucial background aspects and the fact that JIL was essentially an alter ego of JAL; and thus, even while consciously noting that JAL was not a party to the insolvency proceedings, directed that JAL shall deposit a sum of INR 2,000 crores and restraints were also put over disposal of assets or property of JAL and over the movement of the Directors/Managing Directors of JIL or JAL away from the country.

20.2. JAL moved an application (I.A. No. 102471 of 2017) for modification/recall of the aforesaid direction for deposit of INR 2,000 crores or for a modification that would enable it to transfer the rights under the Concession Agreement in respect of the Yamuna Expressway. This application was considered and rejected by the Court on 25.10.2017 after

noticing the submissions in opposition by the learned Attorney General as also by the learned counsel appearing on behalf of IDBI Bank and YEIDA. It was also submitted by the counsel for IRP that the rights under the Concession Agreement belonged to JIL, which was subject to proceedings under the IBC and therefore, such a request could not be granted. However, the time for depositing INR 2,000 crores was extended until 05.11.2017. The relevant part of order dated 25.10.2017 reads as under: -

“It is submitted by Mr Kapil Sibal and Mr Mukul Rohatgi, learned Senior Counsel appearing for the applicant that JAL may be permitted to transfer its rights under the concession agreement in respect of Yamuna Expressway. The same is seriously opposed by Mr K.K. Venugopal, learned Attorney General for India, Dr Abhishek Manu Singhvi, learned Senior Counsel appearing for the IDBI Ltd. and Mr Ravindra Kumar, learned counsel appearing for the Yamuna Expressway Industrial Development Authority.

It is also submitted by Mr Parag P. Tripathi, learned Senior Counsel representing the Interim Resolution Professional (IRP) that the rights under the concession agreement in respect of Yamuna Expressway are of Jaypee Infratech Ltd. (JIL), which is subject to proceeding under the Insolvency and Bankruptcy Code and, therefore, it cannot be transferred. Mr Ravinder Kumar, learned counsel appearing for the Authority has submitted that the rights under the concession agreement, are non-transferable.

We have also heard Mr Ajit Kumar Sinha, learned Senior Counsel appearing for some of the homebuyers. There are other counsel who are representing the homebuyers who are interested in having their flats. We do not want to address the said aspect today.

We are not inclined to entertain the application for modification of the order dated 11-9-2017. However, we extend the time to deposit the sum of Rs 2000 crores (Rupees two thousand crores) till 5-11-2017.”

20.3. Then, on 13.11.2017, this Court appointed learned counsel Mr. Pawanshree Agarwal as the *amicus curiae*, who was to open a web portal on which details of homebuyers could be uploaded. All the Directors of

JAL, except institutional Directors were ordered to remain present before the Court on the next date with the affidavits disclosing their personal assets. This order dated 13.11.2017 reads as under: -

“All the applications for impleadment/intervention stand allowed. The homebuyers are directed to approach Mr Pawanshree Agarwal, learned counsel, who is appointed as the Amicus Curiae in the matter to assist the Court and he shall open a web portal so that the homebuyers can give their details to Mr Pawanshree Agarwal. Let the matter be listed on 22-11-2017. On that day, all the Directors except institutional Directors of Jaiprakash Associates Ltd. (JAL) shall remain personally present in the Court with the affidavits disclosing their personal assets.”

20.4. On the next date, 22.11.2017, eight independent Directors and five promoter Directors were present before the Court. On a statement made on behalf of JAL, this Court permitted JAL to deposit INR 275 crores during the course of the day and directed further deposit, of INR 150 crores by 13.12.2017 and INR 125 crores by 31.12.2017. A restraint was imposed on the alienation of properties and assets of the Directors and their families while maintaining the earlier direction for the deposit of INR 2,000 crores; and the Directors concerned were directed to remain present on the next date. The *amicus curiae* was asked to create a web portal within a week; and for that matter, learned counsel appearing for JAL was to provide all the details as required by the *amicus* and also to provide him a sum of INR 5 lakhs. The relevant part of order dated 22.11.2017 reads as under: -

“It is submitted by learned Senior Counsel appearing for Jaiprakash Associates Ltd. (JAL) that the company is ready with Rs 275 crores. The homebuyers raised their concern about the realisation of the amount. This Court appreciates the grievance and the concern of the homebuyers.

We think it would be appropriate to direct as follows:

(a) A demand draft of Rs 275 crores be deposited by Mr Anupam Lal Das, learned counsel appearing for the company, before the Registry of this Court, today.

(b) A sum of Rs 150 crores be deposited by 13-12-2017.

(c) A further sum of Rs 125 crores be deposited by 31-12-2017.

(d) Neither the independent Directors nor the promoter Directors shall alienate their personal properties or assets in any manner, and if they do so, they will not only be liable for criminal prosecution but contempt of the court.

(e) That apart, we also direct that the properties and assets of their immediate and dependent family members should also not be transferred in any manner, whatsoever.

Needless to say that direction for deposit of Rs 2000 crores shall remain as it is. The only indulgence is to pay the same in instalments.

Mr Pawanshree Agrawal, who had been appointed as Amicus Curiae on an earlier date, shall create a portal within a week and do the needful as he has done in similar matters. Mr Anupam Lal Das, learned counsel shall provide all the details as required by Mr Pawanshree Agrawal. Mr Anupam Lal Das shall provide a sum of Rs 5 lakhs to Mr Pawanshree Agrawal for creation of the portal and to carry on the consequential activities. Matters be listed on 10-1-2018. On that day, all the independent Directors and promoter Directors of Jaiprakash Associates Limited, shall remain present. Copies of the affidavits deposed by all the five promoter Directors, shall be served on the Central Agency, so that the learned Attorney General can be made aware of that. Call on the date fixed.”

20.5. Next to the above, the matter was considered on 15.12.2017, when the deposited INR 150 crores were ordered to be kept in a short-term deposit and the time (for further payment) was extended until 25.01.2018. Further to that, on 10.01.2018, this Court took note of the submissions made on behalf of the homebuyers of JAL as also an application made by Reserve Bank of India³² seeking leave to move the NCLT against JAL and issued the directions, *inter alia*, to the effect that JAL shall file an affidavit disclosing its housing projects throughout the

32 'RBI' for short.

country and the stage of their construction; the *amicus* shall open an independent web portal for the homebuyers of JAL; the application of RBI shall be considered at a later stage; and the Directors concerned need not remain personally present before the Court unless so directed but shall not leave the country. The relevant part of this order dated 10.01.2018 reads as under: -

“Having heard the learned counsel for the parties, we are inclined to pass the following directions:

- (i) Jaiprakash Associates Ltd. (JAL) shall file an affidavit stating therein as to how many housing projects it has throughout the country and the stage of their construction. The said affidavit shall be filed within a week hence.
- (ii) Mr Pawanshree Agarwal, learned Amicus Curiae shall create an independent web portal in respect of the homebuyers of JAL, which shall reflect the details of the homebuyers.
- (iii) The web portal created by Mr Pawanshree Agarwal qua Jaypee Infratech Ltd. (JIL) shall be kept alive.
- (iv) The application filed by Reserve Bank of India seeking permission to move NCLT shall be considered at a later stage.
- (v) The independent Directors of JAL need not remain personally present on every date of hearing unless so directed by this Court. The independent Directors shall not leave the country without leave of this Court.
- (vi) The earlier order of injuncting JAL to create any kind of third-party interest in the assets is reiterated.
- (vii) The applications for impleadment/intervention and directions filed before this Court shall be served on Mr Pawanshree Agarwal.”

20.6. Further effective proceedings took place on 21.03.2018 when it was stated on behalf of JAL that INR 550 crores had already been deposited and that only about 8% of homebuyers were interested in seeking refund while others were desirous of seeking possession of their flats. This Court indicated that at the given stage, only the matter in relation to the homebuyers seeking refund was being examined and other grievances shall be examined in the next phase of proceedings. Since the

order for deposit of INR 2,000 crores had not been complied with despite the end of deadline, the Court issued directions for further deposit of INR 200 crores, as agreed to by the Managing Director of JAL present in the Court, where the first instalment of INR 100 crores was to be deposited by 15.04.2018 and the second instalment in the like amount was to be deposited by 10.05.2018. The *amicus curiae* informed the Court, with reference to his portal and the record of JAL, that a sum of INR 1,300 crores was required to be refunded by way of principal alone to the homebuyers who were seeking refunds, whereupon the *amicus* was requested to submit a project-wise chart, indicating the number of persons and the stage of completion. Taking note of the grievances of the homebuyers that the developer was demanding monthly instalments despite being unable to complete construction, the developer was restrained from raising demands towards outstanding or future instalments in respect of those buyers who had expressed a desire to obtain refunds. Further to that, the IRP was permitted to finalise the resolution plan, to be implemented only with the leave of the Court. This Court also took note of the inability expressed by the learned senior counsel, who was earlier requested to espouse the cause of homebuyers in CoC and, in his place, Mr. Gaurav Agarwal Advocate was appointed for the purpose. This order dated 21.03.2018 reads as under: -

“Heard Mr Anupam Lal Das, learned counsel appearing for Respondent 4 Jaiprakash Associates Ltd. (JAL). Though many a contention has been raised by Mr Das, yet, we are not inclined to entertain the same keeping in view our orders dated 11-9-2017

and 25-10-2017. We have been told by Mr Das that JAL has deposited a sum of Rs 550 crores before the Registry of this Court. It is submitted by Mr Das that only 8% of the homebuyers/allottees are inclined to take refund whereas others have expressed their inclination to have the flats.

We would intend to make it absolutely clear that, for the present, we are only concerned with those homebuyers who intend to have refund. In the next phase, we may consider the grievances, if any, of the homebuyers who intend to have the flats. In that regard, we think it appropriate to hear Mr Parag P. Tripathi, learned Senior Counsel appearing for Interim Resolution Professional (IRP) and Mr Jayant Bhushan and Mr Sanjay Hegde and others, learned Senior Counsel appearing for some Associations of homebuyers who intend to have their flats.

As our order for deposit of Rs 2000 crores has not been complied with, we intend to pass the following directions:

(a) JAL shall deposit a further sum of Rs 200 crores in two instalments, as agreed by the Managing Director who is present in Court today. The first instalment of Rs 100 crores shall be deposited by 15-4-2018 and the second instalment of Rs 100 crores shall be deposited by 10-5-2018;

(b) It is submitted by Mr Pawanshree Agrawal, learned Amicus Curiae that as per his portal an amount of Rs 1300 crores, at present, is required to be refunded towards the principal sum for those homebuyers who, as of today, seek refund. The figure of Rs 1300 crores is as per the record of JAL.

In view of the aforesaid, we would require Mr Agrawal to prepare a projectwise chart indicating the number of persons in respect of that project and the stage of completion of the respective projects so that appropriate order can be passed for disbursement of the amount on pro rata basis to the homebuyers;

(c) Mr Agrawal, learned Amicus Curiae shall keep the portal operational. However, the requests of only those persons on the portal who have sought refund, as of today will be considered at this stage;

(d) The submission of the homebuyers who are seeking refund is that the developer is making demands towards monthly instalments. We direct that no demand towards outstanding or future instalments shall be raised by the developer to the flat buyers who have, as of today, expressed the option to obtain refund. The demands raised by the developer in respect of the homebuyers who have already opted for refund till today, shall remain stayed;

(e) The IRP may proceed to finalise the resolution plan but the same shall be implemented after taking leave of this Court.

(f) The National Company Law Tribunal (NCLT) shall decide subject to the directions which we have given hereinabove.

Before we fix the next date, we must note that we have been apprised that Mr Shekhar Naphade, learned Senior Counsel who was appointed to espouse the cause of the homebuyers before the Committee of Creditors has expressed his inability to continue as such.

In view of the aforesaid, a need has arisen to appoint someone else in place of Mr Shekhar Naphade and accordingly we appoint Mr Gaurav Agrawal, Advocate. It is further clarified that Mr Gaurav Agrawal shall be guided by our previous orders.

Let the matter be listed on 16-4-2018 so that this Court can take note of whether the developer has complied with the direction of depositing the first instalment and to pass directions with regard to disbursement of the amount deposited on pro rata basis on the basis of the report submitted by Mr Pawanshree Agrawal.”

(emphasis in bold supplied)

20.7. On 16.04.2018, apart from dealing with two applications filed by the Managing Director and the Joint Managing Director of JAL seeking permission to travel abroad, this Court took note of the deposit of INR 100 crores by JAL and directed that the second instalment of INR 100 crores be deposited by 10.05.2018. While reiterating liberty to IRP to finalise the resolution plan in terms of the earlier order, this Court also extended liberty to JAL to submit a representation to the competent authority without expressing any opinion on that count and leaving the representation to be considered in accordance with law.³³

20.8. Thereafter, on 16.05.2018, apart from dealing with another application filed by an independent Director of JAL seeking permission to travel abroad, this Court took note of the fact that a sum of INR 750 crores was lying in deposit and it was observed that the same '*has to be disbursed on pro rata basis amongst the homebuyers*'. It was also

33 As discussed a little later, it has appeared in the final judgment passed in the case of **Chitra Sharma** that the referred representation had been in relation to the prayer of JAL to participate as one of the intending bidders in the resolution plan which was being formulated by the IRP; and such a participation by JAL was impermissible in view of Section 29A introduced to the Code.

directed that JAL, the holding company of JIL, shall deposit a further sum of INR 1,000 crores '*jointly and severally*' by 15.06.2018 subject to which, stay was granted over further proceedings, only insofar as concerning the liquidation. The relevant part of this order dated 16.05.2018 reads as under: -

"Having heard the learned counsel for the parties at length, it is directed that Jaiprakash Associates Ltd. (JAL), the holding company of Jaypee Infratech Ltd. (JIL) shall deposit a further sum of Rs 1000 crores jointly and severally by 15-6-2018. Subject to the said deposit, there shall be a stay of further proceedings only insofar as the liquidation is concerned. In the meantime, Interim Resolution Professional (IRP) shall remain in management. If the amount is not deposited by 15-6-2018, the statutory proceedings shall continue. As far as Rs 750 crores, which is lying in deposit is concerned, it has to be disbursed on pro rata basis amongst the homebuyers."

(emphasis in bold supplied)

20.9. Thereafter, on 13.07.2018, this Court took note of certain proposals made by JAL, which were opposed by the petitioners. While observing disinclination to entertain such proposals, this Court posted the matters on 16.07.2018 '*exclusively for the purpose of considering the issue of the rights of the homebuyers and the capability of JAL and JIL to construct the projects*'.

21. After the aforesaid proceedings, the petitions were finally heard and disposed of by this Court by way of the judgement dated 09.08.2018. Before taking note of the significant features and attributes of the final judgement in the case of **Chitra Sharma**, but to keep feasible track of the chronology of events, we may indicate that parallel to the proceedings in

this Court, NCLT continued with CIRP concerning the corporate debtor JIL and in that process, passed orders on 09.05.2018 and 15.05.2018, approving the decision of IRP rejecting the claims of two lenders of JAL to be recognised as financial creditors of the corporate debtor JIL on the strength of the mortgage created by the corporate debtor JIL as collateral security of the debts of its holding company JAL. Thereafter, on 16.05.2018, NCLT accepted an application, that was moved by IRP on 06.02.2018, for avoidance of certain transactions whereby the corporate debtor JIL had mortgaged its properties as collateral securities for the loans and advances made by the lender banks and financial institutions to JAL, as being preferential, undervalued and fraudulent. These aspects were finally dealt with by this Court in the judgement dated 26.02.2020, as shall be noticed later.

22. We may now revert to the final judgement dated 09.08.2018 in the case of **Chitra Sharma**, and take into account the relevant features, which do have a bearing on the issues raised in the present litigation.

22.1. In final judgement dated 09.08.2018 in the case of **Chitra Sharma** (supra), this Court took note of the past proceedings and also the fact that when resolution plans were considered and examined by the CoC, JAL too submitted its proposals which were rejected in view of the bar contained in Section 29A IBC as also for the reason that JAL failed to convince the CoC of its ability to tie up the funds for construction. However, even the other plans could not muster the support of the

requisite majority in CoC. Accordingly, IRP informed NCLT that no resolution plan was approved by the CoC even within the extended period for completing the CIRP, which came to an end on 12.05.2018. This Court took note of the mandate of Section 33 IBC whereby liquidation follows upon rejection of a resolution plan but then, noticed unanimity of the parties during the course of hearing that the liquidation of JIL was not going to subserve the interests of the homebuyers who had made valuable investments by contributing their hard-earned money in the hope of obtaining a roof over their heads. This Court also observed that a home for the family was considered to be a part of the right to life and took note of the appeal made by the homebuyers to ensure complete justice rather than leaving them at the mercy of the liquidation process. While appreciating the substance of that plea, this Court nevertheless indicated the need to abide by the discipline of law and thereafter, proceeded to take a comprehensive view of the scheme of IBC; and also underscored the fact that though IBC, as originally enacted, did not contain express provisions in relation to the interests of homebuyers but, their concerns were sought to be assuaged in the amendment brought about by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, which came into force on 06.06.2018 and whereby, the homebuyers were expressly brought within the purview of financial creditors under the IBC. This Court pointed out that now being duly recognised as financial creditors, the homebuyers were necessarily a part of the CoC, constituted in terms of

Section 21 IBC. This Court also took note of the relevant provisions in the Regulations relating to the voting share of the respective financial creditors in CoC and selection of an authorised representative³⁴ to represent financial creditors in a particular class.

22.2. Proceeding further, this Court extensively referred to a variety of submissions made on behalf of JAL, seeking to explain the perspective of the developers with reference to the projects already accomplished by them and the projects being under execution; and their proposal to deposit post-dated cheques to the tune of INR 600 crores with the registry of this Court, if they were allowed to dispose of some of the assets. The Court also took note of the fact that JAL had sought directions to NCLT to decide an application for sanctioning the scheme of arrangement, propounded pursuant to a restructuring agreement accepted by 32 creditors. The request of JAL was to continue with the stay of liquidation proceedings against its deposit of post-dated cheques of INR 600 crores and also to stay the directions of this Court whereby IRP was allowed to remain in management of the corporate debtor. The Court recorded the propositions of JAL as follows: -

“36. JAL has sought to assure that it would double the strength of existing workers for the construction of its projects. JAL has also stated that it would deposit postdated cheques of Rs 600 crores with the Registry of this Court. However, this is subject to the condition that the Court should allow it to dispose of “identified cement assets” including its cement plant (*sic*) at Rewa in Madhya Pradesh. In order to enable it to do so, JAL has sought a direction to the NCLT at Allahabad to decide the application filed before it for sanctioning a scheme of arrangement, propounded pursuant to a

34 ‘AR’ for short.

master restructuring agreement signed and accepted by the 32 creditors. JAL seeks to continue the stay of liquidation proceedings against its deposit of postdated cheques of Rs 600 crores. JAL also seeks a stay on the direction of this Court allowing the IRP to remain in management.”

22.2.1. After careful consideration, this Court rejected the proposal submitted on behalf of JAL while explaining that accepting any such proposal on behalf of JAL would cause serious prejudice to the discipline of IBC. In that regard, this Court referred to the provisions contained in Section 29A of the Code and the background in which certain specified persons were made ineligible to be the resolution applicants.³⁵ This Court, *inter alia*, observed and explained as under: -

“39. Clauses (c) and (g) of Section 29-A would operate as a bar to the promoters of JAL/JIL participating in the resolution process. Under clause (c), a person who at the time of the submission of the resolution plan has an account which has been classified a non-performing asset under the guidelines of RBI or of a financial regulator is subject to a bar on participation for a stipulated period. Under clause (g), a person who has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the adjudicating authority under the IBC is prohibited from participating. The Court must bear in mind that Section 29-A has been enacted in the larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a backdoor entry to erstwhile managements in the CIRP. Section 30 IBC, as amended, also clarifies that a resolution plan of a person who is ineligible under Section 29-A will not be considered by the CoC.”

³⁵ We may point out that Section 29A was inserted to the Code along with a few other amendments by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, promulgated on 23.11.2017. The Ordinance stated in its Preamble, *inter alia*, that the same was being promulgated because it was considered necessary to provide for prohibition of certain persons from submitting a resolution plan who, on account of their antecedents, may adversely impact the credibility of the process under the Code. This Ordinance later on took the shape of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (No. 8 of 2018) that came into force with retrospective effect from 23.11.2017.

22.3. Apart from the above, this Court also took note of various grounds urged on behalf of the homebuyers in opposition to the proposal so submitted and, after examining the matter in its entirety, this Court was convinced that JAL/JIL were lacking in financial capacity and resources to complete the unfinished projects; and allowing them to participate in the process of resolution would render the statutory provisions nugatory.

22.3.1. Having regard to the issues involved herein, we are impelled to take note of the grounds so urged on behalf of the homebuyers and their due acceptance by this Court as follows: -

“40. Mr Anand Grover appearing on behalf of the homebuyers has opposed the proposal submitted by JAL/JIL on the following grounds:

40.1. Loans given to JAL have been classified as non-performing assets which renders JAL ineligible as a resolution applicant/new promoter under Section 29-A(b) IBC;

40.2. In addition to Section 29-A(b), JAL is also disqualified under Section 29-A(g) IBC. Section 29-A(g) provides that a person who is engaged in a fraudulent transaction should not be allowed to bid for another company as such a person may again engage in fraudulent transactions. In May 2018, the NCLT, Allahabad set aside a fraudulent transaction involving a mortgage of around 750 acres of JIL's land in favour of the lenders of JAL. This mortgage was without any consideration and the land of 750 acres may be worth INR 5000 crores. The matter is now before the NCLAT, which has specifically framed an issue in this regard;

40.3. RBI is already before this Court seeking initiation of insolvency proceedings against JAL. JAL's proposal, although presented under the garb of protecting the interest of homebuyers, is aimed at the twin benefits of avoiding insolvency of JAL and regaining control of JIL, thereby defeating RBI's application for insolvency proceedings of JAL as well as Section 29-A IBC;

40.4. The reasons pleaded by JAL/JIL to excuse their failure to complete the housing projects such as the stay order granted by the National Green Tribunal have been rejected by the orders of the National Consumer Disputes Redressal Commission as there was no stay. One such order was passed by NCDRC on 2-5-2016, in *Developers Township Property Owners Welfare Society v. Jaiprakash Associates Ltd.*;

40.5. The contention of JAL that they faced impediments on account of the purported stay imposed by NGT is patently incorrect

as the stay by NGT was only on handing over possession without an occupation certificate, which had no bearing on the construction. Moreover, JAL carried out construction during that period as is evidenced inter alia by the fact that they raised demands for construction linked payments during this period;

40.6. During the pendency of the CIRP from 9-8-2017, construction work was done under the aegis of the IRP under whom JAL was a mere contractor;

40.7. The claim by JAL that flats have been delivered is a fractured claim as flats have been delivered in incomplete stages and are not in accordance with the allotment letters. The flooring is not complete, doors and windows are missing, no-objection certificates have not been obtained from the Fire Department and the offer of possession is being made without the occupation certificate;

40.8. JAL does not have the capacity to deliver the flats and 22,000 homebuyers are suffering due to delays of more than four years in completion of various projects of JAL and JIL;

40.9. Under the contracts, JAL and JIL are jointly and severally liable to deliver the flats. If JAL was serious about delivering the flats, the present situation would not have arisen. Further, JAL would have avoided the insolvency process of JIL and would not have cast the homebuyers to the uncertainties of insolvency;

40.10. There are serious doubts about the credentials of JAL which has diverted funds from JIL towards its other businesses. The applicant associations had appointed ASA Financial Services to conduct an audit of JIL's financials and the audit report demonstrates that JAL may have diverted more than INR 10,000 crores from JIL;

40.11. JAL is undergoing a serious financial crisis. This is clear from the following facts:

40.11.1. JAL has not yet honoured the order of this Court asking it to deposit Rs 2000 crores for protection of the interest of the homebuyers. JAL has paid only Rs 750 crores out of Rs 2000 crores, after the expiry of almost 10 months from 11-9-2017 which was the date of the initial order of this Court;

40.11.2. JAL has failed to pay even the latest instalment of Rs 1000 crores by 15-6-2018 in accordance with the order of this Court dated 16-5-2018;

40.11.3. JAL is a defaulter of more than 30 banks to the extent of around Rs 30,000 crores. JAL has also defaulted on fixed deposits, foreign currency convertible bonds and payments to Noida Authority;

40.11.4. Even in the latest proposal, the proposal to deposit Rs 600 crores is spread over time indicating that JAL has no resources; and

40.11.5. The proposal of doubling the strength of workers from 4000 to 8000 would only mean doubling the strength from 17

workers per tower to 35 workers per tower (228 towers to be built by 8000 workers). This would amount to 2 workers in each floor of 4 flats (21,532 flats in 228 towers by 8000 workers). At this rate, completion of flats may take several years.

41. Similar submissions have been urged on behalf of the homebuyers by other learned counsel.

42. The bar under Section 29-A would preclude JAL/JIL from being allowed to participate in the resolution process. Moreover, the facts which have been drawn to the attention of the Court leave no manner of doubt that JAL/JIL lack the financial capacity and resources to complete the unfinished projects. To allow them to participate in the process of resolution will render the provisions of the Act nugatory. This cannot be permitted by the Court."

(emphasis in bold supplied)

22.4. It was, however, submitted on behalf of JAL/JIL that with expiry of timelines for CIRP, the only option would be to liquidate the corporate debtor which may not be in the interest of homebuyers and in that situation, the only way out would be to provide for an arrangement outside the provisions of IBC. It was also submitted that unless a group of independent professionals came to a conclusion that it was not financially viable for JAL/JIL to complete the remaining work in a time-bound manner, their role as developers should not be discounted. Hence, it was submitted that an independent committee of experts be constituted by the Court to evaluate the financial capability of JAL/JIL to continue executing the ongoing projects. It was also submitted that only 8% of the homebuyers had opted for refunds while 92% had chosen not to claim refunds, thereby implying a confidence in the ability of JIL/JAL to complete the project. However, on the other hand, the homebuyers uniformly opposed the submissions so made and it was urged before the Court that they had no confidence in the ability of either JIL or JAL to

complete the outstanding projects. In the third dimension, it was submitted on behalf of the IRP that Court may revive the CIRP by extending the time specified in IBC in order to enable fresh consideration to be made of the prospect for a resolution which would take into account the interests of homebuyers under the amended IBC; and the second option would be to appoint a committee under the supervision of the Court to explore the possibility of a resolution which would obviate the need for liquidation. Having pondered over the diverse propositions, the requirement of balancing the discipline of the Code, to do complete justice and to secure the interests of all the concerned, this Court found it just and proper to accept the suggestion that CIRP be revived and CoC be reconstituted as per the amended provisions of IBC with recourse to the powers under Article 142 of the Constitution of India. This Court observed and held as under: -

“47. In considering the rival submissions, several important facets of the case need to be underscored.

47.1. First and foremost, the CIRP was initiated on 9-8-2017, following the order of NCLT admitting the proceedings. The period of 180 days for concluding the CIRP came to an end on 6-2-2018 and the extended period ended on 12-5-2018. When the CIRP was initiated and until the period of 270 days concluded, the homebuyers did not have the status of financial creditors under the provisions of IBC. They had no statutory voting rights in the CoC. Under the interim directions of this Court, a workable arrangement was sought to be put into place by appointing a representative of the homebuyers on the CoC to facilitate their interests being duly borne in mind. But the point to be noted is that in the absence of a statutory recognition of the position of the homebuyers as financial creditors, the law did not allow for real and substantive entitlements to them in the CoC. These statutory entitlements have been brought in by the Ordinance in order to recognise the vital interests of the homebuyers in a real estate project and to allow

them a statutory status in the insolvency resolution process. Unfortunately by the time that the Ordinance came into being on 6-6-2018, the period of 270 days had expired; the resolution plan of Lakshdeep was rejected and the IRP informed NCLT that no resolution plan had been approved within the extended period of 270 days on 12-5-2018.

47.2. Having regard to the material change which has been brought about by the amendment of the IBC by the Ordinance and the fact that this Court has been in seisin of the proceedings to ensure that the homebuyers are protected, we are of the view that it is but appropriate and to do complete justice to secure the interests of all concerned that the CIRP should be revived and CoC reconstituted as per the amended provisions to include the homebuyers. In the facts of the present case, recourse to the power under Article 142 would be warranted to render complete justice. Parliament has undoubtedly provided a period of 180 days and an extended period of 90 days to complete the process. But in the present case a peculiar situation has arisen as a result of which the status of the homebuyers which had not been recognised prior to 6-6-2018 has now been expressly recognised as a result of the amending Ordinance.

47.3. The learned counsel for the IRP submitted that in the CoC which will be reconstituted under the amended IBC, the homebuyers would have a substantial voting power so as to be able to effectively protect their interests. Moreover, this Court should follow the discipline of IBC which has been enacted by Parliament specifically to streamline the resolution of corporate insolvencies. Matters involving corporate insolvencies require expert determination. The legislature has made specific provisions which are conceived in public interest and to facilitate good corporate governance. The Court should not take upon itself the burden of supervising the intricacies of the resolution process. Accepting the suggestion of Mr Nariman (and one of the two options proposed by Mr Tripathi) of the Court appointing a committee to supervise the resolution process outside IBC will involve the Court in an insuperable burden of evaluating intricate matters of financial expertise on which Parliament has legislated to create specific mechanisms.

47.4. We are emphatically of the view that it would not be appropriate for the Court to appoint a committee to oversee the CIRP and assume the task of supervising the work of the Committee. **We must particularly be careful not to supplant the mechanisms which have been laid down in the IBC by substituting them with a mechanism under judicial directions.** Such a course of action would in our view not be consistent with the need to ensure complete justice under Article 142, under the regime of law. Hence, the power under Article 142 should be

utilised at the present stage for the limited purpose of recommencing the resolution process afresh from the stage of appointment of IRP by the order dated 9-8-2017 and resultantly renew the period which has been prescribed for the completion of the resolution process. We have furnished above, the reasons for doing so. Chief amongst them is the fact that in the present case the period of 270 days expired before the Ordinance conferring a statutory status on homebuyers as financial creditors came into existence. **In the circumstances, it would be necessary to revive the period prescribed by the statute by another 180 days commencing from the date of this order. During this period, the IRP shall follow the provisions of the IBC afresh in all respects. A new CoC should be constituted in accordance with the amended provisions IBC to enforce the statutory status of the allottees as financial creditors.** We also clarify that apart from the three bidders whose bids were found to be eligible by the IRP, it would be open to the IRP to invite fresh bids to facilitate a wider field of choice before the CoC. In that process, the offers made by the intervenors in these proceedings can also be considered by CoC anew. We are not inclined to evaluate the merits of the bids submitted by the bidders who were left in the fray, two of whom have intervened. **All bids must follow the discipline IBC. We have, however, not accepted the submission to allow JIL or JAL and the erstwhile promoters to participate in the process. Their participation is expressly prohibited by Section 29-A** and we decline to make any exception which would breach a salutary and express provision made in the IBC.”

(emphasis in bold supplied)

22.5. Thereafter, this Court also took into consideration the submissions made on behalf of some of the homebuyers for issuance of directions to facilitate *pro rata* disbursement of INR 750 crores lying in deposit pursuant to the interim directions. This Court observed that even when the claim of the refund seekers was to be considered with empathy, such request could not be acceded to and specified four major reasons for declining this prayer. The consideration of this Court in relation to the said sum of INR 750 crores, being also directly relevant for the present purpose, could be usefully extracted as under: -

“48. As we have stated earlier, an amount of Rs 750 crores is lying in deposit before this Court pursuant to the interim directions, on which interest has accrued. The homebuyers have earnestly sought the issuance of interim directions to facilitate a pro rata disbursement of this amount to those of the homebuyers who seek a refund. We are keenly conscious of the fact that the claim of the homebuyers who seek a refund of monies deserves to be considered with empathy. Yet, having given our anxious consideration to the plea and on the balance, we are not inclined to accede to it for more than one reason.

48.1. Firstly, during the pendency of the CIRP, it would as a matter of law, be impermissible for the Court to direct a preferential payment being made to a particular class of financial creditors, whether secured or unsecured. For the present, we leave open the question as to whether the homebuyers are unsecured creditors (as was urged by Mr Tripathi) or secured creditors (as was urged by counsel appearing for them). **Directing disbursement of the amount of Rs 750 crores to the homebuyers who seek refund would be manifestly improper and cause injustice to the secured creditors since it would amount to a preferential disbursement to a class of creditors. Once we have taken recourse to the discipline IBC, it is necessary that its statutory provisions be followed to facilitate the conclusion of the resolution process.**

48.2. Secondly, the figures which have been made available presently, following the opening of the web portal by the Amicus Curiae, indicate that 8% of the homebuyers have sought a refund of their monies while 92% would evidently prefer possession of the homes which they have purchased. **We cannot be unmindful of the interests of 92% of the homebuyers many of whom would also have obtained loans to secure a home. They would have a legitimate grievance if the corpus of Rs 750 crores (together with accrued interest) is distributed to the homebuyers who seek a refund.** The purpose of the process envisaged by IBC for the evaluation and approval of a resolution plan is to form a composite approach to deal with the financial situation of the corporate debtor. **Allowing a refund to one class of financial creditors will not be in the overall interest of a composite plan being formulated under the provisions of the IBC.**

48.3. Thirdly during the course of the hearing, the Court has been apprised of the concerns of the secured creditors, chief among them being IDBI Bank Ltd. In its submissions before this Court, IDBI Bank has emphasised that one of the major reasons for the enactment of IBC was to protect the interest of lenders. The debt owing to the banks and financial institutions has been secured by the assets of JIL, to protect their interests. This debt originates in the public deposits of the banks and financial institutions, who are answerable to their stakeholders.

48.4. Fourthly, RBI has moved this Court for permission to initiate an insolvency resolution process. Parliament enacted the Banking

Regulation (Amendment) Act 2017 by introducing Section 35-AA and Section 35-AB into the Banking Regulation Act 1949. The amendment empowers the Central Government to authorise RBI to issue directions to any banking company to initiate an insolvency resolution process in respect of a default as understood under the IBC. Such an order was issued by the Central Government on 5-5-2017. The RBI constituted an Internal Advisory Committee (IAC) consisting primarily of its independent Directors. The IAC took up for consideration accounts which were classified either partly or wholly non-performing from amongst the top 500 exposures in the banking system as on 31-3-2017. As a first step, the IAC recommended all such non-performing asset accounts with fund and non-fund based outstandings exceeding Rs 5000 crores. The IAC has initially taken up twelve accounts involving total exposure of Rs 1,79,769 crores. JIL was one of the twelve accounts in respect of which directions have been issued to banks for initiating insolvency resolution. Subsequently, the IAC recommended that in respect of those accounts where 60% or more had been classified as NPAs as on 30-6-2017, banks may be directed to implement a viable resolution plan within six months failing which the accounts may be directed for a reference under the IBC by 31-12-2017. JAL was one such entity. No viable resolution plan could be found as a result of which it is also required to be referred for CIRP. RBI has carried out this exercise as a matter of economic policy in its capacity as the prime banking institution in the country, entrusted with a supervisory role, and the power to issue binding directions.....”

(emphasis in bold supplied)

22.6. Having said so, this Court acceded to the request made on behalf of the RBI to initiate a CIRP against JAL under IBC and thereafter proceeded to conclude on the matter with the following directions: -

“50. We, accordingly, issue the following directions:

50.1. In exercise of the power vested in this Court under Article 142 of the Constitution, **we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders** in accordance with the provisions of the IBC;

50.2. We direct that **a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly**

the amended definition of the expression “financial creditors”;

50.3. **We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three shortlisted bidders** whose bids or, as the case may be, revised bids may also be considered;

50.4. JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of Section 29-A;

50.5. RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;

50.6. **The amount of Rs 750 crores which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon be transferred to NCLT and continue to remain invested and shall abide by such directions as may be issued by NCLT.”**

(emphasis in bold supplied)

23. Thus, the ternary, of anxiety on the part of stakeholders to avoid liquidation of the corporate debtor JIL; of due recognition by the legislature of the homebuyers as financial creditors; and concern of this Court to do complete justice in the cause while maintaining the discipline of law, led to the improvisation in **Chitra Sharma**, as noticeable in the preceding paragraphs, with revival of CIRP in relation to the corporate debtor JIL and re-constitution of CoC with the basic aim to ensure the resolution of insolvency of the corporate debtor JIL by way of the methods envisaged by, and permissible under, the Code.

Another round in this Court and further enlargement of time for CIRP in question.

24. However, this resolution process concerning the corporate debtor JIL again landed in rough weather, now due to passage of time at different stages while dealing with another grey area i.e., method of counting of votes in the Committee of Creditors, which led to another round of

litigation; and this Court had to again invoke its plenary powers to salvage the situation in the judgment dated 06.11.2019 in the case of ***Jaiprakash Associates Ltd.*** (supra). For their relevance, the observations made and directions issued in that case may also be recapitulated.

25. The second round of litigation concerning this CIRP came up to this Court in the following circumstances:

25.1. Consequent to the aforesaid directions in the case of ***Chitra Sharma***, the matter proceeded before the NCLT being the Adjudicating Authority. The IRP issued public notice inviting claims from all the stakeholders of JIL, including the homebuyers and submitted his report on formation of the Committee of Creditors before the Adjudicating Authority on the following basis:

37.3% in case of financial institutions,
62.3% homebuyers, and
0.4% fixed deposit holders.

25.2. However, on 17.09.2018, an application came to be made before the Adjudicating Authority by one of the associations of homebuyers seeking clarification as to the manner in which the voting percentage of the homebuyers would be reckoned. The two members of NCLT expressed difference of opinion on the issue as a result of which, reference was made to the President of NCLT to place the matter before the third member. Eventually, an order was passed by the third member on 24.05.2019. This order was challenged by one of the associations of homebuyers before NCLAT. In the meantime, IDBI Bank filed an

application before NCLT for excluding the period of pendency of the said application for clarification regarding the manner of counting the votes of the concerned financial creditors, from the period of 270 days for completion of CIRP. However, during the pendency of such an application, the NCLT, by its order dated 06.05.2019, called upon the authorities, the representatives of allottees and others to file reply on the necessity to proceed further with CIRP for considering the resolution plan received from the concerned bidder. The IDBI Bank assailed this order of NCLT by way of another appeal before the NCLAT.

25.3. The aforesaid two appeals were decided together by NCLAT by way of its judgment dated 30.07.2019. The NCLAT took note of the fact that no regulation had been framed under the Code as to how the voting share of thousands of allottees (homebuyers) would be counted when all of them fell within the meaning of 'financial creditors' and hence, were the members of CoC. The NCLAT observed that this had been an extraordinary situation where the law was silent and there was no guideline which led to difference of opinion between the two members and the matter was finally decided by the third member. The NCLAT opined that in the given situation, certain period could be excluded while counting the total period of 270 days. In this judgement dated 30.07.2019, NCLAT provided for exclusion of 90 days for the purpose of counting 270 days of CIRP from the date of receipt of the copy of its judgement. The NCLAT also commented that the aforesaid exclusion was being provided to

enable calling of fresh resolution plans but reiterated that no liberty was available to JAL in view of the observations and decision of this Court in ***Chitra Sharma*** (supra).

25.3.1. Those observations and directions of NCLAT in its judgment dated 30.07.2019, as reproduced in the judgement of this Court dated 06.11.2019, could be usefully recounted as follows: -

“22. In view of the aforesaid extraordinary situation, we are of the view that the period from 17-9-2018 i.e. the date of application filed by the association of the allottees for clarification for the order and till the final decision i.e. 4-6-2019 i.e. the date the matter was finally decided by the Third Hon'ble Member (total 260 days), can be excluded for the purpose of counting the 270 days. However, as the matter is pending since long, we are not inclined to exclude the total period of 260 days and instead in the interest of the allottees, we exclude 90 days for the purpose of counting the period of 270 days of “corporate insolvency resolution process”, which should be counted from the date of receipt of the copy of this order.

23. The aforesaid period is excluded to enable the “resolution professional”/“committee of creditors” to call for fresh “resolution plans” and to consider them, if so required after negotiations pass appropriate order under sub-section (5) of Section 30 of the I&B Code preferably within a period of 45 days. Rest of the period of 45 days margin is given to remove any difficulty and appropriate order as may be passed by the adjudicating authority.

The voting share of the allottees should be counted in terms of “I&B Code” as existing on the date of voting/“Regulation” and/or in accordance with majority decision of the adjudicating authority.

24. It is made clear that all the earlier “resolution plan(s)” including the plan submitted by the “NBCC”, cannot be considered, having been rejected by the “committee of creditors”. However, it will be open to the “NBCC” to file a fresh improved “resolution plan”. It is informed that “Adani Infra (I) Ltd.” also proposed to file “resolution plan” but we are not expressing any opinion with regard to the same. We have given opportunity to all the eligible persons to file “expression of interest”/(improved) “resolution plan”, individually or jointly or in concert with any person, but those who are ineligible in terms of Section 29-A, are barred from filing such plan. No liberty is given to “Jaiprakash Associates Ltd.”, in view of the aforesaid observation and decision of Hon'ble Supreme Court in ***Chitra Sharma***.”

26. The aforesaid judgement of NCLAT was assailed in this Court by JAL and by the Wish Town Homebuyers' Welfare Society. These appeals raised essentially two issues before this Court: one, as to whether NCLT or NCLAT had the power to exclude any period from the statutory period in exercise of inherent powers sans any express provision in the Code in that regard; and second, whether it was open to allow the bidder whose resolution plan had already been rejected by CoC, to submit revised plan or to invite fresh resolution plans to be considered by CoC after the statutory period specified for submission of such plans?

27. After cogitating over the submissions made in support of the appeals, it was clear that the inevitable fallout of accepting the stand taken by the appellants would be to set aside the impugned judgment and relegate the parties to a situation where the only option would be to proceed with the liquidation process concerning JIL on the premise that no resolution plan was received before the expiry of the period of CIRP or being a case of rejection of the resolution plan under Section 31 of the Code. However, during the arguments, there was complete unanimity (again) between all the stakeholders, including the appellants before this Court, that the liquidation of JIL must be eschewed as it would do more harm to the interests of the stakeholders, in particular the large number of homebuyers.

28. In the given set of circumstances and considering the position taken by the stakeholders, this Court found it neither necessary nor

appropriate to dilate on the issues as urged and instead, proceeded to again exercise the plenary powers under Article 142 of the Constitution of India in order to ensure substantial justice in the cause. In the process, this Court, of course, rejected the suggestions given by a section of homebuyers to keep the entire process outside the dispensation under the Code with reference to the observations already made in the case of **Chitra Sharma** (supra), but found it justified to modulate a part of such directions, to the extent such modulation would not stand in conflict with the legislative intent and subserve the cause of justice, by providing a window to find out a viable solution. This Court also took note of various amendments brought about to the Code and the CIRP Regulations; and the overall circumstances of the case, where delay in completion of CIRP relating to JIL was attributable to law's delay and neither homebuyers nor other financial creditors were to be blamed for pendency of proceedings before NCLT and before NCLAT. In the peculiar, rather extraordinary, situation obtaining in the matter, this Court considered it appropriate to ensure that an attempt was made for revival of the corporate debtor JIL, lest it was exposed to liquidation process and for that matter, to permit IRP to reissue the request for resolution plan to the two bidders who had earlier submitted the plans and to call upon them to submit revised resolution plans, which could be placed before CoC. In the process, this Court also took note of the time limit for completion of insolvency resolution process as per third proviso to Section 12(3) of the Code,

which came into effect from 16.08.2019. The relevant observations of this

Court could be usefully reproduced as under: -

“16. Suffice it to note that an extraordinary situation had arisen because of the constant experimentation which went about at different level due to lack of clarity on matters crucial to the decision-making process of CoC. Besides that, in view of the recent legislative changes, the scope of resolution plan stands expanded which may now include provision for restructuring the corporate debtor including by way of merger, amalgamation and demerger and more so the power bestowed on CoC to consider not only the feasibility and viability of the resolution plan but also the manner of distribution proposed, which may take into account the order of priority amongst the creditors. Additionally, the recently inserted Section 12-A enables the adjudicating authority to allow the withdrawal of an application filed under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of 90% voting share of the CoC. Similarly, sub-clause (7) of Regulation 36-B inserted with effect from 4-7-2018, dealing with the request for resolution plans unambiguously postulates that the resolution professional may, with the approval of the Committee, reissue request for resolution plans, if the resolution plans received in response to earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list. In the present case, finally only two bidders had participated and submitted their resolution plan which was placed before CoC and stated to have been rejected. However, applying the principle underlying Regulation 36-B(7), we deem it appropriate to permit IRP to reissue request for resolution plans to the two bidders (Suraksha Realty and NBCC) and/or to call upon them to submit revised resolution plan(s), which can be then placed before CoC for its due consideration.

17. In the present case, as aforementioned, there is unanimity amongst all the parties appearing before this Court including the resolution applicant that liquidation of JIL must be eschewed and instead an attempt be made to salvage the situation by finding out some viable arrangement which would subserve the interests of all concerned.

18. In view of the legislative changes referred to above, we are of the considered opinion that we need to and must exercise our plenary powers to make an attempt to revive the corporate debtor (AIL), lest it is exposed to liquidation process under Chapter III of Part II of the I & B Code. We are inclined to do so because the project has been implemented in part and out of over 20,000 homebuyers, a substantial number of them have been put in possession and the remaining work is in progress and in some cases at an advanced stage of completion. In this backdrop, it

would be in the interest of all concerned to accept a viable plan reflecting the recent legislative changes.

19. Indeed, the third proviso to Section 12(3) predicates time-limit for completion of insolvency resolution process, which has come into effect from 16-8-2019. The same reads thus:

“Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.”

Taking an overall view of the matter, we deem it just, proper and expedient to issue directions under Article 142 of the Constitution of India to all concerned to reckon 90 days’ extended period from the date of this order instead of the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019. That means, in terms of this order, the CIRP concerning JIL shall be completed within a period of 90 days from today.

20. We do not deem it necessary to dilate on the arguments of the respective counsel for the nature of order that we intend to pass, including about the locus standi of JAL which, in our opinion, already stands answered against JAL by virtue of Section 29-A of the Act as expounded in *Chitra Sharma*.”

29. In the given circumstances, this Court passed the following order for the purpose of substantial and complete justice and in the interest of all the stakeholders: -

“21. Accordingly, we pass the following orders to do substantial and complete justice to the parties and in the interest of all the stakeholders of JIL:

21.1. We direct the IRP to complete the CIRP within 90 days from today. In the first 45 days, it will be open to the IRP to invite revised resolution plan only from Suraksha Realty and NBCC respectively, who were the final bidders and had submitted resolution plan on the earlier occasion and place the revised plan(s) before CoC, if so required, after negotiations and submit report to the adjudicating authority NCLT within such time. In the second phase of 45 days commencing from 21-12-2019, margin is provided for removing any difficulty and to pass appropriate orders thereon by the adjudicating authority.

21.2. The pendency of any other application before the NCLT or NCLAT, as the case may be, including any interim direction given therein shall be no impediment for the IRP to receive and process the revised resolution plan from the above named two bidders and take it to its logical end as per the provisions of the I &

B Code within the extended timeline prescribed in terms of this order.

21.3. We direct that the IRP shall not entertain any expression of interest (improved) resolution plan individually or jointly or in concert with any other person, much less ineligible in terms of Section 29-A of the I & B Code.

21.4. These directions are issued in exceptional situation in the facts of the present case and shall not be treated as a precedent.

21.5. This order may not be construed as having answered the questions of law raised in both the appeals, including as recognition of the power of NCLT/NCLAT to issue direction or order not consistent with the statutory timelines and stipulations specified in the I & B Code and the Regulations framed thereunder.”

30. The passages above-quoted give insight as to what had been the concern of all and what had been the intent of the orders passed by this Court in its plenary powers. It is not far to seek that even where CIRP in relation to JIL had been facing one hurdle after another, the principal part of delay was not attributable to any of the stakeholders; and then, all through, there had been unanimity that liquidation of JIL was to be avoided and a viable solution ought to be searched. The aforesaid directions in the judgement dated 06.11.2019 ultimately led the revised resolution plans by the two applicants being placed before CoC and voting of CoC in favour of the resolution plan proposed by NBCC which is the bone of contention in this batch of matters.

31. For completion of the narrative in regard to the second round of litigation, we may also point out that after the judgment dated 06.11.2019, even though the process relating to the submission of revised plans and consideration by CoC took place, but culmination of the proposal in

approval of the resolution plan got delayed. Hence, IRP filed one miscellaneous application in this Court (M.A. No. 540 of 2020), pointing out various difficulties and unavoidable circumstances which had caused the delay though the proposal was submitted within the time frame prescribed. While accepting the reasons stated in the application so filed by the IRP, this Court, by another order dated 03.02.2020, extended the time by four weeks for approval of the resolution plan. This is how the process of approval of resolution plan culminated in the impugned order dated 03.03.2020 by the Principal Bench of NCLT at New Delhi.³⁶

32. Before dilating on the resolution plan in question, it appears just and proper to narrate the features relating to yet another litigation directly impacting the CIRP concerning the corporate debtor JIL. As indicated, that litigation had been in relation to the application made by IRP for avoidance of certain transactions as preferential; and in relation to the claim of some of the lender institutions of JAL to be recognised as financial creditors of JIL on the strength of the mortgage transactions whereby the property of JIL was mortgaged to secure the debts of JAL.

Yet another litigation in this Court relating to preferential transactions and lenders of JAL

33. The other litigation concerning this CIRP, leading to the judgment dated 26.02.2020 in the case of **Anuj Jain** (supra), came up in the following circumstances:

³⁶ It may be indicated in the passing that later on, a few miscellaneous applications as also interlocutory applications were filed in relation to the case of **Chitra Sharma** (supra), most of which were disposed of by this Court on 18.12.2019, in view of the aforesaid order dated 06.11.2019. Having regard to the points requiring determination herein, it is not necessary to dilate on those applications.

33.1. As already noticed, even during the pendency of proceedings in this Court in the case of **Chitra Sharma** (supra), the IRP had filed an application on 06.02.2018 seeking avoidance of certain transactions, whereby the corporate debtor had mortgaged several parcels of its land as collateral security for the loans and advances made by the lender banks and financial institutions to the holding company JAL. The IRP alleged that the transactions in question were preferential, undervalued and fraudulent, in terms of Sections 43, 45 and 66 of the Code. By its order dated 16.05.2018, the NCLT accepted the application so made by IRP in relation to six out of seven transactions that were put in question and held that those transactions were to be avoided as being fraudulent, preferential and undervalued. In other words, in relation to such six transactions, the security interest was ordered to be discharged and the properties involved therein were vested in the corporate debtor, with release of encumbrances. In appeal, the NCLAT, however, took an entirely opposite view of the matter and by its judgement dated 01.08.2019, upturned the order so passed by NCLT, while holding that the transactions in question do not fall within the mischief of being preferential or undervalued or fraudulent; and that the lenders in question (the lenders of JAL) were entitled to exercise their rights under the Code. Aggrieved, the IRP as also one of the creditors of the corporate debtor JIL and the associations of homebuyers preferred appeals in this Court.

33.2. Apart from the above, during the course of CIRP, two of the lender banks of JAL sought inclusion in the category of financial creditors of JIL but IRP did not agree and declined to recognise them as such. Being aggrieved, the said banks preferred separate applications under Section 60(5) of the Code before NCLT while asserting their claim to be recognised as financial creditors of the corporate debtor JIL, on account of the securities provided by JIL for the facilities granted to JAL. The NCLT rejected the applications so filed by the said banks, by way of its orders dated 09.05.2018 and 15.05.2018, while concluding that on the strength of the mortgage created by the corporate debtor JIL, as collateral security of the debt of its holding company JAL, the lenders of JAL could not be categorised as financial creditors of JIL. The appeals filed by the aggrieved lenders of JAL against the said orders dated 09.05.2018 and 15.05.2018 were purportedly allowed as per the result recorded in the impugned order dated 01.08.2019. Aggrieved, one of the lenders of the corporate debtor JIL preferred an appeal in this Court, while asserting that such mortgagees could not be taken as financial creditors of the corporate debtor JIL.

34. The aforesaid two appeals, relating to avoidance of preferential transactions and the claim of lender banks of JAL to be recognised as financial creditors of JIL, were considered together and allowed by this Court by way of the common judgement dated 26.02.2020 in the case of **Anuj Jain** (supra).

34.1. As regards the transactions in question, this Court held that they had been of deemed preference to related party by the corporate debtor JIL during the look-back period of two years and were covered within the period envisaged by Section 43(4) of the Code. This Court also held that clause (a) of sub-section (3) of Section 43 of the Code called for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature; and therefore, the expression “or”, appearing as disjunctive between the expressions “corporate debtor” and “transferee”, ought to be read as “and”; so as to be conjunctive of the two expressions i.e., “corporate debtor” and “transferee”. Having interpreted the provision so, this Court held that the impugned transactions did not fall within the ordinary course of business of the corporate debtor JIL and hence, were not of excepted transfers in terms of Section 43(3) of the Code. Accordingly, this Court held as under: -

“Summation: The transactions in question are hit by Section 43 IBC

30. For what has been discussed hereinabove, we are clearly of the view that the transactions in question are hit by Section 43 of the Code and the adjudicating authority, having rightly held so, had been justified in issuing necessary directions in terms of Section 44 of the Code in relation to the transactions concerning Properties Nos. 1 to 6. NCLAT, in our view, had not been right in interfering with the well-considered and justified order passed by NCLT in this regard.”

34.2. As regards the second question concerning the status of the lenders of JAL, this Court observed that when the transactions in question were found preferential and hit by Section 43 of the Code, they were denuded of their value and worth; and the security interest created by the

corporate debtor JIL over the property involved in those transactions stood discharged in whole; and, therefore, such lenders of JAL cannot claim any status as creditors of the corporate debtor JIL much less as financial creditors. However, the question as regards the status of such lenders of JAL qua the corporate debtor JIL was examined independent of the findings that the transactions in question were hit by Section 43 of the Code, with the following observations: -

“34.4. We may, of course, reiterate that in view of the conclusion that we have reached in relation to the principal issue, the transactions in question are denuded of their value and worth, per the force of the order by NCLT under Section 44 of the Code, which has been approved by us. To be most specific, the security interests created by the corporate debtor JIL over the properties in question stand discharged in whole. Therefore, the respondent lenders cannot claim any status as creditors of the corporate debtor JIL and there could arise no question of their making any claim to be treated as financial creditors as such. However, for its relevance, we deem it appropriate to determine the issue as to whether the lenders of JAL, because of creation of the mortgages in question, could be treated as financial creditors of JIL, independent of the finding that the transactions in question are hit by Section 43 of the Code.”

34.3. Thereafter, this Court dealt with the rival submissions relating to the status of such lenders of JAL and held that they, on the strength of the mortgages in question, might fall in the category of secured creditors but, for the reason that the corporate debtor did not owe them any financial debt, such lenders of JAL were not falling in the category of financial creditors of the corporate debtor JIL. This Court summed up the conclusion on this issue in the following terms: -

“Summation on second issue

57. For what has been discussed hereinabove, on the issue as to whether lenders of JAL could be treated as financial creditors, we

hold that such lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it cannot be said that the corporate debtor owes them any “financial debt” within the meaning of Section 5(8) of the Code; and hence, such lenders of JAL do not fall in the category of the “financial creditors” of the corporate debtor JIL.”

35. It would be relevant to notice that the parcels of land forming the subject of seven questioned transactions were admeasuring about 858 acres; and while leaving 100 acres of land forming the subject of seventh transaction, which was not declared as preferential, a chunk of 758 acres of land, which earlier carried encumbrances because of the mortgages in favour of the lenders of JAL, got released with the judgement delivered by this Court and stood vested in JIL free from encumbrances. The judgement was delivered by this Court on 26.02.2020, after voting by CoC on the resolution plan in question but before the impugned order of NCLT dated 03.03.2020.

36. The foregoing narrative in relation to the past litigations has essentially been to flag and accentuate those attributes of the decisions of this Court which carry their own relevance, bearing and implications on the issues involved in the present batch of matters.

37. Continuing with the narrative, we may now take up the impugned resolution plan, propounded by the resolution applicant NBCC and voted in favour by CoC with an overwhelming majority of 97.36%.

The Resolution Plan

38. As noticed, by the order dated 06.11.2019, this Court directed IRP to complete the CIRP within 90 days from the date of the order; and for that matter, it was provided that in the first 45 days, it would be open to the IRP to invite revised resolution plans only from the two applicants namely Suraksha Realty and NBCC, who were the final bidders and had submitted resolution plans on the earlier occasion, and to place the revised plan(s) before the CoC.

38.1. From the facts stated before us, it is borne out that the revised resolution plans were called from the said applicants and were placed for consideration in the 16th Meeting of CoC held on 07.12.2019. Having considered the resolution plans, the members of CoC requested the resolution applicants to improve their offers and thereupon, both the resolution applicants agreed to submit addendums to their revised resolution plans. Accordingly, Suraksha Realty submitted an addendum to the resolution plan on 07.12.2019 and NBCC submitted its addendum to the resolution plan on 08.12.2019. Then, with the certificate dated 08.12.2019 from IRP that the resolution plans submitted by Suraksha Realty and NBCC were fully compliant under Section 30(3) of the Code read with Regulation 39(2) of the CIRP Regulations, the plans along with the respective addendums were put to e-voting from 9 a.m. of 10.12.2019, until 11.59 p.m. of 16.12.2019.

38.2. In the voting by CoC, the resolution plan submitted by NBCC along with addendum was approved by a vote of 97.36% of voting share

of the financial creditors in favour. On the other hand, the plan submitted by Suraksha Realty could muster only a vote of 2.12% of voting share of the financial creditors. The voting results were circulated by the IRP to the members of CoC on 17.12.2019; and, on the instructions of CoC, the IRP issued the Letter of Intent on 17.12.2019, which was duly accepted by NBCC.

38.3. In compliance of the order dated 06.11.2019 passed by this Court, the IRP filed the application bearing C.A. No. 5 of 2020 in C.P. (IB) No. 77/ALD/2017 seeking approval of the resolution plan of NBCC under Section 30(6) read with Section 31 of the Code before the Allahabad Bench of NCLT on 20.12.2019. Later on, the Principal Bench of NCLT at New Delhi transferred the proceeding to itself and that is how the impugned order dated 03.03.2020 came to be passed by the Adjudicating Authority (NCLT, New Delhi) within the time allowed by this Court.

39. For its very nature and for various requirements of the provisions contained in the Code as also in the CIRP Regulations, the resolution plan in question is a vast document carrying business plans, financial proposals including that of treatment of creditors, equity commitment, projected steps and expected reliefs and concessions. We shall refer to the particular stipulation/s in this plan at the relevant stage while dealing with the specific issue related therewith. However, an overview of the resolution plan shall be apposite to take note of its concept and salient features. In this regard, we may usefully reproduce the summary of

resolution plan placed before us by the IRP. This summary is subdivided into different parts namely, (1) claims and their treatment; (2) implementation of the plan; (3) key reliefs sought for by NBCC; (4) status of project; and (5) annexure 1, being a part of the implementation process.

39.1. The summary of claims and their treatment under the resolution plan is as under: -

S. No.	Type of Creditor	Admitted Claim (INR Crores)	Treatment under the NBCC Resolution Plan
1.	Banks/ Financial Institutions	9,783	• Transfer of ownership of 1526 acres in various land parcels of JIL. NBCC has estimated value of 1526 acres at INR 5,001 Cr. • Transfer of 100% ownership of Yamuna Expressway including, the remaining concession rights of Yamuna Expressway. Yamuna Expressway will be hived off into a SPV. Expressway SPV will raise fresh borrowings of INR 2,200 Crore and pay it to JIL as part of the consideration for transfer of Expressway. This money will be used by NBCC for construction of units.
2.	Allottees of Real Estate	9,588 (Principal amount)	• Allottees to get completed units as per Schedule A, which ranges from 9 months to 42 months from date of transfer to NBCC. • No delay penalty to be paid for past delays units to be constructed and delivered by NBCC. NBCC will pay Delay Penalty @ INR 5 per sq. ft./per month only if there is delay in delivery of

			more than 1 year from the delivery dates mentioned in Schedule A subject to Force Majeure event. Allottees who have not filed their Claims (Approx. 2,100 in number) shall be treated in a manner similar to other allottees and will be provided units, subject to customary check for compliances and KYC of the customers.
3.	Fixed Deposit Holders	29 Note: FD holders of approx. 90 Crore did not file Claims.	100% upfront payment of FD Holders' (only such Claims of FD Holders as are forming part of the Admitted Financial Debt) principal dues amounting to INR 29 Cr within 90 days from the Approval Date. - Liability for other FD holders (approx. INR 90 Crore) who have not filed their respective claims will be relinquished.
4.	Refund Seekers (Allottees and customers)	64 (Principal amount)	The entire admitted claim of the Refund Seekers shall be settled by payment of an amount not exceeding INR 62.40 Cr, of which 20% shall be paid upfront and the remaining amount shall be paid equally over a period of 4 years i.e. 20% each year in the manner provided under the Resolution Plan.
5.	Operational Creditors	464	- The Total Operational Debt of 464 Crore is proposed to be settled by payment of INR 20 Cr. This includes Claim of Yamuna Expressway Industrial Development Authority (YEIDA) towards development charges, etc. - Claim of YEIDA for approx. INR 6000 Crore has not been admitted by IRP since these pertain to future obligations for maintenance of toll road (which have not become due) and sub-judice matters relating to additional farmer compensation.
6.	Employees/workmen of the Corporate Debtor	No Claim	All dues are paid upto date.
7.	Dissenting		Proportionate share in the equity of the

	Financial Creditors (other than allottees)	612	Yamuna Expressway SPV and land parcel of 1526 acres on liquidation value.
8.	Equity Shareholders	1,388	NBCC to become 100% shareholder of JIL. Rs. 1 crore to existing shareholders towards consideration. Delisting of equity shares of JIL.
9.	Jaypee Healthcare Limited (Subsidiary Company)	NA	- Jaypee Healthcare Limited (JHL) is 100% subsidiary of Corporate Debtor. NBCC proposes to divest the entire shareholding of JHL or transfer to a Trust for the purpose of sale. - The lenders of JHL shall not be entitled to deal with the assets or adversely interfere with the continued business operations of JHL in any manner whatsoever.

39.2. In the summary of the implementation process, by way of a flow chart, various steps have been indicated which include formation of different SPVs; raising of fresh debts of about INR 2,000 crores by securitisation of Yamuna Expressway; transfer of rights of Yamuna Expressway against equity shares and debt disbursement; transfer of 1,526 acres of land worth INR 5,001 crores, bank loan of INR 5,000 crores and issuance of equity of INR 1 crore; diversification of JHL; infusion of INR 120 crores equity etc. etc.

39.2.1. The IRP has, in this summary, also indicated other key implementation provisions, most of which are the matters of contention in this litigation. That summary reads as under: -

“Other key implementation provisions

- Deemed approval of YEIDA for transfer of Land and Toll road to designated SPV's without incurring any cost such as stamp duty, transfer charges, Etc.
- Liability for additional farmer compensation (presently sub-judice) not payable by JIL. Alternatively, if found payable, YEIDA to collect is directly from end user.
- Transfer of INR 750 crores (plus interest) deposited by JAL, pursuant to the order of the Hon'ble Supreme Court to be transferred to JIL and to be used exclusively for construction of houses.
- JAL to pay amount due to JIL (approx. INR 500) (INR 716 Crores on insolvency commencement date) to JIL."

39.3. The key reliefs sought for by NBCC in the resolution plan are summarised as under: -

Sl. No.	Matter	Key Reliefs sought
1.	INR 750 Crore (along with interest) deposited by Jaiprakash Associates Ltd. (JAL), holding company of JIL with the Hon'ble Supreme Court in Writ Petition (Civil) No. 744/2017.	NBCC has retained the right to withdraw its Resolution Plan in case INR 750 Cr along with interest accrued thereon is not made available to JIL.
2.	Enforcement Directorate has initiated investigation under the Prevention of Money Laundering Act, 2002 ("PMLA") against JIL.	JIL to be discharged from PMLA and other investigations. NBCC has retained the right to withdraw from its Resolution Plan in case the said relief is not granted.
3.	858 acres of JIL's land was mortgaged with JAL lenders to secure debt of JAL without any consideration or counter guarantee to JIL (Transaction).	NBCC has sought relief that 858 acres of mortgaged land shall continue to be vested in JIL free of any mortgage, charge and encumbrance subject to the orders of the Hon'ble Supreme Court. Note: In the meanwhile, out of 858 acres, the Hon'ble Supreme Court vide order dated 26.2.2020 have set aside mortgage of 758 acres as avoidance transaction.
4.	Deemed approval of YEIDA for business transfer	Approval of the Adjudicating Authority shall be binding on YEIDA and

		constitute adequate approval by YEIDA for any business transfer to be undertaken between the Corporate Debtor and Expressway SPV. As per NBCC, no separate approval will be required for 'carve-out' and transfer of lands to land bank SPV and toll road to Road SPV as contemplated in the plan.
5.	Income Tax Liability	On account of transfer of land parcels from YEIDA to JIL in terms of the Concession Agreement, the Income Tax authority has been making an addition to the income of approximately INR 3,000 Cr on an annual basis estimated by the Resolution Applicant to be a tax demand of INR 33,000 Cr. for a period of 30 years, treating the transfer of land parcels as the revenue subsidy. This amount is being treated as operational debt and is being settled in accordance with the Resolution Plan.
6.	INR 716 Cr advance to JAL on Insolvency commencement date (subsequently this amount has reduced to approx. INR 500 crore)	INR 716 Cr was advanced to JAL towards construction work and maintenance charges/deposit. This amount of INR 716 Cr outstanding from JAL shall also be available to JIL for the purpose of completion of flats to the Home Buyers and other associated purposes. In case the relief is not granted, the assets currently owned by the JIL and being used by the home buyers of JAL relating to maintenance, shall not be available to the home buyers of JAL with effect from the Approval Date.
7.	Additional FAR appeal by YEIDA	YEIDA to withdraw the appeal filed in the District Court, Gautam Budh Nagar challenging the award dated 23.1.2017 passed by arbitral tribunal pertaining to additional FAR and JIL to get the right to use additional FAR as per the Resolution Plan.
8.	Additional Compensation to erstwhile land owner (for both real	Any Claim/claim of YEIDA in future w.r.t. the land acquired and transferred to JIL

	estate parcels and land acquired for toll road)	by YEIDA (in terms of the Concession Agreement), if any, shall only be recoverable by YEIDA directly from the actual lease holders (i.e. the sub-lessees) on such date and no Claim/claim shall lie against JIL or NBCC.
9.	Extension of Concession Period	To ensure feasibility and viability of this Resolution Plan, YEIDA and other concerned authorities shall extend the concession period (currently 36 years) under the Concession Agreement for an additional period of ten years.
10.	Liability to repay of capital cost pertaining to Noida-Greater Noida Expressway	This liability shall stand extinguished, on account of failure of YEIDA to allow JIL to collect and retain toll/fee from the users of the Noida-Greater Noida Expressway during the term of the Concession Agreement.

39.4. The timelines and methods for implementation have been indicated in the annexure to this summary which reads as under: -

S. No.	Actions	Timelines
1.	Incorporation of NBCC SPV for acquisition of 100% shareholding of JIL	Within 90 days of Approval Date
2.	Infusion of Equity Commitment by NBCC SPV into the Corporate Debtor towards acquisition of 100% shareholding in the Corporate Debtor	Upto a maximum of INR 120 Cr within 90 days of taking over the Corporate Debtor in the form of Equity/Quasi-Equity/Debt.
3.	De-listing (with exit price of INR 1 Cr to the public shareholders) and extinguishment of the shares of Non-Promoter Shareholders and Existing Promoters	Within 90 days of Approval Date
4.	Incorporation of Expressway SPV by the Corporate Debtor	Within 90 days of Approval Date

	Transfer of Yamuna Expressway asset from the Corporate Debtor to the Expressway SPV by way of business transfer or any other tax efficient transfer mechanism for a consideration equal to the book value of the Yamuna Expressway in the books of the Corporate Debtor	Within 90 days of Approval Date
	Transfer/Novation of Institutional Financial Creditor's dues to an extent of INR [Fresh Debt – (less) 2000 Cr] from the Corporate Debtor to the Expressway SPV.	
	Issuance of optionally/non-convertible Debentures by Expressway SPV to the Corporate Debtor amounting to INR 2,200 Cr	
	Issuance of equity shares by Expressway SPV to the Corporate Debtor for the balance consideration (i.e. book value of the Yamuna Expressway in the books of the Corporate Debtor –(less) INR 2,200 Cr – (less) transferred/novated debt)	
	Expressway SPV to avail indebtedness in consultation with the CoC aggregating to a minimum of INR 2,000 Cr (“ Fresh Debt ”) from the Expressway Lenders by securitizing future cash flows of the Expressway	
5.	Payment of unpaid CIRP Costs	Within 90 days of Approval Date
6.	Payment of the Operational Debt to Operational Creditors (other than the workmen dues as above) of the Corporate Debtor	INR 20 Cr or the liquidation value, if any due to the Operational Creditors in terms of Sections 30 and 53 of the Code (other than the workmen dues as above), whichever is higher, shall be paid in full before any payment to the Financial Creditors.
7.	Payment of transferred/novated debt of INR [Fresh Debt – (less) 2000 Cr] by Expressway SPV to the Institutional Financial Creditors	

8.	Payment of an amount not exceeding INR 29 Cr forming part of the Admitted Financial Debt to FD Holders subject to conditions as specified in the Resolution Plan	Within 90 days of Approval Date
9.	Payment of INR 2,000 Cr. by Expressway SPV to the Corporate Debtor towards part redemption of optionally/non-convertible debentures	Within 90 days of the Approval Date
10.	Conversion of Admitted Financial Debt (due to Institutional Financial Creditors) into equity shares of the Corporate Debtor and subsequent reduction of share capital to extinguish the shareholding of Institutional Financial Creditors in the Corporate Debtor in entirety	Within 90 days of the Approval Date
11.	Incorporation of Land Bank SPV and issuance of equity shares by the Land Bank SPV to the tune of INR 1 Cr which shall be subscribed to by the Corporate Debtor	Within 90 days of the Approval Date
	Transfer of land worth INR 5,001 Cr* Jaganpur-187 acres, Mirzapur- 170 acres, Tappal-550 acres and Agra-619 acres (the specific land parcels to be transferred to the Land Bank SPV at the aforesaid locations shall be at the discretion of the Resolution Applicant) total admeasuring 1,526 acres from the Corporate Debtor to the Land Bank SPV by way of a business transfer or any other tax efficient transfer mechanism	
	Transfer/Novation of Admitted Financial Debt (due to the Institutional Financial Creditors) to an extent of INR 5,001 Cr from the Corporate Debtor to Land Bank SPV	
	Transfer of 100% shareholding of the Land Bank SPV from the Corporate Debtor to the Institutional Financial Creditors	
12.	Transfer of equity shares from the Corporate Debtor to Institutional Financial Creditors equivalent to 100% equity share capital of Expressway SPV for a consideration equal to their then outstanding debt to be paid by way of settlement of the outstanding debt to the same extent	Within 90 days of the Approval Date
13.	Delivery of constructed flats to the Home Buyers towards satisfaction of their Claims	As per the Delivery Schedule set out in Annexure A.

14.	Payment of an amount not exceeding INR 62.40 Cr to the Refund Seekers towards their admitted claims	20% of INR 62.40 Cr. within 90 days of the Approval Date, remaining amount to be paid shall be paid equally over a period of 4 years i.e. 20% each year in the manner provided under this Plan
15.	Redemption of remaining amount of INR 200 Cr by the Expressway SPV to the Corporate Debtor	Any time prior to the monetization of the Expressway Asset by the Institutional Financial Creditors.

40. As noticed, on this resolution plan being presented for approval before the Adjudicating Authority, various objections were raised by various stakeholders. All such objections and the prayer for approval of the resolution plan were considered analogously; and the Adjudicating Authority has, by its order dated 03.03.2020, proceeded to approve the plan with a few modifications and with certain directions. This order dated 03.03.2020 is the matter of challenge for one reason or another by the parties before us. For their relevance, it would be appropriate to take note of the salient features of this order in necessary details.

Order dated 03.03.2020 by the Adjudicating Authority in approval of the resolution plan with modifications

41. The order dated 03.03.2020, as passed by NCLT in exercise of its jurisdiction under Section 31 of the Code, could be reasonably divided in five segments. In the first place, the NCLT recounted the relevant

background aspects leading to the CIRP in question and the orders passed by this Court in the aforementioned three rounds of litigation in the cases of **Chitra Sharma, Jaiprakash Associates Ltd.** and **Anuj Jain** (supra). Secondly, the NCLT dealt with the issue relating to the said INR 750 crores deposited by JAL in terms of the interim orders passed by this Court in the case of **Chitra Sharma** and which was to abide by the directions of NCLT in terms of the final judgement in **Chitra Sharma**. Thirdly, the NCLT examined the resolution plan and summarised its propositions, projections and stipulations. Thereafter, in the fourth segment, the NCLT dealt with the objections against the resolution plan by several persons/entities, including JAL and its stakeholders, ICICI Bank, YEIDA, some of the aggrieved homebuyers, YES Bank and the agreement holders. In the fifth segment, the NCLT generally dealt with the clauses relating to the reliefs and concessions in the resolution plan as also various other applications filed by different stakeholders. For their relevance, the material observations and findings of the Adjudicating Authority (NCLT) in its order dated 03.03.2020 could be relayed sequentially.

42. In the first part of the order dated 03.03.2020, the NCLT referred to the very same background aspects which we have already recited hereinbefore, namely, the award of contract for construction of Expressway to JAL, incorporation of JIL as special purpose vehicle, the Concession Agreement extended by YEIDA, taking up of the projects by

JIL for laying of Expressway and developing residential flats, JIL having collected money from homebuyers but having failed to deliver flats to them and having also defaulted in payment of loan instalments, initiation of CIRP and litigation in this Court in the case of **Chitra Sharma** (supra). The NCLT traversed through all the aforementioned relevant interim orders and final judgment in **Chitra Sharma**. The NCLT also took note of the directions of this Court in the judgment dated 06.11.2019 in the case of **Jaiprakash Associates Ltd.** and in the judgment dated 26.02.2020 in the case of **Anuj Jain**.

43. In the second part, in relation to the said amount of INR 750 crores and accrued interest thereupon, the NCLT took note of a vast variety of submissions made by different claimants, which may also be usefully recounted as follows.

43.1. It was submitted on behalf of JAL, who moved an application seeking return of the said sum of INR 750 crores, that when the Supreme Court had declined the request of homebuyers for *pro rata* distribution of the said amount and had transferred the same to NCLT, the amount could not be appropriated for any purpose other than refunding it to JAL. It was submitted that the said deposit of INR 750 crores had acquired the character of constructive trust and this amount was required to be refunded to JAL on the principles enshrined in Sections 77 and 83 of the Indian Trusts Act. It was further submitted that since the Supreme Court had nowhere directed either to pay the remaining balance or to utilise this

money towards refund of homebuyers' money, it had to be treated as the money of JAL and returned accordingly. It was also submitted that as per CIRP Regulations 36 and 37, only the properties of the corporate debtor were subject to the resolution process and the amount deposited by JAL, being not the asset of the corporate debtor, was required to be returned. Such submissions of JAL were duly supported by ICICI Bank, the leader of the consortium of banks, who had lent money to JAL and it was further submitted that in the case of **Chitra Sharma** (supra), the Supreme Court directed the promoters of JAL to deposit INR 2,000 crores in order to ensure that the homebuyers were not left remediless and their money could be refunded but after amendment to IBC, the Supreme Court neither ordered such refund nor insisted upon the promoters of JAL to deposit the remaining balance of INR 1,250 crores, but simply delegated this work to the NCLT to proceed with CIRP and to approve the resolution plan in accordance with IBC. It was submitted on behalf of ICICI Bank that there being no specific direction by the Supreme Court to utilise this money for the financial creditors of JIL, the same was required to be returned to JAL. The promoter-directors of the corporate debtor also filed an affidavit stating that no part of this money was deposited by JIL and the same was not handed over to JIL for any purpose whatsoever; and that the Supreme Court had never held that JAL was legally bound to contribute funds required for completing the projects of JIL. On similar lines, the appellant Pankaj Sharma and other homebuyers of JAL also

prayed for release of the said amount to JAL so that it could be utilised for the homebuyers of JAL. It was submitted that JAL itself was in financial distress and if such a huge amount belonging to it was given to another company, the interests of the stakeholders of JAL would be jeopardised. It also submitted that the purpose for which the deposit was made had not been fulfilled and it was not meant for construction of the flats of JIL and this money, being not an asset of JIL, should be returned to JAL.

43.2. In opposition, it was submitted by the lenders of JIL, led by IDBI Bank that in the judgement dated 09.08.2018, the Supreme Court was conscious of the fact that this amount could not be disbursed only to one class of creditors and hence, it was not allowed to be used for the purpose of the refund seekers. It was further submitted that the corporate debtor was generating revenue through collection from Yamuna Expressway but this money, rather than being utilised for servicing the loans provided by the institutional lenders, was being utilised towards construction work and for running the corporate debtor as a going concern; and in this scenario, the said amount of INR 750 crores with interest should be distributed on *pro rata* basis to the lenders of JIL in accordance with the voting share in the CoC. Along with others, IRP also made submissions that there were 32,754 allottees to whom flats were sold as per the records of JIL and as on 05.10.2018, 24,296 of them were waiting for possession of their flats; and if the money was ordered to be released for construction and development of the projects of the

corporate debtor, it would provide a boost to the construction activity and serve the larger purpose. It was submitted by IRP that as per the orders passed by this Court in **Chitra Sharma** (supra), this money was intended to protect the interests of homebuyers only. It was also pointed out that as per the tripartite agreement involving JAL, JIL and homebuyers, JAL was the developer of the project and was responsible for delivering possession of flats to the homebuyers. The IRP also referred to various orders passed by this Court in the course of proceedings in the case of **Chitra Sharma** as also a settlement proposal given by JAL on 15.02.2019, stating that the said sum of INR 750 crores was to be utilised towards revival of the business of JIL irrespective of the outcome of legal proceedings. In the backdrop of these facts and circumstances, it was submitted that the said amount being for the cause of homebuyers, it was not open to JAL or its lenders or promoters or homebuyers to seek reopening of the issue concluded by the decision of this Court.

43.3. Having noticed the length and breadth of the arguments on the two sides, where one was supporting for utilisation of the said amount of INR 750 crores and accrued interest for the benefit of the homebuyers of JIL and where other side was arguing for return of the money to JAL, the NCLT proceeded to consider as to how this money was to be dealt with.

43.4. The NCLT referred to the background in which this Court had passed the order for deposit of the said amount where promoter-directors of JAL and JIL were one and the same; and JIL/JAL had failed to deliver

flats to the homebuyers of JIL within the timelines given by them. The NCLT observed that in the orders of this Court, JIL/JAL were directed to deposit a sum of INR 2,000 crores towards refund of the money of homebuyers; the Court had never treated that money as the property of JAL; and the only reason for this Court not distributing the deposited amount to the homebuyers was that only 8% of them were seeking refund whereas 92% had asked for possession of the flats and, in order to avoid preferential treatment, this issue was relegated to the NCLT. The NCLT further observed that though JAL was per se not a debtor to the homebuyers but, when the money had come on behalf of the debtor in relation to a debt obligation or for discharge of an obligation, neither the person depositing it could subsequently say that he was the owner of the money nor the money could be construed as a trust money. The NCLT held that this money had to be utilised to the obligation owed to the creditors of the corporate debtor and any decision for refund of money to JAL would be overreaching the wisdom of the Supreme Court. The NCLT, accordingly, disposed of all the applications with respect to the issue of INR 750 crores and held that this money is to be treated as the asset of the corporate debtor. The relevant passages of the observations and findings of NCLT in regard to this issue could be extracted as under: -

“51. On reading the judgments and orders of Hon'ble Supreme Court, it is evident that the Hon'ble Supreme Court is aware of the fact that JAL has deposited the money. It is aware of the fact that JIL money has gone to JAL for construction of the towers to the homebuyers of JIL, it is a fact that promoter-directors of JIL and JAL are one and the same. It is a fact that JIL/JAL failed

to deliver flats to the homebuyers of JIL within the timelines given by them. In all the orders of the Hon'ble Supreme Court, it has only been said that JIL/JAL shall deposit Rs. 2000 crore towards the refund of homebuyers money. It has not been treated that money as the money of JAL. On reading all the orders of the Hon'ble Supreme Court, all that could be ascertained is the Hon'ble Supreme Court endeavoured to claw back the homebuyers' money from JIL and JAL. In that pursuance, JAL deposited Rs. 750 crore. The only criteria for not distributing this Rs. 750 crore to the homebuyers is that only 8% of the homebuyers sought for refund of the money whereas 92% homebuyers have asked for flats, therefore to avoid preferential treatment, this issue has been relegated to the NCLT to deal with in accordance with IBC. One more fact is, though Hon'ble Supreme Court initially stayed the proceedings of CIRP, subsequently vacated the stay and allowed the IRP to proceed with CIRP.

52. In the backdrop of these facts and in the light of submissions made by either side, let us see what the Honourable Supreme Court held in Chitra Sharma “**Directing disbursement of the amount of Rs. 750 Crore to the Homebuyers who seek refund would be manifestly improper and cause injustice to the Secured Creditors since it would amount to preferential treatment to a class of creditors**” (Para 48.1 of Chitra Sharma case (2018) 18 SCC). This being the observation, now the point before us is how to go about it. It has not been said anywhere in the observation that this money should go back to JAL. Moreover the Hon'ble Supreme Court has not asked JAL/JIL to deposit the money on the condition that it would be returned to JAL in the event it has not been distributed to JIL homebuyers. It has not been said anywhere that it is the money of JAL.

53. It is a fact that if homes are not delivered within the time, the only recourse is either to complete the homes or to refund the money. Once a contract is not performed as stated under an agreement entered between the parties, if the party advanced money is entitled for refund of the money, the jural relation in between the person given the money and the person taken the money will become creditor and debtor relation. When such money has come back from the debtor to the creditor or to a person in between for the cause of the creditor, it can never be called as the money of the debtor, it has to be treated as money returned to the creditor.

54. In this case, JAL has admittedly failed to complete the projects as stated by JIL and JAL. It is not the case that this money was given for charitable purpose. It is not the case that this money was deposited with the Hon'ble Supreme Court on the condition that it would be returned to JAL in the event it has not been distributed to the homebuyers. As long as debtor is liable to pay

money to the creditor, once it has been deposited towards that payment, it can't be stated that money belongs to the debtor.

56. ICICI Bank Counsel has argued that money is fungible, therefore unless money has gone out from JAL for repayment, it can't be said as money deposited by JIL is the money payable to JIL homebuyers.

57. No doubt money is fungible, but obligation to repay is not fungible, therefore when money is deposited or clawed back to repay it to the creditor, the money being fungible and there being an obligation for repayment, it can no more be considered as money owned by the debtor. Though JAL is per se not a debtor to the Homebuyers, when money has come on behalf of the debtor in relation to a debt obligation or for discharge of an obligation, the person deposited it towards that obligation cannot subsequently say that he is the owner of the money, therefore entitled for return of it.

58. If trust concept is examined, we will know that trust is a relationship where property/money held by one party for the benefit of another party. Trustee holds the property/money for the benefit of the trust beneficiaries. Trustee is under fiduciary duty to ensure that the property of the owner is maintained and the benefit thereof is reached to the persons to whom it is intended to. In the case of trust, the owner is under no obligation to pass on the benefit to the beneficiary, therefore, the owner/settler being the owner of the property, he is entitled to take it back in the event it is not utilized for the purpose the owner intended to. But that is not the case when money from the Debtor or on behalf of the Debtor has gone out towards discharge of an obligation. In the case of trust, ownership of that property or money remains with the owner as long as it is not utilized for the purpose intended to. That owner has no obligation to part with his property/money.

59. In case of homebuyers' issue, once homebuyers entered into an agreement with a developer and when their relations entered into turbulence and not in a position to become normal, the relation in between them will become creditor and debtor and the person under obligation shall refund the money of the homebuyers. In the given case, JAL deposited money on behalf of JIL for utilization of the same to the homebuyers of the Corporate Debtor. Therefore, it is evident that this deposit is made towards an obligation. When any money is received towards an obligation, it can neither be construed as trust money nor construed as governed by constructive trust, therefore we have not found any merit to say that this money is governed by trust concept.

60. In this case, the homebuyers' money has been lying with the Corporate Debtor and JAL, it is an admitted fact that money come from the Homebuyers has gone to JAL in the name of

construction. It is not the case of the JAL that JIL money has not come for construction. Moreover, JAL, by the time it has deposited, was aware that it was depositing that money towards the obligation owned to JIL homebuyers.

61. Here there could not be any assumption or presumption to say that JAL deposited this money before the Honourable Supreme Court with an assumption that it would come back to it in the event this money has not been utilized for the distribution of it to the homebuyers of JIL.

62. As long as the Hon'ble Supreme Court has not stated that this money has to be returned to JAL, it has to be construed that the Hon'ble Supreme Court has consciously retained the money within the custody of it and thereafter transferred this money to NCLT with a direction that the parties shall abide by the directions of NCLT. Had the Hon'ble Supreme Court has felt that it should go back to JAL, the Honourable Supreme Court would have returned it to JAL, but it has not been done. Whenever any payment is made towards any liability, it has to be treated as a payment made towards that liability. It does not matter who paid the money, it matters as to whether it has been paid towards an obligation or not. Since JAL has without any objection or condition paid to the homebuyers of JIL on behalf of JIL, it has to be treated that the payment is towards the obligation of JIL. Though it has not been explicitly explained that JAL paid on behalf of JIL, the matter pending before the Hon'ble Supreme Court being with regard to homebuyers of JIL, when money was asked to be deposited towards refund of JIL homebuyers, and the same being paid by JAL, now it is not open to JAL to say that it is JAL's money.

63. As to the argument saying that for Rs. 750 Crore has not gone into the books of Corporate Debtor (JIL), therefore it cannot be treated as the asset of JIL, when money has been deposited on the directions of Honourable Supreme Court and that has not been returned by Honourable Supreme Court, we are only limited to understand that the Honourable Supreme Court has not refunded the money because refunding to a few creditors in preference to other creditors would become a preferential treatment, therefore such observation cannot be extrapolated to say that the Hon'ble Supreme Court has refused to refund the money on the assumption that this money has to go back to JAL.

64. If we see the situation in the perspective of the historical facts, it is evident that homebuyers paid money, JIL and JAL failed to deliver homes to the homebuyers, therefore the obligation lies upon JIL to satisfy that obligation either by refunding the money or by delivering homes to the homebuyers, for neither of the things being done, the money having passed from JIL to JAL, and part of it having come back as per the orders of the Hon'ble Supreme Court, now it is not open either to JAL or its creditors to canvass that this money is belonging to JAL.

65. In view thereof, we hereby consider that this money has to be utilized to the obligation owed to the creditors of the Corporate Debtor and in case this Bench for any reason passes any order for return of this money to JAL, it would be nothing but overreaching the wisdom of the Hon'ble Supreme Court and its directions. When money has been paid by JAL towards an obligation as per directions of the Hon'ble Supreme Court, it can no more be considered as the assets of JAL. As to whether it has been stated in the information memorandum that this Rs. 750 Crore is an asset of the Corporate Debtor or not, every case has to be seen in the context of its facts. If at all for any reason, this is not shown as the asset of the corporate Debtor in the information memorandum, can it be said that the Hon'ble Supreme Court transferring the deposit to NCLT has no meaning? Any order that has been passed by the Hon'ble Supreme Court, is binding on all Courts and Tribunals, for there being no direction to return this money to JAL or to determine as to whether it has to be paid to JAL or not, it is not open to this Bench to draw any inference other than an inference considering that this money is an asset of the Corporate Debtor. Since JAL is not under further obligation to complete construction of homes, there is no occasion to assume that if this money go back to JAL, it would be utilized for the cause of the creditors of the Corporate Debtor, in view thereof, we hereby dispose of all CAs related to Rs. 750 Crore issue by holding that this money is to be treated as the asset of the Corporate Debtor."

44. After having dealt with the issue of INR 750 crores, the NCLT took up the issue with regard to the approval of the resolution plan and for that matter, in the third segment of the impugned order, summarised the salient features of the resolution plan, which have already been noticed hereinbefore and need not be repeated. The objections dealt with by the NCLT in the fourth segment of its order dated 03.03.2020 could now be noticed with reference to the objector and the subject matter.

45. It was submitted on behalf of JAL that the resolution plan could not be approved for the reasons that it was being used as a device for enrichment of NBCC at the cost of the corporate debtor where NBCC was attempting to acquire JIL having worth of about INR 8,257 crores for a

petty sum of INR 120 crores; that the resolution plan was a contingent one where NBCC reserved its right to withdraw if the said sum of INR 750 crores was not treated as part of the resolution plan and JIL was not discharged of PMLA and other investigations; that the approval was inconsistent with Section 11(4)(g) of RERA; that simultaneous voting on two resolution plans was not permissible in law; that the resolution applicant wrongly suggested that there was no haircut in the proposed settlement of dues of financial creditors because the haircut was as far high as INR 6,101 crores which was 62.36% of the debt of INR 9,783 crores. These contentions were countered by IRP with the submissions that the promoters of JAL and JIL had no locus to question the offer accepted by the CoC and as per the decision of this Court in the case of ***Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Ors.*** (C.A. No. 4242 of 2019)³⁷, no provision in the Code required the resolution applicant to match the liquidation value; that no provision in the Code prevented simultaneous voting over two plans; and that as per the decision of this Court in the case of ***Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors.*** (2019) 8 SCC 416, RERA and IBC co-exist and have to be interpreted harmoniously and in the event of a clash, RERA must give way to IBC. It was also submitted that when the homebuyers who were entitled to raise RERA objections had themselves voted in favour of the plan, the promoters/directors could not raise any grievance. There was a question of claim of the corporate

³⁷ Since reported as (2020) 11 SCC 467.

debtor against JAL, being the amount given as mobilisation advance on which, there was a discrepancy in the accounting, but it was admitted on behalf of JAL that an amount of INR 274 crores was net receivable by JIL from JAL. To this, the NCLT directed payment of the said amount to JIL and for reconciliation of the account as regards the remaining dues. The NCLT had also brushed aside the submissions regarding the contingent nature of the plan with reference to its finding on the issue related to the said deposited sum of INR 750 crores and Section 32A inserted to the Code by way of amendment with effect from 28.12.2019. The relevant observations of NCLT read as under: -

“69. With regard to these two issues, this Bench has already decided that Rs. 750 Crore lying with NCLT shall be utilized for the cause of the creditors of the Corporate Debtor and with regard to PMLA proceedings, for Section 32A being brought into existence by way of Amendment to the Code 28.12.2019, now there need not be any separate protection from the PMLA proceedings over the assets of the Corporate Debtor, therefore we have not dealt with this issue, therefore the argument saying that plan is conditional has no merit.

