BEFORE THE NATIONAL GREEN TRIBUNAL,

WESTERN ZONE AT PUNE

APPEAL NO. 27 OF 2022 (WZ)

IN THE MATTER OF:

THAKORBHAI VALLABHBHAI KHALASI …APPELLANT

VERSUS

MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE & ORS. …RESPONDENTS

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BEFORE THE NATIONAL GREEN TRIBUNAL,

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APPEAL NO. 27 OF 2022 (WZ)

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THAKORBHAI VALLABHBHAI
KHALASI …APPELLANT

VERSUS

MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE & ORS. …RESPONDENTS

SUBMISSIONS ON BEHALF OF AMNS/RESPONDENT NO. 5 IN TERMS OF THE ORDER DATED 03.02.2025

MOST RESPECTFULLY SHOWETH:

1. The present submissions are being filed on behalf of ArcelorMittal Nippon Steel India Limited ("**AMNS**"/ "**Respondent No. 5**") pursuant to the order dated 03.02.2025 passed by this Hon'ble Tribunal and on the limited issue that the non-compliances/violations committed by the previous owners of the Industry/Company i.e., Essar Steel India Limited ("**ESIL**"), cannot be thrust upon the subsequent owner i.e., AMNS and that the new owner of the Company would begin with clean slate in terms of the scheme of the Insolvency and Bankruptcy Code ("**Code**"/ "**IBC**"). A copy of the order dated 03.02.2025 passed by this Hon'ble Tribunal is annexed as **Annexure- R5/1**.

2. It is submitted that during the hearing held on 03.02.2025, the counsel of the Appellant argued that AMNS failed to comply with certain conditions of the Environment Clearance dated 05.07.2010, 28.07.2010 and 09.03.2016 issued by Respondent No. 1 ("**earlier ECs**") and therefore, the Environment Clearance dated 02.03.2022 ("**Impugned EC**") issued to AMNS could not have been granted. This Hon'ble Tribunal by its order dated 03.02.2025 directed AMNS to furnish the relevant law along with judgments on the applicability of clean slate principle on the violations/non-compliance committed by the previous owner of ESIL and that the same cannot be fastened upon AMNS in terms of the provisions of the Code.

3. At the outset, it is submitted that the non-compliances of the earlier EC's were committed by ESIL which was taken over by AMNS through the Corporate Insolvency Resolution Process ("**CIRP"**) in terms of the provisions of the Code.

CIRP under the provisions of the IBC

4. It is submitted that the Code was enacted in 2016 which provides a mechanism for the insolvency resolution of the corporate debtor in a time bound manner to enable the revival, and maximization of the value of the assets of the corporate debtor.

5. The process under the IBC is as follows:

a. It starts with the initiation of corporate insolvency resolution process against the corporate debtor by the National Company Law Tribunal ("**NCLT**")

b. The NCLT imposes a moratorium prohibiting *inter-alia* institution or continuation of proceedings against the corporate debtor.

c. *Vide* the same order, the NCLT appoints an interim resolution professional to manage the affairs of the corporate debtor.

d. Upon initiation of the corporate insolvency resolution process, the powers of the board of directors are suspended in terms of Section 18 of the Code.

e. At this stage, the board of the company (or in this case, the Project Proponent) stands suspended and all powers of the board are transferred to the IRP/RP.

f. Thereafter, the interim resolution professional / resolution professional is required to discharge various duties in terms of the Code including inviting bids from the prospective bidders to submit the resolution plan for the revival of the corporate debtor.

g. The resolution plan submitted by the prospective bidders is placed before the committee of creditors of the corporate debtor, for approval or rejection of the resolution plan. Once the resolution plan is approved by

the committee of creditors, then it is placed before the NCLT for approval in terms of Section 30 (6) of the Code.

h. Upon approval of the resolution plan by the NCLT, the successful bidder or the successful resolution applicant takes over the corporate debtor on a 'clean slate'.

i. Therefore, one of the principal legislative objectives is that the resolution plan approved in terms of the Code must operate as a 'clean slate', such that the successful resolution applicant starts afresh and is not thrown into uncertainty due to the past actions of the earlier management of the corporate debtor which would render the resolution plan unworkable.

6. Therefore, the IBC is a complete code itself which contains a comprehensive scheme that deals with the revival of the company facing corporate death. Further, Section 238 of the Code accords supremacy of IBC over any other law including Environment Protection Act, 1986, which provides that the provisions of the Code will override anything contained in any other law in force or any instrument having effect by virtue of such law. The constitutional validity of the IBC was upheld by the Hon'ble Supreme Court in *'**Swiss Ribbons Private Limited and Another v. Union of India and Others,* (2019) 4 SCC 17**'*, wherein, it was held as follows:

"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 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 (supra) at paragraph 83, footnote 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…"

A copy of the judgment passed by the Hon'ble Supreme Court in '*Swiss Ribbons Private Limited and Another v. Union of India and Others*, (2019) 4 SCC 17' is annexed as **Annexure-R5/2**.

CIRP of ESIL and takeover by AMNS through approved Resolution Plan in terms of the provisions of IBC

7. It is submitted that the Respondent No. 5, in its erstwhile form was known as ESIL. An application was filed by State Bank of

India and Standard Chartered Bank under Section 7 of the Code, for initiation of CIRP against ESIL, with the Hon'ble National Company Law Tribunal, Ahmedabad Bench ("**Ld. NCLT**"). The Ld. NCLT by its order dated 02.08.2017 commenced CIRP against ESIL in terms of the provisions of the Code and appointed Mr. Satish Kumar Gupta as the Interim Resolution Professional ("**IRP**") who was subsequently confirmed as the Resolution Professional ("**RP**") by the Committee of Creditors. From the date of the commencement of CIRP against ESIL i.e., from 02.07.2017, the management of the affairs of ESIL was vested with the IRP/RP and the powers of the board of directors of ESIL were suspended and exercised by the IRP/RP in terms of Section 18 of the Code. Thereafter, in response to the invitation for Expression of Interest ("**EOI**"), various bidders submitted EOI for submitting the resolution plan for the resolution of ESIL. Finally, the resolution plan submitted by Arcelor Mittal India Private Limited ("**AMIPL**") was approved by the Committee of Creditors and subsequently by Ld. NCLT on 08.03.2019. The said Resolution Plan was duly approved by the Hon'ble Supreme Court, on 15.12.2019, as reported in the judgment of Court in ***'Committee of Creditors of Essar Steel India Ltd. vs Satish Kumar Gupta & Ors*. (2020) 8 SCC 531'** ("**Essar Steel Judgment**"). Pertinently, the Hon'ble Supreme Court held that,

> *"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 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, the NCLAT judgment must also be set aside on this count.".

A copy of the judgment passed by the Hon'ble Supreme Court in '*Committee of Creditors of Essar Steel India Limited (through authorized signatory) v. Satish Kumar Gupta and Others,* (2020) 8 SCC 531' is annexed as **Annexure- R5/3**

8. In terms of the *Essar Steel Judgment*, the Resolution Plan, as approved by the Supreme Court was implemented and on 16.12.2019, AMIPL acquired 100% of the shareholding of ESIL and the management of ESIL was handed over to AMIPL. Subsequently, on 08.01.2020, the name of ESIL was changed to 'ArcelorMittal Nippon Steel India Limited'.

Clean Slate Principle

9. It is important to mention that the scheme and objective of the Code is to encourage the resolution of the corporate debtor by providing comfort and statutory protection to the new owner, i.e., the successful resolution applicant, who takes over the corporate debtor with the intent of having a fresh start on a clean slate. Therefore, the dominant purpose is that the successful resolution applicant should start with fresh slate on the basis of approved resolution plan. Further, the takeover by the new owner through resolution plan in terms of the provisions of the Code is not a typical acquisition of a company under the provisions of the Companies Act, 2013.

10. It is most respectfully submitted upon the approval of resolution plan by the NCLT and eventually by the Hon'ble Supreme Court, AMNS/Respondent No. 5 took over ESIL on a 'clean slate', with past liabilities/actions of earlier ESIL stood extinguished. Therefore, the consequences of the non-compliances of the earlier ECs by the earlier management of ESIL cannot be fastened upon AMNS as AMNS acquired ESIL upon approval of the resolution plan by the Ld. NCLT and the Hon'ble Supreme Court. The principle of fresh start is to reassure the successful resolution applicant i.e., AMNS, that no new liabilities will emerge after the resolution of ESIL.

Clean Slate Principle recognized by various forums

11. Reliance is placed on '***Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited,***

(2021) 9 SCC 657' wherein, the Hon'ble Supreme Court re-affirmed the clean slate principle and held as under:

> *"93. As discussed hereinabove, one of the principal objects of the I&B Code is providing for revival of the corporate debtor and to make it a going concern. The I&B Code is a complete Code in itself. Upon admission of petition under Section 7 there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on-going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its*

employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable.

Conclusion

102. In the result, we answer the questions framed by us as under:

102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

102.2. The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.

102.3. Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued."

A copy of the judgment passed by the Hon'ble Supreme Court in '*Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited,* (2021) 9 SCC 657' is annexed as **Annexure- R5/4.**

12. The clean slate principle was also recognized by the Hon'ble High Court of Madras in ***'Vasan Healthcare Pvt. Ltd. vs. The Deputy Director of Income Tax (Investigation), Unit 3(2),* 2024 SCC OnLine Mad 4348'** wherein it was held as follows:

11. The above judgement clearly lays down the law on the subject. The moment the Corporate Insolvency Resolution Process is initiated against the corporate debtor and the application is accepted by the NCLT, the moratorium comes into operation. Once the resolution plan is accepted by the NCLT and orders are passed and the Corporate Debtor gets into hands of the new management, all the past liabilities including the criminal liability of the corporate debtor gets wiped off and the new Management takes over the company with clean slate."

A copy of the judgment passed by the Hon'ble High Court of '*Madras in 'Vasan Healthcare Pvt. Ltd. vs. The Deputy Director of Income Tax (Investigation), Unit 3(2)*, 2024 SCC OnLine Mad 4348' is annexed as **Annexure- R5/5.**

13. Further, in the case of ***'Skyhigh Infraland Private Limited v. Monitoring Committee of the Corporate Debtor & Anr.,* (2023) SCC Online NCLT 547'**, the issue which came for consideration before the National Company Law Tribunal, Chandigarh Bench was whether the present management of the corporate debtor is accountable for the default committed by the corporate debtor or its promoters/directors prior to the insolvency commencement. The National Company Law Tribunal, Chandigarh Bench while relying on Essar Judgment held that the present management of the corporate debtor cannot be accountable for the defaults in regulatory compliances committed by the corporate debtor or its promoters/directors prior to the insolvency commencement. The relevant extracts are reproduced below:

> ***"18. Reliance has been placed on the decision of the NCLT Mumbai Bench in IA No. 1077/2022 dated 19.05.2021, wherein after referring to the decision of the Hon'ble Apex Court in Committee of Creditor of Essar Steel India Limited vs. Satish Kumar Gupta & Ors. (2019) SCC OnLine SC 1478, it was held that the management of the corporate debtor could not be held liable and responsible for malfeasance***

committed by the former promoters and directors of the corporate debtor. It further held that:

20. Though the present predicament faced by the Applicant is not in respect of any new claim, the principle and sentiment echoed by the Hon'ble Court can be applied to resolve the present imbroglio. Rules of procedure are but handmaidens of justice (Mr. Shaik Salim Haji Abdul v. Mr. Kumar & others: AIR 2006 SC 396. The Hon'ble Court in Sardar Amarjit Singh Kalra v. Pramod Gupta: (2003) 3 SCC 272 observed that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizens under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. In the same vein the Hon'ble Court in N. Balaji v. Virender Singh: (2004) 8 SCC 312 observed that the procedure would not be used to discourage the substantial effective justice but would be so construed as to advance the cause of justice. The Hon'ble Court in Collector, Land Acquisition v. Mst. Katiji: AIR 1987 SC 1353 ruled that when substantial justice and technical considerations are pitted against each other, cause of substantial justice

deserves to be preferred. The principle has also been echoed by the Hon'ble Supreme Court in Laxmibai v. Bhagwantbuva (Civil Appeal No. 2058 of 2003 decided on 29.01.2013). 21. Taking the facts and circumstances of the case into consideration and the principles decided, it would accordingly be appropriate to pass the following orders. Hence ordered

ORDER The Application be and the same is allowed on contest. i. The present management of the Corporate Debtor shall be permitted to approve the Accounts and Returns of the Corporate Debtor for the period prior to 16.10.2019 in its next meeting. The Applicant shall file the relevant Returns and Statements for the period within three months hence. The action shall not invite any penalty whatsoever from Respondent No. 2. ii. The Corporate Debtor is permitted to file Accounts and Returns subsequent to 16.10.2019, within a period of three months hence and the same shall be accepted without any penalty. iii. iii.It is made clear that the present management of the Corporate Debtor shall not in any manner be held accountable for the default committed by the Corporate Debtor or its promoters/directors prior to 16.10.2019. iv. The RoC (Respondent No. 2) or the appropriate authority shall consider accepting Returns and Statements in

physical form in case of incompatibility in online submission / e-filing. v. The implementation of the Plan is extended till 31.03.2022. All concerned shall make all endeavours to facilitate the implementation of the Plan within the period.

"19. Keeping in view the facts of the case and the aforementioned decision, we direct the ROC:

i. Not to hold the present management of the corporate debtor accountable for the default committed by the corporate debtor or its promoters/director prior to 29.10.2018

v. No penalty or interest arising out of the default committed by the erstwhile management prior to 29.10.2018 can be fastened to the present corporate debtor under the new management".

A copy of the order passed by the NCLT, Chandigarh Bench in *'Skyhigh Infraland Private Limited v. Monitoring Committee of the Corporate Debtor & Anr.,* (2023) SCC Online NCLT 547' is annexed as **Annexure- R5/6.**

14. Similarly, in the case of ***'Kamla Industrial Park Limited v. Monitoring Committee of Corporate Debtor and Another,* 2021 SCC Online NCLT 249'**, the National Company Law Tribunal, Mumbai Bench by relying upon Essar Judgment held as follows:

18. As it would appear from the materials above, the Applicant is taking all possible steps in right earnest to get the Resolution Plan implemented. The e-Filing of statements and returns obviously could not have envisaged all eventualities arising out of a successful resolution of a Corporate Debtor. It is settled that when the technical considerations are pitted against the substantial justice, cause of substantial justice would be preferred. Therefore, interest of justice requires that the Applicant shall have to be provided with all the support for getting the statutory compliances done.

19. The new management of the Corporate Debtor could not be held liable and responsible for the malfeasance and misfeasance committed by the former promoters/directors of the Corporate Debtor. It could not be saddled with the repercussions of reprehensible actions of the erstwhile management. The Hon'ble Apex Court in Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta : 2019 SCC OnLine SC 1478 have recognised such a predicament of the new management in respect of fresh claims and have afforded the rescue/respite in the following words.

> *"67. ……. 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 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." 20. Though the present predicament faced by the Applicant is not in respect of any new claim, the principle and sentiment echoed by the Hon'ble Court can be applied to resolve the present imbroglio. Rules of procedure are but handmaidens of justice (Mr. Shaik Salim Haji Abdul v. Mr. Kumar : (2006) 1 SCC 46 : AIR 2006 SC 396). The Hon'ble Court in Sardar Amarjit Singh Kalra v. Pramod Gupta : (2003) 3 SCC 272 observed that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizens under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. In the same vein the Hon'ble Court in N.

Balaji v. Virender Singh : (2004) 8 SCC 312 observed that the procedure would not be used to discourage the substantial effective justice but would be so construed as to advance the cause of justice. The Hon'ble Court in Collector, Land Acquisition v. Mst. Katiji : (1987) 2 SCC 107 : AIR 1987 SC 1353 ruled that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. The principle has also been echoed by the Hon'ble Supreme Court in Laxmibai v. Bhagwantbuva (Civil Appeal No. 2058 of 2003 decided on 29.01.2013).

22. iii. It is made clear that the present management of the Corporate Debtor shall not in any manner be held accountable for the default committed by the Corporate Debtor or its promoters/directors prior to 16.10.2019"

A copy of the order passed by the NCLT, Mumbai Bench in *"Kamla Industrial Park Limited v. Monitoring Committee of Corporate Debtor and Another,* 2021 SCC Online NCLT 249" is annexed as **Annexure- R5/7**.

15. Also, in the case of Navin Srichand Kanjwani, RP of ***'BD Overseas and Fiscal Services Limited and Ors. v. Central Bank of India & Ors.*, IA/954 (AHM)/2020 in CP (IB) 203 of 2019**, the successful resolution applicant in its resolution plan sought waiver of all the non-compliance of the corporate debtor

under the applicable laws from the government authorities including Ministry of Environment, Forest and Climate Change/The Central Pollution Control Board/ The Gujarat Pollution Control Board. The Hon'ble NCLT, Ahmedabad Bench allowed the waiver in view of '*Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited,* (2021) 9 SCC 657' and held that the resolution applicant cannot be saddled with any previous claim against the corporate debtor prior to the initiation of corporate insolvency resolution process.

A copy of the order passed by the NCLT, Ahmedabad in '*Navin Srichand Kanjwani, RP of BD Overseas and Fiscal Services Limited and Ors. v. Central Bank of India & Ors.***,** IA/954 (AHM)/2020 in CP (IB) 203 of 2019' is annexed as **Annexure R5/8**.

16. Further, in the case of ***"Monnet Ispat & Energy Ltd. v. Securities Exchange Board of India (2020 SCC OnLine SAT 453)",*** the issue that arose for consideration was whether the order passed by the adjudicating officer imposing penalty upon the appellant for alleged contravention under Regulations 52(4) and 54(2) of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, during the period prior to the approval of the resolution plan could be passed by the adjudicating officer. The Hon'ble Securities Appellate Tribunal ("**SAT**") held as follows:

> *"8. The issue that arises for consideration in the present appeal is, whether the impugned order*

imposing penalty upon the appellant for alleged contravention during the period prior to the approval of the resolution plan could be passed by the adjudicating officer. The submissions of the learned senior counsel for the appellant is, that no show cause notice could be issued nor the impugned order could be passed which is contrary to the approved resolution plan and which is binding on the respondent under section 31 and 32A of the IBC.

...

10. On a perusal of section 31(1) of the IBC, it is apparently clear that the resolution plan is binding not only on all creditors but also on central government, state government or local authority to whom statutory dues are owed. The immunities applicable to the appellant will be in accordance with the approved resolution plan. The Supreme Court in Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2019) 153 CLA 275 (SC) held as follows:—

...

12. A perusal of the aforesaid resolution plan indicates:— (a) Extinguishment of all financial liabilities of the Appellant, including any penalty, whether contingent, assessed, known or unknown, in relation to any period prior to the acquisition. (b) Deemed withdrawal or dismissal of inquiries, investigations, causes of action, regulatory proceeding against the Appellant in relation to any period prior to

the acquisition. (c) Extinguishment of liability in relation to any new enquiry, investigations, causes of action, regulatory proceeding against the Appellant in relation to any period prior to the acquisition.

13. In view of the aforesaid clear terms of the resolution plan, the show cause notice could not be issued to the appellant for the alleged contravention relating to the period prior to the acquisition and, consequently, the impugned order could not be passed against the appellant.

...

17. It is also stated here that what could not done by SEBI when the moratorium under section 14(1) of the IBC was in force cannot certainly be done after a resolution plan is approved and becomes binding on all creditors including government and local authority under section 31 of the IBC.

18. In the light of the aforesaid, we are of the opinion that once a resolution plan has been approved it becomes binding on all creditors including the government and local authorities including the respondent under section 31(1) of the IBC. It is no longer open to the respondent to issue a show cause notice or adjudicate and pass an order of penalty upon the appellant. Consequently, the impugned order cannot be sustained and is quashed. The appeal is accordingly allowed with no order as to costs."

A copy of the order passed by the SAT in *"Monnet Ispat & Energy Ltd. v. Securities Exchange Board of India* (2020 SCC OnLine SAT 453)" is annexed as **Annexure- R5/9**.

17. The above view was also upheld by SAT in the case of ***"Tata Steel Limited v. Securities and Exchange Board of India,* 2022 SCC OnLine SAT 2268"** wherein it was held that:

> *"6. In the instant case, the Company had gone into CIRP in July, 2017 under the IBC and in view of the decision of this Tribunal in Monnet Ispat & Energy Ltd. v. SEBI, Appeal no. 238 of 2020 decided on 29th October, 2020,* ***no penalty can be levied on the new management which came into the picture on 18th May, 2018. The violation, if any, committed for the quarter ended March, 2016 was of the previous management which cannot be imposed upon the new management.***
>
> *7. Insofar as the non-disclosure for the quarter ended September, 2018 and December, 2018 is concerned, no charge has been levied against the appellant in the show cause notice and, consequently, no penalty can be imposed for this violation.*
>
> ***8. In view of the aforesaid, the impugned order cannot be sustained. The impugned order is quashed.*** *The appeal is allowed. It would be open to the respondent to issue a fresh show cause notice for the alleged violation, if so advised. In the circumstances of*

the case there shall be no order as to costs. Misc. application no. 642 of 2022 is also disposed of accordingly."

A copy of the order passed by SAT in *"Tata Steel Limited v. Securities and Exchange Board of India*, 2022 SCC OnLine SAT 2268" is annexed as **Annexure- R5/10**.

Immunity to New Management against offences committed by the erstwhile management under Section 32A of the IBC

18. Furthermore, it is most respectfully submitted that the clean slate theory was further clarified by way of Section 32A of the Code which absolves the new management of the Corporate Debtor from any liability in relation to any offences committed by the erstwhile management of the corporate debtor, prior to initiation of CIRP under the Code. Section 32A of the Code reads as follows:

"Section 32A. Liability for prior offences, etc.—

(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change

in the management or control of the corporate debtor to a person who was not--

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a designated partner as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an officer who is in default, as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the

report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not:-

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation. -- For the purposes of this sub-section, it is hereby clarified that,--

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

19. The above provision was interpreted by the Hon'ble Supreme Court in the matter of ***'Manish Kumar v. Union of India,*** **(2021) 5 SCC 1**. In the said case, the Hon'ble Supreme Court

recognised the immunity granted to the corporate debtor (new management under the resolution plan) against the offence committed by the corporate debtor prior to the initiation of corporate insolvency resolution process and held Section 32A of the Code as constitutional. The Hon'ble Supreme Court also observed that while Section 32-A intends to give a clean break to the successful resolution applicant, it is hedged with ample safeguards to avoid any exploitation. Such immunity is contingent on the fulfilment of several conditions such as approval of resolution plan, change in control of the corporate debtor such that the new management cannot be the disguised avatar of the old management or be a related party of the corporate debtor. The relevant extracts of the judgment are reproduced herein below:

> ***326.*** *We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable.* ***The***

extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. *We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP.* ***With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors.*** *As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.*

329. We would be remiss if we did not remind ourselves that attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgment and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some, it cannot unless it strikingly ill squares with some constitutional mandate, suffer invalidation.

A copy of the judgment passed by the Hon'ble Supreme Court in *'Manish Kumar v. Union of India*, 2021 SCC OnLine SC 30' is annexed as **Annexure- R5/11**.

20. Recently, the Hon'ble High Court of Delhi in the matter of ***'Bhushan Power & Steel Limited v. Union of India & Anr.* W.P.(CRL) 1261/2024'**, also recognised the immunity under Section 32A to the new management of the corporate debtor against offences committed by the corporate debtor prior to the insolvency commencement and held as follows:

> ***"6.1 A plain reading of the above provision would reveal that there is no dispute over the legal position that once a resolution plan has been approved by the adjudicating authority under Section 31 of IBC and the conditions specified in Section 32A of the IBC are fulfilled, the Corporate Debtor shall not be prosecuted for an offence committed prior to the commencement of the CIRP***.
>
> *6.2 However, Section 32A of IBC also clarifies that any erstwhile officer of the Corporate Debtor who was in any manner in charge of, or responsible to the Corporate Debtor for the conduct of its business or associated with the Corporate Debtor in any manner or who was directly or indirectly involved in the commission of such offence prior to the commencement of CIRP as per the complaint filed by the investigating authority, shall continue to be*

prosecuted and punished for such an offence committed by the Corporate Debtor, notwithstanding that the Corporate Debtor's liability has ceased.

6.3 Considering the submissions made by the counsel appearing for the ED, which has not been objected to by the Senior Counsels for the Petitioner Company, it is clarified that the role of the Corporate Debtor, ***as elaborately stated in the prosecution complaint filed before the Special Court for PMLA cases under the PMLA, will necessarily have to be examined in the trial of the erstwhile promoters/directors of the Petitioner Company as it relates to the commission of the offence by the Petitioner Company in its earlier avatar as it was under the erstwhile management, when the offence was committed, more so when there are allegations under Section 70 of the PMLA****.*

7.1 Further, in view of the mandate under sub-section (1) of Section 32A of the IBC, the Petitioner Company, having undergone a successful resolution process under Section 31 of the IBC, shall not be prosecuted for the offences committed prior to the commencement of the CIRP."

A copy of the judgment passed by the Hon'ble High Court of Delhi in '*Bhushan Power & Steel Limited v. Union of India & Anr.* W.P.(CRL) 1261/2024' is annexed as **Annexure- R5/12**.

21. Further, in case of *'**SREI Infrastructure Finance Limited v. State of Tripura & Anr.,* WP (C) No. 260 of 2024'**, the High Court of Tripura also recognised the immunity under Section 32A to the new management of the corporate debtor against offences committed by the corporate debtor prior to the insolvency commencement in view of the clean slate principle and held as follows:

> ***"50. Section 32-A of the I&B Code was introduced w.e.f. 28th December 2019 by Amendment Act 1 of 2020. The provisions of Section 31 and Section 32-A when read together in the light of the opinion of the apex Court rendered in the case of Ghanashyam Mishra & Sons Pvt. Ltd (supra) and in the case of Swiss Ribbons (P) Ltd. (supra) do give an insight that the entire purpose of the I&B Code is to ensure the revival of the corporate debtor upon approval of the resolution plan by the adjudicating authority in order to ensure a clean slate to the new management of the corporate debtor so that it leads to value maximization of the assets of the company and obviate lower recovery to the creditors as a result of the corporate debtor continuing to be exposed to civil and criminal liability. The same view has been expressed by the apex court in the case of P. Mohanraj & Ors. (supra) at para 41 which is…***
>
> ***52. Though the expression "blacklisting" has not been specifically used in the I&B Code but the dominant intent of the legislature is to relieve the***

corporate debtor and its new management from civil liabilities including taxation and also from criminal prosecution from past offences. It can well be understood that a penalty like blacklisting and debarment from participating in future tender against the revived company would only defeat the dominant object of the I&B Code. As otherwise, the company would not be able to enter into any business on account of the scar and stigma operating due to blacklisting and debarment imposed in respect of a contract which could not been executed allegedly due to the wrong doings or negligence or deliberate misconduct on the part of the erstwhile management of the company.

53. Apart from wrecking vengeance on the corporate debtor operating with a new management which is not responsible for the past misdeeds of the erstwhile management, such an order of blacklisting would not serve any fruitful purpose. Rather it would defeat the corporate debtor from reviving itself after approval of the resolution plan by entering into new business. It is commonly known that nowadays in all such tender documents floated by the state or its instrumentalities or even by private parties, the bidders have to disclose their past history including whether they have been blacklisted or debarred earlier. In such circumstances, the considerations of the bids by the revived company would be vitiated, if its past continues to haunt it.

56. From the above stand of the respondents, it can thus be seen that the order of blacklisting has been passed being guided by the past misdeeds or misconducts on the part of the erstwhile management of the Company in execution of the contract. Whether such an action could be justified against the company revived with a new management to start on a clean slate? The objectives of the I&B Code are not only to protect the interest of the debtors whose claims have been admitted in the resolution plan and the employees but also that the assets of such a corporate debtor are revived so that it does not lead to total waste and a loss to national economy.

59. The issue whether the petitioner had duly informed the respondents about its admission in the CIRP or not would not in the ultimate analysis make a difference on propriety of imposing the penalty of blacklisting and debarment once the resolution plan has been approved by the learned NCLT on 11th August, 2023 and the new management has taken over the company to ensure that the company starts on a clean slate.

65. Though, the learned counsel for the respondents have sought to distinguish the judgments relied upon by the petitioner, such as Ghanashyam Mishra & Sons Pvt. Ltd. (supra) but such a plea is not

tenable for the reasons recorded in the foregoing paragraphs. In the case of Ghanashyam Mishra & Sons Pvt. Ltd. (supra) the Apex Court while examining the dominant object of the I&B Code, 2016 had held that it is intended with an object to provide a clean slate to the company upon its revival. If the company is unable to undertake business only on account of the order of blacklisting and debarment, the object of the resolution plan, as approved by the NCLT, would stand defeated.

67. As noticed earlier, the grounds and the facts and circumstances of the case on which the respondents have justified the order of blacklisting are essentially allegations against the erstwhile management of the company in causing delay and tardy progress of the works allotted to it. However, upon approval of the Resolution Plan and the change in management, if the order of blacklisting is allowed to survive the past misconducts of the erstwhile management would continue to haunt the petitioner company and would not serve the purpose of revival of the company. Moreover, the respondents have already forfeited the performance bank guarantee of the petitioner for Rs.95,58,000/- for breach of terms and conditions of the contract.

68. Therefore, on consideration of the issues involved and the elaborate discussion made hereinbefore, we are persuaded to interfere in the

matter on the ground that such order of blacklisting and debarment of the petitioner company after approval of the resolution plan with a new management would defeat the dominant aim and object of the Insolvency and Bankruptcy Code, 2016 and in all likelihood defeat the very purpose of revival of the company."

A copy of the judgment passed by the Hon'ble High Court of Tripura in *'SREI Infrastructure Finance Limited v. State of Tripura & Anr.*, WP (C) No. 260 of 2024' is annexed as **Annexure- R5/13**.

22. The benefit/immunity under Section 32A to the new management of the corporate debtor against offences committed by the corporate debtor prior to the insolvency commencement was also appreciated by the Hon'ble High Court of Bombay in **'*Shiv Charan and Ors. v. Adjudicating Authority under the Prevention of Money Laundering Act, 2002, Department of Revenue and Another*, 2024 SCC OnLine Bom 701'** and by the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") in the matter of **'*Vantage Point Asset Management v. Gaurav Mishra*, 2025 SCC OnLine NCLAT 108'.**

A copy of the judgment passed by the Hon'ble High Court of Bombay in '*Shiv Charan v. Adjudicating Authority,* 2024 SCC OnLine Bom 701' is annexed as **Annexure- R5/14.** A copy of the order passed by the Hon'ble NCLAT in *'Vantage Point*

Asset Management v. Gaurav Mishra, 2025 SCC OnLine NCLAT 108' is annexed as **Annexure- R5/15**.

23. Therefore, in view of the 'clean slate' principle and the immunity granted to AMNS under Section 32A of the Code, the non-compliances of the earlier ECs and other contraventions of various environment laws committed by the earlier management of ESIL prior to the commencement of CIRP cannot be fastened upon AMNS.

FILED THROUGH

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Date: 15.02.2025
Place: New Delhi

Item No.12

ANNEXURE R5/1

3294 (Pune Bench)

BEFORE THE NATIONAL GREEN TRIBUNAL
WESTERN ZONE BENCH, PUNE

[Through Physical Hearing (with Hybrid Option)]

APPEAL NO.27 OF 2022 (WZ)

Thakorbhai Vallabhbhai Khalasi ... **Appellant**

Versus

MoEF&CC & Ors. ... **Respondents**

Date of Hearing : 03.02.2025

CORAM : HON'BLE MR. JUSTICE DINESH KUMAR SINGH, JUDICIAL MEMBER
HON'BLE DR. VIJAY KULKARNI, EXPERT MEMBER

Appellant : Ms. Shilpa Chohan, Advocate

Respondents : Mr. Rahul Garg, Advocate for R-1
Ms. Manvi Damle, Advocate holding for Mr. Maulik Nanavati, Advocate for R-2 and R-3
Mr. Aniruddha Kulkarni, Advocate for R-4
Mr. Gopal Jain, Sernior Advocate, i/b and along with
Mr. Gaurav Arora, Advocate for R-5

ORDER

1. Heard the arguments of learned counsel for the appellant, who began with the first point raised in this matter, which pertains to the Environmental Clearance (EC) dated 02.03.2022 granted in favour of respondent No.5 to be *ex post facto,* on the ground that the photographs, which belong to year 2021, annexed at pages 677 to 679 of the paper-book, show that the plant existed prior to grant of the EC. It is also stated that this point was raised during the public hearing also, but the same was not considered by the Expert Appraisal Committee (EAC). The second point,

2. Learned counsel for the appellant drew our attention to page 24 of the paper-book, wherein in tabular form, it is made clear that the first EC was granted to the project in question in 1992 and further 11 ECs were granted in different years, which have been detailed therein. Thereafter, she started reading terms and conditions of the EC of 2010, annexed at page 88 of the paper-book, wherein relevant conditions under head `Specific Conditions' are read out by her, which are at serial Nos. (ii), (iii), (iv), (v) (vi) and (viii). Similarly she read out the other conditions of the ECs granted in 2010 and 2016 and stated that these conditions were not complied with, nor ZLD was achieved by the Project Proponent and hence, contaminated water was allowed to flow to river Tapi. According to her, all this started happening in the year 2013.

3. At this stage, learned senior counsel for respondent No.5/Project Proponent intervened and stated that under the provisions of Insolvency and Bankruptcy Code, 2016 ("IBC", for short), the violations, if any are found to have been committed by the previous owner of the Industry/Company, the same cannot be thrust upon the subsequent owner and that the new owner of the Company would begin with clean slate. At this stage, we confronted learned counsel for the appellant as to whether she is aware of this position of law, she states that the position of law stated by the learned senior counsel for respondent No.5 is not provided to her. Learned senior counsel for respondent No.5 states that he would provide a copy of the relevant law as well as the interpretation made by the Hon'ble Supreme Court, to the learned counsel for the appellant as well as to this Tribunal so that the time is saved and in that situation, we will not be required to go back to earlier ECs and as to whether the terms thereof were met or not. We appreciate the

counsel for the appellant seeks two weeks' time to go through the said provision of law and interpretation made by the Hon'ble Supreme Court, whereafter she would make her submissions in that regard.

4. We direct the Registry to place this matter for remaining arguments on 05.03.2025.

Dinesh Kumar Singh, JM

Dr. Vijay Kulkarni, EM

February 03, 2025
APPEAL NO.27 OF 2022 (WZ)
npj

(2019) 4 Supreme Court Cases 17

(BEFORE ROHINTON FALI NARIMAN AND NAVIN SINHA, JJ.)

SWISS RIBBONS PRIVATE LIMITED AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions (C) No. 99 of 2018† with Nos. 100, 115, 459, 598, 775, 822, 849, 1221 of 2018, 37 of 2019 and SLP (C) No. 28623 of 2018, decided on January 25, 2019

A. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 7, 8 and 9 r/w Ss. 5(7), 5(8) and 5(20) — Classification of creditors i.e. as financial and operational creditors, held, valid — Operational creditors are not discriminated against and Art. 14 of the Constitution has not been infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness**

— Held, since equality is only among equals, no discrimination results if the Court can be shown that there is an intelligible differentia which separates two kinds of creditors so long as there is some rational relation between the creditors so differentiated, with the object sought to be achieved by the legislation

— Held, financial creditors generally lend finance on a term loan or for working capital while operational creditors are relatable to supply of goods — Further, financial creditors are, from the very beginning, involved with assessing viability of corporate debtor and engage in restructuring of loan as well as reorganisation of corporate debtor's business when there is financial stress, which operational creditors do not and cannot do — Further, they differ qua repayment schedule, security requirement for dues, contractual terms for giving credit, remedy in case of defaults and fora before which dispute resolution takes place — Further, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable — Also, generally the quantum of dues of operational creditors and the number of such creditors are comparatively less — Held, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are different from operational creditors and therefore, there is an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code — Constitution of India — Art. 14 — Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regns. 16-A and 16-B (Paras 37 to 51)

B. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 7, 8 and 9 r/w Ss. 5(7), 5(8) and 5(20) — Different insolvency resolution procedure vis-à-vis operational and financial creditors — Validity of, upheld — Right to dispute claim — Existence of, in a financial debtor**

† Under Article 32 of the Constitution of India

— Rejecting the contention that in the case of a financial debtor, there being no requirement of giving (demand) notice, financial debtor is not entitled to dispute claim of financial creditor, held, at the stage of adjudicating authority's satisfaction under S. 7(5) of the Code, corporate debtor is served with a copy of application filed with adjudicating authority and has opportunity to file a reply before the said authority and be heard before an order is made admitting the said application — Further, a financial creditor has to prove "default" in payment as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due — Thus, differentiation in triggering of insolvency resolution process by financial creditors under S. 7 and by operational creditors under Ss. 8 and 9 of the Code, not invalid — Constitution of India — Art. 14 — National Company Law Tribunal Rules, 2016 — Rr. 11, 34 and 37 — Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — R. 4(3) and Form I — Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regn. 8 and Form C (Paras 52 to 65)

C. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 21 and 24 r/w Ss. 5(7), 5(8), 5(20), 30(2)(b) and 31 — Denial of right to vote in Committee of Creditors (CoC) to operational creditors — Not discriminatory, considering its objective/purpose — Moreover, the interests of operational creditors are otherwise protected, so as to ensure that they are given roughly the same treatment as financial creditors**

— Held, under the Code, Committee of Creditors is entrusted with primary responsibility of financial restructuring — Further, since financial creditors are in business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor while operational creditors are involved only in recovering amounts that are paid for goods and services, and are typically unable to assess viability and feasibility of business — Also, NCLAT, while looking into viability and feasibility of resolution plans approved by Committee of Creditors, has always gone into whether operational creditors are given roughly the same treatment as financial creditors — Thus, operational creditors not discriminated against — Constitution of India — Art. 14 — Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regn. 38 (Paras 71 to 78)

D. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 12-A r/w Ss. 7, 8, 9, 10 and 60 — Withdrawal of admitted application with requirement of approval of at least ninety per cent of voting share of Committee of Creditors — Not discriminatory/arbitrary**

— Held, figure of ninety per cent, in absence of anything further to show that it is arbitrary, must pertain to domain of legislative policy — Also, if Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter, NCLAT can always set aside such decision — Further, clarified that at any stage where Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in

exercise of its inherent powers under R. 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement — National Company Law Tribunal Rules, 2016 — R. 11 — Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regns. 30-A and 36-A (Paras 79 to 83)

E. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 29-A — Eligibility restrictions on who can be resolution applicant i.e. on promoter to be considered as such in resolution process — Validity of, reaffirmed**

— Held, resolution applicants have no vested right to be considered as such in resolution process — Thus, no vested right is taken away by application of S. 29-A — Further, there is no vested right in an erstwhile promoter of a corporate debtor to bid for immovable and movable property of corporate debtor in liquidation (Paras 92 to 98)

F. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 29-A(c) — Prescribed period in S. 29-A(c) of grace period of one year to service NPAs (non-performing assets) — Validity of**

— Held, the legislative policy, that a person who is unable to service its own debt beyond the grace period (i.e. period of one year post declaration of NPA) is unfit to be eligible to become a resolution applicant cannot be found fault with and neither can the period of one year be found fault with, as this is a policy matter decided by RBI — Further, the ineligibility attaches only after this one year period is over as the NPA then gets classified as a doubtful asset — Debt, Financial and Monetary Laws — Reserve Bank — RBI Master Circular on Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances dt. 1-7-2015, Cl. 4 (Paras 103 to 105)

G. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 29-A(j) r/w S. 5(24) — Related or connected party/person or relative — Who are, for purposes of S. 29-A**

— Held, the expression "related party", and "relative" contained in the definition sections must be read noscitur a sociis with the categories of persons mentioned in Expln. I, cl. (ii) to S. 29-A(j), and so read, would include only persons who are connected with business activity of resolution applicant — Further, the expression "connected person" in Expln. I is a person who is in the saddle of the business of corporate debtor either at an anterior point of time or even during implementation of the resolution plan — Words and Phrases — "Related person", "relative", "connected person" (Paras 107 to 110)

H. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 29-A and 240-A — Exemption of micro, small and medium enterprises — Validity of, upheld**

— Upholding the provision, held, rationale for excluding such industries from eligibility criteria laid down in Ss. 29-A(c) and 29-A(h) is because qua such industries, other resolution applicants may not be forthcoming, which then

will inevitably lead not to resolution, but to liquidation — Industry, Trade, Development and Business Laws — Micro, Small and Medium Enterprises Development Act, 2006, S. 7 (Paras 111 to 115)

I. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 53 — Priority of distribution of assets under — Non-violative of Art. 14 of the Constitution**

— Considering various factors such as the objective of Code, intelligible differentia between financial debts and operational debts, kinds of unsecured debts, priority given to workmen's dues, etc. held, Art. 14 of the Constitution does not get infracted — Constitution of India, Art. 14 (Paras 116 to 119)

J. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 18 and 28 — Powers of a resolution professional — Held, do not extend to adjudication — Held, the resolution professional is given administrative as opposed to quasi-judicial powers**

— Further, a resolution professional is a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the adjudicating authority — Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regns. 10, 12, 13, 14 and 35-A (Paras 88 to 91)

K. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 214 and 3(9) — Private information utilities — Held, governed by proper norms and safeguards — Evidence by way of loan default contained in records of such utility, held, only prima facie evidence of default, rebuttable by corporate debtor**

— There are stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt — The utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted — Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, Regns. 20 and 21 (Paras 85 to 87, 53 and 54)

L. **Corporate Laws — Companies Act, 2013 — S. 412 (w.e.f. 9-2-2018) — Appointment of members of Tribunal and Appellate Tribunal — Validity of, upheld**

— Rejecting the contention that appointment of members of NCLT and NCLAT were contrary to judgments in *Madras Bar Assn. (1)*, (2010) 11 SCC 1 and *Madras Bar Assn. (3)*, (2015) 8 SCC 583, held, in compliance of the directions of the Supreme Court, advertisements dt. 10-8-2015 were issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of NCLT and NCLAT had been appointed — Insolvency and Bankruptcy Laws — NCLT/NCLAT (Paras 30 and 31)

M. **Insolvency and Bankruptcy Laws — NCLT/NCLAT — Circuit Benches — Directions qua constitution of Circuit Benches of NCLAT**

— Considering the submission of Attorney General that the ruling in *Madras Bar Assn. (2)*, (2014) 10 SCC 1, will be followed and Circuit Benches will be established as soon as it is practicable, Union of India directed to set up Circuit Benches of NCLAT within a period of 6 months (Paras 32 and 33)

Madras Bar Assn. v. *Union of India*, (2014) 10 SCC 1, *followed*

S.P. Sampath Kumar v. *Union of India*, (1987) 1 SCC 124; *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577, *cited*

N. **Insolvency and Bankruptcy Laws — NCLT/NCLAT — Directions qua functioning of the Tribunals under the wrong Ministry i.e. under the Ministry of Corporate Affairs as opposed to the Ministry of Law and Justice**

— Following the ruling in *Madras Bar Assn.*, (2010) 11 SCC 1 wherein it was inter alia held, that the administrative support for all Tribunals should be from the Ministry of Law and Justice and neither the Tribunals nor their members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned, Union of India directed to follow, both in letter and spirit, *Madras Bar Assn.*, (2010) 11 SCC 1 (Paras 34 to 36)

Union of India v. *Madras Bar Assn.*, (2010) 11 SCC 1, *followed*

Delhi International Airport Ltd. v. *International Lease Finance Corpn.*, (2015) 8 SCC 446, *referred to*

The petitions assailed the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 ("the Insolvency Code" or "the Code").

It was inter alia contended that the members of the National Company Law Tribunal (NCLT) and certain members of the National Company Law Appellate Tribunal (NCLAT), apart from the President, have been appointed contrary to the judgment in *Madras Bar Assn.*, (2015) 8 SCC 583. It was also contended that the administrative support for all tribunals should be from the Ministry of Law and Justice. However, NCLT and NCLAT were functioning under the Ministry of Corporate Affairs. It was also contended that since NCLAT, as an appellate court, has a seat only at New Delhi, this would render the remedy inefficacious.

It was contended that there was no real difference between financial creditors and operational creditors. There was no intelligible differentia between the two types of creditors, regard being had to the object sought to be achieved by the Code, namely, insolvency resolution, and if that is not possible, then ultimately, liquidation. It was inter alia contended that such classification will not only be discriminatory, but also manifestly arbitrary, as under Sections 8 and 9 of the Code, an operational debtor is not only given notice of default, but is entitled to dispute the genuineness of the claim. In the case of a financial debtor, on the other hand, no notice is given and the financial debtor is not entitled to dispute the claim of the financial creditor. It was further contended that Sections 21 and 24 of the Code are discriminatory and manifestly arbitrary in that operational creditors do not have even a single vote in the Committee of Creditors which has very important functions to perform in the resolution process of corporate debtors.

It was further contended that the certificate of an information utility is in the nature of a preliminary decree issued without any hearing and without any process of adjudication. It was contended that Section 12-A derailed the settlement process by requiring the approval of at least ninety per cent of the voting share of the Committee of Creditors. Unbridled and uncanalised power is given to the Committee of Creditors to reject legitimate settlements entered into between creditors and the corporate debtors.

It was contended that the resolution professional, having been given powers of adjudication under the Code and Regulations, grant of adjudicatory power to a non-judicial authority was violative of basic aspects of dispensation of justice and access to justice.

A four fold attack was raised against Section 29-A, in particular, clause (*c*) thereof. It was contended that the vested rights of erstwhile promoters to participate in the recovery process of a corporate debtor have been impaired by retrospective application of Section 29-A.

It was contended that Section 29-A, in any case, was contrary to the object sought to be achieved by the Code, in particular, speedy disposal of the resolution process as it will inevitably lead to challenges before the adjudicating authority and appellate authority, which will slow down and delay the insolvency resolution process.

It was contended that insofar as Section 29-A(*c*) was concerned, a blanket ban on participation of all promoters of corporate debtors, without any mechanism to weed out those who are unscrupulous and have brought the company to the ground, as against persons who are efficient managers, but who have not been able to pay their debts due to various other reasons, would not only be manifestly arbitrary, but also be treating unequals as equals. It was contended that maximisation of value of assets is an important goal to be achieved in the resolution process. Section 29-A is contrary to such goal as an erstwhile promoter, who may outbid all other applicants and may have the best resolution plan, would be kept out at the threshold, thereby impairing the object of maximisation of value of assets.

It was contended that under Section 29-A(*c*), a person's account may be classified as a non-performing asset (NPA) in accordance with the guidelines of Reserve Bank of India (RBI), despite him not being a wilful defaulter. Also, the period of one year referred to in clause (*c*) was wholly arbitrary and without any basis either in rationality or in law.

Qua Section 29-A(*j*), it was contended that persons who may be related parties in the sense that they may be relatives of the erstwhile promoters are also debarred, despite the fact that they may have no business connection with the erstwhile promoters who have been rendered ineligible by Section 29-A.

Held :

Prologue: the pre-existing state of the law

The erstwhile regime which led to the enactment of the Insolvency Code was discussed by the Bankruptcy Law Reforms Committee (BLRC) in its Report dated 4-11-2015 as follows: 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. Given the conflicts between creditors and debtors in the resolution of insolvency as described in Section 3.2.2,

the chances for consistency and efficiency in resolution are low when rights are separately defined. It is problematic that these different laws are implemented in different judicial fora. (Para 14)

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. (Para 16.2)

Madras Petrochem Ltd. v. *BIFR*, (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478; *Innoventive Industries Ltd.* v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356, *relied on*

Previous legislation, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which made provision for rehabilitation of sick companies and repayment of loans availed by them, were found to have completely failed. These two enactments were followed by the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. ... amounts recovered under the said Act recorded improvement over the previous two enactments, but this was yet found to be inadequate. (Para 16.3)

ArcelorMittal (India) (P) Ltd. v. *Satish Kumar Gupta*, (2019) 2 SCC 1, *relied on*

Madras Petrochem Ltd. v. *BIFR*, (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478, *cited*

Judicial hands-off qua economic legislation

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. The Supreme Court has the power to prevent an experiment. The statute which embodies it may be struck down on the ground that the measure is arbitrary, capricious or unreasonable. The Court has power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, the Court must be ever on its guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold. (Para 19)

New State Ice Co. v. *Liebmann*, 1932 SCC OnLine US SC 63 : 76 L Ed 747 : 285 US 262 (1932), *relied on*

Lochner v. *New York*, 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905), *referred to*

Jacobson v. *Massachusetts*, 1905 SCC OnLine US SC 51 : 49 L Ed 643 : 197 US 11 (1905); *Northern Securities Co.* v. *United States*, 1904 SCC OnLine US SC 63 : 48 L Ed 679 : 193 US 197 (1904); *Otis* v. *Parker*, 1903 SCC OnLine US SC 22 : 47 L Ed 323 : 187 US 606 (1903); *Holden* v. *Hardy*, 1898 SCC OnLine US SC 45 : 42 L Ed 780 : 169 US 366 (1898), *cited*

Courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. Legislative bodies have broad scope to experiment with economic problems, and the Supreme Court does not sit to, 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure'. (Para 20)

Ferguson v. *Skrupa*, 1963 SCC OnLine US SC 71 : 10 L Ed 2d 93 : 372 US 726 (1963), *relied on*

Commonwealth v. *Stone*, 191 Pa Super 117 : 155 A 2d 453 (1959); *Adams* v. *Tanner*, 1917 SCC OnLine US SC 168 : 61 L Ed 1336 : 244 US 590 (1917); *Coppage* v. *Kansas*, 1915 SCC OnLine US SC 30 : 59 L Ed 441 : 236 US 1 (1915); *Adkins* v. *Children's Hospital*, 1923 SCC OnLine US SC 105 : 67 L Ed 785 : 261 US 525 (1923); *Jay Burns Baking Co.* v. *Bryan*, 1924 SCC OnLine US SC 89 : 68 L Ed 813 : 264 US 504 (1924); *Olsen* v. *Nebraska*, 1941 SCC OnLine US SC 99 : 85 L Ed 1305 : 313 US 236 (1941); *Sproles* v. *Binford*, 1932 SCC OnLine US SC 112 : 76 L Ed 1167 : 286 US 374 (1932); *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 1949 SCC OnLine US SC 2 : 93 L Ed 212 : 335 US 525 (1949); *West Coast Hotel Co.* v. *Parrish*, 1937 SCC OnLine US SC 58 : 81 L Ed 703 : 300 US 379 (1937); *Day-Brite Lighting Inc.* v. *Missouri*, 1952 SCC OnLine US SC 29 : 96 L Ed 469 : 342 US 421 (1952); *Williamson* v. *Lee Optical of Oklahoma*, 1955 SCC OnLine US SC 29 : 99 L Ed 563 : 348 US 483 (1955), *cited*

The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. (Para 21)

R.K. Garg v. *Union of India*, (1981) 4 SCC 675 : 1982 SCC (Tax) 30, *relied on*

Morey v. *Doud*, 1957 SCC OnLine US SC 105 : 1 L Ed 2d 1485 : 354 US 457 (1957); *Secy. of Agriculture* v. *Central Roig Refining Co.*, 1950 SCC OnLine US SC 14 : 94 L Ed 381 : 338 US 604 (1950); *Munn* v. *Illinois*, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877); *Metropolis Theater Co.* v. *City of Chicago*, 1913 SCC OnLine US SC 123 : 57 L Ed 730 : 228 US 61 (1913), *cited*

The system of checks and balances has to be utilised in a balanced manner with the primary objective of accelerating economic growth rather than suspending its growth by doubting its constitutional efficacy at the threshold itself. (Para 22)

Bhavesh D. Parish v. *Union of India*, (2000) 5 SCC 471, *relied on*

Laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature. (Para 23)

Directorate General of Foreign Trade v. *Kanak Exports*, (2016) 2 SCC 226, *relied on*

BALCO Employees' Union v. *Union of India*, (2002) 2 SCC 333, *cited*

The raison d'être for the Insolvency and Bankruptcy Code

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. (Para 27)

ArcelorMittal (India) (P) Ltd. v. *Satish Kumar Gupta*, (2019) 2 SCC 1, *relied on*

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. (Para 28)

Appointment of members of NCLT and NCLAT not contrary to the Supreme Court's judgments

On 3-1-2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act, 2013 was amended. (Para 30)

A Selection Committee was constituted to make appointments of Members of NCLT in the year 2015 itself. Thus, by an order dated 27-7-2015, (*i*) Justice Gogoi (as he then was), (*ii*) Justice Ramana, (*iii*) Secretary, Department of Legal Affairs, Ministry of Law and Justice, and (*iv*) Secretary, Corporate Affairs, were constituted as the Selection Committee. This Selection Committee was reconstituted on 22-2-2017 to make further appointments. In compliance of the directions of the Supreme Court, advertisements dated 10-8-2015 were issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of NCLT and NCLAT have been appointed. (Para 31)

Union of India v. *Madras Bar Assn.*, (2010) 11 SCC 1; *Madras Bar Assn.* v. *Union of India*, (2015) 8 SCC 583, *referred to*

Classification between financial creditor and operational creditor neither discriminatory, nor arbitrary, nor violative of Article 14 of the Constitution of India

Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute

their views on what the policy is. Another development of the law is that legislation can be struck down as being manifestly arbitrary. (Paras 38 and 39)

Shayara Bano v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277, *applied*

Gopal Jha v. *Supreme Court of India*, (2019) 13 SCC 161 : 2018 SCC OnLine SC 2197; *Indian Young Lawyers Assn.* v. *State of Kerala*, 2018 SCC OnLine SC 1690; *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39; *K.S. Puttaswamy (Aadhaar-5 J.)* v. *Union of India*, (2019) 1 SCC 1; *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1; *Lok Prahari* v. *State of U.P.*, (2018) 6 SCC 1 : (2018) 3 SCC (Civ) 389 : (2018) 3 SCC (Cri) 73 : (2018) 2 SCC (L&S) 162; *Nikesh Tarachand Shah* v. *Union of India*, (2018) 11 SCC 1 : (2018) 2 SCC (Cri) 302, *relied on*

Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1; *State of A.P.* v. *McDowell & Co.*, (1996) 3 SCC 709; *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258; *Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36; *Subramanian Swamy* v. *CBI*, (2005) 2 SCC 317 : 2005 SCC (L&S) 241; *Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311; *Malpe Vishwanath Acharya* v. *State of Maharashtra*, (1998) 2 SCC 1; *E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165; *COAI* v. *TRAI*, (2016) 7 SCC 703; *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Khoday Distilleries Ltd.* v. *State of Karnataka*, (1996) 10 SCC 304; *Sharma Transport* v. *State of A.P.*, (2002) 2 SCC 188, *cited*

A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority. (Para 42)

As a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor. (Para 49)

BLRC Report, Insolvency and Bankruptcy Bill in the Notes on Clause 8, Insolvency Law Committee (ILC)'s, Report of March 2018, Sections 21(6-A) and 21(6-B), *referred to*

Most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors

do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable. (Para 50)

Notice, hearing, and set-off or counterclaim qua financial debts

The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code. (Para 52)

Innoventive Industries Ltd. v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356, *relied on*

Information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 (Information Utilities Regulations), are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information. (Para 54)

At the stage of the adjudicating authority's satisfaction under Section 7(5) of the Code, the corporate debtor is served with a copy of the application filed with the adjudicating authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application. (Para 58)

What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties (Section 65 of the Code). (Para 59)

Also, punishment is prescribed under Section 75 for furnishing false information in an application made by a financial creditor which further deters a financial creditor from wrongly invoking the provisions of Section 7. (Para 60)

Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way — amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the adjudicating authority under Section 60. (Para 61)

Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission

of claims during the resolution plan. Also, there is nothing in the Code which interdicts the corporate debtor from pursuing such counterclaims in other judicial fora. (Para 63)

The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(*e*) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation. (Para 64)

Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for this reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear. (Para 65)

Sections 21 and 24 and Article 14 of the Constitution: operational creditors have no vote in the Committee of Creditors

The original Insolvency and Bankruptcy Bill did not allow operational creditors to attend the Committee of Creditors at all. This Bill was amended. (Para 71)

Expert Committees have been set up by the Government to oversee the working of the Code. Thus, the report of the Insolvency Law Committee of March 2018, after examining the working of the Code, thought it fit not to amend the Code so as to give operational creditors the right to vote. (Para 72)

Under the Code, the Committee of Creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The Committee of Creditors is required to evaluate the resolution plan on the basis of feasibility and viability. (Para 73)

Once the resolution plan is approved by the Committee of Creditors and thereafter by the adjudicating authority, the aforesaid plan is binding on all stakeholders. (Para 74)

Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically

unable to assess viability and feasibility of business. The BLRC Report, makes this abundantly clear. (Para 75)

The United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law (the UNCITRAL Guidelines) recognises the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

"*Ensuring equitable treatment of similarly situated creditors*

> 7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. (Para 76)

NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the Committee of Creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(*b*) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 5-10-2018, Regulation 38 of the CIRP Regulations, 2016 has been amended. Regulation 38 further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors. (Para 77)

For all the aforesaid reasons, operational creditors are not discriminated against, and Article 14 of the Constitution has not been infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness. (Para 78)

Section 12-A is not violative of Article 14 of the Constitution

Section 12-A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 6-6-2018. Before this section was inserted, the Court, under Article 142 of the Constitution, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by NCLT or NCLAT. (Paras 79 and 80)

Lokhandwala Kataria Construction (P) Ltd. v. *Nisus Finance and Investment Managers LLP*, (2018) 15 SCC 589; *Mothers Pride Dairy India (P) Ltd.* v. *Portrait Advertising and Marketing (P) Ltd.*, 2017 SCC OnLine SC 1789; *Uttara Foods and Feeds (P) Ltd.* v. *Mona Pharmachem*, (2018) 15 SCC 587, *cited*

ILC Report of March 2018, *referred to*

Regulation 30-A(1) of the CIRP Regulations, 2016 is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36-A. (Para 81)

Brilliant Alloys (P) Ltd. v. *S. Rajagopal*, 2018 SCC OnLine SC 3154, *referred to*

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. 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 the 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. (Para 82)

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. (Para 83)

Evidence provided by private information utilities: only prima facie evidence of default

The setting up of information utilities was preceded by a regime of information companies which were referred to as credit information companies (CICs), as recommended by the Siddiqui Working Group in 1999. (Para 85)

The Information Utilities Regulations, in particular Regulations 20 and 21, make it clear that on receipt of information of default, an information utility shall expeditiously undertake the process of authentication and verification of information. (Para 86)

The aforesaid Regulations also make it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, the utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, is only prima facie evidence of default, which is rebuttable by the corporate debtor, makes it clear that the challenge based on this ground must also fail. (Para 87)

Resolution professional has no adjudicatory powers

It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. (Para 88)

Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim. It is clear from a reading of these Regulations (Regulations 10, 12, 13 and 14) that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a "determination" under Regulation 35-A, he is only to apply to the adjudicating authority for appropriate relief based on the determination. (Para 89)

As opposed to this, the liquidator, in liquidation proceedings under the Code, has to consolidate and verify the claims, and either admit or reject such claims under Sections 38 to 40 of the Code. It is clear from Sections 41 and 42 that when the liquidator "determines" the value of claims admitted under Section 40,

such determination is a "decision", which is quasi-judicial in nature, and which can be appealed against to the adjudicating authority under Section 42 of the Code. (Para 90)

Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the Committee of Creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the adjudicating authority. (Para 91)

Constitutional validity of Section 29-A

Parliament has introduced Section 29-A into IBC with a specific purpose. The provisions of Section 29-A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. 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 of IBC, as amended, also clarifies that a resolution plan of a person who is ineligible under Section 29-A will not be considered by CoC. (Para 96)

ArcelorMittal (India) (P) Ltd. v. *Satish Kumar Gupta*, (2019) 2 SCC 1; *Chitra Sharma* v. *Union of India*, (2018) 18 SCC 575, *followed*

Salomon v. *A. Salomon and Co. Ltd.*, 1897 AC 22 (HL), *cited*

Retrospective application

It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing. A resolution applicant has no vested right for consideration or approval of its resolution plan. (Para 97)

State Bank's Staff Union (Madras Circle) v. *Union of India*, (2005) 7 SCC 584 : 2005 SCC (L&S) 994; *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1, *relied on*

Ritesh Agarwal v. *SEBI*, (2008) 8 SCC 205; *K.S. Paripoornan* v. *State of Kerala*, (1994) 5 SCC 593; *Darshan Singh* v. *Ram Pal Singh*, 1992 Supp (1) SCC 191; *Pyare Lal Sharma* v. *Jammu & Kashmir Industries Ltd.*, (1989) 3 SCC 448 : 1989 SCC (L&S) 484; *P.D. Aggarwal* v. *State of U.P.*, (1987) 3 SCC 622 : 1987 SCC (L&S) 310; *Govind Das* v. *CIT*, (1976) 1 SCC 906 : 1976 SCC (Tax) 133, *distinguished*

Section 29-A(c) not restricted to malfeasance

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 29-A, 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 wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29-A continues to permeate the section when it applies not merely to resolution applicants, but to liquidation also. (Para 102)

The one-year period in Section 29-A(c) and NPAs

It is clear that Section 29-A goes to eligibility to submit a resolution plan. A wilful defaulter, in accordance with the guidelines of RBI, would be a person

who though able to pay, does not pay. An NPA, on the other hand, refers to the account belonging to a person that is declared as such under guidelines issued by RBI. (Para 103)

What is clear from RBI's Master Circular on Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated 1-7-2015 is that accounts are declared NPA only if defaults made by a corporate debtor are not resolved (for example, interest on and/or instalment of the principal remaining overdue for a period of more than 90 days in respect of a term loan). Post declaration of such NPA, what is clear is that a substandard asset would then be NPA which has remained as such for a period of twelve months. In short, a person is a defaulter when an instalment and/or interest on the principal remains overdue for more than three months, after which, its account is declared NPA. During the period of one year thereafter, since it is now classified as a substandard asset, this grace period is given to such person to pay off the debt. During this grace period, it is clear that such person can bid along with other resolution applicants to manage the corporate debtor. What is important to bear in mind is also the fact that, prior to this one-year-three-month period, banks and financial institutions do not declare the accounts of corporate debtors to be NPAs. As a matter of practice, they first try and resolve disputes with the corporate debtor, after which, the corporate debtor's account is declared NPA. As a matter of legislative policy, therefore, quite apart from malfeasance, if a person is unable to repay a loan taken, in whole or in part, within this period of one year and three months (which, in any case, is after an earlier period where the corporate debtor and its financial creditors sit together to resolve defaults that continue), it is stated to be ineligible to become a resolution applicant. The reason is not far to see. A person who cannot service a debt for the aforesaid period is obviously a person who is ailing itself. (Para 105)

Related party

Persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24-A) show that such persons must be "connected" with the resolution applicant within the meaning of Section 29-A(*j*). This being the case, the said categories of persons who are collectively mentioned under the caption "relative" obviously need to have a connection with the business activity of the resolution applicant. In the absence of showing that such person is "connected" with the business of the activity of the resolution applicant, such person cannot possibly be disqualified under Section 29-A(*j*). All the categories in Section 29-A(*j*) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression "related party", therefore, and "relative" contained in the definition sections must be read noscitur a sociis with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant. (Para 109)

Attorney General for India v. *Amratlal Prajivandas*, (1994) 5 SCC 54 : 1994 SCC (Cri) 1325, *referred to*

Explanation I clause (*ii*) to Section 29-A(*j*) seeks to make it clear that if a person is otherwise covered as a "connected person", this provision would also cover a person who is in management or control of the business of the corporate debtor during the implementation of a resolution plan. Therefore, any such person is not indeterminate at all, but is a person who is in the saddle of the business of the

corporate debtor either at an anterior point of time or even during implementation of the resolution plan. (Para 110)

Section 53 of the Code does not violate Article 14 of the Constitution

The reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. Repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail. (Para 119)

VN-D/61927/C

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The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— The present petitions assail the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 ("the Insolvency Code" or "the Code"). Since we are deciding only questions relating to the constitutional validity of the Code, we are not going into the individual facts of any case.

2. Shri Mukul Rohatgi, learned Senior Advocate, appearing in Writ Petition (Civil) No. 99 of 2018, has first and foremost argued that the members of the National Company Law Tribunal (NCLT) and certain members of the National Company Law Appellate Tribunal (NCLAT), apart from the President, have been appointed contrary to this Court's judgment in *Madras Bar Assn.* v. *Union of India*[1] [*Madras Bar Assn. (3)*], and that therefore, this being so, all orders that are passed by such members, being passed contrary to the judgment of this Court in the aforesaid case, ought to be set aside. In any case, even assuming that the de facto doctrine would apply to save such orders, it is clear that such members ought to be restrained from passing any orders in future. In any case, until a properly constituted committee, in accordance with the aforesaid judgment, reappoints them, they ought not to be allowed to function. He also argued that the administrative support for all tribunals should be from the Ministry of Law and Justice. However, even today, NCLT and NCLAT are functioning under the Ministry of Corporate Affairs. This again needs to be corrected immediately. A further technical violation also exists in that if the powers of the High Court are taken away, NCLAT, as an appellate forum, should have the same convenience and expediency as existed prior to appeals going to NCLAT. Since NCLAT, as an appellate court, has a seat only at New Delhi,

1 (2015) 8 SCC 583

this would render the remedy inefficacious inasmuch as persons would have to travel from Tamil Nadu, Calcutta and Bombay to New Delhi, whereas earlier, they could have approached the respective High Courts in their States. This again is directly contrary to *Madras Bar Assn.* v. *Union of India*[2] [*Madras Bar Assn. (2)*], and to para 123 in particular.

3. Apart from the aforesaid technical objection, Shri Rohatgi assailed the legislative scheme that is contained in Section 7 of the Code, stating that there is no real difference between financial creditors and operational creditors. According to him, both types of creditors would give either money in terms of loans or money's worth in terms of goods and services. Thus, there is no intelligible differentia between the two types of creditors, regard being had to the object sought to be achieved by the Code, namely, insolvency resolution, and if that is not possible, then ultimately, liquidation. Relying upon *Shayara Bano* v. *Union of India*[3] (*Shayara Bano*), he argued that such classification will not only be discriminatory, but also manifestly arbitrary, as under Sections 8 and 9 of the Code, an operational debtor is not only given notice of default, but is entitled to dispute the genuineness of the claim. In the case of a financial debtor, on the other hand, no notice is given and the financial debtor is not entitled to dispute the claim of the financial creditor. It is enough that a default as defined occurs, after which, even if the claim is disputed and even if there be a set-off and counterclaim, yet, the Code gets triggered at the behest of a financial creditor, without the corporate debtor being able to justify the fact that a genuine dispute is raised, which ought to be left for adjudication before ordinary courts and/or tribunals. Shri Rohatgi then argued that assuming that a valid distinction exists between financial and operational creditors, there is hostile discrimination against operational creditors. First and foremost, unless they amount to 10% of the aggregate of the amount of debt owed, they have no voice in the Committee of Creditors. In any case, Sections 21 and 24 of the Code are discriminatory and manifestly arbitrary in that operational creditors do not have even a single vote in the Committee of Creditors which has very important functions to perform in the resolution process of corporate debtors.

4. Shri Rohatgi then went on to assail the establishment of information utilities that are set up under the Code. According to him, under Section 210 of the Code, there can be private information utilities whose sole object would be to make a profit. Further, the said information utility is not only to collect financial data, but also to check whether a default has or has not occurred. Certification of such agency cannot substitute for adjudication. Thus, the certificate of an information utility is in the nature of a preliminary decree issued without any hearing and without any process of adjudication. Shri Rohatgi next argued that Section 12-A of the Code is contrary to the directions of this Court in its order in *Uttara Foods and Feeds (P) Ltd.* v. *Mona Pharmachem*[4], and that instead of following the said order, Section 12-A now derails the settlement process by requiring the approval of at least ninety per cent of the voting share of the Committee of Creditors. Unbridled and

2 (2014) 10 SCC 1
3 (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277
4 (2018) 15 SCC 587

uncanalised power is given to the Committee of Creditors to reject legitimate settlements entered into between creditors and the corporate debtors.