72. Moreover, the calculation of figures given by JAL to say that figures placed by the Resolution Plan are not supported by material, in any event, this being an issue to be taken up by the CoC, this Bench cannot decide the fate of the resolution plan on the figures shown by the promoters of JIL and JAL, unless such plan is vitiated by fraud.

73. Apart from this, it is not the case of promoter/directors that company has positive net worth entitling the promoters of the company to receive the residual proceeds in the event company is liquidated. As long as liabilities are more than the assets of the company, the promoters/directors' arguments cannot be seen as a point having bearing on the resolution plan approved by the CoC.

74.....This objection over simultaneous voting per se does not look as an act in violation of the Code or Regulations thereto. No provision has envisaged that two plans should not be put to voting. Moreover there is no mandate that if two plans are put to voting,

the plan voted in favour to be declared non est in law. Doctrine of severance could be applied by validating the action doable under the law as valid. If any excess has happened, such excess can be taken out. Besides this, both the plans are not approved. In addition to it, unsuccessful Resolution Applicant has no grievance to the plan present before us.

75. With regard to RERA issue, the IRP submits that the Hon'ble Supreme court in para 28 of ***Pioneer Urban Land & Infrastructure Limited & anr. Vs. Union of India & Ors. (WP (c) no. 43 of 2019)*** held that *RERA and IBC must be held to co-exist and be interpreted harmoniously and in the event of clash, RERA must give way to IBC.*

76. When the home-buyers, who are entitled to raise RERA objection themselves have voted in favour of the plan, RERA violation if any, it cannot be the grievance of the promoters/directors.

77. With regard to Rs. 716 Crores claim against JAL by the Corporate Debtor, the IRP submits that after setting off the amount paid to JAL, the amount to be refunded by JAL is a sum of Rs. 594 Crores as on 31.12.2019. It is an admitted fact that mobilisation advance of Rs. 586 Crores is due and payable by JAL and JIL as on 31.12.2019, out of which JAL says, after setting off, the amount due and payable to JIL by JAL is only Rs. 274 Crores. However, JAL counsel has not placed material supporting the figures shown as set off, since JAL Counsel himself has stated that net receivable by JIL from JAL amounts to Rs. 274 crores, JAL shall forthwith pay Rs. 274 crores to JIL, as to remaining money as sought by the Resolution Applicant, JIL and JAL shall draft a reconciliation statement, accordingly payment has to be made to whomever any outstanding is payable.”

46. Another major part of objections, in terms of magnitude and implication, came up from the dissenting financial creditor ICICI Bank. It was submitted by this lender bank that being a dissenting financial creditor, it was entitled to receive payment as per the liquidation value in terms of Section 30(2)(b) of the Code read with Regulation 38(1)(b) of CIRP Regulations but in the resolution plan, it was sought to be provided only the land and equity in the SPVs proposed to be incorporated; and such a provision in the resolution plan was entirely impermissible. It was

also submitted that while the assenting financial creditors were allowed to receive upfront payment of INR 300 crores on the basis of fresh debts raised by Expressway but the same benefit was not being extended to the dissenting financial creditors. The NCLT noted the star argument of the learned counsel for ICICI Bank that distribution of equity or the land parcels to the dissenting financial creditors does not satisfy the requirement of “payment” under Section 30(2) of the Code read with Regulation 38(1)(b) of the CIRP Regulations; and such payment has to be a liquidated sum, as stated under Section 53 of the Code. *Per contra*, it was contended on behalf of the resolution applicant and the IRP that it was nowhere envisaged in Section 30(2) of the Code that payment of liquidation value to dissenting financial creditors has to be in cash; that even Regulation 38(1)(b) of the CIRP Regulations only provided for the priority of payment to the dissenting financial creditors before the assenting financial creditors and the mode of payment to be in cash was not mentioned; that when the assenting financial creditors were not being paid in cash and had accepted equity and land parcels, payment to the dissenting financial creditors in cash would cause prejudice to the rights of the assenting financial creditors. Meaning of the word “payment” in Black’s Law Dictionary was also cited and it was argued that the money or other valuable thing delivered to discharge the obligation is to be construed as payment under Section 30(2) of the Code.

46.1. While dealing with the rival submissions in relation to this claim of the dissenting financial creditor, the NCLT referred to the binding nature of agreement between JIL and the said creditor as also the rights of a dissenting financial creditor in terms of Sections 30(2) and 53 of the Code and concluded that the only recourse available was payment in cash to such dissenting financial creditor a sum equivalent to the liquidated sum he would be entitled to receive under Section 53 of the Code. The NCLT said,-

“91. If you come to the resolution under IBC, there are two outcomes in it. One is some creditors agreeing for a resolution to the existing situation. Another is, some creditors may not agree for the resolution. The persons agree for the resolution, they are no doubt bound by the arrangement they agreed upon. But as to the dissenting creditors, who have not agreed for the resolution, they are governed by sections 30(2) & 53 of the Code. In the case of dissenting creditor, the Corporate Debtor or the Resolution Applicant stepping into the shoes of the Corporate Debtor is bound by the earlier contract entered between the Corporate Debtor and the dissenting financial creditor and then by the pro rata distribution entitled u/s 53 of the Code. The only recourse available is, the dissenting creditor shall be paid in cash equivalent to the liquidated sum he is entitled to receive u/s 53 of the Code. It is a deeming fiction to calculate the liquidated sum payable to the dissenting financial creditor and pay the same to the dissenting creditor as if the company is liquidated. To make such payment, the company need not be factually liquidated.”

46.2. The word “payment”, as defined in Black’s Law Dictionary was also analysed by NCLT and it was stated that the obligation has to be seen and in the instant case, the obligation was repayment of money lent along with interest. It was observed, that the dissenting financial creditors were to be paid in cash not just by virtue of Section 53 of the Code but

also by virtue of the terms and conditions of the agreement between JIL and the dissenting financial creditor, in the following words: -

“92....Therefore this argument will not be ticking to say that payment in kind to the promise is discharge of obligation. If the promisee has agreed to give up the payment obligation, he is free to do so. In this case, for the dissenting financial creditor has not agreed to the approval of the resolution plan, they shall be paid in cash, not only by virtue of the mandate under Section 53 of the Code but also by virtue of terms and conditions of the agreement between the Corporate Debtor and the dissenting financial creditor.”

46.3. The NCLT further observed that upon approval of the plan by the CoC, it was not open to the parties to say that, since the assenting creditors were not getting better treatment than the dissenting creditor, the dissenting creditor shall remain bound to the plan; and when a particular issue was governed by law, something not present in the law could not be thrust upon any party under the cover of equity. The NCLT, thereafter, proceeded to analyse the requirements of Section 30(2) of the Code with Section 53 and Regulation 38 of the CIRP Regulations; and also examined its powers to deal with those aspects of the resolution plan which were not compliant with Section 30(2) of the Code. Having examined and analysed thus, the NCLT held that when the resolution plan is found non-compliant with Section 30(2), the IRP or the resolution applicant cannot say that the approval being within the ambit of commercial wisdom of CoC, all what was decided by CoC was binding on the dissenting financial creditor; and it was within its (NCLT's) jurisdiction to modify the plan so as to make it compliant with the requirements of law

without altering its basic structure. The NCLT observed and held as under: -

“98. If section 30(2) (b) (ii) is carefully examined, and read in the context of the said clause, it is clear that payment will be the amount to be paid to the financial creditors under Section 53 of the code, because it is for payment of the debts of the financial creditors, thereafter it has been further stated it shall be not less than the amount to be paid to them in accordance with Section 53 of the code.

99. When all these provisions and IBBI specifications made clear payment to the dissenting financial creditors means payment of amount, the resolution professional or the resolution applicant cannot argue that the payment can, not only be in cash but also in kind.

100. The persons agreeing for something, they may agree for anything, it does not mean that the persons disagreeing shall also be treated as the assenting financial creditors are treated. When any financial creditor disagreed for a resolution, he knows that he has to be compromised with the situation befall upon him under Section 53 of the code. It does not matter as to whether his entitlement under Section 53 is more or less than the treatment assenting financial creditors getting. Their rights are already compromised under section 53 slating them to their entitlement on pro rata basis. They cannot be put to further sufferance at the wish of the Resolution Applicant or the CoC. As Section 30 (2) has referred to section 53 entitlement, and this Bench being made custodian to verify as to whether section 30(2) compliance has been accomplished or not, the RP or the resolution plan applicant cannot say that plan approval is within the ambit of commercial wisdom of the CoC therefore what all that is decided by the CoC is binding upon the dissenting financial creditors. Whenever such compliance is not present in the plan, this Bench is authorised to examine the same and interfere with the plan despite the plan has been approved as contemplated under Section 30(4) of the code.

101. Looking at the resolution plan treatment to the dissenting financial creditor in the light of the aforesaid legal proposition, since it has not been said in the Code that plan should be approved as submitted by the resolution professional under Section 30(6) of the code, we are of the view that this Bench has jurisdiction to approve the plan by modifying the plan to the extent that does not alter the basic structure of the plan.”

(underlining is in original)

46.4. Having thus held on the requirements of modification of the plan in relation to the treatment of the dissenting financial creditor while retaining

its basic structure, the NCLT observed that the two aspects which were made the basic conditions by the resolution applicant namely, getting the said sum of INR 750 crores and extinguishing of PMLA proceedings were duly taken care of, respectively by the decision in relation to the said corpus of INR 750 crores and by the amendment of law. The NCLT further observed that for the sake of viability and feasibility, the plan could be modified to make it compliant with Section 30(2) of the Code. Having said so, NCLT proceeded to modify the terms of resolution plan in the manner that the resolution applicant shall pay to the dissenting financial creditor the amount receivable in terms of Section 53 of the Code in twelve monthly instalments along with interest starting from six months from the date of order with default conditions of interest. The NCLT ordered as under: -

“103. In view of the same, for the sake of viability and feasibility of the plan, we hereby modify this plan to make it in compliance with the section 30(2) (b) (ii) of the code by holding that the Resolution Applicant shall pay to ICICI an amount that it is entitled to receive u/s 53 of the code within 18 months from the date of approval of this plan, that is in 12 equal monthly instalments along with interest over the admitted claim starting from six months hereof. In the event, the Resolution Applicant has failed to repay as stated above, ICICI is entitled to claim commercial interest over the admitted claim from the date of default, that is from the first month of 12 monthly instalments.”

47. Another major contentious issue before the Adjudicating Authority related to the objections of YEIDA. As noticed, YEIDA had been the land providing agency and had entered into Concession Agreement for leasing the land for construction of Expressway and also for the purpose of development of the surrounding parcels of land.

47.1. The NCLT noticed that as per the said CA, the concessionaire (JIL) was to bear the acquisition cost for the project land given to it and in consideration, the concessionaire would obtain the right to develop land for commercial exploitation and the right to operate the Expressway and collect toll for a period of 36 years; and after the expiry of 36 years from the grant of concession, the Expressway shall revert to YEIDA. As to the land for development, it was given on lease for 90 years. It was essentially submitted on behalf of YEIDA that the question, of additional compensation of the land acquired, cropped up with the directions of the Allahabad High Court; and that the liability in regard to the additional compensation in relation to the land acquired and leased to JIL was that of the corporate debtor JIL. It was also pointed out that the question of such additional compensation by JIL was subjected to arbitration proceedings where an award was made to the effect that the corporate debtor need not pay this amount of additional compensation but the award has been questioned by YEIDA in the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996³⁸⁻³⁹. YEIDA stated its objection to the stipulation in the resolution plan that in case of the award being overruled, YEIDA would collect the amount of additional compensation from the end-users of the project land. It was submitted in this regard that in the CA, two payment components were present - one being of acquisition cost payable by the concessionaire and another being

38 Hereinafter also referred as to 'the Arbitration Act'.

39 It appears from the corrigendum dated 17.03.2020 and the submissions of the parties that the issue is pending before the Court of District Judge, Gautam Budh Nagar.

of lease rent, which could be paid by the sub-lessee/end-user as the case may be. It was submitted that given such components, the IRP or the resolution applicant could not insist that YEIDA has to collect the acquisition cost directly from the end-users. It was also submitted that even if the land utilised for Expressway was to revert to YEIDA after 36 years, the CA nevertheless provided as key components that the concessionaire would collect toll for this period and has to bear all the cost including the cost of acquisition; and there was no exemption as regards the land of Expressway. It was also submitted that the resolution applicant cannot split the transferred land into two and say that the payment of additional compensation would be applicable to the land used for development alone. It was further submitted that in view of Clause 18.1 of CA, in case of the necessity to transfer the concessionaire's rights and obligations to an SPV, there has to be necessary documentation involving YEIDA, the concessionaire and the SPV incorporated, so that YEIDA could keep exercising its rights over the SPV concerned; and the resolution applicant or CoC could not have unilaterally transferred the rights and obligations of the corporate debtor to an SPV without the consent of YEIDA. A decision of this Court in the case of ***Embassy Property Development Pvt. Ltd. v. State of Karnataka and Ors.***: 2019 SCC OnLine SC 1542 was also referred to submit that IBC will not have overriding effect on every enactment which is applicable to the transactions related to the corporate debtor. It was further submitted that

the requirement of withdrawal of arbitration case could not be thrust upon YEIDA under the cover of the plan; and for the resolution plan having set out so many provisions curtailing the rights held by YEIDA, the same was required to be rejected. However, the Adjudicating Authority also noticed that despite such objections, the counsel appearing on behalf of YEIDA submitted that since the project was for public cause, it would have no objection for approval of the resolution plan provided necessary changes were made in it *'by removing the fall outs from the concession agreement'*.

47.2. In regard to this issue relating to the objections and submissions on behalf of YEIDA, the NCLT was of the view that CoC should not have approved the resolution plan stating that the additional compensation would be collected from the end-users; and proceeded to modulate the terms of the resolution plan to read that YEIDA shall have the right to collect the acquisition cost through the SPVs concerned. As regards the issue as to whether additional compensation need not be paid with regard to the Expressway for the same would revert to YEIDA after 36 years, the NCLT found it appropriate to read down the resolution plan as leaving it open to the parties to have proper recourse over this issue in the competent forum when occasion so arise. The NCLT also observed that the Concession Agreement was based on the statute created by the State Government and, therefore, any violation of terms and conditions of the same would be the violation of law in force. The NCLT, however, again

recorded the submissions on behalf of YEIDA that their endeavour was only for compliance of the terms and conditions of CA in order to ensure proper monitoring on realisation of dues and supervision over the work of corporate debtors or SPVs but not for rejection of the resolution plan. The relevant observations, findings and directions of YEIDA in regard to this issue read as under: -

“118. On hearing the submissions of either side, with regard to payment of additional compensation, in the event any direction has been given in the arbitration proceedings to the Corporate Debtor to pay additional compensation, as per concession agreement, additional cost shall be paid by the concessionaire. We don't go into the point as to whether additional compensation is part of the acquisition cost because i.e. a point already Adjudicated by the Arbitral Authority and the issue is pending before the Hon'ble High Court of Delhi, now the limited point to be dealt with is, as to whether such compensation, if directed to be paid, is to be paid by the concessionaire or by the end users.

119. As said above, there are two payment components come from the concessionaire one is acquisition cost, two is the lease rentals. In the concession agreement, it is obvious that acquisition cost (actual cost) shall be paid by the concessionaire, as to lease rentals are concerned, it has been dealt with in detail that lease rentals could be collected either from sub-lessee or from the end users, wherever the interest is transferred either to the sub-lessee or the end users. Therefore, CoC should not have approved the resolution plan stating that the compensation, if awarded, shall be collected from the end users.

120. To iron out all these creases and to make this resolution plan viable, we hereby direct that the resolution plan shall be read as YEIDA has right to collect acquisition cost through the SPVs concerned.

121. With regard to other objections that additional compensation need not be paid with regard to Expressway land on the premise that since Expressway will revert to YEIDA after 36 years, YEIDA counsel submits that this land has been given on consideration of collection of toll for about 36 years.

122. In the backdrop of this factual scenario, we are of view that both are governed by concession agreement, therefore the Resolution Plan is to be read that it is left open to both the parties to have proper recourse over this issue before Competent Forum of law when time comes for payment of additional compensation.

123. On transfer of concessionaire's rights and obligations to SPVs, as per the concession agreement, it is clear that this Corporate Debtor is a concessionaire, for the first time concessionaire having proposed to transfer its rights and obligations to the aforesaid two SPVs, we are of the view that documents shall be executed between the concessionaire, YEIDA and each of the SPVs. At last we must say that the concession Agreement is based on the statute created by the State Government, therefore any violation of the terms and conditions of the concession agreement is violation of the law in force as contemplated under section 30(2) of the Code, it has been decided as above.

124. Despite YEIDA counsel representing the State Government Authorities with regard to its rights, the counsel has categorically mentioned that YEIDA's endeavour is only for compliance of the terms and conditions of concession agreement so that the State Agencies will have proper monitoring on realization of its dues and will have proper supervision over the works of the Corporate Debtor or its SPVs, but not to ensure that this resolution plan is rejected by this Bench on the grounds aforementioned."

48. After having dealt with the aforesaid major issues relating to INR 750 crores, objections of JAL and its stakeholders, ICICI Bank and YEIDA, the NCLT proceeded to deal with the other issues relating to the fixed deposit holders, some of the aggrieved homebuyers, YES Bank and the agreement holders.

48.1. As regards fixed deposit holders, the NCLT provided that the resolution applicant shall make a provision to clear their dues as and when the unclaimed fixed deposit holder claims it, and this right will remain in force as long as they were entitled to claim under the Companies Act, 2013. These directions of NCLT in the impugned order read as under: -

"125. Regarding FD holders payments who have not made claims which have been reflected in the records of the Corporate Debtor, the Plan Applicant shall make a provision to clear their dues as and

when the unclaimed FD holder claims it, and this right will remain in force as long as they are entitled to claim under Companies Act 2013.”

48.2. The NCLT also took note of the submissions of some of the homebuyers who were not agreeing with the resolution plan in question. Those dissatisfied homebuyers submitted that the timelines given in the resolution plan for completion of flats were not workable; there was no clause for refund of money in the event flats not being completed within the timelines envisaged, except to the extent of nominal interest; and that the voting share of homebuyers being only 57.66%, it cannot be said that cent percent consent had been given for approval of the resolution plan by CoC. The NCLT declined to recognise such objectors as dissenting financial creditors because authorised representative of this class of creditors had voted in favour of the resolution plan. The NCLT observed and held as under: -

“126. One Rashmi Singhal and another applicant calling themselves as dissenting home-buyers, filed IA 871/2020, stating that the time lines given in the Resolution Plan for completion of flats are not workable and for there being no clause for refund of money in the event flats are not completed within the time lines envisaged, except to the extent of nominal interest mentioned in the plan, these two submit that they have dissented for the approval of the Resolution Plan. They have further relied upon voting share saying homebuyers voting share is only 57.66% therefore, it cannot be called that cent percent consent has been given for approval of the Resolution Plan by CoC. For there being a rule under IBC, whenever more than 50% voting has come from a class of creditors represented by an authorized representative, the approval given to the authorized representative for more than 50% will become 100% approval, therefore it cannot be said that dissenting homebuyers before authorised representative to be considered as dissenting financial creditors against the total voting of CoC. If the authorized representative dissented in the CoC, then the respective class of creditors would be considered as dissenting financial creditors. Moreover, if at all any dissenting financial

creditor is there, his only look out is as to whether he has been paid as per Section 30(2) of the Code or not but not to see whether the Resolution Plan is workable or not.”

48.3. As regards the objections raised by YES Bank, which had given loan to Jaiprakash Healthcare Ltd., a wholly-owned subsidiary of JIL, against dealing with the shares of its borrower (JHL) in the resolution plan, the NCLT observed that the resolution applicant and the said Bank having agreed for constitution of a Committee to deal with the shares and assets of JHL, that issue was not required to be discussed. The NCLT said, -

“127. YES Bank, which has given loan to Jaiprakash Health Care subsidiary of JIL, has also raised an objection against dealing with the shares of the Health Care belonging to the Corporate Debtor. However, since the Resolution Applicant and YES Bank having agreed for constitution of a Committee to deal with the shares and assets of the subsidiary company, we are under no obligation to discuss this issue any further.”

48.4. As regards the right reserved by the resolution applicant to cancel the transactions where certain parcels of land were transferred by the corporate debtor without proper agreement/sub-lease deed, NCLT noticed the submission made by such agreement holders that the agreements were executed by the corporate debtor in the normal course of its business prior to the commencement of CIRP and monies were also advanced; and therefore, such agreements could not be terminated unilaterally. The NCLT also noticed the counter submissions by IRP and NBCC that the agreements allegedly executed between the corporate debtor and the agreement holders had not been determined, but the

resolution applicant has reserved its right to cancel such instruments wherever the corporate debtor had entered into deals without proper agreements and without support of consideration. In this regard, the NCLT observed that if an agreement was not valid in law and suffered from want of consideration, it was not even required to be said that such agreement could be cancelled by the party concerned. However, the NCLT further observed that even when such a clause had been mentioned, the agreement holders had not lost their right to seek remedy in the competent forum; and determined this part of the matter in the following words: -

“132. It is a trite law when an agreement is not valid in the eyes of law and consideration has not been paid, then it need not be separately said that such agreement could be cancelled by the effected party.

133. Though such clause has been mentioned, it does not mean that the agreement holders have lost their rights to seek remedy for its grievances before Competent Forum, in view thereof, this clause need not be considered as clause effecting the rights of the alleged agreement holders.”

48.5. The NCLT also made observations as regards the objections raised by JAL and other objectors against inclusion of 858 acres⁴⁰ as part of the resolution plan and pointed out that such an objection lost its relevance after the decision of this Court dated 26.02.2020 in the case of **Anuj Jain** (supra).

49. Having thus dealt with the relevant objections, the NCLT entered into the fifth segment of its order and generally dealt with the provisions

40 This figure was corrected on 17.03.2020 by NCLT as '758 acres' in terms of the order of this Court dated 26.02.2020.

relating to the reliefs and concessions with the observations/directions as under: -

“134. The clauses already covered in the aforesaid discussion will not be discussed again, but as to the clauses not covered above are hereby dealt with as follow: -

Clauses 1 to 5 have already been covered in the above discussion.

Clause No. 6:- With regard to the past liabilities of income tax authority, they shall stand extinguished.

Clause No. 7:- Since reduction of the share capital of the corporate debtor is not part of this resolution, this Adjudicating Authority cannot waive the procedure for reduction of share capital in relation to the companies not yet incorporated.

Clause No. 8 & 10:- Payment of stamp duty mentioned in clause 8 is waived to the extent permissible under law.

Clause No. 9:- Any non-compliance arising out of past claims prior to CIRP initiation shall not have any bearing on this corporate debtor from hereof.

Clause No. 11:- The lenders to the corporate debtor shall regularise all the accounts and ensure that such classification of the loan account is standard in their books with effect from the transfer dates.

Clause No. 12:- All claims which have been placed before the RP and any criminal proceedings appurtenant to those claims are hereby extinguished.

Clause No. 13:- As to the contracts relating to the development of land by JAL, the Resolution applicant can reserve its right to terminate the same, as to the claims, if any, the resolution applicant has right to take appropriate action against JAL.

Clause No. 14:- With regard to liability arising out of concession agreement in relation to YEIDA, since those issues are governed by concession agreement, this Bench cannot nullify the rights of YEIDA against the corporate debtor emanating from the concession agreement.

Clause No. 15:- The agreements for subleases executed between the corporate debtor and the third parties, which are not in accordance with law and not supported by material proof, the Resolution applicant will have a right to terminate in accordance with law.

Clause No. 16 to 18:- The resolution applicant is granted 12 months' time from the approval date to ensure compliances in

relation to the non-compliance of applicable laws by the corporate debtor or of its subsidiary pertaining to any period up to the approval date and licenses if any, to be obtained.

Clause No. 19:- In respect to the lands shown as transferred to JAL for real estate development, where the title and ownership is still lying with the corporate debtor, the resolution applicant is at liberty to proceed in accordance with law.

Clause No. 20:- It goes without saying that the IRP will not be held responsible with regard to discharge of his duties during CIR Process. The IRP and the Resolution Applicant will not be liable for any transactions carried out by the ex-management of the corporate debtor.

Clause No. 21:- This point has already been dealt with in the above discussion.

Clause No. 22:- For the purpose of consolidation of the books of the CD with the resolution applicant, the effective date shall be treated as the first day of the quarter immediately succeeding quarter in which the resolution applicant completes the takeover of the CD.

Clause No. 23:- This point is not clear as to whether it is referring to the land of the Corporate Debtor mortgaged to the lenders of JAL, if that is so, since it has been decided by the Honourable Supreme Court, it need not be reiterated.

Clause No. 24:- This generalization of cancellation of all agreements cannot be granted unless each transaction is specifically dealt with.

Clause No. 25:- The resolution applicant cannot modify the resolution plan once it is approved by the CoC.

Clause No. 26:- As to the claims placed before the IRP and other liabilities of the CD which are shown in the records of the company and where notice has been given to such creditors, they can be construed as withdrawn after the approval date.

Clause No. 27:- With regard to extension of concession period by YEIDA, it is YEIDA to decide as to whether such extension should be given or not.

Clause No. 28:- This Adjudicating Authority can only direct the Central Government and Reserve Bank of India to accord permissions to the extent permissible under law.”

50. As regards other applications/objections, the NCLT disposed them of with comments wherever required. We need not elaborate on all such

observations but could usefully point out the rejection of two such applications.

50.1. One such application was filed by a financier of one of the homebuyers seeking its induction in the CoC. This application was dismissed as misconceived in the following words: -

“CA-74/2019 filed by PNB Housing Finance Ltd. for directions to the IRP to induct this applicant in the CoC and if any amount is refunded to the home-buyers, the amount due to the applicant ought to be paid to this applicant because it is the lender to the home-buyers. This application is dismissed as misconceived, as the lender to the home-buyers will not have any right to be financial creditors of the CD.”

50.2. Another application was filed by three homebuyers seeking the relief of quashing the minutes of CoC dated 01.03.2019; for direction to conduct a forensic land audit of the corporate debtor; and for various directions to IRP, like those for taking legal opinion on Concession Agreement, analysis of Expressway cost escalation, providing information and answers to the queries of homebuyers etc. etc. The NCLT noted the propositions of these applicants and dismissed the application with the observations that they were three persons out of thousands of homebuyers and if such issues were to be examined and decided, the resolution process could never be completed; and at the stage of approval of the resolution plan, if objections of this kind were allowed, there would be no end to it. The NCLT said, -

“It is an application filed by Mr. Hemant Kumar & two others, who do not have direct voting in the CoC, because there are thousands of home-buyers, out of them these three are minuscule in number, if at all these issues are to be examined and decided, and remain waiting for the remedies, this resolution process will not complete

even after two years from hereof. Moreover, at the time of approval of this resolution plan, if objections of this kind are allowed there cannot be any end to it, therefore, this application is hereby dismissed.”

51. With the aforesaid, the Adjudicating Authority (NCLT) concluded on the matter while disposing of all the applications and while holding that all the stakeholders shall remain bound by the order so passed. However, various stakeholders have various submissions to make and various objections to take against the order so passed by the Adjudicating Authority.

52. Having taken note of the relevant contents of the order dated 03.03.2020, as passed by the Adjudicating Authority (NCLT) in exercise of its jurisdiction under Section 31 of the Code, it would be worthwhile to summarise the significant attributes of, and takeaways from, this order because a substantial part of the forthcoming discussion shall be revolving around the findings recorded and directions given therein. The relevant aspects could be summarised as follows:

(a) As regards the said sum of INR 750 crores, the Adjudicating Authority, with reference to the orders passed by this Court in the case of **Chitra Sharma** (supra), held that the deposit made by JAL became an asset of the corporate debtor JIL; and the said money was to be utilised towards securing the interests of homebuyers. As regards the question of the amount payable by JAL to JIL, it was directed that JAL shall make payment of the admitted amount of INR 274 crores; and after

reconciliation of accounts, further payment shall be made to whomsoever outstanding was found payable.

(b) As regards the objections by the dissenting financial creditor ICICI Bank, the Adjudicating Authority held that payment to such dissenting financial creditor shall be made in cash, as per the amount it would be entitled to under Section 53 of the Code, in the form of twelve monthly instalments with interest to be accrued six months post the order. It was also observed by the Adjudicating Authority that it had the necessary jurisdiction to modify the resolution plan to make sure it complied with Section 30(2) of the Code, so long as its basic structure was not altered.

(c) As regards the objections by YEIDA, the Adjudicating Authority held that YEIDA shall have the right to collect the acquisition cost through the SPVs proposed to be incorporated so as to make the resolution plan compliant with the terms of the Concession Agreement; however, the Adjudicating Authority refrained from adjudicating on the issue of additional compensation in relation to the land under Expressway and left it for the parties to take appropriate action at the appropriate stage. The Adjudicating Authority also held that for transfer of rights and obligations to the two SPVs, necessary documents shall be executed involving the concessionaire (JIL), YEIDA and the SPV concerned. These alterations were ordered by the Adjudicating Authority *‘to iron out all these creases and to make this resolution plan viable’*.

(d) As regards the issue relating to the fixed deposit holders, the Adjudicating Authority provided that the resolution applicant shall make a provision to clear the dues even of those fixed deposit holders who had not made the claims. In other words, the Adjudicating Authority directed for another modification of the resolution plan, for satisfying the dues of unclaimed fixed deposit holders.

(e) The Adjudicating Authority brushed aside the objections sought to be taken by some of the aggrieved homebuyers, while holding that they could not be categorised or treated as dissenting financial creditors.

(f) As regards the objections by YES Bank, the Adjudicating Authority pointed out that no intervention was required since YES Bank agreed to settle its objections with NBCC by forming a Committee.

(g) As regards the agreement holders, the Adjudicating Authority observed that if an agreement was not valid in law and suffered from want of consideration, it was not even required to be said that such agreement could be cancelled by the party concerned. However, the Adjudicating Authority also observed that even when such a clause had been mentioned in the resolution plan, the agreement holders had not lost their right to seek remedy in the competent forum.

(h) The Adjudicating Authority generally dealt with the clauses relating to the 'reliefs and concessions' in Schedule 3 of the resolution plan as also various other applications filed by different stakeholders. Some of the reliefs and concessions sought for by the resolution applicant were not

granted or were declined, for the reasons specified against the relevant clauses. The other applications/objections were disposed of with a few comments.

Order dated 22.04.2020 by NCLAT making interim arrangement

53. As noticed at the outset, the aforesaid order dated 03.03.2020 was challenged in various appeals before the Appellate Authority (NCLAT), which have since been withdrawn to this Court after we took note of all the factors concerning this litigation and accepted the requests made by the parties concerned. Such requests were made when the matters first appeared before us in challenge to an interim order dated 22.04.2020 passed by NCLAT, whereby the NCLAT made an interim arrangement of constitution of an Interim Monitoring Committee for implementation of the plan in question. The said order dated 22.04.2020, being also a subject of challenge in this batch, could be usefully noticed to complete the narrative.

54. The resolution applicant NBCC preferred an appeal against the aforesaid order dated 03.03.2020 insofar as it felt aggrieved of the modifications in the resolution plan. In that appeal, the NCLAT, while issuing notice to the unrepresented parties, directed that the approved resolution plan may be implemented subject to the outcome of appeal but at the same time, it was also provided that IRP may constitute an Interim Monitoring Committee comprising of the successful resolution applicant (NBCC) and three major institutional financial creditors, who were the

members of CoC. This impugned interim order dated 22.04.2020 reads as under: -

“22.04.2020 The Appellant – NBCC (India) Ltd., which has emerged as the Successful Resolution Applicant in ‘Corporate Insolvency Resolution Process’ initiated against Jaypee Infratech Ltd. (JIL) is aggrieved of modifications made by the learned Adjudicating Authority in the ‘Resolution Plan’ submitted by it and as approved by the ‘Committee of Creditors’ to the extent it allows objections of ICICI Bank Ltd. and Yamuna Expressway Industrial Development Authority and directs payment to unclaimed Fixed Deposit Holders. It is submitted that the learned Adjudicating Authority could not intercede the business decision of the ‘Committee of Creditors’ taken by the prescribed voting shares and the learned Adjudicating Authority exceeded its jurisdiction in making such modifications.

Issue notice to the Respondents through Speed Post in the main appeal as well as in the Interim Application.

On behalf of ICICI Bank Ltd., Ms. Misha, learned Counsel accepts notice. On behalf of Respondent No.4 – Interim Resolution Professional, Mr. Sumant Batra, learned Counsel accepts notice. On behalf of Respondent No.5 – IDBI Bank, Mr. Bidhwajit Dubey, learned Counsel accepts Notice. No further notice be served upon these Respondents. The above Respondents may file their reply affidavits within two weeks. Rejoinders, if any be filed within one week thereof.

Let notice be served upon Respondent Nos.2 and 3. Requisites along with process fee be filed within three days. If the Appellant provides email addresses of the Respondents, let service be effected through email also.

Mr. Sumant Batra, learned Counsel representing the ‘Resolution Professional’ intends to file an Appeal in regard to some observations made in paragraph 103 of the impugned order.

We are told that the implementation of the ‘Successful Resolution Plan’ would involve participation of the ‘Successful Resolution Applicant’, i.e. NBCC (India) Ltd. as also the three major Institutional Financial Creditors, who are Members of the ‘Committee of Creditors’ i.e., IDBI Bank Ltd., IIFCL and LIC.

Meanwhile, till further orders, the approved ‘Resolution Plan’ may be implemented subject to outcome of this Appeal. The Interim Resolution Professional may constitute ‘Interim Monitoring Committee’ comprising of the ‘Successful Resolution Applicant’, i.e., the Appellant and the three major Institutional Financial Creditors, who were Members of the ‘Committee of Creditors’ as named above.

Mr. Sumant Batra, learned Counsel submits that as of now he is continuing and managing the affairs of the 'Corporate Debtor'. The Resolution Professional, who would be constituent of the 'Interim Monitoring Committee' shall continue to be paid as may be deemed reasonable by the 'Interim Monitoring Committee' from the date of this order. If any fee is outstanding for the past services rendered by the Resolution Professional during the 'Corporate Insolvency Resolution Process', the same shall be paid as per the decision of the 'Committee of Creditors'. These directions will last till the disposal of this Appeal.

List the matter for 'admission after notice' on **15th May, 2020.**"

The relevant statutory provisions

55. Having taken note of the parties and their respective interests; the principal points for determination; the relevant factual and background aspects, particularly with reference to the three decisions of this Court dated 09.08.2018, 06.11.2019 and 26.02.2020; the salient features of the resolution plan; and key aspect of the orders impugned, we may now go through the provisions that would be relevant for determination of the points arising in this batch of matters.

56. While the expressions generally used in the Code are defined in Section 3 but then, the expressions employed for the purpose of Part II of the Code, dealing with insolvency resolution and liquidation of corporate persons, are defined in Section 5 thereof.

56.1. The relevant definitions as occurring in Section 3 are as under: -

"Section 3(8): "corporate debtor" means a corporate person who owes a debt to any person;

Section 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;

Section 3(11): “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3(12): “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;

Section 3(30): “secured creditor” means a creditor in favour of whom security interest is created;

Section 3(31): “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;”

56.2. The relevant definitions occurring in Section 5 for the purpose of Part II of the Code are as under: -

“Section 5(1): “Adjudicating Authority”, for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013);

Section 5(7): “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5(8): “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease

under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

⁴¹[*Explanation*.- For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Section 5(20): “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Section 5(21): “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

Section 5(25): “resolution applicant” means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25;

Section 5(26): “resolution plan” means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II

⁴¹ This *Explanation* was inserted by Act 26 of 2018 w.r.e.f. 06.06.2018.

⁴²[*Explanation*.- For removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;]

Section 5(27): “resolution professional”, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; and

Section 5(28): “voting share” means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.”

57. As already indicated, and which is not far to seek, the *Explanation* inserted to sub-clause (f) of clause (8) of Section 5 with effect from 06.06.2018 made it clear that any amount raised from an allottee under a real estate project is deemed to be having the commercial effect of a borrowing and thereby, it answers to the description of a “financial debt”. The pertinent consequence of this clarificatory amendment is that such an allottee under a real estate project stands in the capacity of a financial creditor of the corporate debtor. Prior to this amendment, such an allottee was sought to be regarded only as an ‘other creditor’ and that had been the principal cause behind the litigation in this Court in **Chitra Sharma** (supra). For a complete and meaningful understanding of this *Explanation* inserted to Section 5(8)(f) of the Code, it would be in concordance to take note of the meanings assigned to the expressions “allottee” and “real estate project” in RERA. The referred clauses (d) and (zn) of Section 2 of RERA read as under: -

42 Inserted by Act 26 of 2019, sec. 2 (w.e.f. 16.08.2019).

“Section 2(d): “allottee” in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

Section 2(zn): “real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;”

58. We may now take note of the relevant provisions contained in the Code, as amended from time to time and as applicable to the case at hand, particularly Section 18 relating to the duties of interim resolution professional; Section 21 specifying the composition of the Committee of Creditors and matters related with it; Section 24 laying down the norms for meeting of the Committee of Creditors; Section 25 relating to the duties of the resolution professional; Section 25A, as inserted with effect from 06.06.2018 and as amended with effect from 16.08.2019, in regard to the rights and duties of the authorised representative of the financial creditors; Section 30 on the essentials of a resolution plan and its submission to the Committee of Creditors by the resolution professional; Section 31 relating to the approval of resolution plan by the Adjudicating Authority; Sections 32 and 61 relating to the appeal against an order approving the resolution plan and grounds for such an appeal; Section 53 relating to distribution of assets in case of liquidation; and Section 238 on the overriding effect of the Code. These provisions read as under: -

“Section 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 [section]⁴³, the term “assets” shall not include the following, namely:-

43 Substituted by Act 26 of 2018, sec. 14, for “sub-section” (w.r.e.f. 06.06.2018).

(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.

⁴⁴**Section 21. Committee of creditors.**-(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

(3) Subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor,-

44 This Section 21 has undergone various changes in its amendment by Act 26 of 2018 w.r.e.f. 06.06.2018 which include substitution/omission of certain expressions as also insertion of certain provisions. While leaving aside all the minute details, we may, of course, indicate that by this very amendment, sub-sections (6A) and (6B) were also inserted and sub-sections (7) and (8) were substituted. Before their substitution, sub-sections (7) and (8) stood as under:

“(7) The Board may specify the manner of determining the voting share in respect of financial debts issued as securities under sub-section (6).

(8) All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.”

(a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may-

(a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(b) represent himself in the committee of creditors to the extent of his voting share;

(c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(6A) Where a financial debt—

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of

creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6B) The remuneration payable to the authorised representative-

(i) under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(ii) under clause (b) of sub-section (6A) shall be as specified which shall form part of the insolvency resolution process costs.

(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A).

(8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition.

⁴⁵**Section 24. Meeting of committee of creditors.**-(1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

(3) The resolution professional shall give notice of each meeting of the committee of creditors to-

(a) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5);

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

⁴⁵ This Section 24 has also undergone a few changes in its amendment by Act 26 of 2018 w.r.e.f. 06.06.2018 which are essentially of sequel to the amendment of Section 21.

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) Subject to sub-sections (6), (6A) and (6B) of section 21, any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified.

Section 25. Duties of resolution professional.-(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:-

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, *quasi*-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

⁴⁶[(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.]

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.

⁴⁷**Section 25A. Rights and duties of authorised representative of financial creditors.**-(1) The authorised representative under sub-section (6) or sub-section (6A) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

(2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

(3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

(3A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of

46 This clause (h) was substituted by Act 8 of 2018, sec. 4, w.r.e.f. 23.11.2017. Clause (h), before substitution, stood as under:

“(h) invite prospective lenders, investors, and any other persons to put forward resolution plans;”.

47 This Section 25A was inserted by Act 26 of 2018 (w.r.e.f. 06.06.2018). Herein, sub-section (3A) was inserted by Act No. 26 of 2019 (w.e.f. 16.08.2019).

more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote:

Provided that for a vote to be cast in respect of an application under section 12A, the authorised representative shall cast his vote in accordance with the provisions of sub-section (3).

(4) The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.

Explanation.—For the purposes of this section, the “electronic means” shall be such as may be specified.

⁴⁸**Section 30. Submission of resolution plan.**—(1) A resolution applicant may submit a resolution plan ⁴⁹[along with an affidavit stating that he is eligible under section 29 A] to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the ⁵⁰[payment] of other debts of the corporate debtor;

⁵¹[(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

48 This Section 30 has undergone various changes in its amendments by Acts 8 of 2018, 26 of 2018 and 26 of 2019. Several aspects relating to the requirements of Section 30 have formed the matters of contention herein. For their relevance, all the concerned amendments are being indicated.

49 Inserted by Act 26 of 2018, sec. 23(i) (w.r.e.f. 06.06.2018).

50 Substituted by Act 26 of 2018, sec. 23 (ii)(A), for “repayment” (w.r.e.f. 06.06.2018).

51 Substituted by Act 26 of 2019, sec. 6(a), for clause (b) (w.e.f. 16.08.2019). Earlier clause (b) was amended by Act 26 of 2018, sec. 23(ii)(A) (w.r.e.f. 06.06.2018). Clause (b), before substitution, stood as under:

“(b) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;”

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.—For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2.—For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

⁵²[*Explanation.*—For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.]

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

52 Inserted by Act 26 of 2018, sec. 23(ii)(B) (w.r.e.f. 06.06.2018).

⁵³[(4) The committee of creditors may approve a resolution plan by a vote of not less than ⁵⁴[sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, ⁵⁵[the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.]

⁵⁶[Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018).]

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

53 Substituted by Act 8 of 2018, sec. 6, for sub-section (4) (w.r.e.f. 23.11.2017). Sub-section (4), before substitution, stood as under:

“(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors.”.

54 Substituted by Act 26 of 2018, sec. 23(iii)(a) for “seventy-five” (w.r.e.f. 06.06.2018).

55 Inserted by Act 26 of 2019, sec. 6(b) (w.e.f. 16.08.2019).

56 Inserted by Act 26 of 2018, sec. 23(iii)(b) (w.r.e.f. 06.06.2018).

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

⁵⁷**Section 31. Approval of resolution plan.**-(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors,⁵⁸[including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan:

⁵⁹[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

⁶⁰[(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.]

57 This Section 31 has also undergone various changes in its amendments by Act 26 of 2018 and 26 of 2019. For their relevance, all the concerned amendments of this Section 31 are also indicated.

58 Inserted by Act 26 of 2019, sec. 7 (w.e.f. 16.08.2019).

59 Inserted by Act 26 of 2018, sec. 24(a) (w.r.e.f. 06.06.2018).

60 Inserted by Act 26 of 2018, sec. 24(b) (w.r.e.f. 06.06.2018).

Section 32. Appeal.-Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of section 61.

Section 61. Appeals and Appellate Authority.-(1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:-

- (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;
- (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
- (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
- (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
- (v) the resolution plan does not comply with any other criteria specified by the Board.

(4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.

Section 53. Distribution of assets.-(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:-

- (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
- (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following:-
 - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
 - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) any remaining debts and dues;
- (g) preference shareholders, if any; and
- (h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section-

- (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and
- (ii) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

Section 238. Provisions of this Code to override other laws.-

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the

time being in force or any instrument having effect by virtue of any such law.

59. We may also take note of Regulations 16A, 37, 38, 39 and 39B in

CIRP Regulations, as applicable at the relevant time as follows: -

⁶¹**16A. Authorised representative.**-(1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorised representative of the creditors of the respective class:

Provided that the choice for an insolvency professional to act as authorised representative in Form CA received under sub-regulation (2) of regulation 12 shall not be considered.

(2) The interim resolution professional shall apply to the Adjudicating Authority for appointment of the authorised representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of regulation 12.

(3) Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

(4) The interim resolution professional shall provide the list of creditors in each class to the respective authorised representative appointed by the Adjudicating Authority.

(5) The interim resolution professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated.

Clarification: The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.

(6) The interim resolution professional or the resolution professional, as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

(7) The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties.

61 This Regulation 16A was inserted w.e.f. 04.07.2018.

(8) The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely:-

Number of creditors in the class	Fee per meeting of the committee (Rs.)
10-100	15,000
101-1000	20,000
More than 1000	25,000

(9) The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

⁶²**37. Resolution Plan.**-A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:-

(a) transfer of all or part of the assets of the corporate debtor to one or more persons;

(b) sale of all or part of the assets whether subject to any security interest or not;

(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;

(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

(ca) cancellation or delisting of any shares of the corporate debtor if applicable;

(d) satisfaction or modification of any security interest;

(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;

(f) reduction in the amount payable to the creditors;

(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;

(h) amendment of the constitutional documents of the corporate debtor;

(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;

⁶² This Regulation 37 was substituted for the earlier one w.e.f. 06.02.2018. Clause (ba) was inserted to this Regulation w.e.f. 28.11.2019; and clause (ca) was inserted w.e.f. 04.07.2018.

(j) change in portfolio of goods or services produced or rendered by the corporate debtor;

(k) change in technology used by the corporate debtor; and

(l) obtaining necessary approvals from the Central and State Governments and other authorities.

⁶³**38. Mandatory contents of the resolution plan.**⁶⁴[(1) The amount payable under a resolution plan-

(a) to the operational creditors shall be paid in priority over financial creditors; and

(b) to the financial creditors, who have a right to vote under sub-section (2) of Section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.]

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

(1B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.

(2) A resolution plan shall provide:

(a) the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.

⁶⁵[(3) A resolution plan shall demonstrate that-

(a) it addresses the cause of default;

(b) it is feasible and viable;

63 This Regulation 38 has also undergone several changes. The relevant amendments to sub-regulation (1) and (3) are separately indicated hereinbelow. That apart, sub-regulation (1A) was inserted w.e.f. 05.10.2017 and sub-regulation (1B) was inserted w.e.f. 24.01.2019

64 Sub-regulation (1) was amended w.e.f. 04.07.2018; then was substituted w.e.f. 05.10.2018; and then was again substituted w.e.f. 28.11.2019. Before the last substitution, this sub-regulation (1), stood as under:-

“(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.”

65 Sub-regulation (3) was inserted w.e.f. 07.11.2017 and then was substituted w.e.f. 04.07.2018. Before substitution, this sub-regulation (3), stood as under:-

“(3) A resolution plan shall contain details of the resolution applicant and other connected persons to enable the committee to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval.”.

- (c) it has provisions for its effective implementation;
- (d) it has provisions for approvals required and the timeline for the same; and
- (e) the resolution applicant has the capability to implement the resolution plan.]

⁶⁶**39. Approval of resolution plan.**⁶⁷[(1) A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans under regulation 36B along with-

- (a) an affidavit stating that it is eligible under section 29A to submit resolution plans;

⁶⁸[***]

- (c) an undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code.

(1A) A resolution plan which does not comply with the provisions of sub-regulation (1) shall be rejected.]

⁶⁹[(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him-

- (a) preferential transactions under section 43;
- (b) undervalued transactions under section 45;

⁶⁶ This Regulation 39 has also undergone wide ranging amendments, the relevant of which are indicated hereinbelow.

⁶⁷ Sub-regulation (1) was substituted w.e.f. 01.01.2018 and that was replaced by sub-regulation (1) and (1A) w.e.f. 04.07.2018. Before 04.07.2018, sub-regulation (1) stood as under: –

“(1) A resolution applicant shall submit resolution plan(s) prepared in accordance with the Code and these regulations to the resolution professional within the time given in the invitation made under clause (h) of sub-section (2) of section 25.”

⁶⁸ Clause (b) was omitted w.e.f. 05.10.2018. Before omission, it stood as under:

“(b) an undertaking that it will provide for additional funds to the extent required for the purposes under sub-regulation (1) of regulation 38; and”.

⁶⁹ Sub-regulation (2) was substituted w.e.f. 07.11.2017. Prior to this substitution, this sub-regulation (2) stood as under:

“(2) The resolution professional shall present all resolution plans that meet the requirements of the Code and these Regulations to the committee for its consideration.”

(c) extortionate credit transactions under section 50; and

(d) fraudulent transactions under section 66,

and the orders, if any, of the adjudicating authority in respect of such transactions.]

^{70,71}[(3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit:

Provided that the committee shall record its deliberations on the feasibility and viability of the resolution plans.]

⁷²[(4) The resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating

70 This sub-regulation (3) was substituted w.e.f. 04.07.2018; before its substitution it stood as under:

“(3) The committee may approve any resolution plan with such modifications as it deems fit”

Its proviso was substituted w.e.f. 25.07.2019; before its substitution it stood as under:

“Provided that the committee shall record the reasons for approving or rejecting a resolution plan.”

There had also been an insertion of sub-regulation (3A) w.e.f. 06.02.2018 but the same was omitted w.e.f. 05.10.2018.

71 We may further indicate that w.e.f. 07.08.2020, entire of this sub-regulation (3) has been substituted and sub-regulations (3A) and (3B) have been inserted, essentially dealing with the eventuality of consideration of more than one resolution plans by the CoC.

Though the amendment w.e.f. 07.08.2020, would not directly apply to the present case but, for reference, we may reproduce the newly substituted sub-regulation (3),(3A) and (3B) as under:

“(3) The committee shall-

(a) evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix;

(b) record its deliberations on the feasibility and viability of each resolution plan; and

(c) vote on all such resolution plans simultaneously.

(3A) Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes.

(3B) Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved:

Provided that where two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting:

Provided further that where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code.”

72 This sub-regulation was substituted for the earlier one w.e.f. 04.07.2018 and was also amended w.e.f. 24.01.2019.

Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under section 12, along with a compliance certificate in Form H of the Schedule and the evidence of receipt of performance security required under sub-regulation (4A) of regulation 36B.]

(5) The resolution professional shall forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.

(6) A provision in a resolution plan which would otherwise require the consent of the members or partners of the corporate debtor, as the case may be, under the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature, shall take effect notwithstanding that such consent has not been obtained.

(7) No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date.

(8) A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority, may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan.

⁷³[(9) A creditor, who is aggrieved by non-implementation of a resolution plan approved under sub-section (1) of section 31, may apply to the Adjudicating Authority for directions.]”

⁷⁴**39B. Meeting liquidation cost.**-(1) While approving a resolution plan under sub-section (4) of section 30 or deciding to liquidate the corporate debtor under sub-section (2) of section 33, the committee may make a best estimate of the amount required to meet liquidation costs, in consultation with the resolution professional, in the event an order for liquidation is passed under section 33.

(2) The committee shall make a best estimate of the value of the liquid assets available to meet the liquidation costs, as estimated in sub-regulation (1).

(3) Where the estimated value of the liquid assets under sub-regulation (2) is less than the estimated liquidation costs under sub-regulation (1), the committee shall approve a plan providing for contribution for meeting the difference between the two.

(4) The resolution professional shall submit the plan approved under sub-regulation (3) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be.

⁷³ This sub-regulation was inserted w.e.f. 24.01.2019.

⁷⁴ This sub-regulation was inserted w.e.f. 25.07.2018.

Explanation.-For the purposes of this regulation, 'liquidation costs' shall have the same meaning as assigned to it in clause (ea) of sub-regulation (1) of regulation (2) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

60. We would hasten to reiterate that in the foregoing extractions of the provisions, we have indicated the amendments/substitutions/insertions in the related footnotes to the extent relevant for the present purpose; and not necessarily all the changes as brought about from time to time.

JIL's CIRP: Chronicle of complications

61. The factual and background aspects relating to this batch of matters make it evident that the insolvency resolution of the corporate debtor JIL carries with it vexed and strikingly intricate issues where twice over this Court had exercised its plenary powers under Article 142 of the Constitution of India to ensure complete justice in the cause and yet, for a variety of reasons, the insolvency resolution is eluding the corporate debtor JIL; and even when the resolution plan is said to have been approved by a vast majority of 97.36% of the voting share of Committee of Creditors, several issues are still hovering over with an assortment of grievances of different stakeholders and role players. Even the very process taken up by the Committee of Creditors has been questioned apart from several questions over one or the other stipulation in the resolution plan. Further, several questions have spurt up on the order passed by the Adjudicating Authority, wherein some of the objections have been accepted and the plan has been modified while a few other

objections have been rejected. Modification of the resolution plan by the Adjudicating Authority has given the resolution applicant and even IRP several causes to be discontented with and at the same time, rejection of some of the objections has also been challenged by the objectors. This apart, some of the stakeholders, who did not raise objections before the Adjudicating Authority, have also raised their grievances against the plan. Put in a nutshell, this process of resolution is yet to pass through a maze of hurdles.

61.1. Having regard to the peculiar circumstances of this case, we had withdrawn all the appeals pending before NCLAT to this Court and have heard the entire matter at sufficient length, while extending opportunity of making oral and written submissions to practically all the parties who wished to put their say on record.

61.2. We have examined the submissions so made as also the material placed on record with reference to the law applicable and have given anxious consideration to the relevant submissions, which are reflected in the points for determination formulated hereinbefore.

62. Before proceeding further, we may also recapitulate that while entertaining these matters and transferring the cases pending before NCLAT to this Court by order dated 06.08.2020, we had directed that the IRP shall continue to manage the affairs of the subject company i.e., JIL. We may point out that the IRP has filed an affidavit dated 05.09.2020, stating the status of the corporate debtor and the major part of activities

relating to construction of flats and issuing Offers of Possession which, according to the IRP, has resulted in reduction of liability to the real estate allottees. The relevant paragraphs of this affidavit read as under: -

“I state that as part of management of the affairs of the Corporate Debtor, the Deponent *inter alia* is continuing the construction of residential and commercial dwelling units forming part of the real estate projects of the Corporate Debtor. I further state during the corporate insolvency resolution process (hereinafter, “**CIR Process**”), the IRP continued construction of residential and commercial dwelling units and has issued Offer of Possessions (OOPs) for 7996 units based on occupancy certificates received from the NOIDA Authority, from time to time. That out of these OOPs issued, sub-lease registration of 6,429 has been completed. The process of issuance of OOPs as started by the Deponent after the receipt of such occupancy certificates continues.

I further state that for approximately 2,688 allottees to whom OOPs providing for delay rebate was issued prior to 17.12.2019, either the Sub-Lease Deed is still to be executed or the Sub-Lease Deed is pending for registration before the Registrar of Assurances of Noida.

I state that the delivery of units and their transfer by way of sub-lease registration has resulted in a reduction of Financial Creditors’ (Real-Estate Allottees) liability by more than Rs. 2,250 Crores since commencement of the CIR Process in the Corporate Debtor.”

The objectives and scheme of IBC

63. For dealing with the questions involved, worthwhile it would be to begin the discussion broadly on the scheme of the Code and assignments of some of the relevant role players in the corporate insolvency resolution process.

63.1. As noticed from the Preamble, the Code came to be enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner; the objectives, *inter alia*, being for maximisation of

the value of assets of such persons and balance of interests of all the stakeholders. The Preamble reads as under: -

“An Act to consolidate and amend the laws relating to 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.”

63.2. In the judgment delivered on 25.01.2019 in the case of **Swiss Ribbons Private Limited and Anr. v. Union of India and Ors.: (2019) 4 SCC 17⁷⁵**, this Court traversed through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions therein. One part of such challenge had been founded on the ground that the classification between ‘financial creditor’ and ‘operational creditor’ was discriminatory and violative of Article 14 of the Constitution of India. This ground as also several other grounds pertaining to various provisions of the Code were rejected by this Court after elaborate dilation on the vast variety of rival contentions. In the course, this Court took note, *inter alia*, of the pre-existing state of law as also the objects and reasons for enactment of the Code. While observing that focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation would be the last resort, this Court pointed out that on its scheme and framework, the Code was a beneficial legislation to put the corporate debtor

⁷⁵ Hereinafter also referred to as the case of ‘**Swiss Ribbons**’.

on its feet, and not a mere recovery legislation for the creditors. This Court said, -

“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. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. **When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. 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 framework, 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 *ArcelorMittal*⁷⁶ 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 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

⁷⁶ *ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta & Ors: (2019) 2 SCC 1.*

process is not adversarial to the corporate debtor but, in fact, protective of its interests.....”

(emphasis in bold supplied)

64. Keeping in view the objectives of the Code and observations of this Court, we may now take an overview of the scheme and structure of the relevant parts of the Code. Part I thereof contains the provisions regarding title, extent, commencement and application of the Code as also the definition and meaning of various expressions used in the Code. Different provisions have come into force on different dates, as permissible under proviso to sub-section (3) of Section 1. Part II of the Code deals with insolvency resolution and liquidation for corporate persons. Chapter I of Part II makes provision for its applicability and also defines various expressions used in this Part (Sections 4 and 5). Chapter II of Part II contains the provisions for corporate insolvency resolution process in Sections 6 to 32 whereas Chapter III of this Part II contains the provisions for liquidation process in Sections 33 to 54⁷⁷.

64.1. A glance at Chapter II of Part II would inform that it contains the blueprint for the process of insolvency resolution in relation to the corporate debtors to whom this Part applies, while specifying the persons who could initiate the process; the manner and impact of such initiation; the roles and rights as also duties of key persons and entities to be involved in the resolution process like the resolution professional, the Committee of Creditors, the authorised representative of financial

⁷⁷ Sections 4 to 32 came into force on 01.12.2016 whereas Section 33 to 54 came into force on 15.12.2016.

creditors and the resolution applicant; the matters essential for preparation of the resolution plan; the submission and approval of the resolution plan; and the appeal against approval of the resolution plan.

Approval of resolution plan: Crucial steps and role players

65. As noticed, as per the requirements of the Code read with the orders passed by this Court in the cases of ***Chitra Sharma*** and ***Jaiprakash Associates Ltd.*** (supra), the insolvency resolution process in relation to the corporate debtor JIL has already passed through the stages of initiation, appointment of interim resolution professional, constitution and reconstitution of the Committee of Creditors, submission and resubmission of resolution plans, approval of the resolution plan of NBCC by the Committee of Creditors, submission of the said resolution plan to the Adjudicating Authority, and its approval by the Adjudicating Authority, albeit with some modifications.

65.1. The issues now raised before us basically relate to the contents of the resolution plan in question; its approval by the Committee of Creditors; and the order passed by the Adjudicating Authority in its approval with modifications. Thus, on the issues raised and points arising for determination, the focus in the present case is on the dispensation governing the process of approval of the resolution plan by CoC who, under Section 30(4) of the Code, considers and votes at the resolution plan after it has been verified by the resolution professional as being compliant with the statutory requirements specified in Section 30(2) of

the Code; and on the approval of resolution plan by the Adjudicating Authority in terms of Section 31 of the Code. Having regard to the issues involved, we may usefully take note of the relevant principles enunciated by this Court in relation to these crucial steps of CIRP.

66. The relevant aspects relating to the steps in CIRP for approval of the resolution plan have come up for interpretation before this Court in at least three major decisions, in the cases of ***K. Sashidhar v. Indian Overseas Bank and Ors.***: (2019) 12 SCC 150 (decided on 05.02.2019), ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.***: (2020) 8 SCC 531 (decided on 15.11.2019), and ***Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Ors.***: (2020) 11 SCC 467 (decided on 22.01.2020). The contesting parties have also relied upon these decisions in support of their respective contentions. We shall be referring to these cases in a little detail in the later part of this judgment while determining Point **A** concerning the scope of the jurisdiction of the Adjudicating Authority in dealing with the resolution plan approved by the Committee of Creditors. At this juncture, we may only indicate the importance of a few essential role players in the process, as discernible from the relevant provisions of the Code and as explicated by this Court.

66.1. In the scheme of IBC, the script of corporate insolvency resolution process, to a large extent, revolves around the resolution professional. When CIRP gets initiated with admission of the application by the

Adjudicating Authority as per Sections 7, 9 or 10, as the case may be, an interim resolution professional is appointed by the Adjudicating Authority in terms of Section 13(1)(c) and in the manner laid down in Section 16. Collating and admitting the claims of all creditors; appointing and convening the meetings of the Committee of Creditors; and running the business of the corporate debtor as a going concern during the intermediate period are the key tasks assigned to the interim resolution professional, as distinctly appears from Sections 15, 17, 18 and 20 of the Code. Further, in the scheme of IBC, the Committee of Creditors, in its first meeting to be held within seven days of its constitution, has to resolve to appoint the interim resolution professional as a resolution professional or to replace him by another resolution professional (*vide* Section 22 IBC). In terms of Section 23, the resolution professional is to conduct the entire CIRP and manage the operations of the corporate debtor during the period of CIRP. His duties and responsibilities extend to the conduct of all the meetings of the Committee of Creditors, giving notice of such meetings to the members of CoC, to the members of the suspended Board of Directors and to the operational creditors, if amount of their aggregate dues is not less than 10% of the debt. Akin to the duties of the interim resolution professional under Section 18 of the Code, the resolution professional is also required to preserve and protect the assets of the corporate debtor while continuing with the business operations and while undertaking the actions contemplated by Section

25(2) of the Code. Significantly, the resolution professional is also required to prepare the information memorandum in terms of Section 29 of the Code; invite prospective resolution applicants; and present the resolution plans at the meeting of the Committee of Creditors, while duly examining them as required by Section 30 of the Code. These compliances are duly regulated by Regulations 35, 36, 36A and 36B of the CIRP Regulations.

66.1.1. Taking note of the relevant provisions, this Court in the case of ***Essar Steel*** (supra) summed up the key role of the resolution professional in the following terms: -

“48. The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under Sections 7, 9 or 10 of the Code till a resolution plan is approved by the Adjudicating Authority, but is also a key person who is to appoint and convene meetings of the Committee of Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated and decided by the Committee of Creditors.”

66.2. Further, the role of prospective resolution applicant has also been explained in ***Essar Steel*** with reference, *inter alia*, to UNCITRAL Legislative Guide as also Regulations 37 and 38 of the CIRP Regulations on the contents of a resolution plan, while pointing out the rights of a prospective resolution applicant to receive necessary information as also

its duty to prepare the resolution plan providing for necessary measures for insolvency resolution of the corporate debtor with maximisation of the value of its assets.

Committee of Creditors: the protagonist of CIRP

67. While in their representative roles, the resolution professional and the resolution applicant are duty bound to ensure that the resolution plan is prepared in conformity with the requirements of the Code and the CIRP Regulations and is properly presented for consideration, the central role in taking the decision as to whether a resolution plan be adopted or not, in the same form as presented to it or in a modified form; and as to whether the attempt for revival of corporate debtor be made or not, ultimately rests with the pivotal body, comprising of the financial creditors of the corporate debtor and termed as “Committee of Creditors”. As noticed from the provisions above-quoted, the final decision on a resolution plan is taken by the Committee of Creditors; and, for approval, a resolution plan is required to be voted in favour by not less than 66% of the voting share of the financial creditors, as per Section 30(4) of the Code. It is also relevant to point out that though the resolution professional is to run the business of the corporate debtor as a going concern during the corporate insolvency resolution process but, as per Section 28(3) of the Code, he cannot take certain decisions relating to

the management of the corporate debtor without prior approval of the Committee of Creditors by a vote of at least 66% of the voting shares⁷⁸.

67.1. It is, therefore, evident that corporate insolvency resolution, with approval of the plan of resolution, is ultimately in the exclusive domain of the Committee of Creditors. Even during the resolution process, major decisions as regards management and finances of the corporate debtor are in the control of the Committee of Creditors. As per the composition delineated in Section 21 of the Code, the Committee of Creditors is comprised of all financial creditors of the corporate debtor; and the frame of Section 21 puts it beyond doubt that the voting share of each financial creditor is determined on the basis of financial debt owed to it. It is also clear from Section 30(4) as also Section 28(3) that the major decisions of approval are to be taken by the Committee of Creditors by a vote of at least 66% of the voting share of the financial creditors and not by a simple majority. The reasons and purpose for assigning such a unique and decisive role in corporate insolvency resolution to the Committee of Creditors and for that matter, to a substantial block of not less than 2/3rd of voting share of the financial creditors, were extensively delineated in the report of the Bankruptcy Law Reforms Committee of November, 2015 while remarking on the essential theme that the *'appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it'*.

⁷⁸ This percentage of minimum votes of CoC, for approval of resolution plan as also for prior approval of certain actions, was 'seventy-five' in the Code as originally enacted and was altered to 'sixty-six' by way of an amendment with effect from 06.06.2018.

67.2. In the case of **K. Sashidhar** (supra), while setting out the relevant extracts from the said Report, this Court explicated on the primacy of the commercial wisdom of the Committee of Creditors in the corporate insolvency resolution process in the following terms: -

“52. As aforesaid, upon receipt of a “rejected” resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. **There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.**

53. In the report of the Bankruptcy Law Reforms Committee of November 2015, primacy has been given to CoC to evaluate the various possibilities and make a decision. It has been observed thus:

“The key economic question in the bankruptcy process

When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. *Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.*

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the Government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

(emphasis in bold supplied; emphasis in italics is in original)

67.3. In ***Essar Steel*** (supra), a 3-Judge Bench of this Court surveyed almost all the relevant provisions concerning corporate insolvency resolution process; and, as noticed above, explained the assignments of different role players in this process. In that context, this Court again explained the primacy endowed on the commercial wisdom of the Committee of Creditors and reasons therefor, with a further detailed reference to the aforesaid report of the Bankruptcy Law Reforms Committee of November, 2015. Apart from the passage from the said report that was noticed in ***K. Sashidhar*** (reproduced hereinabove), the Court noticed various other passages from this report in ***Essar Steel***; and one part thereof, which further underscores the rationale for only financial creditors handling the process of resolution, could be usefully reproduced as under (part of paragraph 56 at p. 578 of SCC): -

“5.3.1. Steps at the start of the IRP

4. Creation of the creditors committee

The creditors committee will have the power to decide the final solution by majority vote in the negotiations. The majority vote requires more than or equal to 75 per cent of the creditors committee by weight of the total financial liabilities. *The majority vote will also involve a cram down option on any dissenting creditors once the majority vote is obtained. ...*

The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. *The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor . willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors.”*

(emphasis in italics is in original)

67.4. In ***Essar Steel***, the Court referred to the above-quoted and other passages from the judgement in ***K. Sashidhar*** (supra) and explained the decisive role of the commercial wisdom of the Committee of Creditors, *inter alia*, in the following passages: -

“54. Since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion.....

59. Even though it is the resolution professional who is to run the business of the corporate debtor as a going concern during the intermediate period, yet, such resolution professional cannot take certain decisions relating to management of the corporate debtor without the prior approval of at least 66% of the votes of the Committee of Creditors.....

60. Thus, it is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors. Most importantly, under Section 30(4), the Committee of Creditors may approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations.

64. Thus, what is left to the majority decision of the Committee of Creditors is the “feasibility and viability” of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. **What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.**”

(emphasis in bold supplied)

67.5. In the case of ***Maharashtra Seamless Ltd.*** (supra), again, a 3-Judge Bench of this Court referred extensively to the enunciations in ***Essar Steel*** (supra) and reiterated the primacy assigned to the commercial wisdom of the Committee of Creditors in the matter of corporate insolvency resolution.

68. 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.

69. The significance of primacy of the Committee of Creditors in the process of corporate insolvency resolution unfolds itself when we examine the contours of the jurisdiction of Adjudicating Authority dealing with a resolution plan after the same has been voted at by the Committee of Creditors. We have formulated the questions relating to such contours

as the first point for determination in view of the fact that most of the other questions involved in this batch of matters revolve around the order dated 03.03.2020 as passed by the Adjudicating Authority in approval of the resolution plan of NBCC with certain modifications. The decision on legality and validity of the order passed by the Adjudicating Authority on any particular objection or issue would largely depend on the question as to whether the Adjudicating Authority has acted within its jurisdiction or has overstepped its jurisdiction or has acted illegally or with material irregularity in exercise of its jurisdiction. In fact, contours of the jurisdiction of the Adjudicating Authority are also delineated by this Court in the aforesaid decisions, as shall be noticed *infra*.

70. With the foregoing observations and while keeping the aforementioned enunciations in view, we may now take up the points arising for determination in this case.

Point A

Contours of the jurisdiction of Adjudicating Authority in dealing with a resolution plan

71. As noticed, the resolution plan in relation to the corporate debtor JIL, as propounded by NBCC, has been approved by the Committee of Creditors with the votes of 97.36% of the voting share of financial creditors. However, the Adjudicating Authority (NCLT), while passing the impugned order dated 03.03.2020, has modified some of the terms of the resolution plan while also declining modification in relation to some other terms of the resolution plan. In relation to either of the events, whether of

modifying the terms of the plan or declining the prayer for modification, invariably the question pertaining to the jurisdiction of the Adjudicating Authority would arise for consideration.

72. The contours of the powers and jurisdiction of Adjudicating Authority dealing with a resolution plan approved by the Committee of Creditors have been clearly defined, delineated and described by this Court in the aforesaid decisions in ***K. Sashidhar, Essar Steel and Maharashtra Seamless Ltd.*** Appropriate it would be to take note of the principles emanating from these decisions with a brief reference to the relevant factual aspects of each of these cases.

73. The first in this series of judgments relating to the process of approval of resolution plan in CIRP proceedings had been the case of ***K. Sashidhar*** (supra) where the matters in issue related to two different corporate debtors, *Kamineni Steel & Power (India) (P) Ltd.* ('KSPIPL') and *Innovative Industries Ltd.* ('IIL').

73.1. Shorn of unnecessary details, the relevant factual aspects of the case of KSPIPL had been that the said company had filed a petition under Section 10 of the Code seeking initiation of CIRP that was admitted on 10.02.2017 by NCLT, Hyderabad and IRP was appointed with directions to constitute CoC. Accordingly, CoC was constituted and there had been a few rounds of consideration of the matter by CoC, where different propositions were mooted for insolvency resolution. Ultimately, on 30.10.2017, the voting share of consenting banks

expressly approving the proposed resolution plan was 66.67% and the voting share of dissenting lender banks was 26.97%. Bank of Maharashtra, having 6.36% voting share, neither approved nor rejected the plan nor abstained from voting but conveyed that they remained 'open to consider the resolution plan'. Be it noted that at the relevant time, the requirement for approval of the resolution plan, as per Section 30(4) of the Code, was that it ought to be approved by a vote of not less than 75% of voting share of the financial creditors.

73.1.1. The position as obtainable after the aforesaid voting was that the resolution plan fell short of receiving minimum 75% votes of the voting share of the financial creditors. IRP filed an affidavit of the outcome before the Adjudicating Authority (NCLT, Hyderabad) on 03.11.2017. However, the Managing Director of the corporate debtor submitted before the Adjudicating Authority that the majority ought to be counted without taking into account the voting share of the financial creditor who chose not to participate in the voting. It was the submission that with such exclusion, the percentage of voting share in approval of the plan would be 78.63% and, therefore, the plan could be taken as approved by the CoC. The NCLT, by its order dated 20.11.2017, allowed the petition so filed and approved the resolution plan with certain directions. The three dissenting financial creditors, including the said Bank of Maharashtra, filed an appeal before NCLAT against the order of NCLT in approving the resolution plan despite the same having not received the approval of

minimum 75% votes of the voting share of financial creditors. The Managing Director of the corporate debtor also filed an appeal challenging the observation made by NCLT regarding the corporate guarantee to be proceeded with.

73.2. The factual aspects relating to the other corporate debtor IIL had been that its lender bank filed insolvency application that was admitted by NCLT, Mumbai on 17.01.2017. In the CoC meeting relating to this corporate debtor, the financial creditors holding 66.57% voting share voted in favour of approving the proposed resolution plan, whereas dissenting financial creditors, having 33.43% voting share, voted against. Resultantly, the proposed plan was not approved for want of support of the requisite percentage of voting share. The resolution applicant filed an application seeking permission to submit a revised resolution plan and to invite fresh votes. The impending liquidation proceedings were objected to by the workers' union too. The NCLT, however, rejected the applications and directed initiation of liquidation proceedings by its order dated 23.11.2017. An appeal was filed challenging the order so passed by the NCLT.

73.3. The Appellate Authority (NCLAT) took up both the appeals relating to KSPIPL and IIL together and the same were disposed of by a common judgment dated 06.09.2018, wherein it was held that the statutory requirement of approval of resolution plan by vote of not less than 75% of the voting share of financial creditors, as laid down under Section 30(4)

of the Code, was mandatory and the plans in question were not approved by the requisite majority. Therefore, the appeals were dismissed.

73.4. The common judgment so passed by NCLAT was in challenge before this Court. During the pendency of appeals in this Court, the aforesaid amendment to Section 30(4) was made and the requisite voting share for approval of resolution plan was reduced to 66% with effect from 06.06.2018.

73.5. After examining the long length of rival submissions, this Court proceeded to determine the questions as to whether the percentage of voting share of the financial creditors specified in Section 30(4) of IBC was mandatory; as to whether the votes of the financial creditors who had abstained from voting were required to be ignored for the purpose of computing the required percentage of voting share; as to whether the amendments brought into force during the pendency of appeals were applicable to those cases; and as to whether it was open to the Adjudicating Authority/Appellate Authority to reckon any factor other than those specified in Sections 30(2) or 61(3) of IBC, as the case may be, for rejection of the resolution plan?

73.6. This Court analysed the entire scheme of the Code, particularly concerning the resolution plan and its approval by the Committee of Creditors and then by the Adjudicating Authority; and held that the percentage of voting share was not directory and in the light of the provisions contained in the Code and the CIRP Regulations, the

approving votes must fulfil the requisite percentage of voting share. The Court also held that the amendment to Section 30(4), prescribing new qualifying standard for approval of resolution plan was neither retrospective in operation nor was having retroactive effect. The Court also rejected the suggestion for different percentage of voting share in the case of KSPIPL. These aspects are not much relevant for the present purpose. The aspects relevant are the enunciations in relation to the respective roles of the Committee of Creditors and the Adjudicating Authority. As already noticed, this Court explained in detail the primacy given to the commercial wisdom of the Committee of Creditors and such commercial wisdom being made non-justiciable. Having said so, this Court also proceeded to define the strict limits of the jurisdiction of NCLT/NCLAT while dealing with the matter relating to approval of resolution plan in the following passages: -

“55. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan “as approved” by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers

and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.

56. For the same reason, **even the jurisdiction of NCLAT being in continuation of the proceedings would be circumscribed in that regard** and more particularly on account of Section 32 of the I&B Code, which envisages that any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61(3) of the I&B Code.....

57. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an “order passed by the adjudicating authority (NCLT)”, which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. **The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order “approving a resolution plan” under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers “by the resolution professional” during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board.** Significantly, the matters or grounds—be it under Section 30(2) or under Section 61(3) of the I&B Code—are regarding testing the validity of the “approved”

resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision.

58. Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with Section 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters “other than” enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. **Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.”**

(emphasis in bold supplied)

74. A few months after the decision in the case of **K. Sashidhar**, the aforesaid provisions relating to the approval of resolution plan came up for further exposition before a 3-Judge Bench of this Court in the case of **Essar Steel** (supra).

74.1. On the background aspects, while omitting details, suffice it to notice for the present purpose that in the case of **Essar Steel**, the NCLT, Ahmedabad admitted the petition filed by a lender bank and after a few rounds of proceedings, the negotiated resolution plan of *ArcelorMittal (India) (P) Ltd.* was approved by CoC by a majority of 92.24%. After several further proceedings, the Adjudicating Authority, by its order dated 08.03.2019, disposed of the application to approve the resolution plan. However, in the appeal, the NCLAT modified the terms of the resolution plan and proceeded to redistribute the proceeds while, *inter alia*, holding that financial creditors and operational creditors deserve equal treatment under a resolution plan and while further holding that CoC was not

empowered to decide the manner in which distribution was to be made between one or other creditors, as there would be a conflict of interest between financial and operational creditors. The order so passed by the NCLAT was in challenge before this Court.

74.2. In the given backdrop, the roles of resolution professional, resolution applicant and Committee of Creditors as also the jurisdiction of Adjudicating Authority and Appellate Authority came up for further and fuller exposition by this Court in ***Essar Steel*** (supra). We have already noticed the passages from this decision in regard to the scheme of IBC and the pivotal role of Committee of Creditors in the process of insolvency resolution of a corporate debtor. As regards the jurisdiction of Adjudicating Authority and Appellate Authority in this process of insolvency resolution, in ***Essar Steel***, this Court extensively referred to the principles laid down and explained in ***K. Sashidhar*** and thereafter held as under: -

“Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in *K. Sashidhar*.”

(emphasis in bold supplied)

74.3. In ***Essar Steel***, it was however argued that sub-section (5) of Section 60 was not considered in ***K. Sashidhar*** and in that context, this Court examined the rights of operational creditors and the reasons set forth in the Insolvency Committee Report, 2018 and then, reiterated the

primacy of Committee of Creditors while declaring the law in no uncertain terms that the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors; the limited judicial review available to it was to see that the Committee of Creditors had taken into account the requirement of keeping the corporate debtor as a going concern with maximisation of the value of assets and the interests of all stakeholders including operational creditors were taken care of. Significantly, in ***Essar Steel***, this Court laid down that if the Adjudicating Authority would find that the requisite parameters had not been kept in view, it may send the resolution plan back to the Committee of Creditors to resubmit the same after satisfying the parameters. This Court laid down as under: -

“73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back

to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.”

(emphasis in bold supplied)

74.4. Thereafter, this Court dealt with the matter on merits in relation to certain claims and objections which need not be elaborated; suffice it would be to notice that this Court did not approve the impugned order of NCLAT and directed that CIRP of the corporate debtor shall take place in accordance with the amended resolution plan, as accepted by the Committee of Creditors.

75. ***Maharashtra Seamless Ltd.*** (supra) has been yet another decision in which interference with the decision of Committee of Creditors by NCLAT met with total disapproval of this Court.

75.1. In ***Maharashtra Seamless Ltd.***, the matter related to CIRP concerning the corporate debtor *United Seamless Tubular Private Ltd.* where resolution plans of four different applicants were considered and CoC approved the resolution plan filed by the appellant *Maharashtra Seamless Ltd.* by a majority of 87.10% of the voting share of financial creditors. Certain differences arose with respect to the liquidation value of the assets of corporate debtor and the CoC took an average of the closest estimate. However, NCLAT ordered re-determination of liquidation value and accordingly, the revised value was arrived at. Thereafter, the CoC again approved the resolution plan of the appellant considering the

revised liquidation value. Then, NCLT approved the resolution plan submitted by the appellant which included an upfront payment of INR 477 crores for infusion in the capital of the corporate debtor. A promoter of the corporate debtor and a financial creditor filed appeals before NCLAT contending that the resolution plan gave unfair advantage to the resolution applicant whereupon, the Appellate Authority proceeded to give a direction to the resolution applicant to enhance its fund inflow upfront.

75.2. In the aforesaid backdrop, the matter was considered in appeal filed by the resolution applicant. After having examined the relevant provisions of the Code and the CIRP Regulations as also the enunciations in ***Essar Steel*** (supra), this Court observed that there was no provision in the Code or Regulations under which the bid of any resolution applicant has to match the liquidation value; that the object behind such valuation process was to assist the CoC to take a proper decision on the resolution plan; and once the plan was approved by CoC, the Adjudicating Authority was only to ascertain if the resolution plan was meeting the requirements of sub-sections (2) and (4) of Section 30. The Court observed that in the given case, the Appellate Authority had proceeded on equitable perceptions rather than commercial wisdom. Even while observing that release of assets at the value 20% below the liquidation value arrived by valuers appeared inequitable, this Court observed that the adjudicatory process ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan

on the basis of quantitative analysis. While disapproving interference by the Appellate Authority, this Court observed and held as under: -

“27. Now the question arises as to whether, while approving a resolution plan, the adjudicating authority could reassess a resolution plan approved by the Committee of Creditors, even if the same otherwise complies with the requirement of Section 31 of the Code. The learned counsel appearing for Indian Bank and the said erstwhile promoter of the corporate debtor have emphasised that there could be no reason to release property valued at Rs 597.54 crores to MSL for Rs 477 crores. The learned counsel appearing for these two respondents have sought to strengthen their submission on this point referring to the other resolution applicant whose bid was for Rs 490 crores which is more than that of the appellant MSL.

28. No provision in the Code or Regulations has been brought to our notice under which the bid of any resolution applicant has to match liquidation value arrived at in the manner provided in Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in *Essar Steel*. We have quoted above the relevant passages from this judgment.

29. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the adjudicating authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the adjudicating authority in approving the resolution plan.

30. **The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code.** Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in *Essar Steel*, the relevant passage (para 54) of which we have reproduced in earlier part of

this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the successful resolution applicant to enhance their fund inflow upfront.”

(emphasis in bold supplied)

76. The expositions aforesaid make it clear that the decision as to whether corporate debtor should continue as a going concern or should be liquidated is essentially a business decision; and in the scheme of IBC, this decision has been left to the Committee of Creditors, comprising of the financial creditors. Differently put, in regard to the insolvency resolution, the decision as to whether a particular resolution plan is to be accepted or not is ultimately in the hands of the Committee of Creditors; and even in such a decision making process, a resolution plan cannot be taken as approved if the same is not approved by votes of at least 66% of the voting share of financial creditors. Thus, broadly put, a resolution plan is approved only when the collective commercial wisdom of the financial creditors, having at least 2/3rd majority of voting share in the Committee of Creditors, stands in its favour.

77. In the scheme of IBC, where approval of resolution plan is exclusively in the domain of the commercial wisdom of CoC, the scope of judicial review is correspondingly circumscribed by the provisions contained in Section 31 as regards approval of the Adjudicating Authority and in Section 32 read with Section 61 as regards the scope of appeal against the order of approval.

77.1. Such limitations on judicial review have been duly underscored by this Court in the decisions above-referred, where it has been laid down in explicit terms that the powers of the Adjudicating Authority dealing with the resolution plan do not extend to examine the correctness or otherwise of the commercial wisdom exercised by the CoC. The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

77.2. The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal against an order approving a resolution plan, namely, if the plan is in contravention of the provisions of any law for the time being in force; or there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period; or the debts owed to the operational creditors have not been provided for; or the insolvency resolution process costs have not been provided for repayment in priority;

or the resolution plan does not comply with any other criteria specified by the Board.

77.3. The material propositions laid down in ***Essar Steel*** (supra) on the extent of judicial review are that the Adjudicating Authority would see if CoC

has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of. And,

if the Adjudicating Authority would find on a given set of facts that the requisite parameters have not been kept in view, it may send the resolution plan back to the Committee of Creditors for re-submission after satisfying the parameters. Then, as observed in ***Maharashtra Seamless Ltd.*** (supra), there is no scope for the Adjudicating Authority or the Appellate Authority to proceed on any equitable perception or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors.

77.4. During the course of submissions, one of the parties (YEIDA), seeking to support modification of the resolution plan concerning some of the terms and stipulations, has referred to a decision by a learned Single Judge of the Allahabad High Court in the case of ***Pradumna Kumar Jain***

v. U.P. Secondary Education Service Commission, Allahabad and Ors.: (1997) 30 ALR 339 to submit that the power to approve or disapprove includes the power to modify; and it has been strongly argued that the power to modify is inherent in the power of approval in terms of Section 31 of the Code. It is noticed that the questions involved in the cited decision related to the powers under Regulation 8 of the U.P. Secondary Education Services Commission (Procedure for Approval of Punishment) Regulations, 1985, which provided that '*the Commission shall after due consideration approve or disapprove the punishment proposed or may issue any other directions deemed fit in the case*'. While interpreting the said provision, where the Commission was to act as a superior authority and the provision itself postulated that the said authority could '*issue any other directions deemed fit*', the Court held that the expressions indicated the existence of the power to modify. We are afraid, the principles stated in the said decision or in other decisions of like nature cannot be imported to read the power to modify the resolution plan into Section 31 of the Code.

77.5. In fact, the power of approval conferred on the Adjudicating Authority in Section 31 of the Code is required to be visualised with reference to the overall scheme of the Code and the purposes for which such powers have been conferred. The power of judicial review in Section 31 is not akin to the power of a superior authority to deal with the merits of the decision of any inferior or subordinate authority. As succinctly stated in

Essar Steel (supra), the limited judicial review available is to see that the Committee of Creditors has adhered to the specified parameters, of keeping the corporate debtor going as a going concern during the resolution process; maximisation of the value of its assets; and taking care of the interests of all stakeholders. This Court has, in no uncertain terms, held that if the specified parameters have not been kept in view, the Adjudicating Authority may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the parameters. The reasons given by the Committee of Creditors are, thus, looked at by the Adjudicating Authority only from this point of view. It is not a jurisdiction to decide as to what ought to be the terms of the resolution plan. That jurisdiction, in the scheme of IBC, is conferred on the Committee of Creditors alone, who has to take such a decision in its commercial wisdom, while keeping in view the applicable provisions and the specified parameters; of course, its decision of approval has to be by the requisite majority of minimum 66% of the voting share.

77.6. In yet another set of submissions, on behalf of the erstwhile director of JIL and JAL, it has been repeatedly asserted that the Committee of Creditors had failed in its statutory duty to ensure maximisation of JIL's assets and protecting the interests of all stakeholders; and it is submitted that the Committee of Creditors failed to visualise that there was no justification for NBCC seeking to acquire JIL

on a meagre amount of INR 120 crores despite the net worth of JIL being much higher.

77.6.1. The assessment about maximisation of the value of assets, in the scheme of the Code, would always be subjective in nature and the question, as to whether a particular resolution plan and its propositions are leading to maximisation of value of assets or not, would be the matter of enquiry and assessment of the Committee of Creditors alone. When the Committee of Creditors takes the decision in its commercial wisdom and by the requisite majority; and there is no valid reason in law to question the decision so taken by the Committee of Creditors, the adjudicatory process, whether by the Adjudicating Authority or the Appellate Authority, cannot enter into any quantitative analysis to adjudge as to whether the prescription of the resolution plan results in maximisation of the value of assets or not. The generalised submissions and objections made in relation to this aspect of value maximisation do not, by themselves, make out a case of interference in the decision taken by the Committee of Creditors in its commercial wisdom.

78. To put in a nutshell, the Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code read with the parameters delineated by this Court in the decisions above-referred. The jurisdiction of the Appellate Authority is also circumscribed by the limited grounds of appeal provided in Section 61 of the Code. In

the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the Adjudicating Authority or the Appellate Authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by Code and exposted by this Court.

79. The other points arising in this batch of matters, particularly with reference to the findings and directions by the Adjudicating Authority in the impugned order dated 03.03.2020 and with reference to the other related aspects, may now be examined within the framework of the parameters aforesaid and the principles laid down by this Court.

Point B

Simultaneous voting over two resolution plans by CoC

80. While dealing with a plethora of disputes and objections concerning the resolution plan of NBCC and the process of its approval, we deem it appropriate to deal, first of all, with a part of objections that approval of the resolution plan of NBCC by CoC is vitiated because of the fact that two resolution plans, of Suraksha Realty and NBCC, were put to simultaneous voting whereas such simultaneous voting on the resolution

plans was not permissible. If this part of objections is accepted, perhaps, nothing more would require consideration.

81. It has been argued on behalf of the objectors that at the time of voting by CoC in the present matter, there was no provision in the Code permitting the voting by CoC at more than one resolution plan at a time and in the very scheme of the Code and the requirements of due consideration, it was necessary that one plan was considered at one point of time. The process of simultaneous voting in the present case has vitiated the decision of CoC. It has also been argued that Regulation 39(3B), permitting the CoC to put more than one resolution plan to vote, was inserted to CIRP Regulations only with effect from 07.08.2020 and being prospective in operation, would not apply to the present process. *Per contra*, it is contended by the parties standing with the approval of the plan in question that there had not been any prohibition or restriction in the Code for putting more than one resolution plan to vote at the same time. On behalf of IRP, it has also been contended that in terms of sub-section (3) of Section 30, he was required to present the CoC such resolution plans, which were conforming to the conditions referred in sub-section (2); and as per sub-section (4) of Section 30, the CoC '*may approve a resolution plan*'. It is, therefore, submitted that in the present process, both the plans were rightly placed before the CoC; and the CoC rightly voted on such plans and approved one of them. It is submitted that the amendment brought about with effect from 07.08.2020 is clarificatory

in nature and only gives out the methodology for putting more than one resolution plan to vote.

82. Having examined the objection against simultaneous voting with reference to the material on record and the law applicable, we are unable to find any substance whatsoever in this objection.

83. It is noteworthy that there has not been any prohibition in the scheme of IBC and CIRP Regulations that CoC could not simultaneously consider and vote upon more than one resolution plan at the same time for electing one of the available options. It has rightly been contended on behalf of IRP that in terms of sub-section (3) of Section 30 of the Code, he was obliged to place both the plans before CoC when they were found conforming to the conditions referred to in sub-section (2) of Section 30; and thereafter, it was for the CoC to consider the plans and to vote upon the same. Of course, the CoC could have approved only one resolution plan; and that has precisely been done in the present case. There does not appear any flaw or fault in the process adopted in the present case as regards voting over the resolution plans by the CoC.

83.1. Moreover, as noticed, the legislature itself has made the position clear by way of a later amendment with effect from 07.08.2020, by specifically making stipulations for simultaneous voting over more than one resolution plan by the CoC, particularly with amendment of sub-regulation (3) of Regulation 39 of CIRP Regulations and insertion of sub-regulations (3A) and (3B) thereto.⁷⁹ Such an amendment could only be

⁷⁹ *vide* second footnote to sub-regulation (3) of Regulation 39 of CIRP Regulations, *ibid*.

visualised as clarificatory in nature; and, in any case, even before amendment, there had not been any prohibition in putting two or more conforming resolution plans to vote simultaneously.