5. Shri Rohatgi then argued that the resolution professional, having been given powers of adjudication under the Code and Regulations, grant of adjudicatory power to a non-judicial authority is violative of basic aspects of dispensation of justice and access to justice. Lastly, a four fold attack was raised against Section 29-A, in particular, clause (*c*) thereof. First and foremost, Shri Rohatgi stated that the vested rights of erstwhile promoters to participate in the recovery process of a corporate debtor have been impaired by retrospective application of Section 29-A. Section 29-A, in any case, is contrary to the object sought to be achieved by the Code, in particular, speedy disposal of the resolution process as it will inevitably lead to challenges before the adjudicating authority and appellate authority, which will slow down and delay the insolvency resolution process. In particular, so far as Section 29-A(*c*) is concerned, a blanket ban on participation of all promoters of corporate debtors, without any mechanism to weed out those who are unscrupulous and have brought the company to the ground, as against persons who are efficient managers, but who have not been able to pay their debts due to various other reasons, would not only be manifestly arbitrary, but also be treating unequals as equals. Also, according to Shri Rohatgi, maximisation of value of assets is an important goal to be achieved in the resolution process. Section 29-A is contrary to such goal as an erstwhile promoter, who may outbid all other applicants and may have the best resolution plan, would be kept out at the threshold, thereby impairing the object of maximisation of value of assets.

6. Another argument that was made was that under Section 29-A(*c*), a person's account may be classified as a non-performing asset (NPA) in accordance with the guidelines of Reserve Bank of India (RBI), despite him not being a wilful defaulter. Also, the period of one year referred to in clause (*c*) is again wholly arbitrary and without any basis either in rationality or in law. Shri Rohatgi then trained his gun on Section 29-A(*j*), and stated that persons who may be related parties in the sense that they may be relatives of the erstwhile promoters are also debarred, despite the fact that they may have no business connection with the erstwhile promoters who have been rendered ineligible by Section 29-A.

7. Shri K.V. Viswanathan, learned Senior Advocate, appearing in Writ Petition No. 822 of 2018, strongly supported Shri Rohatgi and argued the same points with great clarity and with various nuances of his own, which will be reflected in our judgment. Followed by Shri Viswanathan, Shri A.K. Gupta, Shri Pulkit Deora, Shri Devanshu Sajlan and Shri Deepak Joshi also made submissions with particular regard to discrimination against operational creditors.

8. As against these submissions, Shri K.K. Venugopal, the learned Attorney General for India, and Shri Tushar Mehta, learned Solicitor General of India, appearing for the Union of India, and Shri Rakesh Dwivedi, learned Senior Advocate, appearing for Reserve Bank of India, countered all the aforesaid submissions. They argued with reference to our judgments and committee reports that till the Insolvency Code was enacted, the regime of previous legislation had failed to maximise the value of stressed assets and had focused

on reviving the corporate debtor with the same erstwhile management. All these legislations had failed, as a result of which, the Code was enacted to reorganise insolvency resolution of corporate debtors in a time-bound manner to maximise the value of assets of such person. They further argued that there is a paradigm shift from the erstwhile management of a corporate debtor being in possession of stressed assets to creditors who now assume control from the erstwhile management and are able to approve resolution plans of other better and more efficient managers, which would not only be in the interest of the corporate debtor itself but in the interest of all stakeholders, namely, all creditors, workers and shareholders other than shareholdings of the erstwhile management. They referred to the Statement of Objects and Reasons, the Preamble, and various provisions of the Code, and to the Rules and Regulations made thereunder, to buttress their submissions. In particular, they referred to judgments which mandated a judicial hands-off when it came to laws relating to economic regulation.

9. The learned counsel argued that the legislature must get the maximum free play in the joints to experiment and come up with solutions to problems that have seemed intractable earlier. In particular, in combating the individual points made by the learned counsel appearing on behalf of the petitioners, they argued that none of the members of NCLT or NCLAT had been appointed contrary to the judgments of this Court in *Union of India* v. *Madras Bar Assn.*[5] [*Madras Bar Assn. (I)*] and *Madras Bar Assn. (3)*[1]. They referred to affidavits filed before this Court to show that all such members had been appointed by a committee consisting of two Supreme Court Judges and two bureaucrats, in conformity with the aforesaid judgments.

10. When it came to classification between financial and operational creditors, the learned counsel argued that the differentiation between the two types of creditors occurs from the nature of the contracts entered into with them. Financial contracts involve large sums of money given by fewer persons, whereas operational creditors are much larger in number and the quantum of dues is generally small. Financial creditors have specified repayment schedules and agreements which entitle such creditors to recall the loan in totality on defaults being made, which the operational creditors do not have. Further, financial creditors are, from the start, involved with the assessment of viability of corporate debtors and are, therefore, better equipped to engage in restructuring of loans as well as reorganisation of the corporate debtor's business in the event of financial stress. All these differentiae are not only intelligible, but directly relate to the objects sought to be achieved by the Code. Insofar as Section 7, relatable to financial creditors, and Sections 8 and 9, which relate to operational creditors, are concerned, it is a fallacy to say that no notice is issued to the financial debtor on defaults made, as financial debtors are fully aware of the loan structure and the defaults that have been made. Further, this Court's judgment in *Innoventive Industries Ltd.* v. *ICICI Bank*[6] (*Innoventive Industries*) has made it clear that under Section 7(5) of the Code,

5 (2010) 11 SCC 1
1 *Madras Bar Assn.* v. *Union of India*, (2015) 8 SCC 583
6 (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356

the adjudicating authority, in being "satisfied" that there is a default, has to issue notice to the corporate debtor, hear the corporate debtor, and then adjudicate upon the same. The reason why disputes raised by financial debtors are not gone into at the stage of triggering the Code is because the evidence of financial debts are contained in the documents of information utilities, banks and financial institutions. Disputes which may be raised can be raised at the stage of filing of claims once the resolution process is underway. Also, by the very nature of financial debts, set-off and counterclaims by financial debtors are very rare and, in any case, wholly independent of the loan that has been granted to them. Insofar as operational creditors having no vote in the Committee of Creditors is concerned, this is because operational creditors are typically interested only in getting payment for supply of goods or services made by them, whereas financial creditors are typically involved in seeing that the entirety of their loan gets repaid, for which they are better equipped to go into the viability of corporate enterprises, both at the stage of grant of the loan and at the stage of default. Also, the interests of operational creditors, when a resolution plan is to be approved, are well looked after as the minimum that the operational creditors are to be paid is the liquidation value of assets. Apart from this, their interests are to be placed on a par with the interests of financial creditors, and if this is not done, then the adjudicating authority intervenes to reject or modify resolution plans until the same is done. In the 80 cases that have been resolved since the Code has come into force, figures were also shown to this Court to indicate that not only are the operational creditors paid before the financial creditors under the resolution plan, but that the initial recovery of what is owed to them is slightly higher than what is owed to financial creditors. Insofar as Section 12-A is concerned, they argued that once an application by a creditor is admitted by the adjudicating authority, the proceeding becomes a proceeding in rem and is no longer an individual proceeding but a collective proceeding. This being the case, it is important that when a resolution process is to begin and a Committee of Creditors is formed, it is that committee that is best equipped to deal with applications for withdrawal or settlement *after* admission of an insolvency petition. Ninety per cent of such creditors have been given this task as once the proceeding is in rem, to halt such proceeding, which is for the benefit of all creditors generally, can only be if all or most of them agree to the same.

11. The learned counsel argued that the resolution professional has no adjudicatory powers under the Code or the Regulations, but is only to collate information. Even when he exercises his discretion to exercise his best judgment in certain situations, he does so administratively, and is subject to an adjudicatory body overseeing the same. When it comes to Section 29-A of the Code, they argued that Section 29-A does not disturb any vested or existing rights, as a resolution applicant does not have any vested or existing rights that can be disturbed, as has been held in *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[7] (*ArcelorMittal*). Further, merely because this section relies on antecedent facts for its application, does not mean that it is retrospective. Also, Section 29-A subserves a very important object of the Code, which is to see

7 (2019) 2 SCC 1

that undesirable persons who are mentioned in all its clauses are rendered ineligible to submit resolution plans so that such persons may not come into the management of stressed corporate debtors. They also argued that Section 29-A is not aimed at only persons who have committed acts of malfeasance, but also persons who are otherwise unfit to be put in the saddle of the management of the corporate debtor, such as undischarged insolvents and persons who have been removed as Directors under Section 164 of the Companies Act, 2013 (for not filing financial statements or annual returns for any continuous period of 3 financial years, for example).

12. The learned counsel further argued that a period of one year is sufficient period within which a person, whose account has been declared NPA, should clear its dues. They referred to the RBI Regulations dealing with NPAs and stated that even before a person's account is declared NPA, a long rope is given for such person to clear off its debts. It is only when it does not do so, that its account is declared NPA in the first instance. Also, once the said guidelines are perused, it is clear that an account, which has been NPA for one year, is declared as substandard asset and it is for this reason that the one-year period is given in Section 29-A(*c*), which is based on reason, and is not arbitrary.

13. Shri C.U. Singh, appearing on behalf of Asset Reconstruction Company of India Ltd., referred to the pre-existing state of legislation before the Code was enacted, and referred in detail to how all such legislations had failed to produce the necessary results. He also relied upon extracts from the Insolvency Act, 1986 of the United Kingdom to buttress his point that worldwide, the Insolvency Acts have moved away from mere liquidation so as to first concentrate on reconstruction of corporate debtors. Also, according to him, Section 29-A is not a section aimed at malfeasance; it is aimed at rendering ineligible persons who are undesirable in the widest sense of the term i.e. persons who are unfit to take over the management of a corporate debtor.

Prologue: the pre-existing state of the law

14. Having heard the rival contentions, it is important to first clear the air on what was the background which led to the enactment of the Insolvency Code. The erstwhile regime which led to the enactment of the Insolvency Code was discussed by the Bankruptcy Law Reforms Committee (BLRC) in its Report dated 4-11-2015 as follows:

> "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. Given the conflicts between creditors and debtors in the resolution of insolvency as described in Section 3.2.2, the chances for consistency and efficiency in resolution are low when rights are separately defined. 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.

The uncertainty that these problems give rise to shows up in case law on matters of insolvency and bankruptcy in India. Judicial precedent is set by "case law" which helps flesh out the statutory laws. These may also, in some cases, pronounce new substantive law where the statute and precedent are silent. (Ravi, 2015) reviews judgments of the High Courts on BIFR cases, DRTs and DRATs, as well as a review of important judgments of the Supreme Court that have had a significant impact on the interpretation of existing insolvency legislation. The judgments reviewed are those after June 2002 when the SARFAESI Act came into effect. It is illustrative of both debtor and creditor led process of corporate insolvency, and reveals a matrix of fragmented and contrary outcomes, rather than coherent and consistent, being set as precedents.

In such an environment of legislative and judicial uncertainty, the outcomes on insolvency and bankruptcy are poor. World Bank (2014) reports that the average time to resolve insolvency is four years in India, compared to 0.8 years in Singapore and 1 year in London. Sengupta and Sharma, 2015 compare the number of new cases that file for corporate insolvency in the UK, which has a robust insolvency law, to the status of cases registered at the BIFR under SICA, 1985, as well as those filed for liquidation under the Companies Act, 1956. They compare this with the number of cases files in the UK, and find a significantly higher turnover in the cases that are filed and cleared through the insolvency process in the UK. If we are to bring financing patterns back on track with the global norm, we must create a legal framework to make debt contracts credible channels of financing.

This calls for a deeper redesign of the entire resolution process, rather than working on strengthening any single piece of it. India is not unusual in requiring this. In all countries, bankruptcy laws undergo significant changes over the period of two decades or more. For example, the insolvency resolution framework in the UK is the Insolvency Act, 1986, which was substantially modified with the Insolvency Act, 2000, and the Enterprise Act, 2002. The first Act for bankruptcy resolution in the US that lasted for a significant time was the Bankruptcy Act, 1889. This was followed by the 1938 Act, the Reform Act, 1978, the 1984 Act, the Act, 1994, a related Consumer Protection Act, 2005. Singapore proposed a bankruptcy reform in 2013, while there are significant changes that are being proposed in the US and the Italian bankruptcy framework this year in 2015. Several of these are structural reforms with fundamental implications on resolving insolvency."

15. BLRC went on to state:

"[.....] India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences. India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India.

* * *

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the 'calm period' can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

This same idea is found in FSLRC's (Financial Sector Legislative Reforms Commission) treatment of the failure of financial firms. The most important objective in designing a legal framework for dealing with firm failure is the need for speed."

16. The pre-existing scenario has been noticed in some of our judgments:

16.1. In *Madras Petrochem Ltd.* v. *BIFR*[8], this Court found: (SCC pp. 37-38, paras 40 & 43)

"*40.* ... The Eradi Committee Report relating to insolvency and winding up of companies dated 31-7-2000, observed that out of 3068 cases referred to BIFR from 1987 to 2000, all but 1062 cases have been disposed of. Out of the cases disposed of, 264 cases were revived, 375 cases were under negotiation for revival process, 741 cases were recommended for winding up, and 626 cases were dismissed as not maintainable. *These facts and figures speak for themselves and place a big question mark on the utility of the Sick Industrial Companies (Special Provisions) Act, 1985. The Committee further pointed out that effectiveness of the Sick Industrial Companies (Special Provisions) Act, 1985, as has been pointed out earlier, has been severely undermined by reason of the enormous delays involved in the disposal of cases by BIFR. (See Paras 5.8, 5.9 and 5.15 of the Report.) Consequently, the Committee recommended that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed and the*

8 (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478

provisions thereunder for revival and rehabilitation should be telescoped into the structure of the Companies Act, 1956 itself."

* * *

43. ... In fact, another interesting document is the Report on Trend and Progress of Banking in India 2011-2012 for the year ended 30-6-2012 submitted by Reserve Bank of India to the Central Government in terms of Section 36(2) of the Banking Regulation Act, 1949. In Table IV.14 the Report provides statistics regarding trends in non-performing assets bank-wise, group-wise. As per the said Table, the opening balance of non-performing assets in public sector banks for the year 2011-2012 was Rs 746 billion but the closing balance for 2011-2012 was Rs 1172 billion only. The total amount recovered through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 during 2011-2012 registered a decline compared to the previous year, but, even then, the amounts recovered under the said Act constituted 70% of the total amount recovered. The amounts recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 constituted only 28%. All this would go to show that the amounts that public sector banks and financial institutions have to recover are in staggering figures and at long last at least one statutory measure has proved to be of some efficacy. This Court would be loath to give such an interpretation as would thwart the recovery process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which Act alone seems to have worked to some extent at least." (emphasis supplied)

16.2. Similarly, in *Innoventive Industries*[6], this Court found: (SCC p. 422, para 13)

"*13.* 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. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia."

16.3. Further, this Court in *ArcelorMittal*[7] observed: (SCC pp. 69 & 71, paras 65-66)

"*65.* Previous legislation, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which made provision for rehabilitation of sick companies and repayment of loans availed by them,

6 *Innoventive Industries Ltd.* v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356
7 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1

were found to have completely failed. This was taken note of by our judgment in *Madras Petrochem Ltd.* v. *BIFR*[8]....

* * *

66. These two enactments were followed by the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. As has been noted hereinabove, amounts recovered under the said Act recorded improvement over the previous two enactments, but this was yet found to be inadequate."

Judicial hands-off qua economic legislation

17. In the United States, at one point of time, Justice Stephen Field's dissents†† of the 19th century were translated into majority opinions in the early 20th century. This was referred to as the Lochner era**, in which the US Supreme Court, over a period of 40 years, consistently struck down legislation which was economic in nature as such legislation did not, according to the Court, square with property rights. As a result, a large number of minimum wage laws, maximum hours of work in factories laws, child labour laws, etc. were struck down. The result, as is well known, is that President Roosevelt initiated a court-packing plan in which he sought to get authorisation from Congress to appoint additional Judges to the Supreme Court, who would have then overruled the Lochner line of precedents. As it turned out, that became unnecessary as Justice Roberts switched his vote so that a 5:4 majority from 1937 onwards upheld‡ economic legislation. It is important to note that the dissents of Justice Holmes and Justice Brandeis now became the law.

18. Holmes, J. had, in his dissent in *Lochner* v. *New York*[9], stated: (SCC OnLine US SC paras 48-49 : US pp. 75-76)

"*48*. This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that State constitutions and State laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some

8 (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478

†† **Ed.**: It appears that the reference is to the cases of *Munn* v. *Illinois*, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877) and *Mugler* v. *Kansas*, 1887 SCC OnLine US SC 282 : 31 L Ed 205 : 123 US 623 (1887)

** **Ed.**: It appears that the reference is to *Lochner* v. *New York*, 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905)

‡ **Ed.**: It appears that the reference is to *West Coast Hotel Co.* v. *Parrish*, 1937 SCC OnLine US SC 58 : 81 L Ed 703 : 300 US 379 (1937)

9 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905)

well-known writers, is interfered with by school laws, by the post office, by every State or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr Herbert Spencer's Social Statics. The other day, we sustained the Massachusetts vaccination law. *Jacobson* v. *Massachusetts*[10]. United States and State statutes and decisions cutting down the liberty to contract by way of combination are familiar to this Court. *Northern Securities Co.* v. *United States*[11]. Two years ago, we upheld the prohibition of sales of stock on margins or for future delivery, in the Constitution of California. *Otis* v. *Parker*[12]. The decision sustaining an eight-hour law for miners is still recent. *Holden* v. *Hardy*[13]. Some of these laws embody convictions or prejudices which Judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

49. General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."

19. Similarly, in *New State Ice Co.* v. *Liebmann*[14], Brandeis, J. echoed Holmes, J. as follows: (SCC OnLine US SC paras 48-49 : US pp. 310-11)

"*48*. ... The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science;

10 1905 SCC OnLine US SC 51 : 49 L Ed 643 : 197 US 11 (1905)
11 1904 SCC OnLine US SC 63 : 48 L Ed 679 : 193 US 197 (1904)
12 1903 SCC OnLine US SC 22 : 47 L Ed 323 : 187 US 606 (1903)
13 1898 SCC OnLine US SC 45 : 42 L Ed 780 : 169 US 366 (1898)
14 1932 SCC OnLine US SC 63 : 76 L Ed 747 : 285 US 262 (1932)

and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

49. To stay experimentation in things, social and economic, is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

20. The Lochner doctrine was finally buried in *Ferguson* v. *Skrupa*[15], where the Supreme Court held: (SCC OnLine US SC paras 5-8 : US pp. 728-33)

"*5*. Both the District Court in the present case and the Pennsylvania court in *Stone*[16] adopted the philosophy of *Adams* v. *Tanner*[17], and cases like it, that it is the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and, by so doing, violates due process. Under the system of Government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner, the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York*[9], outlawing "yellow dog" contracts, *Coppage* v. *Kansas*[18], setting minimum wages for women, *Adkins* v. *Children's Hospital*[19], and fixing the weight of loaves of bread, *Jay Burns Baking Co.* v. *Bryan*[20]. *This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time,*

15 1963 SCC OnLine US SC 71 : 10 L Ed 2d 93 : 372 US 726 (1963)
16 *Commonwealth* v. *Stone*, 191 Pa Super 117 : 155 A 2d 453 (1959)
17 1917 SCC OnLine US SC 168 : 61 L Ed 1336 : 244 US 590 (1917)
9 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905)
18 1915 SCC OnLine US SC 30 : 59 L Ed 441 : 236 US 1 (1915)
19 1923 SCC OnLine US SC 105 : 67 L Ed 785 : 261 US 525 (1923)
20 1924 SCC OnLine US SC 89 : 68 L Ed 813 : 264 US 504 (1924)

particularly by Mr Justice Holmes and Mr Justice Brandeis. Dissenting from the Court's invalidating a State statute which regulated the resale price of theatre and other tickets, Mr Justice Holmes said,

> 'I think the proper course is to recognize that a State Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain.

And, in an earlier case, he had emphasized that, 'The criterion of constitutionality is not whether we believe the law to be for the public good' [*Adkins* v. *Children's Hospital*[19], US at pp. 567 and 570 (dissenting opinion)].

6. The doctrine that prevailed in *Lochner*[9], *Coppage*[18], *Adkins*[19], *Burns*[20], and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. *We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws*. As this Court stated in a unanimous opinion in 1941, 'We are not concerned ... with the wisdom, need, or appropriateness of the legislation. [*Olsen* v. *Nebraska*[21], US at p. 246]' *Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to, 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure'* [*Sproles* v. *Binford*[22]]. It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law' [*Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*[23], US at p. 536].

7. In the face of our abandonment of the use of the "vague contours" [*Adkins* v. *Children's Hospital*[19], US at p. 535] of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner*[17] is as mistaken as would be adherence to *Adkins* v. *Children's Hospital*[19], overruled by *West Coast Hotel Co.* v. *Parrish*[24]. Not only has the philosophy of Adams been abandoned, but also this Court, almost 15 years ago, expressly pointed

19 1923 SCC OnLine US SC 105 : 67 L Ed 785 : 261 US 525 (1923)
9 *Lochner* v. *New York*, 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905)
18 *Coppage* v. *Kansas*, 1915 SCC OnLine US SC 30 : 59 L Ed 441 : 236 US 1 (1915)
20 *Jay Burns Baking Co.* v. *Bryan*, 1924 SCC OnLine US SC 89 : 68 L Ed 813 : 264 US 504 (1924)
21 1941 SCC OnLine US SC 99 : 85 L Ed 1305 : 313 US 236 (1941)
22 1932 SCC OnLine US SC 112 : 76 L Ed 1167 : 286 US 374 (1932)
23 1949 SCC OnLine US SC 2 : 93 L Ed 212 : 335 US 525 (1949)
17 1917 SCC OnLine US SC 168 : 61 L Ed 1336 : 244 US 590 (1917)
24 1937 SCC OnLine US SC 58 : 81 L Ed 703 : 300 US 379 (1937)

to another opinion of this Court as having "clearly undermined" Adams. [*Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*[23]]. We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. *We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' [Day-Brite Lighting Inc.* v. *Missouri*[25]*, US at p. 423] and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down State laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought' [Williamson* v. *Lee Optical of Oklahoma*[26]*, US at p. 488].* Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory". Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us, but with the body constituted to pass laws for the State of Kansas.

8. Nor is the statute's exception of lawyers a denial of equal protection of the laws to non-lawyers. Statutes create many classifications which do not deny equal protection; it is only "invidious discrimination" which offends the Constitution. The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him remedies existing under State laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act—advice which a non-lawyer cannot lawfully give him. If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it. We also find no merit in the contention that the Fourteenth Amendment is violated by the failure of the Kansas statute's title to be as specific as appellee thinks it ought to be under the Kansas Constitution." (emphasis supplied)

21. In this country, this Court in *R.K. Garg* v. *Union of India*[27] has held: (SCC pp. 690-91 & 705-06, paras 8 & 19)

"*8.* Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt

23 1949 SCC OnLine US SC 2 : 93 L Ed 212 : 335 US 525 (1949)
25 1952 SCC OnLine US SC 29 : 96 L Ed 469 : 342 US 421 (1952)
26 1955 SCC OnLine US SC 29 : 99 L Ed 563 : 348 US 483 (1955)
27 (1981) 4 SCC 675 : 1982 SCC (Tax) 30

with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey* v. *Doud*[28] where Frankfurter, J., said in his inimitable style:

> 'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.'

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; 'that exact wisdom and nice adaption of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. *Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid.* The courts cannot, as pointed out by the United States Supreme Court in *Secy. of Agriculture* v. *Central Roig Refining Co.*[29] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. *The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions.* If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

28 1957 SCC OnLine US SC 105 : 1 L Ed 2d 1485 : 354 US 457 (1957)
29 1950 SCC OnLine US SC 14 : 94 L Ed 381 : 338 US 604 (1950)

* * *

19. It is true that certain immunities and exemptions are granted to persons investing their unaccounted money in purchase of Special Bearer Bonds but that is an inducement which has to be offered for unearthing black money. Those who have successfully evaded taxation and concealed their income or wealth despite the stringent tax laws and the efforts of the Tax Department, are not likely to disclose their unaccounted money without some inducement by way of immunities and exemptions and it must necessarily be left to the legislature to decide what immunities and exemptions would be sufficient for the purpose. It would be outside the province of the Court to consider if any particular immunity or exemption is necessary or not for the purpose of inducing disclosure of black money. That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be least fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the Court not to hazard an opinion where even economists may differ. The Court must while examining the constitutional validity of a legislation of this kind, "be resilient, not rigid, forward looking, not static, liberal, not verbal" and the Court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States in *Munn* v. *Illinois*[30], namely, 'that courts do not substitute their social and economic beliefs for the judgment of legislative bodies'. *The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary*. The Court should constantly remind itself of what the Supreme Court of the United States said in *Metropolis Theater Co.* v. *City of Chicago*[31]: (SCC OnLine US SC para 12)

> *12*. ... The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere error of Government are not subject to our judicial review.

It is true that one or the other of the immunities or exemptions granted under the provisions of the Act may be taken advantage of by resourceful persons by adopting ingenious methods and devices with a view to avoiding or saving tax. But that cannot be helped because human ingenuity is so great when it comes to tax avoidance that it would be almost impossible to

30 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)
31 1913 SCC OnLine US SC 123 : 57 L Ed 730 : 228 US 61 (1913)

frame tax legislation which cannot be abused. Moreover, as already pointed out above, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is being utilised for tax evasion or avoidance not intended by the legislature, the Act can always be amended and the abuse terminated. We are accordingly of the view that none of the provisions of the Act is violative of Article 14 and its constitutional validity must be upheld." (emphasis supplied)

22. Likewise, in *Bhavesh D. Parish* v. *Union of India*[32], this Court held: (SCC pp. 486 & 487, paras 26 & 30)

"*26*. The services rendered by certain informal sectors of the Indian economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

* * *

30. Before we conclude there is another matter which we must advert to. It has been brought to our notice that Section 45-S of the Act has been challenged in various High Courts and a few of them have granted the stay of provisions of Section 45-S. When considering an application for staying the operation of a piece of legislation, and that too pertaining to economic reform or change, then the courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in staying the applicability of the same. Merely because a statute comes up for examination and some arguable point is raised, which persuades the courts to consider the controversy, the legislative will should not normally be put under suspension pending such consideration. It is now well settled that there is always a presumption in favour of the constitutional validity of any legislation, unless the same is set aside after final hearing and, therefore, the tendency to grant stay of legislation relating to economic reform, at the interim stage, cannot be understood. *The system of checks and balances has to be utilised in a balanced manner with the primary objective of accelerating economic*

32 (2000) 5 SCC 471

growth rather than suspending its growth by doubting its constitutional efficacy at the threshold itself." (emphasis supplied)

23. In *Directorate General of Foreign Trade* v. *Kanak Exports*[33], this Court has held: (SCC p. 293, para 109)

"*109*. Therefore, it cannot be denied that the Government has a right to amend, modify or even rescind a particular scheme. It is well settled that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore, its validity cannot be tested on any rigid prior considerations or on the application of any straitjacket formula. In *BALCO Employees' Union* v. *Union of India*[34], the Supreme Court held that laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature."

24. It is with this background, factual and legal, that the constitutional validity of the Insolvency and Bankruptcy Code, 2016 has to be viewed.

The raison d'être for the Insolvency and Bankruptcy Code

25. The Statement of Objects and Reasons for the Code have been referred to in *Innoventive Industries*[6] which states: (SCC pp. 421-22, para 12)

"*12*. … The Statement of Objects and Reasons of the Code reads as under:

'*Statement of Objects and Reasons*.—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 Debts 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.*

33 (2016) 2 SCC 226
34 (2002) 2 SCC 333
6 *Innoventive Industries Ltd.* v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356

2. *The objective of the Insolvency and Bankruptcy Code, 2015 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 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 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 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.

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, the Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.

5. The Code seeks to achieve the above objectives.' " (emphasis in original)

26. The Preamble of the Code states as follows:

"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."

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*[7] 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.

Appointment of members of NCLT and NCLAT not contrary to this Court's judgments

29. Shri Rohatgi has argued that contrary to the judgments in *Madras Bar Assn. (1)*[5] and *Madras Bar Assn. (3)*[1], Section 412(2) of the Companies

7 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
5 *Union of India* v. *Madras Bar Assn.*, (2010) 11 SCC 1
1 *Madras Bar Assn.* v. *Union of India*, (2015) 8 SCC 583

Act, 2013 continued on the statute book, as a result of which, the two judicial members of the Selection Committee get outweighed by three bureaucrats.

30. On 3-1-2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act, 2013 was amended as follows:

> "**412.** ***Selection of Members of Tribunal and Appellate Tribunal.***—(1) * * *
>
> (2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of—
>
> (*a*) Chief Justice of India or his nominee— Chairperson;
>
> (*b*) a Senior Judge of the Supreme Court or Chief Justice of High Court—Member;
>
> (*c*) Secretary in the Ministry of Corporate Affairs—Member; and
>
> (*d*) Secretary in the Ministry of Law and Justice—Member.
>
> (2-A) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote."

31. This was brought into force by a Notification dated 9-2-2018. However, an additional affidavit has been filed during the course of these proceedings by the Union of India. This affidavit is filed by one Dr Raj Singh, Regional Director (Northern Region) of the Ministry of Corporate Affairs. This affidavit makes it clear that, acting in compliance with the directions of the Supreme Court in the aforesaid judgments, a Selection Committee was constituted to make appointments of Members of NCLT in the year 2015 itself. Thus, by an order dated 27-7-2015, (*i*) Justice Gogoi (as he then was), (*ii*) Justice Ramana, (*iii*) Secretary, Department of Legal Affairs, Ministry of Law and Justice, and (*iv*) Secretary, Corporate Affairs, were constituted as the Selection Committee. This Selection Committee was reconstituted on 22-2-2017 to make further appointments. In compliance of the directions of this Court, advertisements dated 10-8-2015 were issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of NCLT and NCLAT have been appointed. This being the case, we need not detain ourselves any further with regard to the first submission of Shri Rohatgi.

NCLAT Bench only at Delhi

32. It has been argued by Shri Rohatgi that as per our judgment in *Madras Bar Assn. (2)*[2], para 123 states as follows: (SCC p. 212)

> "*123.* We shall first examine the validity of Section 5 of the NTT Act. The basis of challenge to the above provision has already been narrated by us while dealing with the submissions advanced on behalf of the petitioners with reference to the fourth contention. According to the learned counsel for the petitioners, Section 5(2) of the NTT Act mandates that NTT would ordinarily have its sittings in the National Capital Territory of Delhi. According to the petitioners, the aforesaid mandate would deprive

2 *Madras Bar Assn.* v. *Union of India*, (2014) 10 SCC 1

the litigating assessee the convenience of approaching the jurisdictional High Court in the State to which he belongs. An assessee may belong to a distant/remote State, in which eventuality, he would not merely have to suffer the hardship of travelling a long distance, but such travel would also entail uncalled for financial expense. Likewise, a litigant assessee from a far-flung State may find it extremely difficult and inconvenient to identify an advocate who would represent him before NTT, since the same is mandated to be ordinarily located in the National Capital Territory of Delhi. Even though we have expressed the view, that it is open to Parliament to substitute the appellate jurisdiction vested in the jurisdictional High Courts and constitute courts/tribunals to exercise the said jurisdiction, we are of the view, that while vesting jurisdiction in an alternative court/tribunal, it is imperative for the legislature to ensure that redress should be available with the same convenience and expediency as it was prior to the introduction of the newly created court/tribunal. *Thus viewed, the mandate incorporated in Section 5(2) of the NTT Act to the effect that the sittings of NTT would ordinarily be conducted in the National Capital Territory of Delhi, would render the remedy inefficacious, and thus unacceptable in law. The instant aspect of the matter was considered by this Court with reference to the Administrative Tribunals Act, 1985 in S.P. Sampath Kumar case*[35] and *L. Chandra Kumar case*[36]*, wherein it was held that permanent Benches needed to be established at the seat of every jurisdictional High Court. And if that was not possible, at least a Circuit Bench required to be established at every place where an aggrieved party could avail of his remedy. The position on the above issue is no different in the present controversy. For the above reason, Section 5(2) of the NTT Act is in clear breach of the law declared by this Court.*" (emphasis supplied)

33. The learned Attorney General has assured us that this judgment will be followed and Circuit Benches will be established as soon as it is practicable. In this view of the matter, we record this submission and direct the Union of India to set up Circuit Benches of NCLAT within a period of 6 months from today.

The Tribunals are functioning under the wrong Ministry

34. Shri Mukul Rohatgi argued that in *Madras Bar Assn. (1)*[5], para 120(*xii*) specifically reads as follows: (SCC pp. 65-66)

> "*120.* We may tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:
>
> * * *
>
> (*xii*) The administrative support for all Tribunals should be from the Ministry of Law and Justice. Neither the Tribunals nor their members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned."

35 *S.P. Sampath Kumar* v. *Union of India*, (1987) 1 SCC 124
36 *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577
5 *Union of India* v. *Madras Bar Assn.*, (2010) 11 SCC 1

Even though eight years have passed since the date of this judgment, the administrative support for these tribunals continues to be from the Ministry of Corporate Affairs. This needs to be rectified at the earliest.

35. However, the learned Attorney General pointed out Article 77(3) of the Constitution of India and *Delhi International Airport Ltd.* v. *International Lease Finance Corpn.*[37], which state that once rules of business are allocated among various Ministries, such allocation is mandatory in nature. According to him, therefore, the rules of business, having allocated matters which arise under the Insolvency Code to the Ministry of Corporate Affairs, are mandatory in nature and have to be followed.

36. It is obvious that the rules of business, being mandatory in nature, and having to be followed, are to be so followed by the executive branch of the Government. As far as we are concerned, we are bound by the Constitution Bench judgment in *Madras Bar Assn. (1)*[5]. This statement of the law has been made eight years ago. It is high time that the Union of India follow, both in letter and spirit, the judgment of this Court.

Classification between financial creditor and operational creditor neither discriminatory, nor arbitrary, nor violative of Article 14 of the Constitution of India

37. The tests for violation of Article 14 of the Constitution of India, when legislation is challenged as being violative of the principle of equality, have been settled by this Court time and again. Since equality is only among equals, no discrimination results if the Court can be shown that there is an intelligible differentia which separates two kinds of creditors so long as there is some rational relation between the creditors so differentiated, with the object sought to be achieved by the legislation. This aspect of Article 14 has been laid down in judgments too numerous to cite, from the very inception.

38. Another development of the law is that legislation can be struck down as being manifestly arbitrary. This has been laid down by the recent Constitution Bench decision in *Shayara Bano*[3] as follows: (SCC pp. 95-99, paras 95-97 & 100-01)

> "*95.* On a reading of this judgment in *Natural Resources Allocation case*[38], it is clear that this Court did not read *McDowell*[39] as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and *Ajay Hasia*[40] in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity.

37 (2015) 8 SCC 446
5 *Union of India* v. *Madras Bar Assn.*, (2010) 11 SCC 1
3 *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277
38 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1
39 *State of A.P.* v. *McDowell & Co.*, (1996) 3 SCC 709
40 *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258

And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary" i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.

96. Another Constitution Bench decision in *Subramanian Swamy* v. *CBI*[41] dealt with a challenge to Section 6-A of the Delhi Special Police Establishment Act, 1946. This section was ultimately struck down as being discriminatory and hence violative of Article 14. A specific reference had been made to the Constitution Bench by the reference order in *Subramanian Swamy* v. *CBI*[42] and after referring to several judgments including *Ajay Hasia*[40], *Mardia Chemicals*[43], *Malpe Vishwanath Acharya*[44] and *McDowell*[39], the reference, inter alia, was as to whether arbitrariness and unreasonableness, being facets of Article 14, are or are not available as grounds to invalidate a legislation.

97. After referring to the submissions of the counsel, and several judgments on the discrimination aspect of Article 14, this Court held: (*Subramanian Swamy case*[41], SCC pp. 721-22, paras 48-49)

> '*48.* In *E.P. Royappa*[45], it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p. 38)
>
> > "*85.* ... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."
>
> *Court's approach*
>
> *49.* Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs

41 (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36
42 (2005) 2 SCC 317 : 2005 SCC (L&S) 241
40 *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258
43 *Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311
44 *Malpe Vishwanath Acharya* v. *State of Maharashtra*, (1998) 2 SCC 1
39 *State of A.P.* v. *McDowell & Co.*, (1996) 3 SCC 709
45 *E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165

to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.'

* * *

100. To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution. In *COAI* v. *TRAI*[46], this Court referred to earlier precedents, and held: (SCC pp. 736-37, paras 42-44)

'*Violation of fundamental rights*

42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. [See *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[47], SCC at p. 689, para 75.]

43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In *Khoday Distilleries Ltd.* v. *State of Karnataka*[48], this Court held: (SCC p. 314, para 13)

"*13*. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(*g*) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. *The tests of arbitrary*

46 (2016) 7 SCC 703
47 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
48 (1996) 10 SCC 304

action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[47], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. *A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; 'unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary'.* Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such rules; they are unreasonable and ultra vires'. *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.*"

44. Also, in *Sharma Transport* v. *State of A.P.*[49], this Court held: (SCC pp. 203-04, para 25)

> "*25.* ... The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone." ' (emphasis in original)

101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[47] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We

47 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
49 (2002) 2 SCC 188

are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

This judgment has since been followed in *Gopal Jha* v. *Supreme Court of India*[50] (at para 27); *Indian Young Lawyers Assn.* v. *State of Kerala*[51]; *Joseph Shine* v. *Union of India*[52] (at paras 103, 164, 166); *K.S. Puttaswamy (Aadhaar-5 J.)* v. *Union of India*[53] (at paras 104, 105, 474, 911, 1418-20); *Navtej Singh Johar* v. *Union of India*[54] (at paras 253, 353, 411, 637.9); *Lok Prahari* v. *State of U.P.*[55] (at para 35); and *Nikesh Tarachand Shah* v. *Union of India*[56] (at para 23).

39. Sections 5(7) and 5(8) of the Code define "financial creditor" and "financial debt" as follows:

> "**5.** ***Definitions***.—In this Part, unless the context otherwise requires—
>
> * * *
>
> (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;
>
> (8) "**financial debt**" means a debt along with 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 dematerialised 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;
>
> *Explanation*.—For the purposes of this sub-clause—

50 (2019) 13 SCC 161 : 2018 SCC OnLine SC 2197
51 2018 SCC OnLine SC 1690
52 (2019) 3 SCC 39
53 (2019) 1 SCC 1
54 (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1
55 (2018) 6 SCC 1 : (2018) 3 SCC (Civ) 389 : (2018) 3 SCC (Cri) 73 : (2018) 2 SCC (L&S) 162
56 (2018) 11 SCC 1 : (2018) 2 SCC (Cri) 302

(*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;"

40. Section 5(20) defines "operational creditor" as follows:

"**5.** ***Definitions***.—In this Part, unless the context otherwise requires—

* * *

(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;"

41. Section 7 of the Code states:

"**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.

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).

(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."

42. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.

43. A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a "default" occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the adjudicating authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the adjudicating authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that

at this stage, if an application is filed before the adjudicating authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected.

44. The argument of the learned counsel on behalf of the petitioners is that in point of fact, there is no intelligible differentia having relation to the objects sought to be achieved by the Code between financial and operational creditors and indeed, nowhere in the world has this distinction been made. The BLRC Report presents what according to it is the rationale for the reason to differentiate between financial and operational creditors. The Report states as follows:

> "While both types of creditors can trigger the IRP under the Code, the evidence presented to trigger varies. Since financial creditors have electronic records of the liabilities filed in the Information Utilities of Section 4.3, incontrovertible event of default on any financial credit contract can be readily verifiable by accessing this system. The evidence submitted of default by the debtor to the operational creditor may be in either electronic or physical form, since all operational creditors may or may not have electronic filings of the debtors' liability. Till such time that the Information Utilities are ubiquitous, financial creditors may establish default in a manner similar to operational creditors."

45. Similarly, the Insolvency and Bankruptcy Bill in the Notes on Clause 8 states:

> "Clause 8 lays down the procedure for the initiation of the corporate insolvency resolution process by an operational creditor. This procedure differs from the procedure applicable to financial creditors as operational debts (such as trade debts, salary or wage claims) tend to be small amounts (in comparison to financial debts) or are recurring in nature and may not be accurately reflected on the records of information utilities at all times. The possibility of disputed debts in relation to operational creditors is also higher in comparison to financial creditors such as banks and financial institutions. Accordingly, the process for initiation of the insolvency resolution process differs for an operational creditor.... This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It may also facilitate informal negotiations between such creditors and the corporate debtor, which may result in a restructuring of the debt outside the formal proceedings."

46. However, the Insolvency Law Committee (ILC), in its Report of March 2018 dealt with debenture-holders and fixed deposit-holders, who are also financial creditors, and are numerous. The Report then went on to state:

> "10.6. For certain securities, a trustee or an agent may already be appointed as per the terms of the security instrument. For example, a debenture trustee would be appointed if debentures exceeding 500 have been issued [Section 71(5), Companies Act, 2013] or if secured debentures

are issued [Rule 18(1)(*c*), Companies (Share Capital and Debenture) Rules, 2014]. Such creditors may be represented through such pre-appointed trustees or agents. For other classes of creditors which exceed a certain threshold in number, like home buyers or security-holders for whom no trustee or agent has already been appointed under a debt instrument or otherwise, an insolvency professional (other than IRP) shall be appointed by NCLT on the request of IRP. It is to be noted that as the agent or trustee or insolvency professional i.e. the authorised representative for the creditors discussed above and executors, guarantors, etc. as discussed in Para 9 of this Report, shall be a part of the CoC, they cannot be related parties to the corporate debtor in line with the spirit of proviso to Section 21(2).

* * *

10.8. In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code to mandate representation in meetings of security-holders, deposit-holders, and all other classes of financial creditors which exceed a certain number, through an authorised representative. This can be done by adding a new provision to Section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditors to the extent of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised representative of the financial creditors, a specific provision laying down the rights and duties of such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through regulations to enable efficient voting by the representative. Also, Regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to a large number of creditors voting at the same time."

47. Given this Report, the Code was amended and Sections 21(6-A) and 21(6-B) were added, which are set out hereinbelow:

"**21.** ***Committee of Creditors***.—(1)-(6) * * *

(6-A) 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.

(6-B) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs."

48. Also, Regulations 16-A and 16-B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the CIRP Regulations) were added, with effect from 4-7-2018, as follows:

"**16-A.** ***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.

(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.

16-B. ***Committee with only creditors in a class***.—Where the corporate debtor has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the authorised representative(s)."

49. It is obvious that debenture-holders and persons with home loans may be numerous and, therefore, have been statutorily dealt with by the aforesaid change made in the Code as well as the Regulations. However, as a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor.

50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be

substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

Notice, hearing and set-off or counterclaim qua financial debts

52. This Court, in *Innoventive Industries*[6] stated as follows: (SCC pp. 437-39, paras 27-30)

> "*27.* The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency 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. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability or obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.
>
> *28.* When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to *any* financial creditor of the corporate debtor—it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in

6 *Innoventive Industries Ltd.* v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356

Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing —i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, 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."

53. Section 3(9)(*c*) read with Section 214(*e*) of the Code are important and are set out as under:

"**3.** ***Definitions***.—In this Code, unless the context otherwise requires—

* * *

(9) "**core services**" means services rendered by an information utility for—

* * *

(*c*) authenticating and verifying the financial information submitted by a person; and

* * *

214. ***Obligations of information utility***.—For the purposes of providing core services to any person, every information utility shall—

* * *

(*e*) get the information received from various persons authenticated by all concerned parties before storing such information;"

54. It is clear from these sections that information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 (Information Utilities Regulations), are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information.

55. Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt:

(*a*) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;

(*b*) Certificate of registration of charge issued by the Registrar of Companies (if the corporate debtor is a company);

(*c*) Order of a court, tribunal or arbitral panel adjudicating on the default;

(*d*) Record of default with the information utility;

(*e*) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;

(*f*) The latest and complete copy of the financial contract reflecting all amendments and waivers to date;

(*g*) A record of default as available with any credit information company;

(*h*) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891.

56. Rule 4(3) of the aforesaid Rules states as follows:

"**4.** ***Application by financial creditor***.—(1)-(2) * * *

(3) The applicant shall dispatch forthwith, a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor."

57. Section 420 of the Companies Act, 2013 states as follows:

"**420.** ***Orders of Tribunal.***—(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, 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.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned."

58. Rules 11, 34 and 37 of the National Company Law Tribunal Rules, 2016 (NCLT Rules) state as follows:

"**11.** ***Inherent powers.***—Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

* * *

34. ***General procedure.***—(1) In a situation not provided for in these Rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.

(2) The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT 4.

(3) Every petition or application or reference shall be filed in form as provided in Form No. NCLT 1 with attachments thereto accompanied by Form No. NCLT 2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT 1 accompanied by such attachments thereto along with Form No. NCLT 3.

(4) Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT 6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT 5.

* * *

37. ***Notice to Opposite Party.***—(1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the notice. Such notice in Form No. NCLT 5 shall be accompanied by a copy of the application with supporting documents.

(2) If the respondent does not appear on the date specified in the notice in Form No. NCLT 5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex parte to dispose of the application.

(3) If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the

Registry before the date of hearing and such reply and copies of documents shall form part of the record."

A conjoint reading of all these Rules makes it clear that at the stage of the adjudicating authority's satisfaction under Section 7(5) of the Code, the corporate debtor is served with a copy of the application filed with the adjudicating authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application.

59. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties. Thus, Section 65 of the Code reads as follows:

> "**65.** ***Fraudulent or malicious initiation of proceedings.***—(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.
>
> (2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."

60. Also, punishment is prescribed under Section 75 for furnishing false information in an application made by a financial creditor which further deters a financial creditor from wrongly invoking the provisions of Section 7. Section 75 reads as under:

> "**75.** ***Punishment for false information furnished in application.***— Where any person furnishes information in the application made under Section 7, which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material, such person shall be punishable with fine which shall not be less than one lakh rupees, but may extend to one crore rupees."

61. Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way—amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the adjudicating authority under Section 60.

62. Section 60(5)(*c*) reads as follows:

> "**60.** ***Adjudicating authority for corporate persons.***—(1)-(4) * * *
>
> (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—
>
> * * *

(*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."

63. Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission of claims during the resolution plan. Also, there is nothing in the Code which interdicts the corporate debtor from pursuing such counterclaims in other judicial fora. Form C dealing with submission of claims by financial creditors in the CIRP Regulations states thus:

"**FORM C**

SUBMISSION OF CLAIM BY FINANCIAL CREDITORS

[Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

[Date]

From

[Name and address of the financial creditor, including address of its registered office and principal office]

To

The Interim Resolution Professional/Resolution Professional,

[Name of the Insolvency Resolution Professional/Resolution Professional]

[Address as set out in public announcement]

Subject: Submission of claim and proof of claim.

Madam/Sir,

[Name of the financial creditor], hereby submits this claim in respect of the corporate insolvency resolution process of [name of corporate debtor]. The details for the same are set out below:

Relevant Particulars		
	Name of the financial creditor	
	Identification number of the financial creditor (If an incorporated body, provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)	
	Address and email address of the financial creditor for correspondence	
	Total amount of claim (including any interest as at the insolvency commencement date)	
	Details of documents by reference to which the debt can be substantiated	
	Details of how and when debt incurred	
	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
	Details of any security held, the value of the security, and the date it was given	

	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
	List of documents attached to this claim in order to prove the existence and non-payment of claim due to the financial creditor	
(Signature of financial creditor or person authorised to act on his behalf) [Please enclose the authority if this is being submitted on behalf of the financial creditor]		
Name in BLOCK LETTERS		
Position with or in relation to creditor		
Address of person signing		

*PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

DECLARATION

I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows:

1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the ... day of ... 20..., actually indebted to me for a sum of Rs [insert amount of claim].

2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below:

[Please list the documents relied on as evidence of claim].

3. The said documents are true, valid and genuine to the best of my knowledge, the information and belief and no material facts have been concealed therefrom.

4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set off against the claim].

5. I am/I am not a related party of the corporate debtor, as defined under Section 5(24) of the Code.

6. I am eligible to join Committee of Creditors by virtue of proviso to Section 21(2) of the Code even though I am a related party of the corporate debtor.

Date:

Place:

(Signature of the claimant)

VERIFICATION

I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this ... day of ..., 20...

(Signature of claimant)

[*Note*: In the case of company or limited liability partnership, the declaration and verification shall be made by the Director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity.]"

64. The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(*e*) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation. Four policy reasons have been stated by the learned Solicitor General for this shift in legislative policy:

64.1. *First* is predictability and certainty.

64.2. *Secondly*, the paramount interest to be safeguarded is that of the corporate debtor and admission into the insolvency resolution process does not prejudice such interest but, in fact, protects it.

64.3. *Thirdly*, in a situation of financial stress, the cause of default is not relevant; protecting the economic interest of the corporate debtor is more relevant.

64.4. *Fourthly*, the trigger that would lead to liquidation can only be upon failure of the resolution process.

65. In this context, it is important to differentiate between "claim", "debt" and "default". Each of these terms is separately defined as follows:

"**3.** ***Definitions***.—In this Code, unless the context otherwise requires—

* * *

(6) "**claim**" means—

(*a*) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(*b*) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

* * *

(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;

(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;"

Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not

paid by the debtor. It is for this reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear.

Sections 21 and 24 and Article 14: operational creditors have no vote in the Committee of Creditors

66. Section 21 of the Code reads as follows:

"**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 (6-A) 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 (6-A), 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—

(*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.

(6-A) 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.

(6-B) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (6-A) 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 (6-A).

(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."

67. Sections 24(3), 24(4) and 28, which are also material, read as follows:

"**24.** ***Meeting of Committee of Creditors***.—(1)-(2) * * *

(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 (6-A) 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;

(*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.

* * *

28. ***Approval of Committee of Creditors for certain actions***.—(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the Committee of Creditors, namely—

(*a*) raise any interim finance in excess of the amount as may be decided by the Committee of Creditors in their meeting;

(*b*) create any security interest over the assets of the corporate debtor;

(*c*) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(*d*) record any change in the ownership interest of the corporate debtor;

(*e*) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the Committee of Creditors in their meeting;

(*f*) undertake any related party transaction;

(*g*) amend any constitutional documents of the corporate debtor;

(*h*) delegate its authority to any other person;

(*i*) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(*j*) make any change in the management of the corporate debtor or its subsidiary;

(*k*) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(*l*) make changes in the appointment or terms of contract of such personnel as specified by the Committee of Creditors; or

(*m*) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the Committee of Creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the Committee of Creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the Committee of Creditors in the manner as required in this section, such action shall be void.

(5) The Committee of Creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code. Approval of Committee of Creditors for certain actions."

68. In this regard, the BLRC Report states:

"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 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.

* * *

The second is that any proposed solution must explicitly account for the IRP costs and the liabilities of the operational creditors within a reasonable period from the approval of the solution if it is approved. The Committee argues that there must be a counterbalance to operational creditors not having a vote on the Creditors Committee. Thus, they concluded that the dues of the operational creditors must have priority in being paid as an explicit part of the

proposed solution. This must be ensured by the RP in evaluating a proposal before bringing it to the Creditors Committee. If there is ambiguity about the coverage of the liability in the information memorandum that the RP presents to garner solutions, then the RP must ensure that this is clearly stated and accounted for in the proposed solution."

69. The Joint Parliamentary Committee Report of April 2016 (the Joint Parliamentary Committee Report) on the Insolvency and Bankruptcy Code also agreed with these observations but modified Section 24 so as to permit operational creditors to be present at the meetings of the Committee of Creditors, albeit without voting rights, if operational creditors aggregate to 10% or more of the total debts owed by the corporate debtor.

70. The Joint Parliamentary Committee Report also opined as follows:

"**21.** ***Role of Operational Creditors — Clause 24***

Some of the stakeholders in the memorandum/views furnished before the Committee were of the opinion that whereas operational creditor has right to make application for initiation of corporate insolvency resolution process, operational creditors like workmen, employees, suppliers have not been given any representation in the Committee of Creditors which is pivotal in whole resolution process. In this regard, one of the stakeholders has suggested that Committee of Creditors may contain operational creditors as well, with some thresholds.

In this context, while appreciating that the operational creditors are important stakeholders in a company, the Committee took note of the rationale of not including operational creditors in the Committee of Creditors as indicated in notes on Clause 21 appended with the Bill which states as under—

> 'The committee has to be composed of members who have the capability to assess the commercial viability of the corporate debtor and who are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor. Operational creditors are typically not able to decide on matters relating to commercial viability of the corporate debtor, nor are they typically willing to take the risk of restructuring their debts in order to make the corporate debtor a going concern. Similarly, financial creditors who are also operational creditors will be given representation on the Committee of Creditors only to the extent of their financial debts. Nevertheless, in order to ensure that the financial creditors do not treat the operational creditors unfairly, any resolution plan must ensure that the operational creditors receive an amount not less than the liquidation value of their debt (assuming the corporate debtor were to be liquidated).
>
> All decisions of the Committee shall be taken by a vote of not less than seventy-five per cent of the voting share. In the event there are no financial creditors for a corporate debtor, the composition and decision-making processes of the corporate debtor shall be specified by the Insolvency and Bankruptcy Board. The Committee shall also have the power to call for information from the resolution professional.'

The Committee after due deliberations are of the view that, if not voting rights, operational creditors at least should have presence in the Committee of Creditors to present their views/concerns on important issues considered at the meetings so that their views/concerns are taken into account by the Committee of Creditors while finalising the resolution plan." (emphasis supplied)

71. The original Insolvency and Bankruptcy Bill did not allow operational creditors to attend the Committee of Creditors at all. This Bill was amended whilst in the form of a Bill, the Joint Parliamentary Committee deciding as follows:

"... The Committee, therefore, decided to modify Clauses 24(3) and (4) as given under:

Modified Clause 24(3)—

'The resolution professional shall give notice of each meeting of the Committee of Creditors to—

(*a*) members of Committee of Creditors;

(*b*) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(*c*) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.'

Modified Clause 24(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.'

72. What is also of importance is the fact that Expert Committees have been set up by the Government to oversee the working of the Code. Thus, the report of the Insolvency Law Committee of March 2018, after examining the working of the Code, thought it fit not to amend the Code so as to give operational creditors the right to vote. This was stated as follows:

"This rationale still holds true, and thus it was deemed fit not to amend the constitution of the CoC. Further, operational creditors whose aggregate dues are not less than ten per cent of the debt have a right to attend the meetings of the CoC. Also, under the resolution plan, they are guaranteed at least the liquidation value.

...The Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code."

73. Under the Code, the Committee of Creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the

viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The Committee of Creditors is required to evaluate the resolution plan on the basis of feasibility and viability. Thus, Section 30(4) states:

> "**30.** ***Submission of resolution plan.***—(1)-(3) * * *
>
> (4) The Committee of Creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, 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, where the resolution applicant is ineligible under Section 29-A 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 29-A, 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 29-A:
>
> 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:
>
> Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ordinance 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."

74. It is important to bear in mind that once the resolution plan is approved by the Committee of Creditors and thereafter by the adjudicating authority, the aforesaid plan is binding on all stakeholders as follows:

> "**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, guarantors and other stakeholders involved in the resolution plan:
>
> 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."

75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before

sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

76. Quite apart from this, the United Nations Commission on International Trade Law, in its *Legislative Guide on Insolvency Law* (the UNCITRAL Guidelines) recognises the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

"*Ensuring equitable treatment of similarly situated creditors*

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by *UNCITRAL Legislative Guide on Insolvency Law* ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganisation and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided."

77. NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the Committee of Creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(*b*) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 5-10-2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

"**38.** ***Mandatory contents of the resolution plan.***—(1) A resolution plan shall identify specific sources of funds that will be used to pay the—

(*a*) insolvency resolution process costs and provide that the insolvency resolution process costs, to the extent unpaid, will be paid in priority to any other creditor;

(*b*) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority; and

(*c*) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan."

Post amendment, Regulation 38 reads as follows:

"**38.** ***Mandatory contents of the resolution plan.***—(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) 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."

The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors.

78. For all the aforesaid reasons, we do not find that operational creditors are discriminated against or that Article 14 has been infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness.

Section 12-A is not violative of Article 14

79. Section 12-A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 6-6-2018. It reads as follows:

"**12-A.** ***Withdrawal of application admitted under Sections 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."

80. The ILC Report of March 2018, which led to the insertion of Section 12-A, stated as follows:

"29.1. Under Rule 8 of the CIRP Rules, NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted [*Lokhandwala Kataria Construction (P) Ltd.*

v. *Nisus Finance and Investment Managers LLP*[57]; *Mothers Pride Dairy India (P) Ltd.* v. *Portrait Advertising and Marketing (P) Ltd.*[58]; *Uttara Foods and Feeds (P) Ltd.* v. *Mona Pharmachem*[4]]. This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that "*all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.*" Thus, it was agreed that once CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.

29.2. On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent. It was specifically discussed that Rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage [as observed by the Hon'ble Supreme Court in *Uttara Foods and Feeds (P) Ltd.* v. *Mona Pharmachem*[4]] and even otherwise, as the issue can be specifically addressed by amending Rule 8 of the CIRP Rules." (emphasis in original)

Before this section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by NCLT or NCLAT.

81. Regulation 30-A of the CIRP Regulations states as under:

"**30-A.** ***Withdrawal of application***.—(1) An application for withdrawal under Section 12-A 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 36-A.

(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 per cent voting share, the resolution professional shall submit the application under

57 (2018) 15 SCC 589
58 2017 SCC OnLine SC 1789
4 (2018) 15 SCC 587

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)."

This Court, by its order dated 14-12-2018 in *Brilliant Alloys (P) Ltd.* v. *S. Rajagopal*[59], has stated that Regulation 30-A(1) is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36-A.

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.

Evidence provided by private information utilities: only prima facie evidence of default

84. A frontal attack was made by Shri Mukul Rohatgi on the ground that private information utilities that have been set up are not governed by proper norms. Also, the evidence by way of loan default contained in the records of

59 2018 SCC OnLine SC 3154

such utility cannot be conclusive evidence of what is stated therein. The BLRC Report had stated:

> "Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court.... Hence, the Committee envisions a competitive industry of "information utilities" who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay."

85. The setting up of information utilities was preceded by a regime of information companies which were referred to as credit information companies (CICs), as recommended by the Siddiqui Working Group in 1999. The Attorney General pointed out, in his written submission, that:

> "In 2013, RBI constituted another committee under the chairmanship of Aditya Puri, MD, HDFC Bank to examine reporting formats used by CICs and other related issues. The Committee's report led to the standardisation of data formats for reporting corporate, consumer and MFI data by all credit institutions and streamlining the process of data submission by credit institutions to CICs. In 2015, all credit institutions were directed by RBI to become members of all CICs and submit current and historical data about specified borrower to them and to update it regularly.
>
> The purpose of setting up the above regime of information utilities was to reduce information asymmetry for improved credit risk assessment and to improve recovery processes.
>
> The setting up of IUs marks a shift in the above position as not only is the information with IUs used to reduce information asymmetry, but it is also to be treated as prima facie evidence of the transaction for the purpose of IBC proceedings. This assists in improving the timelines for the resolution process."

86. The Information Utilities Regulations, in particular Regulations 20 and 21, make it clear that on receipt of information of default, an information utility shall expeditiously undertake the process of authentication and verification of information. Regulations 20 and 21 read as follows:

> "**20.** ***Acceptance and receipt of information***.—(1) An information utility shall accept information submitted by a user in Form C of the Schedule.
>
> (2) On receipt of the information submitted under sub-regulation (1), the information utility shall—
>
> (*a*) assign a unique identifier to the information, including records of debt;
>
> (*b*) acknowledge its receipt, and notify the user of—
>
> (*i*) the unique identifier of the information;
>
> (*ii*) the terms and conditions of authentication and verification of information; and

(*iii*) the manner in which the information may be accessed by other parties.

21. ***Information of default.***—(1) On receipt of information of default, an information utility shall expeditiously undertake the processes of authentication and verification of the information.

(2) On completion of the processes of authentication and verification under sub-regulation (1), the information utility shall communicate the information of default, and the status of authentication to registered users who are—

(*a*) creditors of the debtor who has defaulted;

(*b*) parties and sureties, if any, to the debt in respect of which the information of default has been received."

87. The aforesaid Regulations also make it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, the utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, as has been conceded by the learned Attorney General, is only prima facie evidence of default, which is rebuttable by the corporate debtor, makes it clear that the challenge based on this ground must also fail.

Resolution professional has no adjudicatory powers

88. It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows:

"**18.** ***Duties of interim resolution professional.***—(1) 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, the term "assets" shall not include the following, namely—

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

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

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

89. Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim as follows:

"**10.** ***Substantiation of claims***.—The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

* * *

12. ***Submission of proof of claims***.—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(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.

(3) Where the creditor in sub-regulation (2) is a financial creditor under Regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

13. ***Verification of claims***.—(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be—

(*a*) available for inspection by the persons who submitted proofs of claim;

(*b*) available for inspection by members, partners, Directors and guarantors of the corporate debtor;

(*c*) displayed on the website, if any, of the corporate debtor;

(*d*) filed with the adjudicating authority; and

(*e*) presented at the first meeting of the committee.

14. ***Determination of amount of claim***.—(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision."

It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a "determination" under Regulation 35-A, he is only to apply to the adjudicating authority for appropriate relief based on the determination made as follows:

"**35-A.** ***Preferential and other transactions***.—(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under Sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under Sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the adjudicating authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date."

90. As opposed to this, the liquidator, in liquidation proceedings under the Code, has to consolidate and verify the claims, and either admit or reject such claims under Sections 38 to 40 of the Code. Sections 41 and 42, by way

of contrast between the powers of the liquidator and that of the resolution professional, are set out hereinbelow:

> "**41.** ***Determination of valuation of claims***.—The liquidator shall determine the value of claims admitted under Section 40 in such manner as may be specified by the Board.
>
> **42.** ***Appeal against the decision of liquidator***.—A creditor may appeal to the adjudicating authority against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision."

It is clear from these sections that when the liquidator "determines" the value of claims admitted under Section 40, such determination is a "decision", which is quasi-judicial in nature, and which can be appealed against to the adjudicating authority under Section 42 of the Code.

91. Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the Committee of Creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the adjudicating authority.

Constitutional validity of Section 29-A

92. Section 29-A reads as follows:

> "**29-A.** ***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 I.—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, 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, 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."

93. This section was first introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, which amended the Insolvency and Bankruptcy Code on 23-11-2017. The Finance Minister while moving the Amendment Bill stated as follows:

"The core and the soul of this new Ordinance is really Clause 5, which is Section 29-A of the original Bill. I may just explain that once a company goes into the resolution process, then applications would be invited with regard to the potential resolution proposals as far as the company is concerned or the enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act, and, therefore, Clause 29-A introduces those who are not eligible to apply. For instance, there is a clause with regard to an undischarged insolvent who is not eligible to apply; a person who has been disqualified under the Companies Act to act as a Director cannot apply; and a person who is prohibited under the SEBI Act cannot apply. So these are statutory disqualifications. *And, there is also a disqualification in clause (c) with regard to those who are corporate debtors and who, as on the date of the application making a bid, do not operationalise the account by paying the interest itself i.e. you cannot say that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively, this clause will mean that those, who are in management and on account of whom this insolvent or the non-performing asset has arisen, will now try and say, I do not discharge any of the outstanding debts in terms of making the accounts operational, and yet I would like to apply and get the same enterprise back at a discounted value, for this is not the object of this particular Act itself. So Clause 5 has been brought in with that purpose in mind.*" (emphasis supplied)

94. The Statement of Objects and Reasons for the aforesaid amendment states:

"**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.*" (emphasis supplied)

95. This Court has held in *ArcelorMittal*[7]: (SCC p. 47, paras 30-32)

"*30*. A purposive interpretation of Section 29-A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same. We are concerned in the present matter with sub-clauses (*c*), (*f*), (*i*) and (*j*) thereof.

31. It will be noticed that the opening lines of Section 29-A contained in the 2017 Ordinance are different from the opening lines of Section 29-A as contained in the 2017 Amendment Act. What is important to note is that the phrase "*persons acting in concert*" is conspicuous by its absence in the 2017 Ordinance. The concepts of "*promoter*", "*management*" and "*control*" which were contained in the opening lines of Section 29-A under the Ordinance have now been transferred to sub-clause (*c*) in the 2017 Amendment Act. It is, therefore, important to note that the 2017 Amendment Act opens with language which is of wider import than that contained in the 2017 Ordinance, evincing an intention to rope in all persons who may be acting in concert with the person submitting a resolution plan.

32. The opening lines of Section 29-A 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 29-A, 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 and Co. Ltd.*[60] 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." (emphasis supplied)

96. Similarly in *Chitra Sharma* v. *Union of India*[61], this Court observed as follows: (SCC pp. 619-20, paras 93-94)

"*93*. Parliament has introduced Section 29-A into IBC with a specific purpose. The provisions of Section 29-A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. …"

7 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
60 1897 AC 22 (HL)
61 (2018) 18 SCC 575

"*94.* ... 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 of the 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...."

Retrospective application

97. It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing [see *State Bank's Staff Union (Madras Circle)* v. *Union of India*[62] (at para 21)]. In *ArcelorMittal*[7], this Court has observed that a resolution applicant has no vested right for consideration or approval of its resolution plan as follows: (SCC p. 87, para 82)

"*82.* Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time-limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the adjudicating authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place."

98. This being the case, it is clear that no vested right is taken away by application of Section 29-A. However, Shri Viswanathan pointed out the judgments in *Ritesh Agarwal* v. *SEBI*[63] (at para 25), *K.S. Paripoornan* v. *State of Kerala*[64] (at paras 60-66), *Darshan Singh* v. *Ram Pal Singh*[65] (at para 35), *Pyare Lal Sharma* v. *Jammu & Kashmir Industries Ltd.*[66] (at para 21), *P.D. Aggarwal* v. *State of U.P.*[67] (at para 18), and *Govind Das* v. *CIT*[68] (at paras 6 and 11), to argue that if a section operates on an antecedent set of facts, but affects a vested right, it can be held to be retrospective, and unless the legislature clearly intends such retrospectivity, the section should not be construed as such. Each of these judgments deals with different situations in which penal and other enactments interfere with vested rights, as a result of which, they were held to

62 (2005) 7 SCC 584 : 2005 SCC (L&S) 994
7 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
63 (2008) 8 SCC 205
64 (1994) 5 SCC 593
65 1992 Supp (1) SCC 191
66 (1989) 3 SCC 448 : 1989 SCC (L&S) 484
67 (1987) 3 SCC 622 : 1987 SCC (L&S) 310
68 (1976) 1 SCC 906 : 1976 SCC (Tax) 133

be prospective in nature. However, in our judgment in *ArcelorMittal*[7], we have already held that resolution applicants have no vested right to be considered as such in the resolution process. Shri Mukul Rohatgi, however, argued that this judgment is distinguishable as no question of constitutional validity arose in this case, and no issue as to the vested right of a promoter fell for consideration. We are of the view that the observations made in *ArcelorMittal*[7] directly arose on the facts of the case in order to oust the Ruias as promoters from the pale of consideration of their resolution plan, in which context, this Court held that they had no vested right to be considered as resolution applicants. Accordingly, we follow the aforesaid judgment. Since a resolution applicant who applies under Section 29-A(*c*) has no vested right to apply for being considered as a resolution applicant, this point is of no avail.