84. It is also noticeable that when the matter was considered in the second round of litigation and this Court issued various necessary directions in the order dated 06.11.2019 in exercise of its plenary powers under Article 142 of the Constitution of India, it was specifically provided that the two applicants viz., Suraksha Realty and NBCC would be invited to submit revised plans for consideration. The minutes of CoC meeting have also been placed before us by IRP and it appears that this very aspect was duly deliberated in the meeting where IDBI Bank proposed for simultaneous voting over the two plans and this suggestion was accepted by almost all CoC members except ICICI Bank Ltd. and Axis Bank Ltd., who were having together the voting share of only about 2.3%. Due deliberations in this regard, in the meeting of Committee of Creditors dated 07.12.2019, read as under: -

“The IRP enquired from CoC about the Resolution Plan that need to be put for voting by CoC. IDBI Bank on behalf of lenders proposed that given the unique nature of this case both plans should be put to vote as this will provide equal opportunity for individual members of COC to select their preferred Resolution Plan. The main reason for proposing joint vote on both plans was

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-Specific directions of Hon'ble Supreme Court under its special powers (Article 142) where COC/IRP was required to consider Resolution Plans from only NBCC and Suraksha in accordance with law and regulation.

-Ideally it would like to propose the H1 Resolution Plan to vote, but since the total overall evaluation scores were very close and there is no consensus amongst members of COC on the evaluation methodology used.

-Giving equal opportunity to all members of COC (including Home buyers and FD holders) to approve the plan most preferred by them.

-Given the unique and complex nature of this Resolution process.

All CoC members except ICICI Bank Limited, Axis Bank Limited (together having vote share of approx. 2.3%) agreed with the suggestion made by IDBI Bank and decided to put both the Resolution Plans simultaneously to vote. Accordingly, it was decided that both the Resolution Plans will be put to vote simultaneously and in the event both secure the minimum threshold of 66% votes, the plan securing overall higher vote will be considered as the preferred resolution plan. The IRP agreed to follow the COC's instructions and organise the voting.

It was pointed out by CAM in the CoC meeting that since both the Resolution Plans are being put to vote, we might end up in a situation where both the Resolution Plans will receive more than 66% votes, thus creating doubts as to whether both resolution applicants are equally entitled to have their plans submitted to the adjudicating authority for approval. Therefore, to avoid such a situation, the CoC members should be allowed to vote on either of the two Resolution Plans only. The Authorised Representative of the Home Buyers informed that almost all home buyer does not want liquidation of the corporate debtor. In case there is a spilt of vote between Home Buyers and other members of COC, there are more chances of no resolution plan getting approved and situation of liquidation may arise. Majority of home buyers who have written to AR of Home Buyers have indicated NBCC as its preferred choice. Home Buyers are also fully aware that without support of other members of COC, none of the resolution plan will get approved by COC. Para 21(i) of Hon'ble Supreme Court judgment dated 06.11.2019 also directed to "*place the revised plan(s) before the CoC, if so required, after negotiations and submit report to the adjudicating authority NCLT within such time.*"

To avoid scenario of liquidation or non-compliance of Hon'ble Supreme Court direction, AR of Home Buyers insisted that both the Resolution Plans should be put to vote and the CoC members should be allowed to vote on both the Resolution Plans and in the event that both the Resolution Plans receive more than 66% votes, then the successful Resolution Applicant will be decided basis (*sic*) the Resolution Plan that has received higher number of votes."

85. In view of the above, we are unable to find any fault in simultaneous consideration and voting over two resolution plans by CoC for electing one of them; and we would have no hesitation in giving our

imprimatur to such a process. The baseless objection in this regard has rightly been rejected by the Adjudicating Authority.

Point C

Matters related with the land providing agency YEIDA

86. We may now enter into the first major point for determination in this batch of matters; and that relates to the stipulations in the resolution plan concerning the land providing agency YEIDA. The frontal aspect of this issue is about the provision made in the resolution plan for meeting with the contingent liability of additional compensation for land acquisition. The other aspect pertains to the directions by the Adjudicating Authority for execution of tripartite agreement amongst YEIDA, the corporate debtor JIL and the SPVs proposed to be set up in terms of the resolution plan. An ancillary aspect relates to certain reliefs and concessions sought for by the resolution applicant.

87. As noticed, the rights under the land in question were provided to the original concessionaire under the Concession Agreement dated 07.02.2003 and later on, JIL was recognised as the concessionaire. In the broad framework, one chunk of land was provided to the concessionaire for constructing the Expressway and its allied facilities, for which the CA provided, *inter alia*, as under: -

“4.1 Land for construction of Expressway shall be provided by TEA to the Concessionaire, generally in a width of 100 meters along the alignment of the Expressway with additional land width, where required, for developing other facilities like Toll Plazas etc., on following terms & conditions.

b. The land shall be leased for a period starting from the date of transfer till the end of the Concession Period through such lease deed as may be mutually agreed between the Parties.

*** *** ***

d. The sole premium of the transferred land shall be equivalent to the acquisition cost plus a lease rent of Rs. 100.00 (Rupees one hundred) only per hectare per year. The acquisition cost shall be the actual compensation paid to the land owners without any additional charge and shall be payable by the Concessionaire as per applicable rules. The lease rent shall be payable annually."

Another chunk of land was provided to the concessionaire for commercial exploitation, for which the CA provided, *inter alia*, as under: -

"4.3 Land for development shall be transferred by TEA to the Concessionaire free from all Encumbrances on following terms & conditions:

a. It shall be on lease for a period of 90 (ninety) years from the date of transfer through such lease deeds as may be mutually agreed between the Parties.

*** *** ***

c. The sole premium of the transferred land shall be equivalent to the acquisition cost plus a lease rent of Rs. 100.00 (Rupees one hundred) only per hectare per year. The acquisition cost shall be the actual compensation paid to the land owners without any additional charge and shall be payable by the Concessionaire as per applicable rules. The rent shall be payable annually for 90 (Ninety) years from the date of transfer of land.

d. The Concessionaire shall be entitled to further sub-lease developed / undeveloped land to sub-lessees / end-users in its sole discretion without any further consent or approval or payment of any charges / fee etc. to TEA or any other relevant authority.

e. After sub-lease of part of the land by the Concessionaire, the same can be transferred / assigned without requiring any consent or approval of or payment of any additional charges, transfer fee, premiums etc. to TEA or to any other relevant authority and/or there can be subsequent multiple sub-leases of the land in smaller parts. The lease rent of the respective sub-leased portion of land shall be paid by the sub-lessees / transferees to TEA directly on pro-rata basis @ Rs. 100.00 (Rupees one hundred) per hectare per year. The Concessionaire shall be required to pay lease rent to TEA for

the portion of land remaining in its possession after sub-lease, on pro-rata basis at the aforesaid prescribed rate. Total lease rent paid by the Concessionaire and various sub-lessees / transferees shall be Rs. 100.00 (Rupees one hundred) per hectare per year.

*** *** ***

g. The Concessionaire may make a request to TEA to execute the lease deed directly in favour of Concessionaire's subsidiaries, assigns, transferees etc. in respect of any portion of the land on the same terms and conditions as mentioned above, and on receipt of such request TEA shall execute the lease deed in respect of such portion of land directly in favour of such subsidiaries, assigns and transferees.

h. In case TEA and the Concessionaire consider it appropriate, tripartite agreement for sub-lease deed may be executed between the TEA, Concessionaire and the Sub-Lessee.

4.4 The Concessionaire shall be free to decide the purpose for which transferred land will be used i.e. for commercial, amusement, industrial, institutional, residential etc. and also for the area of land to be allocated for different uses. The Concessionaire shall also be free to decide whether the sub-leased land shall be in the form of plots or constructed properties. No permission of TEA shall be required either for the land use or for transfer of leasehold / sub-leasing / multiple sub-leasing of land. The land use shall however be as per applicable Master Plan and other regulations."

Another stipulation, in Clause 18.1 of the CA, which has its own relevance to the present case, may also be taken note of as under: -

"TRANSFER OF CONCESSIONAIRE'S RIGHTS AND OBLIGATIONS TO SPV

18.1 In case the Concessionaire and the TEA consider it necessary to transfer Concessionaire's rights and obligations under this Agreement to a SPV, the Concessionaire shall, in a reasonable time, transfer all its rights and obligations under this Agreement to a SPV for which documents as may be required shall be executed between the Concessionaire, the TEA and the SPV without additional cost to the Concessionaire or the SPV."

87.1. It is not in dispute that under the said Concession Agreement, JIL got the rights: (a) to construct and operate the Expressway and collect toll

for a period of 36 years; and (b) to use the land along the Expressway for commercial exploitation for a period of 90 years.

88. The issue pertaining to additional amount of land acquisition compensation cropped up in the wake of a decision of the Full Bench of Allahabad High Court dated 21.10.2011 in the case of **Gajraj and Ors. v. State of U.P. and Ors.: 2011 SCC OnLine All 1711**, wherein the High Court ruled in favour of payment of additional compensation to the land owners involved therein. The said decision in **Gajraj** was upheld by this Court in the case of **Savitri Devi v. State of U.P. & Ors.: (2015) 7 SCC 21**. In sequel, a spate of litigation in Allahabad High Court concerning other parcels of land came up and several other land owners, including whose land stood acquired for the project in question, demanded additional compensation. It is stated by YEIDA that looking to such litigations and agitations, the Government of U.P. proceeded to set up a committee called the 'Chaudhary Committee'; and the said committee recommended for grant of additional compensation (to the extent of 64.7%) to the land owners whose land had been acquired. While accepting these recommendations, the Government of U.P. proceeded to issue G.O. dated 29.08.2014, directing YEIDA to ensure payment of additional compensation to all the land owners. In this turn of events, YEIDA demanded the amount of additional compensation from JIL to the tune of INR 2591.78 crores by its communication dated 20.01.2015 and

yet another amount of approximately INR 247 crores by its communication dated 31.05.2017.

88.1. The aforesaid communications of YEIDA and the said G.O. dated 29.08.2014 were challenged by JIL by way of a writ petition before the High Court of Allahabad but, later on, JIL sought permission to withdraw with a view to seek recourse to the alternative remedy of arbitration, as provided in the CA. The High Court of Allahabad, by its order dated 03.11.2016, permitted JIL to withdraw and to pursue the alternative remedy of arbitration⁸⁰. Thereafter, the concessionaire JIL took up the matter in arbitration which led to the arbitral award dated 02.11.2019 in its favour, holding that the demand made by YEIDA was not sustainable. This award has been challenged by YEIDA under Section 34 of the Arbitration and Conciliation Act, 1996 and those proceedings, being Arbitration Case No. 3 of 2020, are pending in the Court of District Judge, Gautam Budh Nagar. It has also been pointed out that the said G.O. was struck down by the Allahabad High Court in other petitions; and the order so passed by the High Court has been challenged in SLP (Civil) No. 10015-10034 of 2020, pending in this Court.

89. At the stage of drawing up the resolution plan in question, the said arbitral award had been made with the result that the liability towards the amount of additional compensation was not standing against JIL. However, for the reason that the matter was *sub judice*, the resolution

⁸⁰ As per the facts stated, the said order of High Court was challenged by YEIDA in this Court in D. No. 15058 of 2017, which was dismissed on 01.09.2017.

applicant considered it appropriate to make a provision for meeting with the contingency, in case this liability would ultimately get fastened on JIL; and proposed in the resolution plan as under: -

“1.2 Treatment of creditors

As part of the Resolution Plan, it is proposed that:

(i) As mentioned in this Plan, this Resolution Plan assumes that no amount is payable by the Corporate Debtor in relation to the Landowner Compensation Debt in view of the Award. However, if the said position changes on account of the Award being overruled then in relation to the Landowner Compensation Debt, the amounts payable to the landowners shall be collected directly by YEIDA in the following manner for the following parcels of lands (in relation to which such debt accrues), from the ultimate end-users:

(i) Land under development (real estate projects) – the compensation in this regard shall be collected by YEIDA from the Home Buyers;

(ii) Land already subleased to other entities by the Corporate Debtor – the compensation shall be collected from the respective sub-lessees to whom the lands have been subleased by the Corporate Debtor either directly or indirectly;

(iii) Unutilized land parcels – the compensation shall be collected from the end users in whose favour such land shall be transferred/subleased by the Corporate Debtor; and

(iv) Yamuna Expressway – Yamuna Expressway is a project of public utility and the ultimate owner of the project land is YEIDA, who will get the ultimate ownership of the Yamuna Expressway after the expiry of the concession period under the Concession Agreement and accordingly the compensation in this regard shall be payable by YEIDA.”

90. Apart from the above, the resolution applicant also proposed to set up two separate SPVs, one being Expressway SPV and another being Land Bank SPV. It was proposed that the assets and liabilities pertaining to Expressway shall be transferred to the Expressway SPV by way of transfer of 100% shareholding and the concession rights under the CA;

and that out of the unutilised parcels of land available with the corporate debtor, 1,526 acres shall be transferred to Land Bank SPV; and that Land Bank SPV will also take over the admitted financial debt to the tune of INR 5,100 crores. In the resolution plan, the applicant also stated about the approvals required and its assumptions in that regard in the following terms: -

“BUSINESS PLAN / FINANCIAL PROJECTIONS

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(d) *Provisions for the Approvals required and the timeline for the same*

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(ii) The Resolution Applicant is of the view that the approval of this Resolution Plan by the Adjudicating Authority shall be deemed to have waived all the requirements in relation to transfer of Yamuna Expressway and land bank asset by way of business transfer and no approval/consent shall be necessary from any other person (including Yamuna Expressway Industrial Development Authority (“YEIDA”) or any other Governmental Authority), in this regard.”

91. Moreover, in Clauses 4, 14 and 27 of Schedule 3 of the resolution plan, while seeking ‘reliefs and concessions’, the resolution applicant mooted a few more propositions concerning YEIDA and the Concession Agreement, which have also contributed to the intricacies of the matter.

91.1. In Clause 4 of Schedule 3 of the resolution plan, NBCC expected that YEIDA shall withdraw its challenge to another award dated 23.01.2017, pertaining to the issue of additional FAR, in the following terms: -

“4. YEIDA to withdraw the appeal filed in the District Court, Gautam Budh Nagar being Arbitration Case No. 69 of 2017 challenging the award dated January 23, 2017 passed by arbitral tribunal pertaining to additional FAR and the Corporate Debtor to

get the right to use additional FAR as per details contained in Annexure-P at all five land parcels immediately (on withdrawal of such appeal) without any additional payment for the same. However, the Resolution Applicant shall make a payment of INR 1 Cr in consideration of full and final settlement of YEIDA's claim if any arising out of such appeal, considering YEIDA's claim as Operational Debt in terms of IBC and to ensure equitable treatment to all the Operational Creditors."

91.2. Further, in Clause 14 of Schedule 3 of the plan, the resolution applicant sought extinguishment of liability towards capital cost pertaining to Noida-Greater Noida Expressway in the following terms: -

"14. The liability arising out of the Concession Agreement, to repay the capital cost pertaining to Noida-Greater Noida Expressway (treated as interest free loan from YEIDA to the Corporate Debtor) shall stand extinguished, on account of failure of YEIDA to allow the Corporate Debtor to collect and retain toll/fee from the users of the Noida-Greater Noida Expressway during the term of the Concession Agreement, as agreed under Clause 3.7 of the Concession Agreement."

91.3. Yet further, in Clause 27 of Schedule 3, the resolution applicant expected an extension of the period under the CA by 10 years. This Clause reads as under: -

"27. To ensure feasibility and viability of this Resolution Plan, YEIDA and other concerned authorities shall extend the concession period (currently 36 years) under the Concession Agreement for an additional period of ten years."

92. YEIDA took exception to several parts of the stipulations aforesaid before the Adjudicating Authority and essentially submitted that the liability towards the amount of additional compensation, in relation to the land acquired and leased to JIL, was that of JIL, although such a question was *sub judice* in challenge to the arbitral award under Section 34 of the Arbitration Act. It was submitted on behalf of YEIDA that in case the

liability is ultimately mulcted on JIL, YEIDA cannot be driven to collect the amount of additional compensation from the end-users as proposed in the plan. It was asserted that the terms of CA provided for two payment components: one being of acquisition cost payable by the concessionaire and other being of leased rent to be paid by the sub-lessee/end-user; and given such components, it could not have been provided that YEIDA would collect the acquisition cost directly from the end-users.

92.1. It was also submitted that the resolution applicant was not entitled to split the transferred land into two, and to say that the payment of additional compensation would be applicable only towards the land used for development and not for the land used for Expressway.

92.2. As regards the expected exemption to pay the acquisition cost pertaining to the land utilised for Expressway, it was submitted that even if Expressway was to revert to YEIDA after 36 years, JIL was allowed to collect toll for this period and there could be no exemption as regards cost of acquisition for the land of Expressway.

93. Another part of objection was that if the concessionaire's rights and obligations were proposed to be transferred to SPVs, proper documentation was required, so that YEIDA could exercise its rights over the SPVs concerned. It was yet further submitted that withdrawal of the arbitration case could not be thrust upon YEIDA.

94. As noticed, the Adjudicating Authority observed in regard to these issues concerning YEIDA that looking to the terms of CA, the Committee

of Creditors should not have approved the resolution plan stating that the compensation, if awarded, shall be collected from the end-users. However, the Adjudicating Authority proceeded to modulate such terms 'to make the plan viable' and provided that the resolution plan be read to mean that YEIDA shall have a right to collect acquisition cost through the SPVs concerned. With regard to the issue of additional compensation concerning the land of Expressway, the Adjudicating Authority considered it appropriate to read the resolution plan in the way that it is left open to both the parties to have proper recourse over this issue before a competent forum when the time would come for payment of additional compensation. As regards transfer of concessionaire's rights and obligations to SPVs, the Adjudicating Authority was of the view that, when JIL as concessionaire was, for the first time, proposing to transfer its rights and obligations to SPVs, the documents involving the concessionaire JIL, YEIDA and the SPV concerned were required to be executed. The NCLT also observed that the CA was based on the statute created by the State Government and, therefore, violation of its terms and conditions would be a violation of the law in force and would not be permissible in terms of Section 30(2) of the Code.

94.1. Interestingly, the other reliefs and concessions in regard to YEIDA, as sought for in the aforementioned Clauses 14 and 27, were specifically declined by the Adjudicating Authority (*vide* the comments on these clauses in paragraph 134 of the order dated 03.03.2020). However, as

regards Clause 4 of the 'reliefs and concessions' that YEIDA shall withdraw the arbitration case filed under Section 34 of the Arbitration Act, though the Adjudicating Authority noticed this aspect in the arguments of the parties but, did not make any specific order in that regard and in paragraph 134 of the impugned order dated 03.03.2020, merely observed that Clauses 1 to 5 were covered by the previous discussion.

95. On behalf of the resolution applicant (NBCC), while questioning the directions and observations of the Adjudicating Authority in relation to the dealings with YEIDA and particularly in relation to the contingent liability of additional compensation, a detailed reference has been made to all the background aspects and extensive arguments have been made in support of the stipulations in the resolution plan.

95.1. It is submitted on behalf of the resolution applicant that as on date, there is no claim of YEIDA against JIL in relation to the additional amount of compensation but, keeping the larger interests in view, the resolution plan has provided for this eventuality in the manner that YEIDA would be able to collect the amounts from the end-users. While taking exception to the observations in the order impugned, it is submitted that the Adjudicating Authority has seriously erred in seeking to construe the CA because that was an issue pending in the arbitration case. It is further submitted that in terms of Regulation 37 of CIRP Regulations, the resolution plan can propose modifications/alterations of contracts of the corporate debtors and in fact, all the contracts are being modified under

the plan, of course, subject to the approval by the CoC with requisite majority. As regards legal status of the Concession Agreement, it is submitted that the Adjudicating Authority has erred in assuming as if it were a statutory contract. In this regard, with reference to Section 6-A of the U.P. Act of 1976⁸¹, it is contended that YEIDA may by an agreement authorise any person to provide or maintain, or continue to provide or maintain, any infrastructure or amenities and therefore, once an agreement was reached between JIL and YEIDA, their relationship would be governed by that contract (Concession Agreement). It is submitted that while enacting Section 6-A of the U.P. Act of 1976, the intent of the legislature has been to carve out a contractual relationship distinct from the statute and this goes against the whole construct of 'statutory contract' which YEIDA is trying to project. The decisions of this Court in the cases of ***India Thermal Power Ltd. v. State of M.P. and Ors.*: (2000) 3 SCC 379** and ***Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors.*: (2000) 6 SCC 293** have been referred to submit that merely for YEIDA being a statutory body, the contract in question does not partake the character of a statutory contract. This issue relating to contingent liability of additional compensation, according to NBCC, is required to be

81 Section 6-A of U.P. Act of 1976 reads as under: -

"6-A Notwithstanding anything to the contrary contained in any other provisions of this Act and subject to such terms and conditions as may be specified in the regulations, the Authority may, by Agreement, authorize any person to provide or maintain or continue to provide or maintain any infrastructure or amenities under this Act and to collect taxes or fees, as the case may be, levied therefore."

settled for proper implementation of the resolution plan or else, it may lead to serious impediment in future.

95.2. As regards those observations of the Adjudicating Authority where the issue of additional compensation qua the Expressway land has been left open for decision in the competent forum, it is submitted that the observations are not in accord with the decision in ***Essar Steel*** (supra), that there ought to be finality of claims against the corporate debtor. According to YEIDA, if this issue is left to be decided in any other proceedings, the same would lead to 'hydra head' popping up in the future.

95.3. It is further submitted that Expressway land would admittedly revert to YEIDA after the end of concession period and, therefore, YEIDA is the end-user of the Expressway. It is submitted that since the plan proposed the payment by end-users and this principle was approved by CoC, YEIDA has to be the entity liable towards additional compensation in relation to the land of Expressway, for it being the end-user with the land reverting to it. It has also been submitted that YEIDA has otherwise stated no objection to the pass-through proposition as regards liability towards additional compensation to the end-users and hence, its objection towards this liability qua Expressway land remains unjustified. It is also submitted that in the resolution plan, a debt of INR 2,000 crores is proposed to be raised on the Expressway for the purpose of construction of flats; and in the event this liability of additional compensation on the

Expressway land is not passed on to the end-user, raising of the loan may become difficult.

95.4. NBCC has further stated its objection to the proposed tripartite agreement with reference to Clauses 4.3(d), 4.3(e) and 4.4 of CA and it is submitted that the right of transfer being available to the concessionaire, foisting of tripartite agreement with YEIDA is not justified. It is submitted that so far as the execution of tripartite agreement in relation to the Expressway SPV is concerned, this part of the order is not being challenged but as regards Land Bank SPV, there is no requirement of entering into a tripartite agreement because JIL has unfettered rights under CA to transfer the land to any person.

95.5. As regards decision of this Court in the case of ***Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal and Ors.:*** (2019) SCC OnLine SC 1479, which is relied upon by YEIDA, it is submitted that the said decision is not applicable to the facts of the present case because therein, MCGM had not entered into a binding lease agreement containing the terms similar to the CA applicable to the parties herein. Moreover, in the said decision, the statute, i.e., Municipal Corporation of Greater Mumbai Act, 1888, itself provided that the only way MCGM's properties could be dealt with was through lease or by way of creation of any other interest with the prior permission of MCGM, but there is no similar provision in the U.P. Act of 1976.

96. On behalf of the IRP, it has been submitted that granting or refusing the reliefs sought for under Schedule 3 of the resolution plan is a matter within the discretion of the Adjudicating Authority and even if the same have not been granted, they do not form a part of the commercial terms of the plan; and the referred clauses of 'reliefs and concessions' are not hit by Section 30(2)(e) of the Code.

97. The associations of homebuyers as also the individual homebuyers standing in support of the plan have contended that the alleged terms of the Concession Agreement and any alleged breach thereof does not amount to a breach under Section 30(2)(e) of the Code and therefore, the Adjudicating Authority has acted wholly without jurisdiction in dealing with such terms because they do not come within the scope of Section 31 of the Code.

97.1. However, one of the homebuyers, who has moved an application for intervention, I.A. No. 84309 of 2020, has made several submissions questioning the dealings of JIL and YEIDA and has submitted that the Concession Agreement having not been provided to the homebuyers, the CIRP proceedings are rendered void.

98. In response to the aforesaid submissions in favour of the resolution plan, several counter arguments have been made by different parties. To avoid prolixity and repetition, we take into account the submissions of the parties directly related with these issues namely, YEIDA. Added to that, we may also refer to the submissions made on

behalf of the erstwhile director of the corporate debtor JIL as also its holding company JAL.

99. It has been stated and reiterated, as had been the submissions before the NCLT, that YEIDA does not stand to oppose the resolution plan only for the sake of opposition; rather it would like the plan to succeed but, it has a public duty to ensure that the framework under CA is preserved; and the issues being raised by it are solely intended to preserve the CA and to enforce the terms therein. Again, a detailed reference has been made to the background aspects concerning the land in question and the Concession Agreement as also to the findings of NCLT and thereafter, the contentions urged on behalf of the resolution applicant have been refuted.

99.1. In the first place, YEIDA has submitted that the resolution applicant is not correct in suggesting that the Adjudicating Authority has dealt with the interpretation of CA to hold that compensation was to be paid by the concessionaire and by the proposed SPVs. Paragraph 118 of the impugned order dated 03.03.2020 has been referred wherein, the Adjudicating Authority stated that the question, as to whether additional compensation was a part of the acquisition cost, was not being examined because it had already been adjudicated in arbitration and is pending in the Court.

99.2. While supporting the other part of impugned order dated 03.03.2020, it is submitted that there being no privity of contract between

YEIDA and the end-users, the amount towards additional compensation could only be collected from the SPVs and not directly from the end-users. According to YEIDA, the Adjudicating Authority has rightly modified the mechanism in the resolution plan for collection of additional compensation in the manner that instead of collecting the amount directly from the end-users, YEIDA would now be collecting it through the SPVs concerned. This has, according to YEIDA, no impact on the commercial aspects of the resolution plan.

99.3. It is also submitted that the contract in question, that is, the Concession Agreement, is a statutory contract entered into by YEIDA for public purpose and it cannot be altered or modified through a resolution plan as an ordinary commercial contract. It is submitted that the CA grants and governs the rights of corporate debtor JIL over the land of YEIDA; that such rights are limited and distinct from ownership rights; and that the resolution applicant cannot unilaterally alter the CA and improve upon the rights granted thereunder to enhance the assets of the corporate debtor.

99.4. As regards the land falling under Expressway, YEIDA has questioned the contentions urged on behalf of NBCC and it is submitted that such a ground was not taken in the appeal filed against the impugned order and was raised for the first time in written submissions. Nevertheless, according to YEIDA, the argument is patently incorrect, for it ignores the fact that the corporate debtor JIL and its successor SPVs would derive the benefits of both, the toll collected from Expressway for

36 years as also from the other land for development. It has also been submitted that the additional compensation for Expressway, when to be passed on to the end-users, could only be passed on to the commuters in the form of appropriate adjustment in the toll, but not otherwise.

99.5. Moving on to the questions related with creation of SPVs, transfer of land to them and the aforesaid stipulations in the resolution plan, it is submitted that the project in question is an integrated and indivisible one, as held by this Court in the case of ***Nand Kishore Gupta & Ors. v. State of U.P. & Ors.*** (2010) 10 SCC 282 and hence, its bifurcation is impermissible.

99.6. It is also submitted that the assumption in the resolution plan, that the approval of NCLT would waive the requirement of YEIDA's approval, is misconceived. Regulation 37 of CIRP Regulations has been referred to submit that the plan has to provide for necessary measures for insolvency resolution including approvals from the Central and State Governments and other authorities. Therefore, according to YEIDA, such pre-emptory waiver as envisaged in the plan is contrary to the CIRP Regulations. A further reference has been made to Clause 18.1 of the CA and it is contended that in terms thereof, in case any SPV is to be set up, necessary documents involving the concessionaire JIL, YEIDA and SPV have to be executed. It is reiterated that despite such objections, YEIDA is taking a practical view of the matter so as to ensure the success of the resolution plan and, therefore, the Adjudicating Authority (NCLT) has also

rightly provided for such documentation without disturbing the commercial effect of the plan while ensuring that all the future dealings shall be in terms of the CA and thereby, fulfilling the requirements of Section 30(2) of the Code.

99.7. As regards the contentions on the part of the resolution applicant that Land Bank SPV is not governed by the CA or that there is no restriction on the corporate debtor's ability to sub-lease, it is submitted that the rights for development of the land along the proposed Expressway were to be provided at five or more locations with one location in Noida or Greater Noida in terms of Clause 3.3 of the CA. Therefore, the suggestion that this land may not be governed by CA is not correct. As regards the right to sub-lease, it is submitted on behalf of YEIDA that as per the terms of plan, it is not a mere sub-lease in favour of Land Bank SPV but the chunk of land for development is sought to be transferred to the Land Bank SPV by way of business transfer; and in any case, in terms of the referred clauses of CA, execution of tripartite agreement is a condition indispensable.

99.8. It has also been submitted that YEIDA has consistently taken the stand that it would be ready to do everything within its power to ensure that the plan is a success but even after long length of time, the resolution applicant has not even approached YEIDA for execution of necessary documents. While relying on the aforesaid decision in **MCGM**, it has been argued that the provisions of the Code cannot override a public body's

right and duty to control and regulate as to how its properties are to be dealt with.

99.9. As regards the powers of the Adjudicating Authority to modify the plan, reliance is placed on the decision in **ArcelorMittal** (supra), where this Court has held that the Adjudicating Authority is to apply judicial mind to a resolution plan to satisfy itself that the plan meets the requirements under Section 30 of the Code. It is further submitted that even in **Essar Steel** (supra), this Court has recognised the Adjudicating Authority's power of judicial review. Further, with reference to the decision of Allahabad High Court in the case of **Pradumna Kumar Jain** (supra), it is submitted that the power to approve or reject a plan must necessarily include the power to modify a plan. According to YEIDA, such power of the Adjudicating Authority is implicit in Section 31; and if the Adjudicating Authority finds that a resolution plan does not conform to the Code but would do so by modifications, such modifications deserve to be upheld, lest the corporate debtor is pushed to liquidation. It is re-emphasised that the modifications provided in the impugned order dated 03.03.2020 have no commercial implications and they relate only to the mechanism prescribed by the resolution plan, which are required to be modified to uphold the CA, a statutory contract.

99.10. Apart from the above, it has also been submitted on behalf of YEIDA, that the resolution plan carries such other terms and stipulations which cannot be approved; and objections of YEIDA to such terms were

upheld but, NBCC has not appealed against that part of the order of the Adjudicating Authority. Therefore, those stipulations deserve not to be approved. In this regard, it has been pointed out that YEIDA has taken objection to Clause 4 of Schedule 3 requiring it to give up the litigation under the Arbitration Act; and this objection was noted by the Adjudicating Authority and NBCC has not challenged those observations. Such a relief, according to YEIDA, cannot be claimed in a resolution plan and ought to be declined. It has further been pointed out that the stipulations in the said Clauses 14 and 27 of Schedule 3 of the resolution plan, respectively for extinguishment of the liability arising under the CA and for extension of term of CA, have not been granted by the Adjudicating Authority; and these aspects having not been appealed against, the clauses in question deserve to be deleted from the resolution plan.

100. The submissions so made on behalf of YEIDA have been supported by the erstwhile director of JIL with reference to the decision in ***Embassy Property*** (supra) and with the submissions that YEIDA being a statutory body created under the U.P. Act of 1976, the agreement entered into between YEIDA and the corporate debtor is statutory in nature and this relationship is not just contractual but is statutorily governed. The requirement that YEIDA must collect compensation from the homebuyers or end-users in case it succeeds in the arbitration case, according to the erstwhile director, is in contravention of the law for the time being in force, for it violates the U.P. Act of 1976. It is further submitted that the

Adjudicating Authority has rightly ordered execution of tripartite agreement involving the proposed SPVs. In essence, the submission has been that the treatment of YEIDA in the resolution plan is not in conformity with the law and the order passed by the Adjudicating Authority calls for no interference.

101. While dealing with the rival submissions, we may indicate at the outset that some of the objections like questioning the dealings of JIL and YEIDA and want of availability of CA with the homebuyers have unnecessarily been raised and carry no meaning to the real questions in controversy. They require no discussion and are left at that.

102. Coming to the real questions in controversy, in the first place, we deem it appropriate to observe that the suggestion on behalf of YEIDA and erstwhile director of the corporate debtor, that the Concession Agreement in question is a statutory contract, is not correct and cannot be accepted. It has rightly been pointed out on behalf of the resolution applicant NBCC that the said CA is not a statutory contract; it has only been executed by YEIDA in exercise of its enabling powers conferred by the statute, that is, U.P. Act of 1976 but the same is neither an agreement provided by the statute nor executed under a statute. This Court has clarified the law in this respect in the case of **India Thermal Power Ltd.** (supra) in the following terms: -

“11. It was contended by Mr Cooper, learned Senior Counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/PPs had entered into PPAs under Sections 43 and 43-A of the Electricity Supply Act and as

such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and the High Court was wrong in accepting the same. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. **Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties.** Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.”

(emphasis in bold supplied)

102.1. Applying the principles aforesaid to the facts of the present case, we are clearly of the view that the agreement in question does not acquire the status of a statutory contract merely for having been executed in terms of the powers with YEIDA under Section 6-A of the U.P. Act of 1976.

102.2. Apart from above, another part of the submissions on behalf of YEIDA with reference to the case of ***Nand Kishore Gupta*** (supra) against incorporation of two SPVs cannot be accepted. The observations of this Court in the case of ***Nand Kishore Gupta*** (supra) came in the wake of challenge to the very acquisition process concerning the land parcels for the project in question, that is Yamuna Expressway Project. One of the arguments therein was that about 25 million square kilometres of land was being acquired for 5 parcels of land to be given for commercial exploitation. This Court found the High Court right in commenting that such creation of 5 zones for industry, residence, amusement etc. was going to be complementary to the creation of highway. However, the observations in ***Nand Kishore Gupta*** (supra), holding all the parcels of land to be part of integrated and indivisible project, cannot be read to mean that creation of two SPVs by the concessionaire, one for the Expressway and another for the remaining land for commercial development, can never be provided.

102.3. However, even if the submissions of YEIDA are not correct in regard to the aforesaid two aspects, all other submissions made on its behalf cannot be discarded and rather, on substance, they deserve acceptance to a large extent.

103. The contract in question, the CA, even though not a statutory one, is nevertheless a contract entered into between the concessionaire and statutory authority, that is, YEIDA. It is needless to observe that even if in

the scheme of IBC, a resolution plan could modify the terms of a contract, any tinkering with the contract in question, that is, the Concession Agreement, could not have been carried out without the approval and consent of the authority concerned, that is, YEIDA. Any doubt in that regard stands quelled with reference to Regulation 37 of CIRP Regulations that requires a resolution plan to provide for various measures including '*necessary approvals from the Central and State Governments and other authorities*'. The authority concerned in the present case, YEIDA, is the one established by the State Government under the U.P. Act of 1976 and its approval remains *sine qua non* for validity of the resolution plan in question, particularly qua the terms related with YEIDA. The stipulations/assumptions in the resolution plan, that approval by the Adjudicating Authority shall dispense with all the requirements of seeking consent from YEIDA for any business transfer are too far beyond the entitlement of the resolution applicant. Neither any so-called deemed approval could be foisted upon the governmental authority like YEIDA nor such an assumption stands in conformity with Regulation 37 of the CIRP Regulations.

104. Furthermore, the suggestion that Clause 18.1 of the CA had been a one-time measure and that stands exhausted with creation of JIL as SPV and transfer of original concessionaire's rights to JIL, has its own shortcomings. The concept and purport of Clause 18.1, of course, at the relevant time had been of the obligation on the original concessionaire to

execute the documents for creation of SPV and this clause came in operation when JIL was created as an SPV. However, it would be wholly unrealistic to say that once JIL was created as an SPV, the said Clause 18.1 stood exhausted and there remained no obligation on the part of JIL (as the substituted concessionaire) to execute the necessary documents if it would propose to transfer its rights and obligations under the CA to another SPV; and it could do so without the consent of YEIDA. This suggestion carries an inherent fallacy because if Clause 18.1 is removed from the CA, a serious question would arise as to how the rights and obligations of the substituted concessionaire JIL could at all be transferred to another SPV? Looking to the pith and substance of the CA, the said Clause 18.1 has to be applied for creation of any SPV by or on behalf of JIL.

104.1. The other clauses in CA permitting creation of sub-lease could hardly be applied for *en bloc* transfer of land to the SPVs, as proposed in the resolution plan. The referred Clauses 4.3(d) and 4.3(e) were essentially meant for creation of sub-leases when the land given to the concessionaire for development, or part thereof, was to be sub-leased to the end-user/s. Even in that regard, the provisions were made for the concessionaire to make a request to the land providing agency to execute the lease-deed directly in favour of its subsidiaries, assigns or transferees; and in case the agency and the concessionaire would consider it appropriate, tripartite agreement for sub-lease may be

executed. Taking all the relevant clauses together with the substance and purport of CA, it is difficult to countenance that the proposed transfer to SPVs could be treated as an ordinary sub-lease for which, no documentation involving YEIDA would be required.

104.2. Although, as urged, the proposal to create two separate SPVs may not be impermissible looking to the framework of the CA, where different stipulations were made in relation to the land for constructing Expressway with its allied facilities and the land for commercial exploitation, respectively in Clauses 4.1 and 4.3 of the CA, but the question is as to the method of transfer of concessionaire's rights and obligations to such SPVs. That could only be in accordance with the approval of YEIDA and with the execution of necessary tripartite documents as envisaged by CA.

104.3. As observed hereinbefore, looking to the terms and purport of the CA, creation of two SPVs, one for Expressway and another for the remaining land for commercial development, is not altogether prohibited but then, it cannot be suggested by NBCC that such creation of SPVs could be even without necessary documentation involving YEIDA. In this regard, YEIDA seems to be right in its contentions that such documentation is even otherwise required for avoiding any ambiguity about the rights and obligations and also for itself (YEIDA) to properly monitor the functioning of SPVs, each of which would stand in the

capacity of concessionaire and would be carrying the rights and obligations under the CA.

104.4. For what has been discussed above, we need not delve into the decision of this Court in **MCGM** (supra), where the statutory provision itself required prior approval of the local body before dealing with its properties through lease or by creation of any other interest. Though in the present case, there is no such statutory embargo but for that matter, all the terms of the Concession Agreement cannot be forsaken. Any alteration in the essentials of the Concession Agreement would require the consent of YEIDA.

104.5. The Adjudicating Authority (NCLT), while disapproving the stipulations in the resolution plan whereby documentation for such transfer was sought to be avoided, proceeded to order execution of such documents. According to YEIDA, this modification has no commercial effect and therefore, has rightly been ordered by NCLT. Although this modification, *prima facie*, does not appear to be having any commercial effect, for it being only a matter of proper documentation but, interlaced with this process of documentation are the other stipulations, which do impact the commercial terms of the resolution plan, particularly those relating to the amount of additional compensation, if payable.

105. With the observations foregoing, we may now take up another important aspect of the objections, which relates to the provisions in the

resolution plan towards the amount of additional compensation, if payable.

105.1. Concisely put, as per the resolution plan, the contingent liability concerning additional amount of land acquisition compensation is proposed to be dealt with in the manner that in the event any such amount of additional compensation is to be paid, YEIDA would collect the same from the end-users; and as regards the land of Expressway, such additional compensation shall be payable by YEIDA because YEIDA will be the end-user on getting ownership of the land of Expressway after expiry of the concession period. NBCC has justified these propositions on various grounds as noticed hereinabove. YEIDA takes serious exception to them and particularly to the stipulation that additional compensation in regard to the land of Yamuna Expressway would be payable by it. The Adjudicating Authority has made two-fold modifications in this regard. In paragraph 120 of the impugned order dated 03.03.2020, the Adjudicating Authority has said that to iron out creases and to make the resolution plan viable, it would direct that the plan shall be read to mean that YEIDA has a right to collect acquisition cost through the SPVs concerned. On the other hand, concerning the Expressway land, the Adjudicating Authority has provided in paragraph 122 of the impugned order that the resolution plan would be read to mean that it is left open to both the parties to have proper recourse before competent forum when the time comes for payment of additional compensation. In the submissions of YEIDA, such

modifications were necessary to make the plan compliant with the rights and obligations under the CA.

105.2. We find the prescriptions in the resolution plan in regard to the contingent liability of additional compensation to be questionable on more than one count.

106. The question is yet to be finally determined as to whether such a liability towards additional amount of compensation rests with the corporate debtor JIL or with YEIDA, because the arbitral award made in favour of JIL is the subject matter of challenge in the Court. However, the contingency was required to be provided in the plan in case liability would be ultimately fastened on the corporate debtor JIL. It has not been suggested that any such bifurcation of liability, qua the land under Expressway on one hand and other parcels on the other, is a subject matter of the arbitration proceedings. However, going by the terms of the CA, prima facie, we are unable to find any indication therein that the liability for compensation with reference to the land under Expressway is not of the concessionaire. In any case, while making a provision for meeting with this contingent liability of additional amount of compensation, the resolution applicant could not have decided of its own that there will not be any liability of the concessionaire or its assigns towards the land under Expressway.

106.1. It appears that while proposing to create two different SPVs, the resolution applicant stumbled on an idea that the liability for additional

compensation as regards Expressway land could be simply deflected to YEIDA with reference to the fact that YEIDA will get this land back after 36 years; and reflected this idea by way of the questioned proposition in the resolution plan. The Adjudicating Authority has chosen to leave this issue open, for being litigated at the appropriate time and before the competent forum. In our view, such a prescription as regards Expressway land amounts to alterations of the material terms of CA and cannot be made without the consent of YEIDA. This aspect could have only been disapproved.

106.2. Similarly, the resolution applicant, of its own, could not have decided that end-user would mean sub-lessee and thereby deflect even collection of the amount towards this liability on YEIDA and that too when YEIDA was not going to be a party in creation of any sub-lease. The structuring of these propositions regarding contingent liability turns out to be wholly illogical, apart from being at loggerheads with the terms of the Concession Agreement.

106.3. It needs no great deal of discussion to find that the said aspect concerning the provision for additional compensation, if not approved on material terms, is of significant commercial impact. Even the other modification by the Adjudicating Authority, that YEIDA shall have a right to collect acquisition cost through SPVs concerned, carry their own commercial implications. These are not the terms which could be taken up for modification without disturbing the financial proposal of the resolution

plan. While these prescriptions could not have been approved, in our view, the Adjudicating Authority could not have entered into any process of modification. The only course open for the Adjudicating Authority (NCLT) was to send the plan back to the Committee of Creditors for reconsideration.

107. Apart from the aforesaid, the reliefs and concessions as sought for by the resolution applicant in relation to YEIDA in Clauses 4, 14 and 27 of Schedule 3 are also required to be disapproved. We are unable to countenance the proposition that by way of a resolution plan, it could be enjoined upon an agency of the government like YEIDA to give up or withdraw from a pending litigation. Similarly, extinguishment of existing liability qua YEIDA is not a relief that could be given to the resolution applicant for askance. For the same reason, the resolution applicant cannot seek extension of time period of the Concession Agreement by way of a clause of 'relief' in the resolution plan without the consent of a governmental body like YEIDA.

108. Before concluding on this point for determination where we have accepted the major parts of the objections of YEIDA, we may, in fairness to all the parties concerned, reiterate that despite stating its objections, YEIDA has consistently maintained before the NCLT as also before this Court⁸² that it does not stand to oppose the resolution plan only for the sake of opposition; rather it would like the plan to succeed but, it has a public duty to ensure that the framework under CA is preserved and else,

⁸² *vide* paragraphs 47.2, 99 and 99.8 (*supra*)

it would be ready to do everything within its power to ensure that the plan is a success. Thus, it would not be out of place to add a sanguine hope that being the owner of the land in question and public authority, YEIDA, who had envisaged and promoted the entire project, would, in future dealing with the matter, act with caution and circumspection, while earnestly reflecting upon the practical impact of its propositions/decisions on various stakeholders, including the homebuyers.

109. For what has been discussed hereinabove, we are constrained to hold that the stipulations in the resolution plan, as regards dealings with YEIDA and with the terms of Concession Agreement, have rightly not been approved and the stipulations in question, when not being consented to by YEIDA, are required to be disapproved. Further, in the cumulative effect of the stipulations which have not been approved, the only correct course for the Adjudicating Authority was to send the plan back to the Committee of Creditors for reconsideration.

Point D

Treatment of the debt of dissenting financial creditor ICICI Bank Limited

110. Now, we need to enter into another area of major dispute, which relates to the objections of a dissenting financial creditor, ICICI Bank Limited.

111. For dealing with the issue concerning dissenting financial creditor, we need to look closely at the relevant prescriptions in the resolution plan of NBCC. As noticed, in Schedule 2 of the resolution plan, detailed steps

are mentioned for acquisition of control of the corporate debtor and implementation of the resolution plan. Steps 6A and 6B relate to the institutional financial creditors. The preceding steps, in their chronology, are (1) incorporation of NBCC SPV and acquisition of the corporate debtor by the resolution applicant through that SPV; (2) incorporation of Expressway SPV by the corporate debtor and transfer of Yamuna Expressway to that SPV and securitisation of toll cash flow; (3) payment of unpaid CIRP costs; (4) payment of total operational debt; and (5) incorporation of Land Bank SPV. The sixth step is divided in two parts, being Step 6A concerning upfront payment to the institutional financial creditors and 6B concerning treatment of institutional financial creditors for the remaining amount. In the second part of Step 6B, specific stipulations are contained as regards the dissenting financial creditors. For comprehension of the gamut of such prescriptions, we may reproduce Steps 6A and 6B in the resolution plan as under: -

“STEP 6A: UPFRONT PAYMENT TO THE INSTITUTIONAL FINANCIAL CREDITOR

1. Part of the Admitted Financial Debts of the Institutional Financial Creditors shall be settled to an extent of INR [Fresh Debt- 2,000] Cr by making upfront Payment of ~ INR [Fresh Debt - (less) 2,000] Cr by the Expressway SPV, to be incorporated by the Corporate Debtor under Step 2 above. No prepayment penalty shall be payable to the Institutional Financial Creditors, in the event of any upfront payment of debt of as provided above.
2. In this regard, it is clarified that upon payment of upfront amount aggregating to INR [Fresh Debt - (less) 2,000] Cr to the Institutional Financial Creditors, their charge over the Yamuna Expressway and toll cash flow shall be automatically released, without any further deed or act by the parties.

“STEP 6B: TREATMENT OF INSTITUTIONAL FINANCIAL CREDITORS FOR THE REMAINING AMOUNT

After upfront payment is made to the Institutional Financial Creditors as contemplated under Step-6A above, the remaining Admitted Financial Debt due to the Institutional Financial Creditors shall be settled in its entirety in the following manner.

Conversion of part of Admitted Financial Debt (due to Institutional Financial Creditors) into equity shares of the Corporate Debtor and subsequent reduction of share capital to extinguish the shareholding of Institutional Financial Creditors in the Corporate Debtor in entirety;

Transfer of 100% shareholding of Land Bank SPV from the Corporate Debtor to the Institutional Financial Creditors;

Transfer of 100% shareholding of Expressway SPV from the Corporate Debtor to the Institutional Financial Creditors for a consideration equal to their then outstanding debt to be paid by way of settlement of the outstanding debt to the same extent; and

It is also proposed that the Resolution Applicant shall enter into:

- (i) a management agreement with the Land Bank SPV (to be owned by the Institutional Financial Creditors) for the purpose of monetizing the land held by the Land Bank SPV for an initial tenure of 5 years subject to a fixed/success-based fee to be mutually agreed between the Institutional Financial Creditors and the Resolution Applicant. Detailed terms and conditions of such management agreement, including any escrow mechanism may be mutually agreed between the Institutional Financial Creditors and the Resolution Applicant. Additionally, the Resolution Applicant reserves its first right to buy back the land held by the Land Bank SPV, at the then prevailing market rate.
- (ii) an operations & maintenance agreement with the Expressway SPV (to be owned by the Institutional Financial Creditors) to operate and maintain the Expressway for a tenure of 5 years subject to a fee to be mutually agreed between the Institutional Financial Creditors and the Resolution Applicant. Detailed terms and conditions of such O&M agreement, including any escrow mechanism may be mutually agreed between the Institutional Financial Creditors and the Resolution Applicant.

We have structured the transaction in a tax efficient manner to the best of our knowledge. However, in the event any income tax liability or goods and services tax (GST) liability, arises in future on account of transfer of land parcels, same shall be borne by the Institutional Financial Creditors in a pro rata manner without any recourse, express or implied, to the Resolution Applicant.

As per IBC, Dissenting Financial Creditors are required to be paid a minimum of amounts in the nature of liquidation value due to

them in terms of Sections 30(2) and 53 of the IBC. However, as per the amendment to the CIRP Regulations on 31 December 2017, the requirement for disclosing the Liquidation Value of a corporate debtor undergoing resolution to the resolution applicants has been dispensed with and accordingly, the Liquidation Value for the Corporate Debtor is currently not available with us. However, as per our estimate, the liquidation value owed to the Dissenting Financial Creditors, in terms of Sections 30 and 53 of the IBC read with Regulation 38 of the CIRP Regulations is expected to be nil.;

However, in the event the Dissenting Financial Creditors are entitled to some amount in the nature of liquidation value in terms of Sections 30 and Section 53 of the IBC read with Regulation 38 of the CIRP Regulations, then the Dissenting Financial Creditors would be provided the liquidation value owed to them in terms of Section 30(2) and Section 53 of the IBC read with Regulation 38 of the CIRP Regulations in the form of proportionate share in the equity of the Expressway SPV and transfer of certain land parcels belonging to the Corporate Debtor. For avoidance of doubt it is clarified that on account of the transfer of equity and transfer of land parcels in favour of Dissenting Financial Creditors as stipulated above there will be a corresponding decrease in the equity and area of land parcels being transferred to the Institutional Financial Creditors (through the Land SPV) who vote in favour of the Plan. Further the Resolution Applicant shall have the sole discretion to determine the location of the land parcels to be transferred to the Dissenting Financial Creditors and the value of such land parcels being transferred shall be same as that proposed under this Resolution Plan for the Institutional Financial Creditors who vote in favour of the Plan.

Provided further that the Dissenting Financial Creditors shall bear the stamp duty, registration costs, and other applicable taxes including goods and services tax (GST) involved in the transfer of land parcels in their favour as stipulated hereinabove.

Notwithstanding anything contained in this Resolution Plan, the Dissenting Financial Creditors shall neither be entitled to nor shall they receive any other amounts other than the amounts due to them in the nature of liquidation value as stipulated hereinabove."

111.1. Thus, the proposal in the resolution plan is to the effect that, if the dissenting financial creditors would be entitled to some amount in the nature of liquidation value in terms of Sections 30 and Section 53 of the IBC read with Regulation 38 of the CIRP Regulations, they would be provided such liquidation value *'in the form of proportionate share in the*

equity of the Expressway SPV and transfer of certain land parcels belonging to the Corporate Debtor’.

112. The dissenting financial creditor of JIL, namely, ICICI Bank Limited, took exception to the stipulations aforesaid and submitted before the Adjudicating Authority that being a dissenting financial creditor, it was entitled to receive cash payment as per the liquidation value in terms of Section 30(2)(b) of the Code read with Regulation 38(1)(b) of the CIRP Regulations; and providing for land and equity in the proposed SPVs in lieu of the requisite payment was entirely impermissible. These objections were countered by IRP and NBCC with the submissions that it was nowhere provided in the scheme of the Code and CIRP Regulations that payment of liquidation value to the dissenting financial creditor has to be in cash. It was also submitted that when mode of discharge of obligation towards dissenting financial creditor was not envisaged only by way of cash payment, money or other valuable thing delivered to discharge the obligation would be construed as “payment”, fulfilling the requirement of Section 30(2) of the Code. It was also submitted that when the assenting financial creditors were not being paid in cash, any such payment to the dissenting financial creditors would cause prejudice to the rights of the assenting financial creditors. As noticed, the Adjudicating Authority rejected the stand so taken by IRP and NBCC and observed that all the provisions and specifications of the Board made it clear that payment to dissenting financial creditors means payment of the amount; and it cannot

be argued that the payment could also be in a manner other than cash. The Adjudicating Authority also rejected the contention made with reference to the treatment assigned to the assenting financial creditors while observing that a person agreeing might agree for anything but the same may not be acceptable to the person disagreeing. Accordingly, the Adjudicating Authority (NCLT) did not approve the proposal in the resolution plan as regards treatment of the dissenting financial creditors.

112.1. However, after disapproving, the Adjudicating Authority proceeded on the lines that this objectionable part of the resolution plan could be modified without altering the basic structure of the plan. Having said so, the Adjudicating Authority proceeded to modify the resolution plan in the manner that the resolution applicant shall pay to the dissenting financial creditors the amount, that was receivable in terms of Section 53 of the Code, in twelve monthly instalments together with interest with other stipulations, as contained in paragraph 103 of its order, which we have reproduced in paragraph 46.4 hereinbefore. This part of the order of the Adjudicating Authority has been challenged by NBCC as also by IRP in their respective appeals. The assenting financial creditors, including IDBI Bank and the assenting homebuyers have also supported this challenge. Their submissions have been countered by the dissenting financial creditor ICICI Bank as also by the erstwhile director of the corporate debtor.

113. We may now summarise the essential contents of extensive submissions made by the parties in challenge to this part of the order of the Adjudicating Authority, while avoiding repetition of the same contention by different parties.

113.1. It has been strenuously contended on behalf of the IRP that the Adjudicating Authority has acted wholly without jurisdiction in modifying the terms of the resolution plan that was approved by 97.36% of the voting share of the Committee of Creditors. It is submitted that the resolution plan in question is duly compliant with the requirements of Section 30 of the Code and if the Adjudicating Authority was at all of the view that the plan did not meet with any particular requirement, it could have only sent it back to CoC to consider the proposed modifications, so as to afford an opportunity to the resolution applicant to modify the plan and to the CoC to reconsider and vote upon the same. It is submitted that the Adjudicating Authority, by itself, could not have made any modification in the resolution plan, particularly on any commercial aspect of the plan which remains exclusively within the domain of the CoC.

113.1.1. It has also been submitted on behalf of IRP that in the meeting of CoC dated 28.11.2019, ICICI Bank did not raise any objection to the mode of payment and only objected to the amount provided by the resolution applicant and that being the position, it could not have raised any objection at a later stage.

113.1.2. It is further submitted that the requirements in Section 30(2)(b) of the Code stress upon the ‘value’ a dissenting financial creditor is entitled to receive but, it has nowhere been provided that the manner of payment has to be in cash; rather the manner of payment has been left to be specified by the Board and the Board has also not specified that such payment has to be in cash only.

113.1.3. Further, according to IRP, if the word “payment” is given a prescriptive meaning, it would result in clause (b) of sub-section (2) of Section 30 prescribing the manner of distribution and that would amount to amending the word “creditor” in sub-section (4) of Section 30. It is submitted that in the scheme of the Code, dissenting financial creditors are bound to accept the manner of distribution in the resolution plan as approved by the majority of 66% or more of the voting share in the CoC and if they are not held so bound, the provisions permitting the CoC to take decisions with requisite majority would be rendered nugatory.

113.2. The resolution applicant NBCC has also made long ranging submissions in challenge to the directions in paragraph 103 of the order of the Adjudicating Authority while defending the terms and stipulations in the resolution plan. It is submitted that Step 6B in the resolution plan has been formulated in due compliance of the requirements of Section 30(2) of the Code and Regulation 38(1) of the CIRP Regulations. It is stated in its written submissions that the requirements of law are duly satisfied as follows:

“3. Thus, the requirements of law have been met in the following manner:

a. Payment of liquidation value in terms of payment of proportionate share in the Land Bank SPV and Expressway SPV; and

b. the payment to the Dissenting Financial Creditors shall be made in terms of Regulation 38 of the CIRP Regulations and further states that on account of the payments to the Dissenting Financial Creditors in the form of proportionate equity in the Expressway SPV and transfer of certain land parcels, there would be corresponding decrease in the equity and land parcels being transferred to the lenders who vote in favour of the plan.”

113.2.1. As regards the expression “payment” for the purpose of Section 30(2) of the Code, the meaning of this term stated in Black’s Law Dictionary (9th Edition) has been referred. Further, reliance is placed on the decisions of this Court in the case of ***Pioneer Urban*** (supra), ***Himachal Pradesh Housing and Urban Development Authority and Anr. v. Ranjit Singh Rana: (2012) 4 SCC 505***; and on the decision of the Court of Appeal for the 6th Circuit, USA in the case of ***Samuel Katkin and Doris Katkin v. Commissioner of Internal Revenue: 570 F.2d 139*** as also on a decision of the High Court of Calcutta wherein, a decision of the Court of Appeal of England in ***White v. Elmdene Estates Ltd.: 1959 ALL ER 605*** has been relied upon. With reference to the Dictionary meaning and the cited decisions, the contention has been that “payment” means the discharge of an obligation by delivery of money or its equivalent; and the expression “payment” is not restricted to delivery of money or legal tender only.

113.2.2. It is argued that Section 8 of the Code, as relied upon by ICICI Bank, uses the term “payment” to denote the payment of amounts that

are “operational debts” before commencement of the insolvency resolution process, whereas the same term is used under Section 30(2) to denote the payment under a resolution plan. The language employed under Section 8(2)(b) of the Code includes payment by way of electronic transfer or by cheque. On the other hand, Section 30(2) of the Code is in relation to payment under a resolution plan, and does not in any manner stipulate the mode of payment.

113.2.3. It is also contended that the word ‘payment’ is required to be interpreted with reference to its context and placement; and to support the submissions on contextual interpretation, reliance is placed on the decisions in ***Commissioner of Income Tax, Madhya Pradesh & Bhopal v. Shrimati Sodra Devi***: AIR 1957 SC 832; ***Kolkata Metropolitan Development Authority v. Gobinda Chandra Makal and Anr.***: (2011) 9 SCC 207; ***Indian Handicrafts Emporium and Ors. v. Union of India and Ors.***: 2003 (7) SCC 589; ***CIT, Bangalore v. Venkateswara Hatcheries (P) Ltd.***: (1999) 3 SCC 632; and ***Union of India v. Sankalchand Himatlal Sheth and Anr.***: (1977) 4 SCC 193.

113.2.4. It has also been submitted that the context in relation to the word “payment” needs to be examined in terms of the object and purpose of resolution of insolvency and not in terms of recovery of debt; and in the light of the fact that for the purpose of insolvency resolution, a resolution plan may provide for various ways of settlement of claims. On the scheme of the Code and object and purpose of resolution, the decisions in

ArcelorMittal and **Swiss Ribbons** (supra) have been referred. Regulation 37(1) of the CIRP Regulations has also been referred wherein it is provided that a resolution plan may provide for securities in exchange of claims. It is also submitted that limiting the word “payment” only to mean cash would defeat the purpose of resolution and would rather incentivise dissent. It is submitted that such mode of payment by cash should not be read in the statute, when not provided therein. The decision of this Court in the case of **State through Central Bureau of Investigation v. Parmeshwaran Subramani and Anr.: (2009) 9 SCC 729** has been referred.

113.2.5. It has also been submitted that the “value” under Section 53 is only a guiding factor for the CoC to exercise its commercial wisdom and the reference to “value” in Section 53 does not mean that the dissenting financial creditor has to be paid such value only in cash. It is also submitted that the liquidation value is not known to the resolution applicant and there is no requirement of mentioning the liquidation value in the resolution plan. It is pointed out that earlier, sub-clauses (j) and (k) of Regulation 36(2) provided for inclusion of liquidation value of the corporate debtor and liquidation value due to the operational creditors as part of information memorandum, but these clauses were deleted w.e.f. 31.12.2017 and the resolution applicant is not given access to the liquidation value of the corporate debtor. It is also submitted that as per the decision in **Maharashtra Seamless Ltd.** (supra), there is no

requirement for a resolution applicant to match the liquidation value of a corporate debtor. It has been vehemently contended that all the amounts being raised or made available to NBCC are going to be utilised for construction of homes and any requirement of payment in cash would be detrimental to the object of completing the construction on time, which would cause prejudice to the homebuyers. It is also submitted that 'payment in kind' is accepted under banking norms and in this regard, it is also indicated that on an earlier occasion, the objector ICICI Bank itself had accepted land-debt swap as a method of payment for discharge of the debt of JIL.

113.2.6. Apart from above, NBCC has also referred to its affidavit filed during the course of hearing while submitting that the admitted debt of ICICI Bank is INR 304.1 crores which is 1.31% of total financial debt and as per the final statement available, the proportionate liquidation value payable to this bank would be about INR 238.84 crores. Thereafter, particulars of the parcels of land proposed to be offered to ICICI Bank and their estimated value as also the estimated value of equity in Expressway have been stated to suggest that adequate provision is being made for payment of debt of this bank while indicating that the bank would also be entitled to its proportionate share under Step 6A of the resolution plan.

113.3. The assenting financial creditor, IDBI Bank, has also supported the submissions aforesaid. The additional parts of its submissions are that ICICI Bank is using its dissent to obtain an advantage over the assenting

financial creditors, by seeking to be paid in cash purely by virtue of dissent. It is also submitted that resolution plan was approved by 97.36% of the voting share of the creditors in CoC in its commercial wisdom after assessing the viability and feasibility of the resolution plan; and if the other institutional financial creditors also wanted to receive their money, they would have simply voted for liquidation which would have deprived thousands of homebuyers of any chance of getting their homes. It is also submitted that if cash payment is considered to be the only mode of payment available to the dissenting financial creditors, it would incentivise the financial creditors to go for dissent, leading to more liquidations and fewer resolutions and thereby defeating the theme and spirit of the Code. It has also been submitted in the alternative that if at all, this Court upholds the related part of the order of NCLT and permits cash payment, the interests of the assessing financial creditors need to be safeguarded and such payment should not result in any dilution or reduction in the amount payable to the assenting financial creditors.

114. While opposing the submissions so made and supporting the modification of the resolution plan by NCLT, it has been emphatically argued on behalf of the dissenting financial creditor, ICICI Bank, that the resolution plan in question had been non-compliant with the requirements of law and had it not been amended to provide for payment of the amounts admittedly owed to it by the corporate debtor, the only course would have been of rejection of the plan; and that would have jeopardised

the entire resolution process carried out for more than two years under exceptional circumstances and would have pushed the corporate debtor to liquidation, much to the disappointment of homebuyers.

114.1. With reference to Section 30(2)(b) of the Code and Regulation 38(1)(b) of the CIRP Regulations, it is submitted that as per the statutory mandate, a resolution applicant is required to pay a minimum of liquidation value [in terms of Section 53(1) of the Code] to the dissenting financial creditors in priority over the assenting financial creditors; and if a resolution plan does not provide for this mandatory payment in priority, the same cannot be approved.

114.2. It is submitted that, admittedly, the corporate debtor owed an amount of INR 304.1 crores to ICICI Bank as on the insolvency commencement date; and this bank, holding 1.3% voting share in the CoC, voted against the resolution plan proposed by NBCC and therefore, came to be categorised as a dissenting financial creditor. Consequently, this bank has the right and entitlement to be paid, and in priority over the assenting financial creditors, the amount against its dues, which shall be not less than the amount payable in accordance with Section 53(1) of the Code, that is, the liquidation value; and this payment could only be made in terms of cash and not by any other mode or method.

114.3. It is contended that Section 53 contemplates the proceeds from the sale of the liquidation assets to be utilised to pay the dissenting financial creditors and there is no such conceivable possibility that the

assets of a corporate debtor would be liquidated in any other consideration, apart from cash. The payment, for the purpose of Section 30(2)(b) of the Code, would only be in terms of money or a legal tender; and it is entirely impermissible for a resolution applicant to pay such liquidation value to the dissenting financial creditor in kind, unless the latter accepts such form of payment. Various decisions on the process of interpretation have been referred on behalf of the objector bank including those in ***Sankalchand Himatlal Sheth*** (supra) and ***Rathi Khandsari Udyog and Ors. v. State of Uttar Pradesh and Ors.*** (1985) 2 SCC 485.

114.4. It is further submitted that in the resolution plan, the treatment of the dissenting financial creditors is inferior to the assenting financial creditors inasmuch as the latter is being provided an upfront payment of INR 300 crores, whereas the former is not provided with any cash at all. Such treatment defeats the purpose of Section 30(2)(b) of the Code, which has been amended to protect the interests of the dissenting financial creditors.

114.5. Yet further, it is submitted that the presumption of NBCC that the liquidation value towards the dissenting financial creditors shall be nil is baseless; and the treatment of dissenting financial creditors in the resolution plan is vague and incapable of precise valuation as it is based on speculation rather than current market figures.

114.6. While questioning the valuation suggested in the resolution plan, it is submitted that valuation of the land proposed to be transferred to the

Land Bank SPV is INR 5001 crores which is based on future potential. On the other hand, the valuations conducted by the IRP comes at INR 2509 crores and by the others equals to INR 3643 crores which is significantly less than the value arrived at by NBCC. The treatment under the plan also mentions that the land so transferred shall carry with it the liabilities attached and the dissenting financial creditor shall bear such uncertain and unquantified liabilities. This, it is submitted, raises a doubt as to whether this provision even satisfies the liquidation value payable to the dissenting financial creditors.

114.7. It is further submitted that the contention of NBCC, that the intent of the legislature while using the word “amount” cannot be restricted to only payment in cash, does not have any basis in law. ICICI Bank submits that even a look at the language of Section 8 of the Code makes it clear that when it comes to the requirement of payment in relation to corporate insolvency resolution, the same has to be in monetary terms. It is submitted that once the language of a statute is clear, the meaning of the provisions cannot be altered by judicial interpretation.

114.8. It is further submitted that the purpose of guaranteeing liquidation value to the dissenting financial creditors is to protect their interests so as to make sure that they are not in a worse position than they would have been in the event of liquidation but, the treatment provided in the resolution plan for dissenting financial creditors is done in a way that they get punished for their dissent.

114.9. It is further submitted that once the resolution plan is put forth before the Adjudicating Authority for its approval, judicial mind is applied to see as to whether such plan fulfils the mandatory requirements under the Code, which involves firstly, compliance with Section 30(2) of the Code; secondly, whether the plan is fair and equitable and balances the interests of all the stakeholders; and thirdly, whether the plan maximises the value of assets. Such approval of NCLT is never a formality, but a necessity. According to the objector bank, the Adjudicating Authority, while modifying the resolution plan, has made sure that the modifications do not alter the basic structure of the plan and hence, has not violated the principle of judicial review. Therefore, the contention that NCLT has acted beyond its jurisdiction and has overridden the commercial wisdom of CoC is incorrect.

114.10. It is also submitted that just because ICICI Bank has voted against the approval of both the resolution plans, it does not mean that the intention of the Bank would be the liquidation of the corporate debtor. Such contention of NBCC furthers its *mala fide* intentions and is placed only to undermine the dissentient bank.

115. The submissions so made on behalf of the dissenting financial creditor bank have also been supported by the erstwhile director of the corporate debtor JIL and JAL. It is submitted that the proposition in the resolution plan to satisfy the claim of the dissenting financial creditors in the form of share and equity or transfer of land parcels is not in conformity

with the requirements of Section 30(2)(b) of the Code. It is also submitted that proposing to satisfy the claim of the dissenting financial creditors by a mode other than monetary payment is tantamount to reading the word 'equivalent' in the relevant provision, which is entirely impermissible in law. The decision of this Court in the case of ***Dadi Jagannadham v. Jammulu Ramulu and Ors.*: (2001) 7 SCC 71**, has been referred. It is also submitted that reliance of NBCC on Regulation 37 of the CIRP Regulations, to justify the manner in which dissenting financial creditors are to be paid, is misplaced because instead of Regulation 37, the relevant provision which needs consideration is Regulation 38(1)(b), as it is directly related to Section 30(2)(b)(ii) of the Code. It is, therefore, maintained that the resolution plan, as regards prescription for the dissenting financial creditors, being violative of the requirements of law, could not have been approved.

116. Having examined the rival submissions with reference to the law applicable in relation to the treatment of the debt of dissenting financial creditor in CIRP under the Code, we find the objections taken by the dissenting financial creditor in the present case fully justified; and the interpretation suggested by the IRP, the resolution applicant and the assenting financial creditor cannot be accepted.

117. An overview of the Insolvency and Bankruptcy Code, 2016 gives the basic idea that even while the avowed objects of the Code are towards insolvency resolution in a time bound manner for maximisation of

value of assets of the corporate debtors and balance of interests of all the stakeholders, the core provisions of the Code, a comparatively new legislation, have already undergone several amendments from time to time. In fact, in *Pioneer Urban* (supra), this Court has recognised the legislature's right to experiment when coming to the economic legislation like the Code, while observing as under: -

“The Legislature’s right to experiment in matters economic

15. In *Swiss Ribbons*, this Court was at pains to point out, referring, inter alia, to various American decisions in paras 17 to 24, that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgement in economic choices must be given a certain degree of deference by the courts. In para 120 of the said judgment, this Court held: (SCC p. 112)

“120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, “trial” having led to repeated “errors”, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both the code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.”

It is in this background that the constitutional challenge to the Amendment Act will have to be decided.”

118. A few aspects of the vast variety of amendments to IBC have been noticed hereinbefore and are being dealt with in this judgment, to the extent relevant for the issues involved. One part of such amendments relates to Section 30, with which we are concerned in this point for determination. As noticed, the earlier clause (b) of sub-section (2) of Section 30 of the Code required that the resolution plan should provide for payment of debts of operational creditors, which should not be less than the amount to be paid to the operational creditors in the event of liquidation. The treatment of various classes of creditors in the scheme then existing had been a matter of debate at various levels and in several decisions. It acquired attention of the legislature that a balance was required to be brought about in treatment of different creditors and 'critical gaps' were noticed in the corporate insolvency framework, including those in the treatment of dissenting financial creditors. This led to the introduction of Bill No. XXVI of 2019, being the Insolvency and Bankruptcy Code (Amendment) Bill, 2019, in the Rajya Sabha in July 2019. The Statement of Objects and Reasons for this Bill, giving a reasonable insight as to what was sought to be achieved, reads as under:

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“STATEMENT OF OBJECTS AND REASONS

The Insolvency and Bankruptcy Code, 2016 (the Code) was enacted with a view to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance of interests of all the stakeholders including alteration in the order or priority of

payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.

2. The Preamble to the Code lays down the objects of the Code to include “the insolvency resolution” in a time bound manner for maximization of value of assets in order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximization. **There is a need to ensure that all creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code.** Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre-insolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorized representative.

3. In view of the aforesaid difficulties **and in order to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend** certain provisions of the Insolvency and Bankruptcy Code. The Insolvency and Bankruptcy Code (Amendment) Bill, 2019, *inter alia*, provides for the following, namely:-

(a) to amend clause (26) of section 5 of the Code so as to insert an *Explanation* in the definition of “resolution plan” to clarify that a resolution plan proposing the insolvency resolution of corporate debtor as a going concern may include the provisions for corporate restructuring, including by way of merger, amalgamation and demerger to enable the market to come up with dynamic resolution plans in the interest of value maximization;

(b) to amend sub-section (4) of section 7 of the Code to provide that if an application has not been admitted or rejected within fourteen days by the Adjudicating Authority, it shall provide the reasons in writing for the same;

(c) to amend sub-section (3) of section 12 of the Code to mandate that the insolvency resolution process of a corporate debtor shall not extend beyond three hundred and thirty days from the insolvency commencement date, which will include the time taken in legal proceedings, in order to prevent undue delays in the completion of the Corporate Insolvency Resolution Process. However, if the process, including time take in legal proceedings, is not completed within the said period of three hundred and thirty days, an order requiring the corporate debtor to be liquidated under clause (a) of sub-section (1) of section 33 shall be passed. It is clarified that the time taken for the completion of the corporate insolvency resolution process shall include the time taken in legal proceedings;

(d) to insert sub-section (3A) in section 25A of the Code to provide that an authorized representative under sub-section (6A) of section 21 will cast the vote for all financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote, in order to facilitate decision making in the committee of creditors, especially when financial creditors are large and heterogeneous group;

(e) to amend sub-section (2) of section 30 of the Code to provide that –

(i) the operational creditors shall receive an amount that is not less than the liquidation value of their debt or the amount that would have been received if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priorities in section 53 of the Code, whichever is higher;

(ii) the financial creditors who do not vote in favour of the resolution plan shall receive an amount that is not less than the liquidation value of their debt;

(iii) the provisions shall apply to the corporate insolvency resolution process of a corporate debtor-

(A) where a resolution plan has not been approved or rejected by the Adjudicating Authority; or

(B) an appeal is preferred under section 61 or 62 or such appeal is not time barred under any provision of law for the time being in force; or

(C) where a legal proceeding has been initiated in any court against the decisions of the Adjudicating Authority in respect of a resolution plan;

(f) to amend sub-section (1) of section 31 of the Code to clarify that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities;

(g) to amend sub-section (2) of section 33 of the Code to clarify that the committee of creditors may take the decision to liquidate the corporate debtor, in accordance with the requirements provided in sub-section (2) of section 33, any time after the constitution of the committee of creditors under sub-section (1) of section 21 until the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

4. The Bill seeks to achieve the above objectives.”

(emphasis in bold supplied)

118.1. The aforesaid Bill ultimately took the shape of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, being Act 26 of 2019. This Amendment Act of 2019 not only provided that operational creditors would receive an amount that is not less than liquidation value of their debts or the amount that would have been received if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priorities in Section 53 but, in addition to that, this amendment ensured that the dissenting financial creditors would also be paid a certain minimum amount, which would not be less than the amount to be paid in the event of liquidation; and the *Explanation* clarified that the distribution in accordance with clause (b) would be fair and equitable to all the creditors. The purport and connotation of this amendment came to be tersely explained by this Court in the case of ***Essar Steel*** as under: -

“128. When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Ms Madhavi Divan is correct in her argument that Section 30(2)(b) is **in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount**, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have

been possible to have done this but **after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2)**. Ms Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. **Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors** in accordance with the provisions of the Code and the Regulations made thereunder.

129. **As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors.** As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment.”

(emphasis in bold supplied)

118.2. As noticed, the decision of this Court in ***Essar Steel*** was delivered on 15.11.2019. A few days after this decision, i.e., on 28.11.2019, amendment was carried out in clause (1) of Regulation 38 of the CIRP Regulations, which has direct co-relation with the aforesaid amended clause (b) of Section 30(2) of the Code. By way of this amendment of Regulation 38(1), the priority for the amount payable came to be specified, not only to the operational creditors but also to the dissenting financial creditors over their assenting counterparts. The aforesaid amendments and the expositions of this Court in ***Essar Steel*** make it clear that the interests of dissenting financial creditors are duly taken care

of, while providing for the minimum amount they are entitled to and, for that matter, in priority over the assenting financial creditors.

118.3. Even when the legislature has filled in the gaps in IBC, particularly qua the dissenting financial creditors; and their interests are sought to be taken care of by making it mandatory to provide for the payment of their dues in terms of liquidation value, another grey area has surfaced in the present case. It is concerning the mode of translating such assured returns to reality. Putting it differently, there is no doubt that now the dissenting financial creditors shall get payment and that too, in priority over the assenting financial creditors but, the question remains about the mode of fulfilling such obligations towards dissentient financial creditors.

119. In the present case, the resolution plan has, in the first place, stated that according to the estimate of the resolution applicant, the liquidation value to be received by the dissenting financial creditors was likely to be nil but then, has provided for discharge of any likely obligation towards them in the manner that they shall be provided a proportionate share in the equity of Expressway SPV and land parcels but not any payment in terms of money. The dissenting financial creditor, ICICI Bank, is thoroughly dissatisfied with such a prescription whereby its dues shall be satisfied by a mode other than direct payment in cash. On the other hand, the IRP, the resolution applicant and even the assenting financial creditor would assert that such a prescription satisfies all the essential requirements of Section 30(2)(b) and Regulation 38(1)(b). Both these

provisions essentially use the expressions “payment”; “the amount to be paid”; “the amount payable”; and “shall be paid”. ICICI Bank asserts that these expressions refer only to the payment in monetary terms, whereas the submissions are countered with the assertions that the term “payment” is with reference to discharge of obligation and that could be brought about by any of the methods permissible in law and not necessarily by way of payment in terms of money alone. This takes us to the principles of interpretation and assigning appropriate meaning to the expressions used.

119.1. The principles in the decisions cited by the learned counsel for the contesting parties are not of much debate and hence, we need not elaborate on every cited decision. The contextual interpretation remains one of the fundamental guiding principles; and the relevant observations in paragraph 54 of the decision in ***Sankalchand Himatlal Sheth*** (supra), which have been referred to by the contesting parties, would suffice for the purpose, which read as under: -

“54. Now, it is undoubtedly true that where the language of an enactment is plain and clear upon its face and by itself susceptible to only one meaning, then ordinarily that meaning would have to be given by the Court. In such a case the task of interpretation can hardly be said to arise. But language at best is an imperfect medium of expression and a variety of significations may often lie in a word or expression. It has, therefore, been said that the words of a statute must be understood in the sense which the legislature has in view and their meaning must be found not so much in a strictly grammatical or etymological propriety of language, nor in its popular use, as in the subject or the occasion on which they are used and the object to be attained. It was said by Mr. Justice Holmes in felicitous language in *Town v. Eisner* that “a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to

the circumstances and the time in which it is used". **The words used in a statute cannot be read in isolation: their colour and content are derived from their context and, therefore, every word in a statute must be examined in its context.** And when I use the word 'context', I mean it in its widest sense "as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in *pari materia* and the mischief which – the statute was intended to remedy". **The context is of the greatest importance in the interpretation of the words used in a statute.** "It is quite true", pointed out Judge Learned Hand in *Helvering v. Gregory* "that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can every obviate recourse to the setting in which all appear, and which all collectively create". Again, it must be remembered that though the words used are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, be it a statute, or contract, or anything else, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that a statute always has some purpose or object to accomplish, whose sympathetic and imaginative discovery, is the surest guide to its meaning. The literal construction should not obsess the Court, because it has only prima facie preference, **the real object of interpretation being to find out the true intent of the law maker and that can be done only by reading the statute as an organic whole, with each part throwing light on the other and bearing in mind the rule in *Heydon's case* which requires four things to be "discerned and considered" in arriving at the real meaning : (1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; and (4) the reason of the remedy.** There is also another rule of interpretation which is equally well settled and which seems to follow as a necessary corollary, namely, where the words, according to their literal meaning "produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification", the Court would be justified in "putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear". Vide *River Wear Commissioners v. Admson*. It is in the light of these principles of interpretation that I must proceed to consider what is the true meaning and effect of clause (1) of Article 222: whether it permits transfer of a Judge from one High Court to another, irrespective of his consent."

(emphasis in bold supplied)

119.2. There is no doubt on the principles that, depending upon context, the same word may be used in different parts of the statute with different meanings, as observed in ***Kolkata Metropolitan Development Authority*** (supra); and the same word in the context of one provision of the enactment may convey one meaning and another meaning in different context, as pointed out in ***Venkateswara Hatcheries*** (supra). However, it is also fundamental that construction of a statute leading to absurdity is required to be rejected and if more than one meaning or interpretation is possible, the one which favours the objects of the statute ought to be adopted. When it comes to the world of business and commerce, the observations of the majority in ***Rathi Khandsari Udyog*** (supra) are pertinent where, in paragraph 34 of the decision, this Court observed that in the legislations pertaining to the world of business and commerce, the dictionary to be referred to is the dictionary of the inhabitants of that world. It is also a settled principle of statutory interpretation that the statute is required to be read as a whole; and for that matter, it would be rather pre-elementary to say that for understanding the meaning and connotation of a particular expression in a particular statutory provision, the provision itself is required to be read as a whole. When we look at the 'context' for the purpose of a particular expression, which has otherwise not been defined in the statute elsewhere, a comprehension of the sentence or phrase in which the expression occurs coupled with the frame of the provision taken as a whole and, on the broad sphere, the

entire statute with its objects and intents would lead to the true construction of the expression under reference; of course, while also keeping in view the other relevant principles, including the basics that natural and ordinary meaning of a word or expression is not ignored, unless there be any reason therefor.

120. Keeping the principles aforesaid in view, we may embark upon the interpretation required in this case, of the expressions used in the relevant provisions of Section 30(2)(b) of the Code and Regulation 38(1)(b) of the CIRP Regulations.

120.1. The expression “payment” occurs in Section 30(2) of the Code, which lays down certain basics which the resolution professional has to find in the resolution plan before he presents the same to the Committee of Creditors. As per clauses (a) and (b) of sub-section (2) of Section 30, the resolution plan ought to provide for: (a) payment of insolvency resolution process costs; and (b) payment of debts of operational creditors as also dissenting financial creditors. Such payment has to be in the manner specified by the Board and the resolution process costs rank top in priority. This provision, read with Regulation 38(1), makes it clear that the next priority is of operational creditors who are followed by the dissenting financial creditors. The question is as to what is intended by these provisions and as to how the action of “payment” is to be performed?

120.2. The referred observations in the case of **Pioneer Urban** that the expression “payment” is elastic enough to include “recompense” and “repayment” had been with reference to following passages in the case of **Ranjit Singh Rana** (supra): -

“13. *Webster Comprehensive Dictionary* (International Edn.) Vol. 2 defines “payment”:

“*Payment*.- (1) the act of paying.

(2) Pay; requital; recompense.”

14. *The Law Lexicon* by P. Ramanatha Aiyar, 2nd Edn. Reprint, inter alia, states:

“payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation or duty; satisfaction of claim; recompense; the fulfilment of a promise or the performance of an agreement; the discharge in money of a sum due”.

15. The word “payment” may have different meaning in different context but in the context of Section 37(1)(b); it means extinguishment of the liability arising under the award. It signifies satisfaction of the award. The deposit of the award amount into the court is nothing but a payment to the credit of the decree-holder. In this view, once the award amount was deposited by the appellants before the High Court on 24-5-2001, the liability of post-award interest from 24-5-2001 ceased. The High Court, thus, was not right in directing the appellants to pay the interest @ 18% p.a. beyond 24-5-2001.”

120.3. We need not enter into the other observations regarding the words “pay” and “payment”, made in the context of different statutes and different provisions but, we may profitably look at the meaning assigned to these expressions in the relevant dictionaries and lexicons. In Black’s Law Dictionary (Tenth Edition, page 1309), the verb “pay”, which leads to the derivative “paid” is defined as follows: -

“**Pay**, *vb.* (13c) **1.** To give money for a good or service that one buys; to make satisfaction <pay by credit card>. **2.** To transfer money that one owes to a person, company, etc. <pay the utility bill>. **3.** To give (someone) money for the job that he or she does; to compensate a person for his or her occupation; COMPENSATE

(1) <she gets paid twice a month>. **4.** To give (money) to someone because one has been ordered by a court to do so <pay the damages>. **5.** To be profitable; to bring in a return <the venture paid 9%>.”

On the same page in Black’s Law Dictionary (Tenth Edition, page 1309), the expression “payment” is defined in the following terms: -

“Payment. (14c) **1.** Performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation. **2.** The money or other valuable thing so delivered in satisfaction of an obligation.”

120.4. In the Law Lexicon by P. Ramanatha Aiyar (Fifth Edition, Volume 3 at page 3796), several connotations of the expression “payment” have been mentioned. We may reproduce the relevant part thereof as under: -

“Payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation, or duty; satisfaction of claim; recompense; the fulfilment of a promise or the performance of an agreement; the discharge in money of a sum due.

In legal contemplation, payment is the discharge of an obligation by the delivery of money or its equivalent, and is generally made with the assent of both parties to the contract.”

120.5. Significantly, the “payment”, as envisaged by clause (b) of Section 30(2) as also Regulation 38(1), is of the “amount”. The word “amount” in its noun form is defined in Webster’s Third New International Dictionary (at page 72) in the parlance of accounting as under: -

“3 accounting: a principal sum and the interest on it”

121. Taking up the provisions under debate, it is but clear that as per sub-section (2) of Section 30, the resolution plan ought to provide for certain payments; and first of that is the insolvency resolution process costs. An action of “payment” being that of discharge of an obligation by delivery of money or other valuable thing accepted in discharge of

obligation, one could at once notice that proposing to pay the insolvency resolution process costs in any form other than money would be an exercise in absurdity. Such a payment has to be in terms of money alone. Then comes clause (b) whereby and whereunder, the resolution plan is to provide for payment of debts of operational creditors and the minimum quantum is specified in terms of 'amount to be paid' or 'amount that would have been paid' with reference to the event of liquidation and/or distribution in terms of Section 53 of the Code. Here again, if any proposition is suggested for payment of debts of operational creditors by way of something other than money, and that too in the form of equities in the other corporate entities to be carved out of the corporate debtor, that would not be shunning off the debts of operational creditors but would only be keeping them glued to the corporate debtor or its successor entities. Such a method of payment could least be a step towards insolvency resolution. The same features, with necessary variations, would apply to the second part of clause (b) of sub-section (2) of Section 30 in regard to the dissenting financial creditors. The operational creditors as also the dissenting financial creditors are to be paid in terms of the amount to be determined with reference to Section 53 of the Code and are to be paid in priority, as described in Regulation 38(1) of the CIRP Regulations.

121.1. Therefore, when, for the purpose of discharge of obligation mentioned in the second part of clause (b) of Section 30(2) of the Code,

the dissenting financial creditors are to be “paid” an “amount” quantified in terms of the “proceeds” of assets receivable under Section 53 of the Code; and the “amount payable” is to be “paid” in priority over their assenting counterparts, the statute is referring only to the sum of money and not anything else. In the frame and purport of the provision and also the scheme of the Code, the expression “payment” is clearly descriptive of the action of discharge of obligation and at the same time, is also prescriptive of the mode of undertaking such an action. And, that action could only be of handing over the quantum of money, or allowing the recovery of such money by enforcement of security interest, as per the entitlement of the dissenting financial creditor.

121.2. We would hasten to observe that in case a dissenting financial creditor is a secured creditor and a valid security interest is created in his favour and is existing, the entitlement of such a dissenting financial creditor to receive the “amount payable” could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him. Obviously, by enforcing such a security interest, a dissenting financial creditor would receive “payment” to the extent of his entitlement and that would satisfy the requirement of Section 30(2)(b) of the Code⁸³. In any case, that is, whether by direct payment in cash or by allowing recovery of amount via the mode of enforcement of security interest, the dissenting financial

83 Though it is obvious, but is clarified to avoid any ambiguity, that the “security interest” referred herein for the purpose of money recovery by dissenting financial creditor would only be such security interest which is relatable to the “financial debt” and not to any other debt or claim.

creditor is entitled to receive the “amount payable” in monetary terms and not in any other term.

122. The indications as emerging from the text of other provisions as also from the scheme of the Code, are to the effect that the resolution applicant, with approval of resolution plan, is to proceed on a clean slate rather than carrying the cargo of such debts which need to be satisfied (to the extent required) and then jettisoned. The expressions “payment” and “amount to be paid”, when read in the context and on the canvass of the objects and purposes of the Code, in our view, these expressions only convey their ordinary meaning, as understood in ordinary business parlance, that is, delivery of money alone; and there is no reason to construe these expressions to be conveying the meaning of ‘delivery of money or its equivalent’.

123. A good length of arguments on behalf of IRP are devoted to the stand that, what CoC considers in sub-section (4) of Section 30 is the manner of distribution proposed; and such manner of distribution ought to be fair and equitable, as explained in *Explanation 1* to clause (b) of Section 30(2). It is contended that if legislature intended the word “payment” to have a prescriptive meaning, that is, payment by way of payment of money only, there would have been no need to add *Explanation 1* to clause (b) which provides that distribution under clause (b) to operational and dissenting financial creditors shall be fair and equitable because in such a case, the distribution would only mean a

crystallised sum of money with no room to test if distribution was fair and equitable. The argument is, again, of stretching the plain words beyond their real intent and meaning. The said *Explanation* is for removal of doubts and for clarification that distribution in terms of clause (b) shall be fair and equitable to the creditors covered thereunder that is, operational and dissenting financial creditors. This *Explanation* appears to have been necessitated for the reason that quantification of the minimum amount payable under clause (b) of Section 30(2) is in the realm of certain guesswork or estimate with reference to the distribution envisaged by Section 53 of the Code. This *Explanation* cannot and does not provide meaning to the expressions “payment” and “amount to be paid”. These and other arguments of similar nature, could only be rejected.

123.1. A submission made on behalf of IRP suggesting estoppel against the dissenting financial creditor for having not raised the issue in the meeting of the Committee of Creditors also remains baseless. This is for the simple reason that no estoppel could operate against the statutory right of the dissenting financial creditor to receive payment in terms of Section 30(2)(b) of the Code.

123.2. The submission that commercial banks are permitted by the Banking Regulations Act, 1949 to swap the debt for land and equity has its own shortcomings, rather shortfalls. The expressions “payment” and “amount to be paid” and “amount payable” as occurring in Section 30(2) and Regulation 38(1) cannot be interpreted only for the purpose of banks

as financial creditors; the provisions refer to “financial creditors” as such and it would be too far stretched to say that these expressions may have different meanings for different financial creditors in the manner that a financial creditor who could accept payment by any mode other than money could be “paid” by that mode and the other financial creditors who cannot accept anything except money shall be receiving payment in cash. This kind of interpretation would not only be reading words but even phrases and provisos in the statutory provisions, which is entirely impermissible.

123.3. Similarly, the suggestion that the Government and the Governmental bodies, which are not permitted by law to swap debt with equity or land will have to be paid by way of money and to that extent, the meaning of “payment” in the first part of clause (b) of Section 30(2) will have contextually different meaning, is, again, seeking to provide multiple sub-sects of the mode of payment, whereas no such differentiation or classification is indicated in the provisions under reference or in any other provision contained in the Code.

123.4. The suggestion about prejudice being caused to the assenting financial creditors by making payment to the dissenting one has several shortcomings. As noticeable, in the scheme of IBC, a resolution plan is taken as approved, only when voted in favour by a majority of not less than 66% of the voting share of CoC. Obviously, the dissenting sect stands at 34% or less of the voting share of CoC. Even when the financial

creditors having a say of not less than 2/3rd in the Committee of Creditors choose to sail with the resolution plan, the law provides a right to the remainder (who would be having not more than 34% of voting share) not to take this voyage but to disembark, while seeking payment of their outstanding dues. Even this disembarkment does not guarantee them the time value for money of the entire investment in the corporate debtor; what they get is only the liquidation value in terms of Section 53 of the Code. Of course, in the scheme of CIRP under the Code, the dissenting financial creditors get, whatever is available to them, in priority over their assenting counterparts. In the given scheme of the statutory provisions, there is no scope for comparing the treatment to be assigned to these two divergent sects of financial creditors. The submissions made on behalf of assenting financial creditors cannot be accepted.

123.5. The other submissions and counters with reference to the phraseology of Section 8 of the Code do not require much dilation because, the said provision essentially relates to the dues of an operational debtor and the steps envisaged before commencement of insolvency resolution process. Nevertheless, “payment” for the purpose of the said provision is also of money transfer; and not by any other mode.

124. To sum up, in our view, for a proper and meaningful implementation of the approved resolution plan, the payment as envisaged by the second part of clause (b) of sub-section (2) of Section 30 could only be payment in terms of money and the financial creditor

who chooses to quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (i.e., by dissenting), cannot be forced to yet remain attached to the corporate debtor by way of provisions in the nature of equities or securities. In the true operation of the provision contained in the second part of sub-clause (ii) of clause (b) of sub-section (2) of Section 30 (read with Section 53), in our view, the expression “payment” only refers to the payment of money and not anything of its equivalent in the nature of barter; and a provision in that regard is required to be made in the resolution plan whether in terms of direct money or in terms of money recovery with enforcement of security interest, of course, in accordance with the other provisions concerning the order of priority as also fair and equitable distribution. We are not commenting on the scenario if the dissenting financial creditor himself chooses to accept any other method of discharge of its payment obligation but as per the requirements of law, the resolution plan ought to carry the provision as aforesaid.

125. For what has been observed and held hereinabove, we have no hesitation in rejecting the contentions urged in challenge to that part of the decision of NCLT where the proposition in the resolution plan, concerning the method of meeting with the liability towards dissenting financial creditors, has been disapproved. That part of the decision of NCLT is unexceptionable and is approved.

126. However, as noticed, after disapproving the terms of the resolution plan concerning dissenting financial creditors, the Adjudicating Authority proceeded on the assumption that the offending terms could be modified without changing the basic structure of the plan; and then proceeded to make such modifications by providing that payment shall be made to the dissenting financial creditor bank in instalments. The question is as to whether the Adjudicating Authority could have done so? The answer is simply in the negative.

127. As noticed and held in Point **A** (supra), the Adjudicating Authority has no jurisdiction to enter into the commercial aspects of the resolution plan and to interfere with the wisdom of the Committee of Creditors. The terms as provided in the resolution plan for discharging the obligations towards the dissenting financial creditors were clearly and directly pertaining to the financial model proposed by the resolution applicant and accepted by the requisite majority of the Committee of Creditors. The submissions made on behalf of the IRP in this regard are correct that if the Adjudicating Authority was of the view that the plan did not meet with any particular requirement, it could have only sent it back to the CoC to consider the proposed modifications, so as to afford an opportunity to the resolution applicant to modify the plan and to the CoC to reconsider and vote upon the same.

128. In other words, the Adjudicating Authority, of its own, could not have made any modification in the resolution plan, particularly on any

commercial aspect thereof. The suggestions that in carrying out the requisite modifications by the Adjudicating Authority, the basic structure of the resolution plan is not altered do not merit acceptance, particularly because the terms taken up for modification by the Adjudicating Authority belong to the thick of commercial aspects of the resolution plan; and any alteration thereof goes to the very root of the financial model propounded by the plan.

129. The upshot of the discussion foregoing is that though the Adjudicating Authority has not erred in disapproving the treatment of dissenting financial creditor like ICICI Bank in the resolution plan but, has erred in modifying the terms of the resolution plan and in not sending the matter back to the Committee of Creditors for reconsideration while extending an opportunity to the resolution applicant to make the necessary modifications.

130. For what has been discussed and held hereinabove, we see no reason to enter into the other area of suggestions and disputes concerning the particular parcels of land being offered by the resolution applicant to the objector bank. These aspects are rendered redundant once we have held that the payment envisaged by Section 30(2)(b) read with Section 53 of the Code has to be in monetary terms and not in any other mode.

Point E

Matters related with fixed deposit holders

131. As regards payment to the fixed deposit holders, it is noticed that the resolution plan has provided for 100% upfront payment to the fixed deposit holders whose claims were forming part of the admitted financial debt in the following terms (Schedule 2 to the plan relating to the steps for implementation): -

“VIII. STEP 7: PAYMENT TO FD HOLDERS

Following the Approval Date, the Admitted Financial Debt of the FD Holders shall be settled by making 100% upfront payment of their principal dues within 90 days from the Approval Date but after payment of the CIRP Cost and the Admitted Operational Debt.

It is clarified that other than the Claims of FD Holders forming part of the Admitted Financial Debt, no other payment shall be made to any other FD Holder.”

132. It is also noticed from the minutes of CoC meeting dated 07.12.2019 that the authorised representative of the fixed deposit holders made the submissions for honouring the claims received until the date of approval of the resolution plan, which was recorded as under: -

“Payment to FD Holders: Authorised Representative (“AR”) of Fixed Deposit (“FD”) holders submitted to CoC that FD claims have increased to INR 29 Crores as per the latest CoC reconstitution dated 30.11.2019 and both the Resolution Applicants have fixed the amount to FD holders at INR 28 Crores which shall be paid on pro rata basis, therefore the principal amount to FD holders shall be reduced proportionately. AR of FD holders requested CoC that all the claims received from FD holders till the Resolution Plan approval date should be honored by the Resolution Applicants to avoid any sort of litigation by FD holders.”

133. However, the NCLT, in paragraph 125 of its order has proceeded to modify the said term of the resolution plan as approved by CoC and has provided that the resolution applicant shall make provision to clear even the dues of unclaimed fixed deposit holders when they would make

a claim and such a right will remain in force as long as they were entitled to make a claim under the Companies Act, 2013.

134. The aforesaid modification of the terms of resolution plan has been challenged by NBCC with the submissions that such directions of the Adjudicating Authority are wholly unjustified and are beyond the mandate of this Court in ***Essar Steel*** (supra). In our view, the submissions of NBCC deserve to be accepted.

135. In the scheme of the process for corporate insolvency resolution, it is preliminarily provided in Section 13 of the Code that, after admission of an application for corporate insolvency resolution process, the Adjudicating Authority, apart from declaring moratorium and appointing an interim resolution professional, is also required to cause a public announcement of the initiation of CIRP and '*call for submission of claims under Section 15*'. As per Section 15, the material information in the public announcement is to contain, *inter alia*, '*the last date for submission of claims, as may be specified*'. The IRP is enjoined with several duties under Section 18 and as per clause (b) thereof, he is to '*receive and collate all the claims submitted by the creditors to him, pursuant to the public announcement made under sections 13 and 15*'. CIRP Regulations make the position clearer still, where, by virtue of Regulation 12, a creditor is required to submit his claim with proof '*on or before the last date mentioned in the public announcement*'; and a creditor who fails to submit the claim within the stipulated time, may yet submit the claim with

proof ‘on or before the ninetieth day of the insolvency commencement date’. As per Regulation 13, the resolution professional concerned is to verify the claims within seven days of the last date of receipt of claims.

135.1. Due adherence to the timelines provided in the Code and the related Regulations and punctual compliance of the requirements is fundamental to the entire process of resolution; and if a claim is not made within the stipulated time, the same cannot become a part of the Information Memorandum to be prepared by IRP and obviously, it would not enter into consideration of the resolution applicant as also of the Committee of Creditors. In the very scheme of the corporate insolvency resolution process, a resolution applicant cannot be expected to make a provision in relation to any creditor or depositor who has failed to make a claim within the time stipulated and the extended time as permitted by Regulation 12. In ***Essar Steel*** (supra), while dealing with the topic ‘*Extinguishment of Personal Guarantees and Undecided Claims*’, this Court disapproved that part of the NCLT judgment which held that other claims, that might exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal, could be decided in an appropriate forum in terms of Section 60(6) of the Code. This Court specifically held that a resolution applicant cannot be made to suddenly encounter undecided claims after resolution plan submitted by him has been accepted; and in the scheme of the Code, all claims must be submitted to, and decided by, the resolution

professional so that the resolution applicant could proceed on a fresh plate. This Court, *inter alia*, held as under: -

“107. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count.”

135.2. It has not been the case of anyone that in the process in question, any of the requirements of Sections 13, 15 and 18 had not been complied with. It has also not been anybody’s case that any claim made by any fixed deposit holder within the stipulated time was not taken into account by IRP.

136. In the given fact situation and in view of the law declared by this Court, we find no justification for the directions contained in paragraph 125 of the order passed by NCLT. Those directions are required to be annulled.

Point F

Objections of the financial creditor of subsidiary of the corporate debtor

137. Indisputably, the corporate debtor JIL owns 100% equity shareholding in JHL which is having three operational hospitals in the State of Uttar Pradesh. Substantial part of the shareholding of JHL is pledged with its lenders. In the resolution plan, NBCC has proposed in regard to JHL as follows: -

“Since, majority of shareholding of Jaypee Healthcare Limited is already pledged to the lenders to the hospitals to secure the indebtedness of Jaypee Healthcare Limited, it is proposed to divest the entire shareholding of Jaypee Healthcare Limited by inviting bids for the same and utilize the divestment funds for settlement of outstanding debt obligations of Jaypee Healthcare Limited, without any additional payment by the Corporate Debtor. In this regard, the pledge over shareholding of JIL (shares of Jaypee Healthcare Limited held by JIL) created in favour of the lenders of Jaypee Healthcare Limited shall stand released in terms of this Resolution Plan immediately upon the approval of this Resolution Plan by the Adjudicating Authority. Such release would *inter alia* be in consideration of the proposed repayment of the outstanding debt of the lenders of Jaypee Healthcare Limited. Such repayment would not include levy of any penalties or charges including prepayment penalty, penal charges, etc. In furtherance of the aforesaid objective the lenders of Jaypee Healthcare Limited shall not be entitled to deal with the assets of Jaypee Healthcare Limited or adversely interfere with the continued business operations of Jaypee Healthcare Limited in any manner whatsoever including enforcement of any security created in their favour by the Corporate Debtor or by Jaypee Healthcare Limited (pledge, mortgage, etc.), entering into operation and maintenance agreements or any other agreements with any person which has an effect of selling, leasing or otherwise disposing off the whole or substantially the whole of the undertaking of Jaypee Healthcare Limited, take any action which would otherwise require the consent of the shareholders of Jaypee Healthcare Limited or take any other steps which may be contrary to the treatment proposed for Jaypee Healthcare Limited under this Resolution Plan.

Further, the Resolution Applicant also reserves its right to cause the Corporate Debtor to transfer its entire shareholding in Jaypee Healthcare Limited into a trust. Such trust would be settled by the Corporate Debtor, the beneficiary of the trust would be the Resolution Applicant and the trustee would be a professional entity (to be appointed by the Resolution Applicant). The trust property would comprise *inter alia* of the entire shareholding of the Corporate Debtor in Jaypee Healthcare Limited.”

138. The objector YES Bank Limited, as being the financial creditor of JHL, had raised objections as regards such stipulations and proposals while asserting that the assets of its debtor JHL could not have been dealt with in this resolution plan. The Adjudicating Authority, though took up such objections for consideration but observed that the resolution applicant NBCC and YES Bank having agreed for constitution of a committee to deal with the shares and assets of the subsidiary company, this issue was not required to be discussed.

139. The objector YES Bank has taken exception to the aforesaid part of the order impugned with the submissions that no such settlement was drawn out with NBCC and the Adjudicating Authority has failed to consider the objections on rather incorrect assumptions. It is submitted that the resolution plan interferes with the statutorily protected rights of the lenders of JHL, who are effectively the third parties and not the members of CoC of JIL. It is also submitted that the transfer of the entire undertaking and business of JHL, a wholly-owned subsidiary of JIL, under the garb of sale of equity is not permissible as per the Section 18(f) read with its *Explanation* (b) and Regulation 37(a) of the CIRP Regulations whereby, the resolution plan is only limited to the assets of the corporate debtor. With reference to various decisions, including that in the case of ***Vodafone International Holdings BV v. Union of India and Anr.:*** (2012) 6 SCC 613, it is submitted that holding company does not own the undertaking or business of subsidiary company even if it holds all the

shares therein. It is also contended that the CIRP of JHL must be independently conducted as the sale of business or undertaking in the manner suggested by NBCC severely prejudices the rights of the creditors of JHL to recover their legitimate dues. It is yet further submitted that the shares of JIL, the corporate debtor, are subject to the pledge created by them to secure the debts of JHL and the resolution plan cannot unilaterally extinguish the security interest provided to the lenders of JHL, who are not the creditors of JIL and therefore, not the part of the CoC of JIL. This objector bank submits that the resolution plan does not account for the total debts incurred by JHL and the securities or encumbrances, to the extent of 63.65% of the shares, as created by JHL over its assets. It has, therefore, been prayed that this objector bank be allowed to continue with its appeal before the Allahabad Bench of NCLT against JHL and the portion of resolution plan dealing with JHL and its assets be deleted.

139.1. It is noticed that without prejudice to the aforesaid and other submissions, the objector YES Bank has given out its proposition for evolving a workable mechanism with certain stipulations in sub-paragraphs “ff” and “gg” of paragraph 7 of the memo of appeal, which read as under: -

“ff. Without prejudice to any of the above and the following legal grounds raised in the present proceedings, the Appellant in the best interest of all the interested parties including the interests of the Resolution Applicant and in spirit of reconciliatory approach is still willing to work with the Resolution Applicant in finding a working solution so that JHL assets can be monetized in a timely manner. Provided, the Respondent No. 2 / Resolution Applicant is

willing to accept the proposals and the safeguards as requested by the Appellant. For brevity's sake, the Appellant's proposal for a workable mechanism is set out in the Written Submissions filed before the Ld. Adjudicating Authority, which is reiterated below:

(i) The lenders of JHL led by YBL will take all necessary preparatory measures required for finding a viable buyer to take over the JHL units in a completely transparent manner.

(ii) To the above cause, JHL lenders shall be permitted to prepare an information memorandum, seek bids from prospective buyers, appoint independent, impartial and reputed investment bankers to run the process of JHL monetisation.

(iii) This is proposed to be done through fullest co-operation from RP of JIL as well as Board and Management of JHL as information and engagement will be critical to run an efficient and effective sale process.

(iv) JHL lenders shall liaise with the IRP, Mr. Jain and share the status of the steps periodically with IRP and NBCC.

(v) A Sale Committee to be set up with participation of lenders of JHL and NBCC, for sale of JHL;

(vi) The decision to accept the bid of a particular buyer shall be taken by a unanimous vote of NBCC and YBL (on behalf of the lenders of JHL);

(vii) The sale process shall be finalised within a period of 3 months from the date of approval of the resolution plan by Hon'ble NCLT and latest by June 30, 2020 and until such time rights of lenders of JHL vis-à-vis assets of JHL as well as pledge of JHL Shares (held by JIL as investment) in favour of JHL lenders shall be kept intact;

(viii) In the event of successful disinvestment of JHL, the disinvestment funds shall be utilized for settlement of debt of JHL lenders in priority, in accordance with existing Resolution Plan;

(xi) During the period above, until June 30, 2020, there shall be a moratorium on the rights of the JHL lenders to enforce its securities held in JHL including the share pledge by JIL;

(x) Should the sale still not be finalised before June 30, 2020, for any reason whatsoever (including any delay due to legal proceedings), then the moratorium over enforcement of pledged shares as well as other assets of JHL, shall stand lifted; and

(xi) Thereafter, JHL lenders will have all rights to enforce its securities against JHL to recover its outstanding dues including but not limited to enforcement of pledge, and, or continuation of CIRP against JHL.

gg. If the Respondent No. 2 is agreeable to accept the above mechanism then the Appellant shall not press its remedies for challenging the Resolution Plan. Failing which the entire Resolution Plan insofar as it relates to JHL Assets is required to be severed and set aside.”

140. In response, it is submitted that as a resolution applicant, NBCC is entitled to get the management of the corporate debtor on a clean slate (as observed by this Court in the case of **Essar Steel**); and when NBCC under its plan is extinguishing all the contingent liabilities, disinvestment of JHL shares cannot be taken exception of. It has also been submitted that in the resolution plan, it was made clear that NBCC does not possess the expertise to run the operation of a healthcare business and, therefore, seeks to divest the entire shareholding of JHL to a third party and/or a trust who would have the requisite expertise to deal with the requirements of healthcare business. It is also submitted, with reference to Section 18(f)(v) of the Code, that the assets of the corporate debtor include securities and shares held in any subsidiary; and shares of a subsidiary company are held as the assets of the parent company in its books, as held by this Court in the case of **Vodafone** (supra).

140.1. Apart from the above, NBCC has referred to the proceedings before the Adjudicating Authority before passing of the order dated 03.03.2020 and it is pointed out that the Adjudicating Authority, in its order dated 04.02.2020 observed that a settlement may be reached between NBCC and YES Bank and pursuant thereto, YES Bank and NBCC held a meeting on 06.02.2020 to discuss the mechanism for sale of shares of JHL and thereafter, on 07.02.2020, a proposal for sale of shares of JHL

was given by YES Bank to which NBCC, in its email dated 14.02.2020 stated that *“NBCC is agreeable for constitution of a committee which will take forward the disinvestment process of JHL after approval of the resolution plan as submitted by NBCC.”* Thus, according to NBCC, there has been an agreement between the parties on the manner of sale to be carried out of JHL shares. This apart, NBCC has also referred to the aforesaid proposal stated in the memo of appeal and while reproducing the first part of the above-quoted paragraph “gg”, has stated its acceptance of the proposal so made by YES Bank subject to the approval of resolution plan.

141. We have carefully examined the submissions made by the parties. In the totality of circumstances of the case and the stance of respective parties, when it is noticed that the aforesaid proposal of YES Bank, as stated in sub-paragraphs “ff” and “gg” of paragraph 7 of the memo of appeal, is acceptable to NBCC, subject to approval of the resolution plan, we do not find any reason to say anything further on this score and would leave the parties to work out a viable solution in the best interest of all the stakeholders; and for that purpose, the parties concerned, if necessary, may seek appropriate orders from NCLT, as regards mode and modalities of the process to be carried out.

142. In view of the above, we do not consider it necessary to render any other finding in this point for determination except the observation that the resolution plan essentially deals with the assets of the corporate

debtor JIL and not that of its subsidiary JHL. Differently put, what the resolution plan deals with are the shares in JHL, which are regarded as assets of the corporate debtor JIL. As observed, no further comments are required and we leave this aspect of the matter at that only.

Point G

Grievance of agreement holders

143. As regards certain transfers without proper agreement/sub-lease deed and without consideration, the resolution applicant had reserved a right in itself to cancel such instruments or term sheets without any corresponding obligation to the counter party in the following terms (Clause 21 Schedule 3 of the resolution plan): -

“21. With respect to any alleged transfer of land parcels by the Corporate Debtor to third parties without any proper agreement/sub-lease deeds and where the consideration amount has not been paid to the Corporate Debtor *inter alia* including the land parcels listed in **Annexure G**, the Resolution Applicant reserve a right to cancel such instruments/agreements/term sheets and upon cancellation the title in such land parcels will continue to be legally vested in the Corporate Debtor without any liability/obligation to the counter-party.”

144. The NCLT has observed that when an agreement is invalid and consideration has not been paid, no separate stipulation is required to be made that such agreement could be cancelled. However, at the same time, NCLT has also observed that even though such a clause has been mentioned in the resolution plan, that did not mean that the agreement holders have lost their right to seek remedy before the competent forum.

145. The agreement holders, while questioning this part of the resolution plan in their appeal, have given the details of five term

sheets/agreements with the corporate debtor between 01.05.2017 to 08.08.2017 i.e., before the date of initiation of CIRP (09.08.2017). It is submitted that those term sheets were rectified by CoC in its meetings dated 10.11.2017 and 28.11.2017 and upon assurances of IRP for external development and providing of other services, the appellants had made further part payment, in addition to the amounts already paid. It is further submitted that the resolution plan is contrary to Section 30(2)(e) of IBC as the term sheets/agreements were found valid during the CIRP by the CoC and they cannot become improper agreements overnight on the mere saying of the resolution applicant. The grievance of the appellants is that even after holding that the appellants have not lost their right to seek remedy before a competent forum, the questioned Clause 21 (in 'reliefs and concessions') of the resolution plan was not modified by NCLT. According to the appellants, the approved resolution plan carrying such a clause purports to take away their rights without due process of law in contravention of Article 300-A of the Constitution of India and hence, is violative of Section 30(2)(e) of IBC. The appellants also submit that the Development Plan of the concerned area has not yet been renewed by the Noida Authority and the status of the development is also uncertain.

145.1. With these submissions, the appellants have stated their prayer in the manner that they are willing to pay the balance amount within 1 year in respect of the property at C-1/E, Sector 133 Noida, which is in their possession and to cancel the other 4 term sheets/agreements relating to

the land at Sector 151 Noida with adjustment of the payments made therein towards the property at Sector 133 Noida; and to execute the sale deed and get the master plan sanctions for the next 5 years. Alternatively, the appellants pray for the refund of the amount deposited by them, to the tune of INR 24.03 crores approximately, with appropriate interest.

146. *Per contra*, NBCC maintains that the resolution plan as approved by CoC and the Adjudicating Authority is binding on all the stakeholders including the appellants and in any case, the relief in question, as provided in the resolution plan, is limited to such instances where no proper agreements/sub-lease deeds have been executed by the corporate debtor with counter parties and therefore, Article 300-A of the Constitution is not violated and the relief provided in the resolution plan is not arbitrary or unfair. It is also submitted by NBCC that while dealing with the segment of 'reliefs and concessions', the Adjudicating Authority has not passed any favourable order in regard to the said relief; and even while granting the right to NBCC to cancel the agreement, has kept intact the right of an affected party to seek remedy in a competent forum.

147. In our view, looking to the nature of dealings and the propositions advanced by agreement holders, the observations made by the Adjudicating Authority, in addendum to Clause 21 of 'reliefs and concessions' in the resolution plan but, without encroaching upon the commercial wisdom of CoC, only work towards viability of the plan while extending a fair treatment to the agreement holders, by keeping their right

to seek remedy in a competent forum intact. The resolution applicant, NBCC, also does not appear to be having any qualms about it.

148. Thus, in the overall scheme of the resolution plan, the stipulation in question cannot be said to be unfair; and the observations of the Adjudicating Authority in paragraphs 132 and 133 of the impugned order dated 03.03.2020 remain just and proper. No further orders are required in this regard. This point stands determined accordingly.

Point H

Grievance of minority shareholders

149. The other set of objectors is of the non-promoter shareholders of the corporate debtor, who are also referred to as the minority shareholders. Their grievance is that the resolution plan does not deal with their interests and they have not been provided with a fair exit option. It is submitted that such non-promoter shareholders have invested their hard-earned money in the equity of the corporate debtor much before initiation of CIRP; that they had made the investment on the basis of the financial statements filed by the corporate debtor, suggesting the valuation of various assets including the Expressway and other land parcels; and the corporate debtor has adequate and appreciating assets to take care of all the liabilities and interests of the stakeholders.

150. These shareholders have referred to a valuation report, said to have been prepared by India Infrastructure Finance Co. Ltd., on 31.03.2017 suggesting that even after accounting for liabilities, net worth

of the corporate debtor was about INR 7,377 crores. It is submitted that the IRP itself had valued the corporate debtor at INR 8,257 crores but NBCC is attempting to acquire the company for a meagre sum of INR 120 crores and extinguishing the entire public shareholding of the corporate debtor by paying a sum of INR 1 crore in total, as against the fair value per share at INR 56.68; and the offer of NBCC is unconscionable, is against the principles of proportionality, results in misappropriation of funds of these shareholders, and is being used as a device to enrich the resolution applicant at the cost of stakeholders.

150.1. It is also submitted that the plan is in contravention of Section 230 of the Companies Act, 2013, which provides for the power to compromise or make arrangements with any creditor or member of a company; that the minority shareholders, even if not a part of the CoC, have a right to know and participate in any compromise or arrangement which affects their rights; that they have a right to dissent with any terms of the compromise or arrangement which affects their rights and for that matter, they would be deemed to be dissenting shareholders, who need to be provided a reasonable exit option or opportunity. It is further submitted, while referring to the decision in **Essar Steel** (supra), that the ultimate decision of what amount to pay may rest with the CoC, but the decision should be made by taking into account the maximum value of the assets of the corporate debtor and after adequately balancing the interests of all stakeholders including operational creditors.

150.2. These minority shareholders further contend that when the intent of the IBC is to keep the corporate debtor as a going concern, the action of delisting the public shareholding of the corporate debtor totally defeats the objective. It is also submitted that the resolution plan has not been formulated in accordance with the procedure envisaged by the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009⁸⁴ which require that an exit opportunity ought to be provided for delisting of shares from the stock exchange.

150.3. It is submitted that though the said shareholders were not part of CoC and did not get the opportunity to attend the meetings of CoC, they made all efforts to voice their concerns and even got issued the notice dated 19.02.2020 to IRP and the resolution applicant but the notice failed to evoke any response. According to these objectors, the resolution plan, as approved by the NCLT, is not in accord with Regulation 38(1A) of the CIRP Regulations and is contrary to the intent of IBC inasmuch as it has failed to maximise the value of assets of corporate debtor and to protect the interests of all the stakeholders. It is also contended that the interests of all the stakeholders ought to have been protected but the Adjudicating Authority has not even considered the matter relating to the interests of the minority shareholders.

150.4. With the aforesaid submissions, it has been prayed that appropriate orders are required to safeguard the interests of minority shareholders and the respondents deserve to be directed to devise a reasonable exit scheme for them whereby, they are given a price at least

84 Hereinafter also referred to as 'Delisting Regulations'.

as per the book value of shares at the time of initiation of CIRP or an order be issued to swap the shares of existing minority shareholders with the shares of NBCC.

151. The contentions so urged are opposed by NBCC with the submission that these shareholders have, for the first time, approached in appeal though they were aware of the proceeding before the Adjudicating Authority, as is evidenced by the letter sent by their advocate on 19.02.2020; and the issue has been raised at this stage only to create unnecessary hindrances and to cause prejudice to the entire process.

151.1. As regards fairness of the treatment given to the minority shareholders, it is submitted that the resolution plan provides an exit option to the existing public shareholders at a price which is higher than the liquidation value; and they are being paid an exit price of INR 1 crore, which is in contrast to the treatment being accorded to promoter shareholders, whose shareholding is being extinguished and cancelled in its entirety without any consideration.

151.2. It is submitted that the liquidation value as determined by the valuers appointed by the IRP under the Code is approximately INR 17,876 crores (as per RBSA) and INR 17,658 crores (as per GAA), whereas the total debt owed to financial creditors is approximately INR 23,247 crores. In the aforesaid scenario, according to NBCC, where the minority shareholders are not entitled to any value, the resolution plan, with offer of exit at a price of INR 1 crore, is neither unfair nor arbitrary.

151.3. It has further been submitted that in the scheme of IBC, specific and novel method of insolvency resolution is provided wherein, by way of amendment brought about by Act 26 of 2018 w.e.f. 06.06.2018, the *Explanation* to Section 30(2)(e) has been inserted, providing for deemed approval of shareholders and, therefore, the submissions on behalf of the minority shareholders do not deserve consideration.

152. Having given anxious consideration to the rival submissions, we are clearly of the view that objections sought to be taken by the minority shareholders must fail.

153. It is noticed from the resolution plan that the Delisting Regulations, as amended on 31.05.2018, have been duly taken note of; and the step for delisting and extinguishment of existing shareholding is provided in

Schedule 2 thereof, in the following terms: -

“IX. STEP 8: DELISTING AND EXTINGUISHMENT OF EXISTING SHAREHOLDING

1. As an integral part of the Resolution Plan, post implementation of Step 1, the shares of the Corporate Debtor shall be de-listed, in terms of SEBI (Delisting of Equity Shares) Regulations, 2009. (“**Delisting Regulations**”), as amended by Amendment to Delisting Regulations dated May 31, 2018, which prescribes that the procedure under the Delisting Regulations are not applicable for any delisting pursuant to an approved resolution plan under the Code, if:

(a) the resolution plan sets out a specific delisting procedure; **or**

(b) the resolution plan provides an exit option to existing public shareholders at a price which is higher of the liquidation value (as applied in the order of priority of claims prescribed under Section 53 of IBC) and the exit price being paid to the promoters.

In this regard, the Non-Promoter Shareholders (i.e. the public shareholders) shall be paid an exit price aggregating to INR 1 Cr and pursuant to the same, their shareholding shall be extinguished.

2. In terms of the definition of Public Shareholders under the Delisting Regulations, Existing Promoters are specifically carved

out. Accordingly, simultaneous to the de-listing, the issued equity share capital of the Corporate Debtor as held by the Existing Promoters i.e. 84.70 Cr equity shares of face value of INR 10 (Rupees Ten each) shall be extinguished and cancelled in its entirety without any consideration.

3. Extinguishment of shares of Corporate Debtor may be done through Capital Reduction or selective Capital Reduction.

4. Extinguishment of shares of Corporate Debtor may be done through credit to Capital Reserve Account.

The equity shareholding of the Corporate Debtor post De-listing and Capital Reduction shall be as follows:

Category of shareholder	% of Equity Shareholding
NBCC SPV (New Promoter)	100%
Existing Promoters	Nil
Non-Promoter Shareholder (public shareholder)	Nil
Total Issued, subscribed and Paid up equity Capital	100.00%”

It cannot be said that the resolution plan is not compliant with the requirements of Regulation 38(1A) of the CIRP Regulations.

153.1. As noticed, by way of *Explanation* to Section 30(2)(e) of the Code, it has been made clear by the legislature that if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law. The attempt on the part of minority shareholders to raise objection against the resolution plan simply flies in the face of this *Explanation* to Section 30(2)(e) of the Code.

153.2. Needless to reiterate that in the scheme of IBC, only the CoC is entrusted with the task of dealing with and approving the plan of

insolvency resolution; and the shareholders of a corporate debtor, who is already reeling under debts, have not been provided any participation in the insolvency resolution process. It goes without saying that in the case of a corporate debtor like JIL, if the process of liquidation is resorted to under Chapter III of the Code, there is a very little likelihood of the shareholders getting even dewdrops out of the waterfall of distribution of assets, as delineated in Section 53 of the Code, where the preference shareholders and equity shareholders stand last in the order of priority. In the totality of circumstances, when the promoters' shareholding is extinguished and cancelled in toto without any consideration, even nominal exit price of INR 1 crore for minority shareholders cannot be termed as unfair or inequitable. In any case, a decision in regard to the aforesaid step in the resolution plan had been that of the commercial wisdom of the Committee of Creditors and is not amenable to judicial review.

153.3. Reference to Section 230 of the Companies Act, 2013, which deals with power to compromise or make arrangements with creditors and members is entirely inapt in the context of the present case because no such proceedings for compromise or arrangements are in contemplation. On the contrary, in the present case, the proceedings of CIRP under the Code have reached an advanced stage with approval of resolution plan by the CoC and the Adjudicating Authority.

153.4. Apart from the above, NBCC also appears right in contending that once the resolution plan stands approved by the Adjudicating Authority,

the objecting shareholders, who did not even raise any grievance before the Adjudicating Authority, cannot now, for the first time, object to the arrangement arrived under the resolution plan, in view of Section 31 read with Section 238 of the Code which provide that the approved resolution plan shall be binding on all stakeholders and that the provisions of IBC shall prevail not only over the laws but also the instruments having effect by virtue of any such law.

154. Viewed from any angle, in our view, it cannot be said that the resolution plan does not adequately deal with the interests of minority shareholders. The grievances as suggested by these shareholders cannot be recognised as legal grievances; and do not provide them any cause of action to maintain their objections. The objections by the minority shareholders stand rejected.

Point I

Matters related with dissatisfied homebuyers of JIL

155. We may now take up the issues raised by a section of homebuyers of JIL against the resolution plan of NBCC. For dealing with this segment of disputes, a bit of prelude concerning the status and position of homebuyers in CIRP shall be apposite.

156. Not much of discussion is required to notice that the largest block of stakeholders, who are likely to bear the brunt in the event of liquidation of JIL and conversely, who are likely to find succor in case of resolution of insolvency of JIL, is that of the homebuyers, who have invested their hard-earned money in the projects of JIL. In the first two rounds of

litigation, they had been the focal point of consideration where this Court invoked its powers under Article 142 of the Constitution of India to ensure that the insolvency resolution process of JIL is taken ahead within the discipline of IBC while obviating the likelihood of liquidation. As narrated in sufficient detail hereinbefore, during the pendency of the case of **Chitra Sharma**, by the amendment of IBC with insertion of *Explanation* to Section 5(8)(f), the doubts about the status of homebuyers got clarified and, for being duly recognised as financial creditors of the corporate debtor, the homebuyers got their say in the Committee of Creditors. In fact, such an amendment and inclusion of homebuyers in the Committee of Creditors had far-reaching and ground-breaking effects in the present case for the reason that the homebuyers, as a class, acquired a dominant status in the Committee of Creditors, with more than half of the voting share with them. Obviously, no effective decision of the Committee of Creditors could have been taken without the involvement and assent of the homebuyers. As noticed, the resolution plan in question had been approved by CoC of JIL with more than 97% of the voting share in its favour. In this voting, the homebuyers had the voting share of more than 57%. It goes without saying that if the homebuyers were not to vote for this plan, the same would have not seen its approval with minimum 66% of the voting share of financial creditors, as required by the Code. The other plan of Suraksha Realty got less than 3% votes. If both the plans were unable to muster the requisite (not less than 66%) voting share, the

only consequence would have been liquidation of JIL, which every stakeholder wanted to avoid.

157. In the process envisaged by the Code, where the CoC may approve a resolution plan by a vote of not less than 66% of voting share, there remains an obvious possibility of some of the financial creditors not voting for approval of the plan but by the very nature of process, they would be having the voting share of not more than 34% and could be conveniently described as 'dissenting financial creditors'. The resolution plan is required to carry specific provision for payment of debts of such dissenting financial creditors, more particularly in view of the requirements of the second part of Section 30(2)(b) of the Code. All the features related with such provisions and their operation have been examined in Point **D** (supra) concerning the dissenting financial creditor, who has indeed not voted in favour of the plan in question.

158. The relevant aspect for the present point for determination is that apart from such dissenting financial creditors, a few of the associations of homebuyers and some of the individual homebuyers carry their own grievances against the resolution plan and seek to submit that their interests have not been safeguarded and they are being denied of their legal rights. These dissatisfied associations and individual homebuyers seek to contend that the resolution plan is lacking in various requisite arrangements; is violative of the CIRP Regulations; and is also violative of the provisions of RERA and therefore, it could not have been approved.

One block of such objectors is rather differently dissatisfied for the reason that according to them, the housing projects which have been completed or are nearing completion ought to be kept out of the purview of this plan of resolution. In counter, it is contended on behalf of the resolution applicant that these dissatisfied homebuyers or associations have no right to maintain any objection as if being the dissenting financial creditors because the homebuyers have voted as a class in favour of the resolution plan and are bound as a class with 'drag along' provisions in the Code. The objections have been refuted on merits too. These rival submissions have led to the formulation of four different questions in this point for determination.

159. The associations and the individual homebuyers who are dissatisfied with the resolution plan and the process of its approval have made various overlapping and repeat submissions; we may summarise the substance thereof, while avoiding prolixity, as far as possible.

159.1. It is contended on behalf of the association of homebuyers, who has filed the appeal (in T.C. No. 243 of 2020) and has also filed an intervention application in the appeal filed by other associations, that the homebuyers have the locus standi to file an appeal even though they belong to a class of creditors represented through an authorised representative, who voted in favour of the resolution plan of NBCC. This association of dissatisfied homebuyers submits that sub-section (3A) of Section 25A of the Code is only intended to iron out the logistical issues

and technical difficulties which arise due to the large number of creditors; and the mere fact that more than 51% of the homebuyers voted in favour of the resolution plan cannot take away the statutory right of appeal.

159.1.1. As regards the major part of grievances, it is contended on behalf of this association that the resolution plan in question is patently illegal and is in contravention of the provisions of RERA and its rules. With reference to Section 30(2)(e) of the Code, it has been argued that the resolution plan must be in conformity with other laws in force and merely because IBC has a non-obstante provision over other laws would be no ground to hold that a resolution plan framed under the scheme must also be elevated to such status; that RERA is one such legislation which expressly deals with the rights of the homebuyers and if there is any inconsistency between IBC and RERA, the former would prevail but, the same cannot be said about a resolution plan under IBC. It is submitted that Sections 13(2), 18 and 19(4) of RERA as also U.P. RERA (Agreement for Sale/Lease) Rules, 2018 are in violation as the resolution plan does not provide an option to the homebuyers to seek refund in case the flat is not delivered within the time period prescribed in the revised schedule; and does not provide interest as well as compensation on the amounts already paid by homebuyers, in case they seek refund. Therefore, according to this association, if the resolution plan as existing is approved, it would take away all the rights bestowed upon the homebuyers under RERA and homebuyers will be at the mercy of 'one

sided agreements' made by NBCC with no future remedies available to them. It is also submitted that the resolution plan actually recognises the interest amount to be paid to the homebuyers as part of the 'Admitted Amount' but does not pass on this amount to the homebuyers.

159.1.2. In another line of submissions, it has been contended that 758 acres of land is returned to JIL as per the judgment of this Court dated 26.02.2020 in the case of **Anuj Jain** (supra) but NBCC has failed to specify anything in the resolution plan regarding the treatment and utilisation of this big parcel of land though the same ought to be put to use for the purpose of providing delay penalty/interest to the homebuyers. It is submitted that NBCC cannot be allowed to unjustly enrich itself at the cost of the corporate debtor's unencumbered assets and ought to use this land bank to make its resolution plan compliant with the provisions of RERA.

159.1.3. In yet another line of submissions, it has been contended that the IRP, while filing Form-H along with the approval application, has not placed on record the liquidation costs; and this cost is required for assessing the feasibility and viability of the resolution plan. Therefore, there had been complete violation of Regulation 39B of the CIRP Regulations. It is also submitted that the resolution plan in question, being a conditional one in terms of Clauses 1 and 2 of Schedule 3 thereof, could not have been taken as a resolution plan standing in conformity with the requirements of Regulation 36A(7) of the CIRP Regulations.

159.1.4. Of course, as regards the said amount of INR 750 crores deposited by JAL, this association maintains that the same was to protect the interests of homebuyers of JIL and forms the part of corpus of JIL but, it is also submitted that if there be any ambiguity with respect to the homebuyers of JAL and they are also to be covered under the deposit so made by JAL, then the amount may be used by the corporate debtor and JAL on a *pro rata* basis so as to secure the interests of the homebuyers of both these companies. It has also been prayed that NBCC be directed to start the construction within 30 days and to complete the entire project within 3 years; that NBCC be barred from withdrawing; and that NBCC be prohibited from charging the homebuyers with any extra amount towards arbitrary increase in the name of 'Super Built-Up Area', which would be illegal without corresponding increase in the carpet area.

159.2. Another society of homebuyers of the projects undertaken by JIL has directly approached this Court against the order dated 03.03.2020 passed by NCLT, and is essentially aggrieved that the resolution plan does not provide for the interest to be accrued to the homebuyers or compensation for delay period on their deposits.

159.2.1. On behalf of this society also, the aforesaid submissions relating to 758 acres of land, violation of the provisions of RERA and proposed changes in 'Super Built-Up Area' are re-emphasised. This apart, it is submitted that the resolution plan provides for unfair treatment to the homebuyers of JIL inasmuch as they are liable to pay interest at 18% p.a.

in the event of default to pay the remaining instalments but, on the other hand, a meagre delay compensation, amounting to INR 5/- per square feet per month, is offered to them in case of delay in construction and the same is stated to be due only after the expiry of one year from the date of delivery of possession. It is submitted that the “financial debt” in terms of Section 5(8) of IBC is that of “disbursal against the consideration for the time value of money”, which means compensation for the length of time for which the money has been disbursed. Thus, the provisions for the homebuyers in the resolution plan ought to mandatorily include a just and fair interest to account for the period of delay.

159.3. As noticed, in paragraph 126 of the order dated 03.03.2020, the Adjudicating Authority rejected the submissions sought to be made by a few other homebuyers, who asserted themselves to be the “dissenting” homebuyers, because the authorised representative on behalf of the homebuyers had assented to the resolution plan while observing that *‘it cannot be said that dissenting homebuyers before authorised representative to be considered as dissenting financial creditors against the total voting of CoC’*. These homebuyers have filed a separate appeal (in T.C. No. 242 of 2020) with many a submissions running common to those of the contesting associations. While avoiding repetition, we may take note of the other material submissions on behalf of these appellants-homebuyers.

159.3.1. It is contended on behalf of these homebuyers that they and several other homebuyers have consistently dissented from the resolution plan as the proposed timelines for completion are not workable and there is no clause for refund of money in a situation that the construction is not completed within time; and cent percent approval has not been given for effectuating the resolution plan. The grievance is that their application was rejected by NCLT on the ground that AR on behalf of the homebuyers had assented to the resolution plan but without dealing with the specific objection raised by the appellants with regard to the proceedings before the CoC and the procedure adopted by it; and they were not even allowed to make all their submissions before NCLT. According to these appellants, NCLT has applied two standards while dealing with objections of two dissenting financial creditors i.e., ICICI Bank on one hand and the appellants on the other, which amounts to unfair discrimination amongst the same class of creditors; and the findings in paragraph 126 of the impugned order are in the teeth of NCLT's findings in paragraphs 100 and 101 of the same order.

159.3.2. It is submitted that in the 16th meeting of CoC, there was no consensus with regard to the resolution plan to be adopted; and on evaluation of the resolution plans, it was found that the plan of Suraksha Realty was better than that of NBCC considering the scores given by the experts. The appellants have submitted that in the resolution plan by Suraksha Realty, provision was made for delay penalty pertaining to

previous period in the form of fixed compensation by way of transfer of land worth INR 250 crores at Mirzapur and for this purpose, creation of a Trust was proposed; and it was also proposed that the said resolution applicant shall endeavour to monetise the land for 4 years and the sale proceeds would be distributed amongst the eligible homebuyers. According to the appellants, the plans were put to vote contrary to the provisions of IBC and yet, IRP moved an application for approval of the plan submitted by NBCC, which was objected by them and various other parties with the submissions that the resolution plan of NBCC was unfairly adopted through illegal voting; and that the plan of NBCC was in contravention of RERA.

159.3.3. It is submitted that in the resolution plan in question, Schedule 2 Step 9 provides for treatment of homebuyers and refund seekers in the manner that the claim of homebuyers shall be satisfied by ensuring delivery of flats in accordance with the schedule at Annexure A, whereby project completion period is provided as 42 months with moratorium period of one year and therefore, for 54 months, the appellants and other homebuyers would not get any compensation and thereafter only a delay penalty of INR 5/- per square feet per month is provided, which is also subject to non-occurrence of any *force majeure* event.

159.3.4. While questioning the process of voting and the proposition that homebuyers have as a class assented to the plan of NBCC, these

appellants have submitted that the voting percentage in respect of NBCC's plan was distributed in the following manner:

Home Buyers voting share	57.66%;
Assenting	34.10%;
Dissenting	1.05%;
Abstained	22.51%

Therefore, according to the appellants, the claim that 97.02% homebuyers have voted for NBCC's plan is misleading; and as per the voting percentage, rough ratio is that for every 3 homebuyers who voted for NBCC, 2 have dissented/abstained. The appellants have further contended that the authorised representative of homebuyers made two wrong statements before the Committee of Creditors: one, that both the resolution plans of Suraksha Realty and NBCC would be put to vote and second, that the majority of homebuyers had written to him indicating NBCC as the preferred choice. It is submitted that both these statements on behalf of the homebuyers were grossly incorrect and contrary to record and as such, the entire voting process of the CoC, as contemplated under Section 21(8) of the Code, is vitiated. There had been no such written instruction to the authorised representative of the homebuyers and he could not have determined what was the majority mark of homebuyers. It is further submitted that even if the said authorised representative could have consented to put both the resolution plans to vote contrary to the mandate of Regulation 39(3), CoC could not

have acted contrary to the provisions of IBC as there could be no waiver of the statute. It is submitted that these objections could have been, and had rightly been, raised before the Adjudicating Authority because there is no other forum to raise these concerns; but the Adjudicating Authority has not addressed them at all.

159.3.5. The issue relating to the said land parcel of 758 acres has also been raised by these appellants with the submissions that after the judgment of this Court dated 26.02.2020, the said land ought to have been included in the resolution plan and used in the interest of homebuyers but the Adjudicating Authority has not examined this aspect of the matter either.

159.4. The submissions on behalf of yet another association of homebuyers (appellant in T.C. No. 240 of 2020) are considerably different, where it is prayed that the project related with its members being substantially complete, deserves to be separated from the resolution plan.

159.4.1. It is submitted on behalf of this association that the construction of all 4228 flats in 26 towers of the project “Jaypee Greens Aman” is complete and only the finishing works for Tower Nos. 23, 24, 25 & 27 are pending due to delay in execution of the agreements. It is also submitted that out of 18153 homebuyers of the corporate debtor forming part of the financial creditors, only 459 homebuyers in Project Aman (which amount to 2.53 %) were part of the creditors at the time of voting for the resolution

plan. According to this association, “Jaypee Greens Aman” is an inhabited project where more than 1500 families have already started living and it is situated over 10 kms away from the location of “Wish Town” and hence, should be considered as an independent housing colony and ought to be separated from the resolution plan; and any order on the resolution plan should not have an adverse impact on this project. It is submitted that in relation to the project in question, the resolution applicant is only to complete the finishing work which could be carried out by the IRP himself to avoid further delay whereas, if the resolution plan is followed, these homebuyers shall have to wait for another 18 months to receive possession of the completed flats which would add to their mental agony.

159.4.2. It has also been submitted that the members of this association had deposited an Interest Free Maintenance Deposit (‘IFMD’) and a Maintenance Advance and also executed Maintenance Agreements with JAL; and even though this refundable security deposit was not a part of the information memorandum, the resolution plan in question stakes claim over this amount while ignoring the basic rules of business and to siphon off the hard-earned/borrowed money of the allottees. According to the association, this amount ought to be refunded to the allottees concerned.

159.4.3. It is also submitted that the approved resolution plan only talks about the date of completion of the construction of flats but does not indicate the completion date of the entire project of “Jaypee Greens Aman”; and as construction of flats of this project is carried out, specific

directions need to be issued for completion of the project with all amenities and finishing works.

159.4.4. This association has also relied upon decision of this Court in the case of ***Wg. Cdr. Arifur Rahman Khan & Ors. v. DLF Southern Homes Pvt. Ltd. & Ors.: (2020) SCC OnLine SC 667*** and has prayed for a relief of 6% p.a. simple interest which shall be attached to the allottees of the project “Jaypee Greens Aman” on the total amount paid towards the purchase of the flats in addition to the delay period penalty. It is also submitted that the allottees of Tower Nos. 23, 24, 25 & 27 should not be discriminated and must be treated at par with other allottees, who have already received the penalty for delayed period.

159.4.5. This association has also prayed for directions to IRP to release the payments in a time bound manner to keep the project and its activities as a going concern as the work at the project “Jaypee Greens Aman” has come to a standstill for want of requisite payment of bills of contractors. This association has made yet another prayer for directions to the Noida Authority to issue the necessary Occupancy Certificate.

159.5. Apart from the above-mentioned appellants, a few more homebuyers have filed intervention applications in the leading appeal while essentially reiterating the same contentions that the resolution plan of NBCC is not compliant with the requirements of RERA and that the homebuyers would be put to prejudice in relation to their rights under

RERA. The issue relating to the said 758 acres of land has also been raised.

159.6. For completing the panorama of diverse submissions, we may take note of the fact that the applicant of I.A. No. 84309 of 2020 has filed separate written submissions and has contended that there had been diversion of the money deposited by homebuyers to YEIDA and the same was accepted by JIL and the lenders constituting the CoC without considering that it was a wrongful and fraudulent diversion against accepted norms; that JIL and YEIDA have remained silent on the issue and allowed homebuyers' money to be used in Yamuna Expressway, which acted as an interest free loan to JIL for almost 10 years and therefore, the homebuyers ended up funding 25% of the project of Expressway and the said investment ought to be returned to the homebuyers; that the provisions of the Concession Agreement regarding curing the defaults were never addressed before NCLT and before this Court; that when JIL caused a delay in delivering possession of the flats to the homebuyers, the material adverse effect clause should have been invoked, rather than initiation of the CIRP; that the homebuyers were made aware of liquidation of JIL as the only possibility; that the homebuyers were not provided with the Concession Agreement and even when it was demanded from the IRP, it was not furnished. Therefore, not sharing CA and not providing any such legal advice on CA has put the CIRP proceedings under the scanner and the same be held null and void.

It has further been contended that the resolution plan of NBCC ought to have been rejected as it contravenes several of the provisions of law including that of RERA. It is also contended that the homebuyers to whom flats were delivered could not have been taken out of CoC once it had been constituted; and such taking out has impacted a few thousand homebuyers and thereby, the voting weightage by about 10%. The applicant has further submitted that the present one is an exceptional case requiring innovative approach and has even suggested the alternative that Government of Uttar Pradesh takes over the full project as it is, provided it meets all rights of the homebuyers! It is submitted that this could be a possibility under Article 142 of the Constitution of India.

160. The submissions so made have been duly opposed by the persons/entities standing in favour of the resolution plan as approved by the Adjudicating Authority. For avoiding unnecessary expansion, we deem it appropriate to take note of the submissions made on behalf of IRP and NBCC as also the financial creditor of JIL in this regard.

160.1. It is submitted on behalf of IRP and NBCC that these associations and homebuyers have no locus standi to challenge the approved resolution plan because, in terms of Section 25A(3A) read with Section 21(6A) of the Code, the homebuyers vote in the CoC as a class; even a dissenting individual within the class is bound by the decision of the majority of that class; and as such, this decision operates as a statutory estoppel against the members of the entire class. It is submitted that the

manner of voting by homebuyers has been extensively dealt with by this Court in ***Pioneer Urban*** (supra) and the Adjudicating Authority has, in accordance with Section 25A(3A) and the law laid down in ***Pioneer Urban***, rightly dealt with the issue of 'dissenting homebuyers' in paragraph 126 of the order impugned. It is further submitted that the legislature has recognised the likelihood of conflicting interests among the groups of homebuyers and accordingly, the IBC amendment dated 16.08.2019 has provided a 'drag along' mechanism so far as voting by homebuyers in relation to the approval of a resolution plan is concerned, by way of insertion of sub-section (3A) to Section 25A of the Code. It is, therefore, evident that the minority shall be dragged along with the majority in voting on approval of a resolution plan and hence, the appellants are bound by the decision taken by the collective majority of the homebuyers.

160.2. It is also submitted that as per Section 61 of the Code, an appeal can be filed by a person who is aggrieved by the approval of the resolution plan but, considering that homebuyers as a class have assented to the resolution plan of NBCC, individual homebuyers cannot be treated as dissenting creditors or even aggrieved persons within the meaning of Section 61 of the Code. It is, therefore, submitted that such appeals ought to be dismissed for having been filed without any locus.

160.3. It is yet further submitted that the appellant Wish Town Society attempted to submit an application and objections that were rejected by

the Adjudicating Authority on 31.01.2020, essentially on the grounds that the society had failed to implead itself as the party to the application; that only 448 homebuyers had voted against the resolution plan but the society was claiming to represent 1500 homebuyers without mentioning as to who were the persons who authorised filing of the objections; and that the society had no locus to raise objections. It is submitted that now the society is seeking to place on record a list of alleged 1248 members but no such list was produced before the Adjudicating Authority and cannot be allowed to be introduced at the appellate stage.

160.4. As regards the questions related with RERA, it is submitted that the alleged violation of RERA has been contended by these homebuyers without demonstrating the manner in which any provision under RERA is being violated; and that the resolution plan, at no instance, states that it would not comply with the applicable laws. However, it is submitted that in the event there is any conflict between the approved resolution plan and the provisions of RERA, the approved resolution plan shall remain binding on all stakeholders under Section 31 of the Code and would override the provisions of RERA in accordance with Section 238 of the Code.

160.5. It is also submitted that resolution plan can alter the contracts with financial creditors and the Code gives wide powers to the resolution applicant to modify financial and operational contracts so as to best serve the interests of all the stakeholders. It is submitted that, as per the proposal under the resolution plan, NBCC would construct and deliver the

flats to homebuyers but would not be paying outstanding interests to any homebuyer, and such a proposition is permissible under Regulation 37(f) of CIRP Regulations, that permits a resolution plan to reduce any debts due to any creditors; and such an amendment to the contracts having been agreed to by the overwhelming majority of the CoC, remains binding on all the homebuyers.

160.6. As regards liquidation costs, it is submitted that under Regulation 39B of the CIRP Regulations, CoC has been given a discretion to ascertain the liquidation costs at the time of approval of a resolution plan or deciding to liquidate a company; and, as per the *Explanation* to Regulation 39B, liquidation costs have the same meaning as given to it under Regulation 2(1)(ea) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, whereunder 'liquidation costs' have been defined to mean, *inter alia*, the costs in the liquidation process of a company. It is submitted that non-submission of liquidation costs under Form-H is not an irregularity that is fatal to the CIRP or the resolution plan; that the liquidation costs have no bearing on the feasibility and viability of a resolution plan; and liquidation costs are different from liquidation value, which has been defined under Regulation 2(k) of the CIRP Regulations to mean '*the estimated realisable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date*'. The IRP under Form-H has mentioned the fair value and liquidation value of the corporate debtor.

160.7. As regards the objections raised by Jaypee Aman Owners Welfare Association for exclusion from resolution plan, it is submitted that the NBCC's resolution plan is intended to cover all the homebuyers of JIL, where the creditor-debtor relationship continues to subsist i.e., where the final settlement between the homebuyer and JIL, through execution of sub-lease deed, has not been achieved. With reference to the provisions in the resolution plan, it is submitted that the plan specifically provides that "Aman Project" shall be completed within a period of 15 months from the date resolution applicant acquires the shareholding of the corporate debtor; and such an indicative period has been provided in respect of all the pending projects of JIL, which are to be completed by NBCC in terms of the resolution plan. It is further submitted that the contents of the plan including the indicative delivery schedules were available to all homebuyers and they had, in full cognizance of the same, chosen to approve the plan in question which would remain binding on all the stakeholders of the corporate debtor in terms of Section 31 of the Code once it is approved; and therefore, the said association is estopped from challenging, or seeking an exit from, the resolution plan as the plan stands approved. In regard to the submission that the IRP may be directed to do certain things like apply for OCs in respect of certain towers or issue OOPs, it is submitted that the IRP has disclosed in an affidavit before the Court that during the CIRP process, he has been managing JIL as a going concern and has continued construction of residential and

commercial dwelling units and has issued OOPs for 7996 units based on the OCs received from the Noida Authority; and out of the OOPs issued, sub-lease registration of 6429 has been completed. It is submitted that the claims of a homebuyer vis-à-vis JIL stand settled on execution of the sub-lease deed and, therefore, all those homebuyers whose sub-lease deeds have not been executed shall be bound by the resolution plan approved by the CoC of JIL.

160.8. Again, as regards IFMD, Step 9 in Schedule 2 has been referred and it is submitted that the above provision is only in relation to the monies paid by the homebuyers to JAL (either directly or indirectly, including payment through JIL) as the resolution applicant does not and will not have any control over JAL.

160.9. Apart from the above, it has also been submitted on behalf of IRP that Regulation 36A(7) applies only to expression of interest which cannot be conditional but that provision does not apply to the resolution plan and it is no one's case that the expression of interest submitted by NBCC was conditional. The amendment to the Code with effect from 28.12.2019, that is, before passing of the order by NCLT has also been referred to submit that with Section 32A having been inserted to the Code, NBCC would be entitled to claim the protection thereunder and the question of withdrawing from the resolution plan for the reason stated in Clause 2 of Schedule 3 does not arise.

160.10. The financial creditor of JIL has also opposed the submissions made by these dissatisfied homebuyers and it is submitted that they have erroneously identified ICICI Bank to be similarly situated with them. It is submitted that this bank is a dissenting financial creditor in terms of the resolution plan unlike those dissatisfied homebuyers; and this bank is entitled to a different treatment in terms of Section 30(2)(b) of the Code.

161. We have given anxious consideration to the wide variety of submissions made by dissatisfied homebuyers and the counters thereto.

162. Before proceeding further, it appears appropriate to point out that the contentions urged in regard to simultaneous voting over two resolution plans have already been discussed and rejected in Point **B** hereinbefore. These contentions, in our view, have unnecessarily been taken by the persons who wish to remain on the dissenting side of the fence by carving out every possible objection, whether of substance or not. The issue relating to 758 acres of land, that is now available to JIL after the judgment of this Court in the case of **Anuj Jain**, is being considered separately in Point **K infra**. Likewise, the issue relating to the amount of INR 750 crores deposited by JAL pursuant to the directions in the case of **Chitra Sharma** as also other areas of accounting between JAL and JIL including the issue relating to IFMD are being considered separately in Point **J infra**. These issues, thus, would require no comment herein.

163. Taking up other aspects of the rival submissions and having examined the scheme of the Code in relation to a plan of insolvency resolution, we are clearly of the view that the propositions of some of the associations and individual homebuyers to claim themselves as ‘dissenting homebuyers’ and thereby, ‘dissenting financial creditors’ do not stand in conformity with the scheme of the Code and the manner of voting on a plan of resolution by the Committee of Creditors.

164. As noticed, for the purpose of approval of a resolution plan in CIRP, what is required is its approval by a vote of not less than 66% of the voting share of financial creditors; and what is counted for the requisite percentage (66) is the voting share of the financial creditors and not the individual votes of financial creditors. The expression ‘voting share’ has been precisely defined in clause (28) of Section 5 to mean the voting rights of a single financial creditor in the Committee of Creditors, which is based on the proportion of the financial debt owed to such a financial creditor vis-à-vis the financial debt owed by the corporate debtor. In the scheme of the Code with *Explanation* to Section 5(8)(f), the debt owed by the corporate debtor towards allottees of the real estate project is considered to be a financial debt but for that matter, every individual allottee does not become an independent financial creditor of the corporate debtor, if the number of allottees are 10 or more, in terms of the meaning assigned to the expression “class of creditors” in CIRP

Regulations⁸⁵. The allottees, like the homebuyers of JIL, falling within clause (f) of sub-section (8) of Section 5, do carry the status of financial creditors but they would be falling in a class collectively; and the voting share of that class would be in terms of the financial debt owed to that class as a whole.

164.1. Specific provisions have been made for voting on behalf of a class of creditors in terms of clause (b) of sub-section (6A) of Section 21 by the authorised representative. The rights and duties of the authorised representative of financial creditors are also delineated in Section 25A of the Code and any doubt, as to how he would vote and how his vote is counted, is put to rest by insertion of sub-section (3A) to Section 25A, which provides that notwithstanding anything to the contrary contained in sub-section (3), the AR shall cast his vote on behalf of all the financial creditors he represents *‘in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote’*.

164.2. At this juncture, we may usefully take note of the enunciation of this Court in the case of **Pioneer Urban** (supra) that has direct bearing on the questions raised herein. The decision in **Pioneer Urban** was rendered by this Court in the backdrop of challenge to the said amendment made to the Code whereby, the allottees of real estate

85 The relevant definition clause in CIRP Regulations, inserted with effect from 04.07.2018 reads as under: -

“(aa) “class of creditors” means a class with at least ten financial creditors under clause (b) of sub-section (6A) of section 21 and the expression, “creditors in a class” shall be construed accordingly;”

projects were provided the status of financial creditors by way of insertion of *Explanation* to sub-clause (f) of clause (8) of Section 5 of the Code and with corresponding insertion of Section 25A as also sub-section (6A) to Section 21. While dealing with such a challenge, in ***Pioneer Urban*** (supra), this Court extensively referred to the objects and reasons for these amendments as also their meaning, connotation and effect. The relevant part of the matter, in regard to the issue at hand, is that along with the aforesaid amendment, this Court also examined the amendment of Section 25A with insertion of sub-section (3A) by Act 26 of 2019. This Court explained the connotation of the said amendment and its logic, while rejecting the challenge to Section 21(6A) and 25A of the Code, in the following: -

“63. Given the fact that allottees may not be a homogeneous group, yet there are only two ways in which they can vote on the Committee of Creditors—either to approve or to disapprove of a proposed resolution plan. Sub-section (3-A) goes a long way to ironing out any creases that may have been felt in the working of Section 25A in that the authorised representative now casts his vote on behalf of all financial creditors that he represents. If a decision taken by a vote of more than 50% of the voting share of the financial creditors that he represents is that a particular plan be either accepted or rejected, it is clear that the minority of those who vote, and all others, will now be bound by this decision. As has been stated by us in *Swiss Ribbons*, the legislature must be given free play in the joints to experiment. Minor hiccups that may arise in implementation can always be sorted out later. Thus, any challenge to the machinery provisions contained in Sections 21(6-A) and 25A of the Code must be repelled.”

(emphasis in bold supplied)

164.3. In the face of clear language of sub-section (3A) of Section 25A of the Code, read with the law declared by this Court in ***Pioneer Urban***

(supra), the suggestion on behalf of the dissatisfied homebuyers that the said provision was only intended to iron out the logistical issues and technical difficulties is required to be rejected altogether. The said provision, as held by this Court, is to iron out the creases that might have been felt in the proper working of Section 25A; and it is made explicit that the allottees, even if not a homogeneous group, they could vote only either to approve the resolution plan or to disapprove the same. Divergence of the views within their own class may exist but, when coming to the vote in the Committee of Creditors, their vote would be that of a class.

164.4. Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote over the resolution plan. It is obvious that if this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the

Code. In the larger benefit and for common good, the democratic principles of the determinative role of the opinion of majority have been duly incorporated in the scheme of the Code, particularly in the provisions relating to voting on the resolution plan and binding nature of the vote of authorised representative on the entire class of the financial creditor/s he represents.

164.5. To put it in more clear terms qua the homebuyers, the operation of sub-section (3A) of Section 25A of the Code is that their authorised representative is required to vote on the resolution plan in accordance with the decision taken by a vote of more than 50% of the voting share of the homebuyers; and this 50% is counted with reference to the voting share of such homebuyers who choose to cast their vote for arriving at the particular decision. Once this process is carried out and the authorised representative has been handed down a particular decision by the requisite majority of voting share, he shall vote accordingly and his vote shall bind all the homebuyers, being of the single class he represents.

165. In the present case, on one hand, it has consistently been submitted by the stakeholders, particularly the homebuyers, that liquidation of JIL should be eschewed, but on the other hand, some of the associations and homebuyers have attempted to find faults with the resolution plan to which their majority, who voted, took the decision for approval. There is no scope for any homebuyer suggesting himself to be

a dissenting financial creditor merely because he was not with majority within the class. His dissatisfaction does not partake the legal character of a dissenting financial creditor.

165.1. A rather overambitious attempt has been made by the homebuyers who have filed separate appeal (T.C. No. 242 of 2020) to refer to the percentage of voting share of homebuyers and it has been suggested that out of the total voting share of homebuyers i.e., 57.66%, the assenting voting share was only 34.10%, whereas 22.51% abstained and 1.05% dissented. It is submitted that roughly, for every 3 homebuyers who voted for NBCC, 2 had dissented/abstained. Even assuming the percentage as stated by these appellants to be correct, we are at a loss to find any logic in the submissions so made. A re-look at sub-section (3A) of Section 25A would make it clear that '50%' for the purpose of the said provision is of those homebuyers who cast their vote. On the percentage figures as given before us, out of the total voting share of homebuyers at 57.66%, the persons carrying 22.51% voting share simply abstained and of the persons casting their votes, ayes were having the voting share of 34.10% whereas nays were having the voting share of 1.05%. Obviously, 50% would be counted only of the persons who chose to vote where, much higher than 50% of the homebuyers who cast their vote, stood for approval of the resolution plan of NBCC⁸⁶. Such a voting cannot be set at

86 The IRP has given the details of voting by the allottees in the following terms (in paragraph 4 of its written submissions under the heading- 'Issues raised by homebuyers'): -

".... In the present case, out of 21781 allottees forming the class of allottees, 12147 cast their vote on the Resolution Plan. (It is pertinent to mention that through the resolution plan process of JIL, around 9000 allottees have always remained non-responsive and abstained from voting at any time.) Out of 12147

naught for the purported dissatisfaction of a miniscule minority, which was about 3.69% in terms of the number of persons voting; and about 1.05% in terms of the voting share. They have to sail along with the overwhelming majority. That is the purport and effect of 'drag along' or 'sail along' provisions in the scheme of the Code.

166. For what has been discussed hereinabove, the suggestions that there was no cent percent approval of the resolution plan, or that there was no consensus amongst homebuyers, or that the plan of Suraksha Realty was considered better, are required to be rejected. It is not the case that the AR of homebuyers has not voted in accordance with the decision taken by a vote of more than 50% of the voting share of homebuyers who did cast their vote. In the given set of facts, we have no hesitation in thoroughly disapproving the unnecessary imputations made by one set of homebuyers against the AR that he made any incorrect statement before the CoC. That being the position, and the authorised representative having voted in accordance with the instructions given to him from the class of financial creditors i.e., homebuyers, every individual falling in this class remains bound by his vote and any association or homebuyer of JIL cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way

allottees who cast their vote (present and voting), 11699 allottees voted in favour of the Resolution Plan while 448 voted against the Resolution Plan. Thus, the number of allottees who voted in favour of the Resolution Plan, this 11699, comprise 96.31% of the total number of allottees present and voting....”

of appeal. All such objections and appeals are required to be rejected on this ground alone.

167. The suggestion about the so-called statutory right of appeal has only been noted to be rejected. The homebuyers as a class shall be deemed to have voted in favour of approval of the resolution plan of NBCC; and once having voted so, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. The statute, that is IBC, has itself provided for estoppel against any such attempted opposition to the plan by a constituent of the class that had voted in favour of approval.

168. The misplaced assumptions on the part of dissatisfied homebuyers have gone to the extent that they have attempted to put themselves at par with the dissenting financial creditors like ICICI Bank, who carry an entirely different legal status in CIRP, for being not within the class of homebuyers and being of a different class of financial creditors. The said financial creditor has rightly opposed these submissions and has rightly pointed out that its rights in terms of Section 30(2)(b) of the Code stand at an entirely different footing.

169. Another attempt has been made as regards calculation of voting weightage by suggesting that the homebuyers to whom flats have been delivered could not have been taken out of CoC. Even this suggestion remains bereft of substance. When a person does not stand in the capacity of a financial creditor i.e., to whom no financial debt is owed by

the corporate debtor, he could only be taken out of the block of financial creditors. We are impelled to observe that consideration and voting at the resolution plan is not a process or event where any objection or grievance could be raised even by a person who does not stand in the capacity of a financial creditor. His remedies, in accordance with law, could be elsewhere but not in this process of approval of resolution plan under the Code.

169.1. For the same reasons as above, the suggestion to keep any housing project which is already complete or nearing completion out of the purview of the resolution plan is required to be rejected. When approval of the resolution plan is to be voted by CoC; and its composition is specified by the Code, there is no such concept of keeping any particular homebuyer out of CoC even if the relationship of creditor and debtor subsists between him and the corporate debtor.

170. To sum up this part of discussion, in our view, after approval of the resolution plan of NBCC by CoC, where homebuyers as a class assented to the plan, any individual homebuyer or association cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance.

171. Once we have held that these dissatisfied homebuyers and associations are not entitled to put up any challenge to the resolution plan contrary to the decision of the requisite majority of their class, all their objections are required to be rejected outright. Yet, in the interest of

justice, we have examined these objections to find if there be any aspect worth consideration within the periphery of Section 30(2) of the Code. We find none.

171.1. The major part of the objections of these dissatisfied homebuyers relate to the purported rights under RERA. We are afraid, even such propositions do not stand in conformity with law. The interplay of RERA and IBC also came up for fuller exposition in the case of ***Pioneer Urban*** (supra) and this Court rejected the contentions urged on behalf of the petitioners that RERA being a special enactment dealing with real estate development projects must be given precedence over the Code. In ***Pioneer Urban***, this Court noticed Section 238 of the Code and held as under: -

“25. It is significant to note that there is no provision similar to that of Section 88 of RERA in the Code, which is meant to be a complete and exhaustive statement of the law insofar as its subject-matter is concerned. Also, the non obstante clause of RERA came into force on 1-5-2016, as opposed to the non obstante clause of the Code which came into force on 1-12-2016. Further, the amendment with which we are concerned has come into force only on 6-6-2018. Given these circumstances, it is a little difficult to accede to arguments made on behalf of the learned Senior Counsel for the petitioners, that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the Explanation to Section 5(8)(f) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. The fact that RERA is *in addition to and not in derogation of* the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Also, it is important to remember that as the authorities under RERA were to be set up within one year from 1-5-2016, remedies before those authorities would come into effect only on and from 1-5-2017 making it clear that the provisions of the Code,

which came into force on 1-12-2016, would apply in addition to RERA.”

29. It is clear, therefore, that even by a process of harmonious construction, RERA and the Code must be held to co-exist, **and, in the event of a clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute viz. the Code.**

30. As a matter of fact, the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the corporate debtor. This is to take place by replacing the management of the corporate debtor by means of a resolution plan which must be accepted by 66% of the Committee of Creditors, which is now put at the helm of affairs, in deciding the fate of the corporate debtor. Such resolution plan then puts the same or another management in the saddle, subject to the provisions of the Code, so that the corporate debtor may be pulled out of the woods and may continue as a going concern, thus benefitting all stakeholders involved. It is only as a last resort that winding up of the corporate debtor is resorted to, so that its assets may be liquidated and paid out in the manner provided by Section 53 of the Code. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. The object of RERA is to see that real estate projects come to fruition within the stated period and to see that allottees of such projects are not left in the lurch and are finally able to realise their dream of a home, or be paid compensation if such dream is shattered, or at least get back monies that they had advanced towards the project with interest. At the same time, recalcitrant allottees are not to be tolerated, as they must also perform their part of the bargain, namely, to pay instalments as and when they become due and payable. Given the different spheres within which these two enactments operate, different parallel remedies are given to allottees under RERA to see that their flat/apartment is constructed and delivered to them in time, barring which compensation for the same and/or refund of amounts paid together with interest at the very least comes their way. If, however, the allottee wants that the corporate debtor's management itself be removed and replaced, so that the corporate debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy is available is recognised by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection Fora, he being given the choice to withdraw such complaint and file an application before the adjudicating officer under RERA read with Section 88. In similar circumstances, this Court in *Swaraj Infrastructure (P) Ltd. v. Kotak Mahindra Bank Ltd.* has held that the Debts Recovery Tribunal proceedings under the Recovery of

Debts Due to Banks and Financial Institutions Act, 1993 and winding-up proceedings under the Companies Act, 1956 can carry on in parallel streams (see paras 21 and 22 therein)."

(emphasis in bold supplied)

171.1.1. In view of the above, all the contentions regarding operation of RERA and claim thereunder or any other claim for compensation or interest, when not standing in conformity with the approved resolution plan, deserve to be rejected. In fact, the question as to what kind of agreement should be entered into with financial creditors like homebuyers is essentially a matter falling within the arena of commercial decision; and needless to repeat that in the process of approval of a resolution plan, the factors related with commerce are left to the wisdom of the Committee of Creditors. When the Committee of Creditors has approved the proposals of NBCC in the resolution plan, the same cannot be tinkered with reference to the grievance of some of the homebuyers about deprivation of adequate interest or compensation. In this view of the matter, the decision of this Court in the case of **Wg Cdr. Arifur Rahman Khan** (supra) needs no discussion because that would not apply to the issues presently under consideration.

172. Yet another objection as regards liquidation costs has rightly been clarified by the IRP and NBCC that under Regulation 39B of the CIRP Regulations, the CoC has been given a discretion to ascertain liquidation costs at the time of approval of the resolution plan or deciding to liquidate the company. This aspect, essentially lying within the arena of commerce, is also required to be left to the commercial wisdom of the Committee of

Creditors. In any case, this aspect cannot be said to have a bearing on the decision as regards feasibility and viability of the resolution plan of NBCC and is required to be rejected. Similarly, the objections with reference to Regulation 36A(7) are also required to be rejected because there had not been any condition imposed by NBCC in expression of interest. As regards the conditions in the resolution plan, particularly Clauses 1 and 2 of Schedule 3 thereof, as already indicated, the matter relating to the said amount of INR 750 crores deposited by JAL pursuant to the directions of this Court in **Chitra Sharma** (supra) is being considered separately; and the stipulation in Clause 2 of Schedule 3 is even otherwise redundant in view of insertion of Section 32A to the Code, as discussed by the Adjudicating Authority, which need not be repeated. Suffice it to observe for the present purpose that the process of approval of the resolution plan is not vitiated because of such stipulations. Needless to say that these observations are not to be construed as our approval of Clause 1 of Schedule 3 of the resolution plan, because its legality and validity is being examined separately in Point **J** *infra*.

173. We have summarised the major aspects of multifarious submissions, objections and suggestions projected before us but find that the attempt to raise such objections is itself baseless for being not in conformity with the provisions of the Code read with the law declared by this Court in **Pioneer Urban** (supra). The objections and submissions do not carry any merits either. In this view of the matter, we are not entering

into the other submissions made by NBCC as regards the number of members of one of the appellant-association because nothing turns upon that.

174. Before concluding on this segment of discussion, we are impelled to indicate that the objections and suggestions by dissatisfied homebuyers have gone to the extent of suggesting that IRP should be directed to release funds for raising construction; the Noida Authority be directed to issue the necessary Occupancy Certificate; and NBCC be directed to complete the entire project within 3 years and be prohibited from charging the homebuyers with any extra amount towards arbitrary increase in the name of 'Super Built-Up Area'. An objection is stated that there had been diversion of the money deposited by homebuyers to YEIDA; and the suggestion has gone to the extent that the project may be taken over by the Government of Uttar Pradesh. These and other similar nature submissions, which do not relate to the real questions in controversy, neither carry any meaning nor any substance; they have only been noted to be rejected.

175. For what has been discussed above, we hold that the homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person; the question of violation of the provisions of the Real Estate (Regulation and Development) Act, 2016

does not arise; the resolution plan in question is not violative of the mandatory requirements of the CIRP Regulations; and when the resolution plan comprehensively deals with all the assets and liabilities of the corporate debtor, no housing project could be segregated merely for the reason that the same has been completed or is nearing completion._

Point J

INR 750 crores and accounting between JAL and JIL

176. We now need to enter into another area of serious dispute in these matters, which relates to the claim over the amount of INR 750 crores (which was deposited by JAL pursuant to the directions of this Court in the case of **Chitra Sharma**) and the interest accrued thereupon. On one hand, JAL and the persons/entities related with it, including its homebuyers and institutional financial creditor, assert that this money is the property of JAL and ought to come back to JAL but, on the other hand, the resolution applicant NBCC as also the persons/entities related with the corporate debtor JIL, including its homebuyers and the institutional financial creditor, assert that this money is a part of the assets of JIL and the Adjudicating Authority has rightly held so. In a third angle, an association of homebuyers of JAL submits that a part of this amount be designated to complete the construction work in relation to their project. Yet another angle is projected by some of the dissatisfied homebuyers of JIL, who suggest that NBCC is simply aiming at profiteering by getting hold of this money but without making any

corresponding provision in the resolution plan for its appropriate use for the benefit of homebuyers. Added to these rival claims are the other disputes of accounting, in relation to the advance made by JIL and its homebuyers to JAL towards special advance and Interest Free Maintenance Deposit etc. In fact, it has been the submission on behalf of JAL that either the entire amount of INR 750 crores with accrued interest be returned to it or in the alternative, after reconciliation of accounts, its liability towards JIL be adjusted from this corpus and balance be refunded to it. In this scenario, we have formulated separate questions regarding the treatment of this amount of INR 750 crores and accrued interest and regarding reconciliation of accounts between JAL and JIL but, for being interlaced, these questions are taken up for determination together.

177. Indisputably, this sum of INR 750 crores was deposited by JAL pursuant to the orders passed by this Court in the case of **Chitra Sharma** (supra). While finally deciding the case of **Chitra Sharma** by the judgment dated 09.08.2018, this Court took note of myriad features of the case and also took note of the claim of some of the homebuyers to allow this money to be utilised for making refunds but declined such a prayer and transferred this money to the NCLT.

177.1. In the process taken up thereafter, the relevant facts concerning this amount were spelt out by IRP in the information memorandum. Thereafter, in the resolution plan, NBCC rather made the availability of

this corpus a condition precedent for implementation of the plan in the very first clause of its 'reliefs and concessions' in the following terms: -

"INR 750 Cr was deposited by JAL with the Hon'ble Supreme Court and which amount (with the interest accrued thereon) was transferred to the Adjudicating Authority as per directions of the Hon'ble Supreme Court, with a direction that such monies shall continue to remain invested and parties shall bide by such directions as may be issued by the Adjudicating Authority.

This amount of INR 750 Cr along with the interest accrued thereon will be made available to the Corporate Debtor/Resolution Applicant. Post receipt by the Corporate Debtor, this amount of INR 750 Cr will be treated in the books of accounts of the Corporate Debtor as equity infusion by the Existing Promoters and the corresponding equity of the Existing Promoters shall subsequently be extinguished in a manner similar to that adopted for extinguishment of other equity holding of the Existing Promoters under this Resolution Plan including by way of Capital Reduction or selective Capital Reduction. In the event, the said amount of INR 750 Cr along with the interest accrued is not made available to the Resolution Applicant/Corporate Debtor then the Resolution Applicant has the right to withdraw from this process without any liability of any nature on the Resolution Applicant."

177.2. The resolution plan was approved by the Committee of Creditors; meaning thereby that the aforesaid clause was accepted by the Committee of Creditors. However, the claim towards this amount of INR 750 crores with accrued interest became a bone of contention when the Adjudicating Authority (NCLT) took up the process of approval of the resolution plan, particularly for JAL staking its claim over this amount as being the rightful owner thereof. In this regard, the Adjudicating Authority, after taking note of the orders passed by this Court in the case of **Chitra Sharma** (supra), concluded that the deposit made by JAL was always meant for the benefit of the homebuyers of JIL and became an asset of the corporate debtor JIL; and the said amount was to be utilised towards

securing the interests of homebuyers and fulfilling the obligations made to them, i.e., offering possession of the residential units after completing necessary construction or making refunds, as the case may be.

178. While questioning the aforesaid stipulation in the resolution plan and this part of the order impugned, vast variety of submissions have been made on behalf of JAL, its institutional financial creditor and its homebuyers.

178.1. It has been contended on behalf of JAL that the said sum of INR 750 crores undisputedly belongs to JAL, as the same was deposited by it on the directions of this Court in the order dated 11.09.2017 in **Chitra Sharma** (supra). It is submitted that this Court ordered the deposit to be made by JAL so as to provide an interim workable arrangement and relief to the homebuyers, who were, at the relevant time, not recognised as financial creditors of the corporate debtor and had no say in the resolution process of a company in which, they had made deposits for their future homes. However, it is submitted, the purpose of this deposit was not aimed at resolving the insolvency of JIL so as to make it an asset of JIL; and it was clearly mentioned in the information memorandum that the sum of INR 750 crores was deposited by JAL and was not an asset of JIL. Moreover, the interest payable would also accrue to JAL and would be an asset of JAL.

178.1.1. It has been forcefully contended that the assets belonging to a third party cannot be utilised towards the resolution of insolvency of a

corporate debtor, as held by this Court in the case of **Embassy Property** (supra). The decision in **Anuj Jain** (supra) has also been referred to submit that therein too, this Court disallowed JIL's assets from being utilised for securing the dues owed by JAL.

178.1.2. With reference to the proceedings in the case of **Chitra Sharma**, it is submitted that the purpose for which this deposit was ordered has been achieved due to the amendment of IBC and there is no reason for allowing this amount to be treated as an asset of JIL. It is also submitted that in **Chitra Sharma**, this Court directed opening of the web-portals for the homebuyers of both JIL and JAL; and this makes the position clear that the said amount was meant for the homebuyers of JAL too. Hence, the Adjudicating Authority (NCLT) proceeded on an erroneous premise that the amount was only for the refund of JIL's homebuyers, thereby seriously prejudicing the homebuyers of JAL.

178.1.3. It is submitted that JAL is committed to make the pending homes for its own homebuyers for which it requires funds; and utilisation of the deposit made by JAL towards the insolvency resolution of JIL would result in a 'Domino Effect' and would expose JAL to the risk of insolvency and, on the other hand, would result in unjust enrichment of the resolution applicant (NBCC).

178.1.4. In another limb of arguments, it is submitted that JAL is conscious of its liability towards JIL, which was INR 195 crores as on 31.03.2020; and since JAL is not in a position to make this payment

unless the amount of INR 750 crores is refunded to it, in all fairness, JAL offers that this admitted liability towards JIL could be discharged by appropriating from the said amount of INR 750 crores and the balance be refunded to JAL. It is submitted that the said payable amount may be verified by IRP or by a chartered accountant appointed by him. In this regard, while referring to the background facts relating to the construction contracts given to JAL and advance payment on that account made by JIL, the term in the resolution plan providing for termination of construction contracts has also been referred and it has been prayed that the balance due from JAL could be adjusted from the said amount of INR 750 crores, if NBCC makes a formal submission to the effect that it would be terminating the construction agreements. The written submissions on behalf of JAL in this regard could be reproduced as under: -

“G. AMOUNTS DUE FROM JAL TO JIL

26. JIL has entered into various agreement(s)/ work contract(s) for development of Yamuna Expressway and development/maintenance of other land parcels located at Noida, Jaganpur, Mirzapur, Tappal & Agra. Pursuant thereto, at the request of JAL, JIL has advanced to JAL a sum aggregating to Rs. 716 Crores (as on 31.03.2018) which was recoverable from JAL's RA Bill as also when construction work was carried out.

27. The said sum was accordingly been recovered from JAL's RA Bill since August 2017 leaving an outstanding of Rs.274 Crores as on 31.12.2019. This has further reduced to a sum aggregate of Rs.195 Crores as on 31.03.2020 (as per the audited accounts), and is likely to be reduced by approx. Rs.165 Crores within a period of 12 months as per the work plan drawn by the RBSA (Advisors to the CIRP) [**@Pg.143 of JAL's Additional Affidavit**].

28. Therefore, JAL is conscious of the fact that liability towards JIL now stands to Rs.195 Crores (as on 31.03.2020 and is reducing per the construction work). Since JAL is not in a position to make this payment independently unless the Rs.750 Crores is refunded back to it, hence, in all fairness and *bonafide*, JAL offers that this

admitted and undisputed liability towards JIL can be discharged by appropriating the said liability from the Rs.750 Crores and the balance may be directed to be refunded. This amount may be verified by the RP or by a chartered accountant appointed by him.

29. However, it is pertinent to mention herein that NBCC's Resolution Plan treats the contracts for construction (between JIL and JAL) in the following manner **[@Pg.47of JAL's Additional Affidavit dated 12.05.2020]:**

"(vi) Resolution Applicant shall have a right to terminate the current construction contracts with Jaiprakash Associates Limited, ("JAL"), which are on cost plus basis and enter into fresh construction contracts with the vendors as may be selected by the Resolution Applicant in accordance with its business policies and such contracts shall be entered into on arms' length basis as per the market standard. Provided that JAL shall not be entitled to terminate such construction contracts for a period of 12 months from the Approval Date." (Emphasis Supplied)

30. The above clearly shows that JAL is at the mercy of NBCC wherein NBCC is free to terminate the contracts for construction unilaterally, whereas JAL cannot. Therefore, it is submitted that the aforementioned balance of Rs.195 Crores (which was to be appropriated towards the construction of JIL's Projects) can only be adjusted/ set off from the sum of Rs.750 Crores if NBCC makes a formal submission to the effect that it would be terminating the construction agreements."

(emphasis is in original)

178.1.5. It has, therefore, been prayed that the said sum of INR 750 crores along with accrued interest be ordered to be refunded to JAL or in the alternative, the refund may be ordered after appropriating the amount of liability of JAL towards JIL, in terms of above-quoted paragraph 30 of the written submissions.

178.2. While supporting the submissions for return of INR 750 crores, the homebuyers of JAL have contended that the said deposit was not meant to finance construction, or to grant equity, or loan, or for any charitable purpose; that the Supreme Court ordered the deposit to be made by JAL

only to provide an interim workable arrangement and for relief to the homebuyers, as they were not having the status of a financial creditor under the Code; that the purpose of the deposit was not for resolving the insolvency of JIL; and that the information memorandum did not show this sum of INR 750 crores as an asset of the corporate debtor JIL. With reference to the condition precedent mentioned in the resolution plan involving the transfer of INR 750 crores in favour of NBCC, it is submitted that the question requiring consideration is as to whether NBCC could have laid a claim over the said sum of INR 750 crores as a condition of its bid? Further, an unjustified deprivation of the rightful amount to JAL and deprivation of the right of utilisation of the amount by the developer acts as a serious prejudice and detriment to the legal rights and interests of the homebuyers of JAL. It is submitted that the reasoning and findings of NCLT in the order dated 03.03.2020 are flawed and without any basis. The amount deposited has not been shown in the books of accounts of JIL as its asset and the NCLT had no authority to allow the same to be claimed by NBCC under a conditional resolution plan. It is further submitted that the order of the NCLT puts the homebuyers of JIL at an advantageous position at the cost of the interests of the homebuyers of JAL, which is contrary to the provisions and spirit of the CIRP Regulations and the Code as a whole. The homebuyers of JAL have prayed that this amount of INR 750 crores with accrued interest be released to JAL so as to secure the interests of its homebuyers.

178.3. An association of homebuyers of JAL has also challenged the said order of NCLT dated 03.03.2020 directly in this Court and has submitted that “Knights Court Project” was supposed to be completed by 2015 and the homebuyers have already paid 95% of the sale consideration to JAL. It is submitted that the sum of INR 750 crores was deposited by JAL for the benefit of homebuyers of JAL and JIL and it was stated that 92% of the homebuyers wanted to obtain possession of the flat, which is possible only after necessary construction takes place. It is further submitted that the money of the contributors of JAL ought to be first utilised for the construction of the flats of “Knights Court Project” and not towards the resolution plan of JIL or for returning to JAL. This association has stated its own grievance that in the simultaneously held proceedings under RERA, JAL has demanded from its members another sum of INR 98 crores and it is submitted that the liability for completion and development of flats of the aforesaid project was of JAL but there was an unexplained delay of 5-7 years on the part of JAL; and therefore, it was onerous that JAL was demanding such an amount from its members.

178.3.1. It has been submitted on behalf of this association of homebuyers of JAL that only an amount of INR 160 crores is required to finish the aforesaid project and it has been prayed that the same be made available from the said INR 750 crores deposited by JAL, for completing the houses of the members of this association.

178.4. The institutional financial creditor of JAL has contended that the deposit of INR 750 crores was made by JAL out of its own money and has continued to be its asset; and that in the absence of any direction by the Supreme Court or any legal transfer, the ownership of this deposit would not change, and this money is required to be returned to JAL. It is submitted that this Court has consistently laid down that an act of the Court cannot prejudice any party before it and in case it happens, the Court is bound to revert the party to the position prior to such an act of the Court. The decision in the case of **ONGC and Anr. v. Association of Natural Gas Consuming Industries and Ors.: (2001) 6 SCC 627** has been referred. It is submitted that JAL deposited the money on the directions of this Court for securing the interests of homebuyers but, since the Court did not make any direction for the utilisation of this deposit and simply transferred the fund to NCLT, JAL is entitled to be restored to its original position with return of this amount. It is reiterated that the IRP cannot lay a claim over the assets of a third party, held in trust or in possession of the corporate debtor. It is also re-emphasised that the directions to JAL for making this deposit was to arrive at an interim workable arrangement and to protect the interests of the homebuyers; but when the purpose became moot after the amendment of IBC, the money is supposed to be returned to its owner, i.e., JAL. It is submitted that JAL itself is in financial distress and is unable to meet with the obligations towards its stakeholders and an application under Section 7 of the Code

for the CIRP of JAL is pending. With these submissions, it has been prayed that the deposited amount with accrued interest be ordered to be returned to JAL and be further ordered to be kept in an escrow account under the control of the lenders of JAL, led by ICICI Bank.

179. The submissions aforesaid, for refund of INR 750 crores with accrued interest to JAL, have been duly countered by the persons/entities standing for the resolution plan, while supporting the order passed by the Adjudicating Authority. We may take note of the leading submissions in this regard.

179.1. It has been contended on behalf of the resolution applicant NBCC that the resolution plan introduced by it, which got approved by the CoC and by the Adjudicating Authority, included this deposit of INR 750 crores by JAL to be treated in the CIRP of JIL and utilisation of this amount has been a condition precedent to the implementation of the resolution plan.

179.1.1. NBCC has elaborated on the submissions that the stipulation in its resolution plan as regards this sum of INR 750 crores was essentially based on the orders of this Court in the case of **Chitra Sharma**; and on the fact that JAL was directed to deposit this money in the proceedings which were filed in relation to CIRP of JIL. It is submitted with reference to various orders passed in the case of **Chitra Sharma** that this money was clearly meant for the benefit of homebuyers and though this Court initially discussed the proposition of *pro rata* disbursement among the refund seekers but no such disbursement was ordered after the Court noticed

that an overwhelming majority of homebuyers was desirous of seeking possession of flats and disbursement to refund seekers was going to cause prejudice to others. It is submitted that intention of the Court, that the aforesaid amount shall inure to the benefit of homebuyers, is also apparent from the fact that even after amendment of the Code with effect from 06.06.2018, whereby the homebuyers were included as financial creditors, this Court deemed it appropriate to retain the deposit for the benefit of JIL homebuyers and did not pass any modification order in respect thereof or any order for release of said amount to JAL.

179.1.2. With reference to the contents of the information memorandum under sub-heading '*Unique Investment/financing opportunity for the Resolution Applicant with adequate value to be unlocked*' in the 'Investment Highlights', NBCC would submit that the financial model of the resolution plan is based on the availability of this sum of INR 750 crores, and if the same is not made available, it would be handicapped in completing the flats of the homebuyers. NBCC has reiterated that availability of this amount being a condition precedent, it would have a right to withdraw from the resolution plan in the event this amount is not made available to it.

179.1.3. It has also been submitted that the deposit made by JAL pursuant to the orders of this Court in **Chitra Sharma** was to secure and protect the interests of homebuyers of JIL and in order to act on the lines of the order of this Court, the deposit ought to be permitted to be used to

achieve the purpose namely, the construction of dwelling units. NBCC submits that the said sum of INR 750 crores did not remain an asset of JAL after the same was deposited in this Court.