Section 29-A(c) not restricted to malfeasance

99. According to the learned counsel for the petitioners, Section 29-A(*c*) treats unequals as equals. A good erstwhile manager cannot be lumped with a bad erstwhile manager. Where an erstwhile manager is not guilty of malfeasance or of acting contrary to the interests of the corporate debtor, there is no reason why he should not be permitted to take part in the resolution process. After all, say the counsel for the petitioners, maximisation of value of the assets of the corporate debtor is an important objective to be achieved by the Code. Keeping out good erstwhile managers from the resolution process would go contrary to this objective.

100. This objection by the petitioners was countered by the learned Attorney General and Solicitor General, stating that the various clauses of Section 29-A would show that a person need not be a criminal in order to be kept out of the resolution process. For example, under Section 29-A(*a*), it is clear that a person may be an undischarged insolvent for no fault of his. Equally, under Section 29-A(*e*), a person may be disqualified to act as a Director under the Companies Act, 2013, say, where he has not furnished the necessary financial statements on time [see Section 164(2)(*a*)[69] of the Companies Act, 2013].

101. The learned counsel for some of the petitioners have also argued that the proviso to Section 35(1)(*f*) that was added by the Insolvency and Bankruptcy Code (Amendment) Act, 2017 [dated 19-1-2018] with retrospective effect from 23-11-2017 is manifestly arbitrary and violative of

7 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1

69 "**164.** ***Disqualifications for appointment of Director***.—(1) * * *

(2) No person who is or has been a Director of a company which—

(*a*) has not filed financial statements or annual returns for any continuous period of three financial years; or

(*b*) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a Director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so:

Provided that where a person is appointed as a Director of a company which is in default of clause (*a*) or clause (*b*), he shall not incur the disqualification for a period of six months from the date of his appointment."

Article 14 of the Constitution of India. The proviso to Section 35(1)(*f*) reads 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."

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 29-A, 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 wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29-A continues to permeate the section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected.

The one-year period in Section 29-A(c) and NPAs

103. It is clear that Section 29-A goes to eligibility to submit a resolution plan. A wilful defaulter, in accordance with the guidelines of RBI, would be a person who though able to pay, does not pay. An NPA, on the other hand, refers to the account belonging to a person that is declared as such under guidelines issued by RBI. It is important at this juncture to advert to the aforesaid guidelines. The RBI's Master Circular on Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances dated 1-7-2015 (the RBI Master Circular) consolidates instructions issued up to 30-6-2015 on NPAs. Clause 2.1 defines NPAs as under:

"**2.** ***Definitions***

2.1. Non-performing assets

2.1.1. An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank.

2.1.2. A non-performing asset (NPA) is a loan or an advance where:

(*i*) interest and/or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan,

(*ii*) the account remains 'out of order' as indicated at Para 2.2 below, in respect of an overdraft/cash credit (OD/CC),

(*iii*) the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted,

(*iv*) the instalment of principal or interest thereon remains overdue for two crop seasons for short duration crops,

(*v*) the instalment of principal or interest thereon remains overdue for one crop season for long duration crops,

(*vi*) the amount of liquidity facility remains outstanding for more than 90 days, in respect of a securitisation transaction undertaken in terms of guidelines on securitisation dated 1-2-2006,

(*vii*) in respect of derivative transactions, the overdue receivables representing positive mark-to-market value of a derivative contract, if these remain unpaid for a period of 90 days from the specified due date for payment.

2.1.3. In case of interest payments, banks should, classify an account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter.

2.1.4. In addition, an account may also be classified as NPA in terms of Para 4.2.4 of this master circular."

104. Clause 4 of the RBI Master Circular deals with asset classification as follows:

"**4.** ***Asset Classification***

4.1. *Categories of NPAs*: Banks are required to classify non-performing assets further into the following three categories based on the period for which the asset has remained non-performing and the realisability of the dues:

(*i*) Substandard assets

(*ii*) Doubtful assets

(*iii*) Loss assets

4.1.1. *Substandard assets*: *With effect from 31-3-2005, a substandard asset would be one, which has remained NPA for a period less than or equal to 12 months. Such an asset will have well defined credit weaknesses that jeopardize the liquidation of the debt and are characterized by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected.*

4.1.2. *Doubtful assets*: With effect from 31-3-2005, an asset would be classified as doubtful if it has remained in the substandard category for a period of 12 months. A loan classified as doubtful has all the weaknesses inherent in assets that were classified as substandard, with the added characteristic that the weaknesses make collection or liquidation in full

— on the basis of currently known facts, conditions and values — highly questionable and improbable.

4.1.3. *Loss assets*: A loss asset is one where loss has been identified by the bank or internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some salvage or recovery value." (emphasis supplied)

105. What is clear from the aforesaid circular is that accounts are declared NPA only if defaults made by a corporate debtor are not resolved (for example, interest on and/or instalment of the principal remaining overdue for a period of more than 90 days in respect of a term loan). Post declaration of such NPA, what is clear is that a substandard asset would then be NPA which has remained as such for a period of twelve months. In short, a person is a defaulter when an instalment and/or interest on the principal remains overdue for more than three months, after which, its account is declared NPA. During the period of one year thereafter, since it is now classified as a substandard asset, this grace period is given to such person to pay off the debt. During this grace period, it is clear that such person can bid along with other resolution applicants to manage the corporate debtor. What is important to bear in mind is also the fact that, prior to this one-year-three-month period, banks and financial institutions do not declare the accounts of corporate debtors to be NPAs. As a matter of practice, they first try and resolve disputes with the corporate debtor, after which, the corporate debtor's account is declared NPA. As a matter of legislative policy, therefore, quite apart from malfeasance, if a person is unable to repay a loan taken, in whole or in part, within this period of one year and three months (which, in any case, is after an earlier period where the corporate debtor and its financial creditors sit together to resolve defaults that continue), it is stated to be ineligible to become a resolution applicant. The reason is not far to see. A person who cannot service a debt for the aforesaid period is obviously a person who is ailing itself. The saying of Jesus comes to mind — "if the blind lead the blind, both shall fall into the ditch." The legislative policy, therefore, is that a person who is unable to service its own debt beyond the grace period referred to above, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with. Neither can the period of one year be found fault with, as this is a policy matter decided by RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset. The ineligibility attaches only after this one year period is over as the NPA now gets classified as a doubtful asset.

106. The Committee set up by the Government to oversee the working of the Code has, in its Report of March 2018, also considered this aspect of the matter and has opined as follows:

"14.8. In regard to the disqualification under clause (*c*) for having an NPA account, it was also stated to the Committee that the time period for existence of the NPA account must be increased from one year to three years. The reason provided was that a downturn in a typical business cycle was most likely to extend over a year. However, in the absence of

any concrete data, the Committee felt that there is no conclusive way to determine what the ideal time period for existence of an NPA should be for the disqualification to apply. *The Committee felt that the Code was a relatively new legislation and therefore, it would be prudent to wait and allow industry experience to emerge for a few years before any amendment is made to the NPA holding period under Section 29-A(c). In relation to applicability of Section 29-A(c), the Committee also discussed that it must be clarified that the disqualification pursuant to Section 29-A(c) shall be applicable if such NPA accounts are held by the resolution applicant or its connected persons at the time of submission of the resolution plan to the RP.*" (emphasis in original)

Related party

107. A constitutional challenge has been raised against Section 29-A(*j*) read with the definition of "related party". "Related party" is defined in the Code as follows:

"**5.** ***Definitions.***—In this Part, unless the context otherwise requires—

* * *

(24) "**related party**", in relation to a corporate debtor, means—

(*a*) a Director or partner of the corporate debtor or a relative of a Director or partner of the corporate debtor;

(*b*) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(*c*) a limited liability partnership or a partnership firm in which a Director, partner, or manager of the corporate debtor or his relative is a partner;

(*d*) a private company in which a Director, partner or manager of the corporate debtor is a Director and holds along with his relatives, more than two per cent of its share capital;

(*e*) a public company in which a Director, partner or manager of the corporate debtor is a Director and holds along with relatives, more than two per cent of its paid-up share capital;

(*f*) any body corporate whose Board of Directors, Managing Director or Manager, in the ordinary course of business, acts on the advice, directions or instructions of a Director, partner or Manager of the corporate debtor;

(*g*) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a Director, partner or Manager of the corporate debtor;

(*h*) any person on whose advice, directions or instructions, a Director, partner or Manager of the corporate debtor is accustomed to act;

(*i*) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(*j*) any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement;

(*k*) any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement;

(*l*) any person who can control the composition of the Board of Directors or corresponding governing body of the corporate debtor;

(*m*) any person who is associated with the corporate debtor on account of—

(*i*) participation in policy-making processes of the corporate debtor; or

(*ii*) having more than two Directors in common between the corporate debtor and such person; or

(*iii*) interchange of Managerial personnel between the corporate debtor and such person; or

(*iv*) provision of essential technical information to, or from, the corporate debtor;

(24-A) "**related party**", in relation to an individual, means—

(*a*) a person who is a relative of the individual or a relative of the spouse of the individual;

(*b*) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

(*c*) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(*d*) a private company in which the individual is a Director and holds along with his relatives, more than two per cent of its share capital;

(*e*) a public company in which the individual is a Director and holds along with relatives, more than two per cent of its paid-up share capital;

(*f*) a body corporate whose Board of Directors, Managing Director or Manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;

(*g*) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(*h*) a person on whose advice, directions or instructions, the individual is accustomed to act;

(*i*) a company, where the individual or the individual along with its related party, own more than fifty per cent of the share capital of the company or controls the appointment of the Board of Directors of the company.

Explanation.—For the purposes of this clause—

(*a*) "**relative**", with reference to any person, means anyone who is related to another, in the following manner, namely—

(*i*) members of a Hindu Undivided Family,
(*ii*) husband,
(*iii*) wife,
(*iv*) father,
(*v*) mother,
(*vi*) son,
(*vii*) daughter,
(*viii*) son's daughter and son,
(*ix*) daughter's daughter and son,
(*x*) grandson's daughter and son,
(*xi*) granddaughter's daughter and son,
(*xii*) brother,
(*xiii*) sister,
(*xiv*) brother's son and daughter,
(*xv*) sister's son and daughter,
(*xvi*) father's father and mother,
(*xvii*) mother's father and mother,
(*xviii*) father's brother and sister,
(*xix*) mother's brother and sister, and

(*b*) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;"

108. What is argued by the petitioners is that the mere fact that somebody happens to be a relative of an ineligible person cannot be good enough to oust such person from becoming a resolution applicant, if he is otherwise qualified. We were urged, by Shri Viswanathan in particular, to apply the doctrine of nexus that is well known and that has been applied by this Court in several judgments in other legal contexts, more particularly, in *Attorney General for India* v. *Amratlal Prajivandas*[70]. Para 44 reads as under: (SCC pp. 90-93)

"*44*. It is contended by the counsel for the petitioners that extending the provisions of SAFEMA to the relatives, associates and other "holders" is again a case of overreaching or of over-breadth, as it may be called — a case of excessive regulation. It is submitted that the relatives or associates of a person falling under clause (*a*) or clause (*b*) of Section 2(2) of SAFEMA may have acquired properties of their own, may be by illegal means but there is no reason why those properties be forfeited under SAFEMA just because they are related to or are associates of the detenu or convict, as the case may be. It is pointed out that the definition of 'relative' in Explanation (2) and of 'associates' in Explanation (3) are so wide as to bring in a person even distantly related or associated with the convict/detenu, within the net of SAFEMA, and once he comes within the net, all his illegally acquired properties can be forfeited under the Act. In our opinion, the said contention

70 (1994) 5 SCC 54 : 1994 SCC (Cri) 1325

is based upon a misconception. SAFEMA is directed towards forfeiture of "illegally acquired properties" of a person falling under clause (*a*) or clause (*b*) of Section 2(2). The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu — whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu — whether in his own name or in the name of his relatives and associates. It is to counteract the several devices that are or may be adopted by persons mentioned in clauses (*a*) and (*b*) of Section 2(2) that their relatives and associates mentioned in clauses (*c*) and (*d*) of the said sub-section are also brought within the purview of the Act. The fact of their holding or possessing the properties of convict/detenu furnishes the link between the convict/detenu and his relatives and associates. Only the properties of the convict/detenu are sought to be forfeited, wherever they are. The idea is to reach his properties in whosoever's name they are kept or by whosoever they are held. The independent properties of relatives and friends, which are not traceable to the convict/detenu, are not sought to be forfeited nor are they within the purview of SAFEMA. [That this was the object of the Act is evident from para 4 of the preamble which states: "And whereas such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants." We are not saying that the Preamble can be utilised for restricting the scope of the Act, we are only referring to it to ascertain the object of the enactment and to reassure ourselves that the construction placed by us accords with the said object.] We may proceed to explain what we say. Clause (*c*) speaks of a relative of a person referred to in clause (*a*) or clause (*b*) (which speak of a convict or a detenu). Similarly, clause (*d*) speaks of associates of such convict or detenu. If we look to Explanation (3) which specifies who the associates referred to in clause (*d*) are, the matter becomes clearer. 'Associates' means — (*i*) any individual who had been or is residing in the residential premises (including outhouses) of such person ['such person' refers to the convict or detenu, as the case may be, referred to in clause (*a*) or clause (*b*)]; (*ii*) any individual who had been or is managing the affairs or keeping the accounts of such convict/detenu; (*iii*) any association of persons, body of individuals, partnership firm or private company of which such convict/detenu had been or is a member, partner or Director; (*iv*) any individual who had been or is a member, partner or Director of an association of persons, body of individuals, partnership firm or private company referred to in clause (*iii*) at any time when such

person had been or is a member, partner or Director of such association of persons, body of individuals, partnership firm or private company; (*v*) any person who had been or is managing the affairs or keeping the accounts of any association of persons, body of individuals, partnership firm or private company referred to in clause (*iii*); (*vi*) the trustee of any trust where (*a*) the trust has been created by such convict/detenu; or (*b*) the value of the assets contributed by such convict/detenu to the trust amounts, on the date of contribution not less than 20% of the value of the assets of the trust on that date; and (*vii*) where the competent authority, for reasons to be recorded in writing, considers that any properties of such convict/detenu are held on his behalf by any other person, such other person. *It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict.* Section 4 is equally relevant in this context. It declares that "as from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf". All such property is liable to be forfeited. The language of this section is indicative of the ambit of the Act. Clauses (*c*) and (*d*) in Section 2(2) and Explanations (2) and (3) occurring therein shall have to be construed and understood in the light of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties. By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate — it does not matter whether he intends such a person to be a mere name-lender or whether he really intends that such person shall be the real owner and/or possessor thereof — or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates — in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(*c*). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)(*e*) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property—even though purchased from a convict/detenu—is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are

not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict. We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally acquired, will be forfeited just because they happen to be the relatives or associates of the convict/detenu. *There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the relative/associate*. In this view of the matter, the apprehension and contention of the petitioners in this behalf must be held to be based upon a mistaken premise. The bringing in of the relatives and associates or of the persons mentioned in clause (*e*) of Section 2(2) is thus neither discriminatory nor incompetent apart from the protection of Article 31-B." (emphasis supplied)

109. We are of the view that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24-A) show that such persons must be "connected" with the resolution applicant within the meaning of Section 29-A(*j*). This being the case, the said categories of persons who are collectively mentioned under the caption "relative" obviously need to have a connection with the business activity of the resolution applicant. In the absence of showing that such person is "connected" with the business of the activity of the resolution applicant, such person cannot possibly be disqualified under Section 29-A(*j*). All the categories in Section 29-A(*j*) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression "related party", therefore, and "relative" contained in the definition sections must be read noscitur a sociis with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant.

110. An argument was also made that the expression "connected person" in Explanation I, clause (*ii*) to Section 29-A(*j*) cannot possibly refer to a person who may be in management or control of the business of the corporate debtor in future. This would be arbitrary as the explanation would then apply to an indeterminate person. This contention also needs to be repelled as Explanation I seeks to make it clear that if a person is otherwise covered as a "connected person", this provision would also cover a person who is in management or control of the business of the corporate debtor *during the implementation of a resolution plan*. Therefore, any such person is not indeterminate at all, but is a person who is in the saddle of the business of the corporate debtor either at an anterior point of time or even during implementation of the resolution plan. This disposes of all the contentions raising questions as to the constitutional validity of Section 29-A(*j*).

Exemption of micro small, and medium enterprises from Section 29-A

111. The ILC Report of March 2018 found that micro, small and medium enterprises form the foundation of the economy and are key drivers of employment, production, economic growth, entrepreneurship and financial inclusion.

112. Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 classifies enterprises depending upon whether they manufacture or produce goods, or are engaged in providing and rendering services as micro, small or medium, depending upon certain investments made, as follows:

> "**7.** ***Classification of enterprises.***—(1) Notwithstanding anything contained in Section 11-B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, associations of persons, cooperative society, partnership firm, company or undertaking, by whatever name called—
>
> (*a*) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), as—
>
> (*i*) a micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;
>
> (*ii*) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or
>
> (*iii*) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;
>
> (*b*) in the case of the enterprises engaged in providing or rendering of services, as—
>
> (*i*) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;
>
> (*ii*) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or
>
> (*iii*) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees."

113. The ILC Report of 2018 exempted these industries from Sections 29-A(*c*) and 29-A(*h*) of the Code, their rationale for doing so being contained in Para 27.4 of the Report, which reads as follows:

> "27.4. Regarding the first issue, the Code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial creditor or operational creditors of MSMEs may take it to insolvency under the Code. However, given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of

employees and workers of MSMEs, the Committee sought it fit to explicitly grant exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter, to bid for MSME in insolvency. *The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants*." (emphasis supplied)

114. Thus, the rationale for excluding such industries from the eligibility criteria laid down in Sections 29-A(*c*) and 29-A(*h*) is because qua such industries, other resolution applicants may not be forthcoming, which then will inevitably lead not to resolution, but to liquidation. Following upon the Insolvency Law Committee's Report, Section 240-A has been inserted in the Code with retrospective effect from 6-6-2018 as follows:

"**240-A.** ***Application of this Code to micro, small and medium enterprises***.—(1) Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (*c*) and (*h*) of Section 29-A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

(2) Subject to sub-section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—

(*a*) not apply to micro, small and medium enterprises; or

(*b*) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.

(3) A draft of every notification proposed to be issued under sub-section (2), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

(4) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.

(5) The period of thirty days referred to in sub-section (3) shall not include any period during which the House referred to in sub-section (4) is prorogued or adjourned for more than four consecutive days.

(6) Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament.

Explanation.—For the purposes of this section, the expression "micro, small and medium enterprises" means any class or classes of enterprises classified as such under sub-section (1) of Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006)."

115. It can thus be seen that when the Code has worked hardship to a class of enterprises, the Committee constituted by the Government, in overseeing the working of the Code, has been alive to such problems, and the Government in turn has followed the recommendations of the Committee in enacting Section 240-A. This is an important instance of how the executive continues to monitor the application of the Code, and exempts a class of enterprises from

the application of some of its provisions in deserving cases. This and other amendments that are repeatedly being made to the Code, and to subordinate legislation made thereunder, based upon Committee Reports which are looking into the working of the Code, would also show that the legislature is alive to serious anomalies that arise in the working of the Code and steps in to rectify them.

Section 53 of the Code does not violate Article 14

116. An argument has been made by the counsel appearing on behalf of the petitioners that in the event of liquidation, operational creditors will never get anything as they rank below all other creditors, including other unsecured creditors who happen to be financial creditors. This, according to them, would render Section 53 and in particular, Section 53(1)(*f*) discriminatory and manifestly arbitrary and thus, violative of Article 14 of the Constitution of India.

117. Section 53(1) reads as follows:

"**53.** ***Distribution of assets.***—(1) Notwithstanding anything to the contrary contained in any law enacted by 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."

118. The BLRC Report, which led to the enactment of the Insolvency Code, in dealing with this aspect of the matter, has stated:

> "The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The Government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer.
>
> For the remaining creditors who participate in the collective action of liquidation, the Committee debated on the waterfall of liabilities that should hold in liquidation in the new Code. Across different jurisdictions, the observation is that secured creditors have first priority on the realisations, and that these are typically paid out net of the costs of insolvency resolution and liquidation. In order to bring the practices in India in line with the global practice, and to ensure that the objectives of this proposed Code is met, the Committee recommends that the waterfall in liquidation should be as follows:
>
> 1. Costs of IRP and liquidation.
> 2. Secured creditors and workmen dues capped up to three months from the start of IRP.
> 3. Employees capped up to three months.
> 4. Dues to unsecured financial creditors, debts payable to workmen in respect of the period beginning twelve months before the liquidation commencement date and ending three months before the liquidation commencement date.
> 5. Any amount due to the State Government and the Central Government in respect of the whole or any part of the period of two years before the liquidation commencement date; any debts of the secured creditor for any amount unpaid following the enforcement of security interest.
> 6. Remaining debt.
> 7. Surplus to shareholders."

119. It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are

also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail.

Epilogue

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 to 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.

121. We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. Approximately 3300 cases have been disposed of by the adjudicating authority based on out-of-court settlements between corporate debtors and creditors which themselves involved claims amounting to over INR 1,20,390 crores. Eighty cases have since been resolved by resolution plans being accepted. Of these eighty cases, the liquidation value of sixty-three such cases is INR 29,788.07 crores. However, the amount realised from the resolution process is in the region of INR 60,000 crores, which is over 202% of the liquidation value. As a result of this, Reserve Bank of India has come out with figures which reflect these results. Thus, credit that has been given by banks and financial institutions to the commercial sector (other than food) has jumped up from INR 4952.24 crores in 2016-2017, to INR 9161.09 crores in 2017-2018, and to INR 13,195.20 crores for the first six months of 2018-2019. Equally, credit flow from non-banks has gone up from INR 6819.93 crores in 2016-2017, to INR 4718 crores for the first six months of 2018-2019. Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14,530.47 crores in 2016-2017, to INR 18,469.25 crores in 2017-2018, and to INR 18,798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment. There will be no order as to costs.

ANNEXURE R5/3

3-Judge Bench
2019
Nov. 15

(2020) 8 Supreme Court Cases 531

(BEFORE ROHINTON FALI NARIMAN, SURYA KANT AND V. RAMASUBRAMANIAN, JJ.)

COMMITTEE OF CREDITORS OF ESSAR STEEL INDIA LIMITED THROUGH AUTHORISED SIGNATORY .. Appellant;

Versus

SATISH KUMAR GUPTA AND OTHERS .. Respondents.

Civil Appeals Nos. 8766-67 of 2019† with Nos. 5634-37, 5716-19, 5996, 6266, 6269, 6409, 6433-34, 7260, 7266 of 2019, 8768 of 2019‡, 8769 of 2019††, Writ Petitions (C) Nos. 1049-50, 1055-58, 1060-61, 1063-64, 1066, 1087, 1110, 1113, 1121, 1246 and 1296 of 2019, decided on November 15, 2019

A. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 12(3) [as amended by S. 4 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019], providing inter alia for mandatory completion of corporate insolvency resolution process (CIRP) within a period of 330 days — Validity of amended S. 12(3), affirmed in its entirety *except* that the word "mandatorily" struck down, as being an excessive, arbitrary and unreasonable restriction being violative of Arts. 14 and 19(1)(g) of the Constitution**

— Held, the general rule is that of an outer limit of 330 days — However, held, extension of time can be granted in exceptional cases — Exceptional cases would be cases where only a short period is left for completion of the insolvency resolution process beyond 330 days, and it would be in the interest of all stakeholders that the corporate debtor be put back on its feet and where the delay or a large part thereof is attributable to the tardy process of the Adjudicating Authority/Appellate Tribunal itself — Further, where the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time

— Held, given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date, without any exception thereto, may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Art. 14 of the Constitution and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Art. 19(1)(g) of the Constitution

† Arising out of Diary No. 24417 of 2019. Arising from the Judgment and Order in *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388 [National Company Law Appellate Tribunal, New Delhi, Company Appeal (AT) (Insolvency) No. 242 of 2019, dt. 4-7-2019]

‡ Arising out of Diary No. 31409 of 2019

†† Arising out of Diary No. 36838 of 2019

— Constitution of India — Arts. 14 and 19(1)(g) — Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 — Regns. 39-C, 32(e) & (f) and 32-A(4) — Doctrines and Maxims — Actus Curiae Neminem Gravabit (Paras 125 to 127 and 109 to 131)

B. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 30 [as amended by S. 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019] — Constitutional validity of amended S. 30, affirmed in its entirety — Free play to legislature in the joints when it comes to economic legislation — Principles reiterated**

— Statute Law — Validity of a Statute or Statutory Provision/Judicial review (Paras 109 to 131)

C. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 30(2)(b) [as amended by S. 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019] — Validity of, upheld — Explns. 1 and 2 — Scope and purpose of, explained — Interference with flexibility given by Code to the Committee of Creditors to approve/reject a resolution plan and to take into account different classes of creditors — Impermissibility of (*see also* Shortnotes *D* to *J*)**

— Held, the substituted S. 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 — Further, the order of priority of payment of creditors mentioned in S. 53 is not engrafted in sub-section (2)(b) as amended and S. 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors — Further, Expln. 2 which applies the substituted section to pending proceedings, held, to be constitutionally valid, not having any retrospective operation so as to impair vested rights (Paras 128 to 131)

D. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30(2) and 61(3) r/w Ss. 31(1), 60(5) and 30(4) — Committee of Creditors — Scope of judicial review of decisions of — Principles summarised — Directions/ruling of Adjudicating Authority/Appellate Tribunal providing for equal treatment amongst different classes of creditors i.e. financial and operational creditors & secured and unsecured creditors — Invalidity of, when the same is against the decision of CoC (Committee of Creditors)**

— Jurisdiction of the Adjudicating Authority/Appellate Tribunal qua resolution plan approved by CoC — Restrictions upon i.e. by virtue of Ss. 30(2) and 61(3) respectively — Interference with flexibility given by Code to the Committee of Creditors to approve/reject a resolution plan and to take account different classes of creditors — When not permissible — Use of the expression "feasibility and viability" in S. 30(4) — Relevance of

— Held, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which takes into account all aspects of the plan, including the manner of distribution of funds among

the various classes of creditors — Further, the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code — To resolve stressed assets, equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational

— Held, 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 — Also, a harmonious reading of S. 31(1) and S. 60(5) would lead to the result that the residual jurisdiction of NCLT under S. 60(5)(c) cannot, in any manner, whittle down S. 31(1), by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside S. 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority — Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regn. 39(3) (Paras 60 to 93 and 141 to 147)

E. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30(2) & (4) — Resolution plan — Matters that it must provide for — Held, resolution plan need not itself provide for distribution inter se between secured financial creditors — It is enough that under the Code and the Regulations, the resolution plan provides for distribution of amounts payable towards debts based upon a classification of various types of creditors (Para 142)**

F. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 30(4) — Approval of resolution plan by Committee of Creditors — Freedom and discretion available to Committee of Creditors to classify creditors — Committee of Creditors, held, does not act in fiduciary capacity to any group of creditors — In approval of resolution plan Committee of Creditors is to take a business decision based on ground realities, by a majority, which then binds all stakeholders, including dissentient creditors**

— Full freedom and discretion has been given to Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code (Paras 145 and 146)

G. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30(4), (2)(b) and 53 — S. 53, held, would be applicable only during liquidation and not at the stage of resolving insolvency — S. 30(2)(b) refers to S. 53 not in the context of priority of payment of creditors, but only to provide for a minimum payment to operational creditors — However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured (Para 145)**

H. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 31(1) and 30(4) — Approved resolution plan — Held, is binding on all stakeholders, including guarantors of the corporate debtor**

— Thus, held, in present case that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor (Paras 105 and 106)

I. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 30(4) — "Feasibility and viability" of resolution plan to be considered by Committee of Creditors — Matters covered — Held, includes distribution of the amount of debt under the said plan (Para 141)**

J. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 24, 28 and 30(4) — Role of the Committee of Creditors in the corporate resolution process — Summarised — Commercial wisdom of the Committee of Creditors — Relevance and supremacy of, explained**

— Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regns. 18 to 26, 22, 24 to 26, and 39(3) (Paras 54 to 65)

K. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30(4), 21(8) and 28(1)(h) — Constitution of a sub-committee by the Committee of Creditors — Validity of — Decisions of such sub-committee — Relevance and bindingness of**

— Held, the power to approve a resolution plan under S. 30(4), cannot be delegated to any other body as it is the Committee of Creditors alone that has been vested with this important business decision which it must take by itself — However, sub-committees can be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the Committee of Creditors (Paras 95 to 99)

L. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 60(6) and 31 — Raising of disputed claims outside the provisions of the Code after approval of the resolution plan — Impermissibility of — Claims filed after approval of resolution plan — Rejection of**

— NCLAT, inter alia held that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/ Appellate Tribunal could be decided by an appropriate forum in terms of S. 60(6) of the Code — Held, such conclusion militates against the rationale of S. 31 of the Code and a successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted — 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 (Para 107)

M. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 13(1)(b), 13(1)(c), 15(1), 18(1)(b) & (c), 20, 22(1) and (2), 23(1), 25(1), 25(2)(e) to (i), 29 and 30 — Role of resolution profession in the revival of the corporate debtor — Summarised (Paras 39 to 49)**

— Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regns. 7 to 12, 13(1), 2(1)(ha) & (hb), 2(1)(k), 35(2), 36 and 36-A

N. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 — Regns. 36-B, 36-A(7) and 38 — Role of the prospective resolution applicant, its rights and obligations — Summarised (Paras 50 to 53)**

On 2-8-2017, National Company Law Tribunal (hereinafter referred to as NCLT/Adjudicating Authority), Ahmedabad admitted Company Petition (IB) No. 39 of 2017 filed by Standard Chartered Bank together with a petition filed by State Bank of India under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code").

On 25-10-2018, the final negotiated resolution plan of ArcelorMittal was approved by the Committee of Creditors by a 92.24% majority.

After several proceedings before NCLT and NCLAT, NCLT, by its judgment dated 8-3-2019 disposed of the application to allow the resolution plan filed by ArcelorMittal.

By its final judgment dated 4-7-2019, NCLAT held that:

(*i*) In a resolution plan there can be no difference between a financial creditor and an operational creditor in the matter of payment of dues, and that therefore, financial creditors and operational creditors deserve equal treatment under a resolution plan. Accordingly, NCLAT has redistributed the proceeds payable under the approved resolution plan as per the method of calculation adopted by it so that all financial creditors and operational creditors be paid 60.7% of their admitted claims.

(*ii*) Securities and security interest is irrelevant at the stage of resolution for the purposes of allocation of payments, thereby directing that each financial creditor (whether secured or unsecured) with a claim equal to or more than INR 10 lakhs be paid 60.7% of its admitted claim irrespective of their security interest.

(*iii*) Operational creditors by definition have separate classes within themselves and can be classified into sub-classes for the purpose of distribution (while rejecting any classification amongst the financial creditors) on the basis of the admitted amounts thereby directing that operational creditors with a claim of equal to or more than INR 1 crore be paid 60.268% of their admitted claims.

(*iv*) Certain additional claims of operational creditors (some of which were highly belated and/or without sufficient proof) were admitted, such that the admitted operational debt of approximately INR 5058 crores at the time of

the approval of the approved resolution plan became an operational debt of approximately INR 19,719.20 crores.

(*v*) The profits generated by the corporate debtor during the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") would be distributed equally amongst the financial creditors and operational creditors of the corporate debtor.

(*vi*) A sub-committee or core committee cannot be constituted under the Code, being a foreigner thereto. The Committee of Creditors alone are to take all decisions by themselves.

(*vii*) The Committee of Creditors has not been empowered to decide the manner in which the distribution is to be made between one or other creditors, as there would be a conflict of interest between financial and operational creditors, financial creditors favouring themselves to the detriment of operational creditors.

(*viii*) Section 53 of the Code cannot be applied during the corporate resolution process but will apply only at the stage of liquidation.

(*ix*) Claims that have been decided by the resolution professional and affirmed by the Adjudicating Authority or the Appellate Tribunal are final and binding on all creditors. However, claims which have not been decided by the Adjudicating Authority or the Appellate Tribunal on merits may be decided by an appropriate forum in terms of Section 60(6) of the Code.

(*x*) Financial creditors in whose favour guarantees were executed, as their total claim stands satisfied to the extent of the guarantee, cannot re-agitate such claims as against the principal borrower.

Standard Chartered Bank, defended NCLAT judgment on all aspects. It was contended that the offer made by ArcelorMittal was to make a payment of INR 42,000 crores as an upfront amount in order to pay 100% of the principal outstanding of the secured financial creditors of the corporate debtor. It was inter alia contended that the sum of INR 42,000 crores cannot be worked out unless the principal amount owed to Standard Chartered Bank is also included in the said figure. It was inter alia, contended that in order to achieve acquisition of the debts of OSPIL, the Core Committee of Creditors relieved ArcelorMittal from the solemn offer made to the Supreme Court of India to pay upfront a sum of INR 42,000 crores, and reduced from this said amount, a sum of INR 2500 crores. Thus, the Core Committee's decision, as ratified by the Committee of Creditors, was to accept a sum lesser than that guaranteed as upfront payment by ArcelorMittal.

It was also contended that the very formation of a Core Committee/Sub-Committee, was against the provisions of the Code, and that as originally conceived, it was only to facilitate representation before the Adjudicating Authority, which was over, in any case, by 31-5-2018. The Core Committee however went on conducting secret negotiations with ArcelorMittal by which it buried Standard Chartered Bank's debt almost completely. This was done by reducing Standard Chartered Bank's entitlement of INR 2585 crores (INR 2646 crores minus INR 61 crores), if it were to have outstanding payments made on the basis of value of debt instead of value of security.

It was inter alia, also contended that the decision of the Committee of Creditors on the manner of distribution in the facts of this case was illegal and arbitrary, as once a creditor is classified as a financial creditor, such creditor is entitled to equal treatment with all other financial creditors, irrespective of whether it is secured or unsecured.

It was also contended that the Committee of Creditors could not possibly decide the manner of distribution as it would give rise to a serious conflict of interest, as the majority may get together to ride roughshod over the minority.

It was inter alia also contended that a reading of the amended Section 30(2)(*b*) together with the Explanations contained therein, and the amendment of Section 30(4) would leave nobody in any manner of doubt that the purpose of the amendment was to get over NCLAT judgment in order that the huge amount of around INR 2100 crores, that is payable to a private foreign bank, namely, Standard Chartered Bank, gets reduced to around INR 61 crores, so that nationalised banks and other entities in which the Government has an interest may get a larger share of the pie to the detriment of Standard Chartered Bank. It was contended that legislature has, therefore, overstepped the separation of powers boundaries to step in and legislatively adjudicate the facts of a particular case.

The issue involved in this appeal was whether the impugned NCLAT judgment deserved to be set aside?

Setting aside the impugned NCLAT judgment except insofar as Civil Appeals Nos. 6409, 7266 and 7260 of 2019 were concerned, whilst elaborating on the role of resolution applicants, resolution professionals, the Committee of Creditors, the jurisdiction of "NCLT"/"Adjudicating Authority" and "NCLAT"/"Appellate Tribunal", qua resolution plans approved by the Committee of Creditors, the Supreme Court

Held :

Role of the resolution professional

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. (Para 48)

The resolution professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The resolution professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. (Para 49)

ArcelorMittal (India) (P) Ltd. v. *Satish Kumar Gupta*, (2019) 2 SCC 1, *affirmed*

Role of the prospective resolution applicant

The UNCITRAL Legislative Guide discusses what ought to be the contents of a resolution plan in an Insolvency Code

"4. *The plan*

* * *

20. Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation)." (Para 50)

Under the Code, the prospective resolution applicant has a right to receive complete information as to the corporate debtor, debts owed by it, and its activities as a going concern, prior to the admission of an application under Sections 7, 9 or 10 of the Code. For this purpose, it has a right to receive information contained in the information memorandum as well as the evaluation matrix mentioned in Regulation 36-B. (Para 51)

Role of the Committee of Creditors in the corporate resolution process

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. Thus, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor. (Para 54)

In order to trigger application of the Code, a neat division has been made between financial creditors and operational creditors. Most financial creditors are secured creditors and most operational creditors are unsecured creditors. The rationale for only financial creditors handling the affairs of the corporate debtor and resolving them is for reasons that have been deliberated upon by the BLRC Report of 2015, which formed the basis for the enactment of the Insolvency Code. (Para 55)

It is important to set out the relevant extracts from the aforementioned report:

"2. *Executive Summary*

* * *

The key economic question in the bankruptcy process

* * *

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.* (Para 56)

... Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation). (Para 57)

UNCITRAL Legislative Guide, *referred to*

Section 24 of the Code deals with meetings of the Committee of Creditors. Though voting on the approval of a resolution plan is only with the financial creditors who form the Committee of Creditors, yet the resolution professional is to conduct the aforesaid meeting at which members of the suspended Board of Directors may be present, together with one representative of operational creditors, provided that the aggregate dues owed to all operational creditors is not less than 10% of the entire debt owed — *see* Sections 24(2), (3) and (4) of the Code. Voting shall be in accordance with the voting share assigned to each financial creditor, which is based on the financial debts owed to such creditors — *see* Section 24(6) of the Code. (Para 58)

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. (Para 59)

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. (Para 60)

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. (Para 62)

K. Sashidhar v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222, *affirmed*

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. 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. (Para 64)

Jurisdiction of the Adjudicating Authority and the Appellate Tribunal

After a resolution plan is approved by the requisite majority of the Committee of Creditors, the aforesaid plan must then pass muster of the Adjudicating Authority under Section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by Section 30(2) of the Code. (Para 65)

Innoventive Industries Ltd. v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356; *Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd.*, (2018) 2 SCC 674 : (2018) 2 SCC (Civ) 288, *affirmed*

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. (Para 67)

K. Sashidhar v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222, *affirmed*

Kamineni Steel & Power (India) (P) Ltd. v. *Indian Bank*, 2018 SCC OnLine NCLAT 654, *cited*

The non obstante clause of Section 60(5) speaks of *any other law* for the time being in force, which obviously cannot include the provisions of the Code itself. Secondly, Section 60(5)(*c*) is in the nature of a residuary jurisdiction vested in NCLT so that NCLT may decide all questions of law or fact arising out of or in relation to insolvency resolution or liquidation under the Code. Such residual jurisdiction does not in any manner impact Section 30(2) of the Code which circumscribes the jurisdiction of the Adjudicating Authority when it comes to the confirmation of a resolution plan, as has been mandated by Section 31(1) of the Code. A harmonious reading, therefore, of Section 31(1) and Section 60(5) of the Code would lead to the result that the residual jurisdiction of NCLT under Section 60(5)(*c*) cannot, in any manner, whittle down Section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority. (Para 69)

Insolvency Committee Report, 2018, *referred to*

Synergies-Dooray Automative Ltd., In re, 2017 SCC OnLine NCLT 20883; *Alchemist Asset Reconstruction Co. Ltd.* v. *Hotel Gaudavan (P) Ltd.*, 2017 SCC OnLine NCLT 13223, *cited*

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. (Para 73)

Swiss Ribbons (P) Ltd. v. *Union of India*, (2019) 4 SCC 17, *affirmed*

Secured and unsecured creditors; the equality principle

The impugned NCLAT judgment has applied an equality principle down the board stating that whether creditors are secured or unsecured, financial or operational, equitable treatment demands that they all be treated as one group of creditors similarly situate, as a result of which no differences can be made in terms of the amount of debt to be repaid to them based on whether they are secured or unsecured, and whether they are financial or operational creditors. (Para 74)

The UNCITRAL Legislative Guide states:

> "Designing the key objectives and structure of an effective and efficient insolvency law
>
> * * *
>
> *4. Ensuring equitable treatment of similarly situated creditors*
>
> * * *
>
> 7. *The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor.*" (Para 75)

The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence. (Para 76)

BLRC Report, 2015, Para 3.4.2, *referred to*

That equitable treatment of creditors is equitable treatment only within the same class is echoed in *American Jurisprudence*, 2d, Vol. 9 (hereinafter referred to as "*American Jurisprudence*") as follows:

> "§ **6. Distribution.**—Equality of distribution is the theme of a bankruptcy act and a prime bankruptcy policy. *The bankruptcy system is designed to distribute an estate as equally as possible among similarly situated creditors. Thus, creditors of equal status must be treated equally and equitably.*" (Para 77)

First Central Financial Corpn., In re, 377 F 3d 209 (2d Cir 2004); *Vermont Elec. Generation & Transmission Coop. Inc., In re*, 240 BR 476 (Bankr D Vt 1999), *cited*

The importance of valuing security interests separately from interests of creditors who do not have security is well set out in the IMF paper on Development of International Standards of Security Interests by Pascale De Boeck and Thomas Laryea, Counsel, IMF Legal Department. (Para 80)

Indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow. (Para 85)

Philip R. Wood: *Principles of International Insolvency*, World Bank Report of 2010, titled "A Global View of Business Insolvency Systems", *referred to*

By reading para 77 (of *Swiss Ribbons case*) dehors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of *similarly situated creditors*. This being so, the observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, para 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been

met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors. (Para 88)

Swiss Ribbons (P) Ltd. v. *Union of India*, (2019) 4 SCC 17, *clarified*

Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above. Further, most financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. (Para 89)

Swiss Ribbons (P) Ltd. v. *Union of India*, (2019) 4 SCC 17, *affirmed*

The Code and the Regulations, read as a whole, together with the observations of expert bodies and the Supreme Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code — to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational. (Para 90)

It is the Committee of Creditors, under Section 30(4) read with Regulation 39(3), that is vested with the power to approve resolution plans and make modifications therein as the Committee deems fit. It is this vital difference between the jurisdiction of the High Court under Section 392 of the Companies Act, 1956 and the jurisdiction of the Adjudicating Authority under the Code that must be kept in mind when the Adjudicating Authority is to decide on whether a resolution plan passes muster under the Code. When this distinction is kept in mind, it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of. (Para 93)

Miheer H. Mafatlal v. *Mafatlal Industries Ltd.*, (1997) 1 SCC 579, *clarified*

The constitution of a sub-committee by the Committee of Creditors

Under Section 21(8) of the Code, all decisions by the Committee of Creditors can be taken by a 51% majority vote, unless, a higher percentage is required under other specific provisions of the Code. (Para 95)

When it comes to the exercise of the Committee of Creditors' powers on questions which have a vital bearing on the running of the business of the corporate debtor, Section 28(1)(*h*) provides that though these powers are administrative in nature, they shall not be delegated to any other person, meaning thereby, that the Committee of Creditors alone must take the decisions mentioned in Section 28 and not any person other than such Committee. When it comes to approving a resolution plan under Section 30(4), there is no doubt whatsoever that this power also cannot be delegated to any other body as it is the Committee of Creditors alone that has been vested with this important business decision which it must take

by itself. However, this does not mean that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the Committee of Creditors. (Para 98)

Pradyat Kumar Bose v. *Chief Justice of Calcutta High Court*, (1955) 2 SCR 1331 : AIR 1956 SC 285, *relied on*

High Court of Bombay v. *Shirishkumar Rangrao Patil*, (1997) 6 SCC 339 : 1997 SCC (L&S) 1486, *affirmed*

Barnard v. *National Dock Labour Board*, (1953) 2 QB 18 : (1953) 2 WLR 995 (CA); *Board of Education* v. *Rice*, 1911 AC 179 (HL); *Local Govt. Board* v. *Arlidge*, 1915 AC 120 (HL), *cited*

Every single administrative decision qua approving and administering the resolution plan submitted by ArcelorMittal was in fact done by the requisite majority of the Committee of Creditors itself, the sub-committee having been used only for purposes of initiating proceedings and negotiating with ArcelorMittal, which ultimately culminated in the resolution plan as finally negotiated, being passed by the requisite majority of creditors on 23-10-2018. It is only when Standard Chartered Bank found that things were going against it that it started raising objections on the technical plea that sub-committees cannot be constituted under the Code. This is not a bona fide plea. (Para 99)

Extinguishment of Personal Guarantees and Undecided Claims

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. 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. (Para 105)

SBI v. *V. Ramakrishnan*, (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458, *affirmed*

It is difficult to accept that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. (Para 106)

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. (Para 107)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *reversed on this point*

Utilisation of profits of the corporate debtor during CIRP to pay off creditors

The RFP issued in terms of Section 25 of the Code and consented to by ArcelorMittal and the Committee of Creditors had provided that distribution of profits made during the corporate insolvency process will not go towards payment of debts of any creditor — *see* Clause 7 of the first addendum to the RFP dated 8-2-2018. On this short ground, this part of the judgment of NCLAT is also incorrect. (Para 108)

Constitutional validity of Sections 4 and 6 of the Amending Act, 2019 (i.e. amendments to Sections 12 and 30 of the Code)

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 judgment in economic choices must be given a certain degree of deference by the courts. (Para 109)

Swiss Ribbons (P) Ltd. v. *Union of India*, (2019) 4 SCC 17, *affirmed*

Closely on the heels of the impugned NCLAT judgment which was delivered on 4-7-2019, a representation dated 17-7-2019 was written by the Deputy Secretary General, FICCI to the Secretary, Ministry of Corporate Affairs, pointing out the flaws of NCLAT judgment and suggesting that the Government may consider amendment of the Code to reinstate the law as it was and should be. (Para 110)

K. Sashidhar v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222, *cited*

Pursuant to this and representations from banks and industry, the Amending Act of 2019 was then made. (Para 111)

There is no doubt that the Amending Act of 2019 consists of several sections which have been enacted/amended as difficulties have arisen in the working of the Code. While it is true that it may well be that the law laid down by NCLAT in this very case forms the basis for some of these amendments, it cannot be said that the legislature has directly set aside the judgment of NCLAT. Since an appeal against the judgment of NCLAT lies to the Supreme Court, the legislature is well within its bounds to lay down laws of general application to all persons affected, bearing in mind what it considers to be a curing of a defective reading of the law by an Appellate Tribunal. There can be no doubt whatsoever that apart from the present case the amendments made by the Amending Act of 2019 apply down the board to all persons who are affected by its provisions. (Para 113)

Also, it is settled law that bad faith, in the sense of improper motives, cannot be ascribed to a legislature making laws. The doctrine of colourable legislation does not involve any question of "bona fides" or "mala fides" on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. (Para 114)

K.C. Gajapati Narayan Deo v. *State of Orissa*, 1954 SCR 1 : AIR 1953 SC 375; *STO* v. *Ajit Mills Ltd.*, (1977) 4 SCC 98 : 1977 SCC (Tax) 536, *followed*

Cooley's Constitutional Limitations, Vol 1, p. 379.30, *cited*

It is clear therefore for all these reasons that Sections 4 and 6 of the Amending Act of 2019 cannot be struck down on this score. (Para 116)

So far as Section 4 is concerned, it is clear that the original timelines in which a CIRP must be completed have now been extended to 330 days, which is 60 days more than 180 plus 90 days (which is equal to 270 days). But this 330-day period includes the time taken in legal proceedings in relation to such resolution process of the corporate debtor. (Para 117)

ArcelorMittal (India) (P) Ltd. v. *Satish Kumar Gupta*, (2019) 2 SCC 1, *held, legislatively limited on this point*

The speech of the Hon'ble Minister on the floor of the House of the Rajya Sabha also reflected the fact that with the passage of time the original intent of quick resolution of stressed assets is getting diluted. As the speech of the Hon'ble Minister on the floor of the House only indicates the object for which the amendment was made and as it contains certain data which it is useful to advert to, aid taken from the speech not in order to construe the amended Section 12, but only in order to explain why the Amending Act of 2019 was brought about. (Paras 119 and 123)

K.P. Varghese v. *CIT*, (1981) 4 SCC 173 : 1981 SCC (Tax) 293; *K.S. Paripoornan* v. *State of Kerala*, (1994) 5 SCC 593, *referred to*

Lok Shikshana Trust v. *CIT*, (1976) 1 SCC 254 : 1976 SCC (Tax) 14; *Indian Chamber of Commerce* v. *CIT*, (1976) 1 SCC 324 : 1976 SCC (Tax) 41; *CIT* v. *Surat Art Silk Cloth Manufacturers' Assn.*, (1980) 2 SCC 31 : 1980 SCC (Tax) 170; *Union of India* v. *Zora Singh*, (1992) 1 SCC 673; *Aswini Kumar Ghose* v. *Arabinda Bose*, 1953 SCR 1 : AIR 1952 SC 369; *State of W.B.* v. *Subodh Gopal Bose*, 1954 SCR 587 : AIR 1954 SC 92; *State of W.B.* v. *Union of India*, (1964) 1 SCR 371 : AIR 1963 SC 1241; *State of Travancore-Cochin* v. *Bombay Co. Ltd.*, 1952 SCR 1112 : AIR 1952 SC 366, *cited*

It is well settled that no man should suffer because of the fault of the court or delay in the procedure i.e. the maxim *actus curiae neminem gravabit* — an act of court shall prejudice no man, would apply. (Para 125)

Atma Ram Mittal v. *Ishwar Singh Punia*, (1988) 4 SCC 284; *Neeraj Kumar Sainy* v. *State of U.P.*, (2017) 14 SCC 136 : 8 SCEC 454, *affirmed*

Sarah Mathew v. *Institute of Cardio Vascular Diseases*, (2014) 2 SCC 62 : (2014) 1 SCC (Cri) 721, *relied on*

Bharat Damodar Kale v. *State of A.P.*, (2003) 8 SCC 559 : 2004 SCC (Cri) 39; *Japani Sahoo* v. *Chandra Sekhar Mohanty*, (2007) 7 SCC 394 : (2007) 3 SCC (Cri) 388; *Vanka Radhamanohari* v. *Vanka Venkata Reddy*, (1993) 3 SCC 4 : 1993 SCC (Cri) 571, *cited*

Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date — without any exception thereto — may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 of the Constitution and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(*g*) of the Constitution. This being the case, the provision would have been struck down in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail. Thus, while leaving the provision otherwise intact, the word

"mandatorily" is struck down as being manifestly arbitrary under Article 14 of the Constitution 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. (Para 127)

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 days 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 factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or 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 Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 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. (Para 127)

Madras Petrochem Ltd. v. *BIFR*, (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478, *referred to*

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. 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). 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. (Para 128)

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. 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. (Para 129)

Equally, Explanation 2 applies the substituted section to pending proceedings either at the level of the Adjudicating Authority or the Appellate Authority or in a writ or civil court. No vested right inheres in any resolution applicant to have its plan approved under the Code. An appellate proceeding is a continuation of an original proceeding. This being so, a change in law can always be applied to an original or appellate proceeding. For this reason also, Explanation 2 is constitutionally valid, not having any retrospective operation so as to impair vested rights. (Para 130)

Swiss Ribbons (P) Ltd. v. *Union of India*, (2019) 4 SCC 17; *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1; *Shiv Shakti Coop. Housing Society* v. *Swaraj Developers*, (2003) 6 SCC 659, *affirmed*

Lachmeshwar Prasad Shukul v. *Keshwar Lal Chaudhuri*, 1940 SCC OnLine FC 10 : AIR 1941 FC 5, *approved*

The challenge to sub-clause (*b*) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC Report. Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. (Para 131)

The resolution plan of ArcelorMittal as amended and objections thereto

The final resolution plan as approved on 23-10-2018 was as follows — in the place of INR 35,000 crores to be paid on the effective date as an upfront amount, INR 39,500 crores and INR 2500 crores, aggregating to INR 42,000 crores was to be paid. The resolution applicant agreed that the Committee of Creditors will decide the manner in which the financial package being offered by the resolution applicant to financial creditors will be distributed to secured financial creditors. The payment of INR 17.4 crores was to be made to unsecured financial creditors with a claim amount of more than INR 10 lakhs, and INR 30.55 lakhs to such creditors with a claim amount of less than INR 10 lakhs, with the fresh capital infusion for improving operations and enhancing revival prospects of the corporate debtor remaining at INR 8000 crores. So far as operational creditors were concerned, there was no change made. (Para 136)

Kannan Tiruvengandam v. *M.K. Shah Exports Ltd.*, 2018 SCC OnLine NCLAT 927; *Darshak Enterprise (P) Ltd.* v. *Chhaparia Industries (P) Ltd.*, 2018 SCC OnLine NCLAT 224, *cited*

At the 22nd meeting of the Committee of Creditors dated 27-3-2019, NCLT order of 8-3-2019 was discussed and it was felt that INR 1000 crores extra be paid for operational creditors over and above INR 1 crore each. (Para 137)

Under the caption "Discussion on the suggestions of the Hon'ble NCLT in relation to distribution of amounts proposed to be paid to financial creditors", the minutes of the meeting reflect that the Committee of Creditors had sought for and obtained the opinion of retired Justice B.N. Srikrishna. This opinion dated 23-3-2019 stated as follows:

> "... In the case of SCB, however, there seems to have been gross under security for the large amount of Rs 3000 crores by merely seeking a corporate guarantee from the corporate debtor along with a charge only on the shares of the offshore company held by the corporate debtor, wherein the liquidation value of such shares is a mere Rs 60.71 crores. In fact, in view of the fact situation, I find it hard to understand whether SCB can really be treated as a secured creditor in the first place. I am of the opinion that even if the corporate guarantee were to be enforced, SCB would at best stand as a secured creditor only to the extent of the value of the shares of the offshore company as on the date of enforcement of the guarantee and as an unsecured creditor with respect to the rest of the loan advanced by it. This is an equally valid consideration which might have moved the CoC while approving the resolution plan by which the ultimate discretion for distribution is left to the CoC with a declaration that such allocation to the financial creditors will be binding on all stakeholders, which also would include SCB." (Para 138)

Submissions on behalf of Standard Chartered Bank, that the offer made by ArcelorMittal of payment of INR 42,000 crores as upfront in order to pay 100% principal outstanding of secured financial creditors of the corporate debtor cannot be accepted. (Para 140)

It is also not possible to accept the submission, that "feasibility and viability" of a resolution plan will not include distribution of the amount of debt under the said plan. (Para 141)

It is also not possible to accept that the resolution plan must itself provide for distribution inter se between secured financial creditors. It is enough that under the Code and the Regulations, the resolution plan provides for distribution of amounts payable towards debts based upon a classification of various types of creditors. (Para 142)

SBI v. *Orissa Manganese & Minerals Ltd.*, 2018 SCC OnLine NCLT 21381, *clarified*

Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct. Section 30(2)(*b*) of the Code refers to Section 53 not in the context of priority of payment of creditors, but only to provide for a minimum payment to operational creditors. However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security,

which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself. (Para 145)

The other argument based upon serious conflict of interest between secured and unsecured financial creditors, as the majority may get together to ride roughshod over the minority, is an argument which flies in the face of the majority of financial creditors being given complete discretion over feasibility and viability of resolution plans, which includes the manner of distribution of debts that is contained in them, subject to following the provisions of the Code relating, inter alia, to dealing with the interests of all stakeholders including operational creditors. The Committee of Creditors does not act in any fiduciary capacity to any group of creditors, as is sought to be suggested. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors. (Para 146)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *reversed on this point*

O. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30(4), 31 and 32 — Nature of debt i.e. operational or financial — Determination of — Findings of fact — Non-interference with**

— Appellant assailed its classification as an operational creditor and challenged the NCLAT ruling — Held, the finding in the NCLAT judgment was a finding of fact which dislodges the claim of the appellant to be regarded as a financial creditor — In the present case, upholding the finding, appeal dismissed (Para 148)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *affirmed on this point*

P. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30, 31 and 32 — Quantum of claim — Determination of**

— Held, NCLAT has erred inasmuch as it has added the claim of the appellant to the tune of INR 861.19 crores despite the fact that the claim had already been admitted by the resolution professional thereby resulting in a double counting of the debt of the appellant — In the present case, the impugned NCLAT judgment set aside to the said extent (Para 149)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *reversed on this point*

Q. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 60(6) — Grant of permission to raise disputed claims outside the provisions of the Code after approval of the resolution plan — Impermissibility of (*see also* Shortnote *L*)**

— In the present case, the finding of NCLAT that the claim was filed by appellant after the approval of the resolution plan, upheld however, NCLAT's finding that the said claim is subject to arbitration and that it was open for the appellant to pursue the matter in terms of S. 60(6) of the Code set aside (Para 150)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *reversed on this point*

R. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30, 31 and 32 — Errors in computation of claims — Rectification of**

— Held, there has been an error in the impugned NCLAT judgment inasmuch as it notes the claim amount, as admitted, as being a sum of INR 124.88 crores, but later in the same judgment it notes the said amount as INR 2.47 crores based on a chart submitted by the resolution professional — Further, the chart submitted by the resolution professional specifies the amount of INR 2.47 crores (added after NCLT judgment), which is in addition to the amount of INR 124.88 crores already admitted by the resolution professional — Therefore, NCLAT erred in noting INR 2.47 crores amount as the amount of the appellant's claim — Thus, the claim of the appellant shall be the claim as admitted and registered by the resolution professional (Para 151)

S. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 60(6) — Grant of permission to raise disputed claims outside the provisions of the Code after approval of the resolution plan — Impermissibility of (*see also* Shortnote *L*)**

— In the present case, on facts held, the sum of INR 121.72 crores had been rightly rejected by NCLAT in view of the fact that the said claim was filed after the completion of the CIRP period — However, NCLAT's judgment inasmuch as it left it open for the appellant to pursue the matter in terms of S. 60(6) of the Code set aside (Para 151)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *reversed on this point*

T. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 61 and 62 — Findings of fact — Non-interference with**

— Restoration application filed by the appellants came to be rejected by NCLT 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 — NCLAT upheld the finding of NCLT and the resolution professional — Held, in view of these concurrent findings, the claim of the appellants required no interference — Also, the submission of the appellants that they had now paid the requisite stamp duty, after the impugned NCLAT judgment, held, would not assist the case of the appellants at this belated stage (Para 152)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *affirmed on this point*

Essar Steel Asia Holdings Ltd. v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 736; *Resolution Professional* v. *Essar Steel (India) Ltd.*, 2019 SCC OnLine NCLAT 750, *cited*

U. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30, 31 and 32 — Errors in computation of claims — Rectification of**

— Held, NCLAT wrongly noted that the claim amount was notionally admitted by the resolution professional at INR 1 only while the resolution professional admitted the claim to a tune of INR 17.09 crores and the same was recorded in the list of creditors prepared by the resolution professional — In

view of the same, held, the claim shall be the claim as admitted and registered by the resolution professional (Para 153)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *reversed on this point*

V. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 31 — Liberty to pursue proceedings pending before NCLT — Grant of**

— In view of the fact that the impugned judgment had not opined on the merits of the case of the writ petitioner pending before NCLT, liberty given to petitioner to raise all contentions as permissible under the applicable law before NCLT in the pending proceedings (Para 154)

W. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 30(2), 31 and 32 — Notional value of debts as admitted by resolution professional — Validity of, when disputes are pending before various authorities qua the claimed amounts**

— Resolution professional admitted the claim of the respondents notionally at INR 1 on the ground that there were disputes pending before various authorities in respect of the said amounts, however, NCLT directed the resolution professional to register the entire claim and NCLAT upheld the order — Unsustainability — Held, the resolution professional was correct in only admitting the claim at a notional value of INR 1 (Para 155)

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *reversed on this point*

Standard Chartered Bank v. *Essar Steel (India) Ltd.*, 2017 SCC OnLine NCLT 10751; *Resolution Professional* v. *Essar Steel (India) Ltd.*, 2019 SCC OnLine NCLAT 750; *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 937; *Indian Oil Corpn. Ltd.* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 936, *referred to*

Chitra Sharma v. *Union of India*, (2018) 18 SCC 575, *cited*

VN-D/63795/CV

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The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— Delay condoned in Civil Appeal Diary No. 31409 of 2019 and Civil Appeal Diary No. 36838 of 2019. IA No. 102638 of 2019 in Civil Appeal Diary No. 24417 of 2019 for permission to file appeal allowed. Appeal admitted.

2. This group of appeals and writ petitions raises important questions as to the role of resolution applicants, resolution professionals, the Committee of Creditors that are constituted under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"), and last, but by no means the least, the jurisdiction of the National Company Law Tribunal (hereinafter referred to as "NCLT"/"Adjudicating Authority") and the National Company Law Appellate Tribunal (hereinafter referred to as "NCLAT"/"Appellate Tribunal"), qua resolution plans that have been approved by the Committee of Creditors. The constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (hereinafter referred to as "the Amending Act of 2019") have also been challenged. These appeals and writ petitions are an aftermath of this Court's judgment dated 4-10-2018, reported as *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[1].

3. On 2-8-2017[2], NCLT, Ahmedabad admitted Company Petition (IB) No. 39 of 2017 filed by Standard Chartered Bank together with a petition filed by State Bank of India under Section 7 of the Code. One Satish Kumar Gupta was appointed as the interim resolution professional, who was later confirmed as resolution professional. On 6-10-2017, the resolution professional by way of an advertisement in the *Economic Times*, invited expressions of interest from all interested resolution applicants to present resolution plans for rehabilitating the corporate debtor, namely, Essar Steel India Ltd. On 24-12-2017, the resolution professional issued a request for proposal (hereinafter referred to as "RFP"), inter alia, inviting resolution plans for the aforesaid corporate debtor, which was later amended on 8-2-2018. Two resolution plans were submitted on 12-2-2018, one by ArcelorMittal (India) (P) Ltd. (hereinafter referred to as "ArcelorMittal") and another by Numetal Ltd. (hereinafter referred to as "Numetal") both of which were found to be ineligible under Section 29-A of the Code. On 2-4-2018, resolution plans were then submitted by ArcelorMittal, Numetal and one Vedanta Ltd. (hereinafter referred to as "Vedanta"). The resolution plan of ArcelorMittal specifically provided for an upfront payment of INR 35,000 crores in order to resolve debts amounting to INR 49,213 crores.

1 (2019) 2 SCC 1
2 *Standard Chartered Bank* v. *Essar Steel (India) Ltd.*, 2017 SCC OnLine NCLT 10751

It was stated that unsecured financial creditors shall be paid an aggregate amount of 5% of their admitted claims. Apart from the above, INR 8000 crores of fresh capital infusion by way of capex and working capital was also to be infused. INR 3339 crores — being the aggregate admitted claims of operational creditors, other than workmen and employees, was to be paid to the extent of INR 196 crores, but only to trade creditors and government creditors. Small trade creditors, defined as "having claims of less than one crore" were to be honoured in full, as was the claim of workmen and employees of the corporate debtor, amounting to INR 18 crores. Importantly, the resolution applicant empowered the Committee of Creditors to decide the manner in which the financial package being offered would be distributed among the secured financial creditors. Standard Chartered Bank, which was stated to be an unsecured creditor, was to be paid an aggregate amount of 5% of its admitted claims. On 19-4-2018, the Adjudicating Authority directed the Committee of Creditors of the corporate debtor, which by then had been set up by the interim resolution professional, to consider the eligibility of the aforesaid resolution applicants.

4. On 10-9-2018, Standard Chartered Bank was classified as a secured financial creditor of the corporate debtor by the resolution professional. On 4-10-2018[1], this Court declared both ArcelorMittal and Numetal ineligible by virtue of their resolution plans being hit by Section 29-A of the Code. However, an order was passed under Article 142 of the Constitution, stating that one more opportunity be granted to both ArcelorMittal and Numetal to pay off the NPAs of their related corporate debtors within two weeks of the Supreme Court judgment, failing which the corporate debtor would go into liquidation. On 18-10-2018, ArcelorMittal informed the resolution professional and the Committee of Creditors that it had made payments as per the Supreme Court's judgment dated 4-10-2018[1]. However, Numetal did not make any such payment. As a result, on 19-10-2018, ArcelorMittal resubmitted its resolution plan of 2-4-2018, which was then evaluated by the Committee of Creditors on the same date — ArcelorMittal being declared as the highest evaluated resolution applicant vis-à-vis Vedanta. On 25-10-2018, the final negotiated resolution plan of ArcelorMittal was approved by the Committee of Creditors by a 92.24% majority.

5. After several proceedings before NCLT and NCLAT, NCLT, by its judgment dated 8-3-2019[3] disposed of the application to allow the resolution plan filed by ArcelorMittal as follows: (SCC OnLine NCLT para 27)

> "*27.* … we are of the view that the dues of the operational creditors must get at least similar treatment as compared to the dues of the financial creditors on the principle of equity and fair play as well as the *Wednesbury Principle of Unreasonableness* and the *Doctrine of Proportionality*, so as to avoid disparity in making payments to the operational creditors having debt value of Rs 1 crore and above (a token of Re.1) and the allegation

1 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
3 *Resolution Professional* v. *Essar Steel (India) Ltd.*, 2019 SCC OnLine NCLAT 750

of discriminatory practice could be ruled out. ... Hence, in our view, if a reasonable formula for apportionment is worked out so that 85% of the amount offered by the resolution applicant is distributed among the financial creditors and the remaining 15% of the amount is distributed amongst the rest of the operational creditors, then the entire claim of the operational creditors, which comes to around Rs 4700 crores can be substantially paid off or at least the operational creditors can get 50% of their admitted and undisputed claim in the light of the judgment of the Hon'ble Supreme Court in *Chitra Sharma* v. *Union of India*[4]. Such object can be achieved, if the financial creditor and the members of the CoC are willing to sacrifice the interest component on their principal loan, because it is established position in the record that the principal loan liability of the corporate debtor company comes to around Rs 35,000 crores in the year 2017 when these IB Petitions were admitted, which includes the interest component also and by giving such hair-cut to the interest component to the extent possible by providing provision for 15% amount for the other operational creditors and stakeholders, we are of the view that debts of the entire operational creditors can be satisfied in a reasonable and fair manner and then such IAs preferred by the operational creditors would also become infructuous and this Adjudicating Authority would not be required to deal with the merits of each and every IA Thus, this would be beneficial to avoid multiplicity of legal proceedings and to remove any impediment for effective implementation of the resolution plan and to achieve the main theme and object of the present I&B Code."

6. By an interim order dated 20-3-2019[5] in the appeals that were filed before NCLAT, NCLAT directed the Committee of Creditors to take a decision on certain suggestions that were made. Pursuant to this, on 27-3-2019 the Committee of Creditors decided — voting having concluded on 30-3-2019 — to appeal against NCLAT's order, and, by a majority of 70.73% approved making an ex gratia payment of INR 1000 crores to operational creditors above INR 1 crore. Appeals filed against the interlocutory orders of NCLAT were then heard by this Court, which by its order dated 12-4-2019[6], inter alia, directed non-implementation of the judgment dated 8-3-2019[3] of NCLT and expeditious disposal of the appeal before NCLAT.

7. By its final judgment dated 4-7-2019[7], NCLAT held that:

7.1. In a resolution plan there can be no difference between a financial creditor and an operational creditor in the matter of payment of dues, and that therefore, financial creditors and operational creditors deserve equal treatment under a resolution plan. Accordingly, NCLAT has redistributed the proceeds payable under the approved resolution plan as per the method of calculation

4 (2018) 18 SCC 575
5 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 937
6 *Indian Oil Corpn. Ltd.* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 936
3 *Resolution Professional* v. *Essar Steel (India) Ltd.*, 2019 SCC OnLine NCLAT 750
7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388

adopted by it so that all financial creditors and operational creditors be paid 60.7% of their admitted claims.

7.2. Securities and security interest is irrelevant at the stage of resolution for the purposes of allocation of payments, thereby directing that each financial creditor (whether secured or unsecured) with a claim equal to or more than INR 10 lakhs be paid 60.7% of its admitted claim irrespective of their security interest.

7.3. Operational creditors by definition have separate classes within themselves and can be classified into sub-classes for the purpose of distribution (while rejecting any classification amongst the financial creditors) on the basis of the admitted amounts thereby directing that operational creditors with a claim of equal to or more than INR 1 crore be paid 60.268% of their admitted claims.