179.1.4. Apart from the aforesaid submissions and without prejudice, NBCC has also stated, with reference to the observations made by this Court during the course of hearing, that if any reconciliation of accounts has to be carried out before approval of the plan by this Court, NBCC ought to be involved in such an exercise, for being the successful resolution applicant and a part of the erstwhile Interim Monitoring Committee.

179.1.5. NBCC has also referred to paragraph 77 of the impugned order dated 03.03.2020, wherein the NCLT has recorded an admission on behalf of JAL about its liability towards JIL to the tune of INR 274 crores and ordered that JAL shall make this payment to JIL; and regarding the remaining amount, JAL and JIL shall draft a reconciliation statement and proceed according to the outcome of such reconciliation.

179.1.6. Long drawn submissions have been made on behalf of NBCC in regard to the alleged liabilities of JAL towards JIL on various scores. These aspects of accounting would not, as such, require adjudication herein but have some bearing on the issues raised before us and hence, a part of the written submissions on behalf of NBCC in this regard are reproduced as follows: -

“2. JAL has claimed by way of an additional affidavit filed in the JAL Appeal claimed that as on 31 March 2020, the amount owed

by JAL to JIL has reduced to INR 218 Crores. It needs to be highlighted that under the Resolution Plan, NBCC has reserved its right to terminate all existing contractual arrangements with JAL.

3. It is submitted that as per the records of JIL provided by the IRP and seen by NBCC during its presence in the IMC, it has been observed that:

The Home Buyer of JIL are required to pay amounts in the nature of Interest Free Maintenance Deposit (“**IFMD**”) towards the flat units purchased by them, and after the formation of recognized Residents Welfare Associations (RWAs) this IFMD is required to be transferred to RWA as per provisions of the UP Apartments Act.

Since JAL is the designated maintenance agency for such flat units as per the existing contractual arrangement between JIL, JAL and the Home Buyers, this payment of IFMD was to be paid by Home buyers to JAL and thereafter the transfer of IFMD was to be made by JAL to the RWAs.

In the year 2016, on the request of JAL, JIL has paid to JAL an advance amounting to INR 381 crore towards Interest Free Maintenance Deposit (IFMD, with the understanding that these amounts would be later on recovered by JIL from the Home Buyers at the time of taking over of possession of their flat units by the Home Buyers and the advance paid will get adjusted. However, JAL will transfer the IFMD to the RWAs.

i. Accordingly, during course of handing over of the flats, an amount of approximately INR 115 Crores has been collected from Home Buyers by JIL and same stands adjusted from the advance amount of INR 381 Crores but is now payable/transferrable to the RWAs of the Home Buyers by JAL.

ii. Therefore, an amount of INR 266 Crore (INR 381-INR 115 Cr) is still recoverable by JIL from JAL as per audited accounts of JIL as on 31 March 2020. Overall, the Amount of Rs 115 Crore (ultimately to be transferred to RWA) along with 266 crores (pertaining to JIL) i.e. 381 crores is recoverable from JAL towards Interest Free Maintenance Deposit (IFMD) of Home Buyers. This needs to be seen in the context that NBCC may terminate all existing contractual arrangements with JAL and thus INR 115 Crores which is money belonging to Home Buyers ought to be paid by JAL to JIL for further transfer to the Home Buyers.

iii. Further, JIL has paid to JAL an advance amounting to INR 450 crore towards special advance in the year 2016, which was being recovered on pro-rata basis from the JAL running bills. Till 31 Mar 2020, an amount approx. of INR 146 Crores is adjusted from running bills of JAL and an amount of INR 304 Crore is still recoverable from JAL as on 31 March 2020 as per audited accounts of JIL as on 31 March 2020.

iv. Apart from the above, an amount of INR 71 Crore is also recoverable from JAL in respect of Land Swap Deal with JAL lenders.

v. From above details, it is apparent that a cash amount of INR 756 Cr (381 + 304 + 71 Cr) is payable by JAL to JIL as on 31.3.2020.

vi. It is pertinent to mention that the Hon'ble Court by judgment dated 26.02.2020 in Civil Appeal No. 8512-8527 of 2019 **Anuj Jain vs. Axis Bank Limited etc. etc.** (2020 SCC Online SC 237) ("**758 Acres Judgment**") has set aside mortgage created on 758 acres of land belonging to JIL to secure the debts of JAL on the ground that the same were preferential transactions. However, apart from the said 758 acres of land, mortgage of 100 acres of land of JIL to secure JAL's debts could not be set aside as the same was beyond the look back period. Thus, at present a mortgage of 100 acres of land of JIL still exists to secure the debts of JAL. Hence, an amount equivalent to the market value of the 100 acre mortgaged land (mortgaged against 1500 crore loan) could be payable by JAL to JIL, subject to JIL exercising the remedies available to it under the law in this regard. The equivalent value of the said land as per the valuation taken for the purpose of the Resolution Plan (land proposed to be transferred through land SPV) is INR 328 crores.

vii. Hence it is submitted that for effective implementation of the Resolution Plan and to ensure that the strict timelines prescribed therein are met, JAL shall pay to JIL immediately upon the disposal of these appeals and under the aegis of this Hon'ble Court a total Amount of Rs 1084 Crores (756 crores + 328 Cr).

viii. The same shall be utilised for the construction in terms of the NBCC Resolution Plan."

179.1.7. Apart from the above, the resolution applicant NBCC has also indicated various other aspects of accounting in regard to the defect liability of JAL as the master developer; and charging of excess profit by JAL. However, it is also submitted that the suggested amounts are subject to final reconciliation and verification. With these submissions, the prayer on behalf of NBCC is stated in the following terms: -

"9. Needless to state that the above amounts are subject to final reconciliation and verification of accounts. In this regard it is requested that such reconciliation should be carried out by an independent third party to be nominated by the Hon'ble Court which would ensure that the rightful entitlement of JIL is provided to it and the Resolution Plan is successfully and effectively implemented."

179.2. The associations of homebuyers of JIL, while supporting the submissions of the resolution applicant, have contended that returning the said sum of INR 750 crores deposited by JAL would be contrary to the orders of this Court, as the intention of the Court in **Chitra Sharma** was to safeguard the interests of homebuyers and rehabilitation of JIL. Moreover, direction by the Court to JAL for making such deposit, even when it was aware that JAL was not a party to the CIRP of JIL, shows that the refund shall not be made to JAL. It is submitted that any such refund may cause reduction of readily available funds to start the construction of unfinished projects.

179.2.1. It has been prayed that the Court may confirm that the said sum of INR 750 crores is to protect the interests of the homebuyers and forms a part of the assets of JIL. Alternatively, it has also been prayed that reconciliation of accounts between JAL and JIL be done in a time bound manner; and the refund of leftover funds be not permitted until NBCC completes the construction of apartments and the homebuyers get the possession of the flats. The homebuyers have also prayed for an injunction against NBCC, barring it from withdrawing and for direction to NBCC to expedite the process of implementation. Yet further prayers have been made to direct an audit of the quality of construction by NBCC to make sure that it conforms to the quality agreed upon by the homebuyers at the time of booking the apartments.

179.3. The other homebuyers of JIL, while supporting the submissions aforesaid, have reiterated that the directions of this Court in **Chitra Sharma** to JAL for making the said deposit was primarily to safeguard the interests of the homebuyers and rehabilitation/restitution of JIL; that it was a conscious decision of this Court keeping the interests of the homebuyers in mind; that if the intention of this Court was to revert this deposit to JAL, an express direction would have been made in that behalf but, despite multiple pleas of JAL, this Court did not do so; that the application of JAL seeking recall of the directions for depositing INR 2,000 crores was dismissed by the order dated 25.10.2017 and it is against the principles of *res judicata* for JAL to seek the same relief in the present proceedings; that the IRP was conscious of the intention of this Court regarding the fate of the deposit made by JAL and that is why included this amount in the information memorandum with a caveat that it is subject to the order of the NCLT. It is further submitted that any direction for refund of this money to JAL would cause shortage of readily available funds to start the construction, which may jeopardise the fate of the entire project.

179.4. Even those associations of homebuyers of JIL, who have attempted to project themselves as 'dissenting' homebuyers, are *ad idem* on this issue that the said sum of INR 750 crores is the property of JIL and ought not be refunded to JAL. However, it is submitted by them that NBCC is aiming at profiteering by getting hold of this money without

corresponding provision in the resolution plan for its use for the benefit of homebuyers.

179.5. The other persons/entities standing with JIL have also opposed the submissions made on behalf of JAL for return of this sum of INR 750 crores. It is submitted that even while permitting RBI to allow the banks to initiate CIRP against JAL, this Court did not issue any direction for refund of the deposit made by JAL and rather allowed this amount to be utilised for the CIRP of the corporate debtor JIL. Therefore, this amount has rightly been taken in the resolution plan for being utilised for the purposes of JIL.

180. From the long range of submissions aforesaid, two aspects emerge for determination: one, as regards the treatment of the said amount of INR 750 crores and accrued interest; and second, as regards the amount receivable by JIL from JAL and reconciliation of accounts between these two companies. For dealing with extensive submissions concerning the said amount of INR 750 crores and accrued interest, worthwhile it would be to recapitulate the basic facts related with this deposit.

181. A comprehensive look at what had transpired during the course of consideration of the matter involved in **Chitra Sharma** and what had culminated in the final judgment dated 09.08.2018, a few pertinent features come to the fore, which essentially relate to the concern of this Court towards homebuyers of JAL and JIL taken as a whole. As noticed,

when the proceedings were taken up by this Court in **Chitra Sharma** in the month of September, 2017, the homebuyers were facing critical predicaments inasmuch as, at that point of time, they were not recognised as financial creditors of the corporate debtor. The matter, of course, arose from the insolvency proceedings relating to JIL but the submissions before the Court did not remain limited to the homebuyers of JIL alone; rather the predicaments were placed before the Court on behalf of the homebuyers of JAL and JIL as a whole lot and it was submitted that the interests of the ‘flat purchasers’, who had invested with JAL and JIL, need to be protected. On 11.09.2017, after noticing several facets of the matters, including the fact that JAL, the holding company, was not a party to the insolvency proceedings concerning JIL, this Court issued a slew of directions, including that for deposit of INR 2,000 crores by JAL.

181.1. JAL made an avid effort to wriggle out of the rigour of the direction for deposit of INR 2,000 crores while seeking recall of the order passed by this Court or for a modification that would enable it to transfer the rights under the Concession Agreement in respect of the Yamuna Expressway. This attempt on the part of JAL failed after this Court noticed the submissions in opposition that the rights under the Concession Agreement belonged to JIL. The directions of this Court, for deposit as made from time to time in the course of proceedings in **Chitra Sharma**, resulted in JAL depositing INR 750 crores in instalments.

181.2. The fact of the matter remains, and unfolds from various interim orders passed in the case of **Chitra Sharma**, that basic concern of the Court was regarding the claim of the homebuyers of JAL and JIL taken as a whole; and it was not stated at any stage by this Court that JAL was to part with this money exclusively for the purposes of JIL and, for that matter, for the purposes of the homebuyers of JIL alone. As noticed, during the course of proceedings, this Court appointed *amicus curiae*, who was directed to open web-portal for the homebuyers of JIL and an independent web-portal for the homebuyers of JAL. As per the order dated 22.11.2017, the learned counsel appearing for JAL was to provide the requisite details to the *amicus* as also the amount for creation of the portal and for carrying on the consequential activities.

181.3. On 21.03.2018, it was stated on behalf of JAL that an amount of INR 550 crores had already been deposited and that only about 8% of the homebuyers were interested in seeking refund while others were desirous of seeking possession of their flats. This Court indicated that at the given stage, only the matter in relation to the homebuyers seeking refund was being examined and other grievances would be examined in the next phase of proceedings. Since the order for deposit of INR 2,000 crores had not been fully complied with, the Court issued directions for further deposit of INR 200 crores in instalments. At that stage, the Court was informed by the *amicus curiae* that as per his portal and *as per the record*

of JAL, an amount of INR 1,300 crores was required to be refunded by way of principal alone to the homebuyers who were seeking refunds.

181.4. Thereafter, on 16.05.2018, this Court took note of the fact that a sum of INR 750 crores was lying in deposit and it was observed that the same *'has to be disbursed on pro rata basis amongst the homebuyers'*. On that date, it was also directed that *'Jaiprakash Associates Ltd. (JAL), the holding company of Jaypee Infratech Ltd. (JIL), shall deposit a further sum of Rs. 1000 crores jointly and severally by 15.06.2018'*.

181.5. Lastly, on 13.07.2018, this Court, while expressing disinclination to entertain the proposals advanced on behalf of JAL, posted the matters on 16.07.2018 *'exclusively for the purpose of considering the issue of the rights of the homebuyers and the capability of JAL and JIL to construct the projects'*. Thereafter, the matters were finally heard and decided by way of the judgment dated 09.08.2018.

181.6. Even at the final consideration of the matter, further proposals were mooted on behalf of JAL but were rejected by this Court while explaining that accepting any such proposal on behalf of JAL would cause serious prejudice to the discipline of IBC; and this Court particularly observed that clauses (c) and (g) of Section 29A operated as a bar to the promoters of JAL/JIL participating in the resolution process. This apart, after taking note of various grounds urged on behalf of the homebuyers in opposition to the proposal, this Court was convinced that JAL/JIL were lacking in financial capacity and resources to complete the unfinished

projects. The reasons that were stated on behalf of the homebuyers in opposition to the proposal of JAL were aplenty where it was, *inter alia*, alleged that there had been questionable transactions involving mortgage of around 758 acres of JIL's land worth INR 5,000 crores in favour of the lenders of JAL without any consideration and the same were set aside by NCLT⁸⁷; that the claim by JAL of delivering the flats was also a fractured one because the flats were delivered incomplete and OOP was being made without OC; that about 22,000 homebuyers were suffering due to delays of more than four years in completion of various projects of JAL and JIL; that under the contracts, JAL and JIL were jointly and severally liable to deliver the flats; that there were serious doubts about the credentials of JAL, who had diverted huge funds from JIL towards its other businesses; JAL had been unable to honour the order of this Court for depositing INR 2,000 crores, where only INR 750 crores were deposited after about 10 months from the initial order dated 11.09.2017 and where the instalment of INR 1,000 crores, as ordered on 16.05.2018, was not forthcoming. The aforesaid and all other facts and factors indeed formed the basis of the conclusion by this Court that JAL/JIL were lacking in financial capacity and resources to complete the unfinished projects. There was, of course, a common refrain that liquidation of the corporate debtor JIL would not be in the interest of homebuyers.

⁸⁷ The said order of NCLT was ultimately approved by this Court in the judgment dated 26.02.2020 in the case of **Anuj Jain**.

181.7. In **Chitra Sharma** (supra), having pondered over diverse propositions, the requirement of balancing the discipline of the Code, to do complete justice and to secure the interests of all the concerned, this Court considered it just and proper to revive the CIRP of JIL and to reconstitute the CoC as per the amended provisions of IBC with recourse to the powers under Article 142 of the Constitution of India.

181.8. However, before concluding on the matter, this Court also took into consideration the submissions made on behalf of some of the homebuyers for issuance of directions to facilitate *pro rata* disbursement of the amount of INR 750 crores lying in deposit pursuant to the interim directions. This Court observed that even when the claim of the refund seekers was required to be considered with empathy, such a request could not be acceded to; and specified four major reasons for declining this prayer, which included the reason that there were other creditors too and if the amount was utilised only for refund seekers, the homebuyers who were seeking their flats would have a legitimate grievance. Another reason was that the insolvency resolution process qua JAL was also being permitted. This was coupled with the position that this Court was reviving the CIRP in relation to JIL.

181.9. It is also noteworthy that though the homebuyers were earlier not recognised as financial creditors, the doubts about their status as financial creditors were removed with amendment of the statute (IBC) with effect from 06.06.2018 and that was a major reason that this Court considered it

appropriate, while deciding **Chitra Sharma** on 09.08.2018, to revive the resolution process but while making it clear that it would follow the discipline of IBC. However, this Court did not order that the said sum of INR 750 crores shall stand forfeited to JIL but only transferred the same together with accrued interest to NCLT, so as to abide by the directions of NCLT.

182. Taking all the factors and the orders of this Court into account cumulatively, it is difficult to find if the sum in question was ever ordered by this Court to be deposited by JAL in discharge of its obligations towards JIL or towards homebuyers of JIL alone; and equally difficult it is to accept the submissions made by the resolution applicant and other persons standing with JIL that this corpus of INR 750 crores together with accrued interest has become an asset of JIL.

183. In an overall analysis, it appears that at the relevant time of consideration of the matter in **Chitra Sharma**, the grievances that were projected before this Court were not confined to the homebuyers of JIL alone but they related to the homebuyers of JAL as well; and the agreements with the homebuyers were also of a composite nature, with both JAL and JIL being the parties thereto. It had been in that hodgepodge of the interwoven transactions that the homebuyers of JAL and JIL projected their grievances as a whole lot before the Court in **Chitra Sharma**. As noticed, at the initial stages, *pro rata* disbursement to the refund seekers was under contemplation of the Court (as twice over

stated in the interim orders) but even those refund seekers were not the homebuyers of JIL alone. The figure of INR 1,300 crores, as being the amount required for refund, was stated by the *amicus curiae* as per his portal and ‘*as per the record of JAL*’.

183.1. Therefore, it is apparent that at the given stage, the said deposit was taken for the purpose of the refund seeking homebuyers of JAL and JIL both; and at the final stage, when this Court found that the interests of various other stakeholders were to be taken into account, the money was transferred to NCLT. It is difficult to deduce from the said proceedings and from the final order of this Court in **Chitra Sharma** that the corpus comprising of INR 750 crores with accrued interest is to be treated as the property of JIL.

183.2. The NCLT essentially proceeded on the considerations that JAL had indeed received money from the homebuyers of JIL; that JAL was asked by the Court to deposit the amount towards refund of JIL homebuyers; and that there was no direction from the Court to return this money to JAL. It appears that all the relevant facts and background aspects concerning this deposit did not surface before NCLT, which led it to draw an inference not standing in conformity with the meaning and purport of the directions of this Court in the case of **Chitra Sharma** (supra).

183.3. While deducing that the money in question became the property of JIL in view of the directions for deposit to JAL by this Court, the NCLT

omitted to consider that the directions to JAL by this Court were not backed by any finding that in law JAL was liable to make good the said some of money for the purpose of refund seeker homebuyers of JIL alone. The directions and observations of this Court in the case of **Chitra Sharma** when read *ad seriatim* with their context, it is clear that such directions for deposit to JAL were that of an attempt by this Court to deal with the demands of refund seeking homebuyers of JAL and JIL. Even such a tentative proposition did not reach its finality in **Chitra Sharma**; and after taking note of the other factors and interests of various other stakeholders, the money was transferred to NCLT. In a comprehensive view of the matter, the inference drawn by NCLT in its impugned order dated 03.03.2020, that this money is an asset of the corporate debtor JIL remains unsustainable.

184. Before switching over to the other leg of discussion in regard to this sum of INR 750 crores, it may also be observed that the contentions urged on behalf of the homebuyers of JIL, that this Court having rejected the application of JAL for recalling the directions for depositing the amount of INR 2,000 crores, the claim for refund of deposited amount by JAL is against the principles of *res judicata*, is also baseless. As noticed, during the course of consideration of the matter in **Chitra Sharma** (supra), this Court not only declined the prayer for recall of the directions for deposit but, even reiterated such directions on more than one occasion. However, all such orders and directions were interim in nature and from none of

those interim orders or from the final judgment in **Chitra Sharma**, it could be deduced that the issue concerning entitlement to the deposited amount was finally decided by this Court against the depositor JAL.

185. Coming to the resolution plan, in our view, NBCC could not have prepared the same by assuming that this amount was the property of JIL when it was neither stated so in the orders passed by this Court nor by IRP in the information memorandum. The overt reliance by NBCC on the contents of the information memorandum is also misplaced because IRP never stated in the information memorandum that this amount of INR 750 crores was a part of the assets of JIL. In the relevant heading of ‘Investment/Financing Opportunity’, the IRP stated thus: -

“Unique investment/financing opportunity for the Resolution Applicant with adequate value to be unlocked

- Unutilized land parcels (mortgaged and unencumbered land) of **3502 Acres**
- **4,602 units (6.39 Mn sqft)** of unsold inventory in LFD 1 (Noida), LFD 3 (Mirzapur), LFD 5 (Agra).
- More than INR 3,758 cr receivable (including amount not due) as at Sep 30, 2018, against sold inventory, further approximately INR 184.45 cr is due against bulk sale of land
- **Rights over the toll fee** (along with revenue from road side facilities and advertisement) to be collected on Yamuna Expressway over the balance concession period of 30 years as at date
- 25% CAGR in toll revenue up to H1FY19
- Opportunity to exploit 3.4 mn sqft of road side facility area across express way
- 100% equity shareholding in Jaypee Healthcare Limited, having two fully operational hospitals in Noida & Chitta and one semi operational hospitals in Anoopshahr, UP
- Jaypee Hospital, Noida with 525 beds (338 operational beds) is expandable to 1200 beds

- 750 Crores deposited by JAL lying with Hon'ble NCLT, utilization/ end use of same pending directions and decisions of Hon'ble NCLT."

(underlining supplied for emphasis)

185.1. Therefore, even though various aspects relating to other assets and their potential utilisation were indicated in the information memorandum but, as regards this sum of INR 750 crores, the information memorandum made it absolutely clear that the same was deposited by JAL and was lying with NCLT; and that its end use was pending decision of NCLT. In the face of such unequivocal expressions, it cannot be accepted that in the information memorandum, any declaration was made that this sum of INR 750 crores was readily available to the resolution applicant. The submissions in this regard as made on behalf of NBCC are required to be rejected.

186. We may observe that the decisions cited by the parties do not require much discussion. The principles in the cited decisions including those in the case of ***Embassy Property*** (supra) that the assets belonging to a third party cannot be utilised towards resolution of a corporate debtor remain fundamental and beyond cavil. Equally, the reference to the maxim *actus curiae neminem gravabit*, and to the decision in ***ONGC*** (supra) has been rather unnecessary because the said principle is essentially employed for the purpose of restitution and putting a party in the position where he would have been but for intervention or lapse of the Court.⁸⁸ The principle underlying this maxim is also fundamental to all the

⁸⁸ This principle has been succinctly explained by this Court in the case of ***South Eastern Coalfields Ltd. v. State of M.P. & Ors.*** (2003) 8 SCC 648 in the following

rules of administration of justice and hence, an unintended result of any act or omission on the part of the Court, which occurs for whatever reason, is not allowed to operate to the prejudice of any person. However, this principle would not apply to the present case for the reasons that this Court consciously directed the holding company JAL to make a deposit but, added to that were the other conscious decisions where this amount was not ordered to be forfeited to JIL nor there was any decree that this amount had become property of JIL or the homebuyers of JIL. For what has been found and held hereinabove, we do not consider it necessary to dilate further on these principles.

187. The upshot is that the said amount of INR 750 crores and accrued interest thereupon, is not the property of JIL. In regard to this amount, neither the stipulation in the resolution plan could be countenanced nor the order of NCLT could be approved.

188. Accordingly, we hold that the amount of INR 750 crores, which was deposited by JAL pursuant to the orders passed by this Court in the case of **Chitra Sharma**, and accrued interest thereupon, is the property of JAL; and stipulation in the resolution plan concerning its usage by the

words: -

“28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the “act of the court” embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party.....”

resolution applicant of JIL cannot be approved. The part of the impugned order dated 03.03.2020 placing this amount in the asset pool of JIL is set aside.

189. After we have found that the impugned order dated 03.03.2020 placing the said amount of INR 750 crores and accrued interest in the asset pool of JIL is unsustainable, the question is as to what orders in sequel be made regarding this money? In ordinary circumstances, the consequence of the findings in the preceding paragraphs would have been of direct refund of this money to JAL but the present matter carries with it several entangled features relating to the amount otherwise payable by JAL to JIL; and these features cannot be ignored altogether.

189.1. As noticed, even when JAL and JIL are two separate corporate entities, JIL is an alter ego of JAL, for having been set up as an SPV and having been substituted as concessionaire in the Concession Agreement aforesaid. The agreements with homebuyers had also been of such a nature where JAL and JIL both were signatories thereto. Additionally, JAL had been extended construction contracts by JIL and, as per the submissions made before us [*vide* paragraph 178.1.4 (*supra*)], JAL had been carrying out the construction work and taking steps to reduce the liability towards JIL that stood at a sum of INR 716 crores as on 31.03.2018 and was purportedly reduced to INR 195 crores as on 31.03.2020. Various homebuyers have allegedly made payments towards IFMD to JAL. Moreover, JAL has submitted that balance of INR 195

crores, which was to be appropriated towards the construction of JIL's project, could be adjusted from the said sum of INR 750 crores, if the resolution applicant makes a formal submission of terminating the construction agreement. NBCC, on the other hand, has suggested several other amounts to be recoverable from JAL.

189.2. Having comprehensively taken note of the complex and interwoven features, even while we are not inclined to countenance the other claims against JAL in these proceedings⁸⁹, so far as the admitted amount towards construction advance is concerned, in our view, the process had been a continuing one and admittedly an amount of INR 195 crores was due to JIL as on 31.03.2020. In the given circumstances, it would serve the interests of all stakeholders, if the proposition for reconciliation of accounts, as stated in the alternative submissions by JAL as also by the resolution applicant, be partly accepted and after reconciliation, the payable amount be made over to JIL before refunding the remainder to JAL.

189.3. On behalf of JAL, it is submitted that verification/reconciliation could be carried out by IRP or by a chartered accountant appointed by him, whereas NBCC would submit that such reconciliation should be carried out by an independent third party to be nominated by this Court. However, as noticed, the said sum of INR 750 crores stood transferred to NCLT in terms of the final directions in the case of **Chitra Sharma**

⁸⁹ This is because insolvency resolution of JAL itself is looming large and in case of insolvency resolution or liquidation of JAL, such claims against JAL shall have to stand in the queue as per the discipline of IBC.

(supra). Having regard to all the relevant features of this case, it appears appropriate that the process of reconciliation of accounts between JAL and JIL be taken up under the supervision of NCLT.

190. For the aforesaid purpose of reconciliation of accounts between JAL and JIL, the NCLT shall, within 7 days of receipt of copy of this judgment, nominate an independent accounting expert; and the accounting expert so nominated by NCLT shall carry out the process of reconciliation while involving IRP of JIL and one representative of JAL. Looking to the underlying urgency, the accounting expert shall complete the entire process of reconciliation of accounts and submission of his report to NCLT within 10 days of his nomination. The professional charges and expenses for the task assigned to the accounting expert shall be determined by NCLT and shall be borne equally by JAL and JIL.

190.1. After receiving the report from the accounting expert, the NCLT shall pass appropriate orders in the manner that, if any amount is found receivable by JIL/homebuyers of JIL, the same shall be made over to JIL from out of the said amount of INR 750 crores and accrued interest; and remainder thereof shall be returned to JAL in an appropriate account and that shall abide by the directions of the competent authority dealing with the proceedings concerning JAL. The NCLT would be expected to pass appropriate orders within 2 weeks of submission of report by the accounting expert.

190.2. However, we need to make it clear that this process of reconciliation is not meant for determination of any claim otherwise sought to be levied against JAL by IRP or homebuyers of JIL or by the resolution applicant; and only the accounts concerning the amount/s advanced to JAL by JIL towards construction contracts (*vide* paragraph 178.1.4.) are to be examined and reconciled with reference to the extent of liabilities discharged by JAL and then to find the extent of excessive amount, if any, available with JAL which is receivable by JIL/homebuyers of JIL.

191. In regard to the aforesaid directions concerning reconciliation of accounts and disposal of the said amount of INR 750 crores and accrued interest, a few more comments and observations appear necessary. We have taken note of the submissions made on behalf of NBCC as also on behalf of various homebuyers of JIL that this money is required for construction of houses and if it goes to JAL, there would be acute shortage of funds for construction. We are also aware of the facts that have come on record that JAL is itself in distress and CIRP in its relation is looming large. We have further taken note of the submissions made by the financial creditor of JAL to place this sum of money within their control in an escrow account. However, we have not accepted any of these submissions in entirety.

191.1. As observed hereinabove, after having found that the said money is the property of JAL, ordinarily, the consequence would have been of

directing its refund to JAL but the other entangled features of the case relating to the amount otherwise payable by JAL to JIL cannot be ignored altogether, particularly when it was an admitted position on behalf of JAL before NCLT that an amount of INR 274 crores was payable by it to JIL and even before this Court, this obligation to pay has been admitted on behalf of JAL, albeit to the tune of INR 195 crores as on 31.03.2020; and it appears that JAL has been taking steps (maybe crippled steps) to carry out construction and to reduce its liability. We are not determining the extent of amount payable by JAL to JIL because that would be a matter of reconciliation of accounts but, having regard to the background in which, and the purpose for which, JAL made the said deposit pursuant to the orders of this Court and also having regard to the present position of these two companies, adopting this course appears to be in the balance of the legal rights of the respective stakeholders as also in the balance of equities. We would hasten to observe that ordinarily, the equitable considerations do not directly come into play in corporate insolvency resolution process but the matter concerning this amount of INR 750 crores and accrued interest thereupon is a convoluted and stand-alone issue, having the peculiarities of its own and hence, we have adopted the course as contemplated above. This process is otherwise not of determination of the claims of individual stakeholders, be it operational creditors or financial creditors. In the interest of justice, it is also made clear that disposal of the said sum of INR 750 crores shall otherwise not

be treated as determinative of the rights and obligations of any stakeholder in any of these two companies, JAL and JIL.

192. Before closing on this point for determination, we may indicate that a few of the arguments on this point have gone off on a tangent, as could be noticed from the submissions made by an association of homebuyers of JAL, who has directly approached this Court against the order of NCLT, that INR 160 crores be designated out of the said amount of INR 750 crores for completing the houses of the members of that association; and that in RERA proceedings, JAL was demanding money from its members, though, there was unexplained delay of 5 to 7 years in completion of project by JAL. We are unable to find any logic in the submission of this nature against JAL by its homebuyers having been made in these proceedings. It goes without saying that the dealing between JAL and its homebuyers is not the subject matter of the present proceedings. Similarly, the submission by some of the dissatisfied homebuyers of JIL, that NBCC is aiming at profiteering by getting hold of this money but without making corresponding provision in the resolution plan for the appropriate use of this money for the benefit of homebuyers, also remains baseless and redundant in view of what has already been discussed hereinbefore. Another block of submissions on behalf of some of the homebuyers of JIL, like seeking directions against NBCC that it shall not withdraw and should expedite construction as also seeking audit over the quality of construction, have gone far too beyond the real issues

requiring determination in the present litigation. In regard to these and other submissions of similar nature, we would only leave the parties to take recourse to appropriate remedies in accordance with law, in case of any legal grievance existing or arising in future.

Point K

Security interest of the lenders of JAL and effect of judgment dated

26.02.2020

193. Two separate questions formulated in this point for determination carry their intrinsic correlation and hence are taken up for determination together.

193.1. The genesis of these questions lies in seven such transactions whereby, the financial facilities obtained by JAL were secured by way of mortgages created over various parcels of JIL's land, aggregating to 858 acres. During the present CIRP proceedings, the IRP questioned these transactions as being preferential, undervalued and fraudulent within the meaning of Sections 43, 45 and 66 of the Code. An application moved by IRP for avoidance of these transactions was accepted in part by the Adjudicating Authority in its order dated 16.05.2018 and directions were issued for avoidance of six of these transactions. However, one such transaction was found by the Adjudicating Authority to be not falling within relevant time, as provided in Section 43 of the Code and hence, the same was not avoided. The order so passed by the Adjudicating Authority (NCLT) was, however, reversed by the Appellate Authority (NCLAT).

Hence, the matter came in appeal before this Court and was dealt with in the case of **Anuj Jain** (supra), decided on 26.02.2020.

194. In the judgment dated 26.02.2020 in **Anuj Jain** (supra), this Court took note of all the relevant particulars of the said seven transactions and the one, which was not found falling within relevant time, was noticed by this Court as follows: -

“7.5. Yet another transaction was questioned by IRP as being avoidable but the adjudicating authority held the same to be not falling within the relevant time as provided under Section 43 of the Code. The particulars of this transaction are as follows:

Mortgage deed dated 12-5-2014 for 100 acres of land situated at Village Tappal, Tehsil Khair, District Aligarh, Uttar Pradesh executed by JIL in favour of ICICI Bank Ltd. against the facility agreement dated 12-12-2013 granting term loan of Rs 1500 crores and overdraft amount of Rs 175 crores to JAL (hereinafter also referred to as “Property No. 7”) (As regards this description, it is pointed out on behalf of the respondent ICICI Bank that it had been of “term loan of Rs 1500 crores under the corporate rupee loan facility agreement and general conditions dated 12-12-2013 and mortgage deed was dated 10-3-2014”).”

194.1. As noticed, in final determination of the relevant issues, this Court disapproved the order of NCLAT; and the order of NCLT was upheld in relation to six of these transactions with the finding that the transactions in question were hit by Section 43 of the Code and the Adjudicating Authority (NCLT) was justified in issuing necessary directions in terms of Section 44 of the Code. However, as noticed, the above-noted seventh transaction pertaining to the mortgage dated 12.05.2014 and relating to 100 acres of land, remained intact. The property involved in the said transaction, which was not covered under avoidance provisions is

referred to as ‘Tappal Property 1’, for being situated at village Tappal for which, the mortgage was created on 12.05.2014.

194.2. We have also noticed hereinbefore that in the case of **Anuj Jain** (supra), this Court had examined another issue, that is, as to whether the lenders of JAL could be categorised as financial creditors of JIL. In this regard, this Court though observed that when the transactions in question were hit by Section 43 of the Code, they were denuded of their value and worth and the security interest created over the property of JIL involved in those transactions stood discharged in whole; and, therefore, such lenders of JAL were not entitled to claim any status as creditors of the corporate debtor JIL much less as financial creditors but then, this Court examined the question as regards the status of such lenders of JAL qua the corporate debtor JIL independent of the findings that the transactions in question were hit by Section 43 of the Code. Ultimately, on this issue relating to the status of such lenders of JAL, this Court held that they, on the strength of the mortgages in question, might fall in the category of secured creditors but, for the reason that the corporate debtor did not owe them any financial debt, such lenders of JAL would not fall in the category of financial creditors of the corporate debtor JIL.⁹⁰

194.3. The judgment dated 26.02.2020 in the case of **Anuj Jain** (supra) was delivered by this Court after the voting by CoC on the resolution plan

⁹⁰ The relevant conclusions in the case of **Anuj Jain** have been reproduced in paragraphs 34.1 to 34.3, hereinbefore.

in question but before passing of the impugned order dated 03.03.2020 by the Adjudicating Authority.

195. In the resolution plan, apart from various stipulations in regard to the land of JIL and creation of two SPVs with transfer of certain parcels of land, the resolution applicant stated in Clause 23 of Schedule 3 relating to 'reliefs and concessions' as under: -

"23. The JAL Lenders Mortgaged Land shall continue to be vested in the Corporate Debtor free of any mortgage, charge and encumbrance."

196. The Adjudicating Authority, in its impugned order dated 03.03.2020, while noticing the terms of the resolution plan and key reliefs, summarised the matter relating to the land mortgaged with JAL lenders in the following part of tabulation: -

"Sl. No.	Matter	Relief Sought	Remarks	Cross Reference in Resolution Plan
3	858 acres of Corporate Debtor's land was mortgaged with JAL lenders to secure debt of JAL without any consideration or counter guarantee to JIL (Transaction).	NBCC has sought relief that 858 acres of mortgaged land shall continue to be vested in Corporate Debtor free of any mortgage, charge and encumbrance.	RP filed an application for avoidance of Transaction which was allowed by that Hon'ble NCLT vide order dated 16.05.2018 and 758 acres out of 858 acres was	Page 72 clause 1 of Schedule 3 of the Resolution Plan"

			avoided. However, appeals were filed against the NCLT order dated 16.05.2018 and Hon'ble Supreme Court vide order dated 26.02.2020 has upheld the NCLT order dated 16.05.2018 . The Hon'ble SC has pronounced the order with respect to the same on 26.02.2020 in Civil Appeal No. 8512-27 of 2019.	

(bold is in original)

196.1. As regards the land under mortgage, the Adjudicating Authority stated its consideration in paragraph 128 of the order impugned in the following terms: -

“128. With regard to the objections raised by JAL and other objectors for inclusion of ₹858 acres as part of the resolution plan, for the Hon'ble Supreme Court on 26.02.2020 held that mortgaged of ₹858 acres of JIL land to the lenders of JAL is an avoidance transaction, it can no more be an objection from JAL or from consortium of ICICI Bank to say that land cannot be part of the resolution plan for it has been mortgaged to the financial creditors of JAL.”

However, while concluding on Clause 23 of Schedule 3 of the resolution plan, the Adjudicating Authority observed (in paragraph 134) thus: -

“Clause No. 23:- This point is not clear as to whether it is referring to the land of the Corporate Debtor mortgaged to the lenders of JAL, if that is so, since it has been decided by the Honourable Supreme Court, it need not be reiterated.”⁹¹

196.2. Noteworthy it is that ‘cross-reference’ in the table above-quoted, to ‘*Clause 1 of Schedule 3 of the resolution plan*’ as also the figure of extent of land pertaining to avoidance transactions at ‘858 acres’ in paragraph 128 of the impugned order were incorrect and the Adjudicating Authority corrected these errors in the corrigendum dated 17.03.2020 in the manner that the cross-reference is to ‘*Clause 23 of Schedule 3 of the resolution plan*’ and the extent of land held by this Court to be of avoidance transactions is ‘758 acres’.

197. To put it in clear terms, the net outcome of the propositions, proceedings and findings noticed in the preceding paragraphs is as follows: 858 acres of JIL’s land was mortgaged with the lenders of JAL; in the resolution plan, NBCC sought the relief that such land shall continue to remain vested in the corporate debtor JIL free from any mortgage, charge and encumbrance; 758 acres, out of this 858 acres, of land got released from mortgage in terms of the judgment in **Anuj Jain** (supra); 100 acres of land, being ‘Tappal Property 1’, however, continued to

⁹¹ The aforesaid observations, as occurring in paragraphs 128 and 134 of the impugned order dated 03.03.2020, have been extracted hereinbefore in the narratives but we have re-extracted them for continuity of the present discussion.

remain under mortgage with ICICI Bank; and, as regards this mortgage, ICICI Bank was not recognised as a financial creditor of JIL even if falling in the category of secured creditors; the Adjudicating Authority has not rendered any specific decision as regards such mortgaged land and as regards the relief claimed by the resolution applicant while assuming that the entire matter stands concluded with the judgment of this Court dated 26.02.2020 in **Anuj Jain** (supra).

198. Now, the aforesaid terms of the resolution plan and the order of the Adjudicating Authority have given rise to two major issues. The first one is the grievance of ICICI Bank, who is the mortgagee in the said mortgage transaction relating to 'Tappal Property 1', that was not hit by Section 43 of the Code for having been entered into beyond the look-back period.

199. The mortgagee bank would submit that in terms of the judgment of this Court in **Anuj Jain**, the said mortgage in relation to 'Tappal Property 1' continues to remain in force and thereby, the bank is a secured creditor of the corporate debtor JIL; and this mortgage cannot be taken away through a resolution plan without assigning any value. It is submitted that the stipulations in the resolution plan in regard to this mortgage remain invalid where the resolution applicant has erroneously assumed that the effect of implementation of the plan would be that all encumbrances and charges on the property of the corporate debtor for the loans given to third party shall stand extinguished. It is contended that a legal right in the

property cannot be taken away except by due process of law; that the process under the Code provides for reckoning and accounting of claims against the corporate debtor; and that only those claims which are accounted for and dealt with as a part of this process could possibly be dealt with in a resolution plan but, the claims which have not been accounted for and reckoned in this process cannot stand extinguished. It is submitted that this bank, in its capacity as mortgagee of the said 'Tappal Property 1', is left to suffer from double whammy where its claim under the mortgage has not been reckoned in the CIRP and then, the approved resolution plan proceeds to go ahead and extinguish the mortgage itself. It is argued that all these aspects have not been examined by the Adjudicating Authority and hence, its order, in regard to this issue, cannot be approved. This bank had filed a belated appeal before NCLAT, being D. No. 21936 of 2020 and has sought transfer of the same in this Court by way of Transfer Petition - D. No. 20274 of 2020.

200. In response to the aforesaid submissions of ICICI Bank, the resolution applicant has contended, with reference to the findings and conclusion of this Court in the case of **Anuj Jain** (supra), that the said bank is not a financial creditor of JIL and hence, has no locus in the matter and cannot claim payment of liquidation value of the debt owed by JAL. Without prejudice, it is also submitted that the resolution plan adequately deals with the treatment of the terms of securities, guarantees, indemnities, pledge, charge or encumbrances of any kind in

relation to any debt and in this regard, the prescription in the resolution plan at page 362 of the appeal filed by NBCC has been referred. That part of the resolution plan pertains to the terms/stipulations under the sub-heading, '*Effects of Settlement of Admitted Financial debt due to Financial Creditors*' which in turn, occurs under the heading '*1.2. Proposal for Financial Creditors*'. The referred term provides for release and discharge of all liabilities under such securities etc., other than continuation of guarantee benefits with the institutional financial creditors as laid down in the resolution plan.

201. Apart from the issue raised by ICICI Bank in relation to the said mortgaged land of 100 acres, another issue raised by some of the homebuyers is that adequate provisions have not been made in the resolution plan in relation to 758 acres of land, that was earlier covered by the other six mortgage transactions but now stands released from encumbrance.

202. Having examined the matter in its totality, we find force in the submissions so made by the mortgagee bank as also by the homebuyers.

203. The resolution applicant has overtly relied upon the fact that the objector bank was not accepted as a financial creditor of JIL by this Court in **Anuj Jain** (supra) and has contended on this basis that the objections so raised by this bank are required to be rejected. These submissions of the resolution applicant NBCC suffer from several shortcomings. Even when the said bank has not been recognised as a financial creditor

because the mortgage in question was not relating to any financial debt of the corporate debtor JIL, its capacity as a secured creditor, for being the holder of security in the form of mortgage which has not been avoided and which remains existing, cannot be denied; and has not been denied by this Court in **Anuj Jain** (supra).

203.1. This bank appears right in its contention that when the security in question was not even taken up as a part of the resolution process, it could not have been extinguished on the *ipse dixit* of the resolution applicant. Unfortunately, Adjudicating Authority totally missed out the real issue before it in regard to this mortgage transaction because, in the order as originally passed on 03.03.2020, the Adjudicating Authority assumed that all the mortgages in favour of the lenders of JAL (covering the entire 858 acres of JIL land) were annulled by this Court in **Anuj Jain** (supra) as avoidance transactions. Of course, in the corrigendum dated 17.03.2020, the Adjudicating Authority rectified the error of the figure '858', as occurring in paragraph 128 of the original order dated 03.03.2020, and corrected it to '758' but, did not examine the consequences thereof. In other words, while making the correction on 17.03.2020, the Adjudicating Authority failed to advert to the relevant question as to what would be the proper order as regards the remaining 100 acres of land, if only 758 acres was released in terms of the judgment in **Anuj Jain** (supra).

203.2. The fact that the Adjudicating Authority dealt with this segment rather cursorily is yet further seen from the part of the table reproduced

hereinabove where, while making reference to the mortgages in favour of the lenders of JAL, an incorrect cross-reference was made to Clause 1 of Schedule 3 of the resolution plan. This error was also corrected in the order dated 17.03.2020 and correct reference was made to Clause 23 of Schedule 3 but, again, the implication of this correction totally escaped the attention of the Adjudicating Authority.

203.3. As noticed, in the said Clause 23, a fleeting suggestion on the part of the resolution applicant had been that '*JAL lenders mortgaged land shall continue to be vested in the corporate debtor free from any mortgage, charge and encumbrance*'. The Adjudicating Authority dealt with the said clause of the resolution plan in an equally cursory manner by observing that the point was not clear but, if it was referring to the land mortgaged with the lenders of JAL, the issue had already been decided by the Supreme Court and need not be reiterated. In this entire process of mistakes/errors (might be accidental) and corrections as also cursory observations, the Adjudicating Authority totally missed out that one transaction relating to 100 acres of land, being 'Tappal Property 1', remained unaffected by the judgment in **Anuj Jain** (supra); and that the security creating over this land could not have been annulled in the manner suggested in the plan.

204. It cannot be denied that the claim of ICICI Bank pertaining to the said mortgage over 100 acres of land was not reckoned in the CIRP of JIL and without any specific provision in that regard, the resolution applicant

merely suggested by way of the Clause 23 of Schedule 3 as if such mortgage shall stand annulled and the land shall vest in the corporate debtor free from any encumbrances. To say the least, the said Clause 23 does not appear to be standing in conformity with any principal of law for discharge of a security interest, particularly of a third party who is not included in the insolvency resolution process of a corporate debtor. We would hasten to make it clear that the capacity of ICICI Bank in relation to the said mortgage of 100 acres of land of 'Tappal Property 1' is entirely different than its status as the dissenting financial creditor of JIL, to the extent JIL directly owed a financial debt to it. Those aspects pertaining to its capacity as dissenting financial creditor, to the extent of its share of financial debt, have already been discussed in Point **D** hereinbefore.

205. For what has been discussed above, neither the said Clause 23 of Schedule 3 of the resolution plan relating to 'reliefs and concessions' could be approved nor the order of the Adjudicating Authority in this regard.

206. Similarly, the grievance voiced by some of the homebuyers is also justified that adequate provisions are required for dealing with the other chunk of 758 acres of land (that now stands released from mortgage in consequence of the judgment of this Court in **Anuj Jain**). This is another aspect which is required to be examined by the Committee of Creditors for ensuring viability of the plan and maximisation of the value of the assets of the corporate debtor JIL. We need not make much comment in

this regard but it cannot be gainsaid that availability of this chunk of land free from encumbrances has its own bearing on the entire gamut of insolvency resolution of JIL. The other aspects arising from the availability of this chunk of land shall be dealt with, when examining the question of final orders to be passed in these matters in Point **N** *infra*.

Point L

Other issues requiring clarification/directions

207. In its detailed submissions, NBCC has also raised an issue that in Clause 7 Schedule 3 of the resolution plan, reduction of share capital is being sought for the corporate debtor and '*not for the companies yet incorporated*' but the Adjudicating Authority has erroneously made the observations in its order that such reduction was not a part of this resolution. The resolution applicant NBCC has sought clarification in this regard. The relevant clause in the resolution plan reads as under: -

"7. The approval of this Plan by the Adjudicating Authority shall be deemed to have waived all the procedural requirements in terms of Section 66, Section 42, Section 62(1), Section 71 of the CA, 2013 and relevant rules made thereunder, in relation to reduction of share capital of the Corporate Debtor, issuance of shares by Expressway SPV, Land Bank SPV, conversion of Admitted Financial Debt due to the Institutional Financial Creditors to equity, subscription of debentures by the Corporate Debtor or transfer of shares of the Land Bank SPV from the Corporate Debtor to Institutional Financial Creditors."

208. The observations by the Adjudicating Authority as regards this clause are that since reduction of the share capital of corporate debtor is not a part of the resolution plan, the Adjudicating Authority '*cannot waive*

the procedure for reduction of share capital in relation to the companies not yet incorporated’.

209. When the resolution plan with all its reliefs and concessions was approved by CoC and the plan was otherwise being approved by the Adjudicating Authority (albeit with modifications), the aforesaid observations in regard to Clause 7 of ‘reliefs and concessions’ cannot be said to be of apt dealing with the relief sought. Be that as it may, having regard to the purport and purpose of the said Clause 7 and its approval by CoC, we find no reason as to why the same may not be approved. Hence, the impugned order of the Adjudicating Authority dated 03.03.2020 shall be read as modified and in approval of the said Clause 7 of ‘reliefs and concessions’.

210. In the last, NBCC has also prayed for directions to JAL and its sub-contractors or any other person having control over the project sites/lands of JIL to immediately hand over possession/control thereof to JIL and has also prayed for directions to the local administration for necessary support in that regard. We do not find any reason to make any such generalised observations or directions but would leave it open for the resolution applicant to take recourse to the appropriate proceedings in accordance with law, whenever occasion so arise.

Point M

Modified mechanism for implementation by the Appellate Authority

211. We have formulated this point for determination only in view of the fact that the interim order dated 22.04.2020, as passed by NCLAT while dealing with the appeal filed by NBCC against the said order dated 03.03.2020, has been challenged by the associations and individual homebuyers before this Court. Although in view of what has been discussed and held hereinbefore, all the issues related with the resolution plan and the impugned order of NCLT dated 03.03.2020 stand determined comprehensively and the related appeals before NCLAT, already withdrawn to this Court, shall also come to an end. Therefore, not much of discussion is required on this point but, a few comments in regard to the proposition adopted by the Appellate Authority appear necessary.

212. It appears that the proposition, of providing for Interim Monitoring Committee comprising of the representatives of three institutional financial creditors and the resolution applicant as also the resolution professional, was picked up by the Appellate Authority with reference to the stipulation in Point No. 2(a) of Part A of the resolution plan, where it was provided under the heading '*Management Team*' and sub-heading '*Appointment of Monitoring Agency*' that on and from the approval date and until the transfer date, the corporate debtor will be managed by a monitoring agency or any other person appointed by the resolution applicant in consultation with a Steering Committee comprising of three major institutional financial creditors.

212.1. In our view, even if the resolution plan carried such a management framework, the Appellate Authority, while dealing with the appeal against approval of the resolution plan, could not have provided for such a mechanism which is not envisaged by the Code.

213. The Code lays down detailed procedure for corporate insolvency resolution process and such a proposition, for constitution of any Interim Monitoring Committee during the pendency of appeal before the Appellate Authority (NCLAT) is neither envisaged by law nor appears justified. It is apparent on a bare perusal of sub-section (3) of Section 61 of the Code that any challenge to the order approving a resolution plan under Section 31 could be maintained only on the grounds specified therein. Obviously, while dealing with such appeals, the Appellate Authority is required to remain within the confines of the boundaries delineated by the Code rather than seeking to provide for a mechanism, for implementation of the plan.

214. Moreover, looking to the peculiar features of this resolution process, which has its own complications, constitution of such a Committee, consisting only of the resolution professional, the resolution applicant and the institutional financial creditors while leaving aside the biggest chunk of stakeholders i.e., the homebuyers (having more than 57% of the voting share in the CoC), would have caused more difficulties in implementation of the resolution plan rather than serving any purpose.

215. While entertaining the captioned appeals and directing transfer of the related cases pending before NCLAT to this Court by our order dated 06.08.2020, we had stayed the operation of the impugned order dated 22.04.2020 while allowing the IRP to continue with the management of the affairs of the corporate debtor. While concluding on these matters, it appears appropriate and necessary that the said order dated 22.04.2020 by NCLAT be disapproved and set aside.

Point N

Summation of findings; final order and conclusion

216. For what has been discussed and held on the relevant points for determination, our findings and conclusions are as follows:

A. The Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by Committee of Creditors. If, within its limited jurisdiction, the Adjudicating Authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by the Code and expounded by this Court.

B. The process of simultaneous voting over two plans for electing one of them cannot be faulted in the present case; and approval of the resolution plan of NBCC is not vitiated because of simultaneous consideration and voting over two resolution plans by the Committee of Creditors.

C. The stipulations in the resolution plan, as regards dealings with YEIDA and with the terms of Concession Agreement, have rightly not been approved by the Adjudicating Authority but, for the stipulations which have not been approved, the only correct course for the Adjudicating Authority was to send the plan back to the Committee of Creditors for reconsideration.

D. The Adjudicating Authority has not erred in disapproving the proposed treatment of dissenting financial creditor like ICICI Bank Limited in the resolution plan; but has erred in modifying the related terms of the resolution plan and in not sending the matter back to the Committee of Creditors for reconsideration.

E. The Adjudicating Authority has erred in issuing directions to the resolution applicant to make provision to clear the dues of unclaimed fixed deposit holders. Paragraph 125 of the impugned order dated 03.03.2020 is set aside.

F. The issues related with the objections of YES Bank Limited and pertaining to JHL, the subsidiary of the corporate debtor JIL, are left

for resolution by the parties concerned, who will work out a viable solution in terms of paragraphs 141 and 142 of this judgment.

G. In the overall scheme of the resolution plan, the stipulation in Clause 21 of Schedule 3 thereof cannot be said to be unfair; and the observations in paragraphs 132 and 133 of the order dated 03.03.2020 justly take care of the right of any aggrieved party (agreement holder) to seek remedy in accordance with law and ensures viability of the resolution plan.

H. It cannot be said that the resolution plan does not adequately deal with the interests of minority shareholders. The grievances as suggested by the minority shareholders cannot be recognised as legal grievances. Their objections stand rejected.

I. The homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person; the question of violation of the provisions of the RERA does not arise; the resolution plan in question is not violative of the mandatory requirements of the CIRP Regulations; and when the resolution plan comprehensively deals with all the assets and liabilities of the corporate debtor, no housing project of the corporate debtor could be segregated merely for the reason that same has been completed or is nearing completion.

J. (i) The amount of INR 750 crores (which was deposited by JAL pursuant to the orders passed by this Court in the case of **Chitra Sharma**) and accrued interest thereupon, is the property of JAL and stipulation in the resolution plan concerning its usage by JIL or the resolution applicant cannot be approved. The part of the order of NCLT placing this amount in the asset pool of JIL is set aside.

(ii) The question as to whether any amount is receivable by JIL and/or its homebuyers from JAL, against advance towards construction and with reference to the admitted liability to the tune of INR 195 crores as on 31.03.2020, shall be determined by NCLT after reconciliation of accounts in terms of the directions contained in paragraphs 189 to 191.1 of this judgment. The amount, if found receivable by JIL, be made over to JIL and the remaining amount together with accrued interest be refunded to JAL in an appropriate account. It is made clear that the present matter being related to CIRP of JIL, no other orders are passed in relation to the amount that would be refunded to JAL because treatment of the said amount in the asset pool of JAL shall remain subject to such orders as may be passed by the competent authority dealing with the affairs of JAL.

K. (i) Clause 23 of Schedule 3 of the resolution plan, providing for extinguishment of security interest of the lenders of JAL could not have been approved by the Adjudicating Authority, particularly in

relation to the security interest that has not been discharged. This part of the order dated 03.03.2020 is set aside.

(ii) Adequate provision is required to be made in the resolution plan as regards utilisation of the land bank of 758 acres, that has become available to JIL free from encumbrance, in terms of the judgment dated 26.02.2020 of this Court in the case of **Anuj Jain** (supra).

L. (i) The impugned order dated 03.03.2020 shall be read as modified in relation to Clause 7 of Schedule 3 of the resolution plan; and the said clause shall stand approved.

(ii) As regards possession/control over the project sites/lands of JIL, it is left open for the resolution applicant to take recourse to the appropriate proceedings in accordance with law, whenever occasion so arise.

M. The Appellate Authority was not justified in providing for an Interim Monitoring Committee for implementation of the resolution plan in question during the pendency of appeals. The impugned order dated 22.04.2020 passed by NCLAT is set aside.

217. The net result of the discussion and findings hitherto is that some of the terms and stipulations of the resolution plan of NBCC, which was voted for approval by 97.36% of the voting share of the Committee of Creditors, do not meet with approval. Although, barring such terms and stipulations, all other terms and propositions of the resolution plan stand

approved. To be specific, the terms and stipulations in the resolution plan which do not meet with approval are those concerning: (a) the land providing agency [as held in Point **C** (supra)]; (b) the dissenting financial creditor [as held in Point **D** (supra)]; (c) the undischarged security interest of the lender of JAL [as held in Point **K** (i) (supra)].

217.1. Apart from the above, we have also disapproved the decision of the Adjudicating Authority in relation to the said amount of INR 750 crores with accrued interest and have held that this amount is the property of JAL and the stipulations in the resolution plan concerning its usage by JIL or the resolution applicant cannot be approved [as held in Point **J** (i) (supra)]. However, the final treatment of the said amount of INR 750 crores with accrued interest shall be determined by NCLT after the reconciliation of accounts between JAL and JIL and in terms of the directions contained in this judgment.

217.2. The added feature of the matter is that adequate provision is required to be made by the resolution applicant for utilisation of the land bank of 758 acres on which, security interest of the lenders of JAL stands discharged in terms of the judgment of this Court in **Anuj Jain** (supra).

217.3. The matters aforesaid, one way or the other, relate to the commercial terms of the resolution plan and carry their own financial implications.

218. For what we have held hereinabove, when several shortcomings are found in the resolution plan approved by the Committee of Creditors

vis-à-vis the specified parameters, the plan cannot be approved and the matter is required to be sent back to the Committee of Creditors. But the course to be adopted in the present matter carries its own share of complications.

219. We have anxiously pondered over all the peculiarities and complications involved in this matter where twice over in the past, this Court had to invoke its plenary powers under Article 142 of the Constitution of India, so that the insolvency resolution process concerning JIL could be taken to its logical fruition but within the discipline of IBC. Having regard to the circumstances, this Court had provided windows for completion of CIRP while essentially discounting on the time spent in the course of litigations.

220. As noticed, in the judgment dated 09.08.2018 in ***Chitra Sharma*** (supra), this Court revived the CIRP after taking note of the peculiarities of the case and later amendment to IBC whereby, the doubts about the status of homebuyers were removed and they were duly accorded the recognition as financial creditors. Then, in the judgment dated 06.11.2019 in ***Jaiprakash Associates Ltd.*** (supra), this Court provided another period of 90 days for completion of the CIRP from the date of judgment, after observing that delay in completion of CIRP was attributable to the process of law and neither the homebuyers nor any other financial creditor was to be blamed for pendency of the proceedings. This Court also observed that extraordinary situation had arisen because of constant

experimentation at different levels due to lack of clarity on the matters crucial to the decision making process of CoC and besides, there had been further legislative changes whereby, the scope of resolution plan was expanded. This Court also took note of the fact that there was unanimity amongst all the parties appearing before the Court that liquidation of JIL must be eschewed and an attempt be made to salvage the situation by finding out some viable arrangement which could subserve the interests of all concerned. The Court further took into account the third proviso to Section 12(3) of the Code whereby, another period of 90 days was provided in relation to the pending insolvency resolution process. All these factors led this Court to issue directions under Article 142 of the Constitution of India for the second time in this matter, to do substantial and complete justice to the parties and in the interest of all the stakeholders.

221. Taking up the present position, it appears that the resolution applicant, as also a large number of homebuyers of JIL having substantial voting share in CoC, carried a misplaced notion that the said amount of INR 750 crores and accrued interest has become an asset of JIL. At the same time, it appears that there had been lack of clarity as regards the treatment of contingent liability of the additional amount of compensation. The lack of clarity percolated in the decision of the Adjudicating Authority too, where it was assumed by the Adjudicating Authority that some of the

questionable terms/stipulations of the resolution plan could be modified/modulated by it.

221.1. The consequence and impact of the judgment of this Court in **Anuj Jain** (supra) dated 26.02.2020 was also not properly taken in comprehension by the Adjudicating Authority and, as noticed, it was assumed by the Adjudicating Authority in its order dated 03.03.2020 that the entire '858' acres of land stood discharged from the burden of security. Although the so-called correction of errors was carried out by the Adjudicating Authority on 17.03.2020 and the figure was corrected to '758' acres but the consequences of such a material correction were not examined.

221.2. Nevertheless, it gets reiterated that encumbrance over 758 acres of land (which is said to be carrying a valuation of over INR 5000 crores) is removed; and availability of the said land parcel has a substantial impact on the position of assets and liquidity of the corporate debtor JIL.

222. For all the features we have noticed hereinabove, it is at once clear that the entire substratum of the corporate insolvency resolution concerning JIL has undergone a sea of change. The added features in the continuing processes had been that JAL asserts to have carried out several works to reduce its liability towards JIL and on the other hand, IRP has asserted to have carried out further construction works and having made Offers of Possession to several homebuyers.

223. Taking all the facts and circumstances into account and in keeping with the spirit and purport of the orders passed in the past, we are inclined to again exercise the powers under Article 142 of the Constitution of India and to enlarge the time for completion of CIRP concerning JIL while extending opportunity to the said resolution applicants Suraksha Realty and NBCC to submit modified/fresh resolution plans, which are compliant with the requirements of the Code and the CIRP Regulations and are in accord with the observations and findings in this judgment.

223.1. We are conscious of the requirements of the discipline of IBC and would hasten to observe that the course which is being adopted is in the complex and peculiar features of this case but, this repeat exercise concerning the CIRP of JIL cannot be an unending process and needs to be taken to its logical conclusion. As regards the time frame, we are inclined to proceed on the theme and spirit of the judgment dated 06.11.2019 wherein, first 45 days were allowed for invitation of resolution plan and consideration by CoC. The later part of the extended time was provided for removing any difficulty and for passing appropriate orders by the Adjudicating Authority.

223.2. Having regard to the circumstances, we deem it just and proper to provide further time of 45 days from the date of this judgment for submission of the modified/fresh resolution plans by the resolution applicants, for their consideration by CoC and for submission of report by IRP to the Adjudicating Authority. This extended time includes the

reconciliation of accounts of JIL and JAL referred to in Point J. The process of reconciliation of accounts may go on alongside the processing of the resolution plans.

224. We also deem it appropriate to clarify that the processing of the modified/fresh resolution plans, as permitted and envisaged by this judgment, is required to be completed within the extended time and for that matter, the other aspects like reconciliation of accounts between JAL and JIL or resolution of the issues related with the financial creditor of the subsidiary of the corporate debtor shall be the matters to be dealt with separately and decision on the resolution plan by the Committee of Creditors need not wait the resolution of those issues.⁹²

225. Accordingly, while once again exercising our powers under Article 142 of the Constitution of India to do substantial and complete justice to the parties and in the interest of all the stakeholders of JIL, we conclude on these matters with the following order:

225.1. The matter regarding approval of the resolution plan stands remitted to the Committee of Creditors of JIL and the time for

92 In the passing, we may also observe that intrinsically interwoven transactions between JAL and JIL cover another aspect of arrangements whereby certain land parcels were transferred from JIL to JAL. The resolution plan in question, in clause 19 of Schedule 3, provided for termination of such arrangements where title and ownership was lying with the corporate debtor JIL. The Adjudicating Authority approved the said proposition while observing that the resolution applicant would be at liberty to proceed in accordance with law. The erstwhile director of the corporate debtor has raised questions over this arrangement in his written submissions while submitting that such terminations may create unprecedented crises and would cause prejudice to JAL's homebuyers. We have not commented on this aspect in the judgment essentially for the reason that the same did not form the core of the principal issues involved in this matter. However, when the matter is to be reconsidered, all the relevant aspects are left open for consideration of the Committee of Creditors.

completion of the process relating to CIRP of JIL is extended by another period of 45 days from the date of this judgment.

225.2. We direct the IRP to complete the CIRP within the extended time of 45 days from today. For this purpose, it will be open to the IRP to invite modified/fresh resolution plans only from Suraksha Realty and NBCC⁹³ respectively, giving them time to submit the same within 2 weeks from the date of this judgment.

225.3. It is made clear that the IRP shall not entertain any expression of interest by any other person nor shall be required to issue any new information memorandum. The said resolution applicants shall be expected to proceed on the basis of the information memorandum already issued by IRP and shall also take into account the facts noticed and findings recorded in this judgment.

225.4. After receiving the resolution plans as aforementioned, the IRP shall take all further steps in the manner that the processes of voting by the Committee of Creditors and his submission of report to the Adjudicating Authority (NCLT) are accomplished in all respects within the extended period of 45 days from the date of this judgment. The Adjudicating Authority shall

93 Only these resolution applicants were permitted to submit the revised plans in the judgment dated 06.11.2019.

take final decision in terms of Section 31 of the Code expeditiously upon submission of report by the IRP.

225.5. These directions, particularly for enlargement of time to complete the process of CIRP, are being issued in exceptional circumstances of the present case and shall not be treated as a precedent.

225.6. As noticed in paragraphs 4.5 and 38.3 hereinabove, the proceedings relating to CIRP of JIL were initiated by the Allahabad Bench of National Company Law Tribunal but, later on, the same were transferred to its Principal Bench at New Delhi. Therefore, the proceedings contemplated by this judgment shall be taken up by the Principal Bench of the National Company Law Tribunal at New Delhi.

226. All the appeals, transferred cases, transfer petitions and interlocutory applications in this batch stand disposed of.

227. A copy of this order be forwarded to the NCLT, New Delhi and IRP through email forthwith for compliance.

Acknowledgement

228. While closing, we owe a duty to put on record our thanks and compliments to the learned counsel for the respective parties, their associates and their research assistants who all, despite challenging

circumstances due to the pandemic and virtual hearing, have rendered invaluable assistance to the Court in dealing with vast variety of questions involved in these matters, by way of neatly articulated oral submissions as also meticulously drawn written submissions.

.....J.
(A.M. KHANWILKAR)

.....J.
(DINESH MAHESHWARI)

.....J.
(SANJIV KHANNA)

New Delhi
Dated: 24th March, 2021

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**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI
(APPELLATE JURISDICTION)**

Company Appeal (AT) (CH) (Insolvency) No. 15 of 2021

Under section 61 of Insolvency & Bankruptcy Code)

**(Arising out of Order dated 8.1.2021 in IA No.1079 of 2020 in C.P.(IB) No.184/7/HDB/2019
passed by the Hon'ble National Company Law Tribunal, Hyderabad Bench**

In the matter of:

Mr.Ravi Sankar Deverakonda Appellant
D No.8-2-248/1/79 & 10/6
Third Floor 1 B, Uma Chambers
Punjagutta, Hyderabad 500 082

V.

Committee of Creditors Respondent
of Meenakshi Energy Limited
Represented by State Bank of India
Stressed Assets Management Branch-II
D.No.3-4-1013/A, 1st Floor, CAC, TSRTC Bus Station
Kachiguda, Hyderabad 500 027.

Present:

For Appellant : Mr. Sumant Batra, Advocate

JUDGEMENT

(VIRTUAL MODE)

Venugopal M.J

Preface

The Appellant/Applicant/Resolution Professional' has projected the instant 'Appeal' being dissatisfied with the order dated 8.1.2021 passed by the 'Adjudicating Authority'(National Company Law Tribunal, Hyderabad Bench, Hyderabad) in IA No.1079 of 2020 in CP(IB)No.184/7/HDB/2019.

2. The 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Hyderabad) while passing the 'Impugned Order' dated 8.1.2021 in IA No.1079 of 2020 in CP(IB)No.184/7/HDB/2019 (filed by the 'Appellant/Applicant/Resolution Professional) under section 12(2) of the 'Insolvency & Bankruptcy Code, 2016, Read with Regulation 40 of Insolvency Resolution Process for Corporate Persons Regulations, 2016) and among other things at Paragraph 7 and Paragraph 8, had observed the following:

"In view of the amendments brought in section 12 of the IBC, 2016 with effect from 16.08.2019, the CIRP shall be mandatorily completed within a period of 330 days from the insolvency commencement date including any extension of the period of the CIRP granted under section 12 of the IBC, 2016, Since, the CIRP period of 180 days has already been extended by another 90 days vide this Adjudicating Authority's order date 25.08.2020 and the period of 270 days came to end on 10.11.2020, we hereby allow to complete the Corporate Insolvency Resolution Process with another 60 days with effect from the date of this order. The Applicant is hereby directed to take all necessary steps to complete the CIRP within the mandatory period of 330 days, failing which the liquidation proceeding will commence.

The permission is granted on having considered the steps already been taken by the RP and the current stage of CIRP in the case of the present Corporate Debtor i.e., M/s. Meenakshi Energy Limited”

and resultantly disposed of the ‘Application’.

Appellant’s Contentions:

3. Assailing the correctness, validity and legality of the ‘Impugned Order’ dated 8.1.2021 in IA No.1079 of 2020 in CP(IB)No.184/7/HDB/2019 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Hyderabad Bench, Hyderabad), in the present ‘Appeal’, the Learned Counsel for the ‘Appellant’ submits that the ‘Appellant’ was directed by the ‘Respondent/Committee of Creditors’ of M/s Meenakshi Energy Limited through its majority Resolution passed in its 11th Meeting authorised and directed the ‘Appellant’ to file an ‘Application’ before the ‘Adjudicating Authority’/Tribunal for an extension of ‘CIRP’ of the ‘Corporate Debtor’ beyond 270 days to 330 days including the exclusion of the period lost on account of lock down in the State of Telengana.

4. The Learned Counsel for the ‘Appellant’, proceeds to point out that the ‘Appellant’ filed IA No.1079 of 2020 (330 days Extension Application) before the ‘Adjudicating Authority’ seeking extension of time period to complete ‘CIRP’ of the ‘Corporate Debtor’ from 270 to 330 days.

5. The Learned Counsel for the Appellant brings to the notice of this 'Tribunal' that the 'Adjudicating Authority' ((National Company Law Tribunal, Hyderabad Bench, Hyderabad) while passing the order in IA No.1079 of 2020 in CP(IB)No.184/7/HDB/2019 had allowed the 330 days Extension Application and inter alia, granted the 'Appellant' an extension of 60 days from 270 to 330 days to conclude the 'CIRP' of the 'Corporate Debtor'.
6. The grievance of the Learned Counsel for the Appellant is that in the 'Impugned Order' that 'Adjudicating Authority' had erroneously noted that in the event of 'CIRP' of the 'Corporate Debtor' was not completed within the 330 days period, the 'Liquidation Proceedings' against the 'Corporate Debtor' would commence and this observation of the 'Adjudicating Authority' in the 'Impugned Order' deprive the 'Appellant' of his/its right to seek an extension beyond the period of 330 days as per the dictum by the Hon'ble Supreme Court laid down in the decision in Committee of Creditors of Essar Steel India Limited V Satish Kumar Gupta & Ors., (Judgement in Civil Appeal No.8766-67 of 2019).
7. Advancing his arguments, the Learned Counsel for the 'Appellant' contends that the 330 days period mentioned in Section 12(3) of the 'Insolvency & Bankruptcy Code, 2016' is not a mandatory one and further, the word 'mandatorily' appearing in the second proviso to Section 12(2) of the Code was struck down by the Hon'ble Supreme

Court in the decision in Committee of Creditors of Essar Steel India Limited V Satish Kumar Gupta & Ors., reported in (2020)8 SCC at page 531.

8. The Learned Counsel for the 'Appellant, refers to the relevant Paragraph of the Hon'ble Supreme Court judgement in Committee of Creditors of Essar Steel India Limited V Satish Kumar Gupta & Ors., which runs as under :

"Thus, while leaving the provisions otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1) (g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the Corporate Debtor must be completed within the outer limit of 330 from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the code that only a short period is left for completion of the Insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into Liquidation and that the time taken in legal proceedings is largely due to the factors

owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and / or the Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or the Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to section 12, if any reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act, 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, 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 the corporate debtor is to be driven into liquidation”.

9. The Learned Counsel for the 'Appellant' comes out with an argument that 'CIRP' of the 'Corporate Debtor' may be extended beyond a period of 330 days in exceptional circumstances to be demonstrated before the 'Adjudicating Authority'/'Tribunal' at the appropriate stage. To lend support to this contention, the Learned Counsel for the 'Appellant' refers to the judgement of this 'Tribunal' in *Ritu Rastogi v. Riyal*

Packers, Company Appeal(AT)(Insolvency) No.482 of 2020, whereby and whereunder, it is observed as follows:

"This is a fit case for exercising the jurisdiction by this Appellate Tribunal being an exceptional case to depart from the general rule of 330 days being outer limit prescribed under the law for completion of the 'corporate insolvency resolution process' inclusive of period of judicial intervention. We are also of the considered opinion that failure to exercise discretion in a matter of this nature would have serious implications imperilling the legitimate interests of all stakeholders and inevitable conclusion would be to push the 'Corporate Debtor' into liquidation which has to be avoided at all costs".

10. The Learned Counsel for the 'Appellant' contends that the 'Impugned Order' of the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Hyderabad) was not correct in issuing a direction for 'Commencement of Liquidation', on the expiry of 330 days, and the same is liable to set aside to secure the ends of justice.

11. At this juncture, the Learned Counsel for the 'Appellant' points out that the IA No.120 of 2021 is filed by the 'Appellant/Applicant' before the 'Adjudicating Authority' seeking extension of 60 days to complete the 'CIRP' and the matter was adjourned to 23.4.2021.

APPRAISAL

12. At the outset, it is to be pointed out that the provisions of the 'Insolvency & Bankruptcy Code, 2016' are enacted by the Parliament specifically to streamline the 'Resolution of Corporate Insolvency' and the same are to be followed because of the prime reason that the said provisions are conceived in 'public interest' and 'good governance'. As a matter of fact, the time limit for completion of 'CIRP' is prescribed in Section 12 of the 'Insolvency & Bankruptcy Code'.
13. In reality, the act of extending the 'Insolvency Resolution' beyond the time limit under section 12(3) of the Code is against the underlying policy of the Code for ensuring timely resolution of 'Company Insolvency'. Undoubtedly, an extension of time for extension of time for 'CIRP' is a 'critical arena'. However, the exercise of the power of extending the time limit by the 'Adjudicating Authority' in negation of the statutory provision of the Code may be desirable in an exceptional/extraordinary circumstances of a given case.

14. Be it noted, that 'speed' is the gist for the working of the 'Bankruptcy Code'. It cannot be gainsaid that the 'Corporate Insolvency Resolution' with approval of 'Plan of Resolution' is ultimately the exclusive domain of the 'Committee of Creditors'.
15. Bearing in mind the word 'mandatorily' found in Section 12(3) of the 'Insolvency & Bankruptcy Code, 2016' was struck down by the Hon'ble Supreme Court in the matter of Committee of Creditors of Essar Steels India Pvt.Ltd. V Satish Gupta reported in (2020) 8 SCC at Pg.531, this 'Tribunal' comes to a resultant conclusion that ordinarily the time taken pertaining to the Corporate Insolvency Resolution Process of the 'Corporate Debtor' must be completed within a period of 330 days from the date of commencement of Insolvency (including the extension and time consumed in legal proceedings). However, the exercise of power by the 'Adjudicating Authority' to extend the time period in negation of statutory provision of the 'Insolvency & Bankruptcy Code, 2016' may be desirable in an exceptional/extraordinary Circumstances of a given case by exercising sound 'Judicial discretion' with a view to find a suitable 'Resolution Plan' to prevent an aberration of justice.
16. Be that as it may, in the present case, even though the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Hyderabad) in the 'Impugned Order' dated 08.01.2021 in IA No No.1079 of 2020 in C.P.(IB) No.184/7/HDB/2019, at Paragraph 7, had observed that*"Since, the CIRP period of 180 days has*

already been extended by another 90 days vide this Adjudicating Authority's order date 25.08.2020 and the period of 270 days came to end on 10.11.2020, we hereby allow to complete the Corporate Insolvency Resolution Process with another 60 days with effect from the date of this order. The Applicant is hereby directed to take all necessary steps to complete the CIRP within the mandatory period of 330 days, failing which the liquidation proceeding will commence", this 'Tribunal' is of the prima facie view that the instant 'Appeal' is not maintainable, as it is a premature and otiose one. At this stage, the Learned Counsel for the Appellant seeks permission to withdraw the present 'Appeal' and acceding to his request, this 'Appeal' is dismissed as 'withdrawn'. No costs.

17. However, this 'Tribunal directs the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Hyderabad) to take up the IA No.120 of 2021 (filed by the Appellant/Applicant seeking extension of 60 days for completion of 'CIRP') pending on its file, on the next date of hearing, i.e. on 23.4.2021 and to dispose of the same on merits by passing a 'reasoned order', ofcourse, in a fair, Just and dispassionate manner in accordance with Law and in the manner known to Law, at an early date.

18. IA No.39/2021 filed by the Appellant/Applicant/Resolution Professional, seeking to condone the delay of 15 days is allowed for the reasons mentioned therein. IA No.40/2021 and IA No.41/2021 are closed. The Appellant/Applicant/Resolution Professional is directed to file the 'Certified Copy' of the 'Impugned Order' dated 8.1.2021 in IA No.1079 of 2020 in C.P.(IB) No.184/7/HDB/2019 of the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Hyderabad) within two weeks from Today.

[Justice Venugopal M]
Member (Judicial)

[V.P.Singh]
Member (Technical)

24th March, 2021

HR

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 229 of 2021

In the matter of:

Mirambica Infrastructure Pvt. Ltd.

....Appellant

Vs.

**Sanskrut Jewel Residency LLP & Ors.
 (hereinafter referred as the Corporate Debtor)**

....Respondents

Present:

Appellant: Mr. Sachin Naveen Sinha, PCS.

Respondents:

ORDER
(Through Virtual Mode)

24.03.2021: The Appellant, who happens to be the Operational Creditor having filed Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short 'the I&B Code') before the Adjudicating Authority (National Company Law Tribunal) Ahmedabad Bench, Ahmedabad, Court-2 is aggrieved of the impugned order dated 19th February, 2021 by virtue whereof the matter was adjourned to 23rd March, 2021.

2. It is submitted by Mr. Sachin Naveen Sinha, PCS representing the Appellant – Operational Creditor that the Application filed under Section 9 of the I&B Code in the year 2019 is still pending consideration for admission and the order has been reserved on 23rd March, 2021 only to decide the Intervention Application.

3. After hearing Mr. Sachin Naveen Sinha, PCS we deem it appropriate to dispose of this Appeal emphasising upon the Adjudicating Authority to abide by

Cont'd..../

- 2 -

the mandate of Section 9(5) of the I&B Code, which provides for passing of an order of 'admission' or 'rejection' of the Application of Operational Creditor filed under Section 9 of the I&B Code within 14 days of the receipt of such Application. The Adjudicating Authority, not being a Civil Court and it being enjoined upon it to conduct the Corporate Insolvency Resolution Process in a time bound manner as delineated by the I&B Code, should not allow the pre-admission proceedings to be converted into an adversarial litigation. Speed being the password in CIRP proceedings, the Adjudicating Authority has to act in a swift manner and not allow the proceedings to be hijacked by a person or entities to put a spoke in the wheel, so as to render the process nugatory. The Adjudicating Authority would do well by focusing upon the issue in regard to admission or otherwise to consider the Application on merit and pass an order in that regard most expeditiously, preferably within 10 days. The Appeal is accordingly disposed off.

3. Copy of this order be communicated to the Adjudicating Authority forthwith.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Dr. Ashok Kumar Mishra]
Member (Technical)

Ash/GC
Company Appeal (AT) (Insolvency) No. 229 of 2021

National Company Law Appellate Tribunal, New Delhi**Principal Bench****COMPANY APPEAL (AT) (Insolvency) No. 1017 of 2020**

(Arising out of Order dated 31st August, 2020 passed by National Company Law Tribunal, Mumbai Bench, Court No. II, in Company Petition (IB) No.- 4137/MB/2018)

IN THE MATTER OF:

Shri Abhinandan Jain,
Director,
R/o B-702, Tridev Apartment,
Bhakti Marg Mulund West
Mumbai – 400080
Email: ca_abhinandanjain@hotmail.com
Representing the suspended management of
RISA INTERNATIONAL LTD.
(A company incorporated under the provisions of
the Companies Act, 1956)

Having its registered office at:
7/A, Beaumoon Chambers, Nagindas Master
Road,
Hutatma Chowk, Fort, Mumbai – 400021

.....Appellant**Versus**

Tanaya Enterprises Pvt. Ltd.
(A company incorporated under the provisions of
the Companies Act, 1956)
Through its Directors

Having its office at:
F-108/109, Ansa Industrial Estate,
Sakivihar Road, Sakinaka, Andheri (E)
Mumbai – 400072
E-Mail: info@tepl.biz, accounts@vemb.biz

....Respondent

Appellant: Mr. Sudhir K Makkar, Sr. Advocate alongwith
Mr. Shalabh Singhal and Ms. Saumya Gupta,
Advocates.
Respondent: Mr. Anant A. Pavgi and Mr. Abhishek Anand, for R-1.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. The Appellant, the Suspended Director of the Corporate Debtor has filed the present Appeal assailing the Impugned Order dated 31.08.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court No. II) in C.P. (IB) No. 4137/MB/2018, admitting the Application filed by the Respondent 'Operational Creditor' under Section 9 of the Insolvency and Bankruptcy Code, 2016 (In Short '**the IBC**').

2. Learned Adjudicating Authority while admitting the Section 9 Application observed as follows;

"14. On going through the submissions made by the Counsel from the both the sides and on perusing the documents produced on record, this Bench takes note of the fact that the six invoices and delivery challan raised by the Petitioner have been duly acknowledged by the Corporate Debtor by putting their stamp. Hence the contention raised by the Corporate Debtor denying and disputing the invoices and delivery challans does not have any foundation.

15. The Petitioner has also duly produced the running books of Account of the Corporate Debtor regarding the transactions and invoices. This shows an outstanding Debt of Rs. 90,49,843/- due from the Corporate Debtor as on 31.0.2018. This clearly shows the amount due from the Corporate Debtor.

16. This Bench on examination, finds that the Demand Notice dated 10.09.2018 has been duly served through registered post by the Petitioner at 604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai. A proof of delivery by way of acknowledgement card has been attached by the Petitioner with his Petition. That it is the correct address for delivery of Demand Notice is borne out by the fact this address is mentioned as the Registered address of the Corporate Debtor Company even in their Annual Report of 2018-2019. This Bench,

therefore, has no doubt that the Demand Notice was duly served upon the Corporate Debtor and it chose not to contest it.

17. The Petitioner is registered under the MSME Act, 2006. Since the default amount as per the petition is Rs. 90,49,843/- and the Petitioner claimed Rs. 1,77,11,546/- in Demand Notice. The Bench, while not going into the actual calculation of interest, is of the view that on the Principal amount due the petitioner can claim interest on the amount due in terms of Section 16 of MSME Act;

“Where any buyer fails to make payment of the amount to the supplier, as required under Section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.”

18. The Corporate Debtor has not been able to produce a single piece of paper which points towards it raising any dispute regarding the transaction, invoices or the amount payable. This bench has no doubt that at least an amount of Rs. 90,49,843/- is a liability which is due from Risa International Limited and qualifies as Operational Debt both in terms of section 3(11) and Section 5(21) of the IBC, 2016. This Bench also concludes that there is a default in terms of Section 3(12) of the IBC, 2016 which defines as “... non-payment of Debt when whole of any part or instalment of the amount of debt has become ‘due and payable’...” The two essential requirements, i.e. existence of ‘debt’ and ‘default’, for admission of a petition under Section 9 of the I&B Code, has been met in this case.

Submissions of the Appellant

3. The main submissions of the Learned Counsel for the Appellant are three fold:-

(a) Notice mandated under Section 8 of the IBC, 2016 was never served upon them.

(b) That the Application arises out of 'time barred claims'.

(c) That there is a "Pre-Existing Dispute" prior to the filing of the Application under Section 9 of the IBC.

4. Learned Counsel for the Appellant submitted that Section 9(3)(a) mandatorily requires that the Application should be accompanied with a copy of the Demand Notice delivered by the Operational Creditor to the Corporate Debtor; that Sections 8 & 9 of the Code should be conjointly read with Rules 5 & 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which provide for the mode of service of the Demand Notice on the Corporate Debtor, a sine qua for maintaining an Application under Section 9 of the IBC. Learned Counsel drew our attention to Page Nos. 109-115 of the Appeal Paper Book, which contained the copies of the Registered Post, Acknowledgement due sent to the Corporate Debtor and the Directors of the Corporate Debtor Company; he submitted that the notice sent to the Appellant/Mr. Abhinandan Jain was returned to the Operational Creditor with an endorsement 'closed in the period 2017-2018'. Likewise, the notice sent to Priya Arhant Jain, Mr. Arihant Jain and Mr. Shital Rikhabchand Multha were also returned with an endorsement 'closed for a period 2017-2018'. Regarding the service of notice on the Corporate Debtor, Learned Counsel for the Appellant argued that the stamp on the acknowledgement card is that of 'Brahmecha Modi, Chartered Accountants' who has nothing to do with the Corporate Debtor.

5. With respect to service of notice on Mr. Vipin Champawat Shantilal, Learned Counsel for the Appellant submitted that though the acknowledgement card is signed by him, being an independent Director, he does not occupy any 'Key Managerial Position' and therefore cannot be said to be 'effective service' as provided for under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

6. Learned Counsel for the Appellant further submitted that the Operational Creditor had never directly handed over a copy of the Petition to the Corporate Debtor prior to the filing of any Application.

- Application arising out of 'Time Barred Claims'.

7. Learned Counsel for the Appellant contended that the Petition filed by the Operational Creditor was based on six invoices with dates ranging from 27.10.2014 to 31.10.2014 which were to be paid within 90 days as per the date of invoices. As per the Demand Notice dated 10.09.2018 under Section 8, the date of default is stated to be 29.01.2015 and the Respondent has stated that due dates of payments of the alleged invoices were 25.01.2015, 26.01.2015, 27.01.2015, 28.01.2015 and 29.01.2015. Learned Counsel for the Appellant drew our attention to the fact that interest @ 19.5% was calculated by the Respondent, from these due dates up to 10.09.2018 amounting to Rs. 1,77,11,546/-. It is argued that as the Application was filed on 19.10.2018 and the invoices pertain to the period October, 2014 to January, 2015, the claims arising out of these invoices are time barred. In support of these arguments, he relied upon the Judgments of the Hon'ble Supreme Court in '**Noharlal Verma' Vs. 'District Co-operative Central Bank Limited, Jagdalpur'** (2008) 14 SCC 445, '**Thambusamy' Vs.**

‘Mani’, 2009 SCC OnLine Mad 1774 and ‘Pegasus Assets Reconstructions Pvt. Ltd.’ Vs. ‘Yashomati Hospitals Pvt. Ltd.’, 2020 SCC OnLine NCLAT 793.

8. Learned Counsel for the Appellant further contended that the Respondent/‘Operational Creditor’ cannot change the date of default to 22.09.2016 on the ground that the Corporate Debtor had paid an amount of Rs. 30,30,000 on 22.09.2016, out of which an amount of Rs. 7,06,000/- was adjusted against invoice No. 24. He placed reliance on the Judgment of the Hon’ble Supreme Court in **‘Babulal Vardharji Gurjar’ V/s. ‘Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.’, 2020 SCC Online SC 647.**

- ‘Pre-Existing Dispute’

9. Learned Counsel for the Appellant submitted that the Corporate Debtor had business transactions with one Mr. Puneet Shivkumar Agarwal since September, 2013 through his group/related companies which are as follows:

- a. Akash Lifestyle Pvt. Ltd.
- b. Shirin Export Pvt. Ltd.
- c. Anmol Lifestyle Pvt. Ltd.
- d. Matheysh Multitrading Pvt. Ltd.
- e. Vallari Trading Pvt. Ltd.
- f. Jetspeed Tradecom Pvt. Ltd.
- g. Vigorous Tradelink Pvt. Ltd.
- h. Tanaya Enterprises Pvt. Ltd.
- i. Vemb Lifestyle Pvt. Ltd.”

10. It is submitted that all the email correspondence from Mr. Punit Shivkumar Agarwal was done by Ms. Rashmi Shetye through her email id and vide email dated 03.11.2014, Ms. Rashmi Shetye sought confirmation from the Corporate Debtor of its credit balance with the group companies to the tune of Rs. 34,23,71,004/-. It is argued by the Learned counsel for the

Appellant that the said invoices are forged and fabricated; that the Respondent had filed self-serving documents; that no amount was 'due and payable' under the said invoices; that there is a 'Pre-Existing Dispute' between the parties established from the fact that the Corporate Debtor had filed an Application under Section 8&9 of the IBC against 'Aakash Lifestyle Pvt. Ltd.' and 'Shirin Exports Pvt. Ltd.', which are the companies of Mr. Punit Shivkumar Agarwal before NCLT, Mumbai, vide order dated 14.11.2019 CP(IB) No. 2306/I&BP/2019 in 'Risa International Pvt. Ltd.' Vs. 'Aakash Lifestyle Pvt. Ltd.' and order dated 14.11.2019 in CA(IB) No. 2581/I&BP/2019 in 'Risa International Pvt. Ltd.' Vs. 'Shirin Exports Pvt. Ltd.' Learned Adjudicating Authority was pleased to allow the said Petitions. It was contended that there is a dispute between the parties and the present petition was filed to prevent the Corporate Debtor from making its rightful claims against the related companies.

Submissions of the Learned Counsel for the Respondent.

11. Learned Counsel appearing for the Respondent 'Operational Creditor' submitted that the Demand Notice under Section 8 of the IBC was duly served through registered post at "604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai - 400086", which is the Registered Address of the Corporate Debtor since 2012 as per the records of the MCA and the same address has been mentioned by the Corporate Debtor in the latest available Annual Reports of 2011-12, 2018-19 and 2019-2020; that the Corporate Debtor on page 13 of their Annual Report of 2012 have approved the shifting of their Registered Office to the aforementioned address and since then, is continuing to operate through the same Registered Office

address; that the proof of delivery is also reflected from the acknowledgement card that was annexed by the answering Respondent alongwith his Application under Section 9 of the IBC; that the registered office of the Corporate Debtor is also used by other relatives of the Promoters/Directors of the Corporate Debtor; that the copy of the acknowledgement alongwith the Master Data of the Corporate Debtor and the letter from the Department of Posts- India confirming the delivery of the document on 21.09.2018 to the Corporate Debtor read with the relevant pages of the Annual Report establishes that the Demand Notice of Section 8 was sent by registered post and delivered to the Corporate Debtor and the Directors.

12. Learned Counsel for the Respondent submitted that the Corporate Debtor maintained a running account with them which is reflected in Annexure-5, (Pages 125 to 154 of the Reply Paper Book) filed before this Tribunal. It is submitted that the Appellant has failed to disclose this running account which reflects outstanding debt of Rs. 90,49,843/- due from the Corporate Debtor as on 31.03.2018. It is further submitted that the Notification dated 24.03.2020 issued by the Ministry of Corporate Affairs, Government of India, whereby the minimum threshold for triggering of an Application under Section 9 of the IBC was raised from Rs. 1,00,000 to 1,00,00,000/- is prospective in nature as laid down by this Tribunal in the case of ***'Madhusudan Tantia' Vs. 'Amit Choraria & Anr.' Company Appeal (AT) (Insolvency) No. 557 of 2020 dated 12.10.2020.***

13. Learned Counsel for the Respondent vehemently denied that there was any 'Pre-Existing Dispute' between the parties and further submitted

that the Appellant in contravention of the provisions of the Code, withdrew an amount of Rs. 1,03,30,513/- on 03.09.2020 subsequent to the initiation of the Corporate Insolvency Resolution Process (CIRP) dated 31.08.2020 and thereafter preferred this Appeal on 10.11.2020. Learned Counsel for the Respondent drew our attention to I.A. No. 2065 of 2020 filed by the Resolution Professional (RP in short) under Section 60(5) of the Code seeking direction to the Directors to return the money withdrawn by them. He submitted that this Appeal is preferred subsequent to the filing of the Application by the RP only as an after thought.