7.4. Certain additional claims of operational creditors (some of which were highly belated and/or without sufficient proof) were admitted, such that the admitted operational debt of approximately INR 5058 crores at the time of the approval of the approved resolution plan became an operational debt of approximately INR 19,719.20 crores.

7.5. The profits generated by the corporate debtor during the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") would be distributed equally amongst the financial creditors and operational creditors of the corporate debtor.

7.6. A sub-committee or core committee cannot be constituted under the Code, being a foreigner thereto. The Committee of Creditors alone are to take all decisions by themselves.

7.7. The Committee of Creditors has not been empowered to decide the manner in which the distribution is to be made between one or other creditors, as there would be a conflict of interest between financial and operational creditors, financial creditors favouring themselves to the detriment of operational creditors.

7.8. Section 53 of the Code cannot be applied during the corporate resolution process but will apply only at the stage of liquidation.

7.9. Claims that have been decided by the resolution professional and affirmed by the Adjudicating Authority or the Appellate Tribunal are final and binding on all creditors. However, claims which have not been decided by the Adjudicating Authority or the Appellate Tribunal on merits may be decided by an appropriate forum in terms of Section 60(6) of the Code.

7.10. Financial creditors in whose favour guarantees were executed, as their total claim stands satisfied to the extent of the guarantee, cannot re-agitate such claims as against the principal borrower.

8. We have heard detailed arguments made by Shri Gopal Subramanium and Shri Rakesh Dwivedi, learned Senior Counsel, on behalf of the Committee of Creditors of Essar Steel India Ltd. They have argued that the provisions of the Code provide for a broad classification of creditors as financial creditors and operational creditors on the basis of the nature of the transaction between creditors and a corporate debtor. They have further argued that the Code

does not mandate identical treatment of differently situated creditors either inter se within financial creditors, who may be secured or unsecured, and/or financial creditors vis-à-vis operational creditors. The Code only posits equitable treatment of different classes of creditors recognising that different classes deserve differential treatment. According to them, financial creditors as a class have a superior status as against operational creditors, the same being the case with secured creditors vis-à-vis unsecured creditors. For this purpose, they relied upon certain provisions of the Code. They further argued that the general law of the land as contained in Section 48 of the Transfer of Property Act, 1882 and Section 77 of the Companies Act, 2013 would not have been taken away sub silentio by the Code and have relied upon a large number of authorities for this purpose.

9. They also referred to and relied upon the UNCITRAL Legislative Guide on Insolvency Law (hereinafter referred to as "the UNCITRAL Legislative Guide"), which was referred to by this Court in *Swiss Ribbons (P) Ltd.* v. *Union of India*[8], and upon a report by the International Monetary Fund titled "Orderly and Effective Insolvency Procedures — Key Issues".

10. They also referred to and relied upon judgments under Article 14 of the Constitution of India which highlight the fact that classification is permissible so as to differentiate persons who are unequal, who cannot then be treated equally. They also argued, relying strongly upon the IMF paper on "Development of International Standards of Security Interests" by Pascale De Boeck and Thomas Laryea, in addition to several expert reports, that classification of creditors based on the nature of the debt and/or security interest is a sine qua non for any Insolvency Code. They argued that if secured financial creditors are to be treated at par with unsecured creditors, such secured creditors would rather vote for liquidation rather than Corporate Resolution, contrary to the main objective sought to be achieved by the Code.

11. They then argued that the health of the financial sector is critical for the overall health and growth of the economy, which would otherwise be subverted, if the impugned judgment[7] were to be given effect. They relied strongly upon para 50 of *Swiss Ribbons*[8], in particular, which differentiated between secured and unsecured creditors, most financial creditors being secured creditors and most operational creditors being unsecured. They also argued that the law laid down in *K. Sashidhar* v. *Indian Overseas Bank*[9], had made it clear that there is a judicial hands-off when it comes to the commercial wisdom of the Committee of Creditors, which has been directly infracted by the impugned judgment, which has held that the Committee of Creditors has nothing to do with the distribution of amounts which are infused by the resolution applicant for payment of the corporate debtor's erstwhile debts. They relied heavily upon the Bankruptcy Law Reforms Committee Report, 2015 (hereinafter referred to

8 (2019) 4 SCC 17
7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388
9 (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

as "the BLRC Report") to buttress this submission, as well as the UNCITRAL Legislative Guide.

12. They then submitted that a resolution plan is a consent-based plan proposed by the resolution applicant for a corporate debtor. The counterparty to such a plan is the Committee of Creditors, which is required to give a minimum consent of 66% voting share, which consent then becomes the basis for the Adjudicating Authority to approve a resolution plan for the corporate debtor. Once approved by the Adjudicating Authority, such plan becomes binding on all stakeholders as is mentioned by Section 31 of the Code. Therefore, any modification, as has been done by NCLAT, of such plan is illegal. They then argued that the Committee of Creditors has both the power and the jurisdiction to deal with all commercial aspects of a resolution plan, including distribution of proceeds under such plan, and also referred to and relied upon the recent amendments made to Section 30 of the Code.

13. They stated that the ArcelorMittal plan, as amended, looked after all stakeholders including operational creditors, and stated that a staggering amount of INR 55,000 crores qua operational creditors was paid during the 600 odd days of CIRP being carried out, operational creditors whose claims were above INR 1 crore, now being paid approximately 20% of their admitted dues. They also highlighted the fact that the secured creditors have lost about INR 17,000 crores of interest in the last three years due to the account of the corporate debtor having been classified as NPA.

14. They then argued that the setting up of a sub-committee by the Committee of Creditors is permissible under the Code, and referred to certain judgments to buttress this proposition. They further argued that no decision-making power was delegated to the sub-committee, nor did the sub-committee at any time decide or even recommend on distribution of amounts.

15. They then argued that NCLAT admitted various rejected/disputed/estimated claims worth INR 13,767 crores, which was more than the amount originally claimed by operational creditors. Various instances of non-application of mind were pointed out by which claims worth INR 11,278, which were not yet crystallised, were admitted by NCLAT for payment, and various examples of double payment were also given. It was also argued that NCLAT erroneously permitted several disputed claims to be raised outside the provisions of the Code after approval of the resolution plan, by referring to and relying upon Section 60(6) of the Code, which merely saved limitation for barred claims. They then argued that extinguishment of the right of creditors against individual guarantees extended by the promoters/promoter group of the corporate debtor was wholly illegal being contrary to several judgments of this Court and contrary to the terms of the guarantees themselves. They further argued that the profits that were made during the CIRP can obviously not be used for payment of the debts of the corporate debtor, as has been ordered by NCLAT.

16. Ultimately, according to the learned counsel, the impugned NCLAT judgment[7] deserves to be set aside because it has curtailed the authority of the Committee of Creditors; expanded the jurisdiction of the Adjudicating Authority as well as NCLAT beyond the bounds contained in the Code; and has transgressed the most basic tenet of the Committee of Creditors' commercial wisdom being reflected by an over 66% majority vote, which has been nullified by NCLAT by completely modifying and substituting the resolution plan approved by the Committee of Creditors.

17. Shri Shyam Divan, learned Senior Advocate appearing on behalf of State Bank of India, has supported the submission made on behalf of the Committee of Creditors of Essar Steel India Ltd. According to the learned Senior Advocate, whereas his client and other secured creditors are secured to the extent of 99.66% of their outstanding dues, the only security of Standard Chartered Bank is a pledge of the shares held by the corporate debtor in an offshore Mauritian subsidiary, namely, Essar Steel Offshore Ltd. (hereinafter referred to as "ESOL"), and the fair value of ESOL pledged shares has been determined at only INR 24.86 crores as against the total outstanding admitted dues of INR 3487.10 crores (being 0.7% of the total admitted debt of Standard Chartered Bank). Thus, according to him, Standard Chartered Bank is an unsecured creditor to the extent of INR 3462.14 crores, and as against a sum of INR 60.71 crores which was payable under the resolution plan as approved by the Committee of Creditors, NCLAT has now upped this figure to approximately INR 2160 crores completely beyond its limited jurisdiction under the Code. Apart from the above, he also argued that Standard Chartered Bank is precluded from raising any challenge to the constitution of a sub-committee as it had participated in several meetings in which it raised no objection to the sub-committee, and had in fact requested to be a part of the sub-committee. He then argued that negotiations that were undertaken by the sub-committee were in accordance with the mandate of the Committee of Creditors, which alone took all decisions; the sub-committee merely being an executive arm of the Committee of Creditors.

18. Shri Kapil Sibal, appearing on behalf of Standard Chartered Bank, defended NCLAT judgment[7] on all aspects. According to him, the offer made by ArcelorMittal was to make a payment of INR 42,000 crores as an upfront amount in order to pay 100% of the principal outstanding of the secured financial creditors of the corporate debtor. That this sum came to be offered only as a result of an offer made by Numetal on 7-9-2018 to pay INR 37,000 crores as upfront payment to secured financial creditors. According to the learned counsel, the sum of INR 42,000 crores cannot be worked out unless the principal amount owed to Standard Chartered Bank is also included in the said figure. The figure of INR 42,000 crores was stated by the counsel of the Committee of Creditors before this Hon'ble Court, in the final hearing which took place before the judgment in *ArcelorMittal (India)*[1], and that this sum could be the minimum value of payment with a scope for further negotiations.

7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388
1 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1

However, what ultimately turned out is a payment of a lesser value, namely, INR 39,500 crores as upfront, INR 2500 crores being added as an eyewash towards guaranteed working capital adjustment. The reason this was an eyewash is because Odisha Slurry Pipeline Infrastructure Ltd. (hereinafter referred to as "OSPIL"), a wholly owned subsidiary of the corporate debtor, owned a slurry pipeline. ArcelorMittal, in order to ensure unhindered usage of the said slurry pipeline, agreed that it would acquire the debts of OSPIL. In order to achieve such acquisition of the debts of OSPIL, the Core Committee of Creditors relieved ArcelorMittal from the solemn offer made to the Supreme Court of India to pay upfront a sum of INR 42,000 crores, and reduced from this said amount, a sum of INR 2500 crores. Thus, the Core Committee's decision, as ratified by the Committee of Creditors, was to accept a sum lesser than that guaranteed as upfront payment by ArcelorMittal.

19. Shri Sibal then trained his guns against the very formation of a Core Committee/Sub-Committee, stating that it is against the provisions of the Code, and that as originally conceived, it was only to facilitate representation before the Adjudicating Authority, which was over, in any case, by 31-5-2018. The Core Committee however went on conducting secret negotiations with ArcelorMittal by which it buried Standard Chartered Bank's debt almost completely. This was done by reducing Standard Chartered Bank's entitlement of INR 2585 crores (INR 2646 crores minus INR 61 crores), if it were to have outstanding payments made on the basis of value of debt instead of value of security. In any case, it was further argued that the resolution plan of ArcelorMittal was itself flawed in that it would be contrary to Regulation 38(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as "the 2016 Regulations"), as it did not deal with the interests of all stakeholders. It would also be contrary to the RFP that was issued on 24-12-2017, Clause 4.6.1(*d*) of which stated that the resolution plan should have contained a statement as to how it would deal with the interest of all stakeholders including, but not limited to, break-up of amounts to be paid to secured financial creditors, unsecured financial creditors and operational creditors, all of which was left, thanks to secret negotiations with ArcelorMittal by the resolution plan to the Committee of Creditors.

20. The learned counsel then argued that under the provisions of the Code, the role of the Committee of Creditors is limited to considering the feasibility and viability of the resolution plan, which does not include the manner of distribution of the amount payable by the resolution applicant to the erstwhile creditors of the corporate debtor. In any event, the decision of the Committee of Creditors on the manner of distribution in the facts of this case is illegal and arbitrary, as once a creditor is classified as a financial creditor, such creditor is entitled to equal treatment with all other financial creditors, irrespective of whether it is secured or unsecured. For this purpose, the learned Senior Advocate relied upon the UNCITRAL Legislative Guide as well as the BLRC Report, 2015. According to the learned Senior Advocate, Parliament has advisedly chosen not to create different classes of financial or operational creditors when it comes to the process of resolution of debts; and importance is given to the value of debt, as opposed to, the value of security which is given

importance only when the liquidation process is to take place. He argued that Section 53 of the Code would apply only during liquidation and not at the stage of resolving insolvency as is clear from the fact that "secured creditor" as defined by Section 3(30) of the Code is used only in Section 53 of the Code which is contained in Chapter III entitled "Liquidation Process" and not at all in Chapter II of the Code which is entitled "Corporate Insolvency Resolution Process". In Chapter II, only financial and operational creditors, as defined, are spoken about. In point of fact, in the 17th meeting of the Committee of Creditors held on 9-8-2018, the Committee of Creditors had earlier decided that the upfront payment made shall be divided amongst financial creditors on the basis of their voting shares, which in turn is fixed on the basis of the debt that is owed to each one of them.

21. He further argued that the Committee of Creditors could not possibly decide the manner of distribution as it would give rise to a serious conflict of interest, as the majority may get together to ride roughshod over the minority. He further argued that no categorisation can be made based on the security interest of financial creditors, which security interest may itself vary from first charge holders to second charge holders and then to subservient and residual charge holders. The fact that Standard Chartered Bank has been recognised, albeit only on 10-9-2018, as a secured financial creditor by the resolution applicant, is not challenged by any of the other financial creditors. Further, the valuation of pledged shares at INR 24.86 crores is itself a flawed evaluation, the actual value of the shares being in excess of US $600 million.

22. Shri Sibal then took us to the Amending Act of 2019 and Section 6 of the Amending Act of 2019 in particular, which amended Section 30 of the Code, shortly after the judgment of NCLAT in the present case. This amendment was made in the Code with effect from 16-8-2019. Shri Sibal's first argument is that the aforesaid amendment would not apply to the facts of the present case, inasmuch as the amendment made is prospective in nature. Further, even under Explanation 2 that has been added by the amendment, the facts of the present case do not fall within sub-clauses (*i*) to (*iii*) of the aforesaid Explanation. A reading of the amended Section 30(2)(*b*) together with the Explanations contained therein, and the amendment of Section 30(4) would leave nobody in any manner of doubt that the purpose of the amendment was to get over NCLAT judgment in order that the huge amount of around INR 2100 crores, that is payable to a private foreign bank, namely, Standard Chartered Bank, gets reduced to around INR 61 crores, so that nationalised banks and other entities in which the Government has an interest may get a larger share of the pie to the detriment of Standard Chartered Bank. The legislature has, therefore, overstepped the separation of powers boundaries to step in and legislatively adjudicate the facts of a particular case. Even otherwise, according to the learned counsel, the provision is an arbitrary exercise of power which brings in Section 53, which is applicable only when the corporate debtor gets liquidated, into the Corporate resolution process, contrary to the original scheme of the Code. Also, Explanation 1 directly interferes with the judicial function and cannot state that a distribution shall be fair and equitable, which can only be decided by the Adjudicating Authority and not by Parliament. Also, the

amendment made to Section 30(4) cannot possibly include value of security interest of a secured creditor within the expression "feasibility and viability" which has been done only in order that it be applied to the present case.

23. Shri Arvind Datar supplemented the arguments of Shri Sibal and also appeared on behalf of Standard Chartered Bank. He argued that the loan by Standard Chartered Bank to the wholly owned subsidiary of the corporate debtor is also a loan towards the project asset of the corporate debtor and that State Bank of India was fully aware of such lending that was availed of by the corporate debtor. The wholly owned subsidiary is a special purpose vehicle in order to ensure availability of coal for the corporate debtor to cater to enhanced production capacity.

24. He elaborated on the meaning of the expression "modifications" contained in Regulation 39(3) of the 2016 Regulations, arguing that the power to make modifications does not include the power to discriminate among creditors who are equally situated. Also, the Committee of Creditors cannot make rankings among financial creditors or otherwise create a class within a class. He reiterated that the status of Standard Chartered Bank as a secured financial creditor has not been disputed by any member of the Committee of Creditors.

25. Shri Ranjit Kumar, learned Senior Advocate appearing on behalf of Ideal Movers Ltd., an operational creditor of the corporate debtor, stated that the admitted claim by the resolution professional was INR 178,50,51,792, and the original resolution plan contained nothing by way of repayment to his client. It is only after NCLT judgment when INR 1000 crores extra was paid by ArcelorMittal for operational creditors generally, that his client would now receive 20.5% of the admitted claim. Of course under NCLAT judgment, he would stand to gain much more. He argued from a reading of the Preamble of the Code and some of its provisions that a key objective of the Code is to ensure that the corporate debtor goes on doing its business as a going concern during the CIRP as a result of which a large number of operational creditors have to be paid their dues — such as workmen, electricity dues, etc. It is for this reason that the CIRP has to ensure the balancing of interest of all stakeholders which can only be achieved by a feasible and viable resolution plan which is capable of effective implementation. He, therefore, argued that the process of revival and the process of liquidation are distinct and separate and have been so treated by the Code. This being so, priorities of payment which apply in liquidation obviously cannot apply when the corporate debtor is being run as a going concern as otherwise secured creditors alone will be paid and not operational creditors who are necessary for the running of the business. This stems from the fact that the insolvency resolution process is to maximise the value of assets of corporate debtors whereas the liquidation process is to recover outstanding dues by selling the assets of the corporate debtor. He relied strongly on certain observations in *Swiss Ribbons*[8] to buttress the aforesaid proposition. He also argued that the UNCITRAL Legislative Guide, being a guide to legislation, ought not to be looked at once the Code has been enacted. He then argued, that it

8 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

is obvious that the Amending Act of 2019 has been made in a great hurry in order that NCLAT judgment be neutralised by law. This is clear from the fact that NCLAT judgment is dated 4-7-2019[7] and the Amending Act of 2019 was passed only one month later i.e. on 6-8-2019. No Standing Committee was consulted, as was the case of all previous amendments made to the Code, resulting in completely arbitrary provisions being inserted. He trained his guns against Section 4 of the Amending Act of 2019, arguing that timelines cannot be imposed or stipulated for the adjudication of disputes by any court, least of all the Supreme Court of India. The period of time taken in court proceedings cannot possibly be included within a time-frame as it would then nullify the role of the Adjudicating Authority and the Appellate Tribunal, and would defeat the primary object and purpose of the Code, which is resolution rather than liquidation.

26. Shri Harin P. Raval, learned Senior Advocate appearing on behalf of Kamaljit Singh Ahluwalia in Writ Petition (Civil) No. 1058 of 2019 also assailed the Amending Act of 2019. Apart from the arguments made by Shri Sibal and Shri Ranjit Kumar, he also argued that the amendments made in Section 30 would be contrary to the rationale and design of the BLRC Report, 2015. He also added that the Amending Act of 2019, insofar as it applied retrospectively, would be constitutionally infirm as it cannot be said that the amendments made thereto are in any manner clarificatory but are new substantive amendments.

27. Shri A.K. Gupta, learned advocate appearing for L&T Infrastructure Finance Co. Ltd. in Civil Appeal No. 6409 of 2019, assailed the classification of his client as an operational creditor and stated that, on facts, the appellant had entered into a facility agreement, sanctioning a term loan of INR 75 crores to Essar Power Gujarat Ltd., a subsidiary of the corporate debtor. The borrower then entered into a Promoter Obligation Agreement by which one Essar Power Ltd. undertook an obligation to arrange for cheques from the corporate debtor. INR 62 crores of such post-dated cheques were issued in favour of this appellant, as a result of which this appellant is also entitled to be classified as a financial creditor and not an operational creditor. He thus assailed the finding of the resolution professional, NCLT and NCLAT on this aspect of his case.

28. Shri Mishra, learned advocate, appeared on behalf of Dakshin Gujarat Vij Company, in which he submitted that NCLAT had rightly directed that the claim of his client should be considered with all other creditors, and prayed in the alternative that directions be issued that his client be entitled to recover the amount claimed, subject to the decision of the court, from the corporate debtor as a going concern. Similar were the submissions made by Smt Ramachandran on behalf of Gujarat Energy Transmissions Corporation Ltd.

29. Shri Maninder Singh, learned Senior Counsel, appeared on behalf of the State of Gujarat and supported para 201 of NCLAT judgment by which his client would be paid 60.26% of sales tax dues.

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30. Shri Mukul Rohatgi, learned Senior Advocate appearing on behalf of Mr Prashant Ruia supported the findings of NCLAT, insofar as NCLAT held that the personal guarantees given by his client had become ineffective in view of the payment of the debt by way of resolution to the original lenders. Further, Shri Rohatgi also argued that the right of subrogation and the right to be indemnified conferred on a guarantor under the Indian Contract Act would continue to exist in the absence of a positive waiver of such right by the said guarantor.

31. Shri Harish Salve, learned Senior Advocate appearing on behalf of ArcelorMittal, referred to the appeal filed by Standard Chartered Bank, being Civil Appeal No. 6433 of 2019, and stated that the remedy sought therein was restricted to quashing the impugned judgment to the extent of para 232 thereof which had held that financial creditors in whose favour guarantees were executed, could not re-agitate their claims against the principal borrower, as their total claim stands satisfied to the extent of the guarantee, and that therefore all the arguments made by Shri Sibal on behalf of Standard Chartered Bank, being outside the scope of the appeal, ought not to be considered at all. He further argued that since most of the arguments of Shri Sibal would go to the validity of the resolution plan, which Shri Sibal himself has stated that he is not assailing, should therefore be rejected on this ground alone. He also argued that it was wholly incorrect to say that only INR 39,500 crores would be an upfront payment. He read to us certain documents which would show that the guaranteed upfront payment INR 42,000 crores which his client had committed very much continued and that INR 2500 crores which formed part of this figure was allowed by the Committee of Creditors while negotiating with his client for very good reason.

32. Shri Neeraj Kishan Kaul, learned Senior Counsel also appearing on behalf of ArcelorMittal, stressed the fact that the importance of the insolvency resolution process is that not only is the corporate debtor to be put back on its feet, but that the resolution applicant whose plan is accepted must be able to start on a fresh slate. This being the case, obviously Shri Rohatgi's argument, that the personal guarantees of the erstwhile promoters do not stand extinguished and that, at the very least, the right of subrogation cannot be taken away, would boomerang upon the successful resolution applicant if such right of subrogation were to be allowed to continue.

33. Shri Salman Khurshid and Shri P. Tripathi, learned Senior Advocates appearing on behalf of Deutsche Bank, stressed that it was important to recognise separate classes of creditors and reiterated the arguments made on behalf of a number of their forbears as to how it is important to make a sub-classification among financial creditors, as also among operational creditors, so that there may be real equality, that is, equality among equals.

34. Shri Vikas Mehta, learned advocate appearing on behalf of GAIL, adverted to para 84 of the impugned NCLAT judgment[7] and argued that the facts qua his client were wrongly stated inasmuch as the admitted claim figures are wrongly stated.

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35. Ms Madhavi Divan, learned Additional Solicitor General of India, replied to the arguments of Standard Chartered Bank and the operational creditors as to the constitutional invalidity of Sections 4 and 6 of the Amending Act, 2019. She argued that the amendments further the objects sought to be achieved by the Code, which is maximisation of value of the assets of the corporate debtor in a time-bound frame. She pithily stated that the value of assets and the passage of time within which insolvency resolution takes place are in inverse proportion as the passage of time erodes the value of these assets. She pointed out the previous experiments that had failed and adverted to certain judgments to show that the failure of previous acts such as the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA") and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the Recovery of Debts Act") were due to enormous delays in disposal of cases. It is this loophole that was sought to be plugged in accordance with the original conception for the framework of the Insolvency Code that is to be found in the BLRC Report of 2015.

36. She also referred to Regulation 39-C of the 2016 Regulations and Regulations 32(*e*) and (*f*) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as "the Liquidation Process Regulations") together with Regulation 32-A(4) of Liquidation Process Regulations, to state that a longer period than was originally given by Section 12 of the Code is now given so that, taking into account court proceedings, there must now be an outer limit within which either resolution takes place or the company goes into liquidation. The Regulations pointed out also show that even if the corporate debtor goes into liquidation, 90 days is given to sell the undertaking of the corporate debtor as a going concern so that 90 days over and above 330 days are also available to dispose of the corporate debtor as a going concern. So far as the challenge to Section 6 of the Amending Act of 2019 is concerned, she argued that there is a symbiotic relationship between a resolution applicant and the Committee of Creditors, who alone are to take a commercial decision by the requisite majority whether or not to put the corporate debtor back on its feet. The reason for Explanation 1 to Section 30(2)(*b*) is that, what is fair and equitable must be determined within the framework of the Code, which is the commercial wisdom of the Committee of Creditors, subject to certain minimum guidelines to be observed. Thus, operational creditors who were originally to be paid only a minimum calculated on the basis of what they would be paid in the event of liquidation of a corporate debtor, are now to be paid the higher of two amounts, thereby raising the threshold of what is to be paid by a resolution applicant by way of a minimum to operational creditors, being enhanced under the amended provision. Further, even dissentient financial creditors are now to be paid a minimum guaranteed amount for the first time, as 66% of the financial creditors may give a certain class of financial creditors "nil" recovery, in which case this provision now comes to their rescue stating that they shall not be given anything less than the amount to be paid to such creditors in accordance with Section 53(1) of the Code.

37. She also argued that it is important to realise that the mention made of Section 53 in Section 6 of the Amending Act of 2019 is not in order that the priorities as to liquidation be apportioned among creditors, but only in order that a minimum amount be calculated so as to see that operational creditors and dissentient financial creditors get something more than what they would have got pre-amendment. So far as Explanation 2 of the substituted Section 30(2)(*b*) is concerned, she relied upon this Court's judgment in *ArcelorMittal (India)*[1] and *Swiss Ribbons*[8], for the proposition that there is no vested right in a resolution applicant to have its plan accepted. This being the case, and an appeal being a continuation of the proceedings, there is nothing wrong with applying the amended law in the three cases that have been mentioned by Explanation 2. So far as the addition to Section 30(4) by the Amending Act of 2019 is concerned, the idea was to get over the judgment of the Appellate Tribunal in this very case stating that sub-classification among different classes of creditors may be done by the Committee of Creditors also on the basis of the value of the security interest of a secured creditor. She also read in copious detail, the Rajya Sabha Debate held on 29-7-2019 in which the Hon'ble Minister piloted this amendment. According to her, the Federation of Indian Chambers of Commerce and Industry (hereinafter referred to as "FICCI") gave a representation dated 17-7-2019 to the Secretary, Ministry of Corporate Affairs pointing out the flawed judgment of NCLAT in this very case and asking the Government to swiftly amend the Code so as to reinstate the law as it originally stood, to which the Government and Parliament responded by enacting the Amending Act of 2019.

38. Shri Tushar Mehta, learned Solicitor General of India, has supplemented the submissions of the learned Additional Solicitor General by written arguments. He has argued that it is well settled that the legislature can always take away the basis of a judicial decision without directly interfering with the judgment of the Court, and has cited several decisions to buttress this point. He also argued that Shri Sibal's assault on the constitutional validity of Sections 4 and 6 of the Amending Act of 2019 on the ground that the amendment was tailor-made to do away with the judgment in this very matter, so that his client may walk away without anything, is answered by the well-settled principle that an Act of the legislature cannot be attacked on the ground of improper or bad motive, and cited certain judgments of this Court in support of the same.

Role of the resolution professional

39. The role of the resolution professional in the revival of the corporate debtor is stated in detail in several Sections of the Code read with the 2016 Regulations.

40. The ball starts rolling with the Adjudicating Authority, after admitting an application under either Sections 7, 9 or 10, ordering that a public announcement of the initiation of the CIRP together with calling for the submission of claims under Section 15 shall be made — *see* Section 13(1)(*b*)

1 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
8 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

of the Code. For this purpose, the Adjudicating Authority appoints an interim resolution professional in the manner laid down in Section 16 — *see* Section 13(1)(*c*) of the Code. In the public announcement of the CIRP, under Section 15(1), information as to the last date for submission of claims, as may be specified, is to be given; details of the interim resolution professional, who shall be vested with the management of the corporate debtor and be responsible for receiving claims, shall also be given, and the date on which the CIRP shall close is also to be given — *see* Sections 15(1)(*c*), (*d*) and (*f*) of the Code. Under Section 17 of the Code, the management of the affairs of the corporate debtor shall vest in the interim resolution professional, the Board of Directors of the corporate debtor standing suspended by law. Among the important duties of the interim resolution professional is the receiving and collating of all claims submitted by creditors and the constitution of a Committee of Creditors — *see* Sections 18(1)(*b*) and (*c*) of the Code. Under Section 20 of the Code, the interim resolution professional is to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

41. At the first meeting of the Committee of Creditors, which shall be held within 7 days of its constitution, the Committee, by majority vote of not less than 66% of the voting share of financial creditors, must immediately resolve to appoint the interim resolution professional as a resolution professional, or to replace the interim resolution professional by another resolution professional — *see* Sections 22(1) and (2) of the Code. Under Section 23(1), the resolution professional shall conduct the entire CIRP and manage the operations of the corporate debtor during the same. Importantly, all meetings of the Committee of Creditors are to be conducted by the resolution professional, who shall give notice of such meetings to the members of the Committee of Creditors, the members of the suspended Board of Directors, and operational creditors, provided the amount of their aggregate dues is not less than 10% of the entire debt owed. Like the duties of the interim resolution professional under Section 18 of the Code, it shall be the duty of the resolution professional to preserve and protect assets of the corporate debtor including the continued business operations of the corporate debtor — *see* Section 25(1) of the Code. For this purpose, he is to maintain an updated list of claims; convene and attend all meetings of the Committee of Creditors; prepare the information memorandum in accordance with Section 29 of the Code; invite prospective resolution applicants; and present all resolution plans at the meetings of the Committee of Creditors — *see* Sections 25(2)(*e*) to (*i*) of the Code.

42. Under Section 29(1) of the Code, the resolution professional shall prepare an information memorandum containing all relevant information, as may be specified, so that a resolution plan may then be formulated by a prospective resolution applicant. Under Section 30 of the Code, the resolution applicant must then submit a resolution plan to the resolution professional, prepared on the basis of the information memorandum. After this, the resolution professional must present to the Committee of Creditors, for its approval, such resolution plans which conform to the conditions referred to in Section 30(2)

of the Code — *see* Section 30(3) of the Code. If the resolution plan is approved by the requisite majority of the Committee of Creditors, it is then the duty of the resolution professional to submit the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority — *see* Section 30(6) of the Code.

43. The aforesaid provisions of the Code are then fleshed out in the 2016 Regulations. Under Chapter IV of the aforesaid Regulations, claims by operational creditors, financial creditors, other creditors, workmen and employees are to be submitted to the resolution professional along with proofs thereof — *see* Regulations 7 to 12. Thereafter, under Regulation 13, the resolution professional shall verify each claim as on the insolvency commencement date, and thereupon maintain a list of creditors containing the names of creditors along with the amounts claimed by them, the amounts admitted by him, and the security interest, if any, in respect of such claims, and constantly update the aforesaid list — *see* Regulation 13(1).

44. Chapter X of the Regulations then deals with resolution plans that are submitted. Under Regulation 35, "fair value" as defined by Regulation 2(1)(*hb*)[10] and "liquidation value" as defined by Regulation 2(1)(*k*)[11] shall be determined by two registered valuers appointed under Regulation 27, which shall be handed over to the resolution professional.

45. After receipt of the resolution plans in accordance with the Code and the Regulations, the resolution professional shall then provide the fair value and liquidation value to every member of the Committee of Creditors — *see* Regulation 35(2). Regulation 36 is important as it forms the basis for the submission of a resolution plan. The information memorandum, spoken of by this regulation, must contain the following:

> "**36. (2)(*a*)** assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.
>
> *Explanation.*—"Description" includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.

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10 Under Regulation 2(1)(*hb*), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:

> "**2. (1)(*hb*) "fair value"** means the estimated realisable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion;"

11 *Id.* Under Regulation 2(1)(*k*):

> "**2. (1)(*k*) "liquidation value"** means the estimated realisable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date;"

(*b*) the latest annual financial statements;

(*c*) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(*d*) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(*e*) particulars of a debt due from or to the corporate debtor with respect to related parties;

(*f*) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(*g*) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(*h*) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(*i*) the number of workers and employees and liabilities of the corporate debtor towards them;

(*j*)-(*k*) * * *

(*l*) other information, which the resolution professional deems relevant to the committee."

46. Under Regulation 36-A, the resolution professional shall then publish brief particulars of the invitation for expression of interest in Form G of the Schedule. This document must also, inter alia, provide for such basic information about the corporate debtor as may be required by a prospective resolution applicant for its expression of interest — *see* Regulation 36-A(4)(*c*). The resolution professional, once he receives a proposed resolution plan, must then conduct due diligence based on the material on record, in order that the prospective resolution applicant complies with Section 25(2)(*h*) of the Code (which, inter alia, requires prospective resolution applicants to fulfil such criteria as may be laid down, having regard to the complexity and scale of operations of the business of the corporate debtor); the provisions of Section 29-A; and other requirements as may be specified in the invitation for expression of interest — *see* Regulation 36-A(8). Once this is done, the resolution professional shall issue a provisional list of eligible prospective resolution applicants to the Committee of Creditors, and after considering any objection to their inclusion or exclusion, shall then issue the final list of prospective resolution applicants to the Committee of Creditors — *see* Regulations 36-A(10) to (12).

47. Under Regulation 36-B, the resolution professional shall issue the information memorandum, evaluation matrix, as defined by Regulation 2(1)(*ha*)[12], and a request for resolution plan within the time stated. Importantly, the resolution professional shall endeavour to submit the resolution plan approved by the Committee of Creditors to the Adjudicating Authority, at least 15 days before the maximum period for completion of CIRP, along with a compliance certificate in Form H of the Schedule.

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.

49. In fact, in *ArcelorMittal (India)*[1], this Court referred to the role of the resolution professional under the Code and the aforesaid Regulations, making it clear that the said role is not adjudicatory but administrative, in the following terms: (SCC pp. 86-87, paras 80-81)

> "*80*. However, it must not be forgotten that a resolution professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2). Under Section 25(2)(*i*), the resolution professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30(3), which states that 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). This provision has to be read in conjunction with Section 25(2)(*i*), and with the second proviso to Section 30(4), which provides that where a resolution applicant is found to be ineligible under Section 29-A(*c*), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29-A(*c*). A conspectus of all these provisions would show that the resolution professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before

12 Under Regulation 2(1)(*ha*), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:

> "**2. (1)(*ha*) "evaluation matrix**" means such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval;"

1 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1

submitting it to the Committee of Creditors. The resolution professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the resolution professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time being in force, including Section 29-A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(*e*) does not empower the resolution professional to "*decide*" whether the resolution plan does or does not contravene the provisions of law. Regulation 36-A of the CIRP Regulations specifically provides as follows:

> '**36-A. (8)** The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with—
>
> (*a*) the provisions of clause (*h*) of sub-section (2) of Section 25;
>
> (*b*) the applicable provisions of Section 29-A, and
>
> (*c*) other requirements, as specified in the invitation for expression of interest.
>
> **(9)** The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).
>
> **(10)** The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.
>
> **(11)** Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.
>
> **(12)** On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.'

81. Thus, the importance of the resolution professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the resolution professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law." (emphasis in original)

Role of the prospective resolution applicant

50. The UNCITRAL Legislative Guide discusses what ought to be the contents of a resolution plan in an Insolvency Code in the following terms:

"*4. The plan* * * *

18. The question of what is to be included in the plan is closely related to the procedure for approval of the plan, that is, which creditors are required to approve the plan and the level of support required for approval, the effect of the plan once approved, that is, will it bind dissenting creditors and secured creditors and who will be responsible for implementation of the plan and for ongoing management of the debtor, and whether or not there is a requirement for court confirmation. Many insolvency laws include provisions addressing the content of the reorganisation plan. Some laws address the content of the plan by reference to general criteria, such as requirements that the reorganisation plan should adequately and clearly disclose to all parties information regarding both the financial condition of the debtor and the transformation of legal rights that is being proposed in the plan, or by reference to minimal requirements, such as that the plan must make provision for payment of certain preferred claims. It should be noted that a plan need not modify or otherwise affect the rights of every class of creditor.

19. Other laws set out more specific requirements as to what information is required in relation to the debtor's financial situation and the proposals that can be included in a plan. Information on the financial situation of the debtor could include asset and liability statements; cash flow statements; and information relating to the causes or reasons for the financial situation of the debtor. Information relating to what is proposed by the plan could include, depending upon the objective of the plan and the circumstances of a particular debtor, details of classes of claims; claims modified or affected under the plan and the treatment to be accorded to each class under the plan; the continuation or rejection of contracts that are not fully executed; the treatment of unexpired leases; measures and arrangements for dealing with the debtor's assets (e.g. transfer, liquidation or retention); the sale or other treatment of encumbered assets; the disclosure and acceptance procedure; the rights of disputed claims to take part in the voting and provisions for disputed claims to be resolved; arrangements concerning personnel of the debtor; remuneration of management of the debtor; financing implementation of the plan; extension of the maturity date or a change in the interest rate or other term of outstanding security interests; the role to be played by the debtor in implementation of the plan and identification of those to be responsible for future management of the debtor's business; the settlement of claims and how the amount that creditors will receive will be more than they would have received in liquidation; payment of interest on claims; distribution of all or any part of the assets of the estate among those having an interest in those assets; possible changes to the instrument or organic document

constituting the debtor (e.g. changes to by-laws or articles of association) or the capital structure of the debtor or merger or consolidation of the debtor with one or more persons; the basis upon which the business will be able to keep trading and can be successfully reorganised; supervision of the implementation of the plan; and the period of implementation of the plan, including in some cases a statutory maximum period.

20. Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation)."

51. Under the Code, the prospective resolution applicant has a right to receive complete information as to the corporate debtor, debts owed by it, and its activities as a going concern, prior to the admission of an application under Sections 7, 9 or 10 of the Code. For this purpose, it has a right to receive information contained in the information memorandum as well as the evaluation matrix mentioned in Regulation 36-B. Once it evinces an expression of interest, what follows is laid down in Regulation 36-A(7) which reads as follows:

"**36-A.** ***Invitation for expression of interest.***—(1)-(6) * * *

(7) An expression of interest shall be unconditional and be accompanied by—

(*a*) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (*h*) of sub-section (2) of Section 25;

(*b*) relevant records in evidence of meeting the criteria under clause (*a*);

(*c*) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under Section 29-A to the extent applicable;

(*d*) relevant information and records to enable an assessment of ineligibility under clause (*c*);

(*e*) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;

(*f*) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time

will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and

(*g*) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section 29."

Thereafter, the resolution plan submitted by the prospective resolution applicant must provide for measures as may be necessary for the insolvency resolution of the corporate debtor for maximisation of the value of its assets, which may include transfer or sale of assets or part thereof, whether subject to security interests or not. The plan may provide for either satisfaction or modification of any security interest of a secured creditor and may also provide for reduction in the amount payable to different classes of creditors — *see* Regulation 37.

52. Accordingly, Regulation 38 then deals with the mandatory contents of a resolution plan, making it clear that such plan must contain a provision that the amount due to operational creditors shall be given priority in payment over financial creditors — *see* Regulation 38(1). Such plan must also include provisions as to how to deal with the interests of all stakeholders including financial creditors and operational creditors of the corporate debtor — Regulation 38(1-A). It must then provide for the term of the plan, management and control of the business of the corporate debtor during such term, and its implementation. It must also demonstrate that it is feasible and viable, and that the resolution applicant has the capability to implement the said plan.

53. Regulation 38, being important, is set out hereinbelow:

"**38.** ***Mandatory contents of the resolution plan.***—(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) 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.

(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.

(3) A resolution plan shall demonstrate that—

(*a*) it addresses the cause of default;

(*b*) it is feasible and viable;

(*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."

Role of the Committee of Creditors in the corporate resolution process

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. Thus, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor. "Financial creditors" are defined in Section 5(7) of the Code as meaning persons to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. "Financial debt" is then defined in Section 5(8) of the Code as meaning a debt along with interest, if any, which is disbursed against the consideration for the time value of money. "Secured creditor" is separately defined in Section 3(30) of the Code as meaning a creditor in favour of whom a security interest is created and "security interest" is defined by Section 3(31) as follows:

> "**3.** ***Definitions***.—In this Code, unless the context otherwise requires—
>
> * * *
>
> (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;"

55. It is settled by several judgments of this Court that in order to trigger application of the Code, a neat division has been made between financial creditors and operational creditors. It has also been noticed in some of our judgments that most financial creditors are secured creditors and most operational creditors are unsecured creditors. The rationale for only financial creditors handling the affairs of the corporate debtor and resolving them is for reasons that have been deliberated upon by the BLRC Report of 2015, which formed the basis for the enactment of the Insolvency Code.

56. At this juncture, it is important to set out the relevant extracts from the aforementioned Report:

> "**2. Executive Summary** * * *
>
> *The key economic question in the bankruptcy process*
>
> * * *
>
> *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.*

* * *

5. Process for legal entities * * *

Business decisions by a creditor committee

All decisions on matters of business will be taken by a committee of the financial creditors. This includes evaluating proposals to keep the entity as a going concern, including decisions about the sale of business or units, retiring or restructuring debt. The debtor will be a non-voting member on the creditors committee, and will be invited to all meetings. The voting of the creditors committee will be by majority, where the majority requires more than 75 per cent of the vote by weight.

* * *

No prescriptions on solutions to resolve the insolvency

The choice of the solution to keep the entity as a going concern will be voted on by the creditors committee. There are no constraints on the proposals that the resolution professional can present to the creditors committee. Other than the majority vote of the creditors committee, the resolution professional needs to confirm to the Adjudicator that the final solution complies with three additional requirements. The first is that the solution must explicitly require the repayment of any interim finance and costs of the insolvency resolution process will be paid in priority to other payments. *Secondly, the plan must explicitly include payment to all creditors not on the creditors committee, within a reasonable period after the solution is implemented*. Lastly, the plan should comply with existing laws governing the actions of the entity while implementing the solutions.

* * *

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.

5.3.3. Obtaining the resolution to insolvency in the IRP

The Committee is of the opinion that there should be freedom permitted to the overall market to propose solutions on keeping the entity as a going concern. Since the manner and the type of possible solutions are specific to the time and environment in which the insolvency becomes visible, it is expected to evolve over time, and with the development of the market. The Code will be open to all forms of solutions for keeping the entity going without prejudice, within the rest of the constraints of the IRP. *Therefore, how the insolvency is to be resolved will not be prescribed in the Code.* There will be no restriction in the Code on possible ways in which the business model of the entity, *or its financial model*, or both, can be changed so as to keep the entity as a going concern. *The Code will not state that the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated. This decision will come from the deliberations of the creditors committee in response to the solutions proposed by the market.*" (emphasis supplied)

57. The aforesaid extracts follow what is stated in the UNCITRAL Legislative Guide which prescribes as follows:

"*2. Nature or form of a plan*

3. The purpose of reorganisation is to maximise the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers. With different constituents involved in reorganisation proceedings, each may have different views of how the various objectives can best be achieved. Some creditors, such as major customers or suppliers, may prefer continued business with the debtor to rapid repayment of their debt. Some creditors may favour taking an equity stake in the business, while others will not. Typically, therefore, there is a range of options from which to select in a given case. *If an insolvency law adopts a prescriptive approach to the range of options available or to the choice to be made in a particular case, it is likely to be too constrictive.* It is desirable that the law not restrict reorganisation plans to those designed only to fully rehabilitate the debtor; prohibit debt from being written off; restrict the amount that must eventually be paid to creditors by specifying a minimum percentage; or prohibit exchange of debt for equity. *A non-intrusive approach that does not prescribe such limitations is likely to provide sufficient flexibility to allow the most suitable of a range of possibilities to be chosen for a particular debtor.*

* * *

20. Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation)." (emphasis supplied)

58. Section 24 of the Code deals with meetings of the Committee of Creditors. Though voting on the approval of a resolution plan is only with the financial creditors who form the Committee of Creditors, yet the resolution professional is to conduct the aforesaid meeting at which members of the suspended Board of Directors may be present, together with one representative of operational creditors, provided that the aggregate dues owed to all operational creditors is not less than 10% of the entire debt owed — *see* Sections 24(2), (3) and (4) of the Code. Voting shall be in accordance with the voting share assigned to each financial creditor, which is based on the financial debts owed to such creditors — *see* Section 24(6) of the Code.

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. Section 28 of the Code is important and is set out hereinbelow:

"**28.** ***Approval of Committee of Creditors for certain actions.***—(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the Committee of Creditors, namely—

(*a*) raise any interim finance in excess of the amount as may be decided by the Committee of Creditors in their meeting;

(*b*) create any security interest over the assets of the corporate debtor;

(*c*) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(*d*) record any change in the ownership interest of the corporate debtor;

(*e*) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the Committee of Creditors in their meeting;

(*f*) undertake any related party transaction;

(*g*) amend any constitutional documents of the corporate debtor;

(*h*) delegate its authority to any other person;

(*i*) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(*j*) make any change in the management of the corporate debtor or its subsidiary;

(*k*) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(*l*) make changes in the appointment or terms of contract of such personnel as specified by the Committee of Creditors; or

(*m*) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the Committee of Creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the Committee of Creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the Committee of Creditors in the manner as required in this section, such action shall be void.

(5) The Committee of Creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code."

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.

61. Regulations 18 to 26 of the 2016 Regulations deal with meetings to be conducted by the Committee of Creditors. The quorum at the meeting is fixed by Regulation 22, and the conduct of the meeting is to take place as under Regulation 24. Voting takes place under Regulations 25 and 26. Most importantly, Regulation 39(3) states:

"**39.** ***Approval of resolution plan***.—(1)-(2) * * *

(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 may approve any resolution plan with such modifications as it deems fit."

This Regulation fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants.

62. In *K. Sashidhar*[9], the role of the Committee of Creditors in the corporate resolution process was laid down by this Court thus: (SCC pp. 174-75 & 183, paras 34-35 & 52)

"*34*. CoC is constituted as per Section 21 of the I&B Code, which consists of financial creditors. The term "financial creditor" has been defined in Section 5(7) of the I&B Code to mean any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. Be it noted that the process of insolvency resolution and liquidation concerning corporate debtors has been codified in Part II of the I&B Code, comprising of seven chapters. Chapter I predicates that Part II shall apply in matters relating to the insolvency and liquidation of corporate debtor where the minimum amount of default is Rs 1,00,000. Section 5 in Chapter I is a dictionary clause specific to Part II of the Code. Chapter II deals with the gamut of procedure to be followed for the corporate insolvency resolution process. For dealing with the issue on hand, the provisions contained in Chapter II will be significant. From the scheme of the provisions, it is clear that the provisions in Part II of the Code are self-contained code, providing for the procedure for consideration of the resolution plan by the CoC.

35. The stage at which the dispute concerning the respective corporate debtors (KS&PIPL and IIL) had reached the adjudicating authority (NCLT) is ascribable to Section 30(4) of the I&B Code, which, at the relevant time in October 2017, read thus:

'**30. (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.'

If CoC had approved the resolution plan by requisite per cent of voting share, then as per Section 30(6) of the I&B Code, it is imperative for the resolution professional to submit the same to the adjudicating authority (NCLT). On receipt of such a proposal, the adjudicating authority (NCLT) is required to satisfy itself that the resolution plan as approved by CoC meets the requirements specified in Section 30(2). No more and no less. This is explicitly spelt out in Section 31 of the I&B Code, which read thus (as in October 2017):

9 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

'**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, guarantors and other stakeholders involved in the resolution plan.

(2) Where the adjudicating authority is satisfied that the resolution plan does not conform 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.'

* * *

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."

63. The importance of the majority decision of the Committee of Creditors is then stated in Section 31(1) of the Code which is set out as follows:

> "**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, guarantors and other stakeholders involved in the resolution plan."

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.

Jurisdiction of the Adjudicating Authority and the Appellate Tribunal

65. As has already been seen hereinabove, it is the Adjudicating Authority which first admits an application by a financial or operational creditor, or by the corporate debtor itself under Sections 7, 9 and 10 of the Code. Once this is done, within the parameters fixed by the Code, and as expounded upon by our judgments in *Innoventive Industries Ltd.* v. *ICICI Bank*[13] and *Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd.*[14], the Adjudicating Authority then appoints an interim resolution professional who takes administrative decisions as to the day to day running of the corporate debtor; collation of claims and their admissions; and the calling for resolution plans in the manner stated above. After a resolution plan is approved by the requisite majority of the Committee of Creditors, the aforesaid plan must then pass muster of the Adjudicating Authority under Section 31(1) of the Code. The Adjudicating Authority's

13 (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356
14 (2018) 2 SCC 674 : (2018) 2 SCC (Civ) 288

jurisdiction is circumscribed by Section 30(2) of the Code. In this context, the decision of this Court in *K. Sashidhar*[9] is of great relevance.

66. In *K. Sashidhar*[9] this Court was called upon to decide upon the scope of judicial review by the Adjudicating Authority. This Court set out the questions to be determined as follows: (SCC pp. 173-74 & 176, paras 32 & 37)

> "*32.* Having heard the learned counsel for the parties, the moot question is about the sequel of the approval of the resolution plan by CoC of the respective corporate debtor, namely, KS&PIPL and IIL, by a vote of less than seventy-five per cent of voting share of the financial creditors; and about the correctness of the view[15] taken by NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. Further, is it open to the adjudicating authority/ appellate authority to reckon any other factor [other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be] which, according to the resolution applicant and the stakeholders supporting the resolution plan, may be relevant?
>
> * * *
>
> *37.* ... The Court, however, was not called upon to deal with the specific issue that is being considered in the present cases, namely, the scope of judicial review by the adjudicatory authority in relation to the opinion expressed by CoC on the proposal for approval of the resolution plan."

67. After adverting to the 2016 Regulations, the Court in *K. Sashidhar*[9] set out the jurisdiction of the Adjudicating Authority as well as the Appellate Tribunal as follows: (*K. Sashidhar case*[9], SCC pp. 185-89, paras 55-59, 62 & 64)

> "*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

9 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222
15 *Kamineni Steel & Power (India) (P) Ltd.* v. *Indian Bank*, 2018 SCC OnLine NCLAT 654

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. Section 61(3) of the I&B Code reads thus:

> '**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) * * *
>
> (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.'

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, has 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 the 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.*

59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority per cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the

opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified per cent (25% in October 2017; and now after the amendment w.e.f. 6-6-2018, 44%). The inevitable outcome of voting by not less than requisite per cent of voting share of financial creditors to disapprove the proposed resolution plan, *de jure*, entails in its deemed rejection.

* * *

62. The argument, though attractive at the first blush, but if accepted, would require us to rewrite the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground — to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the corporate debtor concerned was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the Appellate Tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of CoC much less of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.

* * *

64. Suffice it to observe that in the I&B Code and the Regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the adjudicating authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B

Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors — be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the appellate authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite per cent of voting share to approve the resolution plan; and in the process authorise the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan." (emphasis supplied)

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*[9].

68. However, Shri Sibal exhorted us to hold that *K. Sashidhar*[9] missed a very vital provision of the Code which is contained in Section 60(5) of the Code. Section 60(5) reads as follows:

"**60.** ***Adjudicating authority for corporate persons.***—(1)-(4) * * *

(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."

69. It will be noticed that the non obstante clause of Section 60(5) speaks of *any other law* for the time being in force, which obviously cannot include the provisions of the Code itself. Secondly, Section 60(5)(*c*) is in the nature of a residuary jurisdiction vested in NCLT so that NCLT may decide all questions of law or fact arising out of or in relation to insolvency resolution or liquidation under the Code. Such residual jurisdiction does not in any manner

9 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

impact Section 30(2) of the Code which circumscribes the jurisdiction of the Adjudicating Authority when it comes to the confirmation of a resolution plan, as has been mandated by Section 31(1) of the Code. A harmonious reading, therefore, of Section 31(1) and Section 60(5) of the Code would lead to the result that the residual jurisdiction of NCLT under Section 60(5)(*c*) cannot, in any manner, whittle down Section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority. This argument also must needs be rejected.

70. The minimum value that is required to be paid to operational creditors under a resolution plan is set out under Section 30(2)(*b*) of the Code as being the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53. The Insolvency Committee constituted by the Government in 2018 was tasked with studying the major issues that arise in the working of the Code and to recommend changes, if any, required to be made to the Code. The Insolvency Committee Report, 2018 (hereinafter referred to as "the Committee Report, 2018"), inter alia, deliberated upon the objections to Section 30(2)(*b*) of the Code, inasmuch as it provided for a minimum payment of a "liquidation value" to the operational creditors and nothing more, and concluded as follows:

> "18. VALUE GUARANTEED TO OPERATIONAL CREDITORS UNDER A RESOLUTION PLAN
>
> 18.1. Section 30(2)(*b*) of the Code requires the RP to ensure that every resolution plan provides for payment of at least the liquidation value to all operational creditors. Regulation 38(1)(*b*) of the CIRP Regulations provides that liquidation value must be paid to operational creditors prior in time to all financial creditors and within thirty days of approval of resolution plan by NCLT. The BLRC Report states that the guarantee of liquidation value has been provided to operational creditors since they are not allowed to be part of the CoC which determines the fate of the corporate debtor. (BLRC Report, 2015)
>
> 18.2. However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of creditors under Section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue supplying goods or services to the corporate debtor for it to remain a "going concern" given that their chances of recovery are abysmally low.
>
> 18.3. The Committee deliberated on the status of operational creditors and their role in the CIRP. It considered the viability of using "fair value" as the floor to determine the value to be given to operational creditors. Fair value is defined under Regulation 2(1)(*hb*) of the CIRP Regulations to mean *"*the estimated realisable value of the assets of the corporate*

* **Ed.**: The matter between two asterisks has been emphasised in original.

debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion'*. However, it was felt that assessment and payment of the fair value upfront, may be difficult. The Committee also discussed the possibility of using "resolution value" or "bid value" as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.

18.4. It was stated to the Committee that liquidation value has been provided as a floor and in practice, many operational creditors may get payments above this value. The Committee appreciated the need to protect interests of operational creditors and particularly Micro, Small and Medium Enterprises ("MSMEs"). *In this regard, the Committee observed that in practice most of the operational creditors that are critical to the business of the corporate debtor are paid out as part of the resolution plan as they have the power to choke the corporate debtor by cutting off supplies.* Illustratively, in *Synergies-Dooray Automative Ltd., In re*[16], the original resolution plan provided for payment to operational creditors above the liquidation value but contemplated that it would be made in a staggered manner after payment to financial creditors, easing the burden of the 30-day mandate provided under Regulation 38 of the CIRP Regulations. However, the same was modified by NCLT and operational creditors were required to be paid prior in time, due to the quantum of debt and nature of the creditors. Similarly, the approved resolution plan in *Alchemist Asset Reconstruction Co. Ltd.* v. *Hotel Gaudavan (P) Ltd.*[17] provided for payment of all existing dues of the operational creditors without any write-off. The Committee felt that the interests of operational creditors must be protected, not by tinkering with what minimum must be guaranteed to them statutorily, but by improving the quality of resolution plans overall. This could be achieved by dedicated efforts of regulatory bodies including the IBBI and Indian Banks' Association.

18.5. **Finally, the Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code.*"* (emphasis supplied)

Ultimately, the Committee decided against any amendment to be made to the existing scheme of the Code, thereby retaining the prescription as to the minimum value that was to be paid to the operational creditors under a resolution plan.

* **Ed.**: The matter between two asterisks has been emphasised in original.

16 2017 SCC OnLine NCLT 20883

17 2017 SCC OnLine NCLT 13223

71. However, as has been correctly argued on behalf of the operational creditors, the Preamble of the Code does speak of maximisation of the value of assets of corporate debtors and the balancing of the interests of all stakeholders. There is no doubt that a key objective of the Code is to ensure that the corporate debtor keeps operating as a going concern during the insolvency resolution process and must therefore make past and present payments to various operational creditors without which such operation as a going concern would become impossible. Sections 5(26), 14(2), 20(1), 20(2)(*d*) and (*e*) of the Code read with Regulations 37 and 38 of the 2016 Regulations all speak of the corporate debtor running as a going concern during the insolvency resolution process. Workmen need to be paid, electricity dues need to be paid, purchase of raw materials need to be made, etc. This is in fact reflected in this Court's judgment in *Swiss Ribbons*[8] as follows: (SCC pp. 54-55, paras 26-27)

> "*26.* The Preamble of the Code states as follows:
>
> '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.'
>
> *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

8 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

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*[1] at para 86, footnote 46.)" (emphasis supplied)

72. This is the reason why Regulation 38(1-A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value — which in most cases would amount to nil after secured creditors have been paid — would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors.

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.

1 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1

Secured and unsecured creditors; the equality principle

74. The impugned NCLAT judgment[7] has applied an equality principle down the board stating that whether creditors are secured or unsecured, financial or operational, equitable treatment demands that they all be treated as one group of creditors similarly situate, as a result of which no differences can be made in terms of the amount of debt to be repaid to them based on whether they are secured or unsecured, and whether they are financial or operational creditors. The aforesaid judgment relies upon certain paragraphs of this Court's judgment in *Swiss Ribbons*[8] to buttress the aforesaid finding.

75. The UNCITRAL Legislative Guide states:

> "**Designing the key objectives and structure of an effective and efficient insolvency law**
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> * * *
>
> *4. Ensuring equitable treatment of similarly situated creditors*
>
> * * *
>
> 7. *The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor.* This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganisation and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.
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> * * *
>
> *5. Approval of a plan*
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> * * *
>
> *(i) Classification of claims*
>
> 27. The primary purpose of classifying claims is to satisfy the requirements to provide fair and equitable treatment to creditors, treating

7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388
8 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

similarly situated claims in the same manner and ensuring that all creditors in a particular class are offered the same menu of terms by the reorganisation plan. It is one way to ensure that priority claims are treated in accordance with the priority established under the insolvency law. *It may also make it easier to treat the claims of major creditors who can be persuaded to receive different treatment from the general class of unsecured creditors, where that treatment may be necessary to make the plan feasible*. Classification can, however, increase the complexity and costs of the insolvency proceedings, depending upon how many different classes are identified. An alternative, to ensure that creditors who should receive special treatment are not oppressed by the majority, may be to give those groups the opportunity to challenge the decision of the majority in court if they have not been treated in a fair and equitable manner. The fact that such a facility exists may operate to discourage majorities from making proposals that would unfairly disadvantage priority creditors.

(ii) Treatment of dissenting creditors

28. As to the treatment of dissenting creditors, it will be essential to provide a way of imposing a plan agreed by the majority of a class upon the dissenting minority in order to increase the chances of success of the reorganisation. It may also be necessary, depending upon the mechanism that is chosen for voting on the plan and whether creditors vote in classes, to consider whether the plan can be made binding upon dissenting classes of creditors and other affected parties.

29. To the extent that a plan can be approved and enforced upon dissenting parties, there will be a need to ensure that the content of the plan provides appropriate protection for those dissenting parties and, in particular, that their rights are not unfairly affected. *The law might provide, for example, that dissenting creditors can not be bound unless assured of certain treatment. As a general principle, that treatment might be that the creditors will receive at least as much under the plan as they would have received in liquidation proceedings. If the creditors are secured, the treatment required may be that the creditor receives payment of the value of its security interest, while in the case of unsecured creditors it may be that any junior interests, including equity holders, receive nothing*. To the extent that the approval procedure results in a significant impairment of the claims of creditors and other affected parties without their consent (in particular secured creditors), there is a risk that creditors will be unwilling to provide credit in the future. The mechanism for approval of the plan, and the availability of appropriate safeguards, is therefore of considerable importance to the protection of these interests.

* * *

(c) Approval by secured and priority creditors

(i) The need for secured and priority creditors to vote

34. In many cases of insolvency, secured claims will represent a significant portion of the value of the debt owed by the debtor. Different approaches can be taken to approval of the plan by secured and priority creditors. As a general principle, however, the extent to which a secured creditor is entitled to vote will depend upon the manner in which the insolvency regime treats secured creditors, the extent to which a reorganisation plan can affect the security interest of the secured creditor and the extent to which the value of encumbered assets will satisfy the secured creditor's claim.

35. Under one approach, where the insolvency law does not affect secured creditors and, in particular, does not preclude them from enforcing their rights against the encumbered assets, there is no need to give these creditors the right to vote since their security interests will not be affected by the plan. Priority creditors are in a similar position under this approach —the plan cannot impair the value of their claims and they are entitled to receive full payment before creditors without priority are paid. The limitation of this approach, however, is that it may reduce the chances for a successful reorganisation where the encumbered assets or modification of the rights of such creditors are key to the success of the plan. *If the secured creditor is not bound by the plan, the election by the secured creditor to enforce its rights, such as by repossessing and selling the encumbered asset, may make reorganisation of the business impossible to implement.* Similarly, there may be circumstances where ensuring a successful reorganisation requires that priority creditors receive less than the full value of their claims upon approval of the plan. The prospects for reorganisation may improve if priority creditors will accept payment over time and if secured creditors will acquiesce when the terms of the secured debt are modified over time. If these creditors are not included in the plan and entitled to vote on proposals affecting their rights, modification of those rights cannot be achieved.

(ii) Classes of secured and priority creditors

36. Recognising the need for secured and priority creditors to participate, a second approach provides for these creditors to vote as classes separate from unsecured creditors on a plan that would modify or affect the terms of their claims, or to otherwise consent to be bound by the plan. Adopting such an approach provides a minimum safeguard for the adequate protection of these creditors and recognises that the respective rights and interests of secured and priority creditors differ from those of unsecured creditors. *In many cases, however, the rights of secured and priority creditors will differ from each other and it may not be feasible to require all secured creditors or all priority creditors to vote in a single class.* In such cases, some laws provide that each secured creditor with separate rights to encumbered assets forms a class of its own. Those laws

also provide that, where secured creditors do vote as a class (e.g. where there are multiple holders of bonds that are secured by the same assets), the requisite majority of a class of secured creditors would generally be the same as that required for approval by unsecured creditors, although there are examples of laws that require different majorities depending upon the manner in which secured creditors rights are to be affected by the plan (e.g. one law provides that a three-quarter majority is required where the maturity date is to be extended and a four-fifths majority where the rights are to be otherwise impaired). Similarly, each rank of priority claims would be a separate class under those laws.

* * *

(iii) Where secured creditors are not fully secured

38. To the extent that the value of the encumbered asset will not satisfy the full amount of the secured creditor's claim, a number of insolvency laws provide that those secured creditors should vote with ordinary unsecured creditors in respect of the unsatisfied portion of the claim. This may raise difficult questions of valuation in order to determine whether, and to what extent, a secured creditor is in fact secured. For example, where three creditors hold security interests over the same asset, the value of that asset may only support the claim first in priority and part of the second in priority. The second creditor therefore may have a right to vote only in respect of the unsecured portion of its claim, while the third creditor will be totally unsecured. The valuation of the asset is therefore crucial to determining the extent to which these secured creditors are secured and whether or not they are entitled to vote as unsecured creditors with respect to any portion of their claim.

39. In determining which approach should be taken to this issue, it will be important to assess the effect of the desired approach upon the availability and cost of secured financing and to provide as much certainty and predictability as possible, balancing this against the objectives of insolvency law and the benefits to an economy of successful reorganisation." (emphasis supplied)

76. The BLRC Report, 2015 is of great help in understanding what is meant by respecting the rights of all creditors equally. Para 3.4.2 of the said Report states:

"**3.4.2. Principles driving the design**

The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:

* * *

IV. *The Code will ensure a collective process.*

9. The law must ensure that all key stakeholders will participate to collectively assess viability.

The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

V. *The Code will respect the rights of all creditors equally.*

10. The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.

VI. *The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.*

11. The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.

VII. *The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.*

12. The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.

13. While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution." (emphasis supplied)

77. That equitable treatment of creditors is equitable treatment only within the same class is echoed in *American Jurisprudence*, 2d, Vol. 9 (hereinafter referred to as "*American Jurisprudence*") as follows:

"§ **6.** ***Distribution***.—Equality of distribution is the theme of a bankruptcy act and a prime bankruptcy policy. *The bankruptcy system is designed to distribute an estate as equally as possible among similarly situated creditors. Thus, creditors of equal status must be treated equally and equitably.*

One of the conditions placed upon the debtor's use of the Bankruptcy Code to obtain a fresh start is that the debtor treat all creditors fairly.

The bankruptcy process is the process by which a res, under the constructive possession of the bankruptcy court, is administered for the purpose of allowing, disallowing, organizing, and prioritizing claims of creditors in, to, and upon the res. Although the central policy of the Bankruptcy Code is equality of distribution among all creditors, exceptions are made by granting priority to certain claims and subordinating others. Pursuant to the central policy, creditors of equal priority should receive a pro rata share of the debtor's property; thus, when there is not enough to go around, the bankruptcy judge must establish priorities and apportion assets among creditors with the same priority." (emphasis supplied)

78. Shri Sibal, however, relied upon the following statements in *American Jurisprudence*, which read as follows:

> "Chapter 11 reorganisation, specifically, has been called a collective remedy, designed to find the optimum solution for all parties connected with a business — not solely for the business itself and not solely for its creditors.
>
> * * *
>
> Protecting creditors in general is an important objective as is protecting creditors from each other."

79. There is no doubt that even under our Code, reorganisation is a collective remedy designed to find an optimum solution for all parties connected with a business in the manner provided by the Code. Protecting creditors in general is, no doubt, an important objective-the observation that protecting creditors from each other is also important, which must be read with Footnote 7 in the *American Jurisprudence*, which reads as under:

> "*First Central Financial Corpn., In re*[18]
>
> The Bankruptcy Code generally does not imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under otherwise applicable non-bankruptcy law unless it is to serve some bankruptcy purpose. *Vermont Elec. Generation & Transmission Coop. Inc., In re*[19]"

A reading of this footnote will show that what is meant by protecting creditors from each other is only that a Bankruptcy Code should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose.

80. The importance of valuing security interests separately from interests of creditors who do not have security is well set out in the IMF paper on Development of International Standards of Security Interests by Pascale De Boeck and Thomas Laryea, Counsel, IMF Legal Department*. The learned authors state:

> "**I.** ***Value of Security Interests***
>
> In developing standards for the legal framework of security interests, it is important to recognise that security interests serve discernible economic goals. Security interests reduce credit risk by increasing the creditor's likelihood to be repaid, not only when payment is due, but also in the event of a default by its debtor. This increased likelihood of repayment produces wider economic benefits. First, the availability of credit is enhanced; borrowers obtain credit in cases where they would have otherwise failed absent a security interest. Second, credit is also made available on better

18 377 F 3d 209 (2d Cir 2004)

19 240 BR 476 (Bankr D Vt 1999)

* **Ed.**: "Development of International Standards of Security Interests" by Pascale De Boeck and Thomas Laryea, *Current Developments in Monetary and Financial Law*, Vol. 3, 2005 International Monetary Fund.

terms involving, for instance, lower interest rates and longer maturities. The relative cost of secured credit under that of unsecured credit reflects the commercial recognition of the advantages of secured credit in connection with the recovery of the debt.

The efficiency of the legal framework for secured credit is a critical factor in the strengthening of financial systems. In the face of financial sector crises, an effective legal framework of security interests enables banks and other credit institutions to mitigate the deterioration of their claims, it also facilitates corporate restructuring by providing tools to support interim financing. In the longer term, an effective framework for security interests fosters economic growth. Specifically, it supports access to affordable credit, thereby facilitating the acquisition of goods. Further, it increases the capacity of enterprises to finance expansion fuelled by the supply of credit. Also, an effective framework for security interests can support the development of a sound banking system and promotion of capital markets founded on the efficient allocation of credit and effective and predictable mechanisms for realizing credit claims.