Assessment

14. At the outset, we address ourselves to the issue whether Demand Notice under Section 8 has been duly served upon the Appellant 'Corporate Debtor', as per the statutory provisions under Sections 8 & 9 of the Code; which read as follows;

8. Insolvency resolution by operational creditor.

- (1) *An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed*

(2) *The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—*

(a) *existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*

(b) the repayment of unpaid operational debt—

- (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
- (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

(Emphasis Supplied)

9. Application for initiation of Corporate Insolvency Resolution Process by Operational Creditor. –

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

15. At this juncture, it is relevant to reproduce Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 dealing with service of Demand Notice.

“5. Demand Notice by Operational Creditor. – (1)
An Operational Creditor shall deliver to the Corporate Debtor, the following documents, namely:-

(a) a Demand Notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The Demand Notice or the copy of the invoice demanding payment referred to in sub-section (2) of Section 8 of the Code, may be delivered to the Corporate Debtor, -

(a) at the registered office by hand, registered post or speed post with acknowledgement due;

or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the Corporate Debtor.

(3) A copy of Demand Notice or invoice demanding payment served under this rule by an Operational Creditor shall also be filed with an information utility, if any.

(Emphasis Supplied)

16. In the instant case, it is seen from the record that Demand Notice under Section 8 was sent to the Corporate Debtor by 'Registered Post, Acknowledgement Due' to '604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai – 400086'. Rule 5 provides that the Notice is to be served on the Corporate Debtor at the Registered Address available on the Records/Portal of the MCA. A perusal of the Master Data, evidences that the Registered Address is '604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai – 400086'. In the Master Data, the signatory details of the Directors, is stated as below;

<i>Din/PAN</i>	<i>Name</i>	<i>Begin date</i>	<i>End Date</i>	<i>Surrender DIN</i>
03157346	Shital Rikhabchand Mutha	10/12/2011		
03199953	Abhinandan Jain	19/10/2011		
AFFPJ2303D	Abhinandan Jain	12/02/2015		
03288261	Arihant Jain Suresh	27/05/2013		
06369837	Vipin Champawat Shantilal	01/09/2012		
07211719	Priya Jain Arihant	25/06/2015		

17. The documentary evidence on record establishes that the notice was served by Registered Post to the 'Registered Address' as mentioned in the 'Master Data' of the Ministry of Corporate Affairs, MCA. It is the main case of the Appellant that the Registered Post Acknowledgement Card, though sent to the Registered Address of the Corporate Debtor, bears the stamp of one 'Brahmecha Modi & Company', a Chartered Accountant Firm which has nothing to do with the Corporate Debtor and hence cannot be stated to be "received by the Corporate Debtor".

18. In the instant case the Department of Posts, Government of India, has also given a report dated 28.09.2018 that the said letter sent by registered post to the Corporate Debtor was delivered on 29.01.2018. Since the main point for consideration in this case is with respect to service of notice under

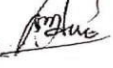
Section 8 of the IBC, we find it relevant to reproduce the said letter issued by the Department of Posts, Government of India.

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DEPARTMENT OF POSTS - INDIA
THE SPM
SAKINAKA PO
MUMBAI - 72.
TEL: 022-28570752
COMPLAINT - SETTLED REPLY

No. 100088-37921 28/09/2018

To
Tanava Enterprises Private
Limited, F-108/ 109, Ansa
Industrial Estate, Sakinaka,
Andheri (East), Mumbai,
400072.
Dear Sir / Madam,

In continuation of our letter regarding the Complaint No. 100088-37921, it is to inform you that the complaint of Delay in delivery of Articles of Registered Letters with Acknowledgement with Transaction No. RM659746213IN on 18/09/2018 of sakinaka s.o-400072 is settled on 28/09/2018 with the following information that 'GHATKOPAR WEST S.O' Article Delivered on 21/09/2018 at ghatkopar west to: ADDRESSEE Thanking you,
Yours faithfully,

SPM
SAKINAKA S.O

CS Scanned with CamScanner

19. Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 specifies that the Demand Notice by Operational Creditor should be served at the Registered Office by hand, Registered Post or Speed Post with acknowledgement due; **or** by Electronic Mail Service to a whole time Director or Designated Partner or Key Managerial Personnel, if any, of the Corporate Debtor.

20. If the argument of the Learned Counsel for the Appellant is accepted that service on the Corporate Debtor was 'insufficient' on the ground that it was *received by somebody else*, though admittedly addressed to the Registered Address, then such an observation would be ultra vires to what has been provided for in Rule 5 of the 'IBC' 2016 and in the Statutory Provisions of Section 8 of the 'IBC'. As long as it has been addressed

properly and once served at the Registered Address, it is not the concern of the Applicant as to who receives it.

21. It is also the case of the Appellant that though the notice was admittedly served to Mr. Vipin Champawat, he is only an Independent Director and does not fall within the definition of 'Key Managerial person' of the Corporate Debtor.

22. The receipt of notice by the Independent Director further fortifies the case of the Operational Creditor, as he is a Member of the Board of Directors and it can be safely construed that the Board of Directors has knowledge of the same. It is the Board of Directors who takes a call and acts on behalf of the Corporate Debtor and the Independent Director is a part of it. Be that as it may, the Respondent had got issued a Legal Notice dated 20.08.2018 prior to the issuance of the Demand Notice in September 2018, addressed to the Corporate Debtor at the Registered Address. The same has not been denied by the Corporate Debtor. Additionally, a notarized Affidavit of service has been filed with respect to handing over a copy of the Petition to the Office of the Corporate Debtor.

23. Keeping in view the facts of the attendant case, Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and Sections 8 & 9 of the IBC, the letter issued by the Department of Posts, Government of India alongwith the fact that admittedly the Registered Office of the Corporate Debtor in the Master Data, Ministry of Corporate Affairs is "604, Kaushal Point, 4th Floor, Behind Uday Cinema, Ghatkopar (W), Mumbai - 400086" and the same is further reflected in the Annual Report filed before us, we are of the considered view that service of Demand

Notice mandated under Section 8 of the IBC to the aforesaid address of the Corporate Debtor is satisfactory and is therefore held sufficient.

Whether the claims made by the Operational Creditor are ‘time barred’?

24. Now we address ourselves to the issue of time barred claims raised by the Learned Counsel for the Appellant. The Hon’ble Apex Court in **‘Babulal Vardharji Gurjar’ (Supra)**, placing reliance on **‘BK Educational Services (P) Ltd.’ (2019) 11 SCC 633**, **‘Gaurav Hargovindbhai Dave’ V/s. ‘Asset Reconstruction Company (India) Ltd. & Anr.’ (2019) SCC OnLine SC 1239**, **‘Jignesh Shah’ V/s. ‘Union of India’ (2019) 10 SCC 750**, **‘Vashdeo R. Bhojwani’ V/s. ‘Abhydaya Coop. Bank Ltd.’ (2019) 9 SCC 158** observed that the scope and intent of the Code was not to reopen the right of claimants to file time barred claims and treat the Code as a Debt Recovery Law.

25. The citations relied upon by the Learned Counsel for the Appellant viz. **‘Pegasus Assets Reconstructions Pvt. Ltd.’ (Supra)**, **‘Noharlal Verma’ (Supra)** and **‘Thambusamy’ (Supra)**, in support of his contention that the alleged debt, is barred by limitation, are not relevant to the facts of the attendant case. In **‘Thambusamy’ (Supra)** the ratio laid down by the Hon’ble Apex Court is with respect to Article 67, of the Limitation Act, 1963 has been elaborately dealt with by the Hon’ble Supreme Court in matters of IBC in **‘Gaurav Hargovindbhai Dave’ (Supra)**.

26. The Hon’ble Apex Court in **‘Babulal Vardharji Gurjar’ (Supra)**, has reproduced the relevant passages of the said decision in **‘Gaurav Hargovindbhai Dave’ (Supra)** detailed as hereunder;

“4. Mr Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21.07.2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in B.K. Educational Services Private Limited v. Parag Gupta and Associates, 2018 SCC OnLine SC 1921 in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr Debal Banerjee, learned Senior Counsel, appearing on behalf of the respondents, countered this by stressing, in particular, para 7 of B.K. Educational Services Private Limited (supra) and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being “an application” which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee’s reliance on para 7 of B.K. Educational Services Private Limited (supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

7. This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted. It is well settled that there is no equity about limitation - judgments have stated that often time periods provided by the Limitation Act can be arbitrary in

nature. 8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside.”

(Emphasis in bold supplied)

27. In **‘Babulal Vardharji Gurjar’ (Supra)**, the Hon’ble Apex Court while dealing with **‘whether Section 18 Limitation Act could be applied to that case’** observed as follows;

“32.1. Even in the later decisions, this Court has consistently applied the declaration of law in **B.K. Educational Services (supra)**. As noticed, in the case of **Vashdeo R. Bhojwani (supra)**, this Court rejected the contention suggesting continuing cause of action for the purpose of application under Section 7 of the Code while holding that the limitation started ticking from the date of issuance of recovery certificate dated 24.12.2001. Again, in the case of **Gaurav Hargovindbhai Dave (supra)**, where the date of default was stated in the application under Section 7 of the Code to be the date of NPA i.e., 21.07.2011, this Court held that the limitation began to run from the date of NPA and hence, the application filed under Section 7 of the Code on 03.10.2017 was barred by limitation.

32.2. In view of the above, we are not inclined to accept the arguments built up by the respondents with reference to one part of observations occurring in paragraph 21 of the decision in **Jignesh Shah (supra)**.

33. Apart from the above and even if it be assumed that the principles relating to acknowledgement as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application under Section 7 of the Code, in our view, neither the said provision and principles come in operation in the present case nor they ensure to the benefit of respondent No. 2 for the fundamental reason that in the application made before NCLT, the respondent No. 2 specifically stated the

date of default as '8.7.2011 being the date of NPA'. It remains indisputable that neither any other date of default has been stated in the application nor any suggestion about any acknowledgement has been made. As noticed, even in Part-V of the application, the respondent No. 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the applicant in the said Part V of the application and even in residuary Point No. 8 therein, nothing was at all stated at any place about the so called acknowledgment or any other date of default.

(Emphasis Supplied)

28. In the instant case the documentary evidence, that is the ledger and the running account filed evidences that the first invoice dated 27.10.2014 is for an amount of Rs. 17,84,640/-, part payment of which i.e. Rs. 7,06,008/- was received, leaving a balance amount of Rs. 10,78,632/-. The other invoices and the amounts claimed for in Part III, Form V of the Application are detailed as hereunder;

- a) Invoice no. TEPL/RIL/024/14-15, dated 27.10.2014, for an amount of Rs. 17,84,640/-. [Part Payment of Rs. 07,06,008/- has been received against the said invoice, leaving behind balance amount receivable to the tune of Rs. 10,78,632/-].
- b) Invoice no. TEPL/RIL/025/14-15, dated 27.10.2014, for an amount of Rs. 23,32,624/-.
- c) Invoice no. TEPL/RIL/026/14-15, dated 28.10.2014, for an amount of Rs. 14,68,125/-.
- d) Invoice no. TEPL/RIL/027/14-15, dated 29.10.2014, for an amount of Rs. 10,57,770/-.
- e) Invoice no. TEPL/RIL/028/14-15, dated 30.10.2014, for an amount of Rs. 17,62,200/-.

f) Invoice no. TEPL/RIL/029/14-15, dated 31.10.2014, for an amount of Rs. 13,50,492/-.

29. The Appellant himself had admitted that 90 days' time was given for the amounts to be paid. The last payment made by the Corporate Debtor was Rs. 30,30,000/- (Rs. 10,15,000/-, Rs. 10,00,000/- & Rs. 10,15,000/-) on 22.09.2016. We find force in the contention of the Learned Counsel for the Respondent that the amount became 'due and payable' on 22.09.2016 when only a part payment was made. Section 3(11) defines "debt" as a *liability or Application* in respect of a claim which is due from any person and includes Financial Debt and Operational Debt. Section 3(12) defines "default" as *non-payment of debt* when whole or any part or instalment of the amount of debt has become 'due and payable' and is not paid by the Debtor or the Corporate Debtor as the case may be. In the instant case part or instalment of the amount of debt has become 'due and payable' as on 22.09.2016. It being a running account, considering the manner in which such businesses are conducted and accounts are kept, it would be material to see when the parties concerned treat the debt to be in 'default'. It is pertinent to mention that the date of default mentioned in Form V of the Application is 22.09.2016 and the Application was filed in October, 2018, keeping in view the ratio laid down by the aforementioned Judgements, specifically regarding the date of default, is squarely applicable to the facts of this case. Hence we are of the considered view that the Application was filed well within the period of limitation.

Whether there is any 'Pre-Existing Dispute'?

30. The contention of the Learned Counsel for the Appellant that there were transactions between one Mr. Puneet Shiv Kumar Agarwal and the Operational Creditor through various group of Companies cannot fall within the definition of dispute relevant to the subject matter of the instant case, in the absence of any communication filed evidencing any 'Pre-Existing Dispute', prior to the filing of the Section 9 Application. It is pertinent to mention that in their Reply to the Application, filed before the Learned Adjudicating Authority, the Appellant apart from raising a bald denial has not filed any substantive material in support of their contentions. We are of the considered view that ratio laid down by the Hon'ble Supreme Court in **'MobiloX Innovations Private Limited' V/s. 'Kirusa Software Private Limited', (2018) 1 SCC 353** is squarely applicable to the facts of this case. At this juncture, we find it relevant to reproduce the specific paragraphs is detailed as hereunder;

"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at

this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

The contention of the Learned Counsel for the Appellant regarding false and fabricated invoices is unsustainable having regard to the fact that the invoices on record bear the stamp of the Corporate Debtor by way of an acknowledgement.

31. In the instant case, going by the aforesaid test of the ‘existence of dispute’ it is clear that the Appellant has not raised any plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence.

32. For all the aforementioned reasons, we do not find any illegality or infirmity in the Impugned Order passed by the Ld. Adjudicating Authority. Hence, this Appeal is dismissed accordingly. No order as to cost.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
22nd March, 2021
ha/sc

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

Civil Appeal No. 9664 of 2019

Arun Kumar Jagatramka

.... Appellant

Versus

Jindal Steel and Power Ltd. & Anr.

.... Respondents

With

Writ Petition (C) No. 269 of 2020

And With

Civil Appeal No. 2719 of 2020

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

This judgment has been divided into the following sections to facilitate analysis:

A Factual Background

A.1 Civil Appeal 9664 of 2019

A.2 Civil Appeal 2719 of 2020

A.3 Liquidation Process Regulations, 2016

A.4 Article 32 Petition

B Issues

C Submissions

D Analysis of the Legal Framework

D.1 Ineligibility during the resolution process and liquidation

D.2 Interplay : IBC liquidation and Section 230 of the Act of 2013

D.3 The ‘Clean Slate’

D.4 Constitutional Validity of Regulation 2B - Liquidation Process Regulations

E Epilogue

F Conclusion

A Factual Background

A.1 Civil Appeal 9664 of 2019¹

1 By its judgment dated 24 October 2019, the National Company Law Appellate Tribunal² held that a person who is ineligible under Section 29A of the Insolvency Bankruptcy Code, 2016³ to submit a resolution plan, is also barred from proposing a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013⁴. The judgment was rendered in an appeal⁵ filed by Jindal Steel and Power Limited⁶, an unsecured creditor of the corporate debtor, Gujarat NRE Coke Limited⁷. The appeal was preferred against an order passed by the National Company Law Tribunal⁸ in an application⁹ under Sections 230 to 232 of the Act of 2013, preferred by Mr Arun Kumar Jagatramka, who is a promoter of GNCL. The NCLT had allowed the application and issued directions for convening a meeting of the shareholders and creditors. In its decision dated 24 October 2019, the NCLAT reversed this decision and allowed the appeal by JSPL. The decision of the NCLAT dated 24 October 2019 is challenged in the appeal before this Court.

2 Mr Arun Kumar Jagatramka, assails the order dated 24 October 2019 of the NCLAT, *inter alia*, on the ground that Section 230 of the Act of 2013 does not place any embargo on any person for the purpose of submitting a scheme.

¹ “First Appeal”

² “NCLAT”

³ “IBC”

⁴ the “Act of 2013”

⁵ Company Appeal (AT) No. 221 of 2018

⁶ “JSPL”

⁷ “GNCL”

⁸ “NCLT”

⁹ C.A. (CAA) No. 198/KB/2018

According to the appellant, in the absence of a disqualification, the NCLAT could not have read the ineligibility under Section 29A of the IBC into Section 230 of the Act of 2013. This would, in the submission, amount to a judicial reframing of legislation by the NCLAT, which is impermissible.

3 Before we advert to the submissions of the counsels on questions of law, it will be useful to outline the salient facts of this dispute to understand the contours of the controversy. GNCL, the corporate debtor, moved an application under Section 10 of the IBC before the NCLT for initiating the Corporate Insolvency Resolution Process¹⁰. The application was admitted on 7 April 2017.

4 Mr Arun Kumar Jagatramka submitted a resolution plan for GNCL on 1 November 2017, which was presented by the Resolution Professional¹¹ before the Committee of Creditors¹². The plan was to be put to a vote in a meeting of the CoC scheduled on 23-24 November 2017.

5 The IBC was amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2018. Section 29A which was inserted with retrospective effect from 23 November 2017 provides a list of persons who are ineligible to be resolution applicants. Sub-section (g) of Section 29A disqualifies a person from being a resolution applicant if they have been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the NCLT under the

¹⁰ "CIRP" or "resolution process"

¹¹ "RP"

¹² "CoC"

IBC. A second amendment was made to various provisions of IBC, including Section 29A, under the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, effective from 6 June 2018. A proviso was added to sub-Section (g) of Section 29A. Section 29A of the IBC in its present form reads as follows:

“29A. Persons not eligible to be resolution applicant:

A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

(a) is an undischarged insolvent;

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation 1.-- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

Explanation II.-- For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(d) has been convicted for any offence punishable with imprisonment--

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013);

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction,

undervalued transaction, extortionate credit transaction or fraudulent transaction;

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

Explanation I -- For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares 9[or completion of such transactions as may be prescribed], prior to the insolvency commencement date;

Explanation II.-- For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:--

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(d) an asset reconstruction company registered with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government.”

(emphasis supplied)

Due to the insertion of Section 29A, Mr Arun Kumar Jagmatramka became ineligible to submit a resolution plan.

6 No further resolution plan was approved by the CoC due to the paucity of time. In the absence of a resolution plan, the NCLT passed an order of liquidation on 11 January 2018, after the expiry of 270 days. The order of the NCLT ordering liquidation was challenged in appeal¹³ by Mr Arun Kumar Jagatramka before the NCLAT. The appeal was dismissed by the NCLAT by its order dated 10 July 2018. The dismissal of the appeal by the NCLAT was assailed before this Court, which issued notice to GNCL on 19 July 2019.

¹³ Company Appeal (IB) No. 55-56 of 2018

7 During the pendency of the appeal before NCLAT, where the order of liquidation passed by the NCLT was assailed, Mr Arun Kumar Jagatramka moved an application under Sections 230 to 232 of the Act of 2013 before the NCLT proposing a scheme for compromise and arrangement between the erstwhile promoters and creditors. This application was allowed by the NCLT through its order dated 15 May 2018, and a direction was issued for convening of a meeting of shareholders, secured creditors, unsecured creditors and FCCB holders for approval of the scheme of compromise and arrangement.

8 JSPL, an operational creditor of GNCL, preferred an appeal against the order of the NCLT dated 15 May 2018 before the NCLAT. The NCLAT allowed the appeal by its judgement dated 24 October 2019, holding that promoters who are ineligible to propose a resolution plan under Section 29A of the IBC are not entitled to file an application for compromise and arrangement under Sections 230 to 232 of the Act of 2013. The basis of this finding is contained in paragraphs 10 to 12 of the impugned judgement which is extracted below:

“10. As noticed above, the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. - Writ Petition (Civil) No.99 of 2019*** held 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'.

11. The aforesaid judgment makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies Act, the 'Corporate Debtor' is to be saved from its own management, meaning thereby the Promoters, who are ineligible under Section 29A, are not entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Proviso to Section 35(f) prohibits the Liquidator to 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, quoted below: -

"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:--

xxx

xxx

xxx

(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."

12. From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the 'Corporate Debtor'."

(emphasis in original)

9 The judgment and order of the NCLAT is the subject of the appeal.

A.2 Civil Appeal 2719 of 2020¹⁴

10 This appeal has been filed for assailing an order dated 19 December 2019 of the NCLAT in which it relied on the judgment dated 24 October 2019 impugned in the earlier appeal, to hold that an individual ineligible for proposing a resolution plan under Section 29A of the IBC, is also ineligible to propose a scheme of compromise and arrangement under Section 230 of the Act of 2013.

¹⁴ "Second Appeal"

11 The appellant - Mr Kunwer Sachdev - was the promoter and director (since suspended) of Su-Kam Power Systems Limited¹⁵. An application¹⁶ under Section 7 of the IBC was filed by one of the financial creditors of Su-Kam, which was admitted by the NCLT through its order dated 5 April 2018. The CIRP was initiated against Su-Kam.

12 When the RP invited applications for resolution plans for Su-Kam, Mr Kunwar Sachdev submitted a plan along with Phoenix ARC Private Limited on 15 November 2018. However, Mr Kunwar Sachdev was informed by an email dated 27 December 2018 issued by the RP, that the CoC had found him to be ineligible under Section 29A(h) of the IBC and consequently annulled his resolution plan.

13 This decision was challenged by filing an application¹⁷ before the NCLT. However, this was dismissed by the NCLT through its order dated 2 April 2019. This order was not challenged.

14 In the interim, due to the absence of any other resolution plan, the NCLT passed an order dated 3 April 2019, under Section 34(1) of the IBC, directing the liquidation of Su-Kam and appointing a Liquidator. The appointment of the Liquidator was challenged before the NCLAT in an appeal¹⁸, which was disposed of by an order dated 29 April 2019 upholding the appointment of the Liquidator. The Liquidator was also directed to accept applications for schemes of compromise and arrangement under Sections 230 to 232 of the Act of 2013.

¹⁵ “**Su-Kam**”

¹⁶ CP (IB)/540 (PB)/2017)

¹⁷ CA. 58(PB)/2019

¹⁸ Company Appeal (AT) (Ins) No.451 of 2019

15 When the Liquidator invited expressions of interest for submitting schemes of compromise and arrangement, Mr Kunwar Sachdev again expressed his interest. Emails were exchanged between the Liquidator and Mr Kunwar Sachdev, during the course of which Mr Kunwar Sachdev was invited to present his plan to the lenders of Su-Kam. However, before this could materialise, Mr Kunwar Sachdev was informed by the Liquidator through an email dated 19 September 2019, that he was ineligible to propose a scheme under Section 230 of the Act of 2013 in view of his ineligibility under Section 29A(h) of the IBC.

16 Mr Kunwar Sachdev challenged this decision in an application¹⁹ filed before the NCLT, which was dismissed by an order dated 31 October 2019 relying on the judgment dated 24 October 2019 impugned in the earlier appeal, and on the basis of Section 29A and Section 35(1)(f) of the IBC.

17 Mr Kunwar Sachdev then filed an appeal²⁰ against this order dated 31 October 2019 before the NCLAT, which dismissed it by an order dated 19 December 2019. Mr Kunwar Sachdev now comes before this Court in appeal.

A.3 Liquidation Process Regulations, 2016

18 Before averting to Writ Petition (Civil) No 269 of 2020, it is important to first understand the controversy surrounding the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016²¹.

19 The Liquidation Process Regulations have been issued by the Insolvency and Bankruptcy Board of India²², constituted under Part IV of the IBC, in exercise

¹⁹ CA-2335(PB)/2019

²⁰ Company Appeal (AT) (Insolvency) No. 1498 of 2019

²¹ "Liquidation Process Regulations"

of the powers conferred by Sections 5, 33, 34, 35, 37, 38, 39, 40, 41, 43, 45, 49, 50, 51, 52, 54, 196 and 208 read with Section 240 of the IBC.

20 The Liquidation Process Regulations were amended by the IBBI by a notification²³ dated 25 July 2019, which inserted Regulation 2B. Sub-section (1) of Regulation 2B provides that a compromise or arrangement proposed under Section 230 of the Act of 2013 shall have to be completed within 90 days of the order of liquidation issued under sub-sections (1) and (4) of Section 33 of the IBC. Further, Sub-section (2) provides that the time taken in a compromise or arrangement, not exceeding 90 days, shall not be included within the liquidation period. Finally, Sub-section (3) provides that any cost which is incurred by the Liquidator in relation to the compromise or arrangement shall be borne by the corporate debtor, if such compromise or arrangement is sanctioned by the NCLT under Section 230(6). However, a proviso to Sub-section (3) notes that if such compromise or arrangement is not sanctioned by the NCLT under Section 230(6), the cost shall be borne by the parties who proposed the compromise or arrangement.

21 Regulation 2B was amended by a notification²⁴ dated 6 January 2020, by which a proviso was added to Sub-section (1) of Regulation 2B, which provides that a party ineligible to propose a resolution plan under the IBC cannot be a party to a compromise or arrangement. Regulation 2B, in its present form, reads as follows:

²² “IBBI”

²³ Noti. No. IBBI/2019-20/GN/REG047

²⁴ Noti. No. IBBI/2019-20/GN/REG053

“2-B. Compromise or arrangement.—(1) Where a compromise or arrangement is proposed under Section 230 of the Companies Act, 2013 (18 of 2013), it shall be completed within ninety days of the order of liquidation under sub-sections (1) and (4) of Section 33:

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.

(2) The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.

(3) Any cost incurred by the liquidator in relation to compromise or arrangement shall be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of Section 230:

Provided that such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned by the Tribunal under sub-section (6) of Section 230.”

(emphasis supplied)

A.4 Article 32 Petition

22 Writ Petition (Civil) No 269 of 2020 has been filed by Mr Arun Kumar Jagatramka, also the appellant in the First Appeal, assailing the notifications dated 25 July 2019 and 6 January 2020 issued by the IBBI, through which it inserted Regulation 2B into the Liquidation Process Regulations, and subsequently amended it. As the petitioner, he contends that Regulation 2B is *ultra vires* the IBC and the Act of 2013, and also violates Articles 14, 19 and 21 of the Constitution. The prayer in the writ petition has been extracted below:

“In the premises set forth above, the Petitioner prays that this Hon'ble Court may be pleased to issue:

a. Writ, Order or Direction more particularly in the nature of WRIT OF DECLARATION declaring that the provisions of Notifications dated 25.07.2019 and 06.01.2020 issued by the Insolvency and Bankruptcy Board of India are ultra vires the Insolvency and Bankruptcy Code, 2016 as well as the Companies Act, 2013 and violative of Article 14, 19, 21 of the Constitution of India.”

B Issues

23 Having detailed the factual background of these petitions, we shall now turn to the issues before this Court and the submissions of counsels.

24 The NCLAT formulated two principal issues in the first of its judgments in appeal:

“(i) Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act;

(ii) If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible under Section 29A of the I&B to submit a 'Resolution Plan'.”

25 The first of the above issues has been answered in the affirmative by the NCLAT, to which, as Mr Sandeep Bajaj, learned Counsel for the appellant noted, there is no challenge. The real bone of dispute relates to the second issue. In the submission of Mr Sandeep Bajaj, what the NCLAT determined while addressing itself to the issue in dispute is whether the ineligibility under Section 29A of the IBC can be read into the provisions of Section 230 of the Act of 2013. In essence, Mr Bajaj’s approach to the issue is that a disqualification which is not provided by

the legislature cannot be introduced by a judicial determination. In the present case, he submitted, Section 29A does not expressly provide that it extends to Section 230 of the Act of 2013. Section 230, in his submission, is a 'different section in different enactment' to which the ineligibility under Section 29A of the IBC cannot be attracted.

26 Mr Amit Sibal, learned Senior Counsel appearing for the respondent in the Second Appeal, on the other hand, submitted that the correct question to pose is whether a person who is ineligible under Section 29A of the IBC is permitted to propose a scheme for revival under Section 230 of the Act of 2013 at the stage of liquidation either themselves or in concert with others.

27 The nuanced manner in which the contesting sides have prefaced their submissions is indicative of the broad nature of the contest. On one hand, Mr Bajaj submits that the ineligibility under Section 29A of the IBC attaches to the proceedings under the IBC alone, involving the submission of a resolution plan. On the other hand, what Mr Sibal urges is that when an order of liquidation has been passed under and in pursuance of proceedings which were initiated under the IBC, Section 230 of the Act of 2013 expressly contemplates that the liquidator appointed under the IBC may move the NCLT where a compromise or arrangement is proposed. Hence, the proposal for a compromise or arrangement under Section 230, where a company is in liquidation under the IBC, is in continuation of that liquidation process. Hence, according to Mr Sibal, a person who is ineligible under Section 29A cannot propose a scheme for revival under Section 230.

C Submissions

28 Having thus elucidated the battle lines of legal conflict, we proceed to enumerate the submissions.

29 Mr Sandeep Bajaj, learned Counsel appearing on behalf of the appellant in the First Appeal and the Petition under Article 32 submitted that:

- (i) Chapter II of the IBC indicates that the CIRP can be invoked in three modes:
 - (a) By a financial creditor under Section 7;
 - (b) By an operational creditor under Section 9; and
 - (c) By a corporate debtor under Section 10.
- (ii) The IBC and its regulations indicate that there is a clear distinction between:
 - (a) the settlement mechanism which allows for a settlement upon which the corporate debtor would stand restored to the promoter together with all its assets and liabilities; and
 - (b) the resolution mechanism under which, upon the acceptance of a resolution plan, the company moves over to the control of the acquirer on a clean slate for a fixed consideration, consequent to the provisions of Section 31;
- (iii) Section 29A is a part of the resolution mechanism, the object and purpose of which is to prevent a back-door entry to the promoter who should not be allowed to have advantage of their own wrong;

- (iv) Though the appellant falls in the prohibited category under Section 29A, the purpose of the prohibition is to prevent the promoter from submitting a resolution plan with reference to the provisions of Sections 30 and 31 of the IBC;
- (v) Chapter III of the IBC, commencing with Section 33, deals with the liquidation process and Regulation 32 of the Liquidation Process Regulations deals with “sale of assets etc. by the liquidator”. In the course of the liquidation under Chapter III, the liquidation estate is to be formed under Section 36 and the sale under Regulation 32 is an intrinsic part of the liquidation estate. The consequence is that acquirer begins on a clean slate. The ineligibility under Section 29A which attaches for the purpose of Chapter II, in the context of a resolution plan, has been extended under Section 35(1)(f) to Chapter III on the basis of the above rationale, *i.e.*, that the liquidator shall not sell the moveable or immoveable property of the corporate debtor or its actionable claims in liquidation to any person who is not eligible to be a resolution applicant;
- (vi) Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 contemplates that the NCLT, in its role as the Adjudicating Authority, may permit withdrawal of an application by the financial creditor, operational creditor or corporate applicant on a request made by the applicant before its admission. This is indicative of the position that the NCLAT does not have an inherent power to allow for withdrawal of the application after admission;

- (vii) Section 12-A was inserted in the IBC by Amending Act 26 of 2018 with retrospective effect from 6 June 2018 so as to permit the NCLT to allow the withdrawal of an application which has been admitted under Sections 7, 9 or 10 on an application made by the applicant, with the approval of ninety per cent of a voting share of the CoC in such a manner as may be specified;
- (viii) Regulation 30-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (which was inserted on 3 July 2018) allowed for the withdrawal under Section 12-A before the issuance of an invitation for expression of interest under Regulation 36-A. In the decision of this Court in **Swiss Ribbons Private Limited v. Union of India**²⁵ which was rendered on 25 January 2019, the Court held that a withdrawal of an application can be permitted between admission of the application and the constitution of the CoC. Following up on this, Regulation 30-A was substituted on 25 July 2019 to allow an application for withdrawal under Section 12-A both before and after the constitution of the CoC. However, where the application is made after the constitution of the CoC (under Regulation 30-A(1)(b)), and after the issuance of the invitation for expression of interest, the reasons justifying the withdrawal are required to be stated;

²⁵ (2019) 4 SCC 17; herein, referred to as “**Swiss Ribbons**”

- (ix) The decision in **Brilliant Alloys (P) Ltd. v. S Rajagopal**²⁶ would indicate that a withdrawal can be permitted even after the expression of interest, as a consequence of which Regulation 30-A is directory in nature;
- (x) The consequence of a withdrawal of the application under Sections 7, 9 or 10 is that the corporate debtor stands restored to the promoter. As such, Section 29A does not operate as an ineligibility on the settlement mechanism. On the withdrawal of the application the corporate debtor goes back to the same promoter, even if they are ineligible under Section 29A for the submission of the resolution plan;
- (xi) The ineligibility under Section 29A, which forms a part of Chapter II of the IBC, is only during the resolution process;
- (xii) The rationale for imposing an ineligibility under Section 29A in the resolution process is that the successful resolution applicant under Section 31 of the IBC obtains the company on a clean slate, as indicated in the decision of this Court in **Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta**²⁷. This benefit is not available where an application is *simpliciter* withdrawn under Section 12-A;
- (xiii) Section 230 of the Act of 2013 is a part of the settlement mechanism and is at par with the provisions of Section 12-A. The impact of a compromise or arrangement is also that company is restored to the promoters with all its liabilities. While Section 12-A of the IBC permits withdrawal of an

²⁶ 2018 SCC OnLine SC 3154; hereinafter, referred to as “**Brilliant Alloys**”

²⁷ (2020) 8 SCC 531

application, Sections 230 and 230-A of the Act of 2013 envisage a compromise or arrangement. As such, they both form a part of the settlement mechanism and are not part of the resolution mechanism, to which alone the ineligibility under Section 29A applies. Hence, this ineligibility cannot now be engrafted into Section 230;

- (xiv) Section 230 was amended on 15 November 2016 and under Sub-Section (6), the compromise or arrangement becomes binding if 3/4th in value of the creditors or class of creditors or members agree to it, and if it is sanctioned by the NCLT. The compromise or arrangement then becomes binding on the liquidator appointed under the IBC as a whole. The provisions of Section 230 are, however, not restricted to liquidation. They are not regulated by the IBC. Section 230 operates in an area independent of the IBC. Following the amendment of Section 230(1) on 15 November 2016, the application for a compromise can also be proposed by the liquidator appointed under the IBC. However, the right of the liquidator to make an application under Section 230(1) is in addition to the others enumerated therein and not exclusive, in view of the principle which was laid down by this Court while construing the corresponding provisions of Section 391 of the Companies Act, 1956²⁸;
- (xv) The discussion papers circulated by the IBBI in April and November 2019 clearly demonstrate that IBBI was aware of the fact that the ineligibility which attaches to the resolution process under Section 29A will not attach

²⁸ the “Act of 1956”

to Section 230 of the Act of 2013. The proviso to Regulation 2B was notified by the IBBI on 6 January 2020 to stipulate that a person who is not eligible under the IBC to submit a resolution plan for insolvency resolution of the corporate debtor shall not be a party to such compromise or arrangement. Regulation 2B is *ultra vires* the provisions of Section 230 of the Act of 2013. IBBI had no statutory authority to make the Regulation 2B, through which it has effectively provided a disqualification under the Act of 2013, even though the mandate of IBBI is confined only to the IBC; and

- (xvi) Regulation 2B is violative of Articles 14, 19 and 21 of the Constitution as it seeks to import an ineligibility under the provisions of the IBC to a dissimilar provision in the Act of 2013. Moreover, when ineligibility is not attracted under Section 12-A of the IBC, imposing this ineligibility under Section 230 of the Act of 2013 is arbitrary.

30 Adopting the submissions which were urged by Mr Sandeep Bajaj, Mr Shiv Shankar Banerjee, learned Counsel appearing on behalf of the appellant in the Second Appeal, submitted that:

- (i) A complete procedure has been stipulated under the provisions of the IBC for liquidation;
- (ii) Where a sale of the assets of the corporate debtor or sale of the business of the corporate debtor takes place in the course of the liquidation, Section 35(1)(f) of the IBC stipulates that the assets cannot be sold to a person who is ineligible under Section 29A. The object is to ensure that liquidation

should not be used to allow the promoter to get the assets free from encumbrances;

- (iii) In contrast to a successful resolution applicant under Chapter II or the person who benefits from the sale of assets in liquidation under Chapter III of the IBC, the person who proposes a compromise or arrangement under Section 230 under the Act of 2013 does not have the benefit of acquiring the company free of encumbrances. There is thus no reason or justification to exclude the promoter from invoking the provisions of Section 230;
- (iv) Section 230(1) makes a reference to a liquidator appointed under the IBC because when the provision of Sections 7, 9 or 10 have been invoked, and an order of admission has been passed, liquidation, if required, will take place under the provisions of Section 35 of the IBC;
- (v) The mischief which was sought to be remedied by the adoption of Section 29A is restricted to the resolution process, its object being that persons should not take advantage of their own wrong. It is justifiable if a defaulter is excluded from the resolution process which may result in the creditors taking a haircut of their outstanding claims. Moreover, a successful resolution applicant begins on a clean slate. In contrast, under Section 230, the scheme has to be sanctioned by the NCLT only upon which it will pass muster; and
- (vi) The insertion of the proviso in Regulation 2B of the Liquidation Process Regulations is a clear indicator of the fact that a disqualification or

ineligibility under Section 29A is not a part of Section 230 of the Act of 2013.

31 The above submissions have been contested by Mr Amit Sibal, learned Senior Counsel appearing on behalf of the respondents in the Second Appeal. Learned Senior Counsel submitted that:

- (i) A proposal under Section 230 of the Act of 2013 need not result in the revival of the company. The proposal may apply only to a class of creditors or shareholders. Even prior to its amendment, this Court had held that additional conditions apply when a plan under the erstwhile provisions of Section 391 of the Act of 1956 is propounded at the time of liquidation of the company;
- (ii) Section 29A has several ineligibilities apart from those that attach to promoters. To allow a person who is ineligible under Section 29A from submitting a compromise or arrangement under Section 230 at the liquidation stage is contrary to the letter and spirit of the IBC;
- (iii) The NCLT while dealing with an application for a compromise or arrangement under Section 230 of the Act of 2013, in respect of a company which is being liquidated under the IBC, performs a dual role: firstly, as an Adjudicating Authority under the IBC and as a Tribunal under the Act of 2013. Therefore, it can insist on adherence to additional conditions namely that:
 - (a) The proposed compromise or arrangement must result in a revival of the company; and

- (b) The compromise or arrangement cannot be proposed by a person who is barred under Section 29A;
- (iv) When the IBC was originally enacted there was no bar of the nature found in Section 29A on who can propose a resolution plan either pre or post liquidation;
- (v) The ineligibility under Section 29A and Section 35(1)(f) was introduced by a legislative amendment on 23 November 2017²⁹, both at the pre and post liquidation stages;
- (vi) The purpose of the disqualification is to ensure a sustainable revival, which means that those responsible for the state of affairs of a company and other persons regarded by the legislature as undesirable should be excluded from the process;
- (vii) Persons who are ineligible under Section 29A or Section 35(1)(f) cannot seek an entry:
 - (a) at the CIRP stage; or
 - (b) under Section 230 of the Act of 2013; or
 - (c) by purchasing the assets during liquidation.
- (viii) Section 29A does not apply only to conduct in relation to the corporate debtor, but in relation to other companies as well;
- (ix) The ineligibility engrafted in Section 29A extends to Chapter III by virtue of the provision of Section 35(1)(f). This must be read together with

²⁹ “Act 8 of 2018”

Regulation 32 of the Liquidation Process Regulations. Regulation 32 provides six modes of realization of assets, out of which four involve the sale of assets and two involve the transfer of the corporate debtor or its business as a 'going concern';

- (x) Regulation 44(1), through its proviso, allows for an additional period of ninety days for the liquidation process where the sale is through Regulation 32-A(1) so as to encourage a revival of the company;
- (xi) There is no reference in the body of the IBC to a scheme of compromise under Section 230. Section 230 (especially sub-Sections (1) and (6)) indicate that:
 - (a) a compromise can be with a sub-set of creditors;
 - (b) liquidation is one scenario in which Section 230 can be invoked; and
 - (c) a compromise with only a class of creditors will bind only that class under Section 230(c);
- (xii) While construing the corresponding provisions of erstwhile Section 391 of the Act of 1956, this Court held in **Meghal Homes Pvt. Ltd. v Shree Niwas Girni K. K. Samiti**³⁰ that where a scheme of compromise and arrangement is proposed in respect of the company in liquidation, additional requirements need to be established, namely that the scheme must be for the revival of company. The impact of a scheme under Section 391, where the company is in liquidation, is that the proposers of the scheme enter into the management with the debt having been resolved.

³⁰ (2007) 7 SCC 753; herein, referred to as "**Meghal Homes**"

This makes the scheme of compromise or arrangement under Section 230 qualitatively different from a *simpliciter* withdrawal of an application under Section 12-A of the IBC. Section 12-A does not incorporate any requirement for the revival of the company;

- (xiii) The IBC provides for three modes of revival:
- (a) the CIRP under Chapter II;
 - (b) sale of a company in liquidation as a going concern (read with Regulation 32(e) and (f)); and
 - (c) a scheme of compromise or arrangement under Section 230 of the Act of 2013, following upon an order for liquidation being passed under Chapter III of the IBC;

The prohibition or ineligibility which applies in (a) and (b) must necessarily attach to (c) as well. When a plan for compromise or arrangement is proposed at the liquidation stage of IBC under Section 230 of the Act of 2013, it must satisfy the rigors of the IBC. Hence, a person who is ineligible under Section 29A cannot submit a plan under Section 230 of the Act of 2013;

- (xiv) In construing the provisions of Sections 29A and 35(1)(f) of the IBC, notice must be taken of the fact that the ineligibility was made applicable both to the resolution stage as well as the stage of liquidation. In interpreting these provisions, the purpose and object of the amendment must be borne in

mind, which is that a scheme of revival cannot be proposed by a person who stands disqualified under Section 29A;

- (xv) The proposal of a compromise or arrangement under Section 230 in a situation where the company is in liquidation under the IBC is a facet of the liquidation process under the IBC. Section 230 was amended to include a liquidator appointed under the IBC. The statutory scheme indicates that:
 - (a) A liquidation under the IBC follows upon the entire gamut of proceedings under the IBC;
 - (b) Section 230 of the Act of 2013 provides one of the modes of revival in the liquidation process; and
 - (c) Other activities of the liquidator do not cease while inviting schemes under Section 230. The steps required to be taken by the liquidator in liquidation include a compromise or arrangement under Section 230. It is in this context that the NCLT performs a dual role - that of an Adjudicating Authority in the matter of liquidation under the IBC as well as of a Tribunal for a scheme of compromise and arrangement under the Act of 2013;
- (xvi) The fundamental postulate of the IBC is that a corporate debtor has to be protected from its management and corporate debt. Hence, it would be anomalous if a compromise or arrangement can be entertained from a person who is responsible for the state of affairs of the corporate debtor;

(xvii) Where a company is in liquidation under the provisions of the IBC, the submission of a compromise or arrangement under Section 230 has distinct features of commonality with a resolution plan namely:

- (a) The object is to revive the company; and
- (b) Once officially approved, it assumes a binding character;

These intrinsic elements of revival and of the binding nature permeate both a resolution plan on the one hand and a compromise or arrangement on the other, which is arrived at in the course of liquidation;

(xviii) The introduction of the proviso to Regulation 2(B) of the Liquidation Process Regulations with effect from 6 January 2020 is only by way of a clarification;

(xix) *Dehors* the provisions of the IBC, the rigors of the IBC will not apply to a proceeding under Section 230 of the Act of 2013. In other words, the ineligibility under Sections 29A and 35(1)(f) applies only to a situation where a corporate debtor has come within the purview of the IBC and has been taken into liquidation under Chapter III. It is only where a compromise or arrangement under Section 230 of the Act of 2013 is proposed in respect of a company which is undergoing liquidation under the IBC that the rigors of Section 29A and 35(1)(f) would stand attracted;

(xx) An absurdity will result if persons found to be derelict or guilty of malfeasance, who are barred from:

- (a) submitting a resolution plan;

- (b) obtaining a sale of assets in liquidation; and
- (c) obtaining a sale of the company as a going concern.

can still propose a compromise under Section 230 of the Act of 2013. It is a settled principle of law that an interpretation which leads to absurdity must be avoided;

- (xxi) There is a fallacy in equating the provisions of Section 230 of the Act of 2013 with an application for withdrawal under Section 12-A of the IBC. Section 12-A is not intended to be the culmination of the resolution process but is at the inception. The withdrawal by an applicant leads to a *status quo ante* in respect of liabilities of the corporate debtor and does not require that the defaults in respect of all creditors are brought to an end. In contrast:

- (a) a resolution plan under Section 31 of the IBC (as well as the scheme under Section 230 of the Act of 2013) binds all the stakeholders;
- (b) results in a clean slate unlike Section 12-A; and
- (c) constitutes a culmination of the resolution plan.

As distinct from the provisions of Section 31 of the IBC and Section 230 of the Act of 2013, a withdrawal under Section 12-A restores the *status quo ante* and is hence not concerned with ineligibilities under Section 29A; and

(xxii) Section 240 of the IBC enunciates the power to make regulations to carry out the provisions of the Code. The insertion of the proviso to Regulation 2(B) is valid because:

- (a) the amendment is consistent with the IBC and carries out its provisions; and
- (b) it is clarificatory in nature since even in its absence, the ineligibility under Section 29A would govern.

32 In summing up, Mr Sibal urged that:

- (i) Where a company is in liquidation under Chapter III of the IBC, a proposed scheme of compromise or arrangement under Section 230 of the Act of 2013 must comply with the requirements of the IBC;
- (ii) The specific requirements which must be fulfilled under (i) above are that:
 - (a) the scheme must be for the revival of the company; and
 - (b) it must not be proposed by a person who is ineligible under Section 29A of the IBC;
- (iii) The above requirements are IBC specific and not inconsistent with the provisions of Section 230 of the Act of 2013;
- (iv) Sections 29A and 35(1)(f) of the IBC prohibit a certain category of persons from proposing a revival of the company in the course of the CIRP, liquidation process and in purchasing the assets in the course of liquidation. To make an exception in a plan for revival under Section 230 of

the Act of 2013 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 would perpetrate the mischief which was sought to be obviated;

- (v) When a company is in liquidation under the IBC, a scheme proposed under Section 230 is a facet of the liquidation process and the same rationale which permeates the liquidation process must also govern it; and
- (vi) Section 12-A stands on a completely different footing. It provides for a withdrawal at the inception of the CIRP and is not a culmination of a resolution process. Nor does a Section 12-A withdrawal bind all stakeholders.

33 Mr Gopal Jain, learned Senior Counsel appearing for the respondents in the First Appeal, has urged submissions along the same lines as Mr Amit Sibal. His submissions are summarized below:

- (i) The commencement or the initiation process attracting the IBC is an application under Sections 7, 9 or 10;
- (ii) In the present case, an application was filed under Section 10 as a consequence of which the case has to be analyzed through the prism of the IBC;
- (iii) The IBC is an economic legislation and its key objectives are to ensure:
 - (a) good corporate governance;

- (b) control deviant behavior;
- (c) protect the integrity of the resolution process;
- (d) enhance commercial morality; and
- (e) foster respect for the rule of law.

The IBC is premised on the principle that there is a significant element of public interest in facilitating a creditor-centric regime for achieving economic growth. Ensuring that resolution plans are submitted by credible persons is intrinsic to the scheme of the IBC. Speed is of the essence. The IBC has sought to convert a legal regime which was a debtor's paradise into a regime governed by corporate justness. The regime under the IBC is dynamic, which is reflected by eight amendments which took place between November 2017 and September 2020;

- (iv) The basic principle is that an entity which is barred under Section 29A and Section 35(1)(f) should not be in control of the assets of the corporate debtor. The objective is that defaulting promoters:
 - (a) should not be in the driver's seat; and
 - (b) should be kept at arm's length;
- (v) In order to achieve the above objectives, the Parliament enacted a simultaneous amendment of both Section 29A and Section 35(1)(f) to

maintain a level playing field by comprehensively catering to all situations relating to defaulting or barred promoters;

- (vi) In interpreting the IBC, legal sanctity and clarity are of utmost importance. But for Section 29A, promoters would have got back into management after securing a haircut to lenders in the course of the resolution plans. Section 29A which applies to the resolution process and Section 35(1)(f) which applies to the liquidation process were intended to plug a loophole. To accept the submissions of the appellants would be creating a new loophole. Section 29A is in the nature of a see-through provision. The submissions of the appellants will in fact scare away genuine creditors and derail the process; and
- (vii) According to Section 238 of the IBC, in case of any inconsistency between the provisions of the IBC and any other law in force, the provisions of the IBC are to have an overriding effect.

34 Mr Tushar Mehta, learned Solicitor General of India, defended the validity of Regulation 2B, more specifically the proviso. The learned Solicitor General submitted that:

- (i) The trigger is the liquidation resulting from the operation of the provisions of Section 33 of the IBC;
- (ii) Regulation 2B facilitates an additional period of ninety days for a compromise under Section 230 of the Act of 2013 because the entire process is time specific;

- (iii) Even if the legal position is assessed independent of Regulation 2B, the same embargo as contained in Section 29A and Section 35(1)(f) would apply to a compromise or arrangement proposed under Section 230 of the Act of 2013 in respect of a company which is undergoing liquidation under Chapter III of the IBC;
- (iv) Regulation 2B is essentially clarificatory;
- (v) The basis of Regulation 2B is the same as Sections 29A and 35(1)(f), which is that a person who is the cause of the problem either by a design or default cannot be a part of the process solution;
- (vi) The IBC is a beneficial legislation. Prior to the enactment of the IBC:
 - (a) individual creditors had individual remedies; and
 - (b) the debtor would remain in possession of the company and its assets.

With the introduction of the IBC, there has been a paradigm shift in that:

- (a) under the new legal regime there is a collective effort of all creditors even if at the behest of one of them;
 - (b) the creditor is in control instead of the debtor in possession; and
 - (c) revival is the soul of the IBC;
- (vii) Sections 196 and 240 of the IBC reflect a specific conferment of power on the IBBI to frame regulations subject to the stipulation that:

- (i) they are not inconsistent with the provisions of the IBC; and
- (ii) they carry out the purposes of the IBC.

Both these conditions are fulfilled by Regulation 2(B);

- (viii) A regulation which is framed under a statute in exercise of the authority which is conferred on the delegate can be challenged on the ground of being:

- (a) *ultra vires* the parent statute; or
- (b) being contrary to the provisions of Part III of the Constitution;

To suffer from unreasonableness, a regulation must be held to be manifestly arbitrary. Regulation 2(B) is consistent with the object and purpose of the IBC; and does not suffer from manifest arbitrariness; and

- (ix) Sections 29A and 35(1)(f) apply to liquidation pursuant to the IBC. The principle of Section 29A stands absorbed in the hybrid process of compromise during liquidation under the IBC, by way of a device of incorporation by reference.

35 Mr Balbir Singh, learned Additional Solicitor General, has addressed submissions also along the above lines.

D Analysis of the Legal Framework

36 Having narrated the submissions advanced by both sides, we now turn to the legal position and the interplay between the proposal of a scheme of

compromise and arrangement under Section 230 of the Act of 2013 and liquidation proceedings initiated under Chapter III of the IBC.

D.1 Ineligibility during the resolution process and liquidation

37 Section 29A of the IBC was introduced with effect from 23 November 2017 by Act 8 of 2018. The birth of the provision is an event attributable to the experience which was gained from the actual working of the provisions of the statute since it was published in the Gazette of India on 28 May 2016. The provisions of the IBC were progressively brought into force thereafter.

The foundation

38 The IBC is a law which consolidated and amended existing legislation relating to re-organisation and insolvency resolution of corporate persons, partnerships and individuals. The long title to the legislation indicates the specific objects, which it is intended to facilitate. These objects include:

- (i) A time bound process of re-organization and insolvency resolution;
- (ii) Maximization of the value of assets;
- (iii) Promoting entrepreneurship;
- (iv) Facilitating the availability of credit; and
- (v) Balancing the interests of all stakeholders.

39 Some of the key drawbacks of the legal regime, as it existed prior to the enactment of the IBC, were:

- (i) The absence of a single legislation governing insolvency and bankruptcy;

- (ii) A multiplicity of laws governing insolvency and bankruptcy of corporate entities;
- (iii) The existence of multiple fora established to deal with the enforcement of diverse legislative provisions; and
- (iv) The complexity caused by a maze of statutes resulting in inadequate, ineffective and delayed resolutions, occasioned by the (then) existing framework.

These inadequacies were noticed in the Statement of Objects and Reasons accompanying the introduction of the Bill. The IBC reflects a fundamental change in the erstwhile legal regime. A timely resolution of corporate insolvency was conceived as an instrument to support the development of credit markets, encourage entrepreneurship, enhance the ease of doing business and provide an environment conducive to investment, setting the economy on the path to growth and development. In resolving some of the complex issues which arise under the new legal regime envisaged under the IBC, it then becomes necessary to vacuum the cobwebs of the past. Interpreting the IBC in a manner which would facilitate the salutary objects which it is intended to achieve requires all stakeholders to shed concepts and notions associated with the earlier legal regime, which was largely a debtor's paradise. The earlier regime was one in which the debtor would largely remain in possession of the company and its assets and individual creditors were left to paddle their own canoe in headwinds controlled by those in debt and default.

40 The enactment of the IBC has marked a quantum change in corporate governance and the rule of law. First and foremost, the IBC perceives good corporate governance, respect for and adherence to the rule of law as central to the resolution of corporate insolvencies. Second, the IBC perceives corporate insolvency not as an isolated problem faced by an individual business entities but places it in the context of a framework which is founded on public interest in facilitating economic growth by balancing diverse stakeholder interests. Third, the IBC attributes a primacy to the business decisions taken by creditors acting as a collective body, on the premise that the timely resolution of corporate insolvency is necessary to ensure the growth of credit markets and encourage investment. Fourth, in its diverse provisions, the IBC ensures that the interests of corporate enterprises are not conflated with the interests of their promoters; the economic value of corporate structures is broader in content than the partisan interests of their managements. These salutary objectives of the IBC can be achieved if the integrity of the resolution process is placed at the forefront. Primarily, the IBC is a legislation aimed at re-organization and resolution of insolvencies. Liquidation is a matter of last resort. These objectives can be achieved only through a purposive interpretation which requires courts, while infusing meaning and content to its provisions, to ensure that the problems which beset the earlier regime do not enter through the backdoor through disingenuous stratagems.

The amendments

41 On 23 November 2017, Parliament intervened through its amending power to introduce Section 29A into the provisions of Chapter II and Section 35(1)(f) into the provisions of Chapter III. Chapter II of the IBC ,which enunciates provisions for the CIRP, has evolved over the previous four years. Chapter III enunciates provisions in regard to the liquidation process. Section 29A stipulates diverse categories of persons who will not be eligible to submit a resolution plan.

42 By the same amending Act through which Section 29A was introduced, Section 35(1)(f) was also amended with the introduction of a proviso. Section 35 specifies the powers of the liquidator as well as their duties, which are subject to the directions of the Adjudicating Authority. Section 35(1)(f) provides as follows:

“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.”

43 The Statement of Objects and Reasons accompanying the introduction of the Bill proposing the amendment dated 23 November 2017, elucidates the purpose of introducing the new provisions:

“2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.”

44 During the course of the debate in the Lok Sabha on 29 December 2017, the Finance Minister noted that the IBC had been in operation for about a year. The new legislation had been a “learning experience”. The Ordinance was promulgated since a large number of cases were “already pending resolution mechanism itself” and there was a danger that if the amendment was not immediately brought in, persons who were “ineligible” would have started applying as resolution applicants. The Finance Minister in the course of his speech highlighted the reason for the amendments when he observed as follows:

“...What do you do with promoters who are themselves responsible for these NPAs, that is clause C. **Every creditor takes his haircut and there is an equitable distribution in the case of dissolution. In the case of resolution also, all type of creditors may take some haircut and the man who created the insolvency pays a fraction of the amount and comes back into management. Should we allow that to continue? The overwhelming view, as expressed by the Members, is that it should not be allowed.** This was a gap which was there in the original Bill and by bringing in 29(a) we have tried to fill in that gap. That is the objective. In order that this provision must apply to all existing cases of resolution which are pending, that is the case for urgency. If we had not done this, then all such defaulters would have rejoiced

because they would have merely walked back into these companies by paying only a fraction of these amounts. That is something which besides being commercially imprudent would also be morally unacceptable. That is the real rationale behind this particular Bill:.”

(emphasis supplied)

45 The Report of the Insolvency Law Committee dated 3 March 2018 states that the intent behind introducing Section 29A was to prevent unscrupulous persons from gaining control over the affairs of the company. These persons included those who by their misconduct have contributed to the defaults of the company or are otherwise undesirable. The Committee observed:

“14.1. Section 29A was added to the Code by the Amendment Act. Owing to this provision, persons, who by their misconduct contributed to the defaults of the corporate debtor or are otherwise undesirable, are prevented from gaining or regaining control of the corporate debtor. This provision protects creditors of the company by preventing unscrupulous persons from rewarding themselves at the expense of creditors and undermining the processes laid down in the Code.”

46 Significantly, the ineligibility which was engrafted by the amending legislation was incorporated in both the provisions of Chapter II dealing with the CIRP as well as in Chapter III dealing with the liquidation process. Section 29A stipulates the category of persons who “shall not be eligible to submit a resolution plan”. The proviso to Section 35(1)(f) incorporates the same norm in the liquidation process, when it stipulates that the liquidator shall not sell the immovable and movable or actionable claims of the corporate debtor in liquidation “to any person who is not eligible to be a resolution applicant”. These

words in Section 35(1)(f) are clearly referable to the ineligibility which is set up in Section 29A.

Judicial understanding

Chitra Sharma

47 The underlying purpose of introducing Section 29A was adverted to in a judgment of this court in **Chitra Sharma v. Union of India**³¹. One of us (Justice DY Chandrachud) speaking for a Bench of three learned judges took note of the Statement of Objects and Reasons accompanying the Bill and emphasised the purpose of Section 29A thus:

“[...]

38. Parliament has introduced Section 29A into IBC with a specific purpose. The provisions of Section 29A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The Statement of Objects and Reasons appended to the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, which was ultimately enacted as Act 8 of 2018, states thus:

“2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in

³¹ (2018) 18 SCC 575; hereinafter, referred to as “**Chitra Sharma**”

order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.”

(emphasis supplied)

Parliament was evidently concerned over the fact that persons whose misconduct has contributed to 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.”

(emphasis supplied)

48 The Court held that “Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance”. The Court further observed that “Parliament rectified a loophole in the Act which allowed backdoor entry to erstwhile managements in the CIRP”.

Arcelormittal

49 In **Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors.**³², Justice Rohinton F Nariman, speaking for himself and Justice Indu Malhotra, reiterated the same principle when he underscored the need to impart a purposive interpretation to Section 29A “depending both on the text and context in which the provision was enacted”:

“30. 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

³² (2019) 2 SCC 1; hereinafter, referred to as “**Arcelormittal**”

same. We are concerned in the present matter with clauses (c), (f), (i) and (j) thereof.”

The decision adverts to Section 29A as “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 persons³³.”

Swiss Ribbons

50 In **Swiss Ribbons** (supra), the constitutionality of certain provisions of the IBC was challenged. Justice Rohinton F Nariman emphasised the object of the IBC in the following observations:

“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 reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization 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. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. 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

³³ “32. 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. For example, it is well settled that a shareholder is a separate legal entity from the company in which he holds shares. This may be true generally speaking, but when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan, it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such cases, the principle laid down in *Salomon v. A. Salomon & Co. Ltd.* [*Salomon v. A. Salomon & Co. Ltd.*, 1897 AC 22 (HL)] will not apply. For it is important to discover in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a resolution plan.”

paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, 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 *ArcelorMittal [ArcelorMittal (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 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. 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."

51 While advertent to the earlier decision in **Chitra Sharma** and **Arcelormittal** (supra), which had elucidated the object underlying Section 29A, this Court in **Swiss Ribbons** (supra) held that the norm underlying Section 29A "continues to permeate" Section 35(1)(f) "when it applies not merely to resolution applicants, but to liquidation also". Rejecting the plea that Section 35(1)(f) is *ultra vires*, this Court held:

“102. According to the learned counsel for the petitioners, when immovable and movable property is sold in liquidation, it ought to be sold to any person, including persons who are not eligible to be resolution applicants as, often, it is the erstwhile promoter who alone may purchase such properties piecemeal by public auction or by private contract. The same rationale that has been provided earlier in this judgment will apply to this proviso as well — there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation. Further, given the categories of persons who are ineligible under Section 29A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either willfully not paid or have been unable to pay. The legislative purpose which permeates Section 29A continues to permeate the section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected.”

A Purposive Interpretation

52 This line of decisions, beginning with **Chitra Sharma** (supra) and continuing to **Arcelormittal** (supra) and **Swiss Ribbons** (supra) is significant in adopting a purposive interpretation of Section 29A. Section 29A has been construed to be a crucial link in ensuring that the objects of the IBC are not defeated by allowing “ineligible persons”, including but not confined to those in the management who have run the company aground, to return in the new *avatar* of resolution applicants. Section 35(1)(f) is placed in the same continuum when the Court observes that the erstwhile promoters of a corporate debtor have no vested right to bid for the property 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). More recent precedents of this Court continue to adopt a purposive interpretation of the provisions of the IBC. (See in this context the judgments in **Phoenix ARC Private Limited v. Spade Financial Service**³⁴, **Ramesh Kymal v. M/s Siemens Gamesa Renewable Power Pvt Ltd.**³⁵ and **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited**³⁶.)

Sustainable revival

53 The purpose of the ineligibility under Section 29A is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution. Section 29A, it must be noted, encompasses not only conduct in relation to the corporate debtor but in relation to other companies as well. This is evident from clause (c) (“an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as a non-performing asset”), and clauses (e), (f), (g), (h) and (i) which have widened the net beyond the conduct in relation to the corporate debtor.

54 The prohibition which has been enacted under Section 29A has extended, as noted above, to Chapter III while being incorporated in the proviso to Section 35(1)(f). Under the Liquidation Process Regulations, Chapter VI deals with the realization of assets. Regulation 32 is in the following terms:

“32. Sale of Assets, etc.

³⁴ 2021 SCC OnLine SC 51 at paragraphs 103-104

³⁵ C.A. No. 4050 of 2020, decided on 9 February 2021, at paragraphs 23 and 25

³⁶ (2020) 8 SCC 401, at paras 28.4 and 28.5

The liquidator may sell-

- (a) an asset on a standalone basis;
 - (b) the assets in a slump sale;
 - (c) a set of assets collectively;
 - (d) the assets in parcels;
 - (e) the corporate debtor as a going concern; or
 - (f) the business(s) of the corporate debtor as a going concern:
- Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate."

Clauses (a) to (d) of Regulation 32 deal with the sale of assets on a stand-alone basis in a slump sale collectively or in parcels. Clauses (e) and (f) deal with the sale of the corporate debtor or its business as a going concern.

55 Regulation 32-A(1) then stipulates:

"32A. Sale as a going concern.
(1) Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximize the value of the corporate debtor, he shall endeavor to first sell under the said clauses."

Regulation 32-A(1) emphasizes the importance placed on the transfer of the corporate debtor or its business on a going concern basis.

56 Regulation 44 allows for a period of one year for the liquidation of the corporate debtor from the liquidation commencement date. Its proviso, however, allows for an additional period up to ninety days where the sale is attempted under sub-Regulation (1) of Regulation 32A. Regulation 44 is as follows:

"44. Completion of liquidation.

(1) The liquidator shall liquidate the corporate debtor within a period of one year from the liquidation commencement date, notwithstanding pendency of any application for avoidance of transactions under Chapter III of Part II of the Code, before the Adjudicating Authority or any action thereof:

Provided that where the sale is attempted under sub-regulation (1) of regulation 32A, the liquidation process may take an additional period up to ninety days.]

(2) If the liquidator fails to liquidate the corporate debtor within 29[one year], he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation.”

D.2 Interplay : IBC liquidation and Section 230 of the Act of 2013

57 Section 230 of the Act of 2013 is incorporated in Chapter XV which is titled “compromise, arrangement and amalgamations”. Sub-section (1) of Section 230 provides as follows:

“230. Power to compromise or make arrangements with creditors and members.— (1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.—For the purposes of this sub-section, arrangement includes a reorganization of the company’s share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.”

58 A compromise or arrangement under Sub-section (1) of Section 230 may take place:

- (i) between a company and its creditors or any subset of creditors; or
- (ii) between a company and its members or subset of members.

59 Liquidation is one of the factual situations in which the provisions of Section 230 can be invoked. Section 230(1) can also be invoked in the case of a company which is wound up, as is evident from the statutory provision itself, which contemplates that an application may be submitted to the NCLT, acting as the Tribunal, by the liquidator.

60 Sub-section (1) of Section 230 was amended by Act 31 of 2016 with effect from 15 November 2016. Prior to the amendment, an application for compromise or arrangement could be moved before the Tribunal by:

- (i) the company;
- (ii) a creditor;
- (iii) a member of the company; and
- (iv) in the case of a company which is being wound up, by the liquidator.

Following the amendment, Section 230(1) envisages that an application in the case of a company which is being wound up may be presented by a liquidator who has been appointed under the Act of 2013 or under the IBC. Interestingly, Section 230 (except Sub-sections (11) and (12)) came into force on 7 December 2016. Where a compromise has been entered into with only a class of creditors, it will bind that class under the provisions of Section 230(6), which reads thus:

“(6) Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three fourths in value of the creditors, or class of creditors or members or class of

members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company."

61 Under Sub-section (6) of Section 230, the compromise or arrangement has to be agreed to by a "majority of persons representing 3/4th in value" of the creditors, members or a class of them. Upon the sanctioning of the compromise or arrangement by the NCLT, it binds the company, all the creditors or members or a class of them, as may be, or in the case of a company being wound up, the liquidator appointed under the Act of 2013 or the IBC and the contributories.

The Companies' Act 1956 : Section 391 and *Meghal Homes*

62 Prior to the enforcement of the Act of 2013, the erstwhile legislation - the Act of 1956 - contained an analogous provision in Section 391.

63 The provisions of Section 391 came up for interpretation in a decision of this Court in **Meghal Homes** (supra). Justice PK Balasubramanyan, speaking for the two judge Bench of this Court, adverted to the earlier decision in **Miheer H Mafatlal v. Mafatlal Industries Ltd.**³⁷ which had dealt with the jurisdiction of the Company Court (or the Company Law Board as it then was) while sanctioning a scheme of merger or amalgamation of two companies. The earlier decision, as this Court noted, did not involve either a transferor or transferee in liquidation. Hence, this Court did not have occasion to consider whether "any additional tests

³⁷ (1997) 1 SCC 579

have to be satisfied when the company concerned is in liquidation and a compromise or arrangement in respect of it is proposed". Dealing specifically with a company which has been ordered to be wound up, this Court observed that the Company Court (before whom the jurisdiction under the erstwhile Section 391 was vested at the material time) had "necessarily to see whether the scheme contemplates revival of the business of the company". In that context, this Court observed:

"47. When a company is ordered to be wound up, the assets of it are put in possession of the Official Liquidator. The assets become *custodia legis*. The follow-up, in the absence of a revival of the company, is the realisation of the assets of the company by the Official Liquidator and distribution of the proceeds to the creditors, workers and contributories of the company ultimately resulting in the death of the company by an order under Section 481 of the Act, being passed. But, nothing stands in the way of the Company Court, before the ultimate step is taken or before the assets are disposed of, to accept a scheme or proposal for revival of the Company. In that context, the court has necessarily to see whether the scheme contemplates revival of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of the workers in terms of Section 529 and Section 529A of the Act. Of course, the court has to see to the bona fides of the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the company in liquidation."

Moreover, the Court held that in the case of a company which has been wound up it would have to perceive aspects of public interest, commercial morality and the existence of a *bona fide* intent to revive the company, while considering whether a compromise or arrangement put forward under Section 391 should be accepted. While the Court would not sit in appeal over the commercial wisdom of the shareholders, "it will certainly consider whether there is a genuine attempt to revive the company that has gone into liquidation and whether such revival is in

public interest and conforms to commercial morality". On the facts of the case, the Court found that it was difficult to hold that "it is a scheme for revival of the Company, the clear statutory intention behind entertaining a proposal under Section 391". These observations of the two judge Bench in **Meghal Homes** (supra) have a significant bearing on the nature of a compromise or arrangement which fell within the purview of Section 391 of the Act of 1956. This Court emphasized that where a company is in liquidation, its assets are *custodia legis*, the liquidator being the custodian for the distribution of the liquidation estate. A compromise or arrangement in respect of a company in liquidation must foster a revival of the company, this being (as the Court termed it) "the clear statutory intention behind entertaining a proposal under Section 391" in respect of a company in liquidation.

IBC liquidation and Section 230 scheme : a statutory continuum

64 Now, there is no reference in the body of the IBC to a scheme of compromise or arrangement under Section 230 of the Act of 2013. Sub-section (1) of Section 230 was however amended with effect from 15 November 2016 so as to allow for a scheme of compromise or arrangement being proposed on the application of a liquidator who has been appointed under the provisions of the IBC. The substratum of the submission of Mr Sandeep Bajaj, learned Counsel for the appellants, is that Section 230 is not regulated by the IBC but is a provision independent of it, though after the amendment of Sub-section (1), a compromise or arrangement can be proposed by the liquidator appointed under the IBC. Aligned to this submission, he urged that the decision in **Meghal Homes** (supra) recognises that the liquidator is an additional person who may submit an

application under Section 391 of the Act of 1956 (corresponding to Section 230 of the Act of 2013). The submission of Mr Bajaj however misses the crucial interface between the provisions of Section 230 of the Act of 2013 in their engagement with a company in respect of which the provisions of the IBC have been invoked, resulting in an order of liquidation under Section 33 of the IBC. Liquidation of the company under the IBC, as emphasized by this Court in its previous decisions, is a matter of last resort. Section 33 requires the NCLT, acting as the Adjudicating Authority, to pass an order for the liquidation of the corporate debtor where:

- (i) before the expiry of the insolvency resolution process period or the maximum period contemplated for its completion a resolution plan has not been received under Sub-section (6) of Section 30; or
- (ii) the resolution plan has been rejected under Section 31 for non-compliance with the requirements of the provision.

65 Under Sub-Section (2) of Section 33, the Adjudicating Authority has to pass a liquidation order where the resolution professional, during the CIRP but before the confirmation of the resolution plan, intimates the Adjudicating Authority of the decision of the CoC approved by not less than 66 per cent of the voting shares to liquidate the corporate debtor. Under Section 34, upon the Adjudication Authority passing an order for liquidation of the corporate debtor under Section 33, the resolution professional appointed for the CIRP under Chapter II is to act as a liquidator for the purpose of liquidation. Section 35 proceeds to stipulate that

subject to the directions of the Adjudicating Authority, the liquidator shall have the powers and duties enumerated in the provision.

66 What emerges from the above discussion is that the provisions of the IBC contain a comprehensive scheme, first, for the initiation of the CIRP at the behest of financial creditor under Section 7 or at the behest of the operational creditor under Section 9 or the corporate debtor under Section 10. Chapter II provides for the appointment of an interim resolution professional³⁸ in Section 17 and the constitution of a CoC under Section 21. Chapter II contemplates the submission of a resolution plan in Section 30 and the approval of the plan in Section 31. Liquidation forms a part of a distinct Chapter - Chapter III. Liquidation under Section 33 is contemplated in specific eventualities which are adverted to in Sub-Section (1) and Sub-section (2) as noted above.

67 Now, it is in this backdrop that it becomes necessary to revisit, in the context of the above discussion the three modes in which a revival is contemplated under the provisions of the IBC. The first of those modes of revival is in the form of the CIRP elucidated in the provisions of Chapter II of the IBC. The second mode is where the corporate debtor or its business is sold as a going concern within the purview of clauses (e) and (f) of Regulation 32. The third is when a revival is contemplated through the modalities provided in Section 230 of the Act of 2013. A scheme of compromise or arrangement under Section 230, in the context of a company which is in liquidation under the IBC, follows upon an order under Section 33 and the appointment of a liquidator under Section 34.

³⁸ "IRP"

While there is no direct recognition of the provisions of Section 230 of the Act of 2013 in the IBC, a decision was rendered by the NCLAT on 27 February 2019 in **Y Shivram Prasad v. S Dhanapal**³⁹. NCLAT in the course of its decision observed that during the liquidation process the steps which are required to be taken by the liquidator include a compromise or arrangement in terms of Section 230 of the Act of 2013, so as to ensure the revival and continuance of the corporate debtor by protecting it from its management and from "a death by liquidation". The decision by NCLAT took note of the fact that while passing the order under Section 230, the Adjudicating Authority would perform a dual role: one as the Adjudicating Authority in the matter of liquidation under the IBC and the other as a Tribunal for passing an order under Section 230 of the Act of 2013. Following the decision of NCLAT, an amendment was made on 25 July 2019 to the Liquidation Process Regulations by the IBBI so as to refer to the process envisaged under Section 230 of the Act of 2013.

68 The statutory scheme underlying the IBC and the legislative history of its linkage with Section 230 of the Act of 2013, in the context of a company which is in liquidation, has important consequences for the outcome of the controversy in the present case. The first point is that a liquidation under Chapter III of the IBC follows upon the entire gamut of proceedings contemplated under that statute. The second point to be noted is that one of the modes of revival in the course of the liquidation process is envisaged in the enabling provisions of Section 230 of the Act of 2013, to which recourse can be taken by the liquidator appointed under Section 34 of the IBC. The third point is that the statutorily contemplated

³⁹ 2019 SCC OnLine NCLAT 172; herein, referred to as "**Y Shivram Prasad**"

activities of the liquidator do not cease while inviting a scheme of compromise or arrangement under Section 230. The appointment of the liquidator in an IBC liquidation is provided in Section 34 and their duties are specified in Section 35. In taking recourse to the provisions of Section 230 of the Act of 2013, the liquidator appointed under the IBC is, above all, to attempt a revival of the corporate debtor so as to save it from the prospect of a corporate death. The consequence of the approval of the scheme of revival or compromise, and its sanction thereafter by the Tribunal under Sub-section (6), is that the scheme attains a binding character upon stakeholders including the liquidator who has been appointed under the IBC. In this backdrop, it is difficult to accept the submission of Mr Bajaj that Section 230 of the Act of 2013 is a standalone provision which has no connect with the provisions of the IBC. Undoubtedly, Section 230 of the Act of 2013 is wider in its ambit in the sense that it is not confined only to a company in liquidation or to corporate debtor which is being wound up under Chapter III of the IBC. Obviously, therefore, the rigors of the IBC will not apply to proceedings under Section 230 of the Act of 2013 where the scheme of compromise or arrangement proposed is in relation to an entity which is not the subject of a proceeding under the IBC. But, when, as in the present case, the process of invoking the provisions of Section 230 of the Act of 2013 traces its origin or, as it may be described, the trigger to the liquidation proceedings which have been initiated under the IBC, it becomes necessary to read both sets of provisions in harmony. A harmonious construction between the two statutes⁴⁰ would ensure that while on the one hand a scheme of compromise

⁴⁰ G.P. Singh, *Principles of Statutory Interpretation* (1st edn., Lexis Nexis 2015) which notes that "Further, these

or arrangement under Section 230 is being pursued, this takes place in a manner which is consistent with the underlying principles of the IBC 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.

69 The IBC has made a provision for ineligibility under Section 29A which operates during the course of the CIRP. A similar provision is engrafted in Section 35(1)(f) which forms a part of the liquidation provisions contained in Chapter III as well. In the context of the statutory linkage provided by the provisions of Section 230 of the Act of 2013 with Chapter III of the IBC, where a scheme is proposed of a company which is in liquidation under the IBC, it would be far-fetched to hold that the ineligibilities which attach under Section 35(1)(f) read with Section 29A would not apply when Section 230 is sought to be invoked.

principles [referring to the principle of harmonious construction] have also been applied in resolving a conflict between two different Acts" and providing the following examples – "**Jogendra Lal Saha v. State of Bihar**, 1991 Supp (2) SCC 654 (Sections 82 and 83 of the Forest Act, 1927 are special provisions which prevail over the provisions in the Sale of Goods Act); **Jasbir Singh v. Vipin Kumar Jaggi**, (2001) 8 SCC 289 (Section 64 of NDPS Act will prevail over section 307 CrPC 1974 as it is a special provision in a Special Act which is also later); **P.V. Hemlatha v. Kattam Kandi Puthiya Maliackal Saheeda**, (2002) 5 SCC 548 (conflict between section 23 of the Travancore Cochin High Court Act and section 98(3) Civil Procedure Code resolved by holding the latter to be special law); **Talchar Municipality v. Talcher Regulated Market Committee**, (2004) 6 SCC 178 (Section 4(4) of the Orissa Agricultural Produce Markets Act, 1956 was held to prevail over section 295 of the Orissa Municipalities Act, 1950 as the former was a special provision and also started with a non-obstante clause); and **Iridium India Telecom Ltd. v. Motorola Inc.**, (2005) 2 SCC 145 (Letters Patent and rules made under it constitute special law for the High Court concerned and are not displaced by the general provisions of the Civil Procedure Code)"

Such an interpretation would result in defeating the provisions of the IBC and must be eschewed.

70 An argument has also been advanced by the appellants and the petitioners that attaching the ineligibilities under Section 29A and Section 35(1)(f) of the IBC to a scheme of compromise and arrangement under Section 230 of the Act of 2013 would be violative of Article 14 of the Constitution as the appellant would be “deemed ineligible” to submit a proposal under Section 230 of the Act of 2013. We find no merit in this contention. As explained above, the stages of submitting a resolution plan, selling assets of a company in liquidation and selling the company as a going concern during liquidation, all indicate that the promoter or those in the management of the company must not be allowed a back-door entry in the company and are hence, ineligible to participate during these stages. Proposing a scheme of compromise or arrangement under Section 230 of the Act of 2013, while the company is undergoing liquidation under the provisions of the IBC lies in a similar continuum. Thus, the prohibitions that apply in the former situations must naturally also attach to the latter to ensure that like situations are treated equally.

D.3 The ‘Clean Slate’

71 A crucial limb of the submissions which have been urged by Mr Sandeep Bajaj and Mr Shiv Shankar Banerjee, learned Counsel appearing for the appellants and the petitioner is that both Section 12-A of the IBC and Section 230 of the Act of 2013 belong to what is described as the “settlement mechanism” which is distinct from the “resolution mechanism”. The corporate debtor, it has

been urged, will proceed to liquidation if no resolution is possible. Section 29A was designed to prevent a back-door entry to a class of persons considered to be ineligible to participate in the resolution process. Section 35(1)(f) extends the ineligibility where the liquidator is conducting a sale of the assets of the corporate debtor in liquidation. It has been submitted in this context that where an application for withdrawal under Section 12-A is allowed, the company reverts to the promoter. Placing a scheme under Section 230 of the Act of 2013 on the same pedestal, it has been urged that there is no reason to prevent a person who falls in the class of those ineligible under Section 29A from submitting a scheme of compromise or arrangement under Section 230 of the Act of 2013. In order to amplify the line of submissions as recorded above, the following points have been urged:

- (i) Though eight amendments have been brought about to the IBC between November 2017 and September 2020, the ineligibility contemplated by Section 29A and Section 35(1)(f) has not been expressly incorporated in Section 230 of the Act of 2013 even after the amendment to the IBC;
- (ii) Under Section 230, the persons competent to submit a scheme are
 - (a) the company or its liquidator;
 - (b) the creditors; or
 - (c) a member.

Section 230 does not prohibit a promoter or a person belonging to the ex-management, from proposing a scheme of compromise or arrangement.

This creates a “front door opportunity” to the erstwhile management to come forth and save the company;

- (iii) Under Section 30(1) of the IBC, a resolution plan can be submitted by a person who is not ineligible with reference to Section 29A. Under Sub-section (4) of Section 30, for the approval of the resolution plan, a 66 per cent voting share only of the financial creditors is required. Sub-section 2(b) of Section 30 requires the resolution professional to examine whether the resolution plan provides for the payment of the debt of operational creditors which shall not be less than the amount which is payable to them in the event of liquidation. On the other hand, the provisions of Section 230 of the Act of 2013 are far more stringent in that they require a voting share of 75 per cent and, where the company is in liquidation, a settlement with all creditors including the operational creditors;
- (iv) Section 35(1)(f) applies to the liquidator but does not apply to the NCLT, acting as either the Adjudicating Authority or as the Tribunal;
- (v) A resolution plan upon being approved becomes binding on all stakeholders and is attended with all benefits unlike Section 230 of the Act of 2013;
- (vi) Under Regulation 32 of the Liquidation Process Regulations, two modes are contemplated for the sale of the corporate debtor as a ‘going concern’, while four modes are contemplated for the sale of the assets of the corporate debtor. The prohibition under Section 35(1)(f) will apply only to a sale which is governed by Regulation 32, and will have no application to a

scheme of compromise or arrangement which is proposed under Section 230; and

- (vii) There is no mechanism in the IBC for effecting a compromise or arrangement, and since the only provision is contained in Section 230, there is no inconsistency with the IBC.

Withdrawal of application

72 Section 12A⁴¹ of the IBC was inserted with effect from 6 June 2018 by Amending Act 26 of 2018. Under Section 12A, the Adjudicating Authority may allow the withdrawal of an application which is admitted under Sections 7, 9 and 10, on an application made by the applicant with the approval of a 90 per cent voting share of the CoC in such manner as may be specified. Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016⁴², on the other hand, contemplates that the NCLT, functioning as the Adjudicating Authority, may permit a withdrawal of an application made under Rule 4 (by the financial creditor), Rule 6 (by the operational creditor) or Rule 7 (by the corporate applicant) on the request made by the applicant before its admission. Regulation 30-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 contains provisions for the withdrawal of an application. Under Regulation 30-A⁴³, as it originally stood, an

⁴¹ “**12A. Withdrawal of application admitted under section 7, 9 or 10** - The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.”

⁴² “**Adjudicating Authority Rules**”

⁴³ “**30A. Withdrawal of Application-** (1) An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A.

application for withdrawal under Section 12-A was required to be submitted before the issuance of an invitation for the expression of interest under Regulation 36-A. In the decision of this Court in **Swiss Ribbons** (supra), which was rendered on 25 January 2019, it was contemplated that an application for withdrawal may be presented between the period commencing from the admission of the application and the date of the constitution of the CoC. This led to the substitution of the Regulation 30-A⁴⁴ on 25 July 2019. As substituted, Regulation 30-A stipulates that an application for withdrawal under Section 12-A may be made to the adjudicating authority:

(2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of regulation 31 till the date of application.

(3) The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.

(4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(5) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4)."

⁴⁴ **"30A. Withdrawal of Application-** (1) An application for withdrawal under section 12A may be made to the Adjudicating Authority-

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code."

- (a) before the constitution of the CoC, by the applicant through the IRP;
and
- (b) after the constitution of the CoC, by the applicant through the IRP or
the RP as the case may be.

However, where the application under clause (b) is made after the issuance of the invitation for expression of interest, the applicant has to state the reasons justifying withdrawal after the issuance of the invitation. In the decision of this Court in **Brilliant Alloys** (supra), it has been held that a withdrawal may be contemplated even after the issuance of invitation of expression of interest. In **Swiss Ribbons** (supra), the provisions of Section 12-A were upheld against the challenge that they violated Article 14 of the Constitution. Justice Rohinton F Nariman, while adverting to the decision in **Brilliant Alloys** (supra), noted that Regulation 30-A(1) has been held not to be mandatory but directory because in a given case an application for withdrawal may be allowed for exceptional reasons even after issuance of an invitation for expression of interest under Section 36-A. Dealing with the provisions of Section 12-A, this Court observed:

“82. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the adjudicating authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a Committee of Creditors is constituted (as per the timelines that are specified, a Committee of Creditors can be appointed at any

time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case.

83. The main thrust against the provision of Section 12-A is the fact that ninety per cent of the Committee of Creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving *all* creditors ought, ideally, to be entered into . This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under Section 60 of the Code, the Committee of Creditors do not have the last word on the subject. If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter, NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12-A also passes constitutional muster.”

Distinction between a withdrawal simpliciter and scheme of arrangement

73 The submission is that on the withdrawal of the application under Sections 7, 9 and 10, as the case may be, the company goes back to the same promoter in spite of such a promoter being ineligible under Section 29A for submitting a resolution plan. As such, it was urged that there is no reason or justification then to preclude a promoter from presenting a scheme of compromise or arrangement under Section 230.

74 There is a fundamental fallacy in the submission. An application for withdrawal under Section 12-A is not intended to be a culmination of the resolution process. This, as the statutory scheme would indicate, is at the inception of the process. Rule 8 of the Adjudicating Authority Rules, as we have seen earlier, contemplates a withdrawal before admission. Section 12-A subjects a withdrawal of an application, which has been admitted under Sections 7, 9 and 10, to the requirement of an approval of ninety per cent voting shares of the CoC. The decision of this Court in **Swiss Ribbons** (para 82 extracted above) stipulates that where the CoC has not yet been constituted, the NCLT, functioning as the Adjudicating Authority, may be moved directly for withdrawal which, in the exercise of its inherent powers under Rule 11 of the Adjudicating Authority Rules, may allow or disallow the application for withdrawal or settlement after hearing the parties and considering the relevant factors on the facts of each case. A withdrawal in other words is by the applicant. The withdrawal leads to a *status quo ante* in respect of the liabilities of the corporate debtor. A withdrawal under Section 12-A is in the nature of settlement, which has to be distinguished both from a resolution plan which is approved under Section 31 and a scheme which is sanctioned under Section 230 of the Act of 2013. A resolution plan upon approval under Section 31(1) of the IBC is binding on the corporate debtor, its employees, members, creditors (including the central and state governments), local authorities, guarantors and other stakeholders. The approval of a resolution plan under Section 31 results in a “clean slate,” as held in the judgment of this Court in **Committee of Creditors of Essar Steel India Limited v. Satish Kumar**

Gupta⁴⁵. Justice Rohinton F Nariman, speaking for the three judge Bench of this Court, observed:

“105. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were. In *SBI v. V. Ramakrishnan* [*SBI v. V. Ramakrishnan*, (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458] , this Court relying upon Section 31 of the Code has held: (SCC p. 411, para 25)

“25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.”

In the same vein, the Court observed:

“107. For the same reason, the impugned NCLAT judgment [*Standard Chartered Bank v. Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in

⁴⁵ (2020) 8 SCC 531

terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count.”

75 The benefit under Section 31, following upon the approval of the resolution plan, is that the successful resolution applicant starts running the business of the corporate debtor on “a fresh slate”. The scheme of compromise or arrangement under Section 230 of the Act of 2013 cannot certainly be equated with a withdrawal *simpliciter* of an application, as is contemplated under Section 12-A of the IBC. A scheme of compromise or arrangement, upon receiving sanction under Sub-section (6) of Section 230, binds the company, its creditors and members or a class of persons or creditors as the case may be as well as the liquidator (appointed under the Act of 2013 or the IBC). Both, the resolution plan upon being approved under Section 31 of the IBC and a scheme of compromise or arrangement upon being sanctioned under Sub-section (6) of Section 230, represent the culmination of the process. This must be distinguished from a mere withdrawal of an application under Section 12-A. There is a clear distinction between these processes, in terms of statutory context and its consequences and the latter cannot be equated with the former.

76 Additionally, there is no merit in the submission that Section 35(1)(f) applies only to a liquidator who conducts a sale of the property of the corporate debtor in liquidation but not to the NLCT, acting as the Tribunal, when it exercises its powers under Section 230 of the Act of 2013. The liquidator appointed under the provisions of Chapter III of the IBC is entrusted with several powers and duties. Sections 37 to 42 of the IBC are illustrative of the powers of the liquidator in the course of the liquidation. The liquidator exercises several functions which are of a quasi-judicial in nature and character. Section 35(1) itself enunciates that the powers and duties which are entrusted to the liquidator are “subject to the directions of the adjudicating authority”. The liquidator, in other words, exercises functions which have been made amenable to the jurisdiction of the NCLT, acting as the Adjudicating Authority. To hold therefore that the ineligibility prescribed under the provisions of Section 35(1)(f) can be disregarded by the Tribunal for the purpose of considering an application for a scheme of compromise or arrangement under Section 230 of the Act of 2013, in respect of a company which is under liquidation under the IBC, would not be a correct construction of the provisions of law.

D.4 Constitutional validity of Regulation 2B - Liquidation Process Regulations

77 Regulation 2B(1) introduced on 25 July 2019 provides that where a compromise or arrangement is proposed under Section 230 of the Act of 2013, it shall be completed within ninety days of the order of liquidation under sub-Sections (1) and (4) of Section 33. The proviso to Regulation 2B has been

inserted with effect from 6 January 2020 to stipulate that a person who is not eligible under the IBC 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.

IBBI discussion papers

78 IBBI initially brought out a discussion paper on 27 April 2019. Para 3.1 of the discussion paper noted thus:

“3.1 Compromise or arrangement under Section 230 of the Companies Act 2013. If there is a proposal for a compromise or arrangement, a member, a creditor or the Liquidator may make an application to the NCLT under the Compromise Act 2013 (Act) (not the Adjudicating Authority under the Code) and then proceed in the manner directed by the NCLT in accordance with the Act. While compromise or arrangement under Section 230 of the Act is proposed, it must be utilized first and only on its closure/ failure, liquidation under the Code may commence. The Code read with regulations may provide that where a credible proposal is made to the Liquidator under Section 230 of the Act for compromise or arrangement of the CD within seven days of the order under Section 33 of the Code for liquidation, the Liquidator shall file an application under the said section within ten days of the order of liquidation under Section 33 of the Code. A member or a creditor may file an application under Section 230 of the Act within 10 days of the order of liquidation. If approved by the NCLT, the Liquidator shall complete the process under Section 230 within 90 days of the order of liquidation. The Regulations may provide that liquidation process under the Code shall commence at the earlier of the four events:

- (a) there is no proposal for compromise or arrangement within ten days;
- (b) the NCLT does not approve the application under Section 230 of the Act,
- (c) the process under Section 230 is not completed within 90 days or such extended period as may be allowed by the NCLT, or

(d) the process under Section 230 is not sanctioned under Section 230(6) of the Act.