* * *

III. ***General Principles***

* * *

• *Establish clear and predictable priority rules*

The issue of priorities between various security interest devices and between various types of creditors is extremely complex, largely due to the myriad of possible competing interests. Whatever priority rules a legal framework establishes, they ought to be clear, predictable and transparent. They need to allow creditors to assess their position before creating a security interest and to enforce their rights in case of default in a timely, predictable and cost-efficient manner.

• *Facilitate the enforcement of creditor rights*

Enforcement is a critical factor in the law and functioning of secured credit. A security interest is of little value to a creditor unless the creditor is able to enforce it in a predictable, efficient and timely manner vis-à-vis the debtor and third parties. An effective framework needs to allow quick and predictable enforcement both within and outside insolvency proceedings."

81. Likewise the World Bank Report of 2015 titled Principles for Effective Insolvency and Creditor/Debtor Regimes* states:

"***Claims and Claims Resolution Procedures***

C12. *Treatment of Stakeholder Rights and Priorities*

C12.1. The rights of creditors and the priorities of claims established prior to insolvency proceedings under commercial or other applicable laws should be upheld in an insolvency proceeding to preserve the

* **Ed.**: "Principles for Effective Insolvency and Creditor/Debtor Regimes", 2016, International Bank for Reconstruction and Development/The World Bank.

legitimate expectations of creditors and encourage greater predictability in commercial relationships. Deviations from this general rule should occur only where necessary to promote other compelling policies, such as the policy supporting reorganisation, or to maximise the insolvency estate's value. Rules of priority should enable creditors to manage credit efficiently, consistent with the following additional principles:

C12.2. The priority of secured creditors in their collateral should be upheld and, absent the secured creditor's consent, its interest in the collateral should not be subordinated to other priorities granted in the course of the insolvency proceeding. Distributions to secured creditors should be made as promptly as possible.

C12.3. Following distributions to secured creditors from their collateral and the payment of claims related to the costs and expenses of administration, proceeds available for distribution should be distributed pari passu to the remaining general unsecured creditors, unless there are compelling reasons to justify giving priority status to a particular class of claims. Public interests generally should not be given precedence over private rights. The number of priority classes should be kept to a minimum.

C12.4. Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors."

82. However, Shri Sibal stated that this 2015 Report should not be relied upon as an earlier World Bank Report of 2010**, titled "A Global View of Business Insolvency Systems" (hereinafter referred to as "the 2010 Report") had opined to the contrary.

83. Quite apart from the fact that the 2010 Report is an earlier report, which opined on the basis of the French system, that creditors are divided into two separate classes without any further sub-classification and that the advantage of such system is that it avoids potential conflict of interest among creditors in a particular class, the Report then goes on to state:

"4.5.3. *Voting and Classes*

* * *

"In some cases, classification makes it easier to treat the claims of major creditors, who may be persuaded to opt to receive a different treatment from the general class of unsecured creditors, where such treatment is necessary to render the plan feasible. In such cases, the treatment for these major creditors is generally on less favourable terms than other, similarly situated creditors. Finally, classification may be a useful means of overriding the vote of a class of creditors that votes

** **Ed.**: A Global View of Business Insolvency Systems by Jay Lawrence Westbrook, Charles D. Booth, Christoph G. Paulus, Harry Rajak, 2010, The International Bank for Reconstruction and Development/The World Bank.

against the plan where the class is otherwise treated in a fair and equitable manner.[20]"

Even according to this Report, therefore, a "cramdown" on dissentient creditors would pass muster under an insolvency law if such creditors will receive, under a resolution plan, an amount at least equal to what such creditors would receive in a liquidation proceeding being "liquidation value".

84. Also, Philip R. Wood's book titled *Principles of International Insolvency* states:

> "Secured creditors are super-priority creditors on insolvency. Security must stand up on insolvency which is when it is needed most. Security which is valid between the parties but not as against the creditors of the debtor is futile. Bankruptcy law which freeze or delay or weaken or de-prioritise security on insolvency destroy what the law created. Hence the end is more important than the beginning.
>
> *Rationale of security.*—The main purposes and policies of security are: protection of creditors on insolvency; the limitation of cascade or domino insolvencies; security encourages capital, e.g. enterprise finance; security reduces the cost of credit, e.g. margin collateral in markets; he who pays for the asset should have the right to the asset; security encourages the private rescue since the bank feels safer; security is defensive control, especially in the case of project finance; security is a fair exchange for the credit.
>
> *Main Objections to security.*—The objections to security are mainly historical, but they resurrect and live on. The hostility may stem from: debtor-protection stirred by the ancient hostility to usurers and money-lending and now expressed in consumer protection statutes; the prevention of false wealth i.e. the debtor has many possessions but few assets — this is usually met by a requirement for possession (inefficient because not public) or public registration; unsecured creditors get less on insolvency and this is seen as a violation of bankruptcy equality, although more often it is motivated by desire to protect unpaid employees and small creditors; security disturbs the safety of commercial transactions because of priority risks, e.g. the purchaser of goods; the secured creditor can disrupt a rescue by selling an essential asset."

85. Indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to

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20 This override, which has come to be known as a "cramdown" based on its effect, allows the court to conclude that a rejecting class should be compelled to accept the plan where the class is paid in strict accordance with the relative priority of creditor claims and will receive under the plan a distribution in an amount equal to or greater than such creditors would receive in a liquidation proceeding. The rationale is that these creditors cannot claim "foul" if their recovery is at least as good as they would have received if they had prevailed in having the enterprise liquidated.

vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.

86. Financial creditors are in the business of lending money. The RBI Report on Trend and Progress of Banking in India, 2017-2018 reflects that the net interest margin of Indian banks for Financial Year 2017-2018 is averaged at 2.5%. Likewise, the global trend for net interest margin was at 3.3% for banks in the USA and 1.6% for banks in the UK in the year 2016, as per the data published on the website of the bank. Thus, it is clear that financial creditors earn profit by earning interest on money lent with low margins, generally being between 1 to 4%. Also, financial creditors are capital providers for companies, who in turn are able to purchase assets and provide a working capital to enable such companies to run their business operation, whereas operational creditors are beneficiaries of amounts lent by financial creditors which are then used as working capital, and often get paid for goods and services provided by them to the corporate debtor, out of such working capital. On the other hand, market research carried out by India Brand Equity Foundation, a trust established by the Ministry of Commerce and Industry, as regards the oil and gas sector, has stated that the business risk of operational creditors who operate with higher profit margins and shorter cyclical repayments must needs be higher. Also, operational creditors have an immediate exit option, by stopping supply to the corporate debtor, once corporate debtors start defaulting in payment. Financial creditors may exit on their long-term loans, either upon repayment of the full amount or upon default, by recalling the entire loan facility and/or enforcing the security interest which is a time consuming and lengthy process which usually involves litigation. Financial creditors are also part of a regulated banking system which involves not merely declaring defaulters as non-performing assets but also involves restructuring such loans which often results in foregoing unpaid amounts of interest either wholly or partially.

87. All these differences between financial and operational creditors have been reflected, albeit differently, in the judgment of *Swiss Ribbons*[8]. Thus, this Court in dealing with some of the differences has held: (SCC pp. 68-69 & 83-85, paras 50-51 & 75-77)

> "*50.* According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. *The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country.* Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services.

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Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

* * *

75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

76. Quite apart from this, the United Nations Commission on International Trade Law, in its *Legislative Guide on Insolvency Law* (the UNCITRAL Guidelines) recognises the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

> '*Ensuring equitable treatment of similarly situated creditors*
>
> 7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by *UNCITRAL Legislative Guide on Insolvency Law* ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganisation and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.'

77. NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the Committee of Creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(*b*) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 5-10-2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

> '**38.** ***Mandatory contents of the resolution plan***.—(1) A resolution plan shall identify specific sources of funds that will be used to pay the—
>
> (*a*) insolvency resolution process costs and provide that the insolvency resolution process costs, to the extent unpaid, will be paid in priority to any other creditor;

(*b*) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority; and

(*c*) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.'

Post amendment, Regulation 38 reads as follows:

'**38.** ***Mandatory contents of the resolution plan.***—(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) 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.'

The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors." (emphasis supplied)

88. By reading para 77 (of *Swiss Ribbons*[8]) dehors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of *similarly situated creditors*. This being so, the observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, para 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

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89. Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above. Further, as has been reflected in *Swiss Ribbons*[8], most financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. Shri Sibal's argument that the expression "secured creditor" does not find mention in Chapter II of the Code, which deals with the resolution process, and is only found in Chapter III, which deals with liquidation, is for the reason that secured creditors as a class are subsumed in the class of financial creditors, as has been held in *Swiss Ribbons*[8]. Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors is also looked at and gets taken care of. Similarly, Regulation 36(2)(*d*) when it provides for a list of creditors and the amounts claimed by them in the information memorandum (which is to be submitted to prospective resolution applicants), also provides for the amount of claims admitted and security interest in respect of such claims.

90. Under Regulation 39(4), the compliance certificate of the resolution professional as to the CIRP being successful is contained in Form H to the Regulations. This statutory form, in Paras 6 and 7, states as under:

> "**6.** The Resolution Plan includes a statement under Regulation 38(1-A) of the CIRP Regulations as to how it has dealt with the interests of all stakeholders in compliance with the Code and Regulations made thereunder.
>
> **7.** The amounts provided for the stakeholders under the Resolution Plan are as under:
>
> (Amount in Rs lakh)

Sl. No.	*Category of stakeholder**	*Amount claimed*	*Amount admitted*	*Amount provided under the Plan*	*Amount provided to the amount claimed (%)*
1.	Dissenting Secured Financial Creditors				
2.	Other Secured Financial Creditors				
3.	Dissenting Unsecured Financial Creditors				
4.	Other Unsecured Financial Creditors				

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* If there are sub-categories in a category, please add rows for each category.

5.	Operational Creditors					
	Government					
	Workmen					
	Employees					
	...					
6.	Other Debts and Dues					
Total						"

Quite clearly, secured and unsecured financial creditors are differentiated when it comes to amounts to be paid under a resolution plan, together with what dissenting secured or unsecured financial creditors are to be paid. And, most importantly, operational creditors are separately viewed from these secured and unsecured financial creditors in Sl. No. 5 of Para 7 of statutory Form H. Thus, it can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code — to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational.

91. However, Shri Sibal relied strongly upon a judgment of this Court being *Miheer H. Mafatlal* v. *Mafatlal Industries Ltd.*[21], and in particular para 28 thereof, which stated as follows: (SCC p. 596)

> "*28.* ... On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a court of law. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the company concerned, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them

21 (1997) 1 SCC 579

also has to be kept in view by the Company Court while putting its seal of approval on the scheme concerned placed for its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that a scheme sanctioned by majority will remain binding to a dissenting minority of creditors or members, as the case may be, even though they have not consented to such a scheme and to that extent absence of their consent will have no effect on the scheme. It can be postulated that even in case of such a scheme of compromise and arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote."

92. The very next paragraph in *Miheer H. Mafatlal case*[21], however, states as follows: (SCC p. 597, para 29)

"*29.* However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire."

93. In *Miheer Mafatlal*[21], the Court was dealing with schemes of amalgamation under Section 391 of the Companies Act, 1956. Under Section 392 of the said Act, the High Court is vested with a supervisory jurisdiction, which includes the power to give directions and make

21 *Miheer H. Mafatlal* v. *Mafatlal Industries Ltd.*, (1997) 1 SCC 579

modifications in such schemes, as it may consider necessary, for the proper working of the said schemes. This power in Section 392 is conspicuous by its absence when it comes to the Adjudicating Authority under the Code, whose jurisdiction is circumscribed by Section 30(2). It is the Committee of Creditors, under Section 30(4) read with Regulation 39(3), that is vested with the power to approve resolution plans and make modifications therein as the Committee deems fit. It is this vital difference between the jurisdiction of the High Court under Section 392 of the Companies Act, 1956 and the jurisdiction of the Adjudicating Authority under the Code that must be kept in mind when the Adjudicating Authority is to decide on whether a resolution plan passes muster under the Code. When this distinction is kept in mind, it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of. It is important to note that even under Sections 391 and 392 of the Companies Act, 1956, ultimately it is the commercial wisdom of the parties to the scheme, reflected in the 75% majority vote, which then binds all shareholders and creditors. Even under Sections 391 and 392, the High Court cannot act as a court of appeal and sit in judgment over such commercial wisdom.

The constitution of a sub-committee by the Committee of Creditors

94. A large part of Shri Sibal's submission was centred around the fact that the Committee of Creditors delegated its functions to a sub-committee, which delegation is impermissible. As a result of this delegation, the sub-committee secretly made negotiations with ArcelorMittal, which secret negotiations then produced a wholly inequitable result in that Standard Chartered Bank, though a financial creditor, was only paid 1.74% of its admitted claim of INR 3487 crores as opposed to other financial creditors who were paid 74.8% of what was claimed by them.

95. Under Section 21(8) of the Code, all decisions by the Committee of Creditors can be taken by a 51% majority vote, unless, a higher percentage is required under other specific provisions of the Code.

96. In *Pradyat Kumar Bose* v. *Chief Justice of Calcutta High Court*[22], SCR at pp. 1345-46, this Court, when dealing with the Chief Justice of the High Court of Calcutta's administrative powers held: (AIR pp. 291-92, para 11)

> "*11.* The further subordinate objections that have been raised remain to be considered. The first objection that has been urged is that even if the Chief Justice had the power to dismiss, he was not, in exercise of that power, competent to delegate to another Judge the enquiry into the charges but should have made the enquiry himself. This contention proceeds on a misapprehension of the nature of the power. As pointed out in *Barnard* v. *National Dock Labour Board*[23] at p. 40, it is true that "no judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication". But the exercise of the power to appoint or dismiss

22 (1955) 2 SCR 1331 : AIR 1956 SC 285
23 (1953) 2 QB 18 : (1953) 2 WLR 995 (CA)

an officer is the exercise not of a judicial power but of an administrative power. It is nonetheless so, by reason of the fact that an opportunity to show cause and an enquiry simulating judicial standards have to precede the exercise thereof. It is well recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides — is the ultimate responsibility for the exercise of such power. As pointed out by the House of Lords in *Board of Education* v. *Rice*[24], AC at p. 182 a functionary who has to decide an administrative matter, of the nature involved in this case, can obtain the material on which he is to act in such manner as may be feasible and convenient, provided only the affected party "has a fair opportunity to correct or contradict any relevant and prejudicial material". The following passage from the speech of Lord Chancellor in *Local Govt. Board* v. *Arlidge*[25], AC at p. 133 is apposite and instructive:

> 'My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a Judge in a court he is not only at liberty but is compelled to rely on the assistance of his staff.'

In view of the above clear statement of the law the objection to the validity of the dismissal on the ground that the delegation of the enquiry amounts to the delegation of the power itself is without any substance and must be rejected."

97. Likewise, in *High Court of Bombay* v. *Shirishkumar Rangrao Patil*[26], this Court, in dealing with the constitution of various committees for the administration of the High Court, when dealing with question of delegation held: (SCC pp. 352-53, para 10)

24 1911 AC 179 (HL)
25 1915 AC 120 (HL)
26 (1997) 6 SCC 339 : 1997 SCC (L&S) 1486

"*10.* It would thus be settled law that the control of the subordinate judiciary under Article 235 is vested in the High Court. After the appointment of the judicial officers by the Governor, the power to transfer, maintain discipline and keep control over them vests in the High Court. The Chief Justice of the High Court is first among the Judges of the High Court. The action taken is by the High Court and not by the Chief Justice in his individual capacity, nor by the Committee of Judges. For the convenient transaction of administrative business in the Court, the Full Court of the Judges of the High Court generally passes a resolution authorising the Chief Justice to constitute various committees including the committee to deal with disciplinary matters pertaining to the subordinate judiciary or the ministerial staff working therein. Article 235, therefore, relates to the power of taking a decision by the High Court against a member of the subordinate judiciary. Such a decision either to hold an enquiry into the conduct of a judicial officer, subordinate or higher judiciary, or to have the enquiry conducted through a District or Additional District Judge, etc. and to consider the report of the enquiry officer for taking further action is of the High Court. Equally, the decision to consider the report of the enquiry officer and to take follow-up action and to make appropriate recommendation to the Disciplinary Committee or to the Governor, is entirely of the High Court which acts through the Committee of the Judges authorised by the Full Court. Once a resolution is passed by the Full Court of the High Court, there is no further necessity to refer the matter again to the Full Court while taking such procedural steps relating to control of the subordinate judiciary."

98. We find, that when it comes to the exercise of the Committee of Creditors' powers on questions which have a vital bearing on the running of the business of the corporate debtor, Section 28(1)(*h*) provides that though these powers are administrative in nature, they shall not be delegated to any other person, meaning thereby, that the Committee of Creditors alone must take the decisions mentioned in Section 28 and not any person other than such Committee. When it comes to approving a resolution plan under Section 30(4), there is no doubt whatsoever that this power also cannot be delegated to any other body as it is the Committee of Creditors alone that has been vested with this important business decision which it must take by itself. However, this does not mean that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the Committee of Creditors.

99. We find, having gone through the minutes of all the important creditors' meetings that were held, that every single administrative decision qua approving and administering the resolution plan submitted by ArcelorMittal was in fact done by the requisite majority of the Committee of Creditors itself, the sub-committee having been used only for purposes of initiating proceedings and negotiating with ArcelorMittal, which ultimately culminated in the resolution plan as finally negotiated, being passed by the requisite

majority of creditors on 23-10-2018. In point of fact, Standard Chartered Bank voted in favour of the constitution of a sub-committee on the 12th Committee of Creditors meeting of 2-5-2018, as also, in favour of decisions of the Committee of Creditors finalising drafts of sub-committees on eligibility of resolution applicants at the 13th Committee of Creditors meeting on 5-5-2018. Also, as a matter of fact, on 31-5-2018, at the 16th Committee of Creditors meeting, a request was made by Standard Chartered Bank to be a member of the sub-committee, which request was later withdrawn. We also find that in the authorisation to the sub-committee to negotiate with ArcelorMittal, mooted at the 20th Committee of Creditors meeting on 19-10-2018, a request was made by Standard Chartered Bank for inclusion in the said sub-committee. However, Standard Chartered Bank did not agree to put the reconstitution of the sub-committee to vote by the Committee of Creditors. Given these facts, we find, therefore, that it is only when Standard Chartered Bank found that things were going against it that it started raising objections on the technical plea that sub-committees cannot be constituted under the Code. This is not a bona fide plea. For all these reasons, this objection of Standard Chartered Bank is also rejected.

Extinguishment of Personal Guarantees and Undecided Claims

100. Shri Gopal Subramanium and Shri Rakesh Dwivedi have also appealed against the extinguishment of the rights of creditors against guarantees that were extended by the promoters/promoter group of the corporate debtor. According to them, this was done by a side wind by the Appellate Tribunal without any reasons for the same.

101. Shri Prashant Ruia a promoter/director of the corporate debtor in his personal guarantee dated 28-9-2013, specifically stated as follows:

> "7. The obligations of the Guarantor under this Guarantee shall not be affected by any act, omission, matter or thing that, but for this Guarantee, would reduce, release or prejudice any of its obligations under this Guarantee (without limitation and whether or not known to it or any Secured Party) including:
>
> * * *
>
> (*g*) any insolvency or similar proceedings."

102. Also, under the caption "terms of settlement", the final resolution plan dated 2-4-2018, as approved on 23-10-2018, specifically provided:

> "*Financial Creditors*:
>
> Pursuant to the approval of this resolution plan by the Adjudicating Authority, each of the financial creditors shall be deemed to have agreed and acknowledged the following terms:
>
> (*i*) The payment to the financial creditors in accordance with this resolution plan shall be treated as full and final payment of all outstanding dues of the corporate debtor to each of the financial creditors as of the effective date, and all agreements and arrangements

entered into by or in favour of each of the financial creditors, including but not limited to loan agreements and security agreements (other than corporate or personal guarantees provided in relation to the corporate debtor by the existing promoter group or their respective affiliates) shall be deemed to have been (*i*) assigned/novated to the resolution applicant, or any person nominated by the resolution applicant, with effect from the effective date, with no rights subsisting or accruing to the financial creditors for the period prior to such assignment or novation; and (*ii*) to the extent not legally capable of assigned or novated-terminated with effect from the effective date, with no rights accruing or subsisting to the financial creditors for the period prior to termination.

(*ii*) In relation to the loan and financial assistance provided to the corporate debtor; each of the financial creditors, as the case maybe, shall:

— Assign/novate all security given (including but not limited to encumbrance over assets of the corporate debtor, pledge of shares of the corporate debtor (other than corporate guarantees and personal guarantees) related in any manner to the corporate debtor) to the resolution applicant and/or its connected persons, and/or banks or financial institutions designated by the resolution applicant in this regard, pursuant to the Acquisition Structure, with effect from the effective date;

— Issue such letters and communications, and take such other actions, as may be required or deemed necessary for the release, assignment or novation of (*i*) the encumbrance over the assets of the corporate debtor; and (*ii*) the pledge over the shares of the corporate debtor; within 5 (five) business days from the effective date; and

— Be deemed to have waived all claims and dues (including interest and penalty, if any) from the corporate debtor arising on and from the insolvency commencement date, until the effective date."

103. Shri Rohatgi, learned Senior Advocate appearing on behalf of Shri Prashant Ruia, also pointed out Section XIII(1)(*g*) of the resolution plan dated 23-10-2018, in which it is stated as follows:

"Upon the approval of the resolution plan by the Adjudicating Authority in relation to guarantees provided for and on behalf of, and in order to secure the financial assistance availed by the corporate debtor, which have been invoked prior to the effective date, *claims of the guarantor on account of subrogation, if any, under any such guarantee shall be deemed to have been abated, released, discharged and extinguished.*

It is hereby clarified that, the aforementioned clause shall not apply in any manner which may extinguish/affect the rights of the financial

creditors to enforce the corporate guarantees and personal guarantees issued for and on behalf of the corporate debtor by existing promoter group or their respective affiliates, which guarantees shall continue to be retained by the financial creditors and shall continue to be enforceable by them." (emphasis supplied)

104. We were also informed by the learned Senior Counsel that the personal guarantees of the promoter group have been invoked and legal proceedings in respect thereof are pending. It has been pointed out to us that Shri Prashant Ruia and other members of the promoter group, who are guarantors, are not parties to the resolution plan submitted by ArcelorMittal and hence, the resolution plan cannot bind them to take away rights of subrogation, which they may have if they are ordered to pay amounts guaranteed by them in the pending legal proceedings.

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*[27], 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."

106. Following this judgment in *V. Ramakrishnan case*[27], it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, NCLAT judgment being contrary to

27 (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458

Section 31(1) of the Code and this Court's judgment in *V. Ramakrishnan case*[27], is set aside.

107. For the same reason, the impugned NCLAT judgment[7] 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.

Utilisation of profits of the corporate debtor during CIRP to pay off creditors

108. The RFP issued in terms of Section 25 of the Code and consented to by ArcelorMittal and the Committee of Creditors had provided that distribution of profits made during the corporate insolvency process will not go towards payment of debts of any creditor — *see* Clause 7 of the first addendum to the RFP dated 8-2-2018. On this short ground, this part of the judgment of NCLAT is also incorrect.

Constitutional validity of Sections 4 and 6 of the Amending Act, 2019

109. In *Swiss Ribbons*[8] 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 judgment 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

27 *SBI* v. *V. Ramakrishnan*, (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458
7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388
8 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to 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 Amending Act of 2019 will have to be decided.

110. Closely on the heels of the impugned NCLAT judgment which was delivered on 4-7-2019[7], a representation dated 17-7-2019 was written by the Deputy Secretary General, FICCI to the Secretary, Ministry of Corporate Affairs, pointing out the flaws of NCLAT judgment and suggesting that the Government may consider amendment of the Code to reinstate the law as it was and should be. This representation stated:

> "A case in point is the recent NCLAT judgment[7] which, in effect, places secured and unsecured financial creditors as well as financial and operational creditors on an equal footing, thus virtually erasing the distinction specifically carved between these two classes of creditors by the provisions of the Code. It may be noted that the consequences of this order stretch beyond this particular case.
>
> The doctrine that secured creditors shall rank ahead of unsecured creditors is a core principle of banking. It allows banks to lend to companies and individuals at lower rates of interest in a secured lending because they know that their loan is secured and in the eventuality of a default, their losses would be mitigated. By virtue of this order, the borrowing rates for all classes would go up in the future because banks cannot be sure of protecting their losses. The fundamental principles of credit analysis and rating no longer hold true. This would also result in unjust enrichment for some creditors who, knowing that they do not have benefit of the security, lent at a much higher rate as compared to the secured lenders. Besides earning far more money than secured creditors, due to higher interest rate during the pre-insolvency stage they now have the benefit of higher share in the plan value, at the expense of secured creditors. In fact the ruling puts in question the very concept of security — what is the use of a charge/security if it is meaningless in insolvency? Even other statutes, including the Companies Act, 2013 clearly lay down a distinction between secured and unsecured creditors and if both are treated at par it will be a huge disincentive for secured creditors…In fact, in its judgment on the constitutionality of the IBC earlier this year, the Supreme Court had justified[8] the difference between financial and operational creditors. NCLAT order effectively negates that distinction, which is against the fundamental theme of the IBC. If the distinction between secured and unsecured financial creditors and between financial and operational creditors is not maintained, bankers would be reluctant to use the IBC provisions for

7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388
8 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

resolution of stressed assets, and would prefer for the companies to enter liquidation, which is certainly not the intent of the Code. The decision may also open the floodgates for reopening of previously concluded cases as well as filing of fresh applications and appeals by operational creditors, alleging discrimination and seeking parity with financial creditors and also by unsecured financial creditors, alleging discrimination and seeking parity with secured financial creditors.

* * *

We would like to draw your attention to Sections 30 and 31 of the Code which contain detailed provisions on submission and approval of the resolution plan. As per Section 31(1), once the Adjudicating Authority is satisfied that the resolution plan as approved by the Committee of Creditors meets the requirements of Section 30, it *shall* approve the resolution plan. The Insolvency and Bankruptcy Board of India has also prescribed rules and regulations on mandatory requirements of resolution plan. The statute thus clearly empowers the Committee of Creditors to decide the distribution of funds. It also recognises that as long as the resolution plan is in conformity with law, the Adjudication Authority must approve the resolution plan, as is evidenced by the usage of the word "shall" in Section 31(1). In *K. Sashidhar case*[9] the Supreme Court has clearly held that commercial decisions of the Committee of Creditors are not open to judicial review. We would like to clarify that the fundamental principle that there should be no discrimination between similarly situated creditors is not being questioned by the industry. The question is whether we can redefine class to mean all financial creditors irrespective of inter-creditor arrangement or their security. Such a finding is a complete rewrite of laws, practices and the agreement and bargain of parties at the time of financing (or when goods or services were provided).

We therefore strongly suggest that the Government may consider amendment of the Code to expressly clarify the distinction between secured and unsecured creditors and between financial and operational creditors. Also, decisions of resolution applicant, as accepted by the Committee of Creditors should be considered final unless they are found to be contrary to law. This would avoid any confusion; be in line with the global practices and held India retain its status of preferred investment destination." (emphasis supplied)

111. Pursuant to this and representations from banks and industry, the Amending Act of 2019 was then made. Sections 4 and 6 of the Amending Act of 2019 read as under:

"**4.** ***Amendment of Section 12.***—In Section 12 of the principal Act, in sub-section (3), after the proviso, the following provisos shall be inserted, namely—

'Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty

9 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

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.'

* * *

6. ***Amendment to Section 30.***—In Section 30 of the principal Act,—

(*a*) in sub-section (2), for clause (*b*), the following shall be substituted, namely—

'(*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

(*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';

(*b*) in sub-section (4), after the words 'feasibility and viability', the words, brackets and figures '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' shall be inserted."

112. The frontal attack of Shri Sibal on Sections 4 and 6 of the Amending Act of 2019 is that it was tailor-made to do away with the judgment of NCLAT in this very matter. This being so, such legislation would be clearly outside the bounds of the legislature as the legislature cannot interfere with a particular judgment and set it aside.

113. There is no doubt that the Amending Act of 2019 consists of several sections which have been enacted/amended as difficulties have arisen in the working of the Code. While it is true that it may well be that the law laid down by NCLAT in this very case forms the basis for some of these amendments, it cannot be said that the legislature has directly set aside the judgment of NCLAT. Since an appeal against the judgment of NCLAT lies to the Supreme Court, the legislature is well within its bounds to lay down laws of general application to all persons affected, bearing in mind what it considers to be a curing of a defective reading of the law by an Appellate Tribunal. There can be no doubt whatsoever that apart from the present case the amendments made by the Amending Act of 2019 apply down the board to all persons who are affected by its provisions.

114. Also, it is settled law that bad faith, in the sense of improper motives, cannot be ascribed to a legislature making laws. This is settled law ever since the celebrated judgment of B.K. Mukherjea, J. In *K.C. Gajapati Narayan Deo* v. *State of Orissa*[28]. This was felicitously laid down as follows: (AIR p. 379, paras 8-9)

> "*8.* ... As the question is of some importance and is likely to be debated in similar cases in future, it would be necessary to examine the precise scope and meaning of what is known ordinarily as the doctrine of "colourable legislation".
>
> *9.* It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of "bona fides" or "mala fides" on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power[29]. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by it which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction.

28 1954 SCR 1 : AIR 1953 SC 375
29 Vide *Cooley's Constitutional Limitations*, Vol 1, p. 379.

If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers."

115. Likewise, a 7-Judge Bench in *STO* v. *Ajit Mills Ltd.*[30], has also clearly stated as follows: (SCC p. 108, para 16)

"*16.* Before scanning the decisions to discover the principle laid down therein, we may dispose of the contention which has appealed to the High Court based on "colourable device". Certainly, this is a malignant expression and when flung with fatal effect at a representative instrumentality like the legislature, deserves serious reflection. If, forgetting comity, the Legislative wing charges the Judicature wing with "colourable" judgments, it will be intolerably subversive of the rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, "colourable" is not "tainted with bad faith or evil motive"; it is not pejorative or crooked. Conceptually, "colourability" is bound up with incompetency. "Colour", according to *Black's Law Dictionary*, is "an appearance, semblance or *simulacrum*, as distinguished from that which is real … a deceptive appearance … a lack of reality". A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms, it is *maya*. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act? Does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary powers implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides."

30 (1977) 4 SCC 98 : 1977 SCC (Tax) 536

116. It is clear therefore for all these reasons that Sections 4 and 6 of the Amending Act of 2019 cannot be struck down on this score.

117. So far as Section 4 is concerned, it is clear that the original timelines in which a CIRP must be completed have now been extended to 330 days, which is 60 days more than 180 plus 90 days (which is equal to 270 days). But this 330-day period includes the time taken in legal proceedings in relation to such resolution process of the corporate debtor. This provision is to get over what is stated in the judgment in *ArcelorMittal (India)*[1] at para 86, that the time taken in legal proceedings in relation to the corporate resolution process must be excluded from the timeline mentioned in Section 12. Secondly, the third proviso added to the Section also mandates that where the period of 330 days is over on the date of commencement of the Amending Act of 2019, a further grace period of 90 days from such date is given, within which such process shall either be completed or the corporate debtor be sent into liquidation.

118. The raison d'être for this provision comes from the experience that has been plaguing the legislature ever since SICA was promulgated. The problems of SICA and other successor enactments were stated in graphic detail in *Madras Petrochem Ltd.* v. *BIFR*[31], SCC paras 17 to 23. It will be seen from these paragraphs that though SICA, the Recovery of Debts Act of 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") all provided for expeditious determination and timely detection of sickness in industrial companies, yet, legal proceedings under the same dragged on for years as a result of which all these statutory measures proved to be abject failures in resolving stressed assets. It is for this reason that the BLRC Report of 2015 stated:

> "In limited circumstances, if 75% of the creditors committee decides that the complexity of a case requires more time for a resolution plan to be finalised, a one-time extension of the 180 day period for up to 90 days is possible with the prior approval of the adjudicator. This is starkly different from certain present arrangements which permit the debtor/promoter to seek extensions beyond any limit.
>
> This approach has many strengths:
>
> (*i*) Asset stripping by promoters is controlled after and before default.
>
> (*ii*) The promoters can make a proposal that involves buying back the company for a certain price, alongside a certain debt restructuring.
>
> (*iii*) Others in the economy can make proposals to buy the company at a certain price, alongside a certain debt restructuring.
>
> (*iv*) All parties know that if no deal is struck within the stipulated period, the company will go into liquidation. This will help avoid delaying tactics. The inability of promoters to steal from the company, owing to the supervision of the IP, also helps reduce the incentive to have a slow lingering death.

1 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
31 (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478

(*v*) The role of the adjudicator will be on process issues: To ensure that all financial creditors were indeed on the creditors committee, and that 75% of the creditors do indeed support the resolution plan.

* * *

Speed is of essence

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the "calm period" can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

This same idea is found in FSLRC's treatment of the failure of financial firms. The most important objective in designing a legal framework for dealing with firm failure is the need for speed.

Identifying and addressing the sources of delay

Before the IRP can commence, all parties need an accurate and undisputed set of facts about existing credit, collateral that has been pledged, etc. Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court. The objective of an IRP that is completed in no more than 180 days can be lost owing to these problems.

Hence, the Committee envisions a competitive industry of "information utilities" who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay.

The second important source of delays lies in the adjudicatory mechanisms. In order to address this, the Committee recommends that the National Company Law Tribunals (for corporate debtors) and Debt Recovery Tribunals (for individuals and partnership firms) be provided with all the necessary resources to help them in realising the objectives of the Code.

* * *

Conclusion

The failure of some business plans is integral to the process of the market economy. When business failure takes place, the best outcome for

society is to have a rapid renegotiation between the financiers, to finance the going concern using a new arrangement of liabilities and with a new management team. If this cannot be done, the best outcome for society is a rapid liquidation. When such arrangements can be put into place, the market process of creative destruction will work smoothly, with greater competitive vigour and greater competition."

119. The speech of the Hon'ble Minister on the floor of the House of the Rajya Sabha also reflected the fact that with the passage of time the original intent of quick resolution of stressed assets is getting diluted. It is therefore essential to have time-bound decisions to reinstate this legislative intent. It was also pointed out on the floor of the House that the experience in the working of the Code has not been encouraging. The Minister in her speech to the Rajya Sabha gives the following facts and figures:

"Now, regarding the Corporate Insolvency Resolution Process (CIRP), under the Code, I want to give you data again as of 30-6-2019. First, I will talk about the status of CIRPs. Number of admitted cases is 2162; number of cases closed on appeal, which I read out about, is 174; number of cases closed by withdrawal under Section 12-A, is 101, I have given you a slightly later data; number of cases closed by resolution is 120; closed by liquidation, 475; and ongoing CIRPs are 1292. So, now, I would like to mention the number of days of waiting. I would like to mention here the details of the ongoing CIRPs, along with the timelines. Ongoing CIRPs are 1292, the figure just now I gave you. Over 330 days, 335 cases; over 270 days, 445 cases; over 180 days and less than 270 days, 221 cases; over 90 days but less than 180 days, 349 cases; less than 90 days, 277 cases. The number of days pending includes time, if any, excluded by the tribunals. So, that gives you a picture on what is the kind of wait and, therefore, why we want to bring the amendments for this speeding up."

120. Ms Madhavi Divan also pointed out that the Hon'ble Minister's speech had also adverted to the strengthening of NCLT as follows:

"In view of the increasing number of cases, the Government has increased the number of Benches of NCLT from 10 to 15, during just the last one year. In one year, we have increased it from 10 to 15. The number of members has also been increased in a phased manner. Recently, 26 new members have joined bringing the total number of members to 52. Sir, more than one court has been operationalised in the Benches where a large number of cases are pending, such as, in Mumbai, Delhi, Chennai and Kolkata. The projects like e-governance and e-courts have also been implemented for faster and speedier disposal of the cases."

121. Shri Sibal vehemently objected to any reliance on the speech of the Minister and cited *K.P. Varghese* v. *CIT*[32] and *K.S. Paripoornan* v. *State of*

32 (1981) 4 SCC 173 : 1981 SCC (Tax) 293 : (1982) 1 SCR 629

Kerala[33]. In *Varghese*[32] this Court held, at SCR pp. 645-46, as follows: (SCC p. 184, para 8)

"*8.* ... Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in *Lok Shikshana Trust* v. *CIT*[34], the other in *Indian Chamber of Commerce* v. *CIT*[35] and the third in *CIT* v. *Surat Art Silk Cloth Manufacturers' Assn.*[36] where the speech made by the Finance Minister while introducing the exclusionary clause in Section 2, clause (15) of the Act was relied upon by the Court for the purpose of ascertaining what was the reason for introducing that clause."

122. In *Paripoornan*[33], the Court held as follows: (SCC p. 642, para 77)

"*77.* In support of the construction placed on Section 23(1-A) of the principal Act and Section 30(1) of the amending Act in *Zora Singh*[37] the learned counsel for the claimants have referred to the Statement of Objects and Reasons appended to the Bill in 1982 as well as the Bill of 1984 and have submitted that the said Statement of Objects and Reasons show that the object underlying the enactment of Section 23(1-A) was to remove the hardship to the affected parties on account of pendency of acquisition proceedings for a long time which renders unrealistic the amounts of compensation offered to them. Our attention has also been invited to the speeches made by members at the time when the Bill was considered and was adopted by Parliament. It has been urged that a construction which advances the said object must be adopted. We are unable to accept this contention. As regards the Statement of Objects and Reasons appended to the Bill the law is well settled that the same cannot be used except for the limited purpose of understanding the background and the state of affairs leading to the legislation but it cannot be used as an aid to the construction of the statute. (See *Aswini Kumar Ghosh* v. *Arabinda Bose*[38], SCR at p. 28;

33 (1994) 5 SCC 593
32 *K.P. Varghese* v. *CIT*, (1981) 4 SCC 173 : 1981 SCC (Tax) 293 : (1982) 1 SCR 629
34 (1976) 1 SCC 254 : 1976 SCC (Tax) 14
35 (1976) 1 SCC 324 : 1976 SCC (Tax) 41
36 (1980) 2 SCC 31 : 1980 SCC (Tax) 170
37 *Union of India* v. *Zora Singh*, (1992) 1 SCC 673
38 1953 SCR 1 : AIR 1952 SC 369

State of W.B. v. *Subodh Gopal Bose*[39], SCR at p. 628, per Das, J.; *State of W.B.* v. *Union of India*[40], SCR at p. 383.) Similarly, with regard to speeches made by the members in the House at the time of consideration of the Bill it has been held that they are not admissible as extrinsic aids to the interpretation of the statutory provisions though the speech of the mover of the Bill may be referred to for the purpose of finding out the object intended to be achieved by the Bill. (See *State of Travancore-Cochin* v. *Bombay Co. Ltd.*[41] and *Aswini Kumar Ghose* v. *Arabinda Bose*[38].) On a perusal of the Bills of 1982 and 1984 we find that they did not contain the provisions found in Section 23(1-A) of the principal Act and Section 30(1) of the amending Act. These provisions were inserted when the 1984 Bill was under consideration before Parliament. The Statement of Objects and Reasons does not, therefore, throw any light on the circumstances in which these provisions were introduced."

123. As the speech of the Hon'ble Minister on the floor of the House only indicates the object for which the amendment was made and as it contains certain data which it is useful to advert to, we take aid from the speech not in order to construe the amended Section 12, but only in order to explain why the Amending Act of 2019 was brought about.

124. Given the fact that timely resolution of stressed assets is a key factor in the successful working of the Code, the only real argument against the amendment is that the time taken in legal proceedings cannot ever be put against the parties before NCLT and NCLAT based upon a Latin maxim which subserves the cause of justice, namely, *actus curiae neminem gravabit.*

125. In *Atma Ram Mittal* v. *Ishwar Singh Punia*[42], this Court applied the maxim to time taken in legal proceedings under the Haryana Urban (Control of Rent and Eviction) Act, 1973, holding: (SCC pp. 288-89, para 8)

"*8.* It is well settled that no man should suffer because of the fault of the court or delay in the procedure. Broom has stated the maxim *actus curiae neminem gravabit* — an act of court shall prejudice no man. Therefore, having regard to the time normally consumed for adjudication, the ten years' exemption or holiday from the application of the Rent Act would become illusory, if the suit has to be filed within that time and be disposed of finally. It is common knowledge that unless a suit is instituted soon after the date of letting it would never be disposed of within ten years and even then within that time it may not be disposed of. That will make the ten years holiday from the Rent Act illusory and provide no incentive to the landlords to build new houses to solve problem of shortages of houses. The purpose of legislation would thus be defeated. Purposive interpretation in a social amelioration legislation is an imperative irrespective of anything else."

39 1954 SCR 587 : AIR 1954 SC 92
40 (1964) 1 SCR 371 : AIR 1963 SC 1241
41 1952 SCR 1112 : AIR 1952 SC 366
38 1953 SCR 1 : AIR 1952 SC 369
42 (1988) 4 SCC 284

126. Likewise, in *Sarah Mathew* v. *Institute of Cardio Vascular Diseases*[43], this Court held that for the purpose of computing limitation under Section 468 of the Code of Criminal Procedure, 1973 the relevant date is the date of filing of the complaint and not the date on which the Magistrate takes cognizance, applying the aforesaid maxim as follows: (SCC pp. 96-97, para 39)

> "*39.* As we have already noted in reaching this conclusion, light can be drawn from legal maxims. Legal maxims are referred to in *Bharat Kale*[44], *Japani Sahoo*[45] and *Vanka Radhamanohari*[46]. The object of the criminal law is to punish perpetrators of crime. This is in tune with the well-known legal maxim *nullum tempus aut locus occurrit regi*, which means that a crime never dies. At the same time, it is also the policy of law to assist the vigilant and not the sleepy. This is expressed in the Latin maxim *vigilantibus et non dormientibus, jura subveniunt*. Chapter XXXVI CrPC which provides limitation period for certain types of offences for which lesser sentence is provided draws support from this maxim. But, even certain offences such as Section 384 or 465 IPC, which have lesser punishment may have serious social consequences. The provision is, therefore, made for condonation of delay. Treating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation under Section 468 of the Code is supported by the legal maxim *actus curiae neminem gravabit* which means that the act of court shall prejudice no man. It bears repetition to state that the court's inaction in taking cognizance i.e. court's inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complainant. Chapter XXXVI thus presents the interplay of these three legal maxims. The provisions of this Chapter, however, are not interpreted solely on the basis of these maxims. They only serve as guiding principles."

127. Both these judgments in *Atma Ram Mittal*[42] and *Sarah Mathew*[43] have been followed in *Neeraj Kumar Sainy* v. *State of U.P.*[47], SCC paras 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date — without any exception thereto — may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(*g*) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as

43 (2014) 2 SCC 62 : (2014) 1 SCC (Cri) 721
44 *Bharat Damodar Kale* v. *State of A.P.*, (2003) 8 SCC 559 : 2004 SCC (Cri) 39
45 *Japani Sahoo* v. *Chandra Sekhar Mohanty*, (2007) 7 SCC 394 : (2007) 3 SCC (Cri) 388
46 *Vanka Radhamanohari* v. *Vanka Venkata Reddy*, (1993) 3 SCC 4 : 1993 SCC (Cri) 571
42 *Atma Ram Mittal* v. *Ishwar Singh Punia*, (1988) 4 SCC 284
47 (2017) 14 SCC 136 : 8 SCEC 454

the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from *Madras Petrochem*[31]. Thus, while leaving the provision 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 days 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 factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or 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 Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 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.

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

31 *Madras Petrochem Ltd.* v. *BIFR*, (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478

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.

130. Equally, Explanation 2 applies the substituted section to pending proceedings either at the level of the Adjudicating Authority or the Appellate Authority or in a writ or civil court. As has been held in *Swiss Ribbons*[8] and *ArcelorMittal (India)*[1] [*see* para 97 of *Swiss Ribbons*[8] and paras 82, 84 of *ArcelorMittal (India)*[1]], no vested right inheres in any resolution applicant to have its plan approved under the Code. Also, the Federal Court in *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri*[48] and later, this Court in *Shiv Shakti Coop. Housing Society* v. *Swaraj Developers*[49] (at paras 16 and 17) have held that an appellate proceeding is a continuation of an original proceeding. This being so, a change in law can always be applied to an original or appellate proceeding. For this reason also, Explanation 2 is constitutionally valid, not having any retrospective operation so as to impair vested rights.

131. The challenge to sub-clause (*b*) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC Report, 2015 (*see* para 56 of this judgment). Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. For

8 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17
1 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
48 1940 SCC OnLine FC 10 : AIR 1941 FC 5
49 (2003) 6 SCC 659

all these reasons, therefore, it is difficult to hold that any of these provisions is constitutionally infirm.

The resolution plan of ArcelorMittal as amended and objections thereto

132. The resolution plan submitted by ArcelorMittal on 2-4-2018 proposed an upfront payment of INR 35,000 crores towards resolution of the debt of INR 49,213 crores of financial creditors. This was buttressed by a letter of commitment from Credit Agricole Corporate and Investment Bank. From this upfront cash recovery, unsecured financial creditors were to be paid only an aggregate amount of 5% of their admitted claims. Apart from this, INR 8000 crores of upfront fresh capital infusion for improving operations and enhancing revival prospects of the corporate debtor was also proposed. So far as operational creditors were concerned, it was proposed that workmen and employees were to be paid INR 18 crores in full against their admitted claims, and out of other operational creditors, those small trade creditors defined as "having admitted claims of less than INR 1 crore" were to be paid in full, as opposed to trade and government creditors of over INR 1 crore, who were to be paid aggregate amount INR 196 crores. Other operational creditors were to be given nothing, liquidation value being payable to operational creditors as a class being in any case nil (INR 3339 crores were the aggregate admitted claims of all operational creditors as a class).

133. Under the caption "Treatment of various stakeholders" the plan provided as follows:

"**VIII.** ***Treatment of various stakeholders***

* * *

Stakeholder	*Proposed Treatment*
Financial creditors	As per the liquidation value of the corporate debtor, the secured financial creditors would realise amounts which were lower than the current outstandings on a cumulative basis. However, the resolution applicant recognises the sacrifices already made by the financial creditors till date and the fact that debt restructuring attempts by the financial creditors have failed in the past. The resolution applicant is proposing to pay the secured financial creditors, the amounts stated under Section V which is significantly higher than the reconvenes that the secured financial creditors as a class would realise in case of liquidation. The payments proposed to be made by the resolution applicant to the unsecured financial creditors is also higher than the recoveries that the unsecured financial creditors as a class would realise in case of liquidation, since the liquidation

value realisable by unsecured financial creditors is nil.

The resolution applicant has empowered the Committee of Creditors to decide the manner in which the financial package being offered by the resolution applicant to the financial creditors will be distributed to the secured financial creditors. All such allocations to the financial creditors will be binding on all stakeholders.

The unsecured financial creditors (including those secured financial creditors who may have claims admitted against unsecured instruments) i.e. Standard Chartered Bank. Bank of New York Mellon, London Branch, Axis Bank, ICICI Bank. Bank of Baroda, SBI Rupee Notes and Individual Rupee Notes to Melwani Gopal Thrumal and/or Melwani Vinod, Mr Arvinlal N. Shah & Mrs Indumati A. Shah, Mr Jiwat K. Dansanghani and Mrs Neetu J. Dhansanghani and Nathu Ram Verma, who have admitted claims as of 28-2-2018 (based on document 2.5.8 uploaded on VDR on 6-3-2018 which provides break-up of secured and unsecured financial creditors), shall be paid an aggregate amount of 5% of their admitted claims.

Furthermore, in accordance with the RFP, it is clarified that:

(*a*) any surplus cash being the positive difference between actual working capital of the corporate debtor as on plan approval date and normalised working capital as at 31-12-2017, shall be added to upfront cash recovery as a closing adjustment under the resolution plan; and

(*b*) the EBITDA generated by the corporate debtor between the plan approval date and the date on which the financial creditors are paid the upfront cash amount shall be available to the financial creditors over and above the upfront cash recovery under the resolution plan.

However, notwithstanding anything stated herein, a dissenting financial creditor will be entitled to only receive liquidation value realisable by such

	financial creditor in case of liquidation of the corporate debtor, which shall be paid out of the upfront cash recovery amount being offered.
Operational creditors (other than workmen, employees and governmental operational creditors)	The resolution applicant recognises the role that the various trade creditors have played in connection with the business of the corporate debtor. Whilst operational creditors as a class of creditors would receive nil returns on liquidation of the corporate debtor, the resolution applicant has agreed to settle part of the admitted claims to the extent set out in Section V above. Without prejudice to the above, the resolution applicant is desirous of setting aside amounts under the financial package to settle at least part of the claims of the small trade creditors. This class of trade creditors are being provided such payments since the resolution applicant understands that these persons typically form a part of small scale/medium sector enterprises, which enterprises play a key role in the Indian economy and given their scale of operations may not be in a position to weather macroeconomic and financial shocks. The identified trade creditors are being paid out on the assumption that they will continue their arrangements with the corporate debtor and shall in no manner commit any acts or omissions which would adversely impact the business of the corporate debtor. Acceptance of payments by the trade creditors shall be considered as an acceptance of the above condition. The resolution applicant recognises and understands that additional payment to certain operational creditors may have to be made as a part of revitalising the business and is prepared to do so, on a case-by-case basis.
Governmental operational creditors	The resolution applicant aims at establishing a good working relationship between the governmental authorities and the corporate debtor and will cause the corporate debtor to duly pay the statutory dues that will be incurred by the corporate debtor going forward from the plan approval date in a timely manner. The revival of the corporate debtor

	will also enhance the tax collection by the governmental authorities in the geographies where the corporate debtor operates."

134. On 22-10-2018, various changes were made in the original resolution plan as follows:

> "The representatives of AM India thanked the RP. Thereafter, they presented a brief summary of the revisions made to the financial proposal. They informed that as per the directives of the CoC, AM India had deliberated and negotiated with the Sub-Committee. Thereafter, the representative highlighted certain key revisions made to the resolution plan, which inter alia included revisions in relation to (*a*) upfront cash recovery available to secured and unsecured financial creditors of ESIL; (*b*) upfront fresh capital infusion; (*c*) process of closing adjustment, which included provision of audit. He further added that they had not provided how the upfront cash would be distributed and the same has been left at the discretion of the CoC. He further added that the business plan has not undergone any substantial changes and the negotiations were largely around the financial proposal and that AM India is committed to implement the plan, as agreed. Thereafter, the representative of AM India also deliberated with the members of the CoC regarding the revised financial proposal and responded to the queries raised in relation thereto."

It was stated that the value and quality of security should be the basis on which proceeds should be distributed by most of the secured financial creditors. This amended resolution plan was approved by a majority of 92.24% of financial creditors. The sharing ratio between secured financial creditors having charge on project assets of the corporate debtor was 99.86% as opposed to 0.14%, so far as Standard Chartered Bank was concerned, which only had a charge on the pledge of shares of ESOL, being an offshore subsidiary of the corporate debtor. The upfront payment to secured financial creditors on the effective date would now be INR 41,909.29 crores and INR 60.71 crores to Standard Chartered Bank. It was pointed out that this was based on the worth of those shares as security, being only INR 24.86 crores.

135. The reasons given for acceptance of this amended resolution plan were stated as follows:

> "By majority consensus of CoC (except Standard Chartered Bank and SREI), it was agreed that fairness of distribution would be reflected only if distribution be made based on underlying security value and quality of security. Based on a comparison of the two suggested options based on fair value and liquidation value, in the interest of all stakeholders and with the objective of the Code it is proposed to the CoC to accept the sharing ratio as per the Liquidation Valuation Report and also to secured financial creditors having charge on project asset of ESIL for taking a sacrifice

of Rs 37.76 crores (for adopting the sharing ratio as per the Liquidation Valuation Report instead of fair value) which shall be allocated to secured financial creditors having charge on pledge of shares of ESOL.

While allocation of the resolution amount it is pertinent to note that the *Committee of Creditors has the widest discretion to determine the terms of the resolution plan.*

A. At the outset it is important to be noted that the legislature in their wisdom under the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) have left the decision-making in respect of commercial matters completely in the domain of the Committee of Creditors (CoC). In fact even the Bankruptcy Law Reforms Committee report (which formed the basis for the enactment of the Code) specifically notes the deliberate scheme of the Code, where the law does not prescribe any particular manner of insolvency resolution and leaves this commercial decision-making process to the CoC without the interference of the legislature as well as judiciary.

B. Further, pro rata distribution cannot be the only method of distribution of assets, as it would lead to the disastrous consequences where the creditors would lose their freedom to restructure the debt as they deem fit. This an important commercial decision which is required to be made by the Code and a straitjacket formula for all cases would result in dilution of the provisions of the Code and would incentivise all secured creditors to liquidate the company rather than opt for resolution. It was noted that generally all secured financial creditors are prudent entities which grant loans after exercising due diligence and are presumed to be able to evaluate their interest and risks sufficiently. Moreover it may negatively impact the credit market and discourage banks and other financial creditors from granting large project loans which are more often than not granted against property or other valuable collateral.

C. The Report of the Insolvency Law Committee provides valuable insights on the principles governing inter-creditor agreements and their relevance to distribution arrangements. In practice, subordination agreements inter se creditors were respected in practice. This was also the stated position in insolvency resolution proceedings other jurisdiction and in other developed countries.

D. The Hon'ble National Company Law Appellate Tribunal has held that the CoC has the discretion to approve any resolution plan and its decision to approve the same cannot be interfered with by the Adjudicating Authority or the Appellate Authority, except for in terms of Section 31(1) to examine compliance of Section 30(2) read with relevant regulations. [See *Kannan Tiruvengandam* v. *M.K.*

Shah Exports Ltd.[50] in and *Darshak Enterprise (P) Ltd.* v. *Chhaparia Industries (P) Ltd.*[51]]

E. The Code specifically provides the CoC with the power under Section 30(4) of the Code, to approve a resolution with requisite majority as set out thereunder. It is an accepted position in law, and as enunciated in various pronouncements of the Supreme Court of India that where a power is conferred or a duty is imposed by a statute, and there is nothing expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions it is reasonable to hold that it carries with it all power of doing all such acts or employing all such means as are reasonably necessary for its execution. The below mentioned provisions of the Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons). Regulation 2016 (CIR Regulations) set out the powers of the CoC in this regard.

Section 31 of the Code (Approval of Resolution Plan):

> '**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, guarantors and other stakeholders involved in the resolution plan:'

Regulation 39 of the CIR Regulations, 2016:

> '**39. (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.
>
> (3) The committee may approve any resolution plan with such modifications as it deems fit.'

* * *

K. It is a recognised principle of insolvency law that creditor rights and ranking of priority claims existing before commencement of insolvency must be recognised and respected in the insolvency proceedings. Recognition of such ranking of priorities of existing and post-commencement creditor claims provide predictability to lenders and ensure consistent application of the rules, create confidence in the proceedings and enable participants to adopt appropriate measures to manage risk. At macro level, it helps create certainty in the market and facilitate the provision of credit, in particular with respect to the rights and priorities of secured creditors. It is also well established that best practices require that priority to claims

50 2018 SCC OnLine NCLAT 927
51 2018 SCC OnLine NCLAT 224

that are not based on commercial bargains should be minimalised. This principle is unequivocally articulated in the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency law (hereinafter, "the UNCITRAL Guide") in the chapter that recommends the policy and legislative design of the "key objectives and structure of an effective and efficient insolvency law".

L. Further, in recognition of the principle that creditor rights and ranking of priority claims existing before commencement of insolvency must be recognised and expected in the insolvency proceedings. To protect/respect the creditor rights and ranking of priority claims, the IBC does not in any manner impose any prescription, mandatory or otherwise on the resolution applicant that would be disruptive of the creditor rights and priority claims of the secured creditors as on insolvency commencement date. If this rule was not to be recognised, it will lead to a free-for-all situation, no short of chaos, as any rights on differential security interest would then be ignored.

M. Therefore in conclusion, since the Code provides the CoC with the power to approve a resolution for the corporate debtor, the manner in which such resolution shall be executed including but not limited to the decision as to the methodology of distribution or the amount of money to be paid to individual stakeholders would also be a decision which the CoC would be permitted to take, especially in the absence of any express provision in the Code prohibiting such a decision by the CoC. As long as such decisions are not contrary to the provisions of the Code."

136. The final resolution plan as approved on 23-10-2018 was as follows — in the place of INR 35,000 crores to be paid on the effective date as an upfront amount, INR 39,500 crores and INR 2500 crores, aggregating to INR 42,000 crores was to be paid. The resolution applicant agreed that the Committee of Creditors will decide the manner in which the financial package being offered by the resolution applicant to financial creditors will be distributed to secured financial creditors. The payment of INR 17.4 crores was to be made to unsecured financial creditors with a claim amount of more than INR 10 lakhs, and INR 30.55 lakhs to such creditors with a claim amount of less than INR 10 lakhs, with the fresh capital infusion for improving operations and enhancing revival prospects of the corporate debtor remaining at INR 8000 crores. So far as operational creditors were concerned, there was no change made.

137. At the 22nd meeting of the Committee of Creditors dated 27-3-2019, NCLT order of 8-3-2019[3] was discussed and it was felt that INR 1000 crores extra be paid for operational creditors over and above INR 1 crore each, as follows:

3 *Resolution Professional* v. *Essar Steel (India) Ltd.*, 2019 SCC OnLine NCLAT 750

"The representative of EARC mentioned that without prejudice to the appeals, a lump sum amount may be set aside and put to vote as they are not averse to examining it. The representative of SBI concurred with the views of the representative of EARC. He further mentioned that CoC as well as SCB has challenged NCLT order. SBI proposed to set aside a capped amount of INR 1000 crores for operational creditors (without prejudice to their right to appeal). He requested that a resolution to that effect may be voted upon.

The RP requested SBI representative to clarify if the proposed amount of INR 1000 crores would be over and above the INR 196 crores which is already included in the Resolution Plan for operational creditors. SBI representative confirmed that the same would be over and above the current proposal, however this additional amount will be capped to INR 1000 crores."

138. Under the caption "Discussion on the suggestions of the Hon'ble NCLT in relation to distribution of amounts proposed to be paid to financial creditors", the minutes of the meeting reflect that the Committee of Creditors had sought for and obtained the opinion of retired Justice B.N. Srikrishna. This opinion dated 23-3-2019 stated as follows:

"In view of this peculiar situation, where a financial creditor has advanced money to the corporate debtor assessing the commercial risk and covers his risk by a charge on the assets of the corporate debtor, there can be no question of his being entitled to the liquidation value or any other fixed value towards his debt. In any event, the plan formulated by the resolution applicant, has to be placed before the CoC for its final approval. It is at that juncture the commercial wisdom of lenders forming the CoC comes into play and they are entitled to take a call on either to approve or not to approve the resolution plan which the FRP has put forward before the CoC for its approval. In my view, therefore, the approved resolution plan would be fully justified in classifying between secured and unsecured financial creditor, and also according to the value of their securities and apportioning the amounts payable to them in the best manner which is considered reasonable. I might add here that irrespective of what the RP considers as reasonable, it is always open to the CoC to adjudge the commercial wisdom of the resolution plan while approving it. As pointed out by the Supreme Court in *K. Sashidhar* v. *Indian Overseas Bank*[9] such commercial decision of the CoC is not subject to appeal under the Code.

In the premises, I am of the opinion that SCB was differently placed than other financial creditors in view of the fact it did not have any charge or security on the project assets but had advanced a large amount of loan amounting to Rs 3000 crores on the basis of the pledge over the shares of an offshore company and a corporate guarantee extended by the corporate debtor. The resolution plan as finally approved by CoC was fully justified

9 (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

in treating SCB as differently placed based on the cogent and intelligible differentia that is apparent from the facts of the case. I see nothing in the provisions of the Code of the Regulations which would militate against the decision taken by the CoC.

I might add here that the commercial wisdom of the lenders who are voting for the resolution of the CoC is evidenced by the fact that they had created securities on the project assets of the corporate debtor after assessing the commercial risk involved. In the case of SCB, however, there seems to have been gross under security for the large amount of Rs 3000 crores by merely seeking a corporate guarantee from the corporate debtor along with a charge only on the shares of the offshore company held by the corporate debtor, wherein the liquidation value of such shares is a mere Rs 60.71 crores. In fact, in view of the fact situation, I find it hard to understand whether SCB can really be treated as a secured creditor in the first place. I am of the opinion that even if the corporate guarantee were to be enforced, SCB would at best stand as a secured creditor only to the extent of the value of the shares of the offshore company as on the date of enforcement of the guarantee and as an unsecured creditor with respect to the rest of the loan advanced by it. This is an equally valid consideration which might have moved the CoC while approving the resolution plan by which the ultimate discretion for distribution is left to the CoC with a declaration that such allocation to the financial creditors will be binding on all stakeholders, which also would include SCB.

* * *

In the facts and circumstances, I am of the opinion that the manner in which the resolution plan was formulated and approved by the overwhelming majority of 92.24% of the voting creditors, is not only perfectly justified but is also equitable. As the Supreme Court has pointed out in *Swiss Ribbons*[8], "equitable" does not mean equal distribution; it means distribution which does justice to every stakeholder involved in the process. In my opinion, mere equal distribution would definitely do injustice to the large majority of 92.24% shareholders who in their commercial wisdom had ensured that the security was created on project assets, while SCB was content with creating a charge only on the shares of the offshore company and seeking a corporate guarantee from the corporate debtor."

139. The aforesaid opinion was shared with all Committee of Creditors members including Standard Chartered Bank. Importantly, the minutes record:

"At this point, the representative from Canara Bank stated that he requires clarity on the following questions before he can consider the revised apportionment to SCB: (*a*) Whether any NOCs were taken from the lenders before taking corporate guarantee, as it is a financial covenant in the sanctions of the lenders? (*b*) When SCB had funded Essar Steel Offshore

8 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

Ltd. (ESOL), whether SCB had not taken security of Trinity Coal Mines as collateral, and the cash flows and credentials from the assets as security? (*c*) What is the end-use of the loan and was that end-use ensured? At what stage is the project? Were the funds really invested in the project?

* * *

The representatives of SCB raised issue of valuation and mentioned that value of above INR 24 crores of ESOL shares has not been estimated appropriately and is erroneous. The value has been estimated based on desktop valuation and the valuer has not considered valuation of underlying assets. A valuation report of equity of Trinity was shared by RP after receipt of same from corporate debtor which shows value in excess of USD 600 mn.

* * *

Further, the representatives of EARC added that they required to clarify as to whether the underlying loans had been enforced against the principal borrower and whether any money has been recovered from the principal borrower. SCB representative replied that these questions were not relevant at this time and they were choosing not to answer these questions. SBI representative pointed out that these questions have been raised earlier and SCB has never replied to these queries.

* * *

After several requests of the lenders, it was noted that SCB declined to share the documents and did not answer any of the questions as asked by the members of the CoC stating that the same were irrelevant at this stage.

* * *

ICICI Bank also stated that it should be recorded that SCB rejected offer of INR 200 crores was not considered by SCB. The representative of SBI mentioned that the proposal offered by ICICI Bank was in its individual capacity and not by other lenders. The representative of SCB mentioned it is evident that the offer was only hypothetical.

It was also suggested by EARC that revised distribution to SCB matter as per NCLT order[3] should also be voted upon and the other lenders concurred with the same." (emphasis supplied)

Finally, the allocation of INR 1000 crores extra to operational creditors was approved by a majority of 70.73% of the Committee of Creditors.

140. Given the aforesaid facts, Shri Sibal's submissions on behalf of Standard Chartered Bank, that the offer made by ArcelorMittal of payment of INR 42,000 crores as upfront in order to pay 100% principal outstanding of secured financial creditors of the corporate debtor cannot be accepted. Given that Standard Chartered Bank was reclassified as a secured financial creditor of the corporate debtor only on 10-9-2018 and that the aforesaid upfront payment of INR 42,000 crores would include the principal amount payable to Standard

3 *Resolution Professional* v. *Essar Steel (India) Ltd.*, 2019 SCC OnLine NCLAT 750

Chartered Bank as well, we have seen how in the course of negotiation, the vast majority of financial creditors have ultimately decided that Standard Chartered Bank will only get an amount based on its security interest, which was accepted by ArcelorMittal.

141. Shri Sibal also argued that the final resolution plan ultimately offered a sum of INR 39,500 crores instead of INR 42,000 crores, being a minimum upfront payment from which it was possible to negotiate upwards but not downwards. We cannot arrive at the conclusion that the acceptance of the resolution plan by the majority of the Committee of Creditors should be set aside on this score, inter alia, for the reason that Shri Sibal assured us that he was not attacking the acceptance of the revised plan but only distribution of amounts payable under the said plan. This being so, it is also not possible to accept the submission of Shri Sibal, that "feasibility and viability" of a resolution plan will not include distribution of the amount of debt under the said plan.

142. It is also not possible to accept Shri Sibal's submission that the resolution plan must itself provide for distribution inter se between secured financial creditors. It is enough that under the Code and the Regulations, the resolution plan provides for distribution of amounts payable towards debts based upon a classification of various types of creditors. This both the original plan as well as the negotiated plan of ArcelorMittal have already done, as has been seen by us hereinabove, both plans containing the amount to be paid to workmen separately, operational creditors of INR 1 crore and less separately, operational creditors of INR 1 crore and over separately and financial creditors, sub-divided into secured and unsecured as sub-classes, separately. All that was left for distribution by ArcelorMittal was distribution inter se between secured financial creditors which was then done by a majority of 92.24%, as has been seen above based upon the value of their respective security interests. Therefore, the allegation that the Committee of Creditors relieved ArcelorMittal from the solemn offer made before the Supreme Court by reducing the offer amount of INR 42,000 crores by INR 2500 crores so that ArcelorMittal could acquire the debts of OSPIL, is again a matter for negotiation being a business decision taken by the Committee of Creditors with ArcelorMittal. In any case ultimately INR 35,000 crores was upped to INR 42,000 crores, it being made clear in the final resolution plan that upfront payment of INR 42,000 crores is a committed amount, even if working capital adjustment turns out to be below INR 2500 crores.

143. Shri Sibal also made an alternative submission that on the facts of this case, a half-way house can be found so that Standard Chartered Bank would get payment of something more above the value of its security interest. The argument is that, assuming, whilst denying, that classification amongst secured financial creditors is permissible, such classification should be on the liquidation value of the security enjoyed by the creditor and the balance distributed to all secured financial creditors pro rata. This methodology of distribution has, according to him, been applied in *SBI* v. *Orissa Manganese &*

Minerals Ltd.[52], approved by NCLT and not disturbed by NCLAT[7]. Therefore, it is argued that, applying the aforesaid classification, the average liquidation value of the security in the instant case, is to be as per the report of DUFF & Phelps and RBSA, being a sum of INR 15,838 crores. This, according to him, is the amount required to be distributed to the secured financial creditors according to the value of their respective security interests (viz. first charge, second charge, subservient charge, residuary charge, etc.) and the balance to be distributed pro rata amongst all financial creditors irrespective of their security. The sum of INR 42,000 crores offered by ArcelorMittal would therefore, according to him, be a sum of INR 15,838 crores paid over to the secured financial creditors according to the value of their security and the balance amount of INR 26,162 crores would then have to be distributed amongst all financial creditors on a pro rata basis.

144. What is important to note is that when one reads the abovementioned judgment, it is a majority of 66% of the Committee of Creditors who has exercised the discretion vested in it under the Code in this particular manner, which has then correctly not been disturbed by NCLT and NCLAT. Far from helping Shri Sibal's client, the principle that is applied in such a case is that ultimately it is the commercial wisdom of the requisite majority of the Committee of Creditors that must prevail on the facts of any given case, which would include distribution in the manner suggested in *Orissa Manganese*[52]. It is, therefore, not possible to accept the argument that the Adjudicatory Authority and consequently the Appellate Authority would be vested with the discretion to apply what was applied by the Committee of Creditors in *Orissa Manganese case*[52]. This submission is also devoid of merit and is, therefore, rejected.

145. The other argument of Shri Sibal that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct. Section 30(2)(*b*) of the Code refers to Section 53 not in the context of priority of payment of creditors, but only to provide for a minimum payment to operational creditors. However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given, as has been seen hereinabove, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself.

146. The other argument based upon serious conflict of interest between secured and unsecured financial creditors, as the majority may get together to ride roughshod over the minority, is an argument which flies in the face of the majority of financial creditors being given complete discretion over feasibility and viability of resolution plans, which includes the manner of distribution of debts that is contained in them, subject to following the provisions of the Code

52 2018 SCC OnLine NCLT 21381
7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388

relating, inter alia, to dealing with the interests of all stakeholders including operational creditors. The Committee of Creditors does not act in any fiduciary capacity to any group of creditors, as is sought to be suggested by Shri Sibal. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors. It is important to note that the original threshold required by way of majority was 75%. It is during the working of the Code that this was found to be unrealistic and therefore reduced to 66% — see the amendments made to Sections 28(3) and 30(4) of the Code by the Insolvency and Bankruptcy Code (Second Amendment) Act of 2018. For all these reasons therefore, it is not possible to accept Shri Sibal's arguments.

147. NCLAT judgment[7] which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside.

148. So far as Civil Appeal No. 6409 of 2019 is concerned, we have perused paras 72 to 77 of the impugned NCLAT judgment[7] to the effect that the cheques issued by the corporate debtor due to its payment obligation towards Bhandar Power Ltd. were not issued with a view to secure any payment obligation of the principal borrower i.e. EPGL, is a finding of fact which dislodges the claim of this appellant to be regarded as a financial creditor. We find no infirmity in the aforesaid finding. This appeal is consequently dismissed.

149. So far as Civil Appeal Diary No. 36838 is concerned, we have perused the relevant documents and paras 66 to 68 of the impugned NCLAT judgment[7] and find that NCLAT has erred inasmuch as it has added the claim of this appellant to the tune of INR 861.19 crores despite the fact that the claim had already been admitted by the resolution professional thereby resulting in a double counting of the debt of this appellant. This being the position, we find it necessary to set aside this part of the impugned NCLAT judgment[7] as well.

150. So far as Civil Appeal No. 6266 of 2019 is concerned, we have perused paras 81 to 83 of the impugned NCLAT judgment[7] and find no reason to dislodge the finding of NCLAT that the claim was filed by the appellant after the approval of the resolution plan. However, NCLAT's finding that the said claim is subject to arbitration and that it was open for the appellant to pursue the matter in terms of Section 60(6) of the Code deserves to be set aside in terms of this judgment. This appeal is consequently dismissed.

151. So far as Civil Appeal No. 6269 of 2019 is concerned, we have perused paras 85, 86 and 201 of the impugned NCLAT judgment[7] and find force in the contention of the appellant that there has been an error in the impugned NCLAT judgment[7] inasmuch as it notes the claim amount, as admitted, as being a sum of INR 124.88 crores, but later in the same judgment notes the said amount as INR 2.47 crores based on a chart submitted by the resolution professional. This chart submitted by the resolution professional specifies the amount of

7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388

INR 2.47 crores (added after NCLT judgment dated 8-3-2019[3]), which is in addition to the amount of INR 124.88 crores already admitted by the resolution professional. Therefore, NCLAT has erred in noting INR 2.47 crores amount as the amount of the appellant's claim, and this part of the judgment also deserves to be set aside. Thus, the claim of the appellant shall be the claim as admitted and registered by the resolution professional. This apart, we find no merit in the submission of the appellant with respect to the sum of INR 121.72 crores as the same has been rightly rejected by NCLAT in view of the fact that the said claim was filed after the completion of the CIRP period. However, NCLAT's judgment[7] inasmuch as it left it open for the appellant to pursue the matter in terms of Section 60(6) of the Code deserves to be set aside in terms of this judgment. This appeal is thus partly allowed.

152. 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 NCLT came to be dismissed by an order dated 14-2-2019[53] on the ground of non-prosecution. The subsequent restoration application filed by the appellants then came to be rejected by NCLT through judgment dated 8-3-2019[3] 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[7], at paras 96 and 97, upheld the finding of 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[7], would not assist the case of the appellants at this belated stage. These appeals are therefore dismissed.

153. So far as Writ Petition (Civil) No. 1064 of 2019 is concerned, we have perused the relevant documents and para 37 of the impugned NCLAT judgment[7] and find force in the contention of the writ petitioner that NCLAT has wrongly noted that the claim amount was notionally admitted by the resolution professional at INR 1 only. The resolution professional has admitted the claim of the writ petitioner to a tune of INR 17.09 crores and the same is recorded in the list of creditors prepared by the resolution professional. In view of the same, this part of NCLAT judgment is thus erroneous and the claim shall be the claim as admitted and registered by the resolution professional. The writ petition is thus allowed to this extent.

3 *Resolution Professional* v. *Essar Steel (India) Ltd.*, 2019 SCC OnLine NCLAT 750
7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388
53 *Essar Steel Asia Holdings Ltd.* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 736

154. So far as Writ Petition (Civil) No. 1049 of 2019 is concerned, the petitioner is admittedly the operational creditor of one Wind World India Ltd. whose CIRP proceedings are pending before NCLT, Ahmedabad. The petitioner has inter alia sought for permission to raise various issues arising out of the facts of its own case (which has been raised before us herein) in the matter pending before NCLT. In view of the fact that this judgment has not opined on the merits of the case of the writ petitioner pending before NCLT, it is open to the writ petitioner to raise all contentions as permissible under the applicable law before NCLT in the pending proceedings. This writ petition is thus allowed to this extent.

155. So far as Dakshin Gujarat Vij Co. (Respondent 11 in Civil Appeal Diary No. 24417 of 2019), State Tax Officer (Respondent 12 in Civil Appeal Diary No. 24417 of 2019), Gujarat Energy Transmission Corporation Ltd. (Respondent 17 in Civil Appeal Diary No. 24417 of 2019) and Indian Oil Corporation Ltd. (Respondent 18 in Civil Appeal Diary No. 24417 of 2019) are concerned, the resolution professional admitted the claim of the abovementioned respondents notionally at INR 1 on the ground that there were disputes pending before various authorities in respect of the said amounts. However, NCLT through its judgment dated 8-3-2019[3] directed the resolution professional to register the entire claim of the said respondents. NCLAT in paras 44, 45 and 201 of the impugned judgment upheld[7] the order passed[3] by NCLT as aforesaid and admitted the claim of the abovementioned respondents. We therefore hold that this part of the impugned judgment deserves to be set aside on the ground that the resolution professional was correct in only admitting the claim at a notional value of INR 1 due to the pendency of disputes with regard to these claims.

156. The appeals filed by the Committee of Creditors of Essar Steel Ltd. and other civil appeals are allowed. The impugned NCLAT judgment[7] is set aside, except insofar as Civil Appeals Nos. 6409, 7266 and 7260 of 2019 are concerned, which are dismissed. Insofar as Civil Appeals Nos. 6266 and 6269 of 2019 are concerned, the appeals are partly allowed in terms of this judgment. The writ petitions are disposed of in terms of the judgment. It is made clear that the CIRP of the corporate debtor in this case will take place in accordance with the resolution plan of ArcelorMittal dated 23-10-2018, as amended and accepted by the Committee of Creditors on 27-3-2019, as it has provided for amounts to be paid to different classes of creditors by following Section 30(2) and Regulation 38 of the Code.

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3 *Resolution Professional* v. *Essar Steel (India) Ltd.*, 2019 SCC OnLine NCLAT 750
7 *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388

ANNEXURE R5/4

(2021) 9 Supreme Court Cases 657

3J

(BEFORE ROHINTON FALI NARIMAN, B.R. GAVAI AND HRISHIKESH ROY, JJ.)

GHANASHYAM MISHRA AND SONS PRIVATE LIMITED THROUGH THE AUTHORISED SIGNATORY .. Appellants;

Versus

EDELWEISS ASSET RECONSTRUCTION COMPANY LIMITED THROUGH THE DIRECTOR AND OTHERS .. Respondents.

Civil Appeals No. 8129 of 2019† with Nos. 1550-53 of 2021‡ and 1554 of 2021††, decided on April 13, 2021

A. **Insolvency and Bankruptcy Code, 2016 — S. 31 r/w Ss. 3(10), 5(20) and 5(21) — S. 31 before *and* after its amendment by S. 7 of Act 26 of 2019 — Approved resolution plan — Bindingness of, on Central Government, State Government and local authorities, including tax authorities — Amendment of S. 31, held, is clarificatory in nature — Thus, the approved resolution plan shall be binding in the abovesaid manner even prior to the amendment coming into effect i.e. before 16-8-2019**

— Claims/statutory/tax dues, including those of Central Government, State Government and local authorities — Extinguishment of, when they are not a part of the approved resolution plan

— Held, the legislative intent of making the resolution plan binding on *all* the stakeholders after it gets the seal of approval from the adjudicating authority, is that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant — That is to say, the dominant purpose is that the successful resolution applicant should start with fresh slate on the basis of the resolution plan approved — Further, the words "other stakeholders" squarely cover the Central Government, any State Government or any local authorities, including tax authorities

— Held, once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of S. 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders — On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a

† Arising from the Judgment and Order in *Edelweiss Asset Reconstruction Co. Ltd.* v. *Orissa Manganese & Minerals Ltd.*, 2019 SCC OnLine NCLAT 764 [National Company Law Appellate Tribunal, Company Appeal (AT) (Insolvency) No. 437 of 2018, dt. 23-4-2019]

‡ Arising out of SLPs (C) Nos. 7147-50 of 2020. Arising from the Judgment and Order in *Electrosteel Steels Ltd.* v. *State of Jharkhand*, 2020 SCC OnLine Jhar 454 [Jharkhand High Court, WP (T) No. 6324 of 2019, dt. 1-5-2020]

†† Arising out of SLP (C) No. 11232 of 2020. Arising from the Judgment and Order in *Ultra Tech Nathdwara Cement Ltd.* v. *State of U.P.*, 2020 SCC OnLine All 1724 (Allahabad High Court, Writ Tax No. 354 of 2020, dt. 6-7-2020)

claim, which is not part of the resolution plan — Further, the 2019 Amendment to S. 31 IBC is clarificatory and declaratory in nature and therefore will be effective from the date on which IBC has come into effect — Therefore, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority including tax authorities, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under S. 31 could be continued — This is equally true of resolution plans approved before the coming into force of 2019 Amendment as it is true for those coming into force thereafter — Statute Law — Declaratory/ Clarificatory Provision

B. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 31(1) — Amendment of, by S. 7 of Act 26 of 2019 — Held, is clarificatory and thus, retrospective — Held, if legislature by an amendment supplies an obvious omission in a former statute or explains a former statute, the subsequent statute has a relation back to the time when the prior Act was passed — Interpretation of Statutes — Particular Statutes or Provisions — Declaratory/Clarificatory provision**

C. **Interpretation of Statutes — External Aids — Parliamentary debates and Minister's speeches — Speech made by the Minister — Extent to which may be relied on — Amendment of S. 31 IBC by S. 7 of Act 26 of 2019 — Reasons for bringing such amendment — Explained — Held, the speech made by Hon'ble Finance Minister while explaining the amendment can referred to for ascertaining what was the reason for moving the Bill and it can be used for finding out: (1) What were the circumstances in which the amendment was carried out; (2) What was the mischief for which the unamended section did not provide; and (3) What was sought to be remedied by amended enactment**

— In the present case, held, the mischief, which was noticed prior to amendment of S. 31 IBC was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities, once an approval was granted to the resolution plan by NCLT — However, on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them — Further, in order to remedy the said mischief, the legislature thought it appropriate to clarify the position that once such a resolution plan was approved by the adjudicating authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished

D. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 31 r/w Ss. 3(10), 5(20) and 5(21) — Dues of Central Government, any State Government or any local authority, including tax authorities, held, amount to "operational debt"**

— Held, it is a cardinal principle of law that a statute has to be read as a whole — Held, harmonious construction of cl. (10) of S. 3 with cls. (20) and

(21) of S. 5 would reveal that even a claim in respect 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 would come within the ambit of "operational debt" — Further, the Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of "operational creditor" as defined under cl. (20) of S. 5 — Consequently, a person to whom a debt is owed would be covered by the definition of "creditor" as defined under S. 3(10) — Interpretation of Statutes — Basic Rules — Harmonious construction (Para 98)

The issues before the Supreme Court were:

(*i*) As to whether any creditor including the Central Government, State Government or any local authority is bound by the resolution plan once it is approved by an adjudicating authority under Section 31(1) of the Insolvency and Bankruptcy Code, 2016 ("IBC")?

(*ii*) As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?

(*iii*) As to whether after approval of resolution plan by the adjudicating authority a creditor including the Central Government, the State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the corporate debtor, which are not a part of the resolution plan approved by the adjudicating authority?

Held :

One of the dominant objects of IBC is to see to it that an attempt has to be made to revive the corporate debtor and make it a running concern. For that, a resolution applicant has to prepare a resolution plan on the basis of the information memorandum. The information memorandum which is required to be prepared in accordance with Section 29 IBC along with Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("the 2016 Regulations") is required to contain various details which have been gathered by RP after receipt of various claims in response to the statutorily mandated public notice. The resolution plan is required to provide for the payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the resolution plan; the implementation and supervision of the resolution plan. It is only after the adjudicating authority satisfies itself that the plan as approved by CoC with the requisite voting share of financial creditors meets the requirement as referred to in sub-section (2) of Section 30, grants its approval to it. It is only thereafter that the said plan is binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The moratorium order passed by the adjudicating authority under Section 14 shall cease to operate once the adjudicating authority approves the resolution plan. The scheme of IBC therefore is, to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency to continue the business of the corporate debtor as a going concern until a resolution plan is drawn up. Once the resolution plan is approved,

the management is handed over under the plan to the successful applicant so that the corporate debtor is able to pay back its debts and get back on its feet. (Para 61)

Innoventive Industries Ltd. v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356, *affirmed*

The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 IBC. (Para 62)

If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode. (Para 63)

The legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by adjudicating authority is limited to the extent provided under Section 31 IBC and of the appellate authority is limited to the extent provided under sub-section (3) of Section 61 IBC, is no more res integra. (Para 64)

Kalpraj Dharamshi v. *Kotak Investment Advisors Ltd.*, (2021) 10 SCC 401 : 2021 SCC OnLine SC 204; *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443; *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh*, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799; *Karad Urban Coop. Bank Ltd.* v. *Swwapnil Bhingardevay*, (2020) 9 SCC 729 : (2021) 2 SCC (Civ) 797, *followed*

K. Sashidhar v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222, *affirmed*

Kamineni Steel & Power (India) (P) Ltd. v. *Indian Bank*, 2018 SCC OnLine NCLAT 654; *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1; *United Seamless Tubulaar (P) Ltd. Resolution Professional* v. *Indian Bank*, 2019 SCC OnLine NCLT 713; *Padmanabhan Venkatesh* v. *V. Venkatachalam*, 2019 SCC OnLine NCLAT 285, *cited*

Bare reading of Section 31 IBC would also make it abundantly clear that once the resolution plan is approved by the adjudicating authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of IBC is revival of the corporate debtor and to make it a running concern. (Para 65)

The resolution plan submitted by the successful resolution applicant is required to contain various provisions viz. provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor under Section 53; or 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. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also 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 to clause (*b*) of sub-section (2) of Section 30 IBC clarifies for the removal of doubts that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management

of the affairs of the corporate debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (*e*) of sub-section (2) of Section 30 IBC also casts a duty on RP to examine that the resolution plan does not contravene any of the provisions of the law for the time being in force. (Para 66)

Perusal of Section 29 IBC read with Regulation 36 of the 2016 Regulations would reveal that it requires RP to prepare an information memorandum containing various details of the corporate debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of the corporate debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by the Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the corporate debtor towards them are required to be contained in the information memorandum. (Para 67)

All these details are required to be contained in the information memorandum so that the resolution applicant is aware as to what are the liabilities that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure that the corporate debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the adjudicating authority upon its satisfaction that the resolution plan approved by CoC meets the requirement as referred to in sub-section (2) of Section 30 is that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is that he should start with fresh slate on the basis of the resolution plan approved. (Para 68)

Essar Steel (India) Ltd. (CoC) v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443, *followed*

Standard Chartered Bank v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388, *cited*

In view of the provisions of Section 238 IBC, the provisions thereof will have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force or any instrument having effect by virtue of any such law. As such, the observations made by NCLAT to the aforesaid effect, if permitted to remain, would frustrate the very purpose for which IBC is enacted. (Para 71)

CIT v. *Monnet Ispat & Energy Ltd.*, (2018) 18 SCC 786 : (2019) 3 SCC (Civ) 252, *affirmed*

Vide Section 7 of Act 26 of 2019 [vide S.O. 2953(E), dated 16-8-2019 with effect from 16-8-2019], the following words have been inserted in Section 31 IBC:

> "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,". (Para 73)

As such, with respect to the proceedings, which arise after 16-8-2019, there will be no difficulty. After the amendment, any debt in respect of the payment of

dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished. (Para 74)

Perusal of the SOR ["Statement of Objects and Reasons" of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019] would reveal that one of the prime objects of IBC was to provide for implementation of the insolvency resolution process in a time-bound manner for maximisation of value of assets in order to balance the interests of all stakeholders. However, it was noticed that in some cases there was extensive litigation causing undue delays resultantly hampering the value maximisation. It was also found necessary to ensure that all creditors are treated fairly. It was therefore in view of the various difficulties faced and in order to fill the critical gaps in the corporate insolvency framework, it was necessary to amend certain provisions of IBC. Clause (*f*) of Para 3 of the SOR of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019 would amply make it clear that the legislative intent in amending sub-section (1) of Section 31 IBC was 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 is owed 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. (Para 78)

In the Rajya Sabha Debates, on 29-7-2019, when the Bill for amending IBC came up for discussion, there were certain issues raised by certain members. (Para 79)

In the speech the Hon'ble Finance Minister has categorically stated that Section 238 provides that IBC will prevail in case of inconsistency between two laws. She also stated that there was question about indemnity for successful resolution applicant and that the amendment was clearly making it binding on the Government. She stated that the Government will not make any further claim after the resolution plan is approved. So, that is going to be a major sense of assurance for the people who are using the resolution plan. She has categorically stated that she would want all the Hon'ble Members to recognise this message and communicate further that IBC gives that comfort to all new bidders. They need not be scared that the taxman will come after them for the faults of the earlier promoters. She further states that once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. (Para 80)

The speech made by Hon'ble Finance Minister while explaining the amendment could be referred to for ascertaining what was the reason for moving the Bill. The speech can be used for finding out:

(1) What were the circumstances in which the amendment was carried out;

(2) What was the mischief for which the unamended section did not provide; and

(3) What was sought to be remedied by amended enactment. (Para 83)

K.P. Varghese v. *CIT*, (1981) 4 SCC 173 : 1981 SCC (Tax) 293; *Union of India* v. *Martin Lottery Agencies Ltd.*, (2009) 12 SCC 209, *affirmed*

Lok Shikshana Trust v. *CIT*, (1976) 1 SCC 254 : 1976 SCC (Tax) 14; *Indian Chamber of Commerce* v. *CIT*, (1976) 1 SCC 324 : 1976 SCC (Tax) 41; *CIT* v. *Surat Art Silk Cloth Manufacturers' Assn.*, (1980) 2 SCC 31 : 1980 SCC (Tax) 170, *cited*

It is clear that the mischief which was noticed prior to amendment of Section 31 IBC was that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position that once such a resolution plan was approved by the adjudicating authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished. (Para 84)

An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language "shall be deemed always to have meant" or "shall be deemed never to have included" is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law. (Para 85)

Central Bank of India v. *Workmen*, AIR 1960 SC 12, 27 : (1960) 1 SCR 200; *Jones* v. *Bennet*, (1890) 63 LT 705, 708; *Madras Marine & Co.* v. *State of Madras*, (1986) 3 SCC 552, 563 : 1986 SCC (Tax) 686; *Satnam Overseas (Export)* v. *State of Haryana*, (2003) 1 SCC 561, 589; *Harding* v. *Queensland Stamp Commissioners*, 1898 AC 769; *R.* v. *Dursley*, (1832) 3 B & Ad 465 : 110 ER 168, 169; *Keshavlal Jethalal Shah (2)* v. *Mohanlal Bhagwandas*, AIR 1968 SC 1336, 1339 : (1968) 3 SCR 623; *S.K. Govindan & Sons* v. *CIT*, (2001) 1 SCC 460, 469; *Birla Cement Works* v. *CBDT*, (2001) 9 SCC 35; *CIT* v. *Shelly Products*, (2003) 5 SCC 461; *Chaman Singh* v. *Jaikaurr*, (1969) 2 SCC 429, 433; *CIT* v. *Straw Products Ltd.*, AIR 1966 SC 1113 : (1966) 2 SCR 881; *Union of India* v. *S. Muthyam Reddy*, (1999) 7 SCC 545, 546-47; *Sakuru* v. *Tanoji*, (1985) 3 SCC 590; *Punjab Traders* v. *State of Punjab*, (1991) 1 SCC 86, 92; *R. Rajagopal Reddy* v. *Padmini Chandrasekharan*, (1995) 2 SCC 630, 646; *Allied Motors (P) Ltd.* v. *CIT*, (1997) 3 SCC 472, 479-80; *CIT* v. *Podar Cement (P) Ltd.*, (1997) 5 SCC 482, 506-07; *Shyam Sunder* v. *Ram Kumar*, (2001) 8 SCC 24, 49-50; *Zile Singh* v. *State of Haryana*, (2004) 8 SCC 1, 7-8; *CIT* v. *Gold Coin Health Food (P) Ltd.*, (2008) 9 SCC 622; *S.B. Bhattacharjee* v. *S.D. Majumdar*, (2007) 10 SCC 513 : (2008) 1 SCC (L&S) 21; *Mithilesh Kumari* v. *Prem Behari Khare*, (1989) 2 SCC 95, 108; *CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362; *CIT* v. *Alom Extrusions Ltd.*, (2010) 1 SCC 489; *Brij Mohan Das Laxman Das* v. *CIT*, (1997) 1 SCC 352, 356; *Suwalal Anandilal Jain* v. *CIT*, (1997) 4 SCC 89; *CIT* v. *Kanji Shivji & Co.*, (2000) 2 SCC 253, *cited*

Justice G.P. Singh: *The Principles of Statutory Interpretation*, 14th Edn., *relied on*

Craies on Statute Law, 7th Edn., *cited*

The presumption against retrospective operation is not applicable to declaratory statutes. In determining, therefore, the nature of the Act, regard must be

had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. (Para 88)

What is material is to ascertain the legislative intent. If the legislature by an amendment supplies an obvious omission in a former statute or explains a former statute, the subsequent statute has a relation back to the time when the prior Act was passed. (Para 89)

Zile Singh v. *State of Haryana*, (2004) 8 SCC 1; *CIT* v. *Gold Coin Health Food (P) Ltd.*, (2008) 9 SCC 622, *followed*

Attorney General v. *Pougett*, (1816) 2 Price 381 : 146 ER 130; *National Agricultural Coop. Mktg. Federation of India Ltd.* v. *Union of India*, (2003) 5 SCC 23; *Shyam Sunder* v. *Ram Kumar*, (2001) 8 SCC 24; *Bengal Immunity Co. Ltd.* v. *State of Bihar*, (1955) 2 SCR 603 : AIR 1955 SC 661; *Heydon case*, (1584) 3 Co Rep 7a : 76 ER 637; *Allied Motors (P) Ltd.* v. *CIT*, (1997) 3 SCC 472, *cited*

Amendment made to Section 14 of the Code, in which the moratorium prescribed by Section 14 was held not to apply to guarantors, was held to be clarificatory, and therefore, retrospective in nature, the object being that an overbroad interpretation of Section 14 ought to be set at rest by clarifying that this was never the intention of Section 14 from the very inception. (Para 92)

SBI v. *V. Ramakrishnan*, (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458; *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528, *affirmed*

Sanjeev Shriya v. *SBI*, 2017 SCC OnLine All 2717 : (2018) 2 All LJ 769 : (2017) 9 ADJ 723; *SBI* v. *V. Ramakrishnan*, 2018 SCC OnLine NCLAT 384; *National Project Construction Corpn. Ltd.* v. *Sadhu and Co.*, 1989 SCC OnLine P&H 1069 : AIR 1990 P&H 300; *Chokalinga Chettiar* v. *Dandayuthapani Chettiar*, 1928 SCC OnLine Mad 236 : AIR 1928 Mad 1262; *Bank of Bihar Ltd.* v. *Damodar Prasad*, AIR 1969 SC 297, *cited*

After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 IBC. Only thereafter the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable. (Para 93)

The words "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of IBC and continuing with the proceedings, has brought out the 2019 Amendment so as to cure the said mischief. We therefore hold that the 2019 Amendment is declaratory and clarificatory in nature and therefore retrospective in operation. (Para 94)

"Creditor" has been defined to mean "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". "Operational creditor" has been defined to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. "Operational debt" has been defined to mean 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. (Para 97)

It is a cardinal principle of law that a statute has to be read as a whole. Harmonious construction of clause (10) of Section 3 IBC read with clauses (20) and (21) of Section 5 thereof would reveal that even a claim in respect 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 would come within the ambit of "operational debt". The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of "operational creditor" as defined under clause (20) of Section 5 IBC. Consequently, a person to whom a debt is owed would be covered by the definition of "creditor" as defined under clause (10) of Section 3 IBC. As such, even without the 2019 Amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term "creditor" and in any case, by the term "other stakeholders" as provided in sub-section (1) of Section 31 IBC. (Para 98)

Demand notices issued by the Central Goods and Service Tax Department for a period prior to the date on which NCLT has granted its approval to the resolution plan are not permissible in law. (Para 99)

Ultra Tech Nathdwara Cement Ltd. v. *Union of India*, 2020 SCC OnLine Raj 1097, *approved*

The claim of operational creditor will also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute. (Para 100)

Akshay Jhunjhunwala v. *Union of India*, 2018 SCC OnLine Cal 142, *approved*

The 2019 Amendment is declaratory and clarificatory in nature. Even if the 2019 Amendment was not effected, still the Central Government, any State Government or any local authority would be bound by the resolution plan, once it is approved by the adjudicating authority (i.e. NCLT). (Para 101)

Conclusion

Thus, it is held that once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan. (Para 102.1)

The 2019 Amendment to Section 31 IBC is clarificatory and declaratory in nature and therefore will be effective from the date on which IBC has come into effect. (Para 102.2)

Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued. (Para 102.3)

E. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Ss. 61(3) and 31 — Appeal against an order approving a resolution plan under S. 31 — Scope of — Held, such appeal is maintainable only on the grounds specified in Ss. 61(3)(i) to (v) — Once it is found that none of these grounds are made out, NCLAT cannot grant any relief to appellant — Hence, in present case, relief granted by NCLAT in essence undoing the binding effect of the approved resolution plan, being clearly beyond the scope of S. 61(3) and rulings of Supreme Court thereon, set aside**

Vide the impugned judgment and order dated 23-4-2019, NCLAT found that as no ground was made out in terms of Section 61(3) IBC, no relief could be granted in the appeals. However, while doing so, NCLAT observed thus:

> "*28*. However, we make it clear that the rejection of the claim for the purpose of collating the claim and making it part of the "resolution plan" will not affect the right of the appellant "Edelweiss Asset Reconstruction Ltd." to invoke the bank guarantee against the "corporate debtor" in case the "principal borrower" failed to pay the debt amount, the "Moratorium" period having come to an end.
>
> * * *
>
> *42*. From the aforesaid provisions, it is clear that after period of Moratorium it is open to the person to move before a civil court or to move an application before the court of competent jurisdiction against the "corporate debtor".
>
> *43*. In the present case, since it is not possible either for the adjudicating authority or for this Appellate Tribunal to give any specific finding, we are of the view that the appellant may move before the civil court or court of competent jurisdiction and may file an application before the Labour Court for appropriate relief in favour of the workmen concerned or against the "corporate debtor" if they have actually worked and have not been taken care in the "resolution plan" due to lack of knowledge and non-filing of the claim within time.
>
> * * *
>
> *51*. In the present case, as no ground has been made out in terms of sub-section (3) of Section 61 of the "I&B Code" and the decision of the "resolution professional" was not challenged by the appellant, no relief can be granted. However, this order will not come in the way of the appellant to move before appropriate forum for appropriate relief if the claim is not barred by limitation.

52. Insofar dues of the State of Jharkhand are concerned, we hold that the statutory dues shall be payable to the State of Jharkhand in terms of existing law which comes within the meaning of "operational debt" as defined in Section 5(20) read with Section 5(21) and held in *Spartek Ceramics (India) Ltd.*, 2018 SCC OnLine NCLAT 289. Except the aforesaid observations, in absence of any appeal filed by the State of Jharkhand, no order is passed." (Para 118)

Held :

The aforesaid observations are beyond the scope of the powers available with NCLAT under sub-section (3) of Section 61 IBC. The said observations run totally contrary to the consistent view taken by the Supreme Court in the line of judgments starting from *K. Sashidhar*, (2019) 12 SCC 150 to *Kalpraj Dharamshi*, (2021) 10 SCC 401. (Para 119)

K. Sashidhar v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222, *affirmed*
Kalpraj Dharamshi v. *Kotak Investment Advisors Ltd.*, (2021) 10 SCC 401 : 2021 SCC OnLine SC 204, *relied on*

NCLAT has categorically found that no ground as is available under sub-section (3) of Section 61 IBC has been made out and has also categorically found that the resolution plan submitted by GMSPL was a better offer than the other two resolution applicants, including EARC and that the adjudicating authority has rightly approved the resolution plan of GMSPL. After coming to such finding, the only option available with NCLAT was to dismiss the appeals. The observations made in the aforesaid paragraphs, if permitted to remain, would totally frustrate the object of IBC of revival of a corporate debtor and to resurrect it as a going concern. The successful resolution applicant cannot be flung with surprise claims which are not part of the resolution plan. (Para 120)

According to the resolution plan submitted by EARC itself, had it been a successful applicant, then in that event, the claims made by it would have been irrevocably waived and permanently extinguished and written off in full with effect from the effective date. Had the resolution plan of EARC been approved, then all such debts would have stood extinguished without any further act or deed and approval of the said plan by NCLT would have been a sufficient notice required to be given to any person for such matter. Undisputedly, the resolution plan submitted by EARC was on the basis of the information memorandum submitted by RP wherein it was specifically clarified that the claims of EARC were not admitted by RP. It is thus clear that EARC is trying to blow hot and cold at the same time. According to it, had its resolution plan been approved by CoC and NCLT, then the claims, which are now insisted by EARC would have stood extinguished. However, on its failure to become a successful resolution applicant and approval of other applicant as a successful resolution applicant, its claim would survive. A party cannot be permitted to apply two different yardsticks. (Para 123)

EARC was taking chances. After rejection of its claim, it did not choose to challenge the same by an application under Section 60(5) but waited till the decision of CoC. During this period, it was actually pursuing its resolution plan. Only after its resolution plan was not approved and the resolution plan of GMSPL was approved, it filed the aforesaid two applications. Apart from that in the

resolution plan of EARC itself, it has provided for extinguishment of all claims not forming part of resolution plan. (Para 129)

Export Import Bank of India v. *JEKPL (P) Ltd. Resolution Professional*, 2018 SCC OnLine NCLAT 465, *distinguished*

Atyant Capital (India) Fund I v. *JEKPL (P) Ltd. Resolution Professional*, 2019 SCC OnLine SC 2005, *clarified*

Even otherwise, if for the sake of argument, it is held that EARC was entitled to be treated as a "financial creditor" and entitled for a participation in CoC, still its share was about 9% and as such, the resolution plan of GMSPL would have been passed by a majority of 80%, which is much above the statutory requirement. (Para 130)

The appeal deserves to be allowed by expunging SCC OnLine NCLAT paras 28, 42, 43, 51 and 52 from the judgment of NCLAT dated 23-4-2019. (Para 133)

SBI v. *Orissa Manganese & Minerals Ltd.*, 2018 SCC OnLine NCLT 20888, *affirmed*

Edelweiss Asset Reconstruction Co. Ltd. v. *Orissa Manganese & Minerals Ltd.*, 2019 SCC OnLine NCLAT 764, *partly reversed*

SBI v. *Orissa Manganese & Minerals Ltd.*, 2017 SCC OnLine NCLT 20886; *Banarsi* v. *Ram Phal*, (2003) 9 SCC 606, *referred to*

CIT v. *Spartek Ceramics (India) Ltd.*, 2018 SCC OnLine NCLAT 289, *cited*

F. **Constitution of India — Art. 226 — Maintainability of writ petition — Existence of alternative remedy — When not a bar to writ remedy — Principles reiterated**

— Held, relegating the appellant to the alternative remedy in the present case would serve no purpose — Furthermore, a party cannot be made to run from one forum to another forum in respect of the proceedings and the claims, which are not permissible in law

— Hence, allowing the appeal, held, since the subject-matter of the writ petition are the proceedings which relate to the tax claims of the respondents against the corporate debtor prior to the approval of the resolution plan under S. 31 IBC, the same cannot be continued — Equally the tax claims, which are not part of the resolution plan approved under S. 31 IBC, shall stand extinguished (*see in detail* Shortnotes *A* to *C*)

— Held, non-exercise of jurisdiction under Art. 226 is a rule of self-restraint and alternative remedy would not operate as a bar in at least three contingencies, namely, (1) where the writ petition has been filed for the enforcement of any of the fundamental rights; (2) where there has been a violation of the principle(s) of natural justice; and (3) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged

— Appellant had filed a writ petition inter alia challenging the order passed by the Additional Commissioner Grade 2 (Appeal) to the effect that the recovery proceedings in the State of Uttar Pradesh would remain unaffected irrespective of the approval of the resolution plan of the appellant by NCLT — The main ground raised on behalf of the respondent was with regard to availability of alternative remedy — Insolvency and Bankruptcy Code, 2016, S. 31(1) r/w Ss. 3(10), 5(20) and 5(21) (Paras 24, 25 and 134 to 140)

The appellant filed Civil Miscellaneous Writ Petition No. 354 of 2020 before the High Court challenging the order passed by the Additional Commissioner Grade 2 (Appeal), Commercial Taxes dated 30-1-2020, to the effect that the proceedings in the State of Uttar Pradesh would remain unaffected irrespective of the approval of the resolution plan of the appellant by NCLT. The appellant also prayed for a declaration that all the proceedings pending before different authorities stand abated in terms of the approval of the resolution plan by NCLT. A prayer was also made for refund of Rs 248.92 lakhs deposited by the appellant under protest and for return of the bank guarantee.

The Division Bench of the High Court vide order dated 6-7-2020 observed that the contention of the appellant with regard to the approval of the resolution plan by NCLT has been dealt with by the assessing authority as well as by the appellate authority and therefore, it was in the fitness of things that the appellant should avail of the alternative remedy of filing a second appeal available under the VAT Act. Being aggrieved by the same, the appellant filed the present appeal.

Allowing the appeal, the Supreme Court

Held :

The main ground raised on behalf of the respondent is with regard to availability of alternative remedy. The second ground raised is, since the transfer date is prior to the 2019 Amendment to Section 31 IBC, the said amendment would not be applicable to the debts owed to the State Government or the Central Government. (Para 136)

Non-exercise of jurisdiction under Article 226 of the Constitution is a rule of self-restraint. It has been consistently held that the alternative remedy would not operate as a bar in at least three contingencies, namely,

(*1*) Where the writ petition has been filed for the enforcement of any of the fundamental rights;

(*2*) Where there has been a violation of the principle of natural justice; and

(*3*) Where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (Para 137)

Baburam Prakash Chandra Maheshwari v. *Antarim Zila Parishad, Muzaffarnagar*, (1969) 1 SCR 518 : AIR 1969 SC 556; *Embassy Property Developments (P) Ltd.* v. *State of Karnataka*, (2020) 13 SCC 308; *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.*, (2021) 10 SCC 401 : 2021 SCC OnLine SC 204, *relied on*

Whirlpool Corpn. v. *Registrar of Trade Marks*, (1998) 8 SCC 1; *Nivedita Sharma* v. *COAI*, (2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947, *affirmed*

The 2019 Amendment to Section 31 IBC is clarificatory and declaratory in nature and therefore will have a retrospective operation. As such, when the resolution plan is approved by NCLT, the claims, which are not part of the resolution plan, shall stand extinguished and the proceedings related thereto shall stand terminated. Since the subject-matter of the petition are the proceedings which relate to the claims of the respondents prior to the approval of the plan, the same cannot be continued. Equally the claims, which are not part of the resolution plan, shall stand extinguished. (Para 138)

Relegating the appellant to the alternative remedy would serve no purpose. A party cannot be made to run from one forum to another forum in respect of the proceedings and the claims, which are not permissible in law. (Para 139)

Ultra Tech Nathdwara Cement Ltd. v. *State of U.P.*, 2020 SCC OnLine All 1724, *reversed*

Bank of Baroda v. *Binani Cements Ltd.*, 2017 SCC OnLine NCLT 7191; *Binani Industries Ltd.* v. *Bank of Baroda*, 2018 SCC OnLine NCLAT 521; *Rajputana Properties (P) Ltd.* v. *Ultratech Cement Ltd.*, 2018 SCC OnLine SC 3596; *CCT* v. *Binani Industries Ltd.*, 2019 SCC OnLine SC 2006; *CCE (GST)* v. *Binani Industries Ltd.*, 2020 SCC OnLine SC 1185, *referred to*

G. **Insolvency and Bankruptcy Code, 2016 — S. 31(1) r/w Ss. 3(10), 5(20) and 5(21) — Approved resolution plan — Bindingness of, on Central Government, State Government and local authorities, including tax authorities — Amendment to S. 31 — Clarificatory in nature, thereby rendering the approved resolution plan binding even prior to the amendment coming into effect i.e. before 16-8-2019**

— After the completion of CIRP on 5-1-2019, R-2 issued a reminder to the petitioner corporate debtor to pay an amount of Rs 4,49,34,917 towards the service tax deposited by it towards royalty, District Mineral Foundation and National Mineral Exploration Trust for the period between 1-4-2016 and 30-6-2017 — Held, the respondents are not entitled to recover any claims or claim any debts owed to them from the corporate debtor accruing prior to the date of approval of the resolution plan (Paras 26 and 147 to 148)

CIT v. *Monnet Ispat & Energy Ltd.*, (2018) 18 SCC 786 : (2019) 3 SCC (Civ) 252, *affirmed*

Monnet Ispat & Energy Ltd. Resolution Professional, In re , 2018 SCC OnLine NCLT 23789, *referred to*

Dena Bank v. *Bhikhabhai Prabhudas Parekh & Co.*, (2000) 5 SCC 694; *CIT* v. *Monnet Ispat & Energy Ltd.*, 2017 SCC OnLine Del 12759, *cited*

The petitioner Company is a corporate debtor in respect of which CIRP proceedings commenced in July 2017 and ended in July 2018, when NCLT approved the resolution plan submitted by a consortium of Aion Investment (P) Ltd. and JSW Steel Ltd. ("Aion-JSW" for short). Prior to approval by NCLT, CoC had granted approval to the said resolution plan by a voting majority of 98.97%. It was the contention of the petitioner that in accordance with the provisions of IBC, RP had made a public announcement thereby, inviting claims from the creditors. Contending that the demand notices issued by the respondents for recovery of service tax towards royalty, District Mineral Foundation and National Mineral Exploration Trust against the iron ore purchased by the petitioner Company are contrary to the law laid down by the Court in *Satish Kumar Gupta*, (2020) 8 SCC 531. Allowing the writ petition. The Supreme Court held as above.

H. **Insolvency and Bankruptcy Code, 2016 — S. 31(1) r/w Ss. 3(10), 5(20) and 5(21) — Approved resolution plan — Bindingness of, on Central Government, State Government and local authorities, including tax authorities — Service tax dues — Non-recoverability of, when not included in approved resolution plan**

— NCLT vide order dt. 17-4-2018 approved the resolution plan of Vedanta Ltd. — Challenging the notices issued by the respondent State authorities and

the order of SBI asking it to pay an amount of Rs 37,41,41,602 on account of tax penalty due under the Jharkhand VAT Act for the period 2011-12 and 2012-13, the appellant approached the High Court — Held, the finding of the High Court that the dues owed to the State Government and Central Government would not come within the definition of "operational debt", is incorrect in law — Also the finding that since the order of NCLT is prior to the date on which S. 31(1) IBC was amended, the provisions of S. 31 would not be applicable, cannot stand — In the present case, held, the respondents are not entitled to recover any claims or claim any debts owed to them from the corporate debtor accruing prior to the transfer date (Paras 27 to 29 and 150 to 157)

I. **Constitution of India — Art. 226 — Maintainability of writ petition — Standing/Locus standi — Corporate debtor — Locus standi of, to invoke writ jurisdiction challenging levy of tax/penalty, even after change of management after approval of resolution plan under provisions of IBC**

— Appellant was a corporate debtor in respect of which the proceedings under S. 7 IBC were initiated by SBI — High Court, inter alia held that since the management of the appellant was taken over by M/s Vedanta Ltd. (resolution applicant) on 4-6-2018, it was only M/s Vedanta Ltd., which had locus to file writ petitions — Held, the High Court erred in holding that the appellant Company does not have locus to file the writ petitions — The approved resolution plan was in respect of the corporate debtor and the successful resolution applicant only takes over the management of the corporate debtor in accordance with the resolution plan — Further, the resolution applicant steps into the shoes of the corporate debtor — Insolvency and Bankruptcy Code, 2016, Ss. 7 and 9 (Paras 151 and 153)

NCLT vide order dated 17-4-2018 approved the resolution plan of Vedanta Ltd. The appeal being Company Appeal (AT) (Insolvency) No. 175 of 2018 filed by one Renaissance Steel India (P) Ltd. challenging the order of NCLT came to be dismissed by NCLAT vide order dated 10-8-2018. Challenging the notices issued by the respondent State authorities and the order of SBI asking it to pay an amount of Rs 37,41,41,602 on account of tax penalty due under the Jharkhand VAT Act for the period 2011-12 and 2012-13, the appellant corporate debtor approached the High Court. The appellant had also challenged the letter dated 22-11-2019 issued by State Tax Officer, Bokaro to deposit the amount of Rs 75,57,000.

Held :

The appellant challenges the judgment and order passed by the Division Bench of the High Court dated 1-5-2020 vide which the petitions filed by the appellant, challenging the action of the respondent authorities thereby, seeking to recover the Jharkhand Value Added Tax ("JVAT") for the period between 2011-2012 and 2012-2013, have been rejected. (Para 150)

The finding of the High Court that the dues owed to the State Government and the Central Government would not come within the definition of "operational debt", is incorrect in law. So also the finding that since the order of NCLT is prior to the date on which Section 31(1) IBC was amended, the provisions of Section 31

would not be applicable, also cannot stand in view of the foregoing observations made hereinabove. (Para 152)

The High Court has erred in holding that the appellant Company does not have locus to file the writ petitions inasmuch as the management has been taken over by M/s Vedanta Ltd. The resolution plan is in respect of the corporate debtor and the successful resolution applicant only takes over the management of the corporate debtor in accordance with the resolution plan. The resolution applicant steps into the shoes of the corporate debtor. As such, the finding in this respect would also not be sustainable in law. (Para 153)

The respondents are not entitled to recover any claims or claim any debts owed to them from the corporate debtor accruing prior to the transfer date. Needless to state that the consequences thereof shall follow. (Para 157)

Electrosteel Steels Ltd. v. *State of Jharkhand*, 2020 SCC OnLine Jhar 454, *reversed*

SBI v. *Electrosteel Steels Ltd.*, 2017 SCC OnLine NCLT 16085; *SBI* v. *Electrosteel Steels Ltd.*, 2018 SCC OnLine NCLT 14651; *Renaissance Steel (India) (P) Ltd.* v. *Electrosteels Steel (India) Ltd.*, 2018 SCC OnLine NCLAT 901, *referred to*

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The Judgment of the Court was delivered by

a **B.R. GAVAI, J.**— Leave granted in Special Leave Petitions (Civil) Nos. 11232 of 2020 and 7147-50 of 2020.

2. The short but important questions, that arise for consideration in this batch of matters, are as under:

2.1. (*i*) As to whether any creditor including the Central Government, State Government or any local authority is bound by the resolution plan once it is b approved by an adjudicating authority under sub-section (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the I&B Code")?

2.2. (*ii*) As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?

2.3. (*iii*) As to whether after approval of resolution plan by the adjudicating c authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the corporate debtor, which are not a part of the resolution plan approved by the adjudicating authority?

3. We will first refer to the facts in each of these matters.

d ***Civil Appeal No. 8129 of 2019* [*Ghanashyam Mishra & Sons (P) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.*]**

4. Orissa Manganese & Minerals Ltd. (hereinafter referred to as "the corporate debtor" or "OMML") was engaged in the business of mining iron ore, graphite, manganese ore and agglomerating iron fines into pellets through its e facilities in Orissa and Jharkhand. The corporate insolvency resolution process (hereinafter referred to as "CIRP") was initiated in respect of the corporate debtor by an application under Section 7 of the I&B Code filed by State Bank of India (hereinafter referred to as "SBI") before the National Company Law Tribunal, Kolkata Bench, Kolkata (hereinafter referred to as "NCLT").

5. Vide order dated 3-8-2017[1], Company Petition (IB) No. 371/KB/2017 f filed by SBI was admitted. Shri Sumit Binani was appointed as interim resolution professional (hereinafter referred to as "IRP"). Upon admission of the said company petition, CIRP was initiated with effect from 3-8-2017. The appointment of IRP was confirmed by the Committee of Creditors (hereinafter referred to as "CoC") in their meeting held on 4-9-2017. The resolution professional (hereinafter referred to as "RP") continued with the resolution g process by inviting expression of interest (hereinafter referred to as "EoI") and applications for resolution plan in accordance with the provisions of the I&B Code and the Regulations framed thereunder. The initial period of CIRP of 180 days expired on 29-1-2018. At the request of CoC, RP moved an application for extension of CIRP period, which came to be extended by 90 days i.e. till 29-4-2018.

h

1 *SBI* v. *Orissa Manganese & Minerals Ltd.*, 2017 SCC OnLine NCLT 20886

6. In response to the invitation, three resolution plans were received by RP each from, Edelweiss Asset Reconstruction Company Ltd. (hereinafter referred to as "EARC"), Respondent 1 herein, Orissa Mining (P) Ltd. (hereinafter referred to as "OMPL") and Ghanashyam Mishra & Sons (P) Ltd. (hereinafter referred to as "GMSPL"), the appellant herein, respectively. In the 8th meeting of the CoC held on 14-3-2018, EARC was declared as H1 bidder. However, EARC failed to satisfy CoC in the negotiations and as such, the resolution plan submitted by EARC came to be rejected in the 9th meeting of CoC held on 31-3-2018.

7. CoC thereafter proceeded for negotiations with the H2 bidder i.e. GMSPL. However, the resolution plan of GMSPL was also found to be unacceptable to CoC and therefore, in its 10th meeting held on 3-4-2018, it decided to annul the existing process and initiate a fresh process for invitation of resolution plan only from the applicants, which had earlier submitted their EoI. Accordingly, a communication was sent to the applicants, which had submitted their EoI. In response to the said invitation, three resolution plans were received each from GMSPL, EARC and Srei Infrastructure Finance Ltd. (hereinafter referred to as "SIFL") respectively. These resolution plans were considered by CoC in its 11th meeting held on 13-4-2018. After evaluation of the resolution plans, CoC ranked GMSPL as the H1 bidder.

8. Further negotiations were held by CoC with GMSPL. After several rounds of negotiations, the resolution plan of GMSPL was considered by CoC for its approval. In its 12th meeting held on 21-4-2018, CoC unanimously took a decision to convene a meeting of CoC on 25-4-2018 at 6 p.m., for voting on the resolution plan proposed by GMSPL. After being satisfied, that the resolution plan submitted by GMSPL meets all the requirements under sub-section (2) of Section 30 of the I&B Code, the same was placed before the members of CoC for voting, and the resolution plan came to be approved by more than 89.23% of the voting share of financial creditors of the corporate debtor.

9. Accordingly, a company application being CA (IB) No. 402/KB/2018 came to be filed by RP for approval of the resolution plan submitted by GMSPL.

9.1. One application being CA (IB) No. 398/KB/2018 came to be filed by EARC, Respondent 1 herein, challenging the approval of the resolution plan of GMSPL.

9.2. One more application came to be filed by EARC, being CA (IB) No. 470/KB/2018 challenging the decision of RP in not admitting its claim. The said application was filed, contending, that its claim stood on the strength of corporate guarantee provided by the corporate debtor against the take-out facility provided to Adhunik Power and Natural Resources Ltd. (hereinafter referred to as "APNRL"), being sister concern of the corporate debtor. It was contended, that in not admitting the claim on the strength of corporate guarantee, RP violated Regulations 13 and 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as "the Regulations"). It was prayed in the application for a direction to the successful resolution applicant

i.e. GMSPL, to undertake to pay the full amount due and payable under the said corporate guarantee and further to issue directions for protecting the rights of the lenders of APNRL as pledgee.

9.3. One more application being CA (IB) No. 509/KB/2018 was filed by the District Mining Officer, Department of Mining and Geology, Jharkhand challenging non-admission of its claim to the tune of Rs 93,51,91,724 and Rs 760.51 crores.

10. NCLT by an elaborate order dated 22-6-2018[2] approved the resolution plan of GMSPL, which was duly approved by CoC by voting share of more than 89.23%. Rest of the applications including the two filed by EARC, Respondent 1 herein, came to be rejected.

11. Being aggrieved by the order[2] passed by NCLT, EARC preferred company appeal being Company Appeals (AT) (Insolvency) Nos. 437 of 2018 and 444 of 2018 before the National Company Law Appellate Tribunal, New Delhi (hereinafter referred to as "NCLAT"). Company Appeal (AT) (Insolvency) No. 437 of 2018 was against the rejection of claims of EARC as financial creditor and thereby its non-inclusion in CoC. Company Appeal (AT) (Insolvency) No. 444 of 2018 came to be filed with the grievance, that RP and CoC had erroneously held, that the plan of GMSPL was better than that of EARC. One more company appeal being Company Appeal (AT) (Insolvency) No. 500 of 2018 came to be filed by Sundargarh Mines & Transport Workers Union (hereinafter referred to as "SMTWU") on behalf of the workmen of the corporate debtor. Another company appeal being Company Appeal (AT) (Insolvency) No. 438 of 2018 came to be filed by one Deepak Singh, an employee of APNRL, claiming dues of his salary.

12. By the impugned judgment and order dated 23-4-2019[3], NCLAT while holding that RP was justified in not accepting the claim of EARC and that NCLT had rightly rejected the application filed by EARC, however, observed that the rejection of the claim for the purpose of collating and making it part of the resolution plan will not affect the right of EARC to invoke the bank guarantee against the corporate debtor, in case the principal borrower failed to pay the debt amount, since the moratorium period had come to an end. NCLAT on comparison of the plans submitted by EARC and GMSPL further held, that the resolution plan submitted by GMSPL was a better one than the one submitted by other applicants and there was no illegality in accepting the resolution plan of GMSPL.

13. Insofar as Company Appeal (AT) (Insolvency) No. 500 of 2018 is concerned, the grievance was that though there were around 1476 workmen, RP ignored their rightful wages, statutory dues and other benefits. NCLAT, in the said order[3], observed, that after the period of moratorium, it was open for the persons to move before a civil court or to move an application before the

2 *SBI* v. *Orissa Manganese & Minerals Ltd.*, 2018 SCC OnLine NCLT 20888

3 *Edelweiss Asset Reconstruction Co. Ltd.* v. *Orissa Manganese & Minerals Ltd.*, 2019 SCC OnLine NCLAT 764

court of competent jurisdiction against the corporate debtor. NCLAT therefore observed that the appellant therein may move before the civil court or a court of competent jurisdiction and may file an application before the Labour Court for appropriate reliefs in favour of the workmen concerned or against the corporate debtor, if they have actually worked and had not been taken care of in the resolution plan.

14. Insofar as Company Appeal (AT) (Insolvency) No. 438 of 2018 is concerned, it was the claim of Deepak Singh, appellant therein, that he had joined APNRL, the holding company of the corporate debtor, as the President-Group Head HR from 2-6-2014 to 9-3-2015. It was his claim that he had an amount of Rs 17,03,000 recoverable from the said APNRL and as such, was an operational creditor. It was submitted that though the claim of the said appellant was valid, it was illegally rejected by RP. NCLAT held that insofar as the said appeal is concerned, no ground as is permissible under sub-section (3) of Section 61 of the I&B Code is made out and as such, relief could not be granted in the appeal. However, it was observed that the said order passed in the appeal would not come in the way of the appellant to move the appropriate forum for appropriate relief.

15. GMSPL, thus, aggrieved by the observations made by NCLAT to the effect that the claims of the parties, which are not included in the resolution plan could be agitated by them before the other forums, has preferred the present appeal.

Civil appeal arising out of Special Leave Petition (Civil) No. 11232 of 2020 (Ultratech Nathdwara Cement Ltd. v. State of U.P.)

16. The appellant is a wholly owned subsidiary of UltraTech Cement Ltd. and is engaged in the business of manufacturing and marketing of cement and allied products.

17. On 19-12-2015, the Additional Commissioner, Commercial Taxes, Ghaziabad passed an order in the appeal preferred by Binani Cement Ltd., thereby, allowing the appeal filed by Binani Cement and setting aside the order of imposition of fine of Rs 24,71,885. Vide another order dated 22-12-2015, passed in the appeal filed by Binani Cement, the order of imposition of fine of Rs 59,61,445 also came to be set aside. Vide order dated 2-8-2017, the Deputy Commissioner, Commercial Taxes, Division-10, Ghaziabad held, that Binani Cement was liable to pay entry tax of Rs 40,47,344 for Assessment Year 2003-2004. By another Order dated 2-8-2017, the Deputy Commissioner, Commercial Taxes, Division-10, Ghaziabad further held, that Binani Cement was liable to pay entry tax of Rs 43,06,715 for Assessment Year 2004-2005.

18. Since the said Binani Cement was unable to pay the debt to Bank of Baroda, Bank of Baroda filed an application being CA (IB) No. 359/KB/2017 before NCLT, Kolkata Bench under Section 7 of the I&B Code. Vide order dated 25-7-2017[4], NCLT admitted the petition for initiating the CIRP process. Vide the said order, NCLT also declared moratorium for the purposes referred to in Section 14 of the I&B Code.

4 *Bank of Baroda* v. *Binani Cements Ltd.*, 2017 SCC OnLine NCLT 7191

19. Vide communication dated 10-11-2017, the authorities were informed about the initiation of the CIRP. However, the authority by an endorsement made on the application of the appellant herein stated, that there was no stay granted by NCLT on tax assessment process. It was observed that if there was any clear order passed by NCLT, the same should be produced or Binani Cement should appear on the next date i.e. 27-11-2017 for hearing of tax assessment process.

20. On 28-7-2017, RP made a public announcement inviting claims from all the creditors of the corporate debtor, as is required under Section 15 of the I&B Code. The last date for submission of claims was 8-8-2017. RP upon receipt of the claims maintained a list of creditors alongside the amount claimed by them and the security interest. RP also invited EoI. In response, various entities including the present appellant submitted their EoI as well as resolution plans. CoC in its meeting dated 28-5-2018, unanimously approved the resolution plan submitted by the present appellant. Pursuant to the approval by CoC, NCLAT granted approval to the resolution plan of the appellant vide order dated 14-11-2018[5]. The said order came to be challenged before this Court in Civil Appeal No. 10998 of 2018, which was dismissed by this Court vide order dated 19-11-2018[6].

21. On 13-12-2018, the name of the corporate debtor was changed to UltraTech Nathdwara Cement Ltd. from Binani Cement Ltd. and the management of the corporate debtor was taken over by Ultratech Cement Ltd. with effect from 20-11-2018. Thereafter, the appellant addressed various communications to the tax authorities, who are the respondents herein informing them, that after the resolution plan was approved by NCLT, all proceedings instituted against the corporate debtor, arising and pending before the transfer date shall stand withdrawn. It was also informed that all the liabilities towards operational creditors shall be deemed to have been settled by discharge and payment of the resolution amount by the corporate debtor. However, it was insisted by the tax authorities that since there was no specific stay, proceedings could not be dropped.

22. After various communications addressed by the appellant to the Joint Commissioner, Commercial Taxes (Corporate Circle), Ghaziabad dated 26-4-2019, the following endorsements came to be made by the authority on 29-4-2019:

> "After consideration on the application presented by you, it is found that, by Hon'ble NCLT/NCLAT after transfer, neither stay is imposed on tax assessment nor on creation of demand. So the created demand is payable by you. If you do not agree with it, preferring an appeal before higher authority, present its copy to us. Disposal is done of the application presented by you."

5 *Binani Industries Ltd.* v. *Bank of Baroda*, 2018 SCC OnLine NCLAT 521
6 *Rajputana Properties (P) Ltd.* v. *Ultratech Cement Ltd.*, 2018 SCC OnLine SC 3596

23. The Commercial Tax Department of the State of Rajasthan filed Civil Appeal No. 5889 of 2019 challenging the resolution plan. However, the said appeal came to be dismissed vide order of this Court dated 26-7-2019[7]. The appeals being Civil Appeals Nos. 630-34 of 2020 were also preferred by the Commissioner of Central Excise, Goods and Services Tax, Jodhpur challenging the resolution plan. The same also came to be dismissed by this Court vide order dated 24-1-2020[8].

24. The appellant therefore filed Civil Miscellaneous Writ Petition No. 354 of 2020 before the High Court of Allahabad challenging the order passed by the Additional Commissioner Grade 2 (Appeal) dated 30-1-2020, to the effect, that the proceedings in the State of Uttar Pradesh would remain unaffected irrespective of the approval of the resolution plan of the appellant by NCLT. The appellant also prayed for a declaration that all the proceedings pending before different authorities stand abated in terms of the approval of the resolution plan by NCLT. A prayer was also made for refund of Rs 248.92 lakhs deposited by the appellant under protest and for return of the bank guarantee.

25. The Division Bench of the Allahabad High Court vide order dated 6-7-2020[9] observed that the contention of the appellant with regard to the approval of the resolution plan by NCLT has been dealt with by the assessing authority as well as by the appellate authority and therefore, it was in the fitness of things that the appellant should avail of the alternative remedy of filing a second appeal available under the VAT Act. Being aggrieved by the same, the appellant has filed the present appeal.

Writ Petition (Civil) No. 1177 of 2020 (Monnet Ispat & Energy Ltd. v. State of Odisha)

26. The petitioner Company is a corporate debtor in respect of which CIRP proceedings commenced in July 2017 and ended in July 2018, when NCLT approved[10] the resolution plan submitted by a consortium of Aion Investment (P) Ltd. and JSW Steel Ltd. ("Aion-JSW" for short). Prior to approval by NCLT, CoC had granted approval to the said resolution plan by a voting majority of 98.97%. It is the contention of the petitioner that in accordance with the provisions of the I&B Code, RP had made a public announcement thereby, inviting claims from the creditors. Contending that the demand notices issued by the respondents for recovery of service tax towards royalty, District Mineral Foundation ("DMF" for short) and National Mineral Exploration Trust ("NMET" for short) against the iron ore purchased by the petitioner Company are contrary to the law laid down by this Court in *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*[11], the petitioner has directly approached this Court by filing a writ petition under Article 32 of the Constitution of India.

7 *CCT* v. *Binani Industries Ltd.*, 2019 SCC OnLine SC 2006
8 *CCE (GST)* v. *Binani Industries Ltd.*, 2020 SCC OnLine SC 1185
9 *Ultra Tech Nathdwara Cement Ltd.* v. *State of U.P.*, 2020 SCC OnLine All 1724
10 *Monnet Ispat & Energy Ltd. Resolution Professional, In re* , 2018 SCC OnLine NCLT 23789
11 (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443

Civil appeals arising out of Special Leave Petitions (Civil) Nos. 7147-50 of 2020 (Electrosteel Steels Ltd. v. State of Jharkhand)

27. The appellant is a corporate debtor in respect of which the proceedings under Section 7 were initiated by SBI. Vide order dated 21-7-2017[12] of NCLT, the application filed by SBI was admitted and Mr Dhaivat Anjaria was appointed as interim resolution professional (IRP). In its meeting dated 21-8-2017, CoC approved the appointment of IRP as RP. In response to the invitation for submission of resolution plans, four applicants had submitted their resolution plans. CoC had approved the resolution plan of Vedanta Ltd. by 100% voting share.

28. NCLT vide order dated 17-4-2018[13] approved the resolution plan of Vedanta Ltd. The appeal being Company Appeal (AT) (Insolvency) No. 175 of 2018 filed by one Renaissance Steel India (P) Ltd. challenging the order of NCLT came to be dismissed by NCLAT vide order dated 10-8-2018[14]. Challenging the notices issued by the respondent State authorities and the order of SBI asking it to pay an amount of Rs 37,41,41,602 on account of tax penalty due under the Jharkhand VAT Act for the period 2011-12 and 2012-13, the appellant approached the High Court of Jharkhand. The appellant had also challenged the Letter dated 22-11-2019 issued by State Tax Officer, Bokaro to deposit the amount of Rs 75,57,000.

29. As in the other matters, it is contended by the appellant, that in view of Section 31 of the I&B Code, since the claim made by the respondent was not a part of the resolution plan, it would get extinguished on the resolution plan being approved by NCLT. The said writ petition came to be rejected[15] by the High Court on the ground that the petitioner had no locus and that the resolution plan was not binding on the State Government since it had not participated in the CIRP proceedings.

***Submissions in Civil Appeal No. 8129 of 2019* [*Ghanashyam Mishra & Sons (P) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.*]**

30. Dr A.M. Singhvi, learned Senior Counsel appearing for GMSPL submitted that as held by this Court in a catena of decisions, the commercial wisdom of CoC in accepting or rejecting the resolution plan is paramount. He submitted that the interference would be warranted within the limited parameters of judicial review that are available under the statute.

31. The learned Senior Counsel further submitted that once the adjudicating authority approves the resolution plan, it shall be binding on everyone including corporate debtor and its employees, members, creditors including the Central Government, any State Government or any local authority, to whom a debt is owed in respect of the payment of dues arising under any law for the time being

12 *SBI* v. *Electrosteel Steels Ltd.*, 2017 SCC OnLine NCLT 16085
13 *SBI* v. *Electrosteel Steels Ltd.*, 2018 SCC OnLine NCLT 14651
14 *Renaissance Steel (India) (P) Ltd.* v. *Electrosteels Steel (India) Ltd.*, 2018 SCC OnLine NCLAT 901
15 *Electrosteel Steels Ltd.* v. *State of Jharkhand*, 2020 SCC OnLine Jhar 454

in force, guarantors and other stakeholders, involved in the resolution plan. He submitted that once a resolution plan is accepted, if any additional liability is thrust upon the resolution plan, the entire plan would become unworkable, resulting into the frustration of the very purpose of the enactment i.e. revival of the corporate debtor.

32. Dr Singhvi further submitted that perusal of the resolution plan submitted by EARC and particularly Clause 2.1.3 thereof would reveal that the said plan also provides that all the debts and all dues, liability or obligations other than the one which are included in resolution plan shall be deemed to have been irrevocably waived and permanently extinguished and written off in full with effect from the effective date. He submitted that a similar provision is also made in the resolution plan submitted by GMSPL.

33. The learned Senior Counsel further submitted that the resolution plan submitted by GMSPL is for an amount of Rs 321.19 crores. If additional liability of Rs 648.89 crores is saddled upon the resolution applicant, the total resolution plan itself would be unworkable.

34. Dr Singhvi further submitted that NCLT has found the conduct of EARC not to be bona fide. He submitted that NCLT has categorically found that the application filed by EARC was a deliberate attempt to stage manage an objection against the approval of resolution plan submitted by an entity, other than it. He submitted that as a matter of fact NCLT has imposed costs of Rs 1 lakh on EARC taking into consideration its conduct.

35. Dr Singhvi relied upon the judgments of this Court in *K. Sashidhar* v. *Indian Overseas Bank*[16], *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*[11], *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh*[17], *Karad Urban Coop. Bank Ltd.* v. *Swwapnil Bhingardevay*[18] and *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.*[19]

36. Mr Prashant Bhushan, learned counsel appearing on behalf of EARC, Respondent 1 submitted that by the impugned order[3], NCLAT has only reserved the right of EARC to invoke the corporate guarantee in its favour. He submitted that on account of the erroneous conduct of the proceedings by RP and CoC, EARC has been put in a precarious condition. He submitted that on one hand RP has not recognised EARC as a financial creditor thereby, depriving its nomination to CoC and participation in finalisation of the proceedings. On the other hand, denying EARC to encash its bank guarantee would leave EARC high and dry. A substantial claim of EARC would be rendered futile, in the

16 (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222
11 (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
17 (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799
18 (2020) 9 SCC 729 : (2021) 2 SCC (Civ) 797
19 (2021) 10 SCC 401 : 2021 SCC OnLine SC 204
3 *Edelweiss Asset Reconstruction Co. Ltd.* v. *Orissa Manganese & Minerals Ltd.*, 2019 SCC OnLine NCLAT 764

event the order[2] passed by NCLT is to be maintained. He therefore submitted that no interference is warranted in the appeal.

37. In reply to the submissions of the appellant that EARC has not preferred an appeal against the order[3] of NCLAT though its appeal was disposed of is concerned, the learned counsel relying on the judgment of this Court in *Banarsi* v. *Ram Phal*[20] submitted that since the findings recorded by NCLAT are in its favour, there was no occasion for it to prefer an appeal. He submitted that in any event, it can raise the grounds insofar as the findings in the impugned order[3], which are adverse to EARC in addition to supporting the final judgment in its favour.

38. Shri Neeraj Kishan Kaul, learned Senior Counsel appearing on behalf of the appellant submitted that assuming without admitting that EARC could be considered as the financial creditor, it could have had voting right only to the extent of 9% and even in that eventuality, resolution plan of GMSPL would have been approved by CoC with the majority of more than 80%.

Submissions in civil appeal arising out of Special Leave Petition (Civil) No. 11232 of 2020 (UltraTech Nathdwara Cement Ltd. v. State of U.P.)

39. Dr Singhvi, learned Senior Counsel appearing on behalf of the appellant, UltraTech Nathdwara Cement Ltd. submitted that a conjoint reading of sub-section (10) of Section 3 and sub-sections (20) and (21) of Section 5 would show that even if there was no amendment to Section 31 of the I&B Code by the 2019 Amendment, still the Central Government and any State Government or the local authorities were bound by the same and any statutory dues owed to them by the corporate debtor, which were not included in the resolution plan, shall stand extinguished.

40. Dr Singhvi submitted that the 2019 Amendment, which amends Section 31 is clarificatory in nature and only declares and clarifies the position of law, which has already been in existence i.e. the Central Government, any State Government and local authorities are bound by the CIRP. He submitted that this Court in *SBI* v. *V. Ramakrishnan*[21] and *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*[22] has held the amendment to certain provisions of the I&B Code to be clarificatory in nature.

41. The learned Senior Counsel submitted that upon perusal of the provisions of the I&B Code, it is clear, that once NCLT grants approval to the resolution plan, all proceedings pending insofar as the corporate debtor is concerned, which are not included in the resolution plan shall stand automatically stayed. He submitted that perusal of the chart pertaining to the dues of the respondents clearly reveal that all of the said dues are prior to the

2 *SBI* v. *Orissa Manganese & Minerals Ltd.*, 2018 SCC OnLine NCLT 20888
3 *Edelweiss Asset Reconstruction Co. Ltd.* v. *Orissa Manganese & Minerals Ltd.*, 2019 SCC OnLine NCLAT 764
20 (2003) 9 SCC 606
21 (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458
22 (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528

admission of the company petition filed under Section 7 of the I&B Code and therefore, the respondents are not entitled to continue the proceedings in respect thereof since the same do not form part of the approved resolution plan.

42. He submitted that the orders passed by NCLAT were challenged before this Court by the Revenue Authorities of the Rajasthan State as well as the Commissioner of Central Excise (GST), Jodhpur and this Court had refused to interfere with the order[3] passed by NCLAT. It is submitted that in this background, the authorities are totally unjustified in continuing the proceedings, which are undisputedly with respect to the dues prior to admission of the application under Section 7 of the I&B Code, only on the ground, that there is no specific stay order passed by NCLT.

43. He submitted that the High Court has erred in refusing to entertain the writ petition of the appellant solely on the ground that an alternative remedy by way of a second appeal was available to the appellant. He submitted that in a catena of judgments, this Court has held, that non-exercise of jurisdiction under Article 226, despite availability of alternative remedy is a rule of self-restraint and in the appropriate areas carved out by this Court, entertaining a petition under Article 226, despite availability of alternative remedy, would be permissible. He submitted that applying the said principle, the proceedings before the authority since stand prohibited in view of the provisions of the I&B Code, the High Court erred in refusing to entertain the petition.

44. The learned Senior Counsel further submitted that despite the pendency of the present appeal, the Joint Commissioner, Commercial Taxes, Ghaziabad has passed an assessment order dated 2-2-2021 for the period prior to admission of Section 7 petition, as such the appellant has filed IA No. 26255 of 2021 challenging the said assessment order.

45. Dr Singhvi further submitted that though the respondent authorities were aware of the resolution proceedings, they had failed to submit any claim in response to the public notices issued by RP.

46. Shri V. Shekhar, learned Senior Counsel appearing on behalf of the State authorities justified the impugned order and prayed for dismissal of the appeal. He submitted that the order passed by NCLT would not come in the way of adjudicatory proceedings which were continued by the authorities under the provisions of the relevant statutes. He submitted that the assessment orders which were passed in accordance with law were duly approved in appeal by the higher authority and therefore, the High Court was justified in observing that the petition was not maintainable in view of the availability of alternative remedy of filing a second appeal.

47. The learned Senior Counsel submitted that the adjudicatory authorities acting under the relevant statutes being not a part of CoC are not bound by the decision of CoC, which is approved by NCLT. He further submitted that merely continuation of the adjudicatory proceedings cannot be a part of coercive action.

3 *Edelweiss Asset Reconstruction Co. Ltd.* v. *Orissa Manganese & Minerals Ltd.*, 2019 SCC OnLine NCLAT 764

48. Shri V. Shekhar submitted that the 2019 Amendment cannot be said to be clarificatory in nature and as such, the proceedings, which were pending prior to the date of the amendment to Section 31, would not be affected by the 2019 Amendment to Section 31. He therefore prayed for dismissal of the appeal.

Submissions in Writ Petition (Civil) No. 1177 of 2020 (Monnet Ispat & Energy Ltd. v. State of Odisha)

49. Shri Kaul, learned Senior Counsel appearing on behalf of the writ petitioner submitted that in spite of clear legal position as enunciated in various judgments of this Court, various authorities in different parts of the country are continuing with the proceedings in respect of statutory dues existing prior to the date of approval of resolution plan by NCLT. He submitted that various High Courts have held, relying on the judgments of this Court, that statutory dues prior to the date of admission of Section 7 application and which are not part of the resolution plan shall stand extinguished and the proceedings in respect thereof would no more survive. However, in some States, the authorities of the State are flouting the law and as such, the petitioner has approached this Court in its extraordinary jurisdiction under Article 32 of the Constitution so that there is an authoritative pronouncement by this Court. He submitted that the respondent authorities in the present case had failed to file the claims in response to the statutory public notice issued by RP. The first demand by the authorities raised is only after the plan was approved by CoC on 9-4-2018. He also relied on the speech delivered by the Hon'ble Finance Minister in Rajya Sabha on 29-7-2019, to buttress his submissions that the 2019 Amendment of Section 31 of the I&B Code is clarificatory in nature.

Submissions in appeals arising out of Special Leave Petitions (Civil) Nos. 7147-50 of 2020 (Electrosteel Steels Ltd. v. State of Jharkhand)

50. Dr Singhvi submitted that in the present matter though NCLT had approved the resolution plan on 17-4-2018[13] and NCLAT had dismissed the appeal on 10-8-2018[14], only thereafter on 17-8-2018, the reassessment order came to be passed for the period 2012-13. He submitted that immediately after the appellant discovered about the said order, the same was challenged in a writ petition. However, the High Court has dismissed[15] the petition on erroneous grounds. It is submitted that one of the grounds on which the petition is dismissed is that it is Vedanta Ltd. which was an aggrieved party since it was a resolution applicant and as such the petition at the behest of the present appellant, which was a corporate debtor was not tenable. He submitted that the second ground on which the writ petition is dismissed is that the State authorities had not participated in CIRP and the order passed by NCLT was binding only on the parties which have participated in the resolution process.

13 *SBI* v. *Electrosteel Steels Ltd.*, 2018 SCC OnLine NCLT 14651
14 *Renaissance Steel (India) (P) Ltd.* v. *Electrosteels Steel (India) Ltd.*, 2018 SCC OnLine NCLAT 901
15 *Electrosteel Steels Ltd.* v. *State of Jharkhand*, 2020 SCC OnLine Jhar 454

He submitted that both the grounds are erroneous inasmuch as Vedanta Ltd. is a successful resolution applicant. The resolution process is in respect of the present appellant-writ petitioner, which is the corporate debtor and as such, the petition at the behest of the present appellant was very much tenable in law. Insofar as the second ground of the High Court is concerned, he submitted that if such a view is accepted, it will frustrate the entire object of the I&B Code and the revival of the debtor companies would be impossible if the successful resolution applicants are sprung with the surprise debts which are not part of the resolution plan.

51. Shri Guru Krishna Kumar, learned Senior Counsel appearing on behalf of the respondent submitted that the entire process conducted by RP and CoC is fraudulent. He submitted that in accordance with Section 29 and specifically, clause H of Regulation 36, RP was required to furnish the details of the material litigation and an ongoing investigation or proceedings initiated by the Government and statutory authorities in the information memorandum. However, the resolution applicant had fraudulently used the I&B Code by suppressing the vital information with regard to the same and thereby denying the legitimate dues of the public exchequer.

52. Dr Singhvi in rejoinder submitted that it is the respondent's own admission that they have not participated in the proceedings conducted by RP, CoC, NCLT, NCLAT and even this Court. He submitted that when the other departments/ministries had participated in the proceedings and raised their claims, it does not lie in the mouth of the respondents to say that they were not aware about CIRP proceedings.

53. In the said appeal, an intervention application has also been filed on behalf of Tata Steel BSL Ltd. It is contended in the intervention application that though the resolution process in respect of intervener-applicant was complete, still the Revenue Authorities were continuing with the proceedings with respect to the dues owed prior to the date of approval of resolution plan by NCLT. It is the submission of the intervener-applicant that as such legal position needs to be settled by this Court and therefore the intervener-applicant has filed the present intervention application.

54. Shri Jaideep Gupta, learned Senior Counsel appearing on behalf of the said intervener-applicant has made submissions on similar lines as are advanced by Dr Singhvi and Shri Kaul, learned Senior Counsel appearing in the other matters.

Consideration

55. We have extensively heard the learned counsel appearing for the parties in all the matters, perused the written submissions and materials on record.

56. The provisions of the I&B Code have undergone scrutiny in various judgments of this Court. We would not like to burden the present judgment with the provisions of the statute, which have been duly reproduced and considered in the earlier judgments of this Court.

57. In *Innoventive Industries Ltd.* v. *ICICI Bank*[23] after reproducing the "Statement of Objects and Reasons" of the I&B Code in para 12, this Court observed thus: (SCC p. 422, para 13)

> "*13. 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.* As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia." (emphasis supplied)

58. This Court thereafter in para 16 of *Innoventive Industries Ltd. case*[23] reproduced the relevant paragraphs contained in the Report of the Bankruptcy Law Reforms Committee Report of 2015. Thereafter, this Court reproduced all the relevant provisions of the I&B Code in paras 18 to 26.

59. This Court in *Innoventive Industries Ltd.*[23] thereafter elaborately discussed the scheme of the various provisions of the I&B Code in paras 27 to 32, which read thus: (SCC pp. 437-39)

> "*27.* The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency 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. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A "financial creditor" has been defined under Section 5(7) as a person to whom a financial debt is owed and a "financial debt" is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an "operational creditor" means a person to whom an operational debt is owed and an "operational debt" under Section 5(21) means a claim in respect of provision of goods or services.
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> *28.* When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a

23 (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356

default is in respect of a financial debt owed to **any** financial creditor of the corporate debtor—it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. *The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority*. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing —i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, 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

* **Ed.**: The word between two asterisks has been emphasised in original.

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.

31. The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

32. As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors." (emphasis supplied)

60. After discussing the relevant provisions of the I&B Code, this Court observed thus: (*Innoventive Industries Ltd. case*[23], SCC pp. 439-40, para 33)

"*33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members,*

23 *Innoventive Industries Ltd.* v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356

creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. *The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet.* All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins." (emphasis supplied)

61. It could thus be seen that one of the dominant objects of the I&B Code is to see to it that an attempt has to be made to revive the corporate debtor and make it a running concern. For that, a resolution applicant has to prepare a resolution plan on the basis of the information memorandum. The information memorandum, which is required to be prepared in accordance with Section 29 of the I&B Code along with Regulation 36 of the Regulations, is required to contain various details, which have been gathered by RP after receipt of various claims in response to the statutorily mandated public notice. The resolution plan is required to provide for the payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the resolution plan; the implementation and supervision of the resolution plan. It is only after the adjudicating authority satisfies itself that the plan as approved by CoC with the requisite voting share of financial creditors meets the requirement as referred to in sub-section (2) of Section 30, grants its approval to it. It is only thereafter that the said plan is binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The moratorium order passed by the adjudicating authority under Section 14 shall cease to operate once the adjudicating authority approves the resolution plan. The scheme of the I&B Code therefore is, to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency to continue the business of the corporate debtor as a going concern until a resolution plan is drawn up. Once the resolution plan is approved, the management is handed over under the plan to the successful applicant so that the corporate debtor is able to pay back its debts and get back on its feet.

62. This Court recently in *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.*[19] has, in detail, considered the provisions of Sections 30 and 31 of the I&B Code, the Bankruptcy Law Reforms Committee (BLRC) Report of 2015 and the judgments of this Court in *K. Sashidhar*[16], *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*[11] and *Maharashtra Seamless Ltd.*

19 (2021) 10 SCC 401 : 2021 SCC OnLine SC 204
16 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222
11 (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443

v. *Padmanabhan Venkatesh*[17] and observed thus: (*Kalpraj Dharamshi case*[19], SCC paras 153-171)

"*153*. It is thus clear, that the Committee was of the view, that for deciding key economic question in the bankruptcy process, the only one correct forum for evaluating such possibilities, and making a decision was, a creditors committee, wherein all financial creditors have votes in proportion to the magnitude of debt that they hold. The BLRC has observed, that laws in India in the past have brought arms of the Government (legislature, executive or judiciary) into the question of bankruptcy process. This has been strictly avoided by the Committee and it has been provided, that the decision with regard to appropriate disposition of a defaulting firm, which is a business decision, should only be made by the creditors. It has been observed, that the evaluation of proposals to keep the entity as a going concern, including decisions about the sale of business or units, restructuring of debt, etc. are required to be taken by the Committee of the financial creditors. It has been provided, that the choice of the solution to keep the entity as a going concern will be voted upon by CoC and there are no constraints on the proposals that the resolution professional can present to CoC.

154. The requirements, that the resolution professional needs to confirm to the adjudicator, are:

154.1. That the solution must explicitly require the repayment of any interim finance and costs of the insolvency resolution process will be paid in priority to other payments.

154.2. That the plan must explicitly include payment to all creditors not on the creditors committee, within a reasonable period after the solution is implemented; and lastly

154.3. The plan should comply with existing laws governing the actions of the entity while implementing the solutions.

155. The Committee also expressed the opinion, that there should be freedom permitted to the overall market, to propose solutions on keeping the entity as a going concern. The Committee opined, that the details as to how the insolvency is to be resolved or as to how the entity is to be revived, or the debt is to be restructured will not be provided in the I&B Code but such a decision will come from the deliberations of CoC in response to the solutions proposed by the market.

156. This Court in *K. Sashidhar*[16] observed thus: (SCC pp. 173-74, para 32)

'*32*. Having heard the learned counsel for the parties, the moot question is about the sequel of the approval of the resolution plan by

17 (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799

19 *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.*, (2021) 10 SCC 401 : 2021 SCC OnLine SC 204

16 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

CoC of the respective corporate debtor, namely, KS&PIPL and IIL, by a vote of less than seventy-five per cent of voting share of the financial creditors; and about the correctness of the view[24] taken by NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. *Further, is it open to the adjudicating authority/appellate authority to reckon any other factor [other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be] which, according to the resolution applicant and the stakeholders supporting the resolution plan, may be relevant?*'

157. After considering the judgment of this Court in *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[25] and the relevant provisions of the I&B Code, this Court further observed in *K. Sashidhar*[16] thus: (*K. Sashidhar case*[16], SCC p. 183, para 52)

'*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.*'

24 *Kamineni Steel & Power (India) (P) Ltd.* v. *Indian Bank*, 2018 SCC OnLine NCLAT 654
25 (2019) 2 SCC 1
16 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

158. This Court has held, that it is not open to the adjudicating authority or appellate authority to reckon any other factor other than specified in Sections 30(2) or 61(3) of the I&B Code. It has further been held, that 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. This Court thus, in unequivocal terms, held, that 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. It has been held, that the opinion expressed by CoC after due deliberations in the meetings through voting, as per voting shares, is a collective business decision. It has been held, that the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority and that the decision of CoC's "commercial wisdom" is made non-justiciable.

159. This Court in *Essar Steel (India) Ltd. (CoC)*[11] after referring to the judgment of this Court in *K. Sashidhar*[16] observed thus: (*Essar Steel case*[11], SCC p. 584, para 64)

> '*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*.'

11 *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
16 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

160. This Court held[11], that what is left to the majority decision of CoC is the "feasibility and viability" of a resolution plan, which is required to take into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. It has further been held, that CoC is entitled to suggest a modification to the prospective resolution applicant, so that carrying on the business of the corporate debtor does not become impossible, which suggestion may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, etc. It has been held, that what is important is, the commercial wisdom of the 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.

161. The view taken in *K. Sashidhar*[16] and *Essar Steel (India) Ltd. (CoC)*[11] has been reiterated by another three-Judge Bench of this Court in *Maharashtra Seamless Ltd.*[17]

162. In all the aforesaid three judgments[11, 16, 17] of this Court, the scope of jurisdiction of the adjudicating authority (NCLT) and the appellate authority (NCLAT) has also been elaborately considered. It will be relevant to refer to para 55 of the judgment in *K. Sashidhar*[16], which reads thus: (SCC pp. 185-86)

> '*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

11 *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
16 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222
17 *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh*, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799

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.'

163. It has been held, that in an enquiry under Section 31, the limited enquiry that the adjudicating authority is permitted is, as to whether the resolution plan provides:

163.1. The payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor.

163.2. The repayment of the debts of operational creditors in prescribed manner.

163.3. The management of the affairs of the corporate debtor.

163.4. The implementation and supervision of the resolution plan.

163.5. The plan does not contravene any of the provisions of the law for the time being in force.

163.6. Conforms to such other requirements as may be specified by the Board.

164. It will be further relevant to refer to the following observations of this Court in *K. Sashidhar*[16]: (SCC pp. 186-87, para 57)

'*57*. ... 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

16 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

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.'

165. It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.

166. The position is clarified by the following observations in para 59 of the judgment in *K. Sashidhar*[16], which reads thus: (SCC p. 187)

'*59*. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors.'

167. This Court in *Essar Steel (India) Ltd. (CoC)*[11] after reproducing certain paragraphs in *K. Sashidhar*[16] observed thus: (*Essar Steel case*[11], SCC p. 589, para 67)

'*67*. ... 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*[16].'

168. It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.

169. In *Maharashtra Seamless Ltd.*[17], NCLT had approved[26] the plan of appellant therein with regard to CIRP of United Seamless Tubulaar (P) Ltd. In appeal, NCLAT directed[27], that the appellant therein should increase upfront payment to Rs 597.54 crores to the "financial creditors", "operational creditors" and other creditors by paying an additional amount of Rs 120.54 crores. NCLAT further directed, that in the event the "resolution

16 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222
11 *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
17 *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh*, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799
26 *United Seamless Tubulaar (P) Ltd. Resolution Professional* v. *Indian Bank*, 2019 SCC OnLine NCLT 713
27 *Padmanabhan Venkatesh* v. *V. Venkatachalam*, 2019 SCC OnLine NCLAT 285

applicant" failed to undertake the payment of additional amount of Rs 120.54 crores in addition to Rs 477 crores and deposit the said amount in escrow account within 30 days, the order of approval of the "resolution plan" was to be treated to be set aside. While allowing the appeal and setting aside the directions of NCLAT, this Court observed thus: (*Maharashtra Seamless case*[17], SCC p. 487, para 30)

> '*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*[11], 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.'
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> *170*. This Court observed, that 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. This Court clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront.
>
> *171*. 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." (emphasis in original)

63. Another three-Judge Bench of this Court in *Karad Urban Coop. Bank Ltd.* v. *Swwapnil Bhingardevay*[18], taking a similar view, has observed thus: (SCC pp. 735-36, para 14)

> "*14*. The principles laid down in the aforesaid decisions, make one thing very clear. If all the factors that need to be taken into account for

17 *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh*, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799

11 *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443

18 (2020) 9 SCC 729 : (2021) 2 SCC (Civ) 797

determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode. It is not the case of the corporate debtor or its promoter/Director or anyone else that some of the factors which are crucial for taking a decision regarding the viability and feasibility, were not placed before CoC or the resolution professional."

64. It could thus be seen, that the legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by adjudicating authority is limited to the extent provided under Section 31 of the I&B Code and of the appellate authority is limited to the extent provided under sub-section (3) of Section 61 of the I&B Code, is no more res integra.

65. Bare reading of Section 31 of the I&B Code would also make it abundantly clear that once the resolution plan is approved by the adjudicating authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is revival of the corporate debtor and to make it a running concern.

66. The resolution plan submitted by the successful resolution applicant is required to contain various provisions viz. provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor under Section 53; or 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. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also 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 to clause (*b*) of sub-section (2) of Section 30 of the I&B Code clarifies for the removal of doubts that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the corporate debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (*e*) of sub-section (2) of Section 30 of the I&B Code also casts a duty on RP to examine that the resolution plan does not contravene any of the provisions of the law for the time being in force.

67. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal that it requires RP to prepare an information memorandum containing various details of the corporate debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of

the corporate debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by the Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the corporate debtor towards them are required to be contained in the information memorandum.

68. All these details are required to be contained in the information memorandum so that the resolution applicant is aware as to what are the liabilities that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the corporate debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the adjudicating authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in sub-section (2) of Section 30 is that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is that he should start with fresh slate on the basis of the resolution plan approved.

69. This aspect has been aptly explained by this Court in *Essar Steel (India) Ltd. (CoC)*[11]: (SCC p. 616, para 107)

> "*107.* For the same reason, the impugned NCLAT judgment in *Standard Chartered Bank* v. *Satish Kumar Gupta*[28] 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[28] must also be set aside on this count."

11 *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
28 2019 SCC OnLine NCLAT 388

70. In view of this legal position, we could have very well stopped here and held that the observation made by NCLAT in the appeal filed by EARC to the effect that EARC was entitled to take recourse to such remedies as are available to it in law, is impermissible in law.

71. As held by this Court in *CIT* v. *Monnet Ispat & Energy Ltd.*[29], in view of the provisions of Section 238 of the I&B Code, the provisions thereof will have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force or any instrument having effect by virtue of any such law. As such, the observations made by NCLAT to the aforesaid effect, if permitted to remain, would frustrate the very purpose for which the I&B Code is enacted.

72. However, in civil appeal arising out of Special Leave Petition (Civil) No. 11232 of 2020, Writ Petition (Civil) No. 1177 of 2020 and civil appeals arising out of Special Leave Petitions (Civil) Nos. 7147-50 of 2020, the issue with regard to the statutory claims of the State Government and the Central Government in respect of the period prior to the approval of resolution plan by NCLT, will have to be considered.

73. Vide Section 7 of Act 26 of 2019 [vide S.O. 2953(E), dated 16-8-2019 with effect from 16-8-2019], the following words have been inserted in Section 31 of the I&B Code:

> "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,".

74. As such, with respect to the proceedings, which arise after 16-8-2019, there will be no difficulty. After the amendment, any debt in respect of the payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished.

75. The only question which remains is what happens to such dues if they pertain to a period wherein Section 7 petitions have been admitted prior to 16-8-2019.

76. To answer the said question, we will have to consider, as to whether the said amendment is clarificatory/declaratory in nature or a substantive one. If it is held that it is declaratory or clarificatory in nature, it will have to be held that such an amendment is retrospective in nature and exists on the statute book since inception. However, if the answer is otherwise, the amendment will have to be held to be prospective in nature, having force from the date on which the amendment is effected in the statute.

77. It will be relevant to refer to the "Statement of Objects and Reasons" (hereafter referred to as "SOR") of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019, which read thus:

29 (2018) 18 SCC 786 : (2019) 3 SCC (Civ) 252

"***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 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 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 maximisation 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 maximisation. 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 authorised 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*)-(*e*) * * *

(*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*;" " (emphasis supplied)

78. Perusal of the SOR would reveal that one of the prime objects of the I&B Code was to provide for implementation of the insolvency resolution process in a time-bound manner for maximisation of value of assets in order to balance the interests of all stakeholders. However, it was noticed that in some cases there was extensive litigation causing undue delays resultantly hampering the value maximisation. It was also found necessary to ensure that all creditors are treated fairly. It was therefore in view of the various difficulties faced and in order to fill the critical gaps in the corporate insolvency framework, it was necessary to amend certain provisions of the I&B Code. Clause (*f*) of Para 3 of the SOR of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019 would amply make it clear that the legislative intent in amending sub-section (1) of Section 31 of the I&B Code was 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 is owed 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.

79. In the Rajya Sabha debates, on 29-7-2019, when the Bill for amending the I&B Code came up for discussion, there were certain issues raised by certain members. While replying to the issues raised by certain Members, the Hon'ble Finance Minister stated thus:

> "IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but largely, yes, it is IBC.
>
> There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan. Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant. There will be no criminal proceedings against successful resolution applicant for fraud by previous promoters. So, I hope that is absolutely clear. I would want all the Hon'ble Members to recognise this message and communicate further that this Code, therefore, gives that comfort to all new bidders. *So now, they need not be scared that the taxman will come after them for the faults of the earlier promoters. No.* Once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. So, that is very clear." (emphasis supplied)

80. It could thus be seen that in the speech the Hon'ble Finance Minister has categorically stated that Section 238 provides that the I&B Code will prevail in case of inconsistency between two laws. She also stated that there was question about indemnity for successful resolution applicant and that the amendment was clearly making it binding on the Government. She stated that the Government will not make any further claim after the resolution plan is approved. So, that is going to be a major sense of assurance for the people who are using the resolution plan. She has categorically stated that she would want all the Hon'ble Members to recognise this message and communicate further that the I&B Code gives that comfort to all new bidders. They need not be scared that the taxman will come after them for the faults of the earlier promoters. She further states that once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company.

81. This Court in *K.P. Varghese* v. *CIT*[30] had an occasion to consider the question as to whether the speech made by the Hon'ble Finance Minister explaining the reason for the introduction of the Bill could be referred for the purpose of ascertaining the mischief sought to be remedied by the legislation. This Court observed thus: (SCC p. 184, para 8)

> "*8.* ... Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in *Lok Shikshana Trust* v. *CIT*[31], the other in *Indian Chamber of Commerce* v. *CIT*[32] and the third in *CIT* v. *Surat Art Silk Cloth Manufacturers' Assn.*[33] where the speech made by the Finance Minister while introducing the exclusionary clause in Section 2, clause (15) of the Act was relied upon by the Court for the purpose of ascertaining what was the reason for introducing that clause. The speech made by the Finance Minister while moving the amendment introducing sub-section (2) clearly states what were the circumstances in which sub-section (2) came to be passed, what was the mischief for which Section 52 as it then stood did not provide and which was sought to be remedied by the enactment of sub-section (2) and why the enactment of sub-section (2) was found necessary."

82. This Court in *Union of India* v. *Martin Lottery Agencies Ltd.*[34], in para 38 has relied on the aforesaid observations made in the judgment of *K.P. Varghese*[30].

83. It could thus be seen that the speech made by Hon'ble Finance Minister while explaining the amendment could be referred to for ascertaining what was the reason for moving the Bill. The speech can be used for finding out:

(*1*) What were the circumstances in which the amendment was carried out;

(*2*) What was the mischief for which the unamended section did not provide; and

(*3*) What was sought to be remedied by amended enactment.

30 (1981) 4 SCC 173 : 1981 SCC (Tax) 293
31 (1976) 1 SCC 254 : 1976 SCC (Tax) 14
32 (1976) 1 SCC 324 : 1976 SCC (Tax) 41
33 (1980) 2 SCC 31 : 1980 SCC (Tax) 170
34 (2009) 12 SCC 209

84. It is clear that the mischief which was noticed prior to amendment of Section 31 of the I&B Code was that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position that once such a resolution plan was approved by the adjudicating authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.

85. In Justice G.P. Singh's treatise on *The Principles of Statutory Interpretation*, 14th Edn., revised by Justice A.K. Patnaik, former Judge of this Court, it is observed thus:

"***(i) Declaratory statutes***

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies and approved by the Supreme Court*:

> "For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word 'declared' as well as the word 'enacted'."[35]

But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective[36]. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form[36]. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective[37]. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as

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* **Ed.**: The reference is to *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, para 29.

35 *Craies on Statute Law*, 7th Edn., p. 58, approved in *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, 27 : (1960) 1 SCR 200. See *Jones* v. *Bennet*, (1890) 63 LT 705, 708 (Lord Coleridge, C.J.); *Madras Marine & Co.* v. *State of Madras*, (1986) 3 SCC 552, 563 : 1986 SCC (Tax) 686; *Satnam Overseas (Export)* v. *State of Haryana*, (2003) 1 SCC 561, 589 : AIR 2003 SC 66, 84.

36 *Harding* v. *Queensland Stamp Commissioners*, 1898 AC 769 at pp. 775, 776 (PC)

37 *R.* v. *Dursley*, (1832) 3 B & Ad 465 : 110 ER 168, 169

to the meaning of the previous Act[38]. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended[39]. The language 'shall be deemed always to have meant'[40] or 'shall be deemed never to have included'[41] is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous[42]. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law[43].

The above statement of the law relating to the nature and effect of a declaratory statute has been quoted with approval by the Supreme Court from earlier editions of this book in a number of cases[44].

> "In *Mithilesh Kumari* v. *Prem Behari Khare*[45], Section 4 of the Benami Transactions (Prohibition) Act, 1988 was, it is submitted, wrongly held to be an Act declaratory in nature for it was not passed to clear any doubt existing as to the common law or the meaning or

38 *Keshavlal Jethalal Shah (2)* v. *Mohanlal Bhagwandas*, AIR 1968 SC 1336, 1339 : (1968) 3 SCR 623. The question whether an "Explanation" added by an amending Act is really explanatory or not would depend on its construction. In *S.K. Govindan & Sons* v. *CIT*, (2001) 1 SCC 460, 469 : AIR 2001 SC 254, 260 : (2001) 247 ITR 192, Explanation 2 inserted in Section 139(8) of the Income Tax Act, 1961 was held to be clarificatory. But in *Birla Cement Works* v. *CBDT*, (2001) 9 SCC 35, it was held that mere addition of an "Explanation" by an amending Act in a taxing Act cannot, without more, be held to be clarificatory and retrospective. In *CIT* v. *Shelly Products*, (2003) 5 SCC 461 at pp. 477-78 provisos (*a*) and (*b*) added in Section 240 of the Income Tax Act, 1961 by amending Act which came into force on 1-4-1989 were held to be clarificatory and retrospective.

39 *Chaman Singh* v. *Jaikaurr*, (1969) 2 SCC 429, 433 : AIR 1970 SC 349, 351

40 *CIT* v. *Straw Products Ltd.*, AIR 1966 SC 1113 : (1966) 2 SCR 881

41 *Union of India* v. *S. Muthyam Reddy*, (1999) 7 SCC 545, 546-47

42 *Sakuru* v. *Tanoji*, (1985) 3 SCC 590, p. 594

43 *Punjab Traders* v. *State of Punjab*, (1991) 1 SCC 86, 92 : AIR 1990 SC 2300, 2304

44 *R. Rajagopal Reddy* v. *Padmini Chandrasekharan*, (1995) 2 SCC 630, 646 : AIR 1996 SC 238, 246; *Allied Motors (P) Ltd.* v. *CIT*, (1997) 3 SCC 472, 479-80 : AIR 1997 SC 1361 at pp. 1366, 1367; *CIT* v. *Podar Cement (P) Ltd.*, (1997) 5 SCC 482, 506-07 : AIR 1997 SC 2523, pp. 2537-38; *Shyam Sunder* v. *Ram Kumar*, (2001) 8 SCC 24, 49-50 : AIR 2001 SC 2472, 2487; *Zile Singh* v. *State of Haryana*, (2004) 8 SCC 1, 7-8 : AIR 2004 SC 5100 at pp. 5103-104; *CIT* v. *Gold Coin Health Food (P) Ltd.*, (2008) 9 SCC 622, paras 19, 20. See further *S.B. Bhattacharjee* v. *S.D. Majumdar*, (2007) 10 SCC 513, paras 32-36 : (2008) 1 SCC (L&S) 21 : AIR 2007 SC 2102, paras 26-29.

45 (1989) 2 SCC 95, 108 : AIR 1989 SC 1247, 1255

effect of any statute. The conclusion, however, that Section 4 applied also to past benami transactions may be supportable on the language used in the section."

These observations and criticism of *Mithilesh Kumari case*[45] also received the approval in *R. Rajagopal Reddy* v. *Padmini Chandrasekharan*[46], where the Supreme Court after quoting them (from G.P. Singh: *Principles of Statutory Interpretation*, 5th Edn., pp. 315-16) said:

"No exception can be taken to the above observations."[47]

A proviso added from 1-4-1988 to Section 43-B inserted in the Income Tax Act, 1961 from 1-4-1984 came up for consideration in *Allied Motors (P) Ltd.* v. *CIT*[48] and it was given retrospective effect from the inception of the section on the reasoning that the proviso was added to remedy unintended consequences and supply an obvious omission so that the section may be given a reasonable interpretation and that in fact the amendment to insert the proviso would not serve its object unless it is construed as retrospective. In *CIT* v. *Podar Cement (P) Ltd.*[49] the Supreme Court held that amendments introduced by the Finance Act, 1987 insofar they related to Sections 27(*iii*), (*iii-a*) and (*iii-b*) which redefined the expression 'owner of house property', in respect of which there was a sharp divergence of opinion amongst the High Courts, was clarificatory and declaratory in nature and consequently retrospective. Similarly, in *Brij Mohan Das Laxman Das* v. *CIT*[50] Explanation 2 added to Section 40 of the Income Tax Act, 1961 from 1-4-1985 on a question on which there was a divergence of opinion was held to be declaratory in nature and, therefore, retrospective. And in *Zile Singh* v. *State of Haryana*[51] substitution of the word 'up to' for the word 'after' in the proviso to Section 13-A (added in 1994) in the Haryana Municipal Act, 1973 by the Haryana Municipal (Second Amendment) Act, 1994 was held to be correction of an obvious

45 *Mithilesh Kumari* v. *Prem Behari Khare*, (1989) 2 SCC 95, 108 : AIR 1989 SC 1247, 1255

46 (1995) 2 SCC 630

47 *R. Rajagopal Reddy* v. *Padmini Chandrasekharan*, (1995) 2 SCC 630, 647

48 (1997) 3 SCC 472, 479-80 : AIR 1997 SC 1361 at pp. 1366-67; Similarly in *CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362, paras 38-39, proviso inserted in Section 113 of the Income Tax Act with effect from 1-6-2002 was held to be clarificatory and retrospective. Again in *CIT* v. *Alom Extrusions Ltd.*, (2010) 1 SCC 489 deletion of a second proviso and consequent amendment in second proviso to Section 43-B of the Income Tax Act, 1961 by the Finance Act, 2003 was held to be curative and retrospective.

49 (1997) 5 SCC 482, 506 : AIR 1997 SC 2523, p. 2538

50 (1997) 1 SCC 352, 356 : AIR 1997 SC 1651, 1654; affirmed in *Suwalal Anandilal Jain* v. *CIT*, (1997) 4 SCC 89 and *CIT* v. *Kanji Shivji & Co.*, (2000) 2 SCC 253. See further cases in G.P. Singh: *The Principles of Statutory Interpretation*, 14th Edn., note 42.

51 (2004) 8 SCC 1

drafting error to bring about the text in conformity with the legislative intent and, therefore, retrospective. Even without the amendment of the proviso, the court in all probability would have read and interpreted the section as corrected by the amendment[52]."

86. In *Zile Singh* v. *State of Haryana*[51], this Court had an occasion to consider the provisions of Section 13-A of the Haryana Municipal Act, 1973 which, prior to amendment, read thus:

"**13-A.** ***Disqualification for membership***.—(1) A person shall be disqualified for being chosen as and for being a member of a municipality—

* * *

(*c*) if he has more than two living children:

Provided that a person having more than two children on or *after* the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified." (emphasis supplied)

87. The faulty drafting in the provision was capable of being interpreted that the legislative embargo imposed on a person from procreating and giving birth to a third child in the context of holding the office of a member of a municipality remained in operation for a period of one year only and thereafter it was lifted. It could be interpreted that on the date on which Section 13-A was brought on the statute book i.e. dated 5-4-1994, even if a person became disqualified, the disqualification ceased to operate and he became qualified once again to contest the election and hold the office of member of a municipality on the expiry of one year from 5-4-1994. After realising the error, Section 13-A came to be amended as under:

"**2.** In the proviso to clause (*c*) of sub-section (1) of Section 13-A of the Haryana Municipal Act, 1973 (hereinafter called the principal Act), for the word '*after*', the word '*up to*' shall be *substituted*." (emphasis supplied)

88. This Court while observing, that the amendment was clarificatory in nature, held thus: (*Zile Singh case*[51], SCC pp. 9-12, paras 14-22)

"*14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit.* A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

52 *Id*, para 23 (SCC).
51 (2004) 8 SCC 1

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (*Statute Law*, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. *In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated.* (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of *Attorney General* v. *Pougett*[53] (Price at p. 392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the Attorney General, said: (ER p. 134)

> 'The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act : but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act;' (Price at p. 392)

17. Maxwell states in his work on *Interpretation of Statutes* (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it 'may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it' (p. 225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "*vary secundum materiam*" (p. 226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in

53 (1816) 2 Price 381 : 146 ER 130

drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).

18. In a recent decision of this Court in *National Agricultural Coop. Mktg. Federation of India Ltd.* v. *Union of India*[54] it has been held

> that there is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to be subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as: (*i*) the words used must expressly provide or clearly imply retrospective operation; (*ii*) the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional; (*iii*) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.

19. The Constitution Bench in *Shyam Sunder* v. *Ram Kumar*[55] has held: (SCC p. 49, para 39)

> '*39.* ... Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word "declaration" in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective.' (p. 2487).

20. In *Bengal Immunity Co. Ltd.* v. *State of Bihar*[56], *Heydon case*[57] was cited with approval. Their Lordships have said: (*Bengal Immunity case*[56], AIR p. 674, para 22)

> '*22.* It is a sound rule of construction of a statute firmly established in England as far back as 1584 when *Heydon case*[57] was decided that—

54 (2003) 5 SCC 23
55 (2001) 8 SCC 24
56 (1955) 2 SCR 603 : AIR 1955 SC 661
57 (1584) 3 Co Rep 7a : 76 ER 637

"... for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered—

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth, and

4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." '

21. In *Allied Motors (P) Ltd.* v. *CIT*[58] certain unintended consequences flowed from a provision enacted by Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rule of reasonable interpretation should apply.

'A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.' [*Allied Motors (P) Ltd. case*[58], SCC pp. 479-80, para 13]

22. The State Legislature of Haryana intended to impose a disqualification with effect from 5-4-1995 and that was done. *Any person having more than two living children was disqualified on and from that day for being a member of a municipality. However, while enacting a proviso by way of an exception carving out a fact situation from the operation of the newly introduced disqualification the draftsman's folly caused the creation of trouble. A simplistic reading of the text of the proviso spelled out a consequence which the legislature had never intended and could not have intended. It is true that the Second Amendment does not expressly give the amendment a retrospective operation. The absence of a provision expressly giving a retrospective operation to the legislation is not determinative of its prospectivity or retrospectivity. Intrinsic evidence may be available to show that the amendment was necessarily intended to have retrospective effect*

58 (1997) 3 SCC 472

and if the Court can unhesitatingly conclude in favour of retrospectivity, the Court would not hesitate in giving the Act that operation unless prevented from doing so by any mandate contained in law or an established principle of interpretation of statutes." (emphasis supplied)

89. It could thus be seen that what is material is to ascertain the legislative intent. If legislature by an amendment supplies an obvious omission in a former statute or explains a former statute, the subsequent statute has a relation back to the time when the prior Act was passed.

90. The law laid down in *Zile Singh*[51] has been subsequently followed in various judgments of this Court, including in *CIT* v. *Gold Coin Health Food (P) Ltd.*[59] (three-Judge Bench).

91. This Court recently in *SBI* v. *V. Ramakrishnan*[21] had an occasion to consider the question as to whether the amendment to sub-section (3) of Section 14 of the I&B Code by Amendment Act 26 of 2018 was clarificatory in nature or not. By the said amendment, sub-section (3) of Section 14 of the I&B Code was substituted to provide that the provisions of sub-section (1) of Section 14 shall not apply to a surety in a contract of guarantee for corporate debtor. Considering the said issue, this Court observed thus: (SCC pp. 417-19, paras 30-33)

"*30*. We now come to the argument that the amendment of 2018, which makes it clear that Section 14(3), is now substituted to read that the provisions of sub-section (1) of Section 14 shall not apply to a surety in a contract of guarantee for corporate debtor. The amended section reads as follows:

'**14.** ***Moratorium***.—(1)-(2) * * *

(3) The provisions of sub-section (1) shall not apply to—

(*a*) such transactions as may be notified by the Central Government in consultation with any financial sector regulator;

(*b*) a surety in a contract of guarantee to a corporate debtor.'

31. The Insolvency Law Committee, appointed by the Ministry of Corporate Affairs, by its Report dated 26-3-2018, made certain key recommendations, one of which was:

'(*iv*) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-à-vis the moratorium on the assets of the corporate debtor, *it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code;*'

51 *Zile Singh* v. *State of Haryana*, (2004) 8 SCC 1
59 (2008) 9 SCC 622
21 (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458

32. The Committee insofar as the moratorium under Section 14 is concerned, went on to find:

> '5.5. Section 14 provides for a moratorium or a stay on institution or continuation of proceeding, suits, etc. against the corporate debtor and its assets. There have been contradicting views on the scope of moratorium regarding its application to third parties affected by the debt of the corporate debtor, like guarantors or sureties. While some courts have taken the view that Section 14 may be interpreted literally to mean that it only restricts actions against the assets of the corporate debtor, a few others have taken an interpretation that the stay applies on enforcement of guarantee as well, if a CIRP is going on against the corporate debtor.
>
> * * *
>
> 5.7. The Allahabad High Court subsequently took a differing view in *Sanjeev Shriya* v. *SBI*[60], by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CIRP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is crystallised, the guarantor's liability may not be triggered. The Committee deliberated and noted that this would mean that surety's liabilities are put on hold if a CIRP is going on against the corporate debtor, and such an interpretation may lead to the contracts of guarantee being infructuous, and not serving the purpose for which they have been entered into.
>
> 5.8. In *SBI* v. *V. Ramakrishnan*[61], NCLAT took a broad interpretation of Section 14 and held that it would bar proceedings or actions against sureties. While doing so, it did not refer to any of the above judgments but instead held that proceedings against guarantors would affect the CIRP and may thus be barred by moratorium. The Committee felt that such a broad interpretation of the moratorium may curtail significant rights of the creditor which are intrinsic to a contract of guarantee.
>
> 5.9. A contract of guarantee is between the creditor, the principal debtor and the surety, whereunder the creditor has a remedy in relation to his debt against both the principal debtor and the surety (*National Project Construction Corpn. Ltd.* v. *Sadhu and Co.*[62]). The surety here may be a corporate or a natural person and the liability of such person goes as far as the liability of the principal debtor. As per Section 128 of the Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor

60 2017 SCC OnLine All 2717 : (2018) 2 All LJ 769 : (2017) 9 ADJ 723
61 2018 SCC OnLine NCLAT 384
62 1989 SCC OnLine P&H 1069 : AIR 1990 P&H 300

may go against either the principal debtor, or the surety, or both, in no particular sequence (*Chokalinga Chettiar* v. *Dandayuthapani Chettiar*[63]). Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several (*Bank of Bihar Ltd.* v. *Damodar Prasad*[64]). The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost importance for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.

5.10. The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14.

5.11. Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under Section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only.'

33. The Report of the said Committee makes it clear that the object of the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14. That such clarificatory amendment is retrospective in nature, would be clear from the following judgments:" (emphasis in original)

63 1928 SCC OnLine Mad 236 : AIR 1928 Mad 1262
64 AIR 1969 SC 297

92. In *B.K. Educational Services (P) Ltd.* v. *Parag Gupta and Associates*[22] this Court considered the question as to whether the 2018 Amendment which inserted Section 238-A to the I&B Code was clarificatory in nature or not. After considering various earlier judgments of this Court, this Court observed thus: (SCC p. 654, paras 26-27)

> "*26*. In the present case also, it is clear that the amendment of Section 238-A would not serve its object unless it is construed as being retrospective, as otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation.
>
> *27*. We may also refer to a recent decision of this Court in *SBI* v. *V. Ramakrishnan*[21], where this Court, after referring to the selfsame Insolvency Law Committee Report, held that the amendment made to Section 14 of the Code, in which the moratorium prescribed by Section 14 was held not to apply to guarantors, was held to be clarificatory, and therefore, retrospective in nature, the object being that an overbroad interpretation of Section 14 ought to be set at rest by clarifying that this was never the intention of Section 14 from the very inception."

93. As discussed hereinabove, one of the principal objects of the I&B Code is providing for revival of the corporate debtor and to make it a going concern. The I&B Code is a complete Code in itself. Upon admission of petition under Section 7 there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on-going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable.

22 (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528
21 (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458

94. We have no hesitation to say that the words "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature noticing that on account of obvious omission certain tax authorities were not abiding by the mandate of the I&B Code and continuing with the proceedings, has brought out the 2019 Amendment so as to cure the said mischief. We therefore hold that the 2019 Amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

95. There is another reason which persuades us to take the said view. Clause (10) of Section 3 of the I&B Code defines "creditor" thus:

> "**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;"

96. Clauses (20) and (21) of Section 5 of the I&B Code define "operational creditor" and "operational debt" respectively as such:

> "**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;
>
> **(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;"

97. "Creditor" therefore has been defined to mean "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". "Operational creditor" has been defined to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. "Operational debt" has been defined to mean 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.

98. It is a cardinal principle of law that a statute has to be read as a whole. Harmonious construction of clause (10) of Section 3 of the I&B Code read with clauses (20) and (21) of Section 5 thereof would reveal that even a claim in respect 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 would come within the ambit of "operational debt". The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of "operational creditor" as defined under clause (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of "creditor" as defined under clause (10) of Section 3 of the I&B Code. As such, even without the 2019 Amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term

"creditor" and in any case, by the term "other stakeholders" as provided in sub-section (1) of Section 31 of the I&B Code.

99. The Division Bench of the Rajasthan High Court in *Ultra Tech Nathdwara Cement Ltd.* v. *Union of India*[65], by judgment and order dated 7-4-2020 has taken a view that the demand notices issued by the Central Goods and Service Tax Department, for a period prior to the date on which NCLT has granted its approval to the resolution plan, are not permissible in law. While doing so, the Rajasthan High Court has relied on the judgment of this Court in *Essar Steel (India) Ltd. (CoC)*[11].

100. The Calcutta High Court in *Akshay Jhunjhunwala* v. *Union of India*[66] has also taken a view that the claim of operational creditor will also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute. We are in agreement with the views taken by these courts.

101. Therefore, in our considered view, the aforesaid provisions leave no manner of doubt to hold that the 2019 Amendment is declaratory and clarificatory in nature. We also hold that even if the 2019 Amendment was not effected, still in light of the view taken by us, the Central Government, any State Government or any local authority would be bound by the resolution plan, once it is approved by the adjudicating authority (i.e. NCLT).

Conclusion

102. In the result, we answer the questions framed by us as under:

102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

102.2. The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.

102.3. Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued.

103. In the light of what has been held by us hereinabove, we now proceed to decide individual matters.

65 2020 SCC OnLine Raj 1097
11 *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
66 2018 SCC OnLine Cal 142

Civil Appeal No. 8129 of 2019

104. In the said appeal, admittedly, the company petition filed by SBI under Section 7 of the I&B Code in respect of OMML/corporate debtor came to be admitted on 3-8-2017. Correspondingly, the order of moratorium and appointment of IRP also came to be passed on the said date. By a public notice, RP invited claims from the creditors. The last date for submission of such claims was 18-8-2017. RP also invited EoI as well as resolution plans. In response to the said invitation, both GMSPL and EARC had submitted their resolution plans. In the 8th meeting of CoC held on 14-3-2018, the resolution plan submitted by EARC was found to be most competitive and as such, it was declared as H1 bidder. However, during negotiation, the resolution plan of EARC was not found to be satisfactory by CoC and as such, in the 9th meeting of CoC held on 31-3-2018, resolution plan of EARC came to be rejected.

105. Thereafter, since GMSPL was H2 bidder, negotiations were held with it. However, the resolution plan submitted by GMSPL was also not found to be satisfactory and therefore in the 10th meeting of CoC held on 3-4-2018, it was decided to annul the existing proceedings and initiate a fresh process for invitation for submission of resolution plan. This was restricted only to such entities, which had submitted their EoI for submission of resolution plan. In response to the fresh invitation for submission of resolution plan, three bidders, namely, GMSPL, EARC and SIFL submitted their resolution plans.

106. In the 11th meeting of CoC held on 13-4-2018, the resolution plan submitted by GMSPL was found to be most competitive and as such, CoC declared it as H1 bidder. After holding several rounds of negotiations, in the 12th meeting of CoC held on 21-4-2018, CoC unanimously decided to convene a meeting of the CoC on 25-4-2018 for voting on the resolution plan proposed by GMSPL. In the meeting of the CoC held on 25-4-2018, CoC being satisfied that the resolution plan submitted by GMSPL meets all the requirements under sub-section (2) of Section 30 of the I&B Code, placed the same for voting. The said resolution plan of GMSPL was approved by more than 89.23% of voting share of financial creditors of the corporate debtor. Accordingly, an application being CA (IB) No. 402/KB/2018 came to be filed by RP for grant of approval to the resolution plan submitted by GMSPL before the NCLT. EARC filed an application being CA (IB) No. 398/KB/2018, challenging the approval granted by CoC to the resolution plan submitted by GMSPL. It also filed CA (IB) No. 470/KB/2018, challenging the decision of RP in not admitting its claim. One application being CA (IB) No. 509/KB/2018 came to be filed by the District Mining Officer, Department of Mining and Geology, Jharkhand challenging the non-admission of its claim to the tune of Rs 93,51,91,724 and Rs 760.51 crores.

107. By common order dated 22-6-2018[2], the application being CA (IB) No. 402/KB/2018 filed by RP, came to be allowed thereby, granting approval under the provisions of Section 31(1) of the I&B Code and declaring that

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the same will be binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Application being CA (IB) No. 398/KB/2018 filed by EARC challenging the approval granted by CoC to the resolution plan submitted by GMSPL was dismissed. Vide same order dated 22-6-2018[2], application being CA (IB) No. 470/KB/2018 filed by EARC challenging the decision of the RP in not admitting its claim and application being CA (IB) No. 509/KB/2018 filed by the District Mining Officer, Department of Mining and Geology, Jharkhand challenging the non-admission of its claim were also dismissed with costs of Rs 1,00,000 each.

108. While allowing the application filed by RP, granting approval to the resolution plan of GMSPL (i.e. CA No. 402/KB/2018) and rejecting the application of EARC challenging the grant of approval to the resolution plan of GMSPL by CoC (i.e. CA No. 398/KB/2018), NCLT found that RP had followed the entire procedure as required under the I&B Code and the Regulations. It also found that CoC after applying its mind found that the resolution plan submitted by GMSPL was in conformity with the requirements under Section 30(2) of the I&B Code.

109. Insofar as the application filed by EARC with regard to non-admission of its claim submitted to RP is concerned, NCLT found that the corporate debtor had executed guarantee securing loan received by APNRL which had been given by India Infrastructure Finance Company Ltd. ("IIFCL" for short). The corporate guarantee executed by the corporate debtor was in favour of IIFCL. The corporate debtor also owned share in APNRL which was pledged with IIFCL to secure the loan given by IIFCL to APNRL. IIFCL assigned its rights to EARC. EARC being the assignee of the aforesaid submitted its claims to the RP.

110. NCLT found that by email dated 6-1-2018 EARC had submitted its claim in Form 'C' for an amount of Rs 648,89,62,395. In response to the said email, RP sought a clarification as to whether the corporate guarantee had been invoked by the applicant. RP had not received any response till 21-2-2018 from EARC. Despite repeated requests made by RP, EARC did not respond to the query made by RP. From the record placed before NCLT, it was clear that EARC had not invoked the corporate guarantee. NCLT therefore posed a question to itself, as to whether an uninvoked corporate guarantee could be considered as matured claim of the applicant. NCLT found that once the moratorium was applied under Section 14 of the I&B Code, EARC was prevented from invoking the corporate guarantee. NCLT further found that the OMML's guarantee had not been invoked by EARC till the date of completion of CIRP process and once the moratorium was imposed, it could not invoke the corporate guarantee. NCLT therefore found that there is no illegality or irregularity in not admitting the claim of EARC.

111. NCLT found that the entire information was uploaded in the virtual data room to which EARC had access since it was also one of the resolution applicants. NCLT found that the information with regard to claim of all

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financial creditors inclusive of EARC's claim was available in the virtual data room. The record also revealed that the claim of EARC was not admitted for the reason that the corporate guarantee in question was uninvoked as on date.

112. Insofar as the second objection of EARC with regard to the shares owned by the corporate debtor in APNRL, which were pledged with IIFCL to secure the loan given by IIFCL to APNRL and which were assigned to EARC being invoked on 30-4-2018 is concerned, NCLT found the same claim also to be without merit. NCLT found that on 30-4-2018, the moratorium was in force and therefore invocation of pledge by EARC on 30-4-2018 was not permissible in law. It was further found that RP had rightly not admitted the said claim.

113. It was sought to be argued on behalf of EARC that CIRP process was complete on 29-4-2018 and therefore, invocation of pledge by EARC on 30-4-2018 was legal and valid. However, NCLT found that unless the application filed by RP under Section 31(1) for approval of the plan was decided and an order either approving or rejecting the resolution plan was passed, the moratorium declared under Section 14 would continue to have force. As such, invocation of pledge on 30-4-2018 was held to be not permissible in law.

114. It would be relevant to refer to the observations made by NCLT with regard to conduct of EARC: (*Orissa Manganese & Minerals case*[2], SCC OnLine NCLT para 57)

> "*57.* It appears to us that it is a deliberate attempt to stage manage an objection against the approval of a resolution plan other than the plan submitted by the resolution applicant. We also found that CA No. 398 of 2018 filed for rejection of the resolution plan is liable to be dismissed since the very same applicant not at all succeeds in proving its contention and that the applicant approaches the Bench without any clean hand. Instances of challenging resolution plan by unsuccessful resolution applicant is at the increase. Filing like petition is also one among the reason for the delay in approving the resolution plan passed by the CoC in compliance with the provisions of the Code. This is a unique case in which the applicant herein filed the application without any valid grounds. Dismissing like petition without cost may encourage the applicant like the applicant to file like petition. It would also amount to allowing the applicant to abuse the process of the Tribunal as well as deliberately delaying the completion of CIRP process. Accordingly, we hold that this application is liable to be dismissed with costs of Rs 1,00,000. Awarding costs of Rs 1,00,000 in the peculiar nature and circumstances of the case in hand is found reasonable."

115. Insofar as application being CA No. 509/KB/2018 filed by the District Mining Officer is concerned, NCLT found that RP had sought clarification from the said applicant with regard to its claim made in Form 'B' since the information supplied therein was found to be inadequate. It was found that in spite of the said request, the District Mining Officer had failed to place on

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record any supportive document or affidavit as required under the Regulations. NCLT found no merit in the contentions raised on behalf of the District Mining Officer with regard to the claim on the basis of Section 25 of the Mines and Minerals (Development and Regulation) Amendment Act, 1972. It was found that in view of the provisions of Section 238 of the I&B Code, the provisions of the I&B Code have an overriding effect over any other law.

116. It was therefore found that no error was committed by RP in not admitting the claim of the District Mining Officer since it was not supported by any document or affidavit. NCLT therefore rejected the said application with costs of Rs 1,00,000.

117. The order dated 22-6-2018[2] passed by NCLT was challenged by way of four appeals before NCLAT; two appeals being Company Appeals (AT) (Insolvency) Nos. 437 and 444 of 2018 filed by EARC; one appeal being Company Appeal (AT) (Insolvency) No. 438 of 2018 filed by one Deepak Singh and one appeal being Company Appeal (AT) (Insolvency) No. 500 of 2018 filed by Sundargarh Mines & Transport Workers' Union.

118. Vide the impugned judgment and order dated 23-4-2019[3], NCLAT found that as no ground was made out in terms of Section 61(3) of the I&B Code, no relief could be granted in the appeals. However, while doing so, NCLAT observed thus: (*Orissa Manganese and Minerals case*[3], SCC OnLine NCLAT paras 28, 42-43 & 51-52)

> "*28*. However, we make it clear that the rejection of the claim for the purpose of collating the claim and making it part of the "resolution plan" will not affect the right of the appellant "Edelweiss Asset Reconstruction Ltd." to invoke the bank guarantee against the "corporate debtor" in case the "principal borrower" failed to pay the debt amount, the "Moratorium" period having come to an end.
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> * * *
>
> *42*. From the aforesaid provisions, it is clear that after period of Moratorium it is open to the person to move before a civil court or to move an application before the court of competent jurisdiction against the "corporate debtor".
>
> *43*. In the present case, since it is not possible either for the adjudicating authority or for this Appellate Tribunal to give any specific finding, we are of the view that the appellant may move before the civil court or court of competent jurisdiction and may file an application before the Labour Court for appropriate relief in favour of the workmen concerned or against the "corporate debtor" if they have actually worked and have not been taken care in the "resolution plan" due to lack of knowledge and non-filing of the claim within time.
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> * * *

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3 *Edelweiss Asset Reconstruction Co. Ltd.* v. *Orissa Manganese & Minerals Ltd.*, 2019 SCC OnLine NCLAT 764

51. In the present case, as no ground has been made out in terms of sub-section (3) of Section 61 of the "I&B Code" and the decision of the "resolution professional" was not challenged by the appellant, no relief can be granted. However, this order will not come in the way of the appellant to move before appropriate forum for appropriate relief if the claim is not barred by limitation.

52. Insofar dues of the State of Jharkhand are concerned, we hold that the statutory dues shall be payable to the State of Jharkhand in terms of existing law which comes within the meaning of "operational debt" as defined in Section 5(20) read with Section 5(21) and held in *CIT* v. *Spartek Ceramics (India) Ltd.*[67] Except the aforesaid observations, in absence of any appeal filed by the State of Jharkhand, no order is passed."

119. We find that the aforesaid observations are beyond the scope of the powers available with NCLAT under sub-section (3) of Section 61 of the I&B Code. We also find that the said observations run totally contrary to the consistent view taken by this Court in the line of judgments starting from *K. Sashidhar*[16] to *Kalpraj Dharamshi*[19].

120. NCLAT has categorically found that no ground as is available under sub-section (3) of Section 61 of the I&B Code has been made out and has also categorically found that the resolution plan submitted by GMSPL was a better offer than the other two resolution applicants, including EARC and that the adjudicating authority has rightly approved the resolution plan of GMSPL. After coming to such finding, the only option available with NCLAT was to dismiss the appeals. In our view, the observations made in the aforesaid paragraphs, if permitted to remain, would totally frustrate the object of the I&B Code of revival of a corporate debtor and to resurrect it as a going concern. As held by this Court, the successful resolution applicant cannot be flung with surprise claims which are not part of the resolution plan.

121. It will also be relevant to refer to the conduct of EARC. Clause 2.1.3 of the resolution plan submitted by EARC reads as under:

"**2.1.3.** ***Financial creditors other than identified financial creditors***

(*i*) *Liabilities*

We have been informed by the RP that other than the identified financial creditors, there are no other financial creditors of the Company, whether secured or unsecured.

Other than the assigned debt, any and all dues to, liabilities or obligations payable to, claims, counterclaims, demands, actions or penalties made or imposed by (including but not limited to all interests, damages, losses, expenses and third-party claims), and any right, title,

67 2018 SCC OnLine NCLAT 289

16 *K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222

19 *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.*, (2021) 10 SCC 401 : 2021 SCC OnLine SC 204

interest enjoyed by, any actual or potential financial creditor or in connection with any financial debt, whether, or not claimed, whether or not filed, whether or not crystallised, whether or not accrued, whether or not admitted, whether or not notional, whether or not known, whether due or contingent, whether or not disputed, present or future, whether or not being adjudicated in any proceeding, whether or not decreed, whether or not reflected in the financial statements of the Company, or whether or not reflected in any record, document, statement, statutory or otherwise, arising prior to or after the effective date, but pertaining to a period prior to the effective date, or arising in connection with the assignment or acquisition of shares of the Company by the investors or conversion of the conversion debt into equity or restructuring of the assigned debt or in any other manner as a result of or in connection with this plan, shall be deemed to have been irrevocably waived and permanently extinguished and written off in full with effect from the effective date.

To give effect to such waiver and extinguishment, any contract, agreement, deed or document; whether oral or written, express or implied, statutory or otherwise, pursuant to which any such dues, liabilities, obligations, claims, counterclaims, demands, actions, penalties, right, title or interest is claimed (other than as specifically mentioned herein) shall stand modified with effect from the effective date without any further act or deed, and approval of this plan by NCLT shall be deemed to be sufficient notice which may be required to be given to any person for such matter and no further notice shall be required to be given."

122. It will also be relevant to refer to similar provisions made in the resolution plan submitted by GMSPL, which read as under:

"*7*. Withdrawal of litigations initiated by the financial creditors against OMML, issue no-dues certificate(s) in favour of OMML and release their respective charges on the securities in full and complete satisfaction of all debts owed to the financial creditors by OMML/the respective SPVs as the case may be, including all guarantees which may have been provided to the financial creditors, for credit facilities availed by OMML.

8. Extinguishment and waiver of all dues to the incumbent promoter group by OMML.

9. Directions to ensure that the proposed merger application shall stand withdrawn. Relinquishment of corporate guarantee issued by OMML in favour of or on behalf of any of its subsidiaries, associates, group companies or any third party. Directions to the effect that the guarantees provided by any and all members of incumbent promoter group or their respective promoters or any person associated with the incumbent promoter group, may continue with the financial creditors. However, the same shall not result in any liability towards OMML or the resolution applicants."

123. It is thus clear that according to the resolution plan submitted by EARC itself, had it been a successful applicant, then in that event, the claims

made by it would have been irrevocably waived and permanently extinguished and written off in full with effect from the effective date. Had the resolution plan of EARC been approved, then all such debts would have stood extinguished without any further act or deed and approval of the said plan by NCLT would have been a sufficient notice required to be given to any person for such matter. Undisputedly, the resolution plan submitted by EARC was on the basis of the information memorandum submitted by RP wherein, it was specifically clarified that the claims of EARC were not admitted by RP. It is thus clear that EARC is trying to blow hot and cold at the same time. According to it, had its resolution plan been approved by CoC and NCLT, then the claims, which are now insisted by EARC would have stood extinguished. However, on its failure to become a successful resolution applicant and approval of other applicant as a successful resolution applicant, its claim would survive. A party cannot be permitted to apply two different yardsticks.

124. Shri Bhushan, learned counsel appearing on behalf of EARC, strongly relying on the judgment of NCLAT dated 14-8-2018 passed in *Export Import Bank of India* v. *JEKPL (P) Ltd. Resolution Professional*[68], submits that NCLAT itself in the said case had held that invocation of corporate guarantee has no nexus with filing of the claim pursuant to public announcement made under Section 13(1)(*b*) read with Section 15(1)(*c*) of the I&B Code and also for collating the claim under Section 18(1)(*b*) or for updating claim under Section 25(2)(*e*). He submits that civil appeal challenging the said judgment and order has been dismissed by this Court vide order dated 23-1-2019[69].

125. He submits that NCLAT itself in the said *Export Import Bank of India case*[68] had directed EXIM Bank and Axis Bank to be treated as "financial creditors" and had further directed them to be given representation on CoC. He submits that, however, in the present case, NCLAT has taken a contrary view. He therefore submits that in the alternative this Court should direct RP/CoC to treat EARC as a "financial creditor" and give it representation on CoC and take a decision in accordance with law.

126. We find that the said case, on facts, would not be applicable to the case at hand. No doubt that the appeal filed against the judgment and order of NCLAT dated 14-8-2018[68] has been dismissed by this Court on 23-1-2019[69]. However, it is a settled law that dismissal of a special leave petition/appeal does not amount to affirmation of the view taken in the judgment impugned in the special leave petition/appeal. It will also be relevant to refer to the order passed by this Court dated 23-1-2019[69] while dismissing the appeal, which reads thus: (*Atyant Capital India Fund I case*[69], SCC OnLine SC paras 3-5)

> "*Civil Appeal No. 10134 of 2018*
>
> *3*. We have heard the learned counsel for the parties and perused the relevant material on record.
>
> *4*. The civil appeal is dismissed.

68 2018 SCC OnLine NCLAT 465

69 *Atyant Capital (India) Fund I* v. *JEKPL (P) Ltd. Resolution Professional*, 2019 SCC OnLine SC 2005

5. It will be open for the appellant to urge all points as may be available to it in law before the appropriate forum, if so advised."

It will thus be clearly seen that this Court in *Atyant Capital India Fund I case*[69] while dismissing the appeal has reserved the liberty to the appellant to urge all points as may be available to it in law before the appropriate forum.

127. It is to be noted that in the appeal before NCLAT, EXIM Bank as well as Axis Bank had taken steps immediately after the claim of the said Banks on the basis of corporate guarantee came to be rejected by RP/CoC. After rejection of the claim, the said Banks had filed an application under Section 60(5) before NCLT. On NCLT rejecting the said claim, those Banks had approached NCLAT in appeals which were allowed and the order, as stated hereinabove, was passed.

128. In the present case the claim of EARC was rejected on 22-1-2018. Instead of challenging the said rejection, EARC participated in the proceedings and was one of the resolution applicants. Not only that, in the first round, it was a successful bidder being ranked H1 bidder. However, since in the negotiations it failed to satisfy CoC, fresh bids were invited from the resolution applicants, which had submitted their EoI. In the 12th meeting of CoC held on 25-4-2018, the resolution plan of GMSPL was approved by 89.23% of the voting shares. Only thereafter EARC filed two applications; one challenging the approval of resolution plan of GMSPL by CoC and another challenging rejection of its claims by RP/CoC.

129. It could thus be clearly seen that EARC was taking chances. After rejection of its claim, it did not choose to challenge the same by an application under Section 60(5) but waited till the decision of CoC. During this period, it was actually pursuing its resolution plan. Only after its resolution plan was not approved and the resolution plan of GMSPL was approved, it filed the aforesaid two applications. Apart from that, as already observed hereinabove, in the resolution plan of EARC itself, it has provided for extinguishment of all claims not forming part of resolution plan.

130. Even otherwise, if for the sake of argument, it is held that EARC was entitled to be treated as a "financial creditor" and entitled for a participation in CoC, still its share was about 9% and as such, the resolution plan of GMSPL would have been passed by a majority of 80%, which is much above the statutory requirement.

131. We are therefore of the considered view that the observation made by NCLAT giving liberty to EARC to take recourse to such proceedings as available in law for raising its claims is totally unsustainable.

132. Insofar as the observation made with regard to claim of the Jharkhand Government is concerned, it is to be noted that the State of Jharkhand has not even appealed against the order passed by NCLT. Insofar as the claims of labour and workmen are concerned, RP has specifically stated before NCLAT, that whatever claims were received from the workmen were duly considered in the resolution plan. Despite that, observing that a liberty is available to the

69 *Atyant Capital (India) Fund I* v. *JEKPL (P) Ltd. Resolution Professional*, 2019 SCC OnLine SC 2005

workmen to raise their claims before a civil court or Labour Court, in our view, is totally in conflict with the provisions of the I&B Code. The same would equally apply to the observation made in the appeal of Mr Deepak Singh claiming to be "operational creditor".

133. We are therefore of the considered view that the appeal deserves to be allowed by expunging SCC OnLine NCLAT paras 28, 42, 43, 51 and 52 from the judgment of NCLAT dated 23-4-2019[3]. It is ordered accordingly. The judgment and order passed by NCLT dated 22-6-2018[2] is upheld. No costs.

Civil appeal arising out of Special Leave Petition (Civil) No. 11232 of 2020

134. The present appeal arises out of the judgment and order passed by the Division Bench of the Allahabad High Court dated 6-7-2020[9] thereby, dismissing the petition filed by the appellant on the ground of availability of alternate remedy. The petition being Civil Miscellaneous Writ Petition (Tax) No. 354 of 2020 came to be filed seeking the following reliefs:

> "(*i*) Issue a writ, order or direction in the nature of certiorari quashing the order dated 30-1-2020 passed by the Additional Commissioner Grade 2 (Appeal) rejecting the appeal preferred by the petitioner in respect of Assessment Year 2015-16 (U.P. VAT) and affirming a demand of Rs 232.60 lakhs raised on the petitioner;
>
> (*ii*) Issue a writ, order or direction in the nature of certiorari quashing the communications/orders of the Joint Commissioner (Corporate), Ghaziabad holding that the proceedings in the State of U.P. would remain unaffected irrespective of the resolution plan of the petitioner being approved by the NCLT under the Insolvency and Bankruptcy Code as the NCLT order does not specifically prohibit these proceedings;
>
> (*iii*) Issue a writ, order or direction in the nature of mandamus directing refund of the amount which the petitioner is entitled to as a result of orders passed by the respondents;
>
> (*iv*) Issue a declaration that all proceedings pending before different authorities (assessing authority, first appellate authority or Commercial Tax Tribunal, Ghaziabad Bench) in respect of transactions entered into by the petitioner prior to the transfer date involving a consolidated amount of Rs 769.73 lakhs stand abated in terms of the resolution plan approved by the NCLT under the Insolvency and Bankruptcy Code, 2016;
>
> (*v*) Issue a writ, order or direction in the nature of mandamus directing the respondents to refund Rs 248.92 lakhs deposited by the petitioner under protest in these proceedings and also to return the bank guarantee submitted for Rs 16.31 lakhs.