A tight time schedule is necessary for conclusion of the process for compromise or arrangement to ensure that the liquidation process is concluded without undue delay.”

79 IBBI noted in its discussion paper that the introduction of ineligibilities stipulated under Section 29-A of the IBC to Section 230 of the Act of 2013 would pose practical difficulties in its implementation. IBBI observed:

“3.3.3 Ineligibility: Proviso to section 35(1)(f) of the Code mandates that the Liquidator shall not sell the immovable and movable property or actionable claims of the CD in liquidation to any person who is not eligible to be a resolution applicant. This prohibits GCS to persons ineligible under section 29A. However, the law does not prohibit such ineligible persons to participate in compromise or arrangement under section 230 of the Act. It may be necessary to harmonise the provisions in the Code and the Act to provide level playing field. Some stakeholders feel that the ineligibility norms under section 29A of the Code may also apply to compromise or arrangement under section 230 of the Act. Other stakeholders feel that unlike liquidation under the Code, which is mostly Liquidator driven, the compromise or arrangement under the Act is mostly driven by the Tribunal. Further, section 29A of the Code has several exceptions, while section 230 of the Act deals with all kinds of companies in all situations. There will be practical difficulties in implementation of ineligibility for the purposes of section 230 of the Act. Therefore, it is proposed that the ineligibility norms under section 29A of the Code may not apply to compromise or arrangement under section 230 of the Act.”

Be that as it may, the IBBI solicited public comments on its proposals. The IBBI evolved its view on the issue of whether Section 29-A should be made applicable to Section 230 of the Act of 2013 in its subsequent discussion paper.

80 The discussion paper brought out on 3 November 2019 by IBBI discussed the applicability of Section 29A of the IBC to a compromise and arrangement under Section 230 of the Act of 2013. The discussion paper notes that there were many instances where the NCLAT had allowed the application under Section 230 of the Act of 2013. In that context, the discussion paper notes thus:

“21. Section 29 A of the Code prohibits certain persons from becoming a resolution applicant/ submitting a resolution plan in a CIRP. Proviso to section 35(1)(f) of the Code mandates that a Liquidator shall not sell the immoveable and moveable property or actionable claims of the CD in liquidation to any person who is not eligible to be a resolution applicant. These provisions were inserted in the Code with effect from 23rd November, 2017, while section 230 of the Act was amended along with the enactment of the Code. There is no explicit prohibition on persons ineligible to submit resolution plans under section 29A from proposing compromise or arrangement made under Section 230 of the Act, which may result in person ineligible under section 29A acquiring control of the CD. Thus, while section 29A of the Code is applicable to a CD when it is under CIRP and when it is under Liquidation Process, it is not applicable to the same CD when it is undergoing compromise or arrangement, in between CIR process and liquidation process. This has created an anomaly that section 29A is applicable during the stage before and the stage after compromise and arrangement and not during compromise and arrangement.

22. Section 29A of the Code keeps out a person, who is a wilful defaulter, who has an account with non-performing assets for a long period, etc. and therefore, is likely to be a risk to a successful resolution of insolvency of a company. This rationale equally applies to the stage of compromise or arrangement. Non-applicability of section 29A at the stage of compromise or arrangement may undermine the process and may reward unscrupulous persons at the expense of creditors. Thus, it may be necessary to harmonise the provisions in the Code and the Act to provide level playing field.”

81 The discussion paper also notes that it was necessary to have a discussion on the following amongst other issues:

“f. Should the persons ineligible under section 29A of the Code to be a resolution applicant be barred from becoming a party in compromise or arrangements under section 230 of the Companies Act, 2013?

g. Or, should applicability of section 230 of the companies act, 2013 during liquidation process under the Coe be reviewed?”

82 Thereafter, public comments were invited. The discussion paper is what it professes to be – a matter for discussion in the public realm. This cannot be held to constitute an admission of IBBI that an applicant who is ineligible under Section 29A may submit a scheme of compromise or arrangement under Section 230 of the Act of 2013. The validity of the provisions of Regulation 2B, more specifically the proviso, has to be considered on their own footing.

Section 196 of the IBC

83 The powers and functions entrusted to IBBI are specified in Section 196 of the IBC. Section 196(1)(t) provides IBBI with the power to frame regulations, as follows:

“(t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and”

Clause (t) empowers IBBI to make regulations and guidelines on matters relating to insolvency and bankruptcy, as may be required under the IBC.

Section 240

Section 240(1) empowers IBBI with the power to make regulations in the following terms:

“(1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code.”

Under Sub-Section (1) of Section 240, the power to frame regulations is conditioned by two requirements: first, the regulations have to be consistent with the provisions of the IBC and the rules framed by the Central Government; and second, the regulations must be to carry out the provisions of the IBC. Regulation 2B meets 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, for the reasons discussed earlier in this judgment.

A clarificatory exercise

84 The principal ground of challenge to Regulation 2B is that the regulation transgressed the authority of IBBI by introducing a disqualification or ineligibility in regard to the presentation of an application for a scheme of compromise or arrangement under Section 230 of the Act of 2013. It has been urged that IBBI, as an entity constituted by the IBC, had no statutory jurisdiction to amend the provisions of Section 230 of the Act of 2013 or to impose a restriction which operates under the purview of Section 230. The position in our view can be considered from two perspectives, independent of the provisions of Regulation 2B. We have indicated in the discussion earlier that even in the absence of the

Regulation 2B, a person ineligible under Section 29A read with Section 35(1)(f) is not permitted to propose a scheme for revival under Section 230, in the case of a company which is undergoing a liquidation under the IBC. We have come to the conclusion, as noted for the reasons indicated earlier, that in the case of a company which is undergoing liquidation pursuant to the provisions of Chapter III of the IBC, a scheme of compromise or arrangement proposed under Section 230 is a facet of the liquidation process. The object of the scheme of compromise or arrangement is to revive the company. The principle was enunciated in the decision in **Meghal Homes** (supra) while construing the provisions of erstwhile Section 391. The same rationale which permeates the resolution process under Chapter II (by virtue of the provisions of Section 29A) permeates the liquidation process under Chapter III (by virtue of the provisions of Section 35(1)(f)). That being the position, there can be no manner of doubt that the proviso to Regulation 2B is clarificatory in nature. Even absent the proviso, a person who is ineligible under Section 29A would not be permitted to propose a compromise or arrangement under Section 230 of the Act of 2013. We therefore do not find any merit in the challenge to the validity of Regulation 2B.

E Epilogue

85 In paragraph 24 of our judgment, we noted the two issues which had been framed by the NCLAT in the impugned judgment in the first of the appeals. The first issue was “Whether in a liquidation proceeding under [IBC] the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the [Act of 2013]”. While we noted in paragraph 25, that no challenge has been made by the appellant in regard to the finding of the NCLAT on this issue, it is

imperative for us to make some remarks in relation to this issue and the larger issue of judicial intervention by the NCLT and NCLAT while adjudicating disputes under the IBC.

86 To begin with, we would like to take note of the observations made by the Insolvency Law Committee in its Report of February 2020⁴⁶. The Committee began by acknowledging that the floating of schemes of compromise or arrangement under Sections 230 to 232 of the Act, even for companies undergoing liquidation, was not part of the framework under the IBC. This, the Committee noted, had led to a multiplicity of issues including, but not limited to, the duality of the role of the NCLT (as a supervisory Adjudicatory Authority under the IBC versus the driving Tribunal under the Act of 2013) and indeed the very question before us in this case, whether the disqualification under Section 29A and proviso to Section 35(1)(f) of the IBC also attaches to Section 230 of the Act of 2013. However, the Committee notes that judicial intervention by the NCLAT along with the IBBI's introduction of new regulations have led to some alignment in the two frameworks.

87 The Committee thereafter notes that the introduction of such schemes into the framework of the IBC may be worrisome since it will alter the incentives during the CIRP and lead to destructive delays, which often plagued the process under the Sick Industrial Companies (Special Provisions) Act, 1985.⁴⁷ However, it

⁴⁶ Available at <<https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf>> accessed on 10 March 2021

⁴⁷ Ibid, at para 4.5.

nonetheless also acknowledges the benefits such schemes may have to offer⁴⁸.

Even so, the Committee concludes by noting that such schemes, if at all they are to be brought in, should not be under the Act of 2013 but the IBC itself. The Report notes thus:

“4.6...However, the Committee was of the view that such a process for compromise or settlement need not be effected only through the schemes mechanism under the Companies Act, 2013, and felt that the liquidator could be given the power to effect a compromise or settlement with specific creditors with respect to their claims against the corporate debtor under the Code.

4.7 Given the incompatibility of schemes of arrangement and the liquidation process, the Committee recommended that recourse to Section 230 of the Companies Act, 2013 for effecting schemes of arrangement or compromise should not be available during liquidation of the corporate debtor under the Code. However, the Committee felt that an appropriate process to allow the liquidator to effect a compromise or settlement with specific creditors should be devised under the Code.”

(emphasis in original)

88 Due to the ambiguity in the application of the two frameworks, it became imperative that a clarification be issued in this regard. The introduction of the proviso to Regulation 2B was a step in this direction which sought to clarify the position with respect to the applicability of the disqualifications set out in Section 29A of the IBC to Section 230 of the Act of 2013 in tandem with the legislative intendment.

⁴⁸ Ibid, para 4.6; In the Indian context, see Umakanth Varottil, ‘The Scheme of Arrangement as a Debt Restructuring Tool in India: Problems and Prospects’ (March 2017) NUS Working Paper 2017/005 available at <<http://law.nus.edu.sg/wp>>

89 At this juncture, it is important to remember that the explicit recognition of the schemes under Section 230 into the liquidation process under the IBC was through the judicial intervention of the NCLAT in **Y Shivram Prasad** (supra). Since the efficacy of this arrangement is not challenged before us in this case, we cannot comment on its merits. However, we do take this opportunity to offer a note of caution for the NCLT and NCLAT, functioning as the Adjudicatory Authority and Appellate Authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC. This conscious shift in their role has been noted in the report of the Bankruptcy Law Reforms Committee (2015) in the following terms:

“An adjudicating authority ensures adherence to the process

At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the

adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator.”

90 Once again, we must clarify that our observations here are not on the merits of the issue, which has not been challenged before us, but only limited to serve as guiding principles to the benches of NCLT and NCLAT adjudicating disputes under the IBC, going forward.

F Conclusion

91 Based on the above analysis, we find that the prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013, when the company is undergoing liquidation under the auspices of the IBC. As such, Regulation 2B of the Liquidation Process Regulations, specifically the proviso to Regulation 2B(1), is also constitutionally valid. For the above reasons, we have come to the conclusion that there is no merit in the appeals and the writ petition. The civil appeals and writ petition are accordingly dismissed.

92 Pending application(s), if any, stand disposed of.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[M R Shah]

**New Delhi;
March 15, 2021**

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 9241 of 2019

Gujarat Urja Vikas Nigam Limited

.... Appellant

Versus

Mr. Amit Gupta & Ors.

.... Respondents

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

This judgment has been divided into sections to facilitate analysis. They are:

- A The appeal
- B The genesis of the PPA
- C Initiation of CIRP
- D Termination of the PPA
- E Proceedings before NCLT and NCLAT
- F Proceedings by the Successful Resolution Applicant
- G Submissions of counsel
 - G.1 Submissions on behalf of the appellant
 - G.2 Submissions on behalf of the respondents
- H Issues arising from the dispute
- I Jurisdiction of the NCLT/NCLAT over contractual disputes
 - I.1 Section 60(5)(c): “arising out of” and “in relation to”
 - I.2 Jurisdiction of NCLT and GERC
 - I.3 Residuary jurisdiction of the NCLT under Section 60(5)(c)
- J Validity of *ipso facto* clauses
 - J.1 Position of international and multilateral organisations

- J.2 National jurisdictions
 - J.3 Position in India
- K Appellant's right to terminate the PPA in the present case
 - K.1 Analysis of the PPA
 - K.2 Validity of the termination of PPA
 - K.3 Dialogical Remedies
- L NCLAT's decision on the issue of liquidation
- M Appellant's liability to pay for the electricity interjected by the Corporate Debtor
- N Conclusion

A The appeal

1 By its judgment dated 29 August 2019, the National Company Law Tribunal¹ stayed the termination by the appellant of its Power Purchase Agreement² with Astonfield Solar (Gujarat) Private Limited³. The order of the NCLT was passed in applications⁴ moved by the Resolution Professional of the Corporate Debtor⁵ and Exim Bank⁶ under Section 60(5) of the Insolvency and Bankruptcy Code, 2016⁷. On 15 October 2019, the NCLAT dismissed the appeal by the appellant⁸ under Section 61 of the IBC. The decision by the NCLAT is called into question.

2 The appellant assails the order dated 15 October 2019 of the NCLAT on, *inter alia*, two broad grounds: first, that the NCLT and NCLAT do not possess jurisdiction under the IBC to adjudicate on a contractual dispute between the appellant and the Corporate Debtor; and second, in any event, the termination of the PPA was validly made under Article 9.2.1(e) and Article 9.3.1 of the PPA.

¹ “NCLT” or “Adjudicating Authority”

² “PPA”

³ “third respondent” or “Corporate Debtor”

⁴ CA No. 701/2019 (first respondent); CA No. 700/2019 (second respondent)

⁵ “first respondent” or “RP”

⁶ “second respondent”

⁷ “IBC”

⁸ “appellant” or “GUVNL”

B The genesis of the PPA

3 The narrative of this case begins with the Government of Gujarat notifying the Solar Power Policy, 2009⁹ on 6 January 2009, for development of Solar Power projects in the state. The appellant, a Government of Gujarat undertaking, is a successor to the Gujarat Electricity Board, and is also the holding company of all the State Power Utilities in Gujarat.

4 On 1 August 2009, the Government of Gujarat allocated a 25-megawatt capacity to the Corporate Debtor for developing and setting up a solar photovoltaic based power project in the State of Gujarat. The Corporate Debtor expressed its desire to setup a ‘Solar Photovoltaic Grid Interactive Power Plant’¹⁰ of 10-megawatt capacity and exercised its option for sale of the entire electrical energy produced from the plant to the appellant for commercial purposes.

5 In exercise of its powers under Sections 61(h), 62 and 86 of the Electricity Act, 2003¹¹, the Gujarat Electricity Regulatory Commission¹² published a draft tariff order for purchase of solar energy, inviting comments and suggestions from members of the public and stakeholders. Public hearings were held by the State Commission on the price at which power could be procured.

6 After the process of public hearings and consultations, a Tariff Order dated 29 January 2010¹³ was issued by the State Commission for procurement of power by the appellant from power producers, under Section 86(1)(a) of

⁹ “Policy”

¹⁰ “Plant”

¹¹ “Electricity Act”

¹² “State Commission” or “GERC”

¹³ “First Tariff Order”

Electricity Act. The tariff was determined on the basis of the then prevailing capital and financing costs, and debt equity ratio. It was envisaged that the PPA will be for 25 years, with higher tariffs in the first 12-15 years, and a scaled-down tariff for the remaining years. The tariff was to be applicable to solar projects commissioned within the control period of the First Tariff Order, *i.e.*, from 29 January 2010 to 28 January 2012.

7 The appellant filed a petition before the State Commission on 28 May 2013, seeking initiation of proceedings for re-determination of the capital cost and tariff fixed under the First Tariff Order. This petition was filed on the basis that subsequent incentives given to power producers on 27 February 2010 had brought down their cost of capital and, as a consequence, the tariff fixed under the First Tariff Order should be revised. This petition was dismissed by the State Commission on 8 August 2013. An appeal against the order was dismissed by the Appellate Tribunal for Electricity¹⁴ on 22 August 2014. An appeal¹⁵ against APTEL's decision is pending before this Court, with notice having been issued on 28 November 2014.

8 The appellant and the Corporate Debtor entered into a PPA on 30 April 2010, in accordance with which the appellant has to purchase all the power generated by the Corporate Debtor. The PPA was amended by two Supplementary Agreements dated 7 August 2010 and 13 April 2011, due to an increase in the capacity of the Plant and a change in its location.

¹⁴ "APTEL"

¹⁵ Civil Appeal No. 10301 of 2014

9 Article 9.1 of the PPA provides that it would remain in force for 25 years, from the ‘Commercial Operation Date’ which, in accordance with Article 1.1 is “the date on which the Solar Photovoltaic Grid Interactive power plant is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least ten days in advance by the [Corporate Debtor] to GUVNL”.

10 Article 5.2 of the PPA stipulates that in case the commissioning of the Plant is delayed beyond 31 December 2011, the appellant shall pay the tariff as determined by the State Commission for Solar Projects effective on the date of commissioning of the Plant or the tariff provided under the clause, whichever is lower. Article 5.2 provides that Rs 15 per unit is payable for the first 12 years and Rs 5 per unit is payable from the 13th to the 25th year.

11 While the Corporate Debtor was in the process of commissioning the Plant, the State Commission, in exercise of its powers under Sections 62 and 86 of the Electricity Act, issued the Tariff Order dated 27 January 2012¹⁶ for procurement of power from solar energy developers by distribution licensees in the State of Gujarat. The tariff was to be applicable to solar projects commissioned within the control period of the Tariff Order, *i.e.*, from 29 January 2012 to 31 March 2015.

12 Having signed the financing documents and attained financial closure with the second respondent and Power Finance Corporation in terms of the PPA, and established the Plant as defined in it, the Corporate Debtor commissioned 1.296

¹⁶ “Second Tariff Order”

MW on 11 December 2012 and 10.212 MW on 20 December 2012. Accordingly, the PPA was to remain in force until December 2037.

13 Since it was commissioned within the applicable period of the Second Tariff Order, the tariff applicable was Rs 9.98 per unit for first 12 years and Rs 7 per unit for next 13 years.

C Initiation of CIRP

14 The initial years of the operationalization of the PPA appear to have been relatively calm. The first major issue arose between July to December 2015. During this period, there was heavy rainfall and floods in the State of Gujarat, due to which the Plant was shut down for two months. The Plant was severely damaged due to the floods, and the generation of electricity was temporarily paused. By December 2015, normalcy was restored in the generation of electricity and the Plant was generating electricity at 70% of its total generating capacity.

15 During June and July 2017, Gujarat was again affected by floods due to heavy rainfall. The Plant was severely damaged due to the floods. Resultantly, it was only able to operate at 10-15% of its original capacity.

16 Due to the financial stress caused by the disruptions and damage, for which insurance claims remained pending, the Corporate Debtor was unable to fully service its debt to the Financing Parties (the second respondent and Power Finance Corporation), who proposed to declare the Corporate Debtor a non-performing asset ("**NPA**").

17 On 15 February 2018, in accordance with Article 8.1 of the PPA, the Corporate Debtor intimated the appellant regarding the impact of the rainfall and floods on the Plant, and the measures adopted by it in this regard. The Corporate Debtor requested the appellant to treat the letter as a formal communication regarding cause for failure in the performance of the Corporate Debtor's obligations under the PPA, and to confirm that this event may be treated as a 'Force Majeure Event' in accordance with Article 8.1.

18 On 4 May 2018, the second respondent declared the Corporate Debtor to be an NPA. On 20 November 2018, the NCLT admitted a petition¹⁷ filed by the Corporate Debtor under Section 10 of the IBC. NCLT commenced the Corporate Insolvency Resolution Process¹⁸ in respect of the Corporate Debtor, issued an order of moratorium and the first respondent was appointed as the Interim Resolution Professional¹⁹.

19 The second respondent and Power Finance Corporation Limited, filed an appeal²⁰ challenging the order dated 20 November 2018. The appeal was dismissed by the NCLAT on 4 December 2018, holding that the right of the Corporate Debtor's shareholders to vote on the initiation of the CIRP under Section 10 of the IBC was not curtailed by the Deed of Pledge of Securities dated 28 March 2013 entered into between the Corporate Debtor, the second respondent and Power Finance Corporation Limited. The first respondent was confirmed as the RP by the NCLT on 1 February 2019.

¹⁷ CIRP petition, C.P. (I.B.) No. 940(ND)/2018

¹⁸ "CIRP"

¹⁹ "IRP"

²⁰ Company Appeal (Insolvency) No. 754 of 2018

D Termination of the PPA

20 The appellant issued two notices of default to the Corporate Debtor on 1 May 2019, which were received by the first respondent on 8 May 2019:

- (i) The basis of the **First Notice** is that under Article 9.2.1(e) of the PPA, the Corporate Debtor undergoing CIRP under the IBC amounts to an 'event of default'. The appellant called upon the Corporate Debtor to remedy this default within 30 days from the date of receipt of the said notice, failing which the appellant stated that it shall terminate the PPA by issuing a termination notice; and
- (ii) The basis of the **Second Notice** is that under Article 9.2.1(a) of the PPA, there was a default in the operation and maintenance of the Plant. Once again, the appellant called upon the Corporate Debtor to remedy the O&M default within 90 days from the receipt of the notice, failing which the appellant stated that it shall terminate the PPA by issuing a termination notice.

21 The first respondent issued his replies to both the notices on 10 May 2019. The replies are summarized below:

- (i) The reply to the First Notice states that the Corporate Debtor's PPA with the appellant is its only PPA, and hence they are heavily dependent on it for reaching a resolution under the IBC. In case the appellant terminates the PPA, prospective resolution applicants²¹ who had submitted their

²¹ "PRAs"

expression of interest for the Corporate Debtor might not submit a resolution plan, which would eventually lead to liquidation of the Corporate Debtor, defeating the main object of the IBC; and

- (ii) The reply to the Second Notice states that since the Corporate Debtor is undergoing CIRP under the IBC, the operations at the Plant were severely affected due to *force majeure* events in terms of the PPA. Thus, the conditions of the PPA could not be said to have been breached.

22 On 21 May 2019, a meeting was scheduled between the first respondent and the General Manager (IPP) of the appellant. During this meeting, the first respondent emphasized that if the PPA was to be terminated, revival of the Corporate Debtor will be at stake, since prospective resolution applicants may not submit resolution plans or may withdraw the resolution plans, if submitted, citing termination of the PPA. Declining to accede to this position, the appellant made it clear that in accordance with a legal opinion obtained by them, they will be terminating the PPA under Articles 9.2.1(e) and 9.3.1 under the First Notice, since the Corporate Debtor is under CIRP. However, the appellant confirmed that the O&M default stood cured, and hence it would not act upon the Second Notice. It may also be noted at this stage that the appellant has not pressed the issue of the O&M default either before this Court or before the NCLAT/NCLT.

E Proceedings before NCLT and NCLAT

23 In May 2019, the first and second respondents filed applications under Section 60(5) of the IBC before the NCLT in regard to the Notices issued by the appellant to the Corporate Debtor, and sought an injunction restraining the appellant from terminating the PPA. By an interim order dated 31 May 2019, NCLT restrained the appellant from terminating the PPA till the next date of hearing.

24 While the interim order was in operation, the appellant wrote to the first respondent on 7 June 2019, stating that the notice period for curing the default had expired. The appellant claimed that Corporate Debtor had failed to cure the default, as a result of which the appellant was entitled to issue the final termination notice under Article 9.3.1 of the PPA. However, since the NCLT had provided an interim protection to the Corporate Debtor till the next date of hearing (12 June 2019), the appellant stated that it was not issuing the final termination notice at the present.

25 On 29 August 2019, the NCLT issued its final order through which it allowed the applications filed by the first and second respondents, thereby restraining the appellant from terminating the PPA and setting aside the First Notice. The NCLT's reasoning is premised on the following:

- (i) The clauses of the PPA cannot be placed on a higher pedestal than the provisions of the IBC, in the context of drawing a timeline for completion of the CIRP. The fact that the CIRP has not concluded within 30 days from

the receipt of the notice of default cannot be construed as an event of default since the time limit for the CIRP under the IBC is 330 days; and

- (ii) The PPA is an 'instrument' within the meaning of Section 238 of the IBC. The clauses of the PPA are inconsistent with the provisions of the IBC, and stand overridden.

However, in paragraph 35 of its order, the NCLT held that the appellant could terminate the PPA, in the event that liquidation proceedings are initiated against the Corporate Debtor. Paragraph 35 reads thus:

“35. It is however, made clear that if due to any reason, the Corporate Debtor goes into liquidation, the Respondent Company will be at liberty to terminate the Power Purchase Agreement.”

26 The NCLAT by its judgment dated 15 October 2019 dismissed the appeal against the NCLT's order. The NCLAT noted that the appellant attempted to terminate the PPA on the sole ground that the CIRP has been initiated for the Corporate Debtor. It observed that during the CIRP, the first respondent has to maintain the Corporate Debtor as a 'going concern' and the termination of its sole PPA, under which it supplied electricity only to the appellant, would render the Corporate Debtor defunct. Hence, the NCLAT held that the appellant could not terminate the PPA solely on the ground of the initiation of CIRP of the Corporate Debtor, which was supplying power to the appellant during the period of the CIRP. Further, it restrained the appellant from terminating the PPA even in the event that the Corporate Debtor underwent liquidation, by setting aside the

observations made by the NCLT in paragraph 35 of the order dated 29 August 2019.

27 The NCLAT thereafter directed the appellant to pay the dues for power supplied by the Corporate Debtor during the CIRP period. On 12 June 2020, the appellant, as an interim measure but without prejudice to its rights, agreed to release an ad-hoc payment of Rs 50 lakhs to the Corporate Debtor. However, the appellant informed the first respondent that this payment to the Corporate Debtor is conditional, and the Corporate Debtor must submit an undertaking on stamp paper stating that the amount released by the appellant will be refunded to them with interest, in case this Court allows the present appeal. The first respondent furnished the undertaking sought on 18 June 2020, following which the appellant released an ad-hoc payment of Rs 50 lakhs to the Corporate Debtor on 1 July 2020. Since then, the appellant has paid a further amount of Rs 1.07 crores to the Corporate Debtor, against a similar written undertaking given by first respondent dated 27 January 2021.

F Proceedings by the Successful Resolution Applicant

28 During the course of these hearings, the court has been informed of parallel proceedings initiated against the respondents by M/s Kundan Care Products Limited²², whose Resolution Plan in relation to the Corporate Debtor was approved by 99.28% of voting shares of the Committee of Creditors²³.

²² "Successful Resolution Applicant"

²³ "CoC"

29 An application²⁴ under Section 31 of the IBC was filed by the first respondent on 15 November 2019 before the NCLT seeking approval of the Resolution Plan approved by the CoC. This application is currently pending adjudication before the NCLT, due to the present appeal filed by the appellant before this Court.

30 However, on 20 December 2019, the Successful Resolution Applicant filed an application²⁵ under Section 60(5) of the IBC before the NCLT, seeking withdrawal of their Resolution Plan submitted for the Corporate Debtor. Further, on 16 January 2020, the Successful Resolution Applicant filed an interlocutory application²⁶ before this Court in the present appeal, seeking certain reliefs from this Court or, in the alternative, seeking permission of this Court to allow them to withdraw their Resolution Plan dated 12 November 2019. This Court allowed the Successful Resolution Applicant to withdraw the interlocutory application filed in the present appeal on 20 July 2020.

31 The NCLT by an order dated 3 July 2020, dismissed the application filed by the Successful Resolution Applicant, thereby refusing to grant them permission to withdraw the Resolution Plan. Thereafter, the NCLAT by a judgment dated 30 September 2020, dismissed the appeal filed by the Successful Resolution Applicant against NCLT's order dated 3 July 2020.

²⁴ C.A. No. 1526 of 2019

²⁵ C.A. 1679 of 2019

²⁶ I.A. No. 9682 of 2020

32 The Successful Resolution Applicant has since filed an appeal²⁷ before this Court challenging NCLAT's judgment dated 30 September 2020. By an order dated 16 November 2020, this Court granted a stay against the NCLAT's judgment dated 30 September 2020.

G Submissions of counsel

G.1 Submissions on behalf of the appellant

33 The case of the appellant has been presented initially in the articulate and carefully reasoned submissions made by Ms Ranjitha Ramachandran, learned counsel. Mr Shyam Diwan, learned senior counsel has then urged his submissions. The following submissions were urged in relation to the jurisdiction of the NCLT/NCLAT under section 60(5) of the IBC:

- (i) Section 60(5) must be interpreted in the context of Section 25(2)(b) of the IBC, which provides that the RP has to "exercise the rights for the benefit of the corporate debtor in judicial, quasi judicial or arbitration proceedings." Hence, if NCLT is conferred with the exclusive jurisdiction in relation to the Corporate Debtor, this section would be rendered redundant. This Court in **Embassy Property Developments (Private) Limited vs State of Karnataka**²⁸ has held that the RP cannot sidestep the jurisdiction of other authorities and approach the NCLT for the enforcement of the Corporate Debtor's rights. Although this judgment was in the context of a renewal of a mining lease by a statutory authority, the interpretation of Section 60(5) would not be limited to statutory authorities particularly in the backdrop of

²⁷ Civil Appeal No. 3560 of 2020

²⁸ (2020) 13 SCC 308; hereinafter referred to as "**Embassy Property**"

Sections 18 (duties of interim resolution professional) and 25(2)(b). In the present case, Article 10.4 of the PPA has granted jurisdiction to the State Commission, the regulatory authority under the Electricity Act, to entertain disputes relating to the PPA. Article 10.4 provides:

“In the event that such differences or disputes between the Parties are not settled through mutual negotiations within sixty (60) days, after such dispute arises, then it shall be adjudicated by the Commission in accordance with Law.”

- (ii) Section 86(1)(f) of the Electricity Act provides that the State Commission shall discharge the function of adjudicating “the disputes between the licensees, and generating companies and to refer any dispute for arbitration”. Therefore, any issue in relation to the PPA must be raised before the State Commission, and not the NCLT. Further, the second respondent has no *locus* to file a petition before the NCLT in relation to the PPA;
- (iii) The NCLT cannot preclude the appellant from exercising its contractual rights under the PPA read with the Electricity Act;
- (iv) If Section 60(5) is given a broad interpretation to include contractual disputes, it would disrupt the streamlined and timebound process under the IBC. Although the NCLT, being conscious of its limitations, has not proceeded to adjudicate on whether the termination of the PPA was valid, or dwelt on the interpretation of the PPA, it has still erroneously set aside the termination of the PPA by the appellant without any basis under the IBC;

- (v) Even if it is assumed that NCLT has jurisdiction over disputes relating to the PPA, the adjudication of such disputes should be in accordance with the PPA. The sanctity of the contracts must be upheld unless there is a statutory provision interdicting such contracts. There can be no exercise of any inherent or residual power by the NCLT to set aside the termination of a contract absent a statutory interdict. The Resolution Applicant or NCLT have no powers to modify the PPA through a resolution plan. The formation, novation or alteration of the contract must be in accordance with Section 30(2)(e) of the IBC, which provides that the Resolution Plan cannot contravene any provision of law which is in force. The provisions of the Indian Contract Act, 1872 ("**Contract Act**"), require mutual agreement of the parties for such a modification;
- (vi) The submission of the respondents that 'property' under Section 3(27) of the IBC includes an actionable claim and hence the dispute falls under the jurisdiction of the NCLT is erroneous in view of the judgement in **Embassy Property** (supra);
- (vii) The contention of the respondents that there is a direct connection between the termination of the PPA by the appellant and the insolvency resolution process should be rejected because the issue in the present case is not of interpretation of the insolvency resolution process but of the PPA, and only the State Commission has the jurisdiction to interpret the PPA; and

(viii) The respondents have relied on judgments under other statutes like the Companies Act, 1956²⁹, Banking Regulation Act, 1949³⁰ and Provincial Insolvency Act, 1920³¹ with provisions corresponding to Section 60(5). However, these statutes do not contain any provisions equivalent to Sections 18 and 25 (2) (b) of IBC. The interplay between these provisions and Section 60(5) must be considered for the purpose of determining NCLT's jurisdiction. Further, the facts of these judgements are also distinguishable from the present case.

34 However, assuming but not conceding that the NCLT could have had jurisdiction over the dispute, the appellants argue that there is no embargo under the IBC on exercise of contractual rights by the appellant, which does not include this termination:

(i) Except for the moratorium stipulated under Section 14 of IBC, there is no other bar in the scheme of the IBC to intervene in contractual arrangements that the Corporate Debtor has entered with a third party. In the present case, the NCLT/NCLAT did not hold that the termination of the PPA was prohibited under Sections 14(1) and (2) of IBC. Sections 14(2) and (2A) deal with supply of essential/critical goods and services to the Corporate Debtor, and do not mandate the third party to purchase any goods and services from the Corporate Debtor. Section 14(2) provides for continued supply of essential goods and services to the Corporate Debtor. However, there is no bar on termination of other agreements. Section

²⁹ "CA 1956"

³⁰ "BRA"

³¹ "PIA"

14(2A) was introduced after the issuance of the default notice by the appellant and, in any event, it does not prohibit the termination of the PPA. Parliament has chosen not to include any provision to this effect despite the multiple amendments that have been made to the IBC;

- (ii) The Explanation to Section 14(1) of the IBC, which was introduced by an amendment in December 2019, covers licenses or approvals granted by a government authority. However, no reference has been made there to contracts such as PPAs;
- (iii) The respondents are attempting to resurrect the regime under Section 22(3) of the Sick Industrial Companies (Special Provisions) Act, 1985³², which empowered the Board to suspend the operation of all or any of the contracts to which the sick industrial company was a party. In **Swiss Ribbons Private Limited vs Union of India**³³, this Court held that the IBC was introduced because the regime under SICA and Board for Industrial and Financial Reconstruction³⁴ had failed. Under the IBC, there is no such power to suspend contracts. Hence, when the legislature has wilfully omitted something or in a situation of a *casus omissus*, this Court cannot introduce what has been omitted by way of interpretation, analogy or implication;
- (iv) The termination of the PPA cannot be set aside based on the objective of the IBC to ensure that the Corporate Debtor remains a 'going concern', in

³² "SICA"

³³ (2019) 4 SCC 17; hereinafter referred to as "**Swiss Ribbons**"

³⁴ "BIFR"

the absence of a specific provision under the IBC. The objective of the IBC cannot be understood to mean that the vested rights of parties can be interfered with or extinguished except to the extent contemplated under Section 14 of the IBC. While in the United States there are specific provisions providing for non-enforcement of *ipso facto* clauses such as Article 9.2.1(e) of the PPA, no such provisions exist under the IBC. Hence, such a bar cannot be read into the legislation by reference to the object of the IBC or duties of the RP. The parties cannot wish away a contractual right because it is not suitable to them by way of a narrow understanding of “public interest”. The public interest lies in preserving the sanctity of contracts and for the contractual bargains to play out;

- (v) The duty of the RP to preserve the Corporate Debtor as a going concern and the definition of resolution plan do not bind third parties to act in favour of the Corporate Debtor. The NCLAT has stressed that the Corporate Debtor would become defunct if the PPA is terminated because it supplies power exclusively to the appellant. However, the Corporate Debtor chose to supply power solely to the appellant. The Corporate Debtor was empowered under Sections 7 and 10 of the Electricity Act to sell electricity to any licensee or consumer. The power producing company can convey electricity to any part of the country using the transmission network under Sections 2(4), 38(2)(d), 39(2)(d), 40(c) and 42(2) of the Electricity Act. Hence, the Corporate Debtor is free to supply power to any other licensee or consumer after the termination of the PPA. The only difference would be

that the Resolution Applicant would have to supply electricity at a lower cost;

- (vi) The second respondent and Power Finance Corporation Limited were aware that the appellant can terminate the PPA under Article 9.2.1(e). They are vested with the right to assign the rights and obligations under the PPA to a third party, in the event of a default committed by the Corporate Debtor, under the financing documents under Article 12.9 of the PPA. Hence, the second respondent could have exercised its power to assign prior to the initiation of the CIRP on 20 November 2018. Instead, it declared the account of Corporate Debtor as an NPA. Then, when the Corporate Debtor applied for the initiation of the CIRP under Section 10 of the IBC, which was admitted by the NCLT through its order dated 20 November 2018, it challenged the order before in an appeal, which was dismissed by the NCLAT on 4 December 2019. Therefore, the appellant has the right to terminate the PPA under Article 9.2.1(e), irrespective of whether any assignment has taken place under Article 12.9;
- (vii) The first respondent cannot rely on the resolution plan to prevent termination of the PPA since the resolution plan or process does not modify the terms of the contract of the Corporate Debtor with third parties. Each party took a calculated risk to enter into the contract with the knowledge that the appellant is entitled to terminate the PPA;
- (viii) The PPA is not an instrument under Section 238 of IBC, since the phrase used in the section - “instrument having effect by virtue of any such law” -

does not cover commercial bilateral agreements between a corporate debtor and a third party laying down the terms of an executory contract entered between them. It only applies to a statutory contract or an instrument entered into by operation of law that is inconsistent with the IBC;

- (ix) No provision of the PPA is inconsistent with the IBC. Article 9.3.1 which specifies a period of 30 days for the Corporate Debtor to remedy a default, and gives the appellant the right to terminate the contract in case of a failure to do so, is not inconsistent with the time limit provided in section 12 of the IBC to complete the insolvency resolution process. Article 9.3.1 obliges the Corporate Debtor to ensure that the proceedings initiated against it come to an end within 30 days by an act of the Corporate Debtor and does not govern the resolution process undertaken under the IBC;
- (x) The right to terminate the PPA in accordance with Article 9.3.1 has accrued to the appellant, since an event of default has occurred within the meaning of Article 9.2.1(e):
 - (a) Article 9.2.1(e) of the PPA provides that if the Corporate Debtor “becomes voluntarily or involuntarily, the subject of a proceeding in any bankruptcy or insolvency laws”, it would be considered as an event of default. Article 9.2.1(e) also lists other events of default like dissolution, liquidation and the appointment of a receiver. Each of these eventualities is independent. The clause may have referred to the legislation which preceded the IBC since the PPA was entered into in 2010. However, each of these laws related to

companies that were bankrupt/insolvent. The exception under Article 9.2.1(e) covers voluntary reconstruction and merger undertaken under the Companies Act, 2013³⁵, leading to a dissolution of the company without liquidation or winding up. The exception is limited to dissolution undertaken for the above purposes and does not contemplate a dissolution in relation to an insolvency or bankruptcy proceeding. There is no dissolution in the present case. Respondents have contended that the third “or” under the Article 9.2.1(e) should be changed into “and” or other situations should be read into the exception which is only for dissolution. The interpretation of “or” as “and” would mean that initiation of proceedings under any bankruptcy or insolvency laws would constitute an event of default only if the company goes into liquidation. The usage of words “or” and “and” are deliberate. The interpretation proposed by the respondents would exclude liquidation taking place for reasons other than insolvency/bankruptcy, which could not have been the intent of the parties. In absence of any ambiguity or uncertainty in the clause, the court cannot imply any term or interpret the clause contrary to its plain meaning;

- (b) Clauses such as Article 9.2.1(e) are standard clauses in agreements of this nature. Even after the notification of the IBC, similar provisions continue in PPA formats notified by the Government of India as part of the Standard Bid Documents for Tariff Based Competitive Bid Process under Section 63 of the Electricity Act for conventional power. Similar provisions

³⁵ “CA 2013”

are found in the PPAs being drafted as per Guidelines for Tariff Based Competitive Bidding Process for renewable energy sources; and

- (c) The bargain between the parties was fair and not one sided. The same default clause has been provided under the appellant's defaults in Article 9.2.2(c), and a corresponding right to terminate has been provided under Article 9.3.2. Similar clauses are provided under the standard PPAs issued by the Government of India for competitive bidding under Section 63 of the Electricity Act. Therefore, the clauses cannot be said to be unreasonable or unconscionable.

35 In summing up their submissions, the appellants have raised two more arguments:

- (i) The NCLAT's observations in relation to the termination of the PPA if the Corporate Debtor goes into liquidation were incorrect:

- (a) In the appeal filed by the appellant against the order of the NCLT dated 29 August 2019, the appellant had not challenged the determination of the NCLT that the PPA can be terminated in the event of the initiation of a liquidation proceeding against the Corporate Debtor. It is a settled principle of law that the courts cannot go beyond the pleadings or the prayer put forth by the parties; and

- (b) NCLAT erroneously proceeded on the basis that there is no difference between the liquidation and resolution process. On the commencement of liquidation proceedings, the corporate debtor is no longer a going concern. The assets of the corporate debtor are sold for recovery of money.

However, agreements with third parties are not assets. The appellant cannot be compelled to continue the agreement with a new person or entity for the benefit of the creditors of the Corporate Debtor.

(ii) NCLAT's direction to the appellant to pay for the electricity injected by the Corporate Debtor was flawed:

(a) The appellant was entitled to terminate the PPA from 7 June 2019, and cannot be compelled to procure and pay for power to preserve the value of the Corporate Debtor. The injection of electricity from 7 June 2019 is due to the orders of the court and not under the PPA. Under the principle of "*actus curiae neminem gravabit*", the act of the court cannot prejudice any party. The court is under an obligation to undo the wrong caused to a party due to its actions. The appellant cannot be made to suffer on account of the erroneous injunctions granted by NCLT/NCLAT when it could have procured electricity at a lower cost from other solar power projects;

(b) The appellant has paid the Corporate Debtor an amount of Rs 50 lakhs and Rs 1.07 crores pending the present appeal and against the undertaking that the amount would be returned with interest if the appeal is decided in its favour. Additionally, under Article 9.3.1 of the PPA, the compensation for termination of the PPA is Rs 55.80 crores; and

(c) The issues relating to tariff determination and replacement of solar panels raised by the respondents were not considered by the NCLT/NCLAT, and are not relevant for the interpretation of the PPA and provisions of the IBC.

G.2 Submissions on behalf of the respondents

36 Mr C U Singh and Mr Nakul Dewan, learned Senior counsel appearing on behalf of the first respondent, have argued that NCLT had the jurisdiction to consider the validity of the termination of the PPA by the appellant on the sole ground of the initiation of the insolvency proceedings of the Corporate Debtor and that the jurisdiction was rightly exercised by the NCLT, in the present case. Mr C U Singh has made the following submissions on the jurisdiction of the NCLT:

- (i) The application for staying the termination of the PPA was filed by the first respondent before the NCLT under Section 60(5) of the IBC. Section 60(5)(c) confers upon the NCLT complete jurisdiction to decide any application by or against the Corporate Debtor on any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution of the Corporate Debtor, notwithstanding any other law for the time being in force. Hence, notwithstanding the provisions of the Electricity Act, the NCLT has jurisdiction to consider an application filed by the RP which may not specifically relate to a particular section of the IBC (such as Section 14), provided the application involves any question of law or facts, arising out of or in relation to the insolvency resolution of the third respondent;
- (ii) Relatedly, since the jurisdiction vested in the NCLT under Section 60(5)(c) is of a residuary character, even where a question of law or fact is not specifically covered under Section 14, the NCLT would have the jurisdiction to consider such a question of law or fact, provided it arises out

or is in relation to the insolvency resolution process of the corporate debtor. Any other interpretation of Section 60(5) would render it otiose;

- (iii) A narrow interpretation of Section 60(5) is neither warranted from the language of the section, nor is it in line with judicial precedents which have interpreted similar provisions in other insolvency laws. Provisions similar to Section 60(5)(c) have been read in an expansive way. In this regard, reliance is placed on the interpretation of Section 446(2) of the CA 1956, Section 4(1) of the PIA and Section 45-B of the BRA;
- (iv) The expressions used in Section 60(5)(c), *i.e.*, 'relating to' and 'arising out of' have been interpreted as words of the widest amplitude. The expression 'relating to' has been held to be equivalent to or synonymous with 'as to,' 'concerning with,' and 'pertaining to'. In view of the broad scope of these terms, an interpretation divesting the NCLT of the power to injunct the termination of the PPA should not be countenanced in this case;
- (v) The first respondent is not advocating for the adoption of an absolute rule about what falls within and beyond the NCLT's jurisdiction under Section 60(5)(c). Rather, it submits that this determination must be made on the facts of each case;
- (vi) The termination of the PPA in the present case is sought solely on the ground of insolvency. The cause of action for termination is therefore alleged to be the insolvency of the Corporate Debtor and the contention that the Corporate Debtor is no longer 'reliable' on account of the insolvency resolution process. There would be no termination of the PPA

but for the initiation of the CIRP against the Corporate Debtor. Hence, the cause of action arises out of and is in relation to the insolvency resolution of the Corporate Debtor. This case is materially different from cases in which termination of the PPA is sought for reasons independent of the insolvency of the Corporate Debtor (for instance where termination is sought for non-supply of electricity);

- (vii) The fact that Sections 20(2)(e) and 25 of the IBC are couched in terms of a duty, does not necessarily mean that the NCLT does not have jurisdiction to decide matters that arise from the duty of the RP to preserve the assets or maintain the Corporate Debtor as a 'going concern'. On the contrary, NCLT is the only forum which has the jurisdiction to oversee the resolution process of the Corporate Debtor which necessarily includes the continuation of the Corporate Debtor as a going concern and its successful resolution;
- (viii) The facts of this case are different from those of **Embassy Property** (supra) and **Municipal Corporation vs Abhilash Lal**³⁶. Unlike **Abhilash Lal** (supra), the property in this case (long term contractual right under the PPA) is the property of the Corporate Debtor and not the property of a statutory authority. Further, there was no violation of law when NCLT enjoined the appellant from terminating the PPA on the ground of the initiation of the CIRP of the Corporate Debtor. In addition, the facts in **Abhilash Lal** (supra) dealt with the public duty of Municipal Corporation in

³⁶ (2020) 13 SCC 234; hereinafter referred to as "**Abhilash Lal**"

respect of the construction of a hospital. Further, there were existing defaults and a show cause-notice was issued in this regard prior to the commencement of the CIRP of the company. As opposed to this, in the present case, termination by the appellant is not on grounds of default but solely on the ground of the initiation of the insolvency resolution process of the Corporate Debtor and, that too, nearly six months after the admission of the application under Section 10 of the IBC; and

- (ix) In **Embassy Property** (supra), what was at issue in was whether the NCLT has jurisdiction over a matter which is in the realm of public law. In the present case, the decision of the appellant to terminate the PPA is not a decision taken by the Government or by a statutory authority in relation to a matter which is in the realm of public law. The decision of the appellant to terminate the PPA is only because the Corporate Debtor is undergoing insolvency resolution. The Corporate Debtor has not defaulted in supplying solar power to the appellant and is otherwise not in breach of its obligations under the PPA.

37 Assuming that the NCLT has jurisdiction, the following submissions were made by Mr C U Singh in relation to the interpretation of the PPA:

- (i) Article 9.2.1 of the PPA, read with Article 9.3.1, which allows the appellant to terminate the PPA if the third respondent commits an event of default, must be read with other provisions of the PPA. In this regard, our attention was drawn to:

- (a) The recitals to the PPA state that the Power Producer will include its successors and assignees;
- (b) Article 4.1(iii) of the PPA provides that the Corporate Debtor shall sell the power produced by it to the appellant on first priority basis and is not allowed to sell to any third party;
- (c) Article 4.1(x) of the PPA provides for the eventuality of an equity dilution of the power producer;
- (d) Article 9.1 of the PPA provides for the term of the agreement, *i.e.*, 25 years from the commercial operation date;
- (e) Article 9.3.1 of the PPA provides that in case of a default of the Corporate Debtor, it shall have the liability to make payments towards compensation to the appellant which is equivalent to three years billing based on the first-year tariff considered on normative PLF while determining the tariff by GERC, within 30 days from the termination notice;
- (f) Article 12.9 of the PPA specifically provides that the financing parties may cause the power producer to assign its interest, rights and obligations to a third party; and
- (g) The PPA contemplates the financing of the project and that there could be financial defaults by the Corporate Debtor. Hence, the PPA specifically allowed financing parties to step in and change the identity of the power producer provided the successor was capable of and willing to assume the

obligations of the power producer under the PPA. Article 9.2.1(e) must be read in light of this background.

- (ii) In relation to the interpretation of Article 9.2.1(e), it was submitted:
 - (a) When the PPA was entered into in 2010, the IBC was not in existence. The contract was a standard form contract. While the clause refers to insolvency or bankruptcy proceedings, the intent of Article 9.2.1(e) could only have been to cover liquidation proceedings as contemplated under the CA 1956. The CA 1956 did not contemplate 'insolvency' or 'bankruptcy' proceedings. Insolvency at the time of the drafting of the clause was understood to include individual insolvency. Hence, Article 9.2.1(e) could not have intended to cover 'insolvency resolution' proceedings under the IBC as a trigger for an event of default;
 - (b) If the term 'insolvency' proceedings in Article 9.2.1(e) of the PPA, which was entered into in 2010, is sought to be applied to the 'insolvency resolution' proceedings contemplated under the IBC then the exception in the clause, in the form of 'reorganization' will also necessarily need to be applied in light of the updated understanding. Read thus, the term must extend to any form of reorganization because of which the company does not go into liquidation or winding-up. Read in this manner, Article 9.2.1(e) must be interpreted to exclude the reorganization proceedings under the IBC; and
 - (c) Assuming, *arguendo*, that Article 9.2.1(e) of the PPA is ambiguous, it ought to be interpreted in favour of the power producer. The PPA is a

standard form contract. The third respondent and the appellant do not stand on a footing of equality. The application of the rule of *contra preferentum* is well settled and an interpretation of the contract which favours the party with lesser bargaining power is preferred. Applying that rule here, any ambiguity in the interpretation of Article 9.2.1(e) must be resolved in favour of the third respondent.

38 Submissions were also urged by Mr C U Singh in relation to Sections 14 and 238 of the IBC:

(i) In relation to the application of Section 238 of the IBC to the PPA, it was submitted that:

(a) Under Article 9.3.1 of the PPA, the third respondent is required to remedy the default (if any) within 30 days of service of the default notice. If read in this manner, on the receipt of a default notice during the pendency of the CIRP, the third respondent would be required to complete the reorganization process within 30 days so as to obviate the consequence of the PPA getting terminated. The IBC provides a period of 330 days for the completion of the CIRP. There is a dichotomy between the provisions of the PPA and the IBC. The timelines under the PPA for curing a default are inconsistent with those under the IBC for completing the CIRP with respect to the third respondent. In view of the non-obstante clause in Section 238, the provisions of the IBC would override those of the PPA;

(b) The argument that the PPA is not an “instrument” under the IBC is incorrect. Since the term “instrument” has not been defined in the IBC, it

may bear a meaning drawn from the definition in other statutes. The PPA is approved by the GERC and has the force of law under the Electricity Act. The PPA sets out the rights and liabilities of the parties and is an instrument for the purposes of Section 238. Being an “instrument”, which is inconsistent with the provisions of the IBC, the latter would have overriding effect over the former, in view of Section 238 of the IBC. Therefore, the right to terminate would only arise in case the third respondent fails to cure the default, *i.e.*, resolve itself in accordance with the IBC; and

- (c) In view of Section 238, the IBC overrides the provisions of the Electricity Act. Section 63 of the IBC provides that “No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under IBC.” NCLT’s jurisdiction excludes that of the GERC.
- (ii) In relation to the legislative intent underlying Section 14 of the IBC, it was submitted that:
 - (a) The Notes on Clauses to the Insolvency and Bankruptcy Bill, 2015 and the Insolvency Law Committee Report dated 20 February 2020 suggest a clear legislative intent of Section 14 that, an *ipso facto* clause allowing a party to terminate the contract if the counterparty enters into some form of insolvency resolution process must either be declared void or be suitably read down in order to ensure that the objective of the IBC in keeping the company as a going concern is met. If in the facts of a given case, the

relevant authorities find that to preserve the assets of the Corporate Debtor and to keep it as a going concern, certain contracts need to be protected, they ought to be invalidated or read down; and

- (b) The nature of the third respondent and its business renders the PPA a valuable asset, and its termination would have the effect of running the third respondent to the ground. Therefore, in view of the legislative intent, and reading the provisions of the PPA as a whole, Article 9.2.1 (e) must be read to exclude reorganization proceedings under the IBC as an event of default.

39 Supplementing these submissions, Mr Nakul Dewan, learned Senior Counsel made the following additional submissions:

- (i) The Resolution Plan submitted by the Successful Resolution Applicant and approved by the CoC was dependent on the continuation of the PPA:

- (a) The following aspects of the resolution plan need to be highlighted: (i) the significance of the PPA to the continued commercial viability of the corporate debtor; (ii) the reason for the initiation of the CIRP including the nature of the debts; (iii) the experience of the RP in reviving the Corporate Debtor including the revival plan; (iv) the summary of the resolution plan, including the 'haircut' being taken by the creditors in order to ensure that the Corporate Debtor is restructured; (v) the relevant rates pertaining to solar tariff; (vi) the business plan; (vii) the financial plan; and (viii) the potential risks and mitigation measures;

- (b) The Corporate Debtor was put into financial difficulty on account of the force majeure events which transpired in 2015 and 2017. The first respondent had started putting the Corporate Debtor back on its track, and along with the Resolution Applicant had formulated a plan under which the Corporate Debtor would be revived. The resolution plan was dependent on the continuation of the PPA; and
- (c) If the termination is permitted, the Corporate Debtor would not be able to revive in terms of the resolution plan which has been agreed upon by the lenders, even though it continues to be able to perform its obligations under the PPA.
- (ii) In relation to the interpretation of Article 9.2.1(e):
- (a) The term ‘law’, in Article 9.2.1(e) must be interpreted in a dynamic sense. The interpretation of Article 9.2.1(e) must be considered at the point of time it was sought to be invoked in order to ascertain whether there was an event of default. The exception under which “reorganization” is excluded as an event of default, would apply to the proceedings which were initiated under section 10 of the IBC for the sole purpose of the reorganization of the Corporate Debtor; and
- (b) The invocation of Article 9.2.1(e) on the ground that proceedings under Section 10 of the IBC had been commenced was both erroneous and premature. It was erroneous because at the time of commencement of the proceedings, the Corporate Debtor was looking at the reorganization of its affairs. It squarely fell within the exception to Article 9.2.1(e). It was

premature because unless and until the appellant was sure that after a reorganization the resulting entity would not have the financial standing to perform its obligations or as to its lack of creditworthiness, it had no basis to terminate the PPA on the ground that it constituted an event of default under Article 9.2.1(e).

(iii) In relation to the jurisdiction of the NCLT, it was submitted that:

- (a) The NCLT's jurisdiction with respect to Section 60(5) was invoked to seek quashing of the default notice issued by "taking insolvency proceedings as Event of Default." Therefore, the application filed before the NCLT was within the realm of its jurisdiction under Section 60(5) of the IBC;
- (b) The appellant's submission about GERC having jurisdiction should not be accepted. Instead, this Court should adopt the position that, should the commencement of proceedings under the IBC be used as a ground to terminate a contract, then the matter ought to be determinable by the NCLT. This is further bolstered by the exclusion of the jurisdiction of civil courts under Section 231 of the IBC; and
- (c) IBC, being a special law, enacted after the Electricity Act, the NCLT and NCLAT have exclusive jurisdiction to govern all questions of fact and law relating to the insolvency process of the corporate debtor.

40 Mr V Giri, learned senior counsel on behalf of the second respondent, made the following submissions in support of the arguments made by the first respondent:

- (i) Once an application under sections 7, 9 or 10 of the IBC is admitted by the NCLT, it is conferred with the jurisdiction to deal with matters relating to the insolvency of the corporate debtor;
- (ii) Both the Electricity Act and the IBC are special legislations, which have been enacted to deal with electricity related issues and insolvency, respectively. In **Ashoka Marketing vs PNB**³⁷ this court held that a harmonious construction of two special laws containing non-obstante clauses can be undertaken by looking at the purpose of both the laws. This Court was also mindful of the principle that a special law enacted at a later date prevails over the earlier special law. In this regard, the non-obstante clause under Section 174 of the Electricity Act would be overridden by Section 238 of IBC in case of a conflict of jurisdiction to resolve a dispute;
- (iii) The NCLT can exercise its jurisdiction under Section 60(5) of the IBC to ensure that the Corporate Debtor survives as a 'going concern'. It would not be possible to enter into another PPA with the same terms and conditions as the current PPA;
- (iv) The second respondent as a lender bank may not be able to initiate a dispute resolution process under Section 86(f) of the Electricity Act since it contemplates the resolution of disputes between a generator and a trading licensee;
- (v) Section 60(5)(c) of the IBC provides that the NCLT can entertain or dispose of any event or action arising out of, in relation to, effecting or

³⁷ 1990 (4) SCC 406

hampering the insolvency resolution process. NCLT has the jurisdiction to intervene to the extent of removing any obstacle in the CIRP process for it to reach its logical end, which is approval of the resolution plan or liquidation. The contours of Section 14 of the IBC must be determined under such an understanding of Section 60(5)(c);

- (vi) The moratorium under Section 14 of IBC is not exhaustive because:
 - (a) The object of section 14 is protection of the Corporate Debtor during the CIRP;
 - (b) The preamble of the IBC provides for preserving the maximum value of the assets of the Corporate Debtor; and
 - (c) Section 14(3) only excludes certain kinds of agreements and transactions from moratorium under Section 14(1), as notified by the Central Government in consultation with the financial regulator or any other authority. The NCLT has the power to impose moratorium or status quo in the interest of protecting the corporate debtor and the CIRP in addition to the protections enumerated in Section 14(1);
- (vii) Maintaining the Corporate Debtor as a 'going concern' is the soul of the CIRP. Section 14(2A) provides that a supply of goods or services which an IRP or RP considers critical for protecting and preserving the value of the Corporate Debtor, and managing its operation as a going concern cannot be terminated, suspended or interrupted. Section 20(1) imposes a duty on the IRP to protect and preserve the value of the Corporate Debtor and manage the operations as a 'going concern'. The 'Resolution Plan' has

been defined under Section 5(26) of the IBC as a plan proposed by the resolution applicant for insolvency resolution of the Corporate Debtor as a 'going concern'. The termination of the PPA would push the Corporate Debtor towards a corporate death, namely, liquidation;

- (viii) The Explanation to Section 14(1) clarifies that, *inter alia*, "a similar grant of right given by the Central government, State government, local authority, sectoral regulator or any other authority shall not be terminated on the ground of insolvency". This indicates the intent of the legislature that no right conferred on the Corporate Debtor can be taken away due to the initiation of the CIRP;
- (ix) Article 9.2.1(e) must be read with Article 12.9 of the PPA, which provides that if a default is committed under the financing documents, lenders have a right to assign the rights and obligations of the Corporate Debtor under the PPA to a third party. Hence, the PPA contemplates a situation where the Corporate Debtor may go through a reorganization. The present proceedings under the IBC are in the nature of a reorganization. Hence, the CIRP cannot be construed as event of default under the PPA;
- (x) The lenders extended the loan based on the: (a) right of assignment granted under Article 12.9 of the PPA; (b) purchase of electricity as a fixed tariff; and (c) term of the PPA for a period of 25 years. The financial projections on the loan and its repayment were made on the above terms. The default notice is in violation of the terms of the PPA and the understanding reached between the parties;

- (xi) Article 9.3.1 of the PPA is inconsistent with the IBC, since the PPA grants a time of 30 days to remedy the insolvency whereas the IBC provides a timeline of 180 days, which is extendable up to 330 days. Section 238 of IBC ensures that the IBC will prevail over the PPA. The phrase “instrument” in Section 238 can be interpreted in light of Section 2(14) of the Indian Stamp Act, 1899 and Section 2(b) of the Notaries Act, 1952 which provide that an “instrument”, “includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.” Hence the PPA qualifies as an instrument;
- (xii) Section 14(1)(d) provides for protection of the property of the Corporate Debtor. The expression “property” would include the PPA in terms of its definition in Section 3(27) of the IBC. Paras 8.1 to 8.3 of the Third Insolvency Committee Report dated 20 February 2020 indicate that the intent of the IBC is to ensure that the Corporate Debtor remains a going concern and contracts cannot be terminated by way of *ipso facto* clauses relating to insolvency; and
- (xiii) The appellant terminated the PPA not due to the default *per se* but due to a commercial decision to negotiate and reduce the purchase price of electricity under tariff. It is not the intent of the IBC to allow an entity to take the benefit of the CIRP to negotiate a better price for a contract and in effect reduce the value of the Corporate Debtor.

H Issues arising from the dispute

41 The following two issues arise for determination:

- (i) Whether the NCLT/NCLAT can exercise jurisdiction under the IBC over disputes arising from contracts such as the PPA; and
- (ii) Whether the appellant's right to terminate the PPA in terms of Article 9.2.1(e) read with 9.3.1 is regulated by the IBC.

I Jurisdiction of the NCLT/NCLAT over contractual disputes

42 The primary issue upon which the outcome of this appeal would turn is the nature of the jurisdiction which is exercised by the NCLT under Section 60(5) of the IBC. The provision reads thus:

“(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

43 Sub-section (1) of Section 60 provides the NCLT with territorial jurisdiction over the place where the registered office of the corporate person is located. NCLT shall be the adjudicating authority “in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors”. The NCLT has been constituted under Section 408 of the CA 2013 “to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force”³⁸.

44 NCLT owes its existence to statute. The powers and functions which it exercises are those which are conferred upon it by law, in this case, the IBC.

³⁸ “**Section 408.** The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.”

45 The NCLT in its decision dated 29 August 2019 did not specifically examine the issue of its jurisdiction under Section 60(5)(c) of the IBC. It prohibited the termination of the PPA on the ground that it is an “instrument” under Section 238; Articles 9.2.1(e) read with 9.3.1 of the PPA are inconsistent with the provisions of the IBC; and the latter overrides an instrument having effect by virtue of law. One of the considerations which weighed with the NCLT while coming to its determination was that termination of the PPA would prejudice the status of the Corporate Debtor as a “going concern”, and lead to the failure of the CIRP. The NCLT observed:

“30. ...the CIR process in the instant case was triggered on 20.11.2018, which was further extended by 90 days on 16.05.2019 and the default notices were issued by the Respondent Company on 01.05.2019. That termination of PPA at this stage may have adverse consequences on the status of the Corporate Debtor as "going concern" and eventually, may jeopardise the entire CIR Process. While elaborating on the objectives of IBC as enshrined in the Preamble, the Hon'ble Supreme Court, had held in the matter of **Swiss Ribbons Pvt. Ltd. v Union of India, 2019 SCC Online SC 73**:

" What is interesting to note is that 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 plan submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern".”

46 In appeal, the NCLAT by its order dated 15 October 2019, upheld the exercise of jurisdiction by the NCLT. The NCLAT held:

“Taking into consideration the nature of the case, we are of the view that to keep the 'Corporate Debtor' a going concern, which is generating electricity and supplying only to 'Gujarat Urja Vikas Nigam Ltd.', the Adjudicating Authority rightly asked 'Gujarat Urja Vikas Nigam Ltd.' not to terminate the 'Power Purchase Agreement' dated 30th April, 2010.

We may make it clear that the 'Gujarat Urja Vikas Nigam Limited', being purchaser of the electricity cannot terminate the 'Power Purchase Agreement' solely on the ground that the 'Corporate Insolvency Resolution Process' has been initiated against 'Astonfield Solar (Gujrat) Pvt. Ltd.' (Corporate Debtor) which is generating electricity and supplying it and there is no default in supplying electricity and during the 'Corporate Insolvency Resolution Process'..."

However, like the NCLT, the NCLAT did not give any specific finding on whether it or the NCLT can exercise its jurisdiction under section 60(5)(c) over a dispute arising out of the termination of the PPA. In this regard, the task falls on this Court to enumerate the contours of the jurisdiction that can be exercised under Section 60(5)(c) of the IBC.

I.1 Section 60(5)(c) : “arising out of” and “in relation to”

47 It has been submitted before us on behalf of the appellant that the NCLT does not have any inherent powers, and its exercise of jurisdiction is circumscribed by the provisions of the IBC. As such, it does not have the jurisdiction to entertain all disputes or all issues related to the Corporate Debtor. On the other hand, the respondents have made a limited submission that while the NCLT may not have jurisdiction to adjudicate upon contractual disputes that arise independent of the insolvency of the Corporate Debtor, it has the sole jurisdiction to decide a dispute that arises from or relates to the insolvency of the Corporate Debtor or where the property of the Corporate Debtor (in this case its rights under the PPA) is sought to be taken away on the ground of insolvency. For their argument, the respondents have relied on Section 60(5)(c) to submit

that NCLT is vested with a wide jurisdiction to consider questions of law or fact “arising out of” or “in relation to” insolvency resolution proceedings.

48 In varying contexts, this Court has expansively construed the expressions “relating to” and “arising out of” in its previous decisions. The respondents have relied on some of these judgments to buttress their submissions in regard to the width of Section 60(5)(c). In **Renusagar Power Co. Ltd. vs General Electric Company**³⁹, a two judge Bench while interpreting the words “arising out of” or “related to” in an arbitration clause held as follows, speaking through Justice V.D. Tulzapurkar

“25...(2) Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content..”

49 In **Mansukhlal Dhanraj Jain vs Eknath Vithal Ogale**⁴⁰, another two judge Bench of this Court emphasized the comprehensive nature and wide sweep of the term “relating to” in the context of the Small Causes Courts Act, 1887. Justice S B Majumdar held:

“16. It is, therefore obvious that the phrase “relating to recovery of possession” as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently in the light of the averments in plaints under consideration and the prayers sought for therein, on the clear

³⁹ (1984) 4 SCC 679

⁴⁰ (1995) 2 SCC 665

language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Cause Court, Bombay and City Civil Court would have no jurisdiction to entertain such suits.”

50 In **Doypack System (P) Ltd. vs Union of India**⁴¹, a two judge Bench held that the expression “in relation to” is broad and is equivalent to the expressions “concerning with” and “pertaining to”, with the latter also being expansive in ambit. Justice Sabyasachi Mukharji (as the learned Chief Justice of India then was) observed:

“50. The expression “in relation to” (so also “pertaining to”), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both direct significance as well as indirect significance depending on the context [internal citation omitted]. Assuming that the investments in shares and in lands do not form part of the undertaking but are different subject matters, even then these would be brought within the purview of the vesting by reason of the above expressions. **In this connection reference may be made to 76 Corpus Juris Secundum at pages 620 and 621 where it is stated that the term “relate” is also defined as meaning to bring into association or connection with. It has been clearly mentioned that “relating to” has been held to be equivalent to or synonymous with as to “concerning with” and “pertaining to”. The expression “pertaining to” is an expression of expansion and not of contraction.**”

(emphasis supplied)

51 While the phrases “arising out of” and “relating to” have been given an expansive interpretation in the above cases, words can have different meanings depending on the subject or context. Words are after all, a vehicle for communicating ideas, thoughts and concepts. A one-size-fits-all analogy may not

⁴¹ (1988) 2 SCC 299

always hold good when we construe similar words in entirely distinct settings. Justice G.P. Singh in his authoritative commentary on the interpretation of statutes, *Principles of Statutory Interpretation*, has noted that the same words used in different sections of the same statute or used at different places in the same clause or section can have different meanings⁴². Therefore, it is necessary to bear in mind the context in which the phrases have been used. Justice G.P. Singh has stated in his commentary that⁴³:

“When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy.”

52 Bearing in mind the above caution, it may be of relevance to discuss the interpretation of similar provisions in other insolvency laws. Textually, the provisions of Section 60(5) bear a flavor of resemblance to the provisions which were contained in sub-Section 2 of Section 446⁴⁴ of the CA 1956, which correspond now to Section 280⁴⁵ of CA 2013.

⁴² G.P. Singh, *Principles of Statutory Interpretation* (1st edn., Lexis Nexis 2015)

⁴³ Ibid.

⁴⁴ Sub-section 2 of section 446 provides as follows:

“(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of- (a) any suit or proceeding by or against the company; (b) any claim made by or against the company (including claims by or against any of its branches in India); (c) any application made under section 391 by or in respect of the company; (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.”

⁴⁵ Section 280 of the CA 2013 provides as follows:

“**280. Jurisdiction of Tribunal.**— The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,— (a) any suit or proceeding by or against the company; (b) any claim made by or against the company, including claims by or against any of its branches in India; (c) any application made under section 233; (d) any scheme submitted under section 262; (e) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter

53 A textual comparison of the provisions of Section 60(5) of the IBC with Section 446(2) of CA 1956 would reveal some similarities of expression, with textual variations. For the purposes of the present proceedings, it suffices to note that clause (c) of Section 60(5) confers jurisdiction on the NCLT to entertain or dispose of “any question of priorities or any question of law or facts arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code”. Section 446(2)(d) of CA 1956 and section 280(d) of CA 2013 use the expression any question of priorities or any other question whatsoever whether of law or fact. These words bear a striking resemblance to the provisions of section 60(5) (c) of the IBC. But textually similar language in different enactments has to be construed in the context and scheme of the statute in which the words appear. The meaning and content attributed to statutory language in one enactment cannot in all circumstances be transplanted into a distinct, if not, alien soil. For, it is trite law that the words of a statute have to be construed in a manner which would give them a sensible meaning which accords with the overall scheme of the statute, the context in which the words are used and the purpose of the underlying provision. Therefore, while construing of section 60(5), a starting point for the analysis must be to decipher Parliamentary intent based on the object underlying the enactment of the IBC. The Statement of Objects and Reasons leading up to the enactment to the IBC conveys a strong sense of the intent of the legislature. According to it:

arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made.”

“There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization 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 priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code.

Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.”

54 The salient aspects which emerge from the state of the law prior to the enactment to the IBC can be formulated thus:

- (i) There was a multiplicity of legislation dealing with insolvency and bankruptcy;
- (ii) Multiplicity of statutes led to the creation of multiplicity of fora;
- (iii) Provisions relating to insolvency and bankruptcy of companies were embodied in the SICA, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993⁴⁶, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002⁴⁷ and the CA 2013;
- (iv) The above statutes provided for the establishment of multiplicity of adjudicating bodies including the BIFR, Debt Recovery Tribunal⁴⁸, NCLT and the Appellate Tribunal;
- (v) While the liquidation of companies was adjudicated upon by the High Courts exercising company jurisdiction, individual insolvency was governed by the Presidency-Towns Insolvency Act, 1909 and the PIA;

⁴⁶ “RDDB”

⁴⁷ “SARFAESI”

⁴⁸ “DRT”

- (vi) The multiplicity of statute and fora in the regime prior to the IBC led to a framework for insolvency and bankruptcy which was inadequate and ineffective, and resulted in undue delay;
- (vii) The underlying purpose and object of enacting the IBC was to ensure a timely resolution of insolvency and bankruptcy which would:
 - (a) Maximize of the value of assets;
 - (b) Promote entrepreneurship;
 - (c) Facilitate the availability of credit;
 - (d) Support the development of credit markets; and
 - (e) Balance interests of all stake-holders.
- (viii) Bearing the above aspects in mind, the IBC, which is a consolidating and amending statute, came to be enacted; and
- (ix) The IBC, in a clear departure from the past, separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects.

55 In the decision of this Court in **Swiss Ribbons** (supra), where the challenge was to the constitutional validity of some provisions of the IBC, the judgment by Justice RF Nariman contains a section titled “**Prologue: the pre-existing state of the law**”. The problems which arise from multiplicities of statutes and fora in the erstwhile regime were noticed in the report of the Bankruptcy Law Reforms Committee (2015) (“**BLRC**”):

“14. ...The current state of the bankruptcy process for firms is a highly fragmented framework. Powers of the creditor and the debtor under insolvency are provided for under different Acts...

It is 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. This gives rise to two types of problems in implementation of the resolution framework. The first is the lack of clarity of jurisdiction. In a situation where one forum decides on matters relating to the rights of the creditor, while another decides on those relating to the rights of the debtor, the decisions are readily appealed against and either stayed or overturned in a higher court. Ideally, if economic value is indeed to be preserved, there must be a single forum that hears both sides of the case and makes a judgment based on both. A second problem exacerbates the problems of multiple judicial fora. The fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This leads to delays and extensions in arriving at an outcome, and increases the vulnerability to appeals of the outcome...a matrix of fragmented and contrary outcomes,...

A “debtor and creditor led process of corporate insolvency” had resulted in a matrix of fragmented and contrary outcomes rather than “coherent and consistent.... precedents”.

56 The BLRC noted that speed is of the essence for the working of a bankruptcy code. From the point of the view of creditors, a good realization can be obtained when a firm is sold as a going concern. The decisions of this Court in **Madras Petrochem**⁴⁹, **Innoventive Industries**⁵⁰ and **Arcelor Mittal (India) (Private) Limited**⁵¹ emphatically advert to the failure of the statutory resolution

⁴⁹ **Madras Petrochem Limited. vs BIFR** : (2016) 4 SCC 1

⁵⁰ **Innoventive Industries vs ICICI Bank** : (2018) 1 SCC 407; hereinafter referred to as “**Innoventive Industries**”

⁵¹ **Arcelor Mittal (India) (Private) Limited. vs Satish Kumar Gupta** : (2019) 2 SCC 1; hereinafter referred to as “**Arcelor Mittal**”

machinery in the regime prior to the IBC. It was in this backdrop that the IBC was enacted to provide for a timely resolution of the CIRP. The primary focus of the IBC is to ensure the revival and continuation of the corporate debtor. The interests of the corporate debtor have been bifurcated and separated from the interests of persons in management. The timelines which are prescribed in the IBC are intended to ensure the resuscitation of the corporate debtor.

57 The enactment of the IBC is in significant senses a break from the past. While interpreting the provisions of the IBC, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the backdoor by a process of disingenuous legal interpretation. However, this is not to say that the interpretation given to the statutory provisions that existed prior to the enactment IBC is to be rejected *in toto*. The interpretation given to such statutory provisions that are textually similar to Section 60(5)(c) may be relevant, provided that such interpretation is in tandem with the objective of enacting the IBC, that is, *inter alia*, avoidance of multiplicity of fora and a timely resolution of the insolvency process.

58 In **Sudharshan Chits (I) Ltd. vs O Sukumaran Pillar**⁵², a three judge Bench of this Court held that the object of Section 446(2) of CA 1956 was to enlarge the jurisdiction of the Company Court to avoid a multiplicity of proceedings, delay and expensive litigation. The Court was speaking through Justice D.A Desai held:

“8..Sub-Section (2) was introduced to enlarge the jurisdiction of the court winding up the company so as to facilitate the

⁵² (1984) 4 SCC 657

disposal of winding-up proceedings...To save the Company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding-up proceedings, the Parliament devised a cheap and summary remedy conferring jurisdiction on the court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Section 446(2) and therefore, it must receive such construction at the hands of the court as would advance the object and at any rate not thwart it”

59 Section 4(1) of the PIA used similar words in relation to the jurisdiction of the insolvency court as Section 60(5) of the IBC. Section 4(1) of the PIA provided:

“Section 4 - Power of Court to decide all questions arising in insolvency

(1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, **which may arise in any case of insolvency coming within the cognizance of the Court**, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.”

(emphasis supplied)

60 Another three judge Bench of this Court, in **Thampanoor Ravi vs Charupara Ravi**⁵³, held that a High Court does not have the jurisdiction to determine whether a person is an undischarged insolvent in an election petition filed under the Representation of People Act, 1951, in view of the exclusive jurisdiction conferred upon an insolvency court constituted under the PIA. Justice S. Rajendra Babu, held:

⁵³ (1999) 8 SCC 74

“11.....The Insolvency Act is a complete code and determination of all questions regarding insolvency including a question as to whether (1) a person is an insolvent or not, or (2) an insolvent be discharged or not and subject to what conditions, can be decided by the court constituted under that Act alone.....

13. In the present case, as we have explained earlier the scheme of the provisions of the Insolvency Act, the exclusive jurisdiction to deal with any question relating to insolvency could be adjudicated upon only by the court constituted under that Act. In such a situation, it would not be possible to hold that the High Court had, while dealing with an election petition, jurisdiction to decide a question as to whether a person is an undischarged insolvent or not. Admittedly, in this case, there is no such adjudication. Hence the High Court could not declare the appellant to be an 'undischarged insolvent'.”

61 Section 45-B of the BRA uses language similar to Section 60(5) of the IBC.

Section 45-B of the BRA provides:

“Section 45B - Power of High Court to decide all claims in respect of banking companies

The High Court shall, save as otherwise expressly provided in section 45C, have exclusive jurisdiction to entertain and decide any claim made by or against a banking company which is being wound up (including claims by or against any of its branches in India) or any application made under section 39 of the Companies Act, 1956 by or in respect of a banking company or any question of priorities or any other question whatsoever, whether of law or fact [sic fact] **which may relate to or arise in the course of the winding up of a banking company**, whether such claim or question has arisen or arises or such application has been made or is made before or after the date of the order for the winding up of the banking company or before or after the commencement of the Banking Companies (Amendment) Act, 1953 (52 of 1953).”

(emphasis supplied)

62 In **Dhirendra Chandra Pal vs Associated Bank of Tripura Ltd.**⁵⁴, a four judge Bench of this Court examined the scope of Section 45-B. Justice B. Jagannadhas observed:

“4. It is to be remembered that section 45-B is not confined to claims for recovery of money or recovery of property, movable or immovable, but comprehends all sorts of claims which relate to or arise in the course of winding up.”

63 The above judgements were undoubtedly in relation to the jurisdiction of courts in relation to winding up and insolvency proceedings under distinct statutes. But considerations such as avoiding multiplicity of fora, speedy disposal and litigation costs would also be germane to the establishment of an exclusive body under the IBC to adjudicate matters arising from or in relation to the insolvency resolution process.

64 In this context, it would be useful to trace the history of the NCLT and NCLAT, which are empowered to deal with all issues relating to insolvency, specifically with the aim of avoiding a multiplicity of fora. The Justice Eradi Committee was constituted by the Department of Company Affairs to make recommendations on reforming the existing law on winding up of companies to increase transparency and reduce delays in the liquidation of companies. The Report of the High Level Committee on Law relating to Insolvency and Winding Up of Companies (2000) stated that:

“...there is a need for establishing a National Tribunal as a specialized agency to deal with matters relating to rehabilitation, revival and winding up of companies. **With a**

⁵⁴ AIR 1955 SC 213

view to avoiding multiplicity of fora, the National Tribunal. should be conferred with jurisdiction and powers to deal with matters under Companies Act, 1956 presently exercised by the Company Law Board; jurisdiction, power and authority relating to winding up of companies vested with High Courts and power to consider rehabilitation and revival of companies presently vested in the BIFR. This suggestion of the Committee will involve amending the provisions of Part VU of Companies Act, 1956 besides repeal of Sick Industrial Companies (Special Provisions) Act, 1985 and amending section 10E of the Companies Act relating to the present Company Law Board. All the existing cases pending with the High Courts and the Company Law Board may be transferred to the Tribunal and the pending references before BIFR/AAFIR shall abate.”

(emphasis supplied)

65 The above report was discussed in the decision of this Court in **Union of India vs R. Gandhi, President, Madras Bar Association**⁵⁵. A Constitution Bench noted that the recommendations of the Committee were accepted by the Government, which established the NCLT and NCLAT to transfer the functions being performed by High Courts, Company Law Board, BIFR and Appellate Authority for Industrial and Financial Reconstruction to a single forum to avoid long drawn litigation before multiple fora. Justice R.V. Raveendran observed:

“3. (...) The Committee found that multiplicity of court proceedings is the main reason for the abnormal delay in dissolution of companies. It also found that different agencies dealt with different areas relating to companies, that Board for Industrial & Financial Reconstruction (BIFR) and Appellate Authority for Industrial & Financial Reconstruction (AAIFR) dealt with references relating to rehabilitation and revival of companies, High Courts dealt with winding-up of companies and Company Law Board (CLB) dealt with matters relating to prevention of oppression and mismanagement etc. Considering the laws on corporate insolvency prevailing in industrially advanced

⁵⁵ (2010) 11 SCC 1

countries, the Committee recommended various amendments in regard to the provisions of Companies Act, 1956 for setting-up of a National Company Law Tribunal which will combine the powers of the CLB under the Companies Act, 1956, BIFR and AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 as also the jurisdiction and powers relating to winding-up presently vested in the High Courts.

4. It is stated that the recommendations of the Eradi Committee were accepted by the Government and Company (Second Amendment) Act, 2002 was passed providing for establishment of NCLT and NCLAT to take-over the functions which are being performed by CLB, BIFR, AAIFR and the High Courts. It is submitted that the establishment of NCLT and NCLAT will have the following beneficial effects: (i) reduce the pendency of cases and reduce the period of winding-up process from 20 to 25 years to about two years; (ii) avoid multiplicity of litigation before various fora (High Courts and quasi-judicial Authorities like CLB, BIFR and AAIFR) as all can be heard and decided by NCLT; (iii) the appeals will be streamlined with an appeal provided against the order of the NCLT to an appellate Tribunal (NCLAT) exclusively dedicated to matters arising from NCLT, with a further appeal to the Supreme Court only on points of law, thereby reducing the delay in appeals; and (iv) with the pending cases before the Company Law Board and all winding-up cases pending before the High Courts being transferred to NCLT, the burden on High Courts will be reduced and BIFR and AAIFR could be abolished.”

(emphasis supplied)

66 The IBC was a reform which was distilled through many committee reports, most importantly the Report of the BLRC, which recommended that the earlier institutional framework relating to the winding up and liquidation of the companies should continue under the IBC. The Report stated:

“4.2.2 Territorial jurisdiction

...

Further, following from current law, once a liquidation or bankruptcy order has been made, leave of the NCLT or DRT would be necessary to proceed with any pending suit or proceeding or to file any fresh suit or proceeding by or against

the debtor firm or individual. This will ensure the sanctity of the liquidation or bankruptcy process. **The NCLT or DRT should also have jurisdiction to entertain and dispose of any pending or fresh suit or legal proceeding by or against the debtor company or individual; question of priorities or any other question, whether of law or facts, in relation to the liquidation or bankruptcy. By bringing all litigations that may have a monetary impact on the economic value of debtor firm or individual's assets within the jurisdiction of the NCLT, the liquidation or bankruptcy process will be made streamlined and efficient...**

4.21 Tribunals Jurisdiction on firm insolvency and liquidation

Under Companies Act, 2013, the National Company Law Tribunal (NCLT) has jurisdiction over the winding up and liquidation of companies. NCLAT has been vested with the appellate jurisdiction over NCLT. Similarly, the Limited Liability Partnership Act, 2008 also confers jurisdiction to NCLT for dissolution and winding up of limited liability partnerships, while appellate jurisdiction is vested with NCLAT. **The Committee recommends continuing with this existing institutional arrangement. NCLT should have jurisdiction over adjudications arising out of firm insolvency and liquidation, while NCLAT will have appellate jurisdiction on the same."**

(emphasis supplied)

67 The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora. In the absence of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different fora. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of appeal. A delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the

prospects of a successful reorganization or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner. Pursuing this theme in **Innoventive** (supra) this court observed that “one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process”. The principle was reiterated in **Arcelor Mittal** (supra) where this court held that “the non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings”. Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing do, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.

68 It is appropriate to refer to the observations in the Report of the BLRC, wherein it noted the role of the NCLT, as the Adjudicating Authority for the CIRP, in the following terms:

“An adjudicating authority ensures adherence to the process

At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator.”

As such, it is important to remember that the NCLT’s jurisdiction shall always be circumscribed by the supervisory role envisaged for it under the IBC, which sought to make the process driven by trained resolution professionals.

69 In the present case, the PPA was terminated solely on the ground of insolvency, since the event of default contemplated under Article 9.2.1(e) was the commencement of insolvency proceedings against the Corporate Debtor. In the absence of the insolvency of the Corporate Debtor, there would be no ground to terminate the PPA. The termination is not on a ground independent of the insolvency. The present dispute solely arises out of and relates to the insolvency of the Corporate Debtor.

70 Ms Ramachandran and Mr Diwan have contended that CA 1956, PIA and BRA do not contain any provisions equivalent to Sections 25(2)(b) and 18(f)(vi) of the IBC which empower the RP to exercise rights for the benefit of the Corporate Debtor in certain adjudicatory proceedings. They submit that Section 60(5)(c) of the IBC must be read in consonance with Sections 25(2)(b) and 18(f)(iv), which would be rendered nugatory if NCLT becomes the exclusive forum for the

enforcement of all the Corporate Debtor's rights. Section 25(2)(b) of the IBC provides:

“Section 25 - Duties of resolution professional

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:--

....

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;”

Section 18(f)(vi) provides:

“Section 18 - Duties of interim resolution professional

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

.....

(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—

.....

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

71 We are inclined to agree with the submission made by Mr Singh that merely because a duty has been imposed on the IRP or the RP, it does not mean that the jurisdiction of the NCLT is circumscribed under section 60(5)(c) of the IBC. In **Embassy Property** (supra), it was argued that the term “property” under Section 3(27) of the IBC includes a mining lease granted by government and the IRP is duty bound under Section 20(1) of the IBC to preserve the value of the

property of the Corporate Debtor. Hence, the submission was that the RP can invoke the jurisdiction of the NCLT to adjudicate upon a dispute relating to non-extension of the lease. However, Justice V. Ramasubramanian, speaking for this Court, observed that “the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT”⁵⁶.

72 Therefore, we hold that the RP can approach the NCLT for adjudication of disputes that are related to the insolvency resolution process. However, for adjudication of disputes that arise *dehors* the insolvency of the Corporate Debtor, the RP must approach the relevant competent authority. For instance, if the dispute in the present matter related to the non-supply of electricity, the RP would not have been entitled to invoke the jurisdiction of the NCLT under the IBC. However, since the dispute in the present case has arisen solely on the ground of the insolvency of the Corporate Debtor, NCLT is empowered to adjudicate this dispute under Section 60(5)(c) of the IBC.

I.2 Jurisdiction of NCLT and GERC

73 It has been urged on behalf of the appellant that in terms of Article 10.4 of the PPA, GERC is entitled to entertain the disputes relating to the PPA.

74 Our attention has also been drawn to Section 86(1)(f) of the Electricity Act, which provides that GERC shall discharge the function of adjudicating “the disputes between the licensees, and generating companies and to refer any

⁵⁶ **Embassy Property** (supra), para 39.

dispute for arbitration”. It has been submitted that, therefore, any issue in relation to the PPA must be raised before the GERC and not the NCLT.

75 Reliance has also been placed on the judgement of this Court in **Embassy Property** (supra), where this Court held that the NCLT and NCLAT did not have jurisdiction over a dispute arising under the Mines and Minerals (Development and Regulation) Act, 1957, in relation to the refusal of the State of Karnataka to extend a mining lease. The primary consideration which weighed with this Court while coming to its decision was that NCLT cannot have jurisdiction on matters of public law. This Court held:

“37....Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5)..."

In the present case the decision to terminate the PPA has not been taken by any governmental or statutory authority acting within the domain of its public law functions. The decision has been simply taken by a contracting party solely on account of the initiation of insolvency proceedings against the Corporate Debtor in terms of an agreement between the parties.

76 Ms Ramachandran and Mr Diwan have also relied on the judgment of this Court in **Abhilash Lal** (supra), which concerned taking the approval of the Municipal Corporation of Greater Mumbai (“**MCGM**”) for implementing a resolution plan. The Corporate Debtor in that case had committed defaults prior

to the initiation of the CIRP, in relation to its obligation to construct a hospital on a land owned by the MCGM, subsequent to which a lease deed was to be executed. It had also apparently failed to pay annual lease rentals. In this context, Justice S. Ravindra Bhat, speaking for this Court held that:

“47..... Section 238 cannot be read as overriding the MCGM's right – indeed its public duty to control and regulate how its properties are to be dealt with.” Further, this Hon'ble Court held that “in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands....Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with properties and land in question, which undeniably are public properties. The resolution plan, therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)”

In other words, the statutory powers entrusted to the Municipal Corporation to exercise control over its own properties are not overridden by Section 238 of the IBC. Once again, the present situation is distinguishable. The contract in question in **Abhilash Lal** (supra) was terminated due to defaults unrelated to the insolvency of the corporate debtor. In the present case, the sole default attributed by the appellant to the Corporate Debtor was that it was undergoing an insolvency resolution process, which makes the present dispute amenable to the jurisdiction of the NCLT under Section 60(5)(c) of the IBC.

77 Section 238 of the IBC stipulates that IBC would override other laws, including an instrument having effect by virtue of any such law. The NCLT in its decision dated 29 August 2019 gave detailed findings on the issue of whether the

PPA is an instrument within the meaning of section 238 of the IBC. Section 238 of the IBC provides:

“Section 238 - Provisions of this Code to override other laws

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

The findings of the NCLT are extracted below:

“19. That from the plain reading of Section 238, it is evident that the aforesaid Section is applicable to an 'instrument' too. However, we find that the term 'instrument' has not been defined anywhere under IBC 2016.

20. To know, whether the Power Purchase Agreement (PPA) is an 'instrument' or not, we referred to the provisions of Section 3 (37) of the Code, which is reproduced as below:

"Section 3(37) : Words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Securities Contract (Regulation) Act, 1956, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the meanings respectively assigned to them in those Acts."

21. However, in the definition clauses of all these enactments and of General Clause Act 1897, we failed to find a definition of the term 'instrument'.

22. For interpretation of the term 'instrument', we, therefore, thought it proper to check how the Legislature has defined the term 'instrument' in other enactments.

23 . Finding that the PPA has been executed on a Stamp Paper, we referred to the Section 2(14) of the Indian Stamp Act, 1899, which reads as follows:

"Section 2(14): "Instrument" - "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded".

24. That near similar definition of the term 'instrument' is provided under Section 2(b) of Notaries Act, 1952 :

"Section 2(b): "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded;"

25. Further, the Bombay Stamp Act, 1958 defines the term 'instrument' in Section 2(1) as follows :

"Section 2(1): instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt;"

26. That the Merriam-Webster Dictionary defines the word 'instrument', inter alia, as:

"a formal legal document (such as a deed, bond or agreement)"

27. Since, the rights and liabilities of parties have been created in the Power Purchase Agreement and such an agreement is enforceable by law and the word 'instrument' inter alia, includes an 'agreement', we are of the view, that the Power Purchase Agreement i.e., PPA is an 'Instrument' for the purpose of Section 238 of IBC 2016."

78 It has been urged on behalf of the appellant that Section 238 does not apply to a bilateral commercial contract between a Corporate Debtor and a third party and only applies to statutory contracts or instruments entered into by operation of law. The basis of this submission is that the word "instrument" should be given a meaning *ejusdem generis* to the provision "contained in any other law". We do not find force in this argument. Section 238 does not state that the "instrument" must be entered into by operation of law; rather it states that the instrument has effect by virtue of any such law. In other words, the instrument need not be a creation of a statute; it becomes enforceable by virtue of a law.