3 *Edelweiss Asset Reconstruction Co. Ltd.* v. *Orissa Manganese & Minerals Ltd.*, 2019 SCC OnLine NCLAT 764

2 *SBI* v. *Orissa Manganese & Minerals Ltd.*, 2018 SCC OnLine NCLT 20888

9 *Ultra Tech Nathdwara Cement Ltd.* v. *State of U.P.*, 2020 SCC OnLine All 1724

(*vi*) Issue a writ, order or direction in the nature of mandamus restraining the respondents from passing any orders including penalty orders, raising any further demands, imposing any liability or taking any coercive steps including continuing with pending assessments/ proceedings/litigation/appeals/revisions in respect of period prior to transfer date."

135. The High Court found that the appellant has an alternative efficacious remedy of filing the second appeal and as such, deemed it fit to not to entertain the said petition. The basic grievance of the appellant in the writ petition was that after the resolution application was approved by the adjudicating authority and the management of the corporate debtor was transferred to the resolution applicant, all the claims stood extinguished and the proceedings in respect thereof could not continue.

136. The main ground raised on behalf of the respondent is with regard to availability of alternate remedy. The second ground raised is, since the transfer date is prior to the 2019 Amendment to Section 31 of the I&B Code, the said amendment would not be applicable to the debts owed to the State Government or the Central Government.

137. As held by this Court in a catena of cases including in *Baburam Prakash Chandra Maheshwari* v. *Antarim Zila Parishad, Muzaffarnagar*[70], *Whirlpool Corpn.* v. *Registrar of Trade Marks*[71], *Nivedita Sharma* v. *COAI*[72], *Embassy Property Developments (P) Ltd.* v. *State of Karnataka*[73] and recently in *Kalpraj Dharamshi*[19], that non-exercise of jurisdiction under Article 226 is a rule of self-restraint. It has been consistently held that the alternate remedy would not operate as a bar in at least three contingencies, namely,

(*1*) where the writ petition has been filed for the enforcement of any of the fundamental rights;

(*2*) where there has been a violation of the principle of natural justice; and

(*3*) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

138. In the foregoing paragraphs, we have held that the 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will have a retrospective operation. As such, when the resolution plan is approved by NCLT, the claims, which are not part of the resolution plan, shall stand extinguished and the proceedings related thereto shall stand terminated. Since the subject-matter of the petition are the proceedings, which relate to the claims of the respondents prior to the approval of the plan, in the light of the

70 (1969) 1 SCR 518 : AIR 1969 SC 556
71 (1998) 8 SCC 1
72 (2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947
73 (2020) 13 SCC 308
19 *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.*, (2021) 10 SCC 401 : 2021 SCC OnLine SC 204

view taken by us, the same cannot be continued. Equally the claims, which are not part of the resolution plan, shall stand extinguished.

139. In this view of the matter, we find that relegating the appellant to the alternative remedy would serve no purpose. A party cannot be made to run from one forum to another forum in respect of the proceedings and the claims which are not permissible in law.

140. The appeal therefore is allowed. The impugned judgment and order dated 6-7-2020[9] passed by the Allahabad High Court is quashed and set aside. We hold and declare that the respondents are not entitled to recover any claims or claim any debts owed to them from the corporate debtor accruing prior to the transfer date. Needless to state that the consequences thereof shall follow.

Writ Petition (Civil) No. 1177 of 2020

141. For the reasons stated, IA for change of name of Petitioner 1 is allowed. Cause-title be amended accordingly.

142. The present writ petition has been filed by the petitioners under Article 32 of the Constitution. In this case also, the resolution plan in respect of the corporate debtor (petitioner Company) has been approved by the adjudicating authority on 24-7-2018. Pursuant thereto, the management of the corporate debtor (petitioner Company) was transferred to the successful resolution applicant i.e. Aion-JSW.

143. After the completion of CIRP on 5-1-2019, Respondent 2 issued a reminder to the petitioner to pay an amount of Rs 4,49,34,917.00 towards the service tax deposited by it towards royalty, DMF and NMET for the period between 1-4-2016 and 30-6-2017. The petitioner replied to the said notice pointing out to the authorities the provisions of the I&B Code and stating therein that the demands made by the respondent were not permissible in view of the I&B Code. The petitioners had also requested for refund of an amount of Rs 5,25,15,880 deposited as advance against supply of iron ore.

144. In this background, the petitioners have approached this Court challenging the demand notice dated 20-7-2018 and 28-4-2020.

145. The present case would also be covered by the view taken by us hereinabove.

146. It is further to be noted that the Income Tax Authorities had approached this Court with respect to income tax dues concerning the present petitioner by way of Special Leave Petition (Civil) No. 6483 of 2018. This Court passed the following order in the said special leave petition on 10-8-2018[29]: (*Monnet Ispat & Energy Ltd. case*[29], SCC pp. 786-87, paras 1-3)

> "*1*. Heard. Delay, if any, is condoned.
>
> *2*. Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income Tax Act. We may also refer

9 *Ultra Tech Nathdwara Cement Ltd.* v. *State of U.P.*, 2020 SCC OnLine All 1724
29 *CIT* v. *Monnet Ispat & Energy Ltd.*, (2018) 18 SCC 786 : (2019) 3 SCC (Civ) 252

in this connection to *Dena Bank* v. *Bhikhabhai Prabhudas Parekh & Co.*[74] and its progeny, making it clear that income tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.

3. We are of the view that the High Court[75] of Delhi, is, therefore, correct in law. Accordingly, the special leave petitions are dismissed. Pending applications, if any, stand disposed of."

147. In ordinary course, we would not have entertained such a petition directly under Article 32 of the Constitution. However, a question of law, which arises for consideration in the present petition has been considered by us in this batch of matters. In that view of the matter, we find that it would not be in the interest of justice to non-suit the present petitioner when we have specifically decided question of law which would govern the present case also. As such, the present petition is allowed.

148. We hold and declare that the respondents are not entitled to recover any claims or claim any debts owed to them from the corporate debtor accruing prior to the transfer date. Needless to state that the consequences thereof shall follow.

Civil appeals arising out of Special Leave Petitions (Civil) Nos. 7147-50 of 2020

149. For the reasons stated, interlocutory application for intervention on behalf of the applicant, TATA Steel BSL Ltd. is allowed.

150. In the present case, the appellant challenges the judgment and order passed by the Division Bench of the Jharkhand High Court dated 1-5-2020[15] vide which the petitions filed by the appellant challenging the action of the respondent authorities thereby seeking to recover the Jharkhand Value Added Tax (JVAT) for the period between 2011-2012 and 2012-2013 have been rejected. Both the learned Judges have written separate judgments.

151. In the judgment authored by H.C. Mishra, J, the petitions filed by the appellant were rejected on two grounds viz. one, that since the management of the appellant was taken over by M/s Vedanta Ltd. on 4-6-2018, it was only M/s Vedanta Ltd. which had locus to file writ petitions. Secondly, it was debatable whether the amount of JVAT shall be covered by the expressions "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" so as to bring it within the definition of "operational debt".

152. Insofar as the judgment authored by Deepak Roshan, J. is concerned, the learned Judge has observed that since the resolution plan was approved by NCLT on 17-4-2018[13], the 2019 Amendment to Section 31(1) of the I&B Code would not apply to the said plan. We find that the finding of the High Court that the dues owed to the State Government and the Central Government would not come within the definition of "operational debt", is incorrect in law in the light

74 (2000) 5 SCC 694
75 *CIT* v. *Monnet Ispat & Energy Ltd.*, 2017 SCC OnLine Del 12759
15 *Electrosteel Steels Ltd.* v. *State of Jharkhand*, 2020 SCC OnLine Jhar 454
13 *SBI* v. *Electrosteel Steels Ltd.*, 2018 SCC OnLine NCLT 14651

of the view that is taken by us. So also the finding that since the order of NCLT is prior to the date on which Section 31(1) of the I&B Code was amended, the provisions of Section 31 would not be applicable, also cannot stand in view of the foregoing observations made by us hereinabove.

153. We also find that the High Court has erred in holding that the appellant Company does not have locus to file the writ petitions inasmuch as the management has been taken over by M/s Vedanta Ltd. The resolution plan is in respect of the corporate debtor and the successful resolution applicant only takes over the management of the corporate debtor in accordance with the resolution plan. The resolution applicant steps into the shoes of the corporate debtor. As such, the finding in this respect would also not be sustainable in law.

154. Shri Guru Krishna Kumar, learned Senior Counsel, strenuously argued that RP/CoC had acted in a fraudulent manner. It is submitted that though a notice inviting claim was required to be published in local newspapers where the registered office of the corporate debtor was situated, the notice was published in the newspaper of Kolkata edition. As per Regulation 6(2)(*b*) of the 2016 Regulations, the said notice is required to be published in one English and one regional language newspaper with wide circulation at the location of the registered office and corporate office of the corporate debtor. Perusal of the record would reveal that the notice was published in *Business Standard* and *Ananda Bazar Patrika* newspapers of Kolkata edition which have wide circulation in Ranchi. The corporate office of the corporate debtor is at Kolkata whereas its registered office is at Ranchi. In any case, it is to be noticed that the Forest Department of the State Government had filed intervention application before NCLT as well as NCLAT. When one of the wings of the State Government has approached NCLT and NCLAT, it is difficult to believe that other organ of the State was not aware about the said proceedings.

155. The contention of Shri Guru Krishna Kumar, learned Senior Counsel, that finding with regard to non-compliance of Section 13 is not challenged by Electrosteel Steels Ltd. is also incorrect inasmuch as Electrosteel Steels Ltd. has raised the specific ground in Grounds 'U' to 'AA' to that effect in the appeal memo.

156. In the result, the appeals deserve to be allowed. It is ordered accordingly. The impugned judgment and order of the Jharkhand High Court dated 1-5-2020[15] is quashed and set aside.

157. We hold and declare that the respondents are not entitled to recover any claims or claim any debts owed to them from the corporate debtor accruing prior to the transfer date. Needless to state that the consequences thereof shall follow.

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15 *Electrosteel Steels Ltd.* v. *State of Jharkhand*, 2020 SCC OnLine Jhar 454

2024 SCC OnLine Mad 4348 : (2024) 1 LW 668 : (2024) 3 CTC 724

In the High Court of Madras

(BEFORE N. ANAND VENKATESH, J.)

Crl.OP. No. 134 of 2024

Vasan Healthcare Pvt. Ltd., rep. by Mr. Vimal Chandrasekran … Petitioner/Accused.

Versus

Deputy Director of Income Tax (Investigation) … Respondent/Complainant.

Crl.O.P. Nos. 134, 137, 151, 152, 264 & 269 of 2024 and Crl MP Nos. 119, 121, 135, 136, 162 & 165 of 2024

Decided on January 9, 2024

Advocates who appeared in this case :

For Petitioner : Mr. G. Gautham Ram Vittal (in all the cases)

For Respondent : Ms. Sheela Special Public Prosecutor (Income Tax) (in all the cases)

Criminal Original Petition under Section 482 of the Criminal Procedure Code praying to call for the records in EOCC No. 182 of 2016 on the file of the learned Additional Chief Metropolitan Magistrate (E.O.II), Egmore, Chennai against the 1st Accused.

The Order of the Court was delivered by

N. ANAND VENKATESH, J.:— The issue that is involved in all these Criminal Original Petitions are common and therefore, on consent given by either side, the main petitions are taken up for hearing and disposed of through this common order.

2. The particulars of the proceedings that have been put to challenge in these petitions are tabulated hereunder:—

Sl. No.	**Quash petition before the Hon'ble High Court of Madras**	**Complaint pending before Hon'ble learned Additional Chief Metropolitan Magistrate (E.O.II) at Egmore**	**Complaint filed under Section 277 of the Income Tax Act, 1961 for undisclosed Income and Assessment year**
1.	Crl OP No. 264 of 2023	E.O.CC No. 179 of 2016	Assessment year 2010-2011 and

			undisclosed Income Rs. 1,60,07,054/-
2.	Crl OP No. 151 of 2023	E.O.CC No. 180 of 2016	Assessment year 2011-2012 and undisclosed Income Rs. 4,61,09,828/-
3.	Crl OP No. 137 of 2023	E.O.CC No. 181 of 2016	Assessment year 2012-2013 and undisclosed Income Rs. 11,85,47,810/-
4.	Crl OP No. 134 of 2023	E.O.CC No. 182 of 2016	Assessment year 2013-2014 and undisclosed Income Rs. 19,91,43,972.29/-
5.	Crl OP No. 269 of 2023	E.O.CC No. 183 of 2016	Assessment year 2014-2015 and undisclosed Income Rs. 28,48,39,948.70/-
6.	Crl OP No. 152 of 2024	E.O.CC No. 184 of 2016	Assessment year 2015-2016 and undisclosed Income Rs. 28,51,51,885.90/-

3. The Company and its erstwhile Directors were prosecuted by the Income Tax Department for offence under the Income Tax Act committed during various assessment years 2010-2011 till 2015 - 2016. The undisclosed income for these assessment years were also separately worked out and mentioned in the complaint. The company was arrayed as A1 and the Managing Director one Mr. A.M. Arun was arrayed as A2.

4. The case of the petitioner is that an application was filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for Brevity herein after called as IBC) by M/s. Alcon Laboratories, before the NCLT, Chennai Bench. This application was admitted and by an order dated 21.04.2017, the company was admitted into the Corporate Insolvency

Resolution Process (CIRP) and Interim Resolution Professional (IRP) was appointed. The IRP who took charge of the company proceeded further and ultimately, filed an application under Section 30 of the IBC on 03.03.2022 seeking for the approval of the resolution plan. The NCLT, Chennai, approved the resolution plan and IRP was appointed as the Chairman of the Monetary committee. He submitted the list of creditors including the name of the Income Tax Department, which was also shown as one of the Creditor. The Successful Resolution Applicant took over the Management of the A1 company on 01.04.2023.

5. Pursuant to the above, the NCLT passed an order on 03.02.2023 and the relevant portion in the order is extracted hereunder:—

33.	All the Civil and criminal litigations investigations, enquiries, proceedings, causes of action, claims, disputes or other judicial regulatory proceedings as against the Corporate Debtor or the affairs of the Corporate Debtor pending or threatened, present or future, in relation to any period on or before the closing date or an account of the Resolution Applicant being in control of the Corporate Debtor pursuant to this Resolution Plan shall stand extinguished.	Granted

6. The present quash petitions have been filed by the new Management on the ground that as per 32A of IBC, the liability of A1 company completely gets wiped off after the resolution plan is approved by the NCLT and therefore, the prosecution as against A1 company cannot be continued. A further stand has been taken to the effect that the criminal prosecution cannot be proceeded as against the new management which has taken over A1 company. Since the present petitions confine itself only to these two legal issues, the main petitions were taken up for hearing.

7. Heard Mr. G. Gautham Ram Vittal, learned counsel for the petitioner in all Criminal Original Petitions and Ms. Sheela, learned Special Public Prosecutor for Income Tax Department.

8. There is no dispute with regard to the fact that the criminal

complaint was initiated by the respondent against A1 company and the then Managing Director of the Company. The scope of Section 32A was discussed by the Apex Court in [*Ajay Kumar Radheshyam Goenka* v. *Tourism Finance Corporation of India Limited*] reported in 2023 SCC onLine SC 26. The relevant portion is extracted hereunder:—

> *Thus, Section 32A broadly leads to:*
>
> *a. Extinguishment of the criminal liability of the corporate debtor, if the control of the corporate debtor goes in the hands of the new management which is different from the original old management.*
>
> *b. The prosecution in relation to "every person who was a "designated partner" as defined in clause (j) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of Section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence" shall be proceeded and the law will take it's own course. Only the corporate debtor (with new management) as held in Para 42 of P. Mohanraj will be safeguarded.*
>
> *c. If the old management takes over the corporate debtor (for MSME Section 29A does not apply (see 240A), hence for MSME old management can takeover) the corporate debtor itself is also not safeguarded from prosecution under Section 138 or any other offences.*

9. In the above judgment, the Apex Court after dealing with the provision in detail, came to a categoric conclusion that insofar as the criminal prosecution is concerned, the criminal liability of the corporate debtor viz., company gets completely wiped off and the new management is allowed to take over the company on a clean slate. However, the Apex Court also made it clear that the persons who are involved in the day today affairs of the company and were incharge and responsible for running of the company, will be liable to face all the offence committed prior to the commencement of the Corporate Insolvency Resolution Process. There is no escape for those persons from criminal liability even though the corporate debtor is given a clean slate and is handed over to the new Management.

10. Useful reference can also be made to the judgment of the Calcutta High Court in [*Tantia Constructions Limited* v. *Krishna Hi-Tech Infrastructure P Ltd*] in CRP No. 172 of 2022. The relevant portions in the order are extracted hereunder:—

4. For the application of Section 32A of IBC, 2016 and in light of the present matter, it is pertinent to determine the following two issues, i.e.,

i. Whether the offence as complained in the impugned criminal proceedings has been alleged to be committed before the initiation of corporate insolvency resolution process or during such process?

ii. Whether the resolution plan has resulted in change in the management or corporate debtor in consonance with the provisions of Section 32A(1) of IBC, 2016?

5. With respect to Issue No. 1, it is pertinent to note that the corporate insolvency resolution process as against the Petitioner/Corporate Debtor was initiated on 13.03.2019 when the application was accepted and the Order of Moratorium under Section 14 of the IBC, 2016 was imposed by NCLT, Kolkata in the aforementioned case. The complaint that commenced the impugned criminal proceedings was filed on 22.07.2019 before the concerned court by the opposite party. Whereby, said alleged offence so complained, took place before or during the corporate insolvency resolution process and is covered under the ambit of Section 32A of IBC, 2016.

6. With respect to Issue No. 2, it is observed that the petitioner has not made specific submission in this regard. However, it is the submission of the opposite party that the impugned complaint case does not concern itself with the new directors that were appointed after takeover by the Resolution Applicant in line with the Resolution Plan so approved by NCLT dated 24.02.2022. It is their submission that they are primarily aggrieved by the actions of petitioner when it was in control of erstwhile Directors.

11. The above judgment clearly lays down the law on the subject. The moment the Corporate Insolvency Resolution Process is initiated against the corporate debtor and the application is accepted by the NCLT, the moratorium comes into operation. Once the resolution plan is accepted by the NCLT and orders are passed and the Corporate debtor gets into hands of the new management, all the past liabilities including the criminal liability of the Corporate debtor gets wiped off and the new Mangement takes over the company with clean slate.

12. In the instant case, the A1 company has now gone into the hands of the new management, pursuant to the order passed by the NCLT dated 03.02.2023. In view of the same, the new management takes over the A1 company as a clean slate and the criminal liability can no longer be mulcted as against A1 company. Therefore, the continuation of criminal proceedings as against A1 company can no longer subsist.

13. The company has been taken over by a new management and the criminal liability cannot be passed on to the new management. The Apex Court had an occasion to directly deal with this issue in a recent judgment reported in (2023) 4 Mad LJ (Cri) 497. Paragraph 30 in that judgment is extracted hereunder:—

> 30. It is, therefore, noticeable that the criminal liability of a company (a) is recognized where it can be attributable to individual acts of employees, directors or officials of a company or juristic persons (Tesco, Meridian Global Funds, Standard Chartered Bank, and Iridium) (b) recognized even if its conviction results in a term of imprisonment (Meridian, Iridium); (c) cannot be transferred ipso facto, except when it is in the nature of penalty proceeding (McLeod Russel) 16 (d) the legal effect of amalgamation of two companies is the destruction of the corporate existence of the transferor company (in this case, LVB); it ceases to exist. (e) that apart, only defined legal proceedings, are succeeded to by the transferee company, which, in this case, is the DBS Bank.

14. It is clear from the above that the criminal liability of a company cannot be transferred to another company or the new management *ipso facto*. Therefore, the new management apart from not taking over the criminal liability of the A1 company, cannot also be made to undergo criminal prosecution for the offence committed by the persons who were incharge of the company during the relevant point of time.

15. In the light of the above discussion, the continuation of the criminal prosecution as against A1 company has to be interfered by this Court. This Court has already recorded the fact that A2 has already died and therefore, the charge abates insofar as A2 is concerned. Accordingly, the proceedings as against A1 company in all these complaints stands quashed. It is left open to the respondent to identify the persons who were in-charge of running the company and were involved in the day today affairs of the company during the relevant point of time and it will be left open to the respondent to continue the criminal prosecution as against those officers. This is in view of the judgment of the Apex Court in *Ajay Kumar Radheshyam Goenka case* referred supra.

16. In the result, all these criminal Original petitions are allowed in the above terms. Consequently, the connected miscellaneous petitions are closed.

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2023 SCC OnLine NCLT 547

In the National Company Law Tribunal[†]

(BEFORE HARNAM SINGH THAKUR, MEMBER (JUDICIAL) AND SUBRATA KUMAR DASH, MEMBER (TECHNICAL))

Allahabad Bank … Petitioner-Financial Creditor;

Versus

Skyhigh Infraland Private Limited … Respondent-Corporate Debtor.

And

In the matter of

IA No. 924/2023

Skyhigh Infraland Private Limited … Applicant;

Versus

Monitoring Committee of Corporate Debtor and Another … Respondents.

IA No. 924/23 and CP (IB) No. 161/Chd/Hry/2018[‡]

Decided on August 28, 2023

Advocates who appeared in this case :

Mr. G.S. Sarin, PCS for the SRA;

Mr. Vaibhav Sahni, Advocate for the applicant in IA No. 924/2023;

Mr. Avtaar Singh for the Respondents.

The Judgment of the Court was delivered by

HARNAM SINGH THAKUR, MEMBER (JUDICIAL):— That the present application is filed by the Director appointed in M/s Skyhigh Infraland Private Limited in terms of the order dated 06.10.2021 passed by this Adjudicating Authority approving the Resolution Plan of M/s INR Constructions being the successful resolution applicant seeking directions against Registrar of Companies NCT of Delhi and Haryana.

2. It is submitted that Allahabad Bank, a financial creditor of the respondent Skyhigh Infraland Private Limited, (the corporate debtor) filed CP (IB) No. 161/Chd/Hry/2018 under Section 7 of the Code before this Adjudicating Authority seeking initiation of CIRP against the said corporate debtor. This Adjudicating Authority vide its order dated 29.10.2018 admitted the said CP to CIRP and declared a moratorium. Further, Mr. Jalesh Kumar Grover was appointed as the Interim Resolution Professional vide its order dated 02.11.2018 in the said CP (IB) No. 161/Chd/Hry/2018. Copy of the said order dated 29.10.2018 is annexed herewith as Annexure A-1 of the Application.

3. Thereafter, the RP published Form G on 16.01.2019 and since no Expression of Interest (EOI) and resolution plans were received within the last date, Form G was republished again on 05.03.2019. It is stated that in response to the second Form G, an Expression of Interest and one Resolution Plan was received. Thereafter, Form G was republished again on 10.06.2019 and 4 resolution plans were submitted within the said extended time.

4. In compliance of the order dated 08.11.2019 passed in CA 944/2019 by this Adjudicating Authority, RP placed the Resolution Plan of INR Constructions before the CoC members in the 13th CoC meeting and the same was put to vote before the Committee of Creditors, who approved the resolution plan of the INR Constructions with 100% voting rights and further the RP filed an application for approval of resolution plan before this Tribunal. 5. This Tribunal upon being satisfied with the resolution plan of the applicant, allowed the application for approval of the Resolution Plan vide order dated 06.10.2021. The relevant extract of the order dated 06.10.2021 is reproduced hereinunder:—

"Further, the resolution plan fulfills all the requirements of Regulation 38 and 39 of the CIRP Regulations. A perusal of Regulation 38 would clearly show that by virtue of the mandatory contents of the resolution plan as discussed in the preceding paragraphs in relation to Section 30 and Section 31 of the Code, the requirement of Regulation 38 also stands fulfilled. Even the requirement of Regulation 39 has been satisfied, as the RP has submitted that the resolution plan of the Resolution applicant, as approved by the Committee of Creditors, to this Tribunal along with the compliance certificate in Revised Form H, as per the requirements of Regulation 39(4) of the CIRP Regulations meets all the requirements of the Code and the CIRP Regulations and that the resolution plan has been duly approved by the Committee of Creditors.

In respect of the reliefs and concessions, as set forth in Schedule 2 of the resolution plan dated 11.11.2019 along with its Addendum dated 17.01.2020, it is not possible for us to issue any direction except to say that the resolution applicant may take appropriate steps in accordance with the law, in respect of the said reliefs and concessions. It is needless to say the public authorities/government authorities/any other party would duly consider the requests/applications of the resolution applicant in accordance with Jaw. We make it clear that we are not expressing any opinion on the claim concerning reliefs and concessions nor any part of this order shall be understood in that spirit. Moreover, these reliefs and

concessions/prayers are also not condition precedent for b *the acceptance of the resolution plan. It would not be any impediment for us to accept the resolution plan.*

In view of our finding that the resolution plan dated 11.11.2019 along with the addendum dated 17.01.2020, as approved by the COG satisfies all the requirements of the Code and Regulations made thereunder. We pass the following orders:—

a. *The Resolution Plan, as approved by the Committee of Creditors and submitted by INR Constructions (Successful Resolution Applicant) is approved and the same is binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any Local Authority to whom a debt is due 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 the other stakeholders involved in the Resolution Plan.*

b. *The Resolution Applicant is directed to obtain the approval of the Competition Commission of India within a period of one year of approval of)(this resolution plan by this Tribunal as stated under Section 31 (4) of the Code, as the plan does not provide for any combination, in terms of Section 5 of the Competition Act, 2002.*

c. *The moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect.*

d. *The RP shall forward all records relating to the CIRP and the resolution plan to IBBI to be recorded at its database in terms of Section 31(3}(b) of the Code.*

Accordingly, IA No. 1085/2019 is disposed of"

5. Copy of Resolution plan and order dated 06.10.2021 is annexed as Annexure A-2 of the application.

6. It is submitted that upon approval of the Resolution Plan by this Tribunal the successful resolution applicant on 06.12.2021 represented before the Registrar of Companies, Haryana for removal of the earlier Directors and the appointment of new Directors as envisaged under the resolution plan submitted by the applicant.

7. Further, the applicant on 06.12.2021 also filed Form No. DIR-12 with the Registrar of Companies for removal of the erstwhile management and also for the appointment of new management (Directors).

8. In terms of the approved resolution plan, the list of the directors appointed on the Board of Directors of M/s Skyhigh Infralnd Private Limited as reflected in the Master Data is annexed as Annexure A-10 of

the Application.

9. Furthermore, the present application is being moved by the applicant since the applicant is facing difficulty in making the statutory compliances with the office of Respondent No. 2 in as much as of filing Form No. INC-22 A. It is submitted that whenever the applicant tries to upload form INC-22 on the portal of the Ministry of Corporate Affairs the same is denied and the following error is shown "In case AR is not filed for the FY 2017-18, filing shall not be allowed for the companies which are not marked for management dispute."

10. It is stated that when the applicant approached the office of respondent No. 2, it was informed that the applicant must file annual previous returns and balance sheets failing which the Corporate Debtor would continue to remain in default of its statutory obligations.

11. The Resolution Plan as approved by this Tribunal is binding on one and all including respondent No. 2. It is submitted that the compliances that are being asked to be complied with pertain to the year prior to the approval of the resolution plan, meaning thereby the said compliances were to be carried out by the erstwhile management of Corporate Debtor.

12. The inability of statutory authority to accept the current financial statement and returns post approval of the resolution plan is only because of the reason that the returns prior to the approval of the plan are not filed with it.

13. The applicant further submits that as both the ex directors are absconding in nature from the date of initiation of CIRP and no record/information/data was available with the Resolution Professional of the Corporate Debtor except for the bank statement and data which were available in public domain However, now the Successful resolution Applicant on the basis of the data collated by the erstwhile RP of the Corporate Debtor wishes to comply all the pending compliances of the Corporate Debtor but heavy penalties are being imposed.

14. The applicant further submits that the default of the erstwhile management cannot be fastened upon the present applicant as the present applicant acquired the Corporate Debtor upon successful approval of the resolution plan vide this Tribunal vide order dated 06.10.2021.

15. The default committed by the erstwhile management is creating a hindrance for the applicant in filing the statutory returns post approval of the resolution plan by this Tribunal. It is further submitted that the Companies Act, 2013 provides for penalties in cases of non-compliance by the companies, which the applicant also fears will be fastened upon it as statutorily mandated by the Companies Act, 2013.

16. It is submitted that the NCLT Mumbai Bench in IA No. 1077 of

2020 is CP (IB) No. 1329/MB/2017 in the case titled *Kamla Industrial Park Limited* v. *Monitoring Committee of Corporate Debtor* has dealt with a similar situation and has allowed the application of a successful resolution applicant seeking reliefs similar to that of the present applicant. Further, the Bench has also issued directions in respect of the same to the Registrar of Companies, Maharashtra.

17. We have heard the learned counsel for the parties and have perused the available records carefully.

18. Reliance has been placed on the decision of the NCLT Mumbai Bench in IA No. 1077/2022 dated 19.05.2021, wherein after referring to the decision of the Hon'ble Apex Court in *Committee of Creditor of Essar Steel India Limited* v. *Satish Kumar Gupta*, 2019 SCC OnLine SC 1478, it was held that the management of the corporate debtor could not be held liable and responsible for malfeasance committed by the former promoters and directors of the corporate debtor. It further held that:

> *20. Though the present predicament faced by the Applicant is not in respect of any new claim, the principle and sentiment echoed by the Hon'ble Court can be applied to resolve the present imbroglio. Rules of procedure are but handmaidens of justice* (Mr. Shaik Salim Haji Abdul *v.* Mr. Kumar:
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> > *(2006) 1 SCC 46 : AIR 2006 SC 396. The Hon'ble Court in* Sardar Amarjit Singh Kalra *v.* Pramod Gupta: *(2003) 3 SCC 272 observed that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizens under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. In the same vein the Hon'ble Court in* N. Balaji *v.* Virender Singh: *(2004) 8 SCC 312 observed that the procedure would not be used to discourage the substantial effective justice but would be so construed as to advance the cause of justice. The Hon'ble Court in* Collector, Land Acquisition *v.* Mst. Katiji: *(1987) 2 SCC 107 : AIR 1987 SC 1353 ruled that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. The principle has also been echoed by the Hon'ble Supreme Court in* Laxmibai *v.* Bhagwantbuva *(Civil Appeal No. 2058 of 2003 decided on 29.01.2013).*
>
> *21. Taking the facts and circumstances of the case into consideration and the principles decided, it would accordingly be appropriate to pass the following orders. Hence ordered.*

ORDER

The Application be and the same is allowed on contest.

i. The present management of the Corporate Debtor shall be permitted to approve the Accounts and Returns of the Corporate Debtor for the period prior to 16.10.2019 in its next meeting. The Applicant shall file the relevant Returns and Statements for the period within three months hence. The action shall not invite any penalty whatsoever from Respondent No. 2.

ii. The Corporate Debtor is permitted to file Accounts and Returns subsequent to 16.10.2019, within a period of three months hence and the same shall be accepted without any penalty.

iii. It is made clear that the present management of the Corporate Debtor shall not in any manner be held accountable for the default committed by the Corporate Debtor or its promoters/directors prior to 16.10.2019.

iv. The RoC (Respondent No. 2) or the appropriate authority shall consider accepting Returns and Statements in physical form in case of incompatibility in online submission/e-filing.

v. The implementation of the Plan is extended till 31.03.2022. All concerned shall make all endeavors to facilitate the implementation of the Plan within the period.

19. Keeping in view the facts of the case and the aforementioned decision, we direct the ROC:

i. Not to hold the present management of the corporate debtor accountable for the default committed by the corporate debtor or its promoters/director prior to 29.10.2018;

ii. Allow the applicant to file the returns and the financial statements as required under the provisions of the Companies Act 2013 and other related acts;

iii. If the returns/statements by the new management of the corporate debtor cannot be accepted online through e-filing due to technological issues, the same be accepted in the physical mode;

iv. No penalty or interest arising out of the default committed by the erstwhile management prior to 29.10.2018 can be fastened to the present corporate debtor under the new management.

v. In the result, IA No. 924/23 is allowed and disposed of accordingly.

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† Chandigarh Bench

‡ Under Section 60(5) of IBC 2016

2021 SCC OnLine NCLT 249

In the National Company Law Tribunal[†]

(BEFORE MOHAMMED AJMAL, MEMBER (JUDICIAL) AND V. NALLASENAPATHY, MEMBER (TECHNICAL))

An Application under Rule 11 of the National Company Law Tribunal Rules, 2016

Kamla Industrial Park Limited … Applicant;

Versus

Monitoring Committee of Corporate Debtor Through Mr. Hemant J. Mehta and Another … Respondents.

And

C.P. (IB) No. 1329/MB/2017

State Bank of India … Financial Creditor;

Versus

Metallica Industries Limited … Corporate Debtor.

IA No. 1077 of 2020 and C.P. (IB) No. 1329/MB/2017

Decided on May 19, 2021

Advocates who appeared in this case:

Mr. Amir Arsiwala with Ms. Radhika Motiani, Advocates, for the Applicant;

None, for Respondent No. 1;

None, for Respondent No. 2.

The Order of the Court was delivered by

MOHAMMED AJMAL, MEMBER (JUDICIAL):— This is an Application by the Successful Resolution Applicant seeking certain directions against the Registrar of Companies, Maharashtra, Mumbai (Respondent No. 2/R2).

2. The facts giving rise to the Application are that Metallica Industries Limited (the Corporate Debtor) went into Corporate Insolvency Resolution Process (CIRP) by an order dated 13.04.2018 in the aforementioned Company Petition. The present Applicant was one of the Resolution Applicants in response to the Public Announcement and subsequent action taken during CIRP. This Tribunal by an order dated 16.10.2019 (wrongly mentioned as 19.10.2019 in the Application) in MA No. 660 of 2019 approved the Resolution Plan submitted by the Applicant.

3. The former promoters of the Corporate Debtor were engaged in various nefarious activities and criminal prosecution had been initiated against them. They had reportedly been arrested and had been in jail prior to the admission of the aforementioned Company Petition.

4. The Corporate Debtor was involved in the development of one Real Estate Project namely the Industrial Gala Complex admeasuring 6645.10 sq. mtrs. in Kandivali (West), Mumbai. The Company Petitioner and the Gala owners were the financial creditors of the Corporate Debtor. It was felt necessary that if the Gala owners themselves could submit a Resolution Plan, their earlier investment would remain protected and the Company would not go into liquidation which ultimately may adversely affect their investment. Eventually all the Gala owners supported the Resolution Plan submitted by the Applicant.

5. In pursuance to the Resolution Plan the Applicant has cleared dues of the sole Secured Creditor (Company Petitioner) and has received 'No Dues Certificate' there for. The Books of Accounts of the Corporate Debtor shows that it was in arrears of Rs.

1,21,13,467/- to the Municipal Authorities towards Property Tax as on the Insolvency Commencement Date (ICD). The Applicant has paid the arrears in instalments and the last instalment was due in July 2020.

6. The Application reveals that the Resolution Plan is unique in the way that the beneficiaries themselves would take over the Corporate Debtor and complete the Real Estate Project, where they have invested their substantial hard earned money. The Resolution Plan proposes that the shareholding of the Corporate Debtor would be written down and 10,500 fresh equity shares of Rs. 10/- each would be issued to 7 (seven) persons named in the Resolution Plan. Eventually the Gala owners would be issued with shares and ultimately the Company would be wholly owned by them.

7. Amidst its efforts to bring about early resolution of the Corporate Debtor the Applicant has been facing difficulty in implementation of the Resolution Plan, in getting the regulatory compliances accomplished. First, for the fraudulent actions of the former promoters and secondly due to the complications and lockdown resulting by the Covid-19 Pandemic. The Applicant accordingly has not been able to adhere to the timelines set out in the Resolution Plan. Because of the negligence of the former promoters, Annual Returns and Balance Sheets subsequent to 31.03.2013 have not been filed.

8. The Applicant has also not been able to lay its hands on the relevant documents prior to 16.10.2019. No authentic data having been submitted by the disqualified directors, the present directors are not able to sign any anterior document. The Applicant could only be able to provide and submit returns and statements for the period subsequent to 16.10.2019.

9. The Application further avers that the Resolution Plan approved by the Adjudicating Authority is binding on all including R2. While getting the statutory compliances made, the Applicant interacted with the officials of R2 and was informed that he must file all previous annual returns and balance sheets, failing which the Corporate Debtor would continue to remain in default of its statutory obligations. It would therefore be unfair to expect the Applicant to comply with the statutory obligations of the Corporate Debtor anterior to 16.10.2019. The Applicant is unable to access those information/data basing on which the statutory compliances are to be made. The Applicant has accordingly made representation to R2 in that regard, which is pending for consideration.

10. It is further submitted that the Resolution Plan was to be implemented within a period of 10-12 months from the date of approval (i.e. 16.10.2019). But because of onset of the Covid-19 Pandemic from March 2020 and resultant dislocation/disruption all around, the Applicant has not been able to complete the implementation within time.

11. Considering the gravity of the situation facing the whole world the Hon'ble Apex Court and the Hon'ble National Company Law Appellate Tribunal (NCLAT) have extended the timelines and suitable amendments have also been made to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in that regard. The Applicant accordingly seeks the following reliefs.

i) That this Hon'ble Tribunal may be pleased to direct the Respondent No. 2 to not insist upon compliance of any regulatory requirements of the Companies Act, 2013, pertaining to the period of time prior to the 19th of October, 2019, and to not take any coercive action against the Corporate Debtor arising out of the same;

ii) That this Hon'ble Tribunal may be pleased to direct the Respondent No. 2 to waive the requirement of filing of annual returns or balance sheets for the period of time prior to the 19th of October, 2019;

iii) That this Hon'ble Tribunal may be pleased to extend the tenure to implement the Resolution (plan) up to the end of December, 2021;

iv) Any other order that this Hon'ble Tribunal may deem fit in the facts and circumstances of this case.

12. R2 in its reply submitted that it has no authority to waive the statutory compliances mandated in the Companies Act, 2013 (the Act). Section 17(2)(e) and Section 23(2) of the Code requires that the Resolution Professional shall comply with the requirements under any law for the time being in force and the same would accordingly apply to the Resolution Applicant who takes over the Company. Besides, General Circular No. 08/2020 dated 06.03.2020 issued by the Ministry of Corporate Affairs (MCA), clarified that the Annual Returns in E-form no. MGT-7 and the Financial Statements in E-form No. AOC-4 and other documents as per the provisions of the Act shall have to be filed along with the required fees till such time the Company remains under CIRP. Therefore, the statutory requirements could not be waived, as sought for.

13. As the averments made in the Application would indicate, the Applicant has expressed its genuine difficulty in collating the data for filing of anterior statutory returns and statements and the inability of the Statutory Authority (R2) in accepting the current (post 16.10.2019) returns and statements. Considering the peculiar circumstance this Bench on 18.09.2020 passed the following order.

"Heard the Counsel for the Applicant in IA No. 1077 of 2020. This Bench requires the presence of some officer from the office of the Registrar of Companies (RoC), so that the issue with regard to the filing of Returns with the RoC through e-filing can be settled. Accordingly, the Applicant is directed to inform the next date of hearing to the RoC, for some officer from the RoC to be present and the matter of filing can be discussed. List this matter on 05.10.2020 for further orders."

14. On 05.10.2020 considering the technical difficulty, the Bench passed the following order:

"Mr. Amir Arsiwala, Counsel for the Successful Resolution Applicant is present. Ms. Yogini Chauhan, Deputy Registrar representing the RoC is also present and submits regarding E-filing that it will be appropriate for the Applicant to approach the RoC for the Resolution of the problem which Applicant/Resolution Applicant is facing. Thus the Applicant may take up the matter with the RoC for Resolution of the issue. List the matter on 28/10/2020 awaiting result of the discussion between the Applicant and the RoC."

15. It appears that the matter has not been resolved yet and intervention of the Bench has thus become imperative.

16. The Applicant in his Additional Affidavit dated 17.09.2020, has informed to have undertaken the following works in pursuance to the Resolution Plan.

"10. With respect to the timeline for completion of the Resolution Plan the following acts were undertaken in February and March 2020:

a. A new Company Secretary was appointed to expedite work.

b. BMC's temporary waterline payment was made for connection.

c. The 3rd instalment of BMC Assessment was made.

d. List was installed for materials at site.

e. Some building raw materials were purchased and delivered at site for starting miscellaneous work.

f. RCC consultant feasibility report was received.

g. Architects appointment file was forwarded to Executive Engineer of BMC.

11. The following acts were undertaken in the Month of April to June 2020:

a. Partial work of restoration is in progress.

b. Pillar Jacketing work was in progress as recommended by RCC Consultant.

c. Creation of Partition wall of Galas was in progress for the first floor.

d. Reconstruction of Pardi Work was started to replace existing old Pardi.

e. Mr. Mitesh P. Kothari a Director of the Resolution Applicant was added as a Director of the Corporate Debtor from the back end process by the RoC department.

12. The following acts were undertaken in the Month of July 2020:

a. Mr. Mitesh Kothari, Chetan Soni, Himanshu Mehta and Amit Dhanak were appointed as directors. Their additions were made by the Registrar of Companies office after removing erstwhile Directors/authorized signatory as per provision of Resolution Plan.

b. Application for reduction of Capital was made to the Registrar of Companies.

c. A new GST Number was allotted and certificate of Registration was obtained.

d. GST Number as per certificate was received.

e. Scrutiny fees was paid to BMC for Plan approval.

f. Provisional NOC from Chief Fire Officer was obtained.

13. The following Acts were undertaken in the Month of August 2020:

a. A Current Bank Account was opened with HDFC Akurli Road, Kandivali East Branch in August.

b. Old Charge over immovable property under the Resolution Plan had been removed from the RoC's website.

c. Auditing of Financials including balance sheets since 2013-2014 was in process.

d. BMC road status with respect to the project was confirmed.

e. Title search was allotted to the Advocate.

f. SBI cancellation of mortgage deed was in process.

g. TDS Number was applied for.

h. Revised plans as per new norms were submitted to BMC for approval.

i. The 4th Instalment of BMC Assessment i.e., Rs. 26,13,467/- was paid on 11.09.2020."

17. It is further submitted that the Corporate Debtor initially used extensible business reporting language (XBRL) for the purpose of filing with the Respondent No. 2. XBRL being the standardized computer language that businesses use to send information back and forth. The same is the requirement when the share capital of firm is above Rs. 5,00,00,000/-. Now that the share capital of the Company has reduced to Rs. 1,05,000/- the management should not be forced to file through this medium. However, once XBRL is adopted it would not be possible for the Company to use another medium for filing. This however should not be applied to the present case. The Company faced with such a predicament, should be allowed the normal procedure for filing. Since the former promoters had not conducted regular Board Meetings, the Applicant is at a loss to put the date of the Board Meetings in the Forms. In the absence of which the Form in online filing is not accepted. The Corporate Debtor accordingly could be allowed to put 'best estimate date' when the board meetings of the erstwhile directors ought to have taken place during the particular financial year. It is accordingly submitted that the necessary directions in that regard may have to be made so that the technical issues can be resolved.

18. As it would appear from the materials above, the Applicant is taking all possible steps in right earnest to get the Resolution Plan implemented. The e-Filing of statements and returns obviously could not have envisaged all eventualities arising out of a successful resolution of a Corporate Debtor. It is settled that when the

technical considerations are pitted against the substantial justice, cause of substantial justice would be preferred. Therefore, interest of justice requires that the Applicant shall have to be provided with all the support for getting the statutory compliances done.

19. The new management of the Corporate Debtor could not be held liable and responsible for the malfeasance and misfeasance committed by the former promoters/directors of the Corporate Debtor. It could not be saddled with the repercussions of reprehensible actions of the erstwhile management. The Hon'ble Apex Court in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta* : 2019 SCC OnLine SC 1478 have recognised such a predicament of the new management in respect of fresh claims and have afforded the rescue/respite in the following words.

> *"67. .....*
>
> *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 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."*

20. Though the present predicament faced by the Applicant is not in respect of any new claim, the principle and sentiment echoed by the Hon'ble Court can be applied to resolve the present imbroglio. Rules of procedure are but handmaidens of justice (*Mr. Shaik Salim Haji Abdul* v. *Mr. Kumar* : (2006) 1 SCC 46 : AIR 2006 SC 396). The Hon'ble Court in *Sardar Amarjit Singh Kalra* v. *Pramod Gupta* : (2003) 3 SCC 272 observed that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizens under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. In the same vein the Hon'ble Court in *N. Balaji* v. *Virender Singh* : (2004) 8 SCC 312 observed that the procedure would not be used to discourage the substantial effective justice but would be so construed as to advance the cause of justice. The Hon'ble Court in *Collector, Land Acquisition* v. *Mst. Katiji* : (1987) 2 SCC 107 : AIR 1987 SC 1353 ruled that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. The principle has also been echoed by the Hon'ble Supreme Court in *Laxmibai* v. *Bhagwantbuva* (Civil Appeal No. 2058 of 2003 decided on 29.01.2013).

21. Taking the facts and circumstances of the case into consideration and the principles decided, it would accordingly be appropriate to pass the following orders. Hence ordered.

ORDER

22. The Application be and the same is allowed on contest.

i. The present management of the Corporate Debtor shall be permitted to approve the Accounts and Returns of the Corporate Debtor for the period prior to 16.10.2019 in its next meeting. The Applicant shall file the relevant Returns and Statements for the period within three months hence. The action shall not invite any penalty whatsoever from the Respondent No. 2.

ii. The Corporate Debtor is permitted to file Accounts and Returns subsequent to 16.10.2019, within a period of three months hence and the same shall be

accepted without any penalty.

iii. It is made clear that the present management of the Corporate Debtor shall not in any manner be held accountable for the default committed by the Corporate Debtor or its promoters/directors prior to 16.10.2019.

iv. The RoC (Respondent No. 2) or the appropriate authority shall consider accepting Returns and Statements in physical form in case of incompatibility in online submission/e-filing.

v. The implementation of the Plan is extended till 31.03.2022. All concerned shall make all endeavours to facilitate implementation of the Plan within the period.

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† Mumbai Bench

ANNEXURE R5/

3599

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.143

IA 954 of 2020 in CP(IB) 203 of 2019

Order under Section 30 r.w 31 IBC

IN THE MATTER OF:

Navin Srichand Kanjawani RP of B D Overseas & Fiscal Services Ltd — **.....Applicant**

V/s

Central Bank of India — **.....Respondent**

Order delivered on ..20/09/2022

Coram:

Dr. Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for the pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

SD/-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

SD/-

DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1

IA/954(AHM)/2020
IN
CP (IB) 203 of 2019

IA/954(AHM)/2020
(An application under Section 30 r.w. Section 31 of the Insolvency and Bankruptcy Code, 2016)

Mr. Navin Srichand Kanjwani
Resolution Professional of;
M/s B D Overseas and Fiscal Services Limited,
Having Office at 1, New Maharaja Park,
Maya Cinema Road, Kubernagar,
Ahmedabad, Gujarat – 382 340

……. Applicant

Versus

Central Bank of India
Sole Member of Committee of Creditors,
Having Office at Regional Office,
Central Bank Building, Laldarwaja, Old
City, Ahmedabad – 380 001

…….Respondent

In the matter of:

CP (IB) 203 of 2019

(An application under Section 9 of the Insolvency and Bankruptcy Code, 2016)

M/s. Vedant Tradelink Private Limited

….Operational Creditor

Versus

M/s. B D Overseas and Fiscal Services Limited

….Corporate Debtor

Order delivered on 20 September 2022

Coram: **Dr. Madan B. Gosavi, Member (Judicial)**
Kaushalendra Kumar Singh, Member (Technical)

Appearance:

Ms. Natasha D Shah, Ld. Adv. for the Resolution Professional.
Mr. Sandip C Bhatt, Ld. Adv. for the CoC.
Mr. Dheeraj Garg, Ld. Adv. for the Suspended Management.
Mr. Rasesh Parikh, Ld. Adv. a.w. Mr Kishan Dave, Ld. Adv. for the Successful Resolution Applicant.

ORDER

1. This instant application is filed by Mr. Navin Srichand Kanjwani Resolution Professional of M/s. B. D Overseas and Fiscal Services Limited under Section 30 r.w. Section 31 of the Insolvency and Bankruptcy Code, 2016 [**'IB Code']** on a going concern basis for approval of the Resolution Plan of M/s. Steel Cube India LLP.

2. The averments made by the Applicant are summarized as under:-

(i) The Corporate Debtor was admitted in the Corporate Insolvency Resolution Process [**'CIRP'**] vide order dated 20.01.2020 by this Adjudicating Authority and Mr. Navin Srichand Kanjwani was appointed as an Interim Resolution Professional [**'IRP']**, the Applicant herein. The Applicant published Form-B in **Economic Times** English newspaper and **Loksatta Jansatta** in Gujarati newspaper for submission of claims by the creditors and the last date for submission of claims was 26.02.2020. The Applicant constituted the Committee of Creditor [**'CoC']** which

comprised of sole members namely the Central Bank of India. The 2nd CoC meeting was convened on 05.06.2020 wherein the CoC resolved to appoint the IRP as a Resolution Professional for conducting the Resolution Process of the Corporate Debtor. The CoC further resolved to publish a calling for the Expression of Interest [**'EoI'].** Thereupon, the Applicant published inviting for the EoI in Form-G on 10.06.2020 in **'Financial Express'** in English as well as Gujarati newspaper and the same was also uploaded on the website of IBBI on 10.06.2020 and the last date of receipt of EoI was 10.07.2020.

(ii) The 3rd CoC meeting was convened on 13.07.2020 wherein it was discussed that only two EoIs were received. Therefore, for inviting more EoIs from the Prospective Resolution Applicants ['PRAs'], the CoC decided to extend 10 days for submission of the EoIs. Thereafter, the Applicant published Form G on 14.07.2020, giving therein the last date of submission of the EoIs on 24.07.2020. The Applicant shared the Information Memorandum [**'IM']** with the CoC and the CoC approved the Evaluation Matrix and Draft Information Memorandum.

(iii) The 4th meeting of the CoC was held on 21.08.2020 wherein the CoC discussed the EoIs received from four Prospective Resolution Applicants viz. Raj Chem, Sudeep Dasani, Sahaj Solar Private Limited, and Steel Cube India LLP. The applicant filed an application bearing No. 637 of 2020 for an extension of the period of CIRP by 90 days

beyond 180 days and the extension of 90 days was granted by this Adjudicating Authority vide order dated 07.10.2020.

(iv) The notice of the 9th CoC meeting was served to the Suspended Management on 27.10.2020 which was conducted on 29.10.2020, wherein the Inter-se bidding was conducted and all the Prospective Resolution Applicants [PRAs] had signed an undertaking to submit the revised Resolution Plan on or before 02.11.2020. The notice of the 10th CoC meeting was served to the Suspended Management which was held on 09.11.2020, wherein the CoC discussed the revised Resolution Plans submitted by the Prospective Resolution Applicants [PRAs] and provided scores to the plan submitted by the PRAs. The notice of the 11th CoC meeting was served to the Suspended Management on 11.12.2020 and the 11th CoC meeting was held on 14.12.2020 wherein CoC approved the Resolution Plan of M/s. Steel Cube India LLP with 100% votes (by the sole CoC member).

(v) A member of the Suspended Management- Mr. Ankit Vera had preferred a Company Appeal bearing No. Company Appeal (AT) (Insolvency) No. 721 of 2021 under section 61 of the IB Code before the Hon'ble NCLAT, New Delhi which was rejected vide order dated 14.09.2021 as the copy of the Resolution Plan had already been served upon the Suspended Management Mr. Dheeraj Garg on 24.02.2021 and the proof of service has been filed. The Hon'ble NCLAT has further stated that no interference is required in the CIRP process as the time limit of 330 days is fixed in the IB Code for completing the CIRP.

(vi) No claim was furnished by the workmen with respect to the amount due and payable to the workmen as shown in the Balance sheet of the Corporate Debtor for the FY 2019-20, and there is no document received by the applicant to corroborate the claim such as salary slips, employment agreement and muster roll of the employees as a result of which the claims have not been registered. The claim submitted by the Operational Creditor has been accepted and is in the process of verification.

(vii) The reliefs and concessions claimed by the Resolution Applicant are as under;

a) The Central Board of Direct Taxes (CBDT) and GST Department shall give exemption for applicability of payment of all taxes including MAT and GST liability which may arise for the acquisition of the Corporate Debtor under the IB Code, and allow the company to enjoy all future tax benefits, deductions, an exemption which are allowed to the Corporate Debtor.

b) The Collector of Stamps, Revenue Department of State Government & Ministry of Corporate Affairs provide the exemption(s) from levy of stamp duty and fee in relation to this resolution plan.

c) All licenses and approval required for running the business including renewal of consents to operate are obtained by the Corporate Debtor under the provision of the Water (Prevention and Control of Pollution) Act, 1947 and Air (Prevention and Control of Pollution) Act, 1981 and

the same will remain in force or will be renewed/ extended by the respective Department.

d) All Government Entities including the Ministry of Environment, Forest and Climate Change/ The Central Pollution Control Board/ The Gujarat Pollution Control Board will waive the non-compliance under the applicable laws by the Corporate Debtor.

e) The fuel supply agreement entered by the Corporate Debtor shall be assigned to the Resolution Applicant and the Resolution Applicant shall be entitled to review/ modify/ terminate agreements entered by the Corporate Debtor.

f) Central Board of Excise and Customs/ VAT Department/ Entry Tax Authority/ Director General of Foreign Trade will give reliefs from all direct litigation pending before various Courts/ Forums and waiver from all dues from such litigation.

g) The rights of any person with respect to share capital shall stand unconditionally and irrevocably extinguished.

3. The Suspended Management of the Corporate Debtor has filed their objection(s) opposing the approval of the Resolution Plan and made the averments which are summarized as under:-

(i) The Corporate Insolvency Resolution Process (**'CIRP'**) had been conducted in a highly illegal and irregular manner in gross violation of provisions of Section 24 of the IB Code r.w. Regulation 21 of the IBBI (Insolvency Resolution Process for the Corporate Person) Regulations, 2016 [hereinafter

referred to as the **'CIRP Regulations, 2016']** and also against the direction given by the Hon'ble Supreme Court in the matter of ***'Vijay Kumar Jain Vs. Standard Chartered Bank and Ors. [2019] 152 SCL 56 (SC).*** The applicant had neither shared the copies of the Resolution Plan nor the material documents relating to the Resolution Plan with the Suspended Management while placing the same before the CoC. For the First time, the limited documents and a copy of the resolution plan was supplied by the Applicant only on 21.01.2021 to the Suspended Management which otherwise violates the other provisions of the IB Code.

(ii) The Resolution Plan falsely states how it has dealt with the interest of all stakeholders as required under Regulation 38 (1A) of CIRP Regulations, 2016. Para (b) of the resolution plan under 'grounds' specifically contains stipulations for making the payment to employees and workmen. However, on perusal of the Resolution Plan, it shows that no amount is being offered to any stakeholders other than Financial Creditors.

(iii) The balance sheet of the Corporate Debtor for the F.Y. 2019-20 depicts that an amount of Rs. 39,00,000/- is due and payable to the workmen and employees while an amount more than Rs.31,00,00,000/- is due and payable to the Operational Creditors. As per the knowledge of the Suspended Management, the Operational Creditors have already submitted their claims to the Applicant as evident from the E-mail addressed by the Applicant to the Statutory Auditor of the Corporate Debtor. The Hon'ble NCLAT in the

matter of "*Hammond Power Solution Private Limited Versus Sanjit Kumar Nayak* RP" overturned the order approving the resolution plan which was offering NIL amount to the Operational Creditors while relying upon the judgments of the Hon'ble Supreme Court rendered in the matter of Committee of Creditors of *Essar Steel India Limited Versus Satish Kumar Gupta & Ors and Swiss Ribbons Pvt. Ltd. & Ans Versus Union of India & Ors.*

(iv) The CIRP was conducted in gross violation of Regulation 13 (2)(ca) of CIRP Regulations, 2016 which mandates uploading the list of claims by the Creditors on the IBBI website, the RP has not uploaded the list of claims on the electronic portal of the IBBI.

(v) The CIRP has been conducted in gross violation of Regulation 39(3)(a) CIRP Regulations, 2016. In the 10th & 11th minutes of meetings of the CoC, it is clearly mentioned that the Resolution Professional had evaluated the Resolution Plan, however, the said Regulation mandates that the Resolution Plan shall be evaluated by the CoC. The Resolution Plan is violating Regulation 38 of CIRP Regulations, 2016 for the following reasons:

a) The Resolution Plan has miserably failed to address the cause of default as required under Regulation 38(3)(a) of the CIRP Regulations, 2016. The Resolution Plan also failed to comply with the provisions of Regulations 38(3)(d) of CIRP Regulations, 2016 as it has no provisions for taking approval(s) under the applicable laws.

Instead, under para 14 of the Resolution Plan, the obligations of the Resolution Applicant have been made completely conditional subject to receipt of all requisite approval(s) without providing for the provisions and timelines for obtaining the same. The Resolution Professional was well aware that the condition precedent ought not to be placed in the Resolution plan as evident from the Minutes of the 6th meeting of the CoC held on 15.09.2020.

b) The Resolution Plan has failed to achieve the maximization of assets of the Corporate Debtor which is one of the objects of the IB Code. The shared resolution plan with the Suspended Management reveals that the amount offered under the Resolution Plan is a meagre amount of Rs. 4.05 Crores that too without balancing the interest of all stakeholders. The value offered by the Resolution Applicant is lower than the actual value of the assets of the Corporate Debtor. The assets of the Corporate Debtor were valued at Rs. 23.78 Crores in the month of June 2020 by the same financial creditor (the sole CoC member herein) while filing an Original Application bearing No. 168 of 2020 before the Learned DRT- Ahmedabad. Moreover, the offered amount under the resolution plan is lower than the One Time Settlement [**'OTS']** proposal given by the Suspended Management in the month of September 2020 which was Rs.11 Crores.

c) The Suspended Management has filed an additional affidavit dated 14.02.2022 before this

Adjudicating Authority wherein the Suspended Management has prayed that direction to be given to the Applicant for conducting a fresh valuation of the assets of the Corporate Debtor by the Registered Independent Valuer(s) under the supervision of jurisdictional official liquidator to determine the true and fair value of the assets of the Corporate Debtor before approving the Resolution Plan.

4. Heard learned counsel for the parties and perused the material on record. It is noted that the Corporate Debtor was admitted to the CIRP on 20.01.2020 and Mr. Navin Srichand Kanjwani was appointed as an IRP who constituted the CoC which comprised of sole CoC members namely, the Central Bank of India. In the 2nd CoC meeting dated 05.06.2020, IRP was appointed as the RP, the Applicant herein who conducted the CIRP process. The CoC in the 11th meeting dated 14.12.2020 approved the Resolution Plan of M/s. Steel Cube India LLP with 100% votes on the basis of scores given by the CoC to all Prospective Resolution Applicants.

5. It is also noted that the Applicant has proposed to pay an amount of Rs.4.30 Crores against the total admitted debt of Rs.21,34,47,336/-., An amount of Rs.4.05 Crores has been proposed to be paid to the Financial Creditors against the total admitted claim of Rs.21.29 Crores and an amount of Rs.0.25 Crores has been proposed to be paid as a CIRP cost. The fair value of the Corporate Debtor is Rs. 642.80 lakhs and the liquidation value of the Corporate Debtor is Rs.389.30 Lakhs. The Resolution Applicant has filed an affidavit dated 18.11.2021

wherein it states that though there are no provisions for the payment for the Operational Creditor to be made under the Resolution Plan, however, one claim asserted by the Uttar Gujarat Vij Limited at the time of hearing of the present application, thereupon the Resolution Applicant through the said affidavit agreed to pay an amount of Rs.5,19,827/- (filed and admitted debt) to the said Operational Creditor over and above amount proposed under the Resolution Plan. In addition, the Resolution Applicant has proposed to infuse the required funds for meeting the Capex and working capital requirements. The details of the amount proposed under the resolution plan are reproduced hereunder (as per form-H);

The amounts provided for the stakeholders under the Resolution Plan are as under:-

Sl. No.	Category of Stakeholder*	Sub-Category of Stakeholder	Amount Claimed	Amount Admitted	Amount Provided under the Plan#	Amount Provided to the Amount Claimed (%)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1.	Secured Financial Creditors	(a) Creditors not having a right to vote under sub-section (2) of Section 21	N.A.	N.A.	N.A.	N.A.
		(b) Other than (a) above: (i) Who did not vote in favour of	N.A.	N.A.	N.A.	N.A.

		the resolution plan (ii) who voted in favour of the resolution plan	21,29,27,509/-	21,29,27,509/-	4,05,00,000/	19.02%
		Total [(a) + (b)]	21,29,27,509/	21,29,27,509/ -	4,05,00,000/	19.02%
2.	Unsecured Financial Creditors	(a) Creditors not having a right to vote under sub-section (2) of Section 21	N.A.	N.A.	N.A.	N.A.
		(b) Other than (a) above: (i) who did not vote in favour of the Resolution Plan (ii) who voted in favour of the Resolution Plan	N.A. N.A. N.A.	N.A. N.A. N.A.	N.A. N.A. N.A.	N.A. N.A. N.A.
		Total [(a) + (b)]	N.A.	N.A.	N.A.	N.A.
3.	Operational Creditors	(a) Related Party of Corporate Debtor	N.A.	N.A.	N.A.	N.A.
		(b) other than (a) above: (i) Governme	N.A. N.A.	N.A. N.A.	N.A. N.A.	N.A. N.A.

		nt (ii) Workmen (iii) Employees (iv) Others	N.A. 8,56,69,805/-	N.A. 5,19,827/-	N.A. Nil	N.A. Nil
		Total [(a) + (b)]	8,56,69,805/-	5,19,827/-	Nil	Nil
4.	Other debts and dues		N.A.	N.A.	N.A.	N.A.
Grand Total			29,85,97,314/-	21,34,47,336/	4,05,00,000/	13.56%

6. This Adjudicating Authority vide order dated 16.08.2021 directed the Resolution Applicant to produce the list of Creditors, plant, and machinery, valuation report, and information memorandum within two weeks to consider the plan. The Applicant in compliance with the aforesaid direction filed an affidavit dated 15.09.2021 furnishing the aforesaid details. In view of the order dated 05.01.2022 passed by this Adjudicating Authority, the Resolution Applicant filed an affidavit dated 21.01.2022 to show the financial soundness of the Resolution Applicant. On perusal of the document filed with the aforesaid affidavit, it shows that the Resolution Applicant and its associates are financially sound and are capable to revive the Corporate Debtor.

7. This Adjudicating Authority vide order dated 27.06.2022 directed the Resolution Applicant to serve a copy of the Resolution Plan to the Suspended Management and the Operational Creditor whose claim has been accepted in view of the judgment of ***Vijay Kumar Jain (supra).*** The Resolution

Applicant served a copy of the minutes of the 12th meeting to the Suspended Management on 02.07.2022 and the 12th meeting was conducted on 04.07.2022 which was attended by Suspended Management also. The CoC considered all objections of the Suspended Management. The first objection of the Suspended Management with respect to the amount proposed under the plan i.e. Rs.4.30 Crores being very less than Rs.23.78 Crores valuation as per the Original Application filed by the Bank (sole member of CoC) before DRT-Ahmedabad. The sole member of CoC has responded that an amount of Rs.23.78 Crores was valued as per the books of account of the Corporate Debtor. However, the plan of the Resolution Applicant has been approved on the basis of the liquidation value i.e., Rs. 427.23 Lakhs evaluated by two IBBI Registered valuers. More so the total plan value of Rs.10.30 Crore wherein Rs.4.05 Crore is payable to the Financial Creditor, therefore, on the mere ground of payment to the Financial Creditor only cannot be said the plan value is very less. As per the affidavit dated 15.09.2021 filed by the applicant, there are personal guarantors to the Corporate Debtors who have given guarantees in favour of the financial creditor (sole CoC member) for securing the debt. In the resolution plan, the applicant has not proposed anything toward the personal guarantor, therefore the sole financial creditor i.e., the Central Bank of India has the right to initiate an action and recover the debt from the personal guarantors also.

8. The CoC also discussed the objection of the Suspended Management that they were keen to put/ submit their resolution plan. However, due to Covid-19, they couldn't attend the

meetings when the plan was discussed and voted upon, to which the CoC responded that they could have requested for video conferencing if they were so keen to participate in the process. The CoC also cited that many meetings had been conducted online during that time and even court functioned online. The Suspended Management further insisted that the Corporate Debtor can be taken into liquidation if their (Suspended Management's) plan can not be considered due to technicalities. The CoC responded that the Suspended management should have submitted the plan when it was time to do so, Suspended Management did not even submit the EOI. The CoC further clarified that even the settlement plan which has been submitted now has not demonstrated the financial capacity of the Suspended Management. Thereafter, considering all objections of the Suspended Management the CoC confirmed the approval of the Resolution Plan of M/s. Steel Cube India LLP.

9. The office of Commissioner Central GST & Central Excise, Ahmedabad- North vide letter dated 28.07.2021 [for brevity **"Commissioner of CGST"**] issued a show cause notice under section 74 and /or 122 of CGST Act, 2017 to the Corporate Debtor wherein the Commissioner of CGST has asked from the Corporate Debtor why penalty should not be imposed for non-payment of an amount of Rs. 6,97,63,605/- for evading of tax for supply made during the period from August 2017 to February 2018 and interest at the applicable rate should not be demanded and recovered. It is also mentioned why an amount of Rs. 6,56,775/-is not demanded and recovered for tax evaded for finished goods. We noted that an affidavit dated 15.09.2021 has

been filed by the applicant showing details of a submitted claim by the creditors wherein it shows that claim of Rs. 1,96,39,214/- has been submitted by the Sale Tax Department on 21.01.2021 which was rejected by the applicant on the ground that the claim received after filing of resolution plan before the Adjudicating Authority.

10. Hence, considering the aforesaid facts it is noted that the objections raised by the Suspended Management are merely technical in nature. Moreover, all the grievances/objections of the Suspended Management have been dealt with by the CoC in the 12th meeting dated 04.07.2022 and now the objections raised by the Suspended Management do not sustain. The plan proposed by the Resolution Applicant revives the Corporate Debtor and maximizes the value of the assets of the Corporate Debtor which are the main objects of the IB Code.

11. The resolution plan should adhere to the following requirements as per Section 30(2) of the Code read with CIRP Regulations:

(i) It should provide for the payment of insolvency resolution process costs in priority to the payment of other debts of the corporate debtor.

[Section 30(2)(a) of IB Code];

(ii) The repayment of the debts of operational creditors and dissenting financial creditors should not be less than the amount to be paid to such respective creditors in the event of liquidation of the corporate debtor under section 53 of the Code. Moreover, the payment to the operational creditor is to be made in priority over the financial creditor; and the payment to dissenting

financial creditor is to be made in priority to the consenting financial creditors.

[Section 30(2)(b) of the IB Code read with regulation 38(1)(a) & 38(1)(b) CIRP Regulations];

(iii) Provides for the management of the affairs of the corporate debtor after approval of the resolution plan.

[Section 30(2)(c) of the IB Code read with regulations 38(2)(b) CIRP Regulations];

(iv) The implementation and supervision of the resolution plan.

[Section 30(2)(d) of the IB Code read with 38(2)(c) CIRP Regulations];

(v) It does not contravene any of the provisions of the law for the time being in force.

[Section 30(2)(e) of the IB Code];

(vi) It conforms to such other requirements as may be specified by the Board.

[Section 30(2)(f) of the IB Code]

Such other requirements of the resolution plan as detailed