Therefore, we are inclined to agree with the view taken by the NCLT. Section 238 is prefaced by a non-obstante clause. NCLT's jurisdiction could be invoked in the present case because the termination of the PPA was sought solely on the ground that the Corporate Debtor had become subject to an insolvency resolution process under the IBC.

79 Section 63 of the IBC provides that "no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code".

I.3 Residuary jurisdiction of the NCLT under section 60(5)(c)

80 The respondents have relied upon the decision of this Court in **Committee of Creditors of Essar Steel India Limited vs Satish Kumar Gupta**⁵⁷, where this Court held that section 60(5)(c) of the IBC "is in the nature of residuary jurisdiction vested in the NCLT so that NCLT may decide all questions of law or fact arising out of or in relation to insolvency or liquidation under the Code"⁵⁸.

81 At this stage we may visit some of the precedents emanating from this court where a statutory conferment of residuary powers has been analyzed. A two-judge Bench of this Court discussed the contours of the residuary power in **Remdeo Chauhan vs Bani Kant Das**⁵⁹, while interpreting sub-Section (j) of Section 12 of the National Human Rights Commission Act, 1993 which confers

⁵⁷ (2020) 8 SCC 531; hereinafter referred to as "**Satish Kumar Gupta**"

⁵⁸ Ibid, para 69

⁵⁹ (2010) 14 SCC 209

NHRC with “such other functions as it may consider necessary for the promotion of human rights”. While construing the provision, this Court held that:

“45....It is not necessary that each and every case relating to the violation of human rights will fit squarely within the four corners of Section 12 of the 1993 Act for invoking the jurisdiction of the NHRC. One must accept that human rights are not edicts inscribed on a rock. They are made and unmade on the crucible of experience and through reversible process of human struggle for freedom. They admit of a certain degree of fluidity. Categories of human rights, being of infinite variety, are never really closed. **That is why the residuary clause in Sub-section (j) has been so widely worded to take care of situations not covered by Sub-sections (a) to (i) of Section 12 of the 1993 Act.**

46. The jurisdiction of NHRC thus stands enlarged by Section 12(j) of the 1993 Act, to take necessary action for the protection of human rights. Such action would include inquiring into cases where a party has been denied the protection of any law to which he is entitled, whether by a private party, a public institution, the government or even the Courts of law. We are of the opinion that if a person is entitled to benefit under a particular law, and benefits under that law have been denied to him, it will amount to a violation of his human rights.”

(emphasis supplied)

82 In **D.R. Kohli vs Atul Products Ltd.**⁶⁰, a three judge Bench of this Court differentiated between the power of Central Excise authorities for recovery of monies due to the Government under two provisions, one of them being a residuary provision:

“14. The next question relates to the appropriate provision of law under which action could have been taken in this case by the Central Excise authorities. This question was not decided by the High Court in view of its finding on the liability of the respondent to pay excise duty on the products manufactured by

⁶⁰ (1985) 2 SCC 77

it. Since we have not agreed with the decision of the High Court on this point, it has become necessary for us to decide this question in this appeal. While the Department asserts that it was open to it to proceed under Rule 10-A of the Rules, the respondent contends that even if there was any short levy, the proper Rule applicable to its case was Rule 10 and not Rule 10-A. Rule 10 and Rule 10-A of the Rules during the relevant period ran as follows :

10. Recovery of duties or charges short-levied, or erroneously refunded: When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied/has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date, on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

10-A. Residuary powers for recovery of sums due to Government:

Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify.

15. The points of difference between the above two Rules were that (i) whereas Rule 10 applied to cases of short levy through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of the excisable goods-on the part of the owner **Rule 10-A which was a residuary clause applied to those cases which were not covered by Rule 10** and that (ii) whereas under Rule 10, the deficit amount could not be collected after the expiry of three months from the date on which the duty or charge was paid or adjusted in the owners account-current or from the date of making the refund, Rule 10-A did not contain any such period of limitation.”

(emphasis supplied)

83 Hence, the residuary jurisdiction conferred by statute may extend to matters which are not specifically enumerated under a legislation. While a residuary jurisdiction of a court confers it wide powers, its jurisdiction cannot be in contravention of the provisions of the concerned statute. In **A. Deivendran vs State of T.N.**⁶¹, a two judge Bench of this Court, while determining the limitations of the residuary jurisdiction under Section 465 of the Code of Criminal Procedure, 1973⁶², held that a residuary jurisdiction cannot be invoked when there is a patent defect of jurisdiction or an order is passed in contravention of any mandatory provision of the CrPC. Speaking through Justice G.B. Pattanaik, this Court observed that a competent court is vested with the power to exercise residuary jurisdiction under section 465 of the CrPC in the following terms:

“15. We may notice also the arguments advanced by Mr Mohan, learned counsel appearing for the State, that the conviction and sentence against the appellants should not be interfered with in view of the provisions of Section 465 of the Code, inasmuch as there has been no failure of justice. We are unable to accept this contention. Section 465 of the Code is the residuary section intended to cure any error, omission or irregularity committed by a Court of competent jurisdiction in course of trial through accident or inadvertence, or even an illegality consisting in the infraction of any provisions of law. The sole object of the Section is to secure justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. **But by no stretch of imagination the aforesaid provisions can be attracted to a situation where a Court having no jurisdiction under the Code does something or passes an order in contravention of the mandatory provisions of the Code.** In view of our interpretation already made, that after a criminal proceeding is committed to a Court of Sessions it is only the Court of Sessions which has the jurisdiction to tender pardon to an accused and the Chief Judicial Magistrate does

⁶¹ (1997) 11 SCC 720

⁶² “CrPC”

not possess any such jurisdiction, it would be impossible to hold that such tender of pardon by the Chief Judicial Magistrate can be accepted and the evidence of the approver thereafter can be considered by attracting the provisions of Section 465 of the Code. **The aforesaid provision cannot be applied to a patent defect of jurisdiction.** Then again it is not a case of reversing the sentence or order passed by a Court of competent jurisdiction but is a case where only a particular item of evidence has been taken out of consideration as that evidence of the so-called approver has been held by us to be not a legal evidence since pardon had been tendered by a Court of incompetent jurisdiction. In our opinion, to such a situation the provisions of Section 465 cannot be attracted at all. It is true, that procedures are intended to subserve the ends of justice and undue emphasis on mere technicalities which are not vital or important may frustrate the ends of justice. The Courts, therefore, are required to consider the gravity of irregularity and whether the same has caused a failure of justice. To tender pardon by a Chief Judicial Magistrate cannot be held to be a mere case of irregularity nor can it be said that there has been no failure of justice. **It is a case of total lack of jurisdiction, and consequently the follow up action on account of such an order of a Magistrate without jurisdiction cannot be taken into consideration at all.** In this view of the matter the contention of Mr Mohan, learned Counsel appearing for the State in this regard has to be rejected.”

(emphasis supplied)

84 In **Johri Lal Soni vs Bhanwari Bai**⁶³ (“**Johri Lal Soni**”), a two judge Bench of this Court had to determine whether an insolvency court can scrutinize the validity of a transfer made seven years before the transferor was adjudged as insolvent, when Section 53 of the PIA classified only those transfers as voidable against the receiver, where the transferor was adjudged insolvent on a petition presented within two years after the date of transfer. This Court, in view of the wide discretion granted in terms of Section 4, held that the insolvency court will have the jurisdiction to determine the validity of void transfers undertaken at any

⁶³ (1977) 4 SCC 59 : hereinafter, referred to as “**Johri Lal Soni**”

point of time. While Section 53 was applicable only to voidable transactions, this Court was of the view that Section 4 provides a discretion to an insolvency court to decide all questions which arise in a case of insolvency and an interpretation which allowed the court to examine void transfers undertaken at any point of time would be in consonance with the object of the provision. The Court held:

“4. We now proceed to interpret the provisions of s. 4 itself, the relevant part of which may be extracted thus:

4. (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary

to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

5. It would be seen that the section has been couched in the widest possible terms and confers complete and full powers on the Insolvency Court to decide all questions of title or priority, or of any nature whatsoever, which may arise in any case of insolvency. **The only restriction which is contained in Section 4 is that these powers are subject to the other provisions of the Act.** In other words, the position is that where any other section of the Act contains a provision which either runs counter to Section 4 or expressly excludes the application of Section 4, to that extent Section 4 would become inapplicable. Counsel for the respondent strongly relied on the provisions of Section 53 which runs thus:

53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court.”

(emphasis supplied)

It is relevant to note that unlike Section 4 of the PIA, Section 60(5)(c) of the IBC is not subject to other provisions of the statute. Hence, Section 60(5)(c) of the IBC has been worded more expansively than Section 4 of the PIA.

85 In respect of the interplay between Sections 53 and 4 of the PIA, in **Johri Lal Soni** (supra), this Court further held:

“6. It was submitted that the effect of Section 53 of the Act clearly is that it bars the jurisdiction of the Insolvency Court to determine the validity of any transfer made beyond two years of the transferor being adjudged insolvent. It is no doubt true that the words "within two years after the date of the transfer" being voidable as against the receiver does fix a time-limit within which the transfer could be annulled by the Court. But a plain construction of Section 53 would manifestly/indicate that the words "within two years after the date, be voidable as against the receiver and shall be annulled by the Court" clearly connote that only those transfers are excepted from the jurisdiction of the Court which are voidable. The section has, therefore, made a clear distinction between void and voidable transfers-a distinction which is well-known to law. A void transfer is no transfer at all and is completely destitute of any legal effect: it is a nullity and does not pass any title at all. For instance, where a transfer is nominal, sham or fictitious, the title remains with the transferor and so does the possession and nothing passes to the transferee. It is manifest, therefore, that such a transfer is no transfer in the eye of the law. Such transfers, therefore, clearly fall beyond the purview of Section 53 of the Act which refers only to transfers which are voidable. It is well settled that a voidable transfer is otherwise a valid transaction and continues to be good until it is avoided by the party aggrieved. For instance, transfers executed by the transferor to delay or defraud his creditors may be avoided under Section 53 of the Transfer of Property Act. Similarly transfers made under coercion, fraud or undue influence may be avoided by the party defrauded. It is only such transfers which, if they take place beyond two years of the date of transfer, cannot be enquired into by the Court by virtue of Section 53 of the Act. This appears to us to be the plain and simple interpretation of the combined reading of Sections 4 and 53 of the Act. Indeed, if a different interpretation is given, it will render the entire object of the section [4] nugatory, because the Court would be

powerless to set at naught transfers which are patently void, merely because they had been made at a particular point of time.”

(emphasis supplied)

86 The decision in **Johri Lal Soni** (supra) gave an expansive interpretation to the powers of an insolvency court under Section 4 of the PIA, which is similar to Section 60(5)(c) of the IBC. This Court held that an insolvency court was empowered to consider the validity of void transfers under Section 4 of the PIA, which did not explicitly fall under Section 53 of the PIA. However, this Court’s decision was premised on the finding that Section 53 of the PIA only dealt with voidable transfers. This Court noted that the jurisdiction of an insolvency court will be restricted in matters where a voidable transfer has taken place beyond the time-limit stipulated under Section 53 within which the transfer could be annulled by the court. Hence, in the name of exercising a residuary jurisdiction, a court cannot cloak itself with jurisdiction which is contrary to the provisions of a statute. However, at the same time, as held by this Court in **Johri Lal Soni** (supra), an interpretation which renders the objective of a residuary jurisdiction nugatory cannot be upheld by this Court. A fine line has to be drawn between ensuring that a residuary jurisdiction is not rendered otiose due to an excessively restrictive interpretation, as well as, guarding against usurpation of power by a court or a tribunal not vested in it.

87 The residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of the NCLT

were to be confined to actions prohibited by Section 14 of the IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the IBC in matters of preserving the value of the corporate debtor and its status as a ‘going concern’. We hasten to add that our finding on the validity of the exercise of residuary power by the NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by the NCLT. However, it is pertinent to mention that the NCLT cannot exercise its jurisdiction over matters *dehors* the insolvency proceedings since such matters would fall outside the realm of IBC. Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in **Satish Kumar Gupta** (*supra*).

J Validity of *ipso facto* clauses

88 Before we proceed to analyze the validity of the termination of the PPA by the appellant under Articles 9.2.1(e) and 9.3.1 in the present case, it is important to contextualize it within the larger debate on this issue. Globally, *ipso facto* clauses arise in a variety of contracts. Ipso facto clauses are contractual provisions which allow a party (“**terminating party**”) to terminate the contract with its counterparty (“**debtor**”) due to the occurrence of an ‘event of default’. In the context of insolvency law, in some of these *ipso facto* clauses, the ‘event of default’ includes applying for insolvency, commencement of insolvency proceedings, appointment of insolvency representative, et al. The United Nations

Commission on International Trade Law⁶⁴ released its *Legislative Guide on Insolvency Law* in 2004⁶⁵. This guide defines *ipso facto* clauses in the following terms:

“114. Many contracts include a clause that defines events of default giving the counterparty an unconditional right, for example, of termination or acceleration of the contract (sometimes referred to as “*ipso facto*” clauses). These events of default commonly include the making of an application for commencement, or commencement, of insolvency proceedings; the appointment of an insolvency representative; the fact that the debtor satisfies the criteria for commencement of insolvency proceedings; and even indications that the debtor is in a weakened financial position...”

The validity of such *ipso facto* clauses has been considered in a global perspective by international organizations and in the domestic jurisdictions of nation-states in their national insolvency laws. In order for us to assess their validity in India, we must first understand the global trends in contemporary jurisprudence. We can attempt to extrapolate our experiential learning from comparative law. As India develops into a responsive member of the international community, our laws cannot afford to be inward-looking.

J.1 Position of international and multilateral organizations

89 The UNCITRAL Guide notes that insolvency laws across various jurisdictions either uphold *ipso facto* clauses or invalidate them. It notes the arguments of both sides thus:

⁶⁴ “UNCITRAL”

⁶⁵ “UNCITRAL Guide”; Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 18 February 2021. The UNCITRAL Guide was created with the intent that it would be used “as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations”

“115. The approach of upholding these types of clauses may be supported by a number of factors, including the desirability of respecting commercial bargains; the need to prevent the debtor from selectively performing contracts that are profitable and rejecting others (an advantage that is not available to the counterparty); the effect on financial contract netting of not upholding an automatic termination provision; the belief that, since an insolvent business will generally be unable to pay, delaying the termination of contracts potentially only increases existing levels of debt; the need for creators of intellectual property to be able to control the use of that property; and the effect on the counterparty's business of termination of a contract, especially one with respect to an intangible.

116. Under a different approach, the insolvency law overrides those clauses, making them unenforceable. Where the clause provides, for example, for termination on the occurrence of the defined event, the contract can be continued over the objection of the counterparty. Although the approach of overriding such clauses can be regarded as interfering with general principles of contract law, such interference may be crucial to the success of the proceedings. In reorganization, for example, where the contract is a critical lease or involves the use of intellectual property embedded in a key product, continued performance of the contract may enhance the earnings potential of the business; reduce the bargaining power of an essential supplier; capture the value of the debtor's contracts for the benefit of all creditors; and assist in locking all creditors into a reorganization.”

90 In finding a pragmatic solution to a vexed issue such as the validity of ipso facto clauses, the law acknowledges the inherent tension between the primary arguments on both sides of the debate. On the one hand there is a need of ensuring that the debtor remains as a ‘going concern’ throughout the insolvency process. On the other hand, the law has to respect the freedom to enter upon contracts and the sanctity of enforcing contractual remedies. Controlling the ambit of ipso facto clauses does give rise to arguments of infringing upon the parties’ freedom to enter into and enforce their contracts. The UNCITRAL Guide offers guidance to national authorities by concluding that it is desirable that their

national insolvency laws override such *ipso facto* clauses, subject to limited exceptions, since the continued performance of the terminated contracts is often crucial to the success of the insolvency process. The UNCITRAL Guide states this in the following terms:

“118. Although some insolvency laws do permit these types of clause to be overridden if insolvency proceedings are commenced, this approach has not yet become a general feature of insolvency laws. There is an inherent tension between promoting the debtor’s survival, which may require the preservation of contracts, and injecting unpredictability and extra cost into commercial dealings by creating a variety of exceptions to general contract rules. **While this issue is clearly one that may require a careful weighing of the advantages and disadvantages, there are, nevertheless, circumstances where the ability of the insolvency representative to ensure that a contract continues to be performed will be crucial to the success of reorganization and also, but perhaps to a lesser extent, liquidation where the business is to be sold as a going concern. For these reasons, it is desirable that an insolvency law permit such clauses to be overridden.** Any negative impact of a policy of overriding these types of clauses can be balanced by providing compensation to creditors who can demonstrate that they have suffered damage or loss as a result of the contract continuing to be performed after commencement of insolvency proceedings, or including exceptions to a general override of these clauses for certain types of contracts, such as contracts to lend money and, in particular, financial contracts (see below, paras. 208-215).”

(emphasis supplied)

91 The World Bank, in its *Principles for Effective Insolvency and Creditor/Debtor Regimes* published in 2016⁶⁶, notes that *ipso facto* clauses should be overridden, subject to limited exceptions. It states thus:

“C10 Treatment of Contractual Obligations

⁶⁶ Available at <<http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf>> accessed 18 February 2021.

...

C10.2 To gain the benefit of contracts that have value, the insolvency representative should have the option of performing and assuming the obligations under those contracts. Contract provisions that provide for termination of a contract upon either an application for commencement or the commencement of insolvency proceedings should be unenforceable subject to special exceptions.”

92 While assessing the position adopted by supranational organizations, we note that the European Parliament issued Directive (EU) 2019/1023 on 20 June 2019⁶⁷ in relation to the restructuring and insolvency framework in the European Union, thereby amending the previous Directive. The EU Directive notes in its Recitals the issues which can arise for a Corporate Debtor undergoing restructuring when its suppliers terminate contracts based on *ipso facto* clauses. The Recitals state as follows:

“(40) When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so called *ipso facto* clauses, entitling them to terminate the supply contract solely on account of the insolvency, even if the debtor has duly met its obligations. *Ipsso facto* clauses could also be triggered when a debtor applies for preventive restructuring measures. **Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay.**

(41) **Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential**

⁶⁷ “EU Directive”

supplies such as gas, electricity, water, telecommunication and card payment services are concerned. Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long term supply contracts and franchise agreements.”

(emphasis supplied)

93 Thereafter, the EU Directive recommends that the member States of the European Union shall ensure that creditors are not allowed to terminate contracts based on *ipso facto* clauses when the ‘event of default’ is a Corporate Debtor undergoing restructuring. Article 7 of the Directive states as follows:

“Article 7

Consequences of the stay of individual enforcement actions

...

5. Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:

- (a) a request for the opening of preventive restructuring proceedings;
- (b) a request for a stay of individual enforcement actions;
- (c) the opening of preventive restructuring proceedings; or
- (d) the granting of a stay of individual enforcement actions as such.”

J.2 National jurisdictions

94 As we begin assessing the positions of national jurisdictions, it is apposite that we begin by analyzing the contradictory positions adopted by the United States and the United Kingdom before looking at European and other nations with civil law traditions, and thereafter at nations with common law roots.

J.2.1 United States

95 In the US, Section 365(e) of the United States Bankruptcy Code, 1979 (“**US Bankruptcy Code**”) renders *ipso facto* clauses unenforceable when they are present in an executory contract or an unexpired lease. Section 365(e) stipulates:

“(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on-

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement”

96 A related provision, Section 541(c)(1)(B) of the US Bankruptcy Code provides that “an interest of the debtor in property becomes property of the estate” in spite of any “agreement, transfer instrument, or applicable non-bankruptcy law” which “gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property”. However, even so, the US

Bankruptcy Code does allow *ipso facto* clauses in certain contracts (swap agreements, securities, forwarding, et al) to be enforceable.

97 Further, there have been instances where District Bankruptcy Courts in United States have invalidated *ipso facto* clauses in contracts other than executory contracts or unexpired leases based on broad considerations relating to the purpose of the US Bankruptcy Code. The *ipso facto* provisions in such contracts may not be *per se* invalid, but they may be set aside where “any such default would deprive the debtor of the advantages of the Code’s liquidation procedures”⁶⁸. For instance, the District Court for the District of Delaware has noted “the general trend of the federal courts that the prohibition against *ipso facto* clauses is not limited to actions [involving executory contracts or unexpired leases]”, while invalidating an *ipso facto* clause premised on bankruptcy filing⁶⁹. Similarly, in another case, an *ipso facto* clause in a non-executory contract was held to be invalid because “it would defeat the purposes of the [US] Bankruptcy Code” and “cannot be enforced by a court of equity”⁷⁰. The Bankruptcy Court reasoned that:

“Under the Bankruptcy Code, there is no statutory mandate that bankruptcy-default clauses are valid and enforceable. The only Congressional statement is clear that in most, if not all, instances, such clauses are not enforceable. Also, cf. Sections 363(l) and 541(c)(1)(B) of the Bankruptcy Code, where bankruptcy-default clauses are not given effect. Thus, there is simply no reason to assume that Congress intended to make these clauses enforceable only in non-executory contracts. Such an assumption would be directly contrary to the spirit and purposes of the

⁶⁸ Riggs National Bank of Washington, D.C. v. John Gillis Perry, Jr., in Re John Gillis Perry, Jr., Debtor, 729 F.2d 982 (4th Cir. 1984)(Court of Appeals for the Fourth Circuit).

⁶⁹ In re W.R. Grace & Co., 475 B.R. 34, 154 (D. Del. 2012).

⁷⁰ In the Matter of James Margaret Rose Jr., Debtors 21 B.R. 272 (Bankr. D.N.J. 1982) (United States Bankruptcy Court, D. New Jersey).

Bankruptcy Code. One of the objectives of bankruptcy laws is to enable debtors to make a fresh start.”⁷¹

However, it is important to note that District Court of New York has taken a contrary position, holding that the text of Section 365(e) of the US Bankruptcy Code is clear and limits its prohibition only to executory contracts and unexpired leases⁷². Hence, the position in relation to this issue seems to be unsettled even in the US.

J.2.2 United Kingdom

98 Coming to the position of law in the UK, we must first acknowledge that the insolvency regime there is governed not just by legislation but also through common law doctrine. The important common law doctrine is the ‘anti-deprivation rule’, which seeks to prevent the improper removal of an asset from the debtor’s estate, which would reduce the debtor’s overall net asset value, which would in turn reduce the size of the pie. Hence, the rule seeks to prevent the debtor’s assets from being reduced before they can become subject to the insolvency process. As such, it has been argued that *ipso facto* clauses could be in violation of the anti-deprivation rule since they allow a party to terminate a contract upon commencement on insolvency, which then takes away the debtor’s valuable asset (*i.e.*, the contract).

⁷¹ Ibid

⁷² In Re General Growth Properties, Inc., 451 B.R. 323 (Bankr. S.D.N.Y. 2011) (United States Bankruptcy Court, S.D. New York).

99 The scope of the anti-deprivation rule was clarified by the UK Supreme Court⁷³ in the case of **Belmont Park Investments Pty Ltd and others vs BNY Corporate Trustee Services Ltd and another (Revenue and Customs Comrs and another intervening)**⁷⁴. The facts of this case have been succinctly summarized in an article by Adrienne Ho in the McGill Law Journal: the reproduction below is from the footnoted article⁷⁵:

- (i) Lehman Brothers set up special purpose vehicles ("**Issuer**"), which in turn issued Notes to investors ("**Noteholders**"), including the respondents. The Issuer used the Notes' proceeds to purchase secure investments ("**Collateral**") while simultaneously entering into credit default swap agreements ("**Agreements**") with Lehman Brothers Special Financing ("**LBSF**"). LBSF agreed to pay the Issuer premiums in exchange for the latter's credit protection on loans owned by Lehman Brothers. The premiums the Issuer received from LBSF were then paid to the Noteholders. The Agreement was governed by English law;
- (ii) On the basis that Lehman Brothers' and LBSF's Chapter 11 filings (*i.e.*, for bankruptcy in the US) in 2008 were 'Events of Default' as outlined in the Agreements, the Noteholders directed the Trustee to terminate the Agreements. The Collateral, which was held by the Trustee, provided security for the Issuer's obligations to the Noteholders and LBSF. Although the latter had priority to the Collateral, the Agreements contained a

⁷³ "**UKSC**"

⁷⁴ [2011] 3 W.L.R. 521; hereinafter referred to as "**Belmont Park**"

⁷⁵ As noted in Adrienne Ho, The Treatment of Ipso Facto Clauses in Canada, (2015) 61:1 McGill LJ 139.

provision (“**flip clause**”) that would reverse the priorities in favour of the Noteholders if an Event of Default occurred; and

- (iii) LBSF argued the flip clause was invalid for two reasons: first, it deprived LBSF of property that it would have been otherwise entitled to in its bankruptcy; and second, the clause offended the anti-deprivation rule by reversing LBSF's and the Noteholders' respective priorities on the basis of LBSF's bankruptcy.

100 The UKSC in this case was considering the contours of the anti-deprivation rule, which protects against the dilution of the debtor's value. This is quite distinct from a situation where the effect of the concerned clause would be the failure of the insolvency resolution process in its entirety. Writing the majority opinion, Lord Collins upheld the flip clause on the basis that it was “a complex commercial transaction entered into in good faith” and that the provisions were not used deliberately to evade the application of insolvency law, which was a key requirement for the application of the anti-deprivation rule. The learned judge held thus:

“102 It would go well beyond the proper province of the judicial function to discard 200 years of authority, and to attempt to re-write the case law in the light of modern statutory developments. **The anti-deprivation rule is too well-established to be discarded despite the detailed provisions set out in modern insolvency legislation, all of which must be taken to have been enacted against the background of the rule.**

103 As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule. Despite statutory inroads, party autonomy is at the heart of English commercial law. Plainly there are limits to party autonomy in the field with which this appeal is concerned, not least

because the interests of third party creditors will be involved. **But, as Lord Neuberger stressed [2010] Ch 347, para 58, it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed. And there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal.**

104 **No doubt that is why, except in the case of a blatant attempt to deprive a party of property in the event of liquidation** (Folgate London Market Ltd v Chaucer Insurance plc [2011] EWCA Civ 328; The Times, 13 April 2011), **the modern tendency has been to uphold commercially justifiable contractual provisions which have been said to offend the anti-deprivation rule:** Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd [2002] 1 WLR 1150; Lomas v JFB Firth Rixson Inc [2011] 2 BCLC 120; and the judgments of Sir Andrew Morritt C and the Court of Appeal in these proceedings. The policy behind the anti-deprivation rule is clear, that the parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. **It is possible to give that policy a common sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy."**

(emphasis supplied)

101 Lord Mance in his concurring opinion, expressed a similar view:

"177 However, Mr Snowden advanced propositions which would mean that any provision for termination on bankruptcy, which would deprive the trustee or liquidator of the opportunity of continuing the contract and so the bankrupt estate of future potential advantage, would infringe the principle. There is in my opinion no basis for any such rule. **Where a contract provides for the performance in the future of reciprocal obligations, the performance of each of which is the quid pro quo of the other, I see nothing objectionable or evasive about a provision entitling one party to terminate if the other becomes bankrupt."**

(emphasis supplied)

As such, it was understood that *bona fide* commercial contracts entered into by parties which contained *ipso facto* clauses would not violate the anti-deprivation rule.

102 Lord Mance also discussed the parallel proceedings in the US and the legislative invalidation of *ipso facto* clauses there. Noting the difference between the position in the UK and the US, he concluded by holding that a similar invalidation of *ipso facto* clauses in the UK should be done legislatively, and not through a common law development. He held thus:

“173 It is relevant to note that the American bankruptcy rule invalidating ipso facto termination clauses is a product of legislation: section 365(e) of the Bankruptcy Code 1978...

174 **The anti-deprivation principle recognised in English case law finds a parallel in section 541. But the English case law has to date focused on deprivation of property, and has not recognised any equivalent principle to that enacted in section 365(e).** Further, section 365(e) is itself qualified by the “safe harbour” provisions of section 560, which specifically protect a non-defaulting swap participant’s contractual rights to liquidate, terminate or accelerate a swap agreement because of a condition of the kind specified in section 365(e)(1), that is the insolvency or financial condition of the debtor and the commencement of a bankruptcy case... **What it does suggest is that any general rule invalidating ipso facto termination clauses ought to be a matter for legislative attention, rather than novel common law development.”**

(emphasis supplied)

103 The decision in **Belmont Park** (supra) has been followed by the Chancery Division in **Fibria Celulose S/A v Pan Ocean Co Ltd vs Fibria Celulose S/A Chancery Division**, dated 30 June 2014⁷⁶. Morgan J held thus:

“12 In some jurisdictions, a clause which allows a party to a contract to terminate the contract by reason of the insolvency of the counterparty is called an ipso facto clause. In certain jurisdictions in the United States of America such clauses are automatically invalid. In Canada, the court has power to stay the exercise of rights under such clauses. Later in this judgment, I will consider how such clauses are treated under Korean insolvency law.

13 **There was no dispute before me as to the efficacy in English law of the provisions in clause 28.1 of the contract which allow termination by reason of an insolvency event. It was accepted that those provisions are valid in English law. In particular, it was accepted that the rule of insolvency law, known as the anti-deprivation rule, does not strike down those provisions.**

14 Although there was no argument as to the approach of an English court to the insolvency provisions in clause 28.1 of the contract, it is helpful for present purposes to understand why those provisions do not infringe the anti-deprivation rule or any other rule of English insolvency law. The scope of the anti-deprivation rule has been considered recently by the Supreme Court in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* (Revenue and Customs Comrs intervening) [2011] Bus LR 1266; [2012] 1 AC 383...”

(emphasis supplied)

104 In his treatise, *Principles of Corporate Insolvency Law*⁷⁷, Professor Roy Goode has discussed the effect of the decision in **Belmont Park** (supra) on the validity of *ipso facto* clauses. Professor Goode does so in the following terms:

“As explained above, **the validity of provisions for the termination of contracts by reason of one party’s entry into insolvency proceedings has long been assumed,**

⁷⁶ [2014] Bus. L.R. 1041; hereinafter referred to as “**Pan Ocean Co Ltd**”

⁷⁷ 5th ed (London: Sweet & Maxwell, 2018), paras 7-24 and 7-29

and appears to have been accepted by Lord Mance in Belmont. Such provisions do not escape the rule because they effect no deprivation of property (in substance, they do), but because they are commercially sensible or (in Lord Mance's language) have a legitimate commercial basis.

...

The statute law of some jurisdictions prohibits counterparties from relying on clauses in contracts that permit termination on another party's entry into insolvency proceedings (so-called *ipso facto* clauses). Absent statutory control, such clauses allow a counterparty to terminate even in circumstances where the debtor is ready, willing and able to perform their part of the bargain so that creditors can enjoy the benefit of performance by the counterparty. Such clauses can also be wielded as leverage to extract concessions from the debtor, as where the counterparty agrees to keep the contract on foot on the proviso that any outstanding debts owing by the company to it are discharged.

English law has traditionally taken a generous approach to such clauses. The common law anti-deprivation rule does not invalidate termination clauses, there being "nothing objectionable or evasive about a provision entitling one party to terminate it [a bilateral contract] if the other becomes bankrupt". As David Richards J explained in the Football Creditors case:

"In the absence of specific statutory provision, insolvency law does not compel a party to continue to deal with a company in administration or liquidation, nor does it prohibit a party from stipulating that all future dealings shall be on terms that not only future debts but also existing debts are paid in full. It is then for the administrator or liquidator to decide whether to accept these terms."

(emphasis supplied)

105 On the legislative side, the insolvency regime in the UK is governed by the Insolvency Act, 1986⁷⁸, which does not invalidate *ipso facto* clauses. However, the UK Act was recently amended by the Corporate Insolvency and Governance

⁷⁸ "UK Act"

Act 2020⁷⁹, which came into force on 26 June 2020. Amongst other changes, it introduced Section 233B into the UK Act. Section 233B reads thus:

“Protection of supplies of goods and services

(1) This section applies where a company becomes subject to a relevant insolvency procedure.

(2) ...

(3) A provision of a contract for the supply of goods or services to the company ceases to have effect when the company becomes subject to the relevant insolvency procedure if and to the extent that, under the provision—

(a) the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure, or

(b) the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company becomes subject to the relevant insolvency procedure.

(4) Where—

(a) under a provision of a contract for the supply of goods or services to the company the supplier is entitled to terminate the contract or the supply because of an event occurring before the start of the insolvency period, and

(b) the entitlement arises before the start of that period, the entitlement may not be exercised during that period.

(5) Where a provision of a contract ceases to have effect under subsection (3) or an entitlement under a provision of a contract is not exercisable under subsection (4), the supplier may terminate the contract if—

(a) in a case where the company has become subject to a relevant insolvency procedure as specified in subsection (2)(b), (c), (e) or (f), the office-holder consents to the termination of the contract,

(b) in any other case, the company consents to the termination of the contract, or

⁷⁹ “CIGA”

(c)the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract.

(6)Where a provision of a contract ceases to have effect under subsection (3) and the company becomes subject to a further relevant insolvency procedure, the supplier may terminate the contract in accordance with subsection (5)(a) to (c).

(7)The supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid.

(8) ...

(9) ...

(10) ...”

(emphasis supplied)

106 The Legislative Comment to the introduction of Section 233B reads as follows:

“Ipso facto (termination) clauses

A permanent change to the use of termination clauses in supply contracts is introduced by the Bill. **In circumstances where a company has entered an insolvency or restructuring procedure, or obtains a moratorium, the company’s suppliers will not be able to rely on contractual terms to stop supplying the company or vary the contract terms (e.g. by increasing the price of supplies).**

The customer is required to pay for any supplies made once the company is in the insolvency process, but is not required to pay outstanding amounts due for past supplies while it is arranging its rescue plan. Safeguards are contained in the Bill to ensure that suppliers can be relieved of the requirement to supply if it causes hardship to their business, and a temporary exemption will operate for small companies during the Coronavirus emergency.”

(emphasis supplied)

107 We can therefore conclude that while Section 233B invalidates *ipso facto* clauses, it does so only in relation to contracts where the terminating party is supplying goods and services to the Corporate Debtor, and does not cover those contracts where the Corporate Debtor was supplying to the terminating party. Further, Section 233B(5)(c) allows an exception even in relation to supplier contracts when it causes “financial hardship” to the terminating party, and Section 233B(6) allows a termination if once after the terminating party is prevented from terminating, the Corporate Debtor goes through another insolvency proceeding. It has also been noted by certain commentators that, given the narrow scope of Section 233B, the decision in **Belmont Park** (supra) would still have been decided in the same way even under this new regime⁸⁰. Finally, discussing the legislative process behind CIGA, Felicity Toubé QC and Joanne Rumley have noted that the UK Parliament did not intend to use CIGA to bring UK in line with the US position on broad invalidation of *ipso facto* clauses, but rather their focus was on ensuring that the Corporate Debtor retains its supply of goods during the insolvency process⁸¹.

J.2.3 Austria

108 A position similar to the US has been adopted in Austria where, after the insolvency regime reform which came into force on 1 July 2010, *ipso facto* clauses are broadly considered invalid in accordance with Section 25b(2) of the

⁸⁰ ‘Corporate Insolvency and Governance Act: Ipso Facto (Termination) Clauses’ (Ashurst, 26 June 2020) <<https://www.ashurst.com/en/news-and-insights/legal-updates/ciga---ipso-facto-termination-clauses/>> accessed 18 February 2021.

⁸¹ Felicity Toubé QC, Joanne Rumley ‘A brave new world? Should the UK ban ipso facto clauses in non-executory contracts?’ *Insolvency Intelligence* 2018

Austrian Insolvency Code⁸². This law renders unenforceable all such provisions in contracts which provide a party with termination rights, due to the opening of insolvency proceedings against the debtor. However, this is only so when the terminating party's interests are not unreasonably affected, *i.e.*, when a terminating party can show a good cause for termination, the termination shall not be rendered unenforceable. Further, contractual terminations due to other events of defaults mentioned in contracts remain valid⁸³.

J.2.4 France

109 This is also the position in France which, since its 2014 reform, in accordance with Articles L622-13⁸⁴, L631-14(I)⁸⁵ and L641-11⁸⁶ of the Commercial Code, categorically states that *ipso facto* clauses in executory contracts are invalid⁸⁷. However, termination rights referring to breaches of executory contract, other than *ipso facto* clauses, remain valid due to events of default occurring both pre- and post-commencement of insolvency proceedings. Further, the insolvency administrator does not have to treat pre-insolvency claims arising out of an executory contract preferentially to continue the contract;

⁸² "Invalid Agreements. Section 25b. - (2) A contractual provision rescinding or terminating a contract in the event of the opening of insolvency proceedings shall be unenforceable, except for contracts pursuant to Section 20(4)." English Translation available at <https://www.rautner.com/wp-content/uploads/2016/05/3645187_Austrian_Insolvency-Code_ENG.pdf> accessed 24 February 2021.

⁸³ Jan Felix Hoffmann, 'Executory Contracts, Ipso Facto Clauses and Licensing Agreements in Cross-Border Insolvencies' (2018) 27 Int'l Insolvency Rev 300, 304; 'International Comparative Legal Guides' (International Comparative Legal Guides International Business Reports) <<https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/austria>> accessed 18 February 2021.

⁸⁴ "...Notwithstanding any legal rule or contractual term to the contrary, the indivisibility, termination or rescission of the contract may not result from the commencement of safeguard proceedings alone..." English Translation available at <<https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf>> accessed 24 February 2021.

⁸⁵ "I - Articles L622-2 to L622-9 and L622-13 to L622-33 shall apply to reorganization proceedings." English Translation available at <<https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf>> accessed 24 February 2021.

⁸⁶ "The supervisory judge shall perform the duties entrusted to him by Articles L621-9, L623-2 and L631-11, the first paragraph of Article L622-13 and the fourth paragraph of Article L622-16." English Translation available at <<https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf>> accessed 24 February 2021.

⁸⁷ 'International Comparative Legal Guides' (International Comparative Legal Guides International Business Reports) <<https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/france>> accessed 18 February 2021.

however, she has to comply with the contract in the future to prevent termination⁸⁸.

J.2.5 Germany

110 The German insolvency regime is governed by Insolvency Statute, 1999 (Insolvenzordnung)⁸⁹. However, a change is forthcoming, since on 17 December 2020, the German Parliament passed the Act on the Further Development of Restructuring and Insolvency Law⁹⁰, which is expected to lead to a fundamental modification of the restructuring landscape in Germany. The SanInsFoG primarily serves to implement the EU Directive discussed above, and aims at introducing a comprehensive legal framework for out-of-court restructurings. The centerpiece of the SanInsFoG is the Act on the Stabilization and Restructuring Framework for Companies⁹¹, which partially entered into force on 1 January 2021. In accordance with Section 46 of the StaRUG, during the moratorium period, the contracting parties of the debtor cannot terminate their contract with the debtor based on *ipso facto* clauses in a pending restructuring matter.

111 However, before the StaRUG came into effect, the validity of *ipso facto* clauses had been previously considered by German Courts. On 15 November 2012, the 9th Senate of the Federal Supreme Court of Germany issued a decision which overruled the lower courts' decisions and held that *ipso facto* clauses in contracts regarding the continuous delivery of goods or energy should be invalid if such termination is either triggered by a request for the opening of

⁸⁸ *Ibid* at 305.

⁸⁹ "InsO"

⁹⁰ "SanInsFoG"

⁹¹ "StaRUG"

insolvency proceedings or the opening of insolvency proceedings over the assets of the other contractual party. The Federal Supreme Court also held that for such invalidation, it was irrelevant whether the trigger was institution of insolvency proceedings or filing of an insolvency petition. Briefly, the facts of the case were that a utility provider had entered into a long-term contract for providing electricity. The energy contract had an *ipso facto* clause which allowed for automatic termination if bankruptcy proceedings were instituted over the utility provider's customer or if the customer filed a petition for bankruptcy. The *ipso facto* clause was then given effect to by the terminating party.

112 The Federal Supreme Court based its decision on the purpose of the insolvency administrator's right to opt for the performance/non-performance of contracts, which protects the assets of the insolvent company and increases such assets in the interest of a settlement of creditor claims *pari passu*. Particularly, it was noted that the insolvency administrator has the right to choose which contracts of the insolvent debtor she will perform in accordance with Section 103 of the InsO. Hence, any contractual provision excluding or limiting this right is invalid in accordance with Section 119 of the InsO. Therefore, this would be obstructed if the contractual partner of the insolvent debtor, just because of its insolvency, could terminate a contract which is in the interest and to the benefit of the insolvent debtor. Further, the Federal Supreme Court noted that the stay on termination based on *ipso facto* clauses did not lead to any disadvantage to the

terminating party since they will then receive payment for their deliveries in full as so-called preferred estate liability⁹².

113 However, to the extent the statutory law itself already provides for an *ipso facto* termination right, such termination rights have been held to be valid and enforceable. Accordingly, the *ipso facto* termination of a partnership contract has in the past been upheld by the Federal Supreme Court⁹³. Further, in a 2016 decision, the 7th Senate of the Federal Supreme Court upheld an *ipso facto* clause contained in a construction contract, in favour of the terminating party. It held that such clauses are valid when the contracting party has a reasonable right to terminate the contract in insolvency, and the estate's interests are not unreasonably affected. Thus, the position of German law on the validity of such clauses was never entirely settled judicially⁹⁴.

J.2.6 Greece

114 Article 32 of the Bankruptcy Code (Law 3588/2007) states that there would be “no prejudice to the counter contracting party's rights to rescind the contract, based on a clause that allows the rescission in case of insolvency of the other party or subjection to collective execution proceedings”⁹⁵. Hence, *ipso facto* clauses are legislatively provided validity in Greece.

⁹² 'Potential Invalidity of Insolvency-Related Termination Clauses under German Insolvency Rules' (Global Restructuring Watch, 17 September 2014) <<https://www.globalrestructuringwatch.com/2014/09/potential-invalidity-of-insolvency-related-termination-clauses-under-german-insolvency-rules/>> accessed 18 February 2021.

⁹³ Volker Gattringer, 'German Supreme Court renders ipso facto clauses invalid and unenforceable – Roma locuta, causa finita?' (K&L Gates, 27.02.2013).

⁹⁴ Jan Felix Hoffmann, 'Executory Contracts, Ipso Facto Clauses and Licensing Agreements in Cross-Border Insolvencies' (2018) 27 Int'l Insolvency Rev 300, 305.

⁹⁵ Christoph G Paulus and Stathis Potamitis and Alexandros Rokas and Ignacio Tirado, 'Insolvency Law as a Main Pillar of Market Economy - A Critical Assessment of the Greek Insolvency Law' (2015) 24 Int'l Insolvency Rev 1, 18.

J.2.7 Republic of Korea

115 The Republic of Korea follows the civil law tradition. Under Article 119(1) of the Debtor Rehabilitation and Bankruptcy Act of Korea⁹⁶, the custodian of a company undergoing rehabilitation may choose to cancel or terminate an unperformed bilateral contract. Article 119 appears to allow the custodian to require the other party to fulfil its obligations under such a contract. While some commentators have noted that this is believed to essentially be in the nature of a restriction on an *ipso facto* clause, others state that this position has not been adopted uniformly by all courts⁹⁷. In fact, the International Monetary Fund issued a technical note in September 2020 on “Insolvency and Creditor Rights” while conducting a “Financial Sector Assessment Program” of Republic of Korea, in which they also noted this lack of clarity and recommended legislative guidance⁹⁸.

116 A lack of this clarity is shown by a case where the predecessor of Article 119 was considered by the Korean Supreme Court in its decision dated 6 September 2007 in the case of **Allied Domecq (Holdings) plc vs The trustee of Jinro Co Ltd**⁹⁹. This was noted in the decision of **Pan Ocean Co Ltd** (supra)¹⁰⁰,

⁹⁶ “Article 119 (Options when Both Parties Fail to Fulfill Bilateral Contract) - (1) When the debtor and the other party to a bilateral contract have yet to complete performance of the contract at the time rehabilitation procedures commence, any custodian may cancel or terminate such bilateral contract and request the debtor to meet his/her obligations and require the other party to fulfill his/her obligations: Provided, That the custodian shall not cancel or terminate the bilateral contract after the assembly of related persons held to deliberate on a rehabilitation proposal or a decision is made to pass a written resolution on any case pursuant to the provisions of Article 240.”

⁹⁷ June Young Chung and Sy Nae Kim, “Korean Corporate Rehabilitation Proceedings and Cross-Border Insolvency - From the Perspective of the Hanjin Shipping Bankruptcy Case” <https://nysba.org/NYSBA/Sections/International/Events/2018/Seoul%20Regional%20Meeting/Course%20Materials/4_Korean%20Corporate%20Rehabilitation%20Proceedings%20and%20Cross-border%20Insolvency_....pdf> accessed 24 February 2021.

⁹⁸ Footnote 26 at Page 16, available at <<https://www.imf.org/~media/Files/Publications/CR/2020/English/1KOREA2020003.ashx>> accessed 24 February 2021.

⁹⁹ “**Allied Domecq**”

¹⁰⁰ Para 49.

discussed above, where the Chancery Division was considering the *ipso facto* clause in a contract governed by English law, but where the party was undergoing insolvency proceedings in Republic of Korea. The Korean Supreme Court held in **Allied Domecq** (supra) that, in a case not governed by Article 119, an insolvency termination clause would be valid. It then considered the types of contract which came within Article 119, and referred to the nature of the obligations under the particular unperformed bilateral contract in that case. Ultimately, it held that the contract in that case was not governed by Article 119.

117 Further, **Pan Ocean Co Ltd** (supra) also discussed¹⁰¹ a later decision of a Korean Court dated 24 January 2014 in **Trustee of Tongyang Networks Co Ltd vs Standard Chartered Bank Ltd**, which concerned a contract under which the debtor company was to provide services to the bank. The contract contained an insolvency termination clause and the bank gave, or purported to give, notice to terminate pursuant to that clause. The trustee of the debtor company argued that the bank's right to terminate should be considered null and void by reason of Article 119 or, alternatively, the bank should refrain from terminating the contract at least during the period of the rehabilitation. The court considered the earlier decision in **Allied Domecq** (supra) and held that to achieve a proper balance between the purpose of rehabilitation and the principle of freedom of contract and the counterparty's need to be able to trust the debtor company, it was necessary to look at all the circumstances, such as the nature of the contract, the necessity to protect the debtor and the counterparty and allied relevant factors. The Court

¹⁰¹ Para 52.

then conducted a detailed examination of what it regarded as the relevant factors, and held that Article 119 did not render the insolvency termination clause null and void. However, the Chancery Division in **Pan Ocean Co Ltd** (supra) did note that this decision may have been appeal in Republic of Korea.

J.2.8 Canada

118 Legislatively, in Canada, Sections 65.1¹⁰², 66.34¹⁰³ and 84.2¹⁰⁴ of the Bankruptcy & Insolvency Act¹⁰⁵ and provisions of the Companies' Creditors Arrangement Act¹⁰⁶ invalidate *ipso facto* clauses in both commercial and consumer restructurings, and are intended to protect consumer debtors from the deleterious consequences of provisions that trigger upon bankruptcy. These provisions also clarify that any contractual clause that, in substance, is contrary to

¹⁰² "Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that:

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

...

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect."

¹⁰³ "Certain rights limited

66.34 (1) If a consumer proposal has been filed in respect of a consumer debtor, no person may terminate or amend any agreement, including a security agreement, with the consumer debtor, or claim an accelerated payment, or the forfeiture of the term, under any agreement, including a security agreement, with the consumer debtor, by reason only that:

(a) the consumer debtor is insolvent, or

(b) a consumer proposal has been filed in respect of the consumer debtor until the consumer proposal has been withdrawn, refused by the creditors or the court, annulled or deemed annulled.

...

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect."

¹⁰⁴ "Certain rights limited

84.2 (1) No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.

...

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect."

¹⁰⁵ "BIA"

¹⁰⁶ "CCAA"

the provisions as a whole is of no force or effect. However, their prohibition on *ipso facto* clauses does not apply to agreements such as commodities and forward contracts. Further, the terminating party, including utilities, can apply for a court order that these provisions do not apply, or only apply to an extent determined by the court, if they can demonstrate that the operation of these provisions will cause it significant hardship¹⁰⁷.

119 On the other hand, judicially, in a split decision on 2 October 2020, the Supreme Court of Canada¹⁰⁸ upheld the Alberta Court of Appeal's majority decision in **Chandos Construction Ltd. vs Deloitte Restructuring Inc.**¹⁰⁹ in its capacity as Trustee in Bankruptcy of Capital Steel Inc., a bankrupt (Chandos). Briefly, the facts of the case were that:

- (i) Chandos had subcontracted a project's steel work to Capital Steel. The subcontract included a term under which Capital Steel agreed to forfeit ten percent of the contract price if it became insolvent "as a fee for the inconvenience of [Chandos] completing the work using alternate means and/or for monitoring the work" ("**Insolvency Clause**"); and
- (ii) Capital Steel completed most of its work under its subcontract with Chandos before making an assignment in bankruptcy. Deloitte was appointed as trustee of the estate of Capital Steel and Capital Steel ceased operations at that time. As a result, Chandos had to complete the steel work at its own cost. Even after costs of completion were accounted

¹⁰⁷ See Adrienne Ho, *The Treatment of Ipso Facto Clauses in Canada*, (2015) 61:1 McGill LJ 139.

¹⁰⁸ "SCC"

¹⁰⁹ 2020 SCC 25

for, Chandos owed a balance to the estate of Capital Steel based on the remaining unpaid contract price. However, Chandos took the position that it could rely on the Insolvency Clause to deduct 10% of the contract price (almost \$140,000) as an ‘inconvenience fee’ and that, once deducted, Chandos owed nothing to Capital Steel. The trustee brought an application seeking a judicial determination of whether the Insolvency Clause was enforceable.

120 The majority opinion of the SCC held that the present clause violated the common law doctrine grounded in the ‘anti-deprivation rule’, which invalidates provisions that are “engaged by a debtor’s insolvency and remove value from the debtor’s estate to the prejudice of creditors”. Further, it reasoned that the anti-deprivation rule continues to exist at common law; that it was part of Canadian law, and was neither judicially nor legislatively excluded. It further continued to exist even though it was not fully codified in the BIA. Since this rule voids contractual terms that prevent property from passing to the bankruptcy trustee, the non-application of this rule would also go against the purpose of section 71 of the BIA. The majority opinion ultimately relied on the ‘effects-based’ test for understanding the anti-deprivation rule, noting it was in consonance with the BIA, thereby holding that any clause which had the ‘effect’ of removing a debtor’s estate would be invalid as being against the anti-deprivation rule. On the contrary, the dissenting opinion relied on the ‘bona fide commercial transaction test’ as enunciated by the UKSC in **Belmont Park** (supra), and noted that the codification of the invalidity of *ipso facto* clauses in BIA was unrelated to the

principles behind anti-deprivation rule since “*ipso facto* provisions are aimed at protecting debtors; the anti-deprivation rule, by contrast, protects creditors”¹¹⁰.

121 Some commentators note that the practical effect of this decision is that if a contracting party enters insolvency proceedings, certain contractual clauses that are triggered by insolvency and remove value from the debtor’s estate are void and will not be given effect by Canadian courts. Further, they believe that the SCC rejected the UK Supreme Court’s more lenient view of the anti-deprivation rule and aligned more closely to the policy underlying the anti-*ipso facto* clause provisions in the US Bankruptcy Code¹¹¹.

J.2.9 Australia

122 Recently in Australia, the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act, 2017¹¹² amended the Corporations Act, 2001, which governs the insolvency regime. Under this new regime, during the period of a specified restructuring or insolvency procedure, a right in a contract, agreement or arrangement will not be enforceable, and ‘self-executing provisions’ will not apply, by reason only of “[t]he company entering the specified procedure; the company’s financial position; a prescribed reason; or a reason that is in substance contrary to the above”.

¹¹⁰ Para 118.

¹¹¹ ‘Chandos Upheld by Supreme Court of Canada: The Anti-Deprivation Rule in Canada’ (Norton Rose Fulbright, January 2021) <<https://www.nortonrosefulbright.com/en-ca/knowledge/publications/db4bb7a6/chandos-upheld-by-supreme-court-of-canada>> accessed 18 February 2021.

¹¹² “Amending Act”

123 Before this amendment, termination of contracts based on *ipso facto* clauses was permitted¹¹³. The new regime also applies to contracts entered into on or after 1 July 2018, *i.e.*, its application is prospective only. However, certain contracts and contractual rights have been excluded from the operation of the stay under this new regime. Critically, in respect of financing arrangements, the *ipso facto* reforms will not apply to (amongst other things) syndicated loans, securities, bonds, promissory notes, financial products, derivatives, and certain contracts involving special purpose vehicles. The excluded contractual rights do not depend on the type of contracts in which they are embodied.

124 However, according to the Explanatory Memorandum to the Amending Act, the stay is not intended to restrict a counterparty from enforcing a right (or disapply self-executing provisions) for any other reason, such as a breach involving non-payment or non-performance. Further, the *ipso facto* provisions also allow the relevant insolvency administrator to apply for an order expanding the stay to prohibit the exercise of rights (for example, a right to terminate for convenience), even where the right does not expressly operate on the basis of one of the prohibited reasons set out above, if the court is satisfied that a counterparty is likely to exercise those rights for a prohibited reason¹¹⁴.

¹¹³ 'The Impact of Insolvency on Licence Agreements' (2015) 254 Managing Intell Prop 31, 32.

¹¹⁴ 'Australia's New Ipso Facto Regime Is Now Live: Are Your Contractual Rights Affected?' (Herbert Smith Freehills | 2 July 2018) <<https://www.herbertsmithfreehills.com/latest-thinking/australia%E2%80%99s-new-ipso-facto-regime-is-now-live-are-your-contractual-rights-affected>> accessed 18 February 2021.

J.2.10 Singapore

125 In Singapore, *ipso facto* clauses are prohibited in accordance with Section 440¹¹⁵ of the Insolvency, Restructuring and Dissolution Act, 2018 (“IRDA”), which came into force on 30 July 2020. This provision limits the exercise of *ipso facto* clauses which are triggered by reason only of the insolvency of a contracting party or the commencement of corporate rescue proceedings, namely proceedings for judicial management and schemes of arrangement¹¹⁶. However, this provision may not restrict a contracting party from terminating the contract if there are other events of default, for instance: (a) failure to pay outstanding sums; (b) appointment of a receiver; or (c) passing of a resolution for the winding up of the debtor. Further, section 440 does not apply retroactively, and only applies to contracts entered into after 30 July 2020¹¹⁷.

¹¹⁵ “Certain contractual rights limited

440.—(1) No person may, at any time after the commencement, and before the conclusion, of any proceedings by a company —

(a) terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement (including a security agreement) with the company; or

(b) terminate or modify any right or obligation under any agreement (including a security agreement) with the company,

by reason only that the proceedings are commenced or that the company is insolvent.

(2) ...

(3) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(4) On an application by a party to an agreement, the Court may declare that this section does not apply, or applies only to the extent declared by the Court, if the applicant satisfies the Court that the operation of this section would likely cause the applicant significant financial hardship.

(5) Subsection (1) does not apply in respect of any legal right under —

(a) any eligible financial contract as may be prescribed;

(b) any contract that is a licence, permit or approval issued by the Government or a statutory body;

(c) any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed;

(d) any commercial charter of a ship;

(e) any agreement within the meaning of the Convention as defined in section 2(1) of the International Interests in Aircraft Equipment Act (Cap. 144B); or

(f) any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed.

(6) ...”

¹¹⁶ ‘Singapore - Restructuring: Ipso Facto Clauses, Distressed Debt Market Update And DIP/Rescue Finance | Conventus Law’ <<https://www.conventuslaw.com/report/singapore-restructuring-ipso-facto-clauses/>> accessed 18 February 2021.

¹¹⁷ ‘Ipso Facto Clauses under the New Insolvency, Resolution & Dissolution Act’ (Rajah Tann & Asia, July 2020) <https://eoasis.rajahtann.com/eoasis/lu/pdf/2020-07_Ipso-Facto-Clauses.pdf> accessed 18 February 2021.

126 In addition, two legislative safeguards have been built into the IRDA to balance the contractual interests of stakeholders:

- (i) Certain types of contracts are exempted from these restrictions. These are the following: (a) derivatives contracts, margin lending agreements or securities contracts; (b) master netting agreements, securities/commodities lending or repurchase agreements, or spot contracts, that contain a netting or set-off arrangement; (c) covered bond or connected agreements; (d) debentures or connected agreements; (e) any agreement to clear or settle transactions relating to a derivatives contract; and (f) business rules of an approved exchange, a licensed trade repository, an approved or recognized clearing house or a recognized market operator; and
- (ii) Exclusion from this provision can also be sought, in accordance with section 440(4), if the injunction of the ipso facto clause would “likely cause the applicant significant financial hardship”¹¹⁸.

127 It is also important to note the background to this legislative reform. In 2013, Singapore’s Insolvency Law Committee recommended against the adoption of such restrictions on *ipso facto* clauses. It noted the benefits in favour of restricting such clauses, which included: (a) keeping key contracts alive; and (b) protecting the interests of different contract holders and incentivizing the management to bring the defaulting company back on track. Further, it also noted

¹¹⁸ ‘Ipso facto clauses under the Insolvency, Restructuring and Dissolution Act’ (White and Case LLP | 20 August 2020) <<https://www.whitecase.com/publications/alert/ipso-facto-clauses-under-insolvency-restructuring-and-dissolution-act>> accessed on 18 February 2021.

the disadvantages of such restrictions, which included: (A) existing counterparties would be locked-in to unfavourable contracts, and compelled to perform their contractual obligations even where there may be no hope of being paid; and (B) a legislative provision would be too static for the dynamic character of modern-day commercial transactions in this domain. It therefore advised against legislative intervention to restrict such clauses. However, having taken note of these criticisms, Singapore nevertheless followed the examples of Australia and the UK in legislating such restrictions on *ipso facto* clauses¹¹⁹.

J.2.11 Analysis

128 On the basis of our discussion of the above-mentioned jurisdictions, the following conclusions emerge:

- (i) Many jurisdictions follow the US model of legislatively invalidating *ipso facto* clauses. Interestingly, this shift has been far more prominent in the last decade even though the US Bankruptcy Code has had this position since 1979;
- (ii) Some of the recent jurisdictions to follow the US model, such as Australia and Singapore, invalidate *ipso facto* clauses prospectively, *i.e.*, *ipso facto* clauses contained in the contracts entered into before the laws came into effect will not be invalidated;
- (iii) The UK, through the CIGA, only invalidates *ipso facto* clauses in supplier contracts, which is similar to the effect of Section 14(2) of the IBC. Further,

¹¹⁹ 'Singapore's Restrictions on Ipso Facto Clauses: What Comes next? | Lexology' <<https://www.lexology.com/library/detail.aspx?g=4d40d932-2ac4-45dd-abf4-76853aa7331a>> accessed 18 February 2021.

other *ipso facto* clauses are understood to be valid, based on the UKSC's decision in **Belmont Park** (supra). However, as noted previously, the UKSC decision was given in the context of the application of the anti-deprivation rule, which protects against the dilution of the value of the company in debt and does not necessarily affect the status of the company as a 'going concern';

- (iv) Greece is one of the few countries which legislatively upholds *ipso facto* clauses;
- (v) The position of law in the Republic of Korea is unclear due to contradictory judicial decisions, which has prompted demands for legislative clarity. This highlights the growing commercial importance of legislative clarity in this area;
- (vi) Generally, even where *ipso facto* clauses are invalidated, it does not have effect on the termination rights of the terminating party based on other events of default in the contract;
- (vii) Some nations which invalidate *ipso facto* clauses, such as Austria, Canada, Singapore and UK (limited to supplier contracts), provide for an exception based on "hardship" being caused to the terminating party. This "hardship" is to be determined by the courts; and
- (viii) Even in nations which legislatively invalidate *ipso facto* clauses, there are often contrasting judicial decisions in relation to the scope of their invalidation. There are certain judicial decisions which go beyond the legislative text to invalidate *ipso facto* clause on broad considerations of

the object and purpose of the relevant insolvency regimes. On the other hand, there are judicial precedents, which follow a more conservative approach and strictly construe the legislative mandate.

J.3 Position in India

129 Before we consider the extent to which the lessons of other jurisdictions should be applied to India, it is important to advert to the discussion on the invalidation of *ipso facto* clauses in India.

130 In 2005, the Report of the Expert Committee on Company Law headed by J.J. Irani¹²⁰ noted the requirement of reforms in the Indian insolvency regime, specifically citing the lessons from the recently published UNCITRAL Guide. In relation to the moratorium period, it made the following observations:

“Moratorium and suspension of proceedings

13.1 A limited standstill period is essential to provide an opportunity to genuine business to explore re-structuring.

...

13.4 The law should provide for treatment of unperformed contracts. Where the contracts provide for automatic termination on filing of insolvency, its enforcement should be stayed on commencement of insolvency.

13.5 There should be enabling provisions to interfere with the contractual obligations which are not fulfilled completely. Such interference or overriding powers would assist in achieving the objectives of the insolvency process. The power is necessary to facilitate taking appropriate business and other decisions including those directed at containing rise in liabilities and enhancing value of assets.

¹²⁰ Available at

<<https://ibbi.gov.in/uploads/resources/May%202005,%20J.%20J.%20Irani%20Report%20of%20the%20Expert%20Committee%20on%20Company%20Law.pdf>> accessed 24 February 2021.

13.6 Exceptions of such powers are also essential to be insured in the law where there is a compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract.”

(emphasis supplied)

131 The Committee noted the need to invalidate *ipso facto* clauses so as to prevent the value of a Corporate Debtor’s assets from becoming diluted during the insolvency process. However, this invalidation was to be subject to exceptions, keeping in mind the “compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract”.

132 However, as is evident, this recommendation was never directly embodied legislatively since the current IBC contains no clear-cut provision which invalidates *ipso facto* clauses. In fact, the issue of the invalidation of *ipso facto* clauses was noted in a December 2018 report titled ‘Insolvency and Bankruptcy Code: The journey so far and the road ahead’ issued by Vidhi Centre for Legal Policy¹²¹. The report notes that the IBC “does not per se prohibit the operation of *ipso facto* clauses during insolvency proceedings. However, Section 14 provides for a limited exception prohibiting the termination, suspension or interruption of specified “essential goods or services” (i.e. water, electricity, telecommunication services and information technology services to the extent they are not direct inputs to the output produced or supplied by the corporate debtor), and also provides relief to the corporate debtor from the recovery of any property by an owner or lessor during the moratorium”. As a solution, the report recommends a

¹²¹Pages 34-35, available at <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/IBC_Thejourneysofarandtheroadahead_Dec18.pdf> accessed on 18 February 2021.

conditional stay on the operation of *ipso facto* clauses, beginning from the insolvency commencement date, since “a complete stay on the operation of ipso facto clauses would constitute a serious restraint on the freedom of contract and would effectively compel suppliers to perform contracts even when such an action is against their commercial interests”. In relation to the implementation of this solution, the report suggests the insertion of a new provision to the IBC.

133 More recently, however, the IBC was amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2020 which, *inter alia*, introduced an Explanation to Section 14(1). The Explanation to Section 14(1) reads thus:

“14. Moratorium.—

...

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.”

134 The legislative intent behind this amendment was discussed in the Report of the Insolvency Law Committee dated 20 February 2020. The Report noted the importance of keeping the Corporate Debtor as a ‘going concern’ during the moratorium period imposed under Section 14, and how it was being affected by the termination of certain Government licenses, permits, et al, based on *ipso*

facto clauses which allowed termination upon commencement of insolvency. Noting that the legislative intent underlying Section 14 would be to invalidate such terminations, the Report recommended the addition of the Explanation to Section 14(1) of the IBC. The relevant portion, in relation to the Explanation to Section 14(1), reads thus¹²²:

“Prohibition on Termination on Grounds of Insolvency

...

8.3. It was brought to the Committee that in some cases government authorities that have granted licenses, permits and quotas, concessions, registrations, or other rights (collectively referred to as “**grants**”) to the corporate debtor attempt to terminate or suspend them even during the CIRP period. This could be attempted in two ways: one, by relying on ipso facto clauses, by virtue of which these grants may be terminated on the advent of insolvency proceedings themselves, and second, by initiating termination on account of non-payment of dues.

8.4. The Committee discussed that by and large, the grants that the corporate debtor enjoys form the substratum of its business. Without these, the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern. **Consequently, their termination during the CIRP by relying on ipso facto clauses or on non-payment of dues would be contrary to the purpose of introducing the provision for moratorium itself. Thus, the Committee concluded that the legislative intent behind introducing the provision for moratorium was to bar such termination.**

8.5. In this regard, the Committee noted that depending on the nature of rights conferred by them, these grants may constitute the “property” of the corporate debtor. Section 3(27) of the Code provides an inclusive definition of property which includes “*money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to,*

¹²² Available at <<https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf>> accessed on 18 February 2021.

property.” This definition is substantially the same as the definition of “property” under Section 436 of the Insolvency Act, 1986 (UK), which has been considered the widest possible definition of property. In India too, it is accepted that certain licenses and concessions can convey permission to use property, or may embody a lease, permit, etc. granting rights in the property. Thus, their termination in certain circumstances, could have been considered contrary to an order of moratorium barring actions under Section 14(1)(d) or preventing alienation of property by any person.

8.6. Similarly, in many circumstances, termination or suspension of grants, particularly registrations, would be through proceedings that follow due process of law. Such proceedings may be a form of enforcement that would deprive the corporate debtor of its assets. In this regard, The Committee noted that the Section 14(1)(a) prevents “*the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority.*” (Emphasis supplied). This provision has been given an expansive reading by the Appellate Authority and the Adjudicating Authority, that had passed orders preventing recovery by stock exchanges and regulators, as well as the de-registration of aircrafts.

8.7. Relying on this, the Committee was of the view that termination or suspension of such grants during the moratorium period would be prevented by Section 14. However, to avoid any scope for ambiguity and in exercise of abundant caution, the Committee recommended that the legislative intent may be made explicit by introducing an Explanation by way of an amendment to Section 14(1).”

135 The position of law in India today invalidates *ipso facto* clauses in:

- (i) Government licenses, permits, registrations, quotas, concessions, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, in accordance with the Explanation to Section 14(1); and

- (ii) Contracts where the counter-party supplies essential/critical goods and services to the Corporate Debtor, within the meaning of Sections 14(2) and 14(2A).

However, no clear position emerges in relation to the validity of *ipso facto* clauses in other contracts, from the bare text of the IBC. Hence, this task is now left to this Court in the present case.

136 In order to fully appreciate the weight of this task upon us, it is important to understand that one of the key principles enshrined within our Constitution is separation of powers between our three main organs: the legislature, the executive and the judiciary. In **Rai Sahib Ram Jawaya Kapur vs State of Punjab**¹²³, speaking for a Constitution Bench, Chief Justice Bijan Kumar Mukherjea, spoke about the ‘separation of powers’ doctrine in the following terms:

“12...The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another...”

137 In **Kesavananda Bharati vs State of Kerala**¹²⁴, Chief Justice S.M. Sikri noted that the ‘separation of powers’ doctrine is part of the basic structure of the Constitution:

¹²³ (1955) 2 SCR 225

¹²⁴ (1973) 4 SCC 225

“292. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. **The basic structure may be said to consist of the following features:**

- (1) Supremacy of the Constitution;
- (2) Republican and Democratic form of Government;
- (3) Secular character of the Constitution;
- (4) Separation of powers between the legislature, the executive and the judiciary;**
- (5) Federal character of the Constitution.”

(emphasis supplied)

138 In performing our duties as members of the judicial branch in this case, we must tread a fine line between providing a just decision while not entering into the domain of the legislature.

139 We have already noted above in our analysis of the laws of various other national jurisdictions that the invalidation of *ipso facto* clauses seems to have occurred through legislative intervention. Although, in certain jurisdictions, there have been a few judicial decisions which have given an expansive interpretation to the legislative text, in order to invalidate *ipso facto* clauses (and their variations) which have not been explicitly barred by the legislature, these decisions have often been issued in order to give effect to legislative policy, intent and purpose of the insolvency regime. In countries like the Republic of Korea, where it is yet to happen legislatively, it is recommended. In others like the UK,

Lord Mance in his concurring opinion in **Belmont Park** (supra) has noted that it should happen only legislatively, and not through the intervention of the court.

140 Further, we also acknowledge the myriad complex questions which will arise while deciding on the issue of the validity/invalidity of *ipso facto* clauses, such as:

- (i) The extent of invalidation of *ipso facto* clauses, *i.e.*, termination solely based on an ‘insolvency event’ (filing of an application for commencement of CIRP, commencement of CIRP, appointment of RP, et al) within the IBC will be invalid;
- (ii) Whether the invalidation is absolute or conditional during the insolvency process;
- (iii) What kinds of contracts should be exempt from this invalidation;
- (iv) What should be the nature of the exceptions to the invalidation of *ipso facto* clauses to preserve the interests of the terminating party;
- (v) Whether the invalidation should happen prospectively or retrospectively; and
- (vi) What safeguard will be required to ensure that parties do not circumvent the invalidation.

141 The issues which we have delineated above are not exhaustive. The enumeration only seeks to highlight the complexity of the task at hand, which will require consideration of a variety of principles, which have to be balanced. The

tension between the rights of a corporate debtor during the insolvency process as against the contractual rights of a terminating party, which is central to the task at hand, is one which has been acknowledged even by the UNCITRAL in its UNCITRAL Guide. There is a public interest underlying each of these balancing considerations. The law confronts the judge with the greatest challenges of adjudication when a balance has to be made between what is right and what is right.

142 There are limitations of the judicial process in providing absolute answers to these questions. Judgments are rendered in cases involving specific fact situations. While they immediately bind the parties before the court, the impact of the pronouncement of principle will have a bearing on others whose contracts may contain similar provisions. In **Northern Securities Company vs United States**¹²⁵, Justice Oliver Wendell Holmes Jr. acknowledged a similar judicial conundrum in the following terms in his dissenting opinion:

“356. Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment...”

143 Consequently, we hold that question of the validity/invalidity of *ipso facto* clauses is one which the court ought not to resolve exhaustively in the present case. Rather, what we can do is appeal in earnest to the legislature to provide concrete guidance on this issue, since the lack of a legislative voice on the issue will lead to confusion and reduced commercial clarity.

¹²⁵ 1904 SCC OnLine US SC 63 : 24 S.Ct. 436

K Appellant's right to terminate the PPA in the present case

K.1 Analysis of the PPA

144 We now turn to a consideration of the text, structure and salient features of the PPA. As the PPA records in its recitals:

“[T]he Government of Gujarat through letter dated 1st August 2009 has allocated 25 MW capacity to power producer for developing and setting up Solar Photovoltaic based power project in the State of Gujarat. The power Producer desires to set up a Solar Photovoltaic Grid Interactive Power Plant of 10 MW capacity at village Loria, Taluka-Bhuj, District Kutchh using new Solar Photovoltaic Grid Interactive power plants to produce the Electric Energy.”

145 The preambular portion of the PPA also clarifies that the Power Producer (the Corporate Debtor) includes its respective successors and permitted assignees. Article 1, containing the definitions, clarifies that the term ‘Commission’ refers to the GERC.

146 The PPA defines the term ‘law’ in the following terms:

"Law" means any valid legislation, statute, rule, regulation, notification, directive or order, issued or promulgated by any Governmental Instrumentality.”

147 Article 4.1(iii) provides that the Corporate Debtor shall sell the power produced by it to the appellant on first priority basis and is not allowed to sell to any third party. Article 4.1(x) states that the Corporate Debtor shall continue to hold at least 51% equity stake for the first two years after the Commercial Operation Date and at least 26% for 3 years thereafter. Article 5.2 of the PPA, as we have noted previously, clarifies that, in case the commissioning of the Plant is

delayed beyond 31 December 2011, the appellant shall pay the tariff as determined by the GERC for Solar Projects effective on the date of commissioning of the plant or the tariff provided under the clause, whichever is lower.

148 Article 9.1 of the PPA clarifies that the PPA shall become effective upon the execution and delivery thereof by the parties and shall remain in operation for a period of 25 years. Article 9.2.1 enumerates the Events of Default by the Corporate Debtor, within which Article 9.2.1(e) states that the Corporate Debtor becoming voluntarily or involuntarily, the subject of a proceeding in any bankruptcy or insolvency laws, constitutes an Event of Default. The exception to this clause is triggered where dissolution of the Corporate Debtor is for the purpose of a merger, consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under PPA and creditworthiness. Article 9.2.1(e) of the PPA is quoted below:

"9.2. 1 Power Producer's Default: The occurrence of any of the following events at any time during the Tariff [sic term] of this Agreement shall constitute an Event of Default by Power Producer:

xxx

e. If the Power Producer becomes voluntarily or involuntarily the subject of proceeding under any bankruptcy or insolvency laws or goes into liquidation of [sic or] dissolution or has a receiver appointed over it or liquidator is appointed, pursuant to law, except where such dissolution of the Power producer is for the purpose of a merger, consolidated [sic consolidation] or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement and creditworthiness similar to the Power Producer and expressly assumes all

obligations under this agreement and is in a position to perform them.”

149 In accordance with Article 9.3.1, the appellant, on the occurrence of an Event of Default under Article 9.2.1, can issue a Default Notice which shall specify in reasonable detail the Event of Default giving rise to the default notice, and call upon the Corporate Debtor to remedy it. At the expiry of 30 days from such notice, unless otherwise agreed, if the default has not been remedied, the appellant can terminate the PPA. Further, the Corporate Debtor shall have the liability to make payments towards compensation to the appellant which is equivalent to three years’ billing based on the first-year tariff considered on normative PLF while determining the tariff by GERC, within 30 days from the termination notice. In accordance with Article 10.4, when differences or disputes between the parties are not settled through mutual negotiation within 60 days of the dispute arising, it shall be adjudicated by the State Commission, in accordance with Law.

150 In accordance with Article 12.9, assignment of the Corporate Debtor’s rights under the PPA is permissible, with the prior written consent of the other party. The proviso to this Article makes it clear that any assignee shall expressly assume the Corporate Debtor’s obligations thereafter arising under the PPA, on the furnishing of satisfactory documentation.

151 At this juncture, it is important, at the risk of repetition, to note the concurrent findings of fact returned by the NCLT and the NCLAT as to the PPA

being the sole basis for the Corporate Debtor's existence. In its judgment dated 29 August 2019, the NCLT held as follows:

"6. That the Corporate Debtor is reportedly a Special Purpose Vehicle (SPV) set up only for generation of solar power in the State of Gujarat. The Respondent is the only purchaser of power generated by the Corporate Debtor's Plant, therefore, the PPA is very critical to the "going concern" status of the Corporate Debtor.

...

30... That termination of PPA at this stage may have adverse consequences on the status of the Corporate Debtor as "going concern" and eventually, may jeopardise the entire CIR Process."

In the impugned judgment, the NCLAT held as follows:

"Gujarat Urja Vikas Nigam Ltd.' is the only purchaser of electricity generated by 'Astonfield Solar (Gujrat) Pvt. Ltd.' (Corporate Debtor). [T]he electricity line have been given only to the 'Gujarat Urja Vikas Nigam Ltd.' and in terms of an agreement, they are supposed to supply electricity to 'Gujarat Urja Vikas Nigam Ltd.'"

152 As the above excerpts indicate, but for the subsistence of the PPA, the Corporate Debtor would no longer remain as a 'going concern'. Differently stated, by virtue of the PPA with the appellant being the sheet-anchor of the Corporate Debtor's business and consequently of the CIRP, its continuation assumes enormous significance for the successful completion of the CIRP. The termination of the PPA will have the consequence of cutting the legs out from under the CIRP.

K.2 Validity of the termination of PPA

153 As discussed in Section “J.3” of this judgement, the broader question of the validity of *ipso facto* clauses has been the subject matter of sustained legislative intervention in many jurisdictions. This is an intricate policy determination, for it raises a series of questions about striking the appropriate balance between contractual freedom on the one hand and corporate rescue on the other. We are cognizant that any rule that we might craft, howsoever narrow, could have a series of unintended second order effects, in terms of opening the floodgates for intervention from the NCLT that might impinge upon contractual freedom of the terminating party. Further, the comparative experience also teaches us that, given that the invalidation of *ipso facto* clauses can unsettle the interests that contractual relationships are founded upon, some jurisdictions that have invalidated such clauses have done so in a cautious, prospective fashion. This ensures that while the policy of the insolvency law is brought into tandem with the global regimes, it does not affect the contractual rights of those parties who could not have reasonably accounted for this change in position while negotiating their contractual terms. Such an approach is an evidence and recognition of the harmful effects on commercial stability that such encroachment into contractual freedom can generate, even when done legislatively after careful deliberation.

154 The question of the validity/invalidity of *ipso facto* clauses has been discussed in a variety of documents over the years, such as: (a) UNCITRAL Guide of 2004; (b) J.J. Irani Committee Report of 2005; (c) Vidhi’s Report of

2018 critiquing the IBC; and (d) IBBI's Report of 2020, which acknowledges the issue of *ipso facto* clauses in relation to government grants. All these materials were available to the members of the various committees which discussed the IBC. Further, suspension of contracts during insolvency was specifically allowed under Section 22(3) of SICA, which was the **erstwhile** statutory regime. Section 22 of the SICA provided for the suspension of legal proceedings and contracts, of which sub-Section (3) was in the following terms:

“(3) Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period] of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.”

Parliament would have been conscious of the provision which was adopted in the SICA. Yet, no concrete position has been adopted in relation to the termination of *ipso facto* clauses by the legislature under the IBC. In the absence of an express prohibition by the legislature, it can be argued that there is no general embargo

on the operation of such clauses if they are part of a valid contract under the Contract Act.

155 At the same time, we cannot lose sight of the fact that this Court is apprised with a novel situation where the ‘going concern’ status of a corporate debtor will be negated by a termination of its sole contract, on the basis of an *ipso facto* clause. It is pertinent to note that the IBC has been in effect from 5 August 2016, and has also been amended multiple times. Hence, if the ‘going concern’ status of corporate debtors was being affected on a regular basis due to *ipso facto* clauses (which are in vogue even in the present contracts similar to the current PPA), then the legislature may, if it considered necessary, have proceeded to legislate on an explicit position with regard to the operation of *ipso facto* clauses. However, this Court in the present case is not required to resolve the broad question of whether the invalidation/stay of *ipso facto* clauses in India, generally, is legally permissible. This is a matter which raises complex issues of legal policy and a balancing between distinct and conflicting values. Reform will have to take place through the legislative process. The stages through which legislative reform must take place -absolute or incremental – is a matter for legislative change. Our task is limited to the issue of deciding whether the NCLT correctly exercised the jurisdiction vested in it, in the facts of this case, to stay the termination of the PPA. In the absence of an explicit stand taken by the legislature, this Court’s intervention in this matter would be guided by ascertaining the legislative intention from the provisions of the IBC.

156 Section 14 of the IBC reads as follows:

“Moratorium.--(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 (54 of 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.

Explanation.--For the purposes of this Sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of Sub-section (1) shall not apply to--

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan Under Sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor Under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

157 Section 14 of the IBC lists the conditions under which a moratorium can be imposed by the NCLT in terms of sub-sections (a) to (d). It further clarifies that a license, permit, quota, concession, grant or right given by a government cannot be suspended or terminated on the grounds of insolvency, subject to certain exceptions. This clarification was added by way of an Explanation to Section 14(1) with effect from 28 December 2019. The Report of the Insolvency Law Committee dated 20 February 2020, as discussed above, noted that without such government grants "the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern"¹²⁶. The Report further stated that the termination of such grants during CIRP on account of *ipso facto* clauses or non-payment of dues is in contravention of the purpose behind imposition of moratorium itself.

¹²⁶ Para 8.4

158 While recommending the inclusion of an explanation, the Report of the Insolvency Law Committee stated that while it was of the view that termination or suspension of such grants is prevented by Section 14, it recommended adding the Explanation “to avoid any scope for ambiguity and in exercise of abundant caution”¹²⁷, and to ensure that the legislative intent should be made explicit by introduction of the explanation by way of an amendment to Section 14(1). The Insolvency Law Committee (in its discussion in the February 2020 Report) took the position that Section 14 even in its unamended form, contained an interdict on the invalidation of government grants, though the language of Section 14 did not make this position explicit.

159 In contrast, this Court’s judgment in **Embassy Property** (supra), concluded that the non-renewal of a mining lease was not within the ambit of Section 14. The Explanation to Section 14(1) was added by Parliament to make the position clear, on whether the moratorium under Section 14 included government licenses, grants, permits, quotas and concessions.

160 Section 14(2) provides that supply of essential goods or services, as may be specified, cannot be terminated, suspended or interrupted during the moratorium. Section 14(2A) was added with effect from 28 December 2019. It provides that, where the IRP or RP considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage its operations as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium,

¹²⁷ Para 8.7

except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. The order of moratorium has effect till the culmination of insolvency resolution process.

161 The inclusion of the Explanation to Section 14(1) and Section 14(2A) indicates that Parliament has been amending the IBC to ensure that the status of a corporate debtor as a ‘going concern’ is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the IBC. It will be relevant to note that in a recent three judge Bench decision of this Court in **P Mohanraj vs Shah Brothers Ispat Pvt. Ltd.**¹²⁸, Justice Rohinton Fali Nariman, speaking for the Court, expounded upon the object of Section 14 in the following terms:

“...the object of a moratorium provision such as Section 14 is to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that **it can be kept running as a going concern** during this time, thus maximising value for all stakeholders. The idea is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor.”

(emphasis supplied)

162 Further, the scheme of the IBC, *inter alia*, in terms of Sections 20(2)(e), 25(1) and definition of resolution plan shows that it aims to preserve the

¹²⁸ Civil Appeal No. 10355 of 2018 decided on 1 March 2021

corporate debtor as a 'going concern'. The relevant portion of Section 20 is extracted below:

“20. Management of operations of corporate debtor as a going concern

(1) The interim resolution professional shall 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.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—

.....

to take all such actions as are necessary to keep the corporate debtor as a going concern.”

It is also relevant to note that Section 25(1) provides:

“Section 25 - Duties of resolution professional

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.”

Resolution plan is defined under Section 5(26) of the IBC as follows:

“(26) "resolution plan" means a plan proposed by 3[resolution applicant] for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;

Explanation.--For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;”

163 Although various provisions of the IBC indicate that the objective of the statute is to ensure that the corporate debtor remains a 'going concern', there must be a specific textual hook for the NCLT to exercise its jurisdiction. The

NCLT cannot derive its powers from the ‘spirit’ or ‘object’ of the IBC. Section 60(5)(c) of the IBC vests the NCLT with wide powers since it can entertain and dispose of any question of fact or law arising out or in relation to the insolvency resolution process. We hasten to add, however, that the NCLT’s residuary jurisdiction, though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do.

164 In this case, the PPA has been terminated solely on the ground of insolvency, which gives the NCLT jurisdiction under Section 60(5)(c) to adjudicate this matter and invalidate the termination of the PPA as it is the forum vested with the responsibility of ensuring the continuation of the insolvency resolution process, which requires preservation of the Corporate Debtor as a going concern. In view of the centrality of the PPA to the CIRP in the unique factual matrix of this case, this Court must adopt an interpretation of the NCLT’s residuary jurisdiction which comports with the broader goals of the IBC. Sir P.B. Maxwell in his commentary, *On Interpretation of Statutes*¹²⁹, has emphasized that a provision should be given an harmonious interpretation which comports with the intention of the Legislature. The commentary provides:

"The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. **Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other**

¹²⁹ Roy Wilson, Brian Galpin and Peter Benson Maxwell, *On Interpretation of Statutes*, (11th edn., Sweet and Maxwell 1962).

statutes, is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Sir Edward Cole's words, to suppress the mischief and advance the remedy."

(emphasis supplied)

165 Given that the terms used in Section 60(5)(c) are of wide import, as recognized in a consistent line of authority, we hold that the NCLT was empowered to restrain the appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the Corporate Debtor. In doing so, we reiterate that the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an *ipso facto* clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being

the corporate debtor's sole contract (as was the case in this matter's unique factual matrix).

166 The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile ground for the revival of the regime under section 22 of SICA which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of the PPA which is the sole contract of the Corporate Debtor, governing the supply of electricity which it generates, it will pull the rug out from under the CIRP, making the corporate death of the Corporate Debtor a foregone conclusion.

K.3 Dialogical Remedies

167 As indicated above in section “J.3” of this judgment, we would like to take this opportunity to note the desirability of Parliament providing its legislative vision on the broader validity of *ipso facto* clauses. We have outlined some of the complex considerations in paragraph 138.

168 In the past, this Court has adopted such dialogical remedies – where the Court engages in a dialogue in its judgments with the other two organs of government so that each organ can best perform its constitutionally assigned role. To illustrate, in its judgement in **S. Sukumar vs The Secretary, Institute of Chartered Accountants of India**¹³⁰, a two judge Bench of this Court, speaking through Justice Adarsh Kumar Goel, held as follows:

¹³⁰ (2018) 14 SCC 360.

“53.1.The Union of India may constitute a three member Committee of experts to look into the question whether and to what extent the statutory framework to enforce the letter and spirit of Sections 25 and 29 of the CA Act and the statutory Code of Conduct for the CAs requires revisit so as to appropriately discipline and regulate MAFs. The Committee may also consider the need for an appropriate legislation on the pattern of Sarbanes Oxley Act, 2002 and Dodd Frank Wall Street Reform and Consumer Protection Act, 2010 in US or any other appropriate mechanism for oversight of profession of the auditors. Question whether on account of conflict of interest of auditors with consultants, the auditors' profession may need an exclusive oversight body may be examined. The Committee may examine the Study Group and the Expert Group Reports referred to above, apart from any other material. It may also consider steps for effective enforcement of the provisions of the FDI policy and the FEMA Regulations referred to above. It may identify the remedial measures which may then be considered by appropriate authorities. The Committee may call for suggestions from all concerned. Such Committee may be constituted within two months. Report of the Committee may be submitted within three months thereafter. The UOI may take further action after due consideration of such report.”

169 Conscious as we are of the fact that this case is about statutory and not constitutional interpretation, we think it would be apposite to quote the following observations by Anne Meuwese and Marnix Snel¹³¹:

“The core of constitutional dialogue between the judiciary and the legislature is that they engage in a conversation about constitutional meaning, in which both actors (should) listen in order to learn from each other's perspectives, which can then lead to modifying their own views accordingly... In this way, 'dialogue' represents the 'middle way between judicial supremacy on the one hand, and legislative supremacy on the other'.

¹³¹ Anne Meuwese and Marnix Snel, 'Constitutional Dialogue': An Overview, Utrecht Law Review, vol. 9, issue 2, p. 128 [March, 2013].

170 The Court is at its heart, an institution which responds to concrete cases brought before it. It is not within its province to engraft into law its views as to what constitutes good policy. This is a matter falling within the legislature's remit. Equally, when presented with a novel question on which the legislature has not yet made up its mind, we do not think this Court can sit with folded hands and simply pass the buck onto the Legislature. In such an event, the Court can adopt an interpretation – a workable formula – that furthers the broad goals of the concerned legislation, while leaving it up to the legislature to formulate a comprehensive and well-considered solution to the underlying problem. To aid the legislature in this exercise, this Court can put forth its best thinking as to the relevant considerations at play, the position of law obtaining in other relevant jurisdictions and the possible pitfalls that may have to be avoided. It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalized in a nuanced fashion. It is in this way that the Court can tread the middle path between abdication and usurpation¹³².

L NCLAT's decision on the issue of liquidation

171 NCLT in paragraph 35 of its order dated 29 August 2019 upheld the right of the appellant to terminate the PPA, in case a liquidation process is initiated against the Corporate Debtor. The appellant had neither challenged this issue in its appeal before NCLAT nor was it raised by any other party. However, the NCLAT deleted the observations made by the NCLT in paragraph 35, thereby holding that the appellant cannot terminate the PPA even if the Corporate Debtor

¹³² This phrase is taken from - O Ferraz, 'Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa' in Oscar Vilhena Vieira, Upendra Baxi, Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP, Pretoria 2013) 375, 393.

goes into liquidation. Since no pleadings or prayers were made in relation to paragraph 35 of NCLT's order, NCLAT could not have considered this issue as a subject matter of the appeal. We hold that the NCLAT exceeded its jurisdiction by considering the issue of liquidation. In the absence of any liquidation proceedings initiated against the Corporate Debtor, we are not required to consider the issue of whether the appellant would be entitled to terminate the contract in such a context. Such a discussion would be academic in nature, and beyond the scope of this appeal.

M Appellant's liability to pay for the electricity injected by the Corporate Debtor

172 The appellant had served a notice of termination to the Corporate Debtor with effect from 7 June 2019, though the termination could not be carried out due to the operation of interim protection which had been granted to the respondents by the NCLT. It was contended on behalf of the appellant that it cannot be made to suffer on the ground of erroneous injunctions granted by the NCLT and NCLAT, due to which it had to pay a higher tariff because it could not terminate the PPA with the Corporate Debtor and procure electricity at a cheaper tariff from another power producer. Since we have set aside the termination of the PPA based on the reasons discussed above, the appellant is liable to pay for the electricity procured after 7 June 2019. Consequently, the appellant's claim in respect of compensation for the termination of the PPA in terms of Article 9.3.1 of the PPA does not arise because it is restrained from terminating the PPA. Hence, this contention of the appellant has been rendered otiose.

N Conclusion

173 In conclusion, we hold that:

- (i) The NCLT/NCLAT could have exercised jurisdiction under section 60(5)(c) of the IBC to stay the termination of the PPA by the appellant, since the appellant sought to terminate the PPA under Article 9.2.1(e) only on account of the CIRP being initiated against the Corporate Debtor;
- (ii) The NCLT/NCLAT correctly stayed the termination of the PPA by the appellant, since allowing it to terminate the PPA would certainly result in the corporate death of the Corporate Debtor due to the PPA being its sole contract; and
- (iii) We leave open the broader question of the validity/invalidity of *ipso facto* clauses in contracts for legislative intervention.

Consequently, for the above reasons we find no merit in this appeal and it is accordingly dismissed.

174 Pending application(s), if any, stand disposed of.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[M. R. Shah]

**New Delhi;
March 8, 2021.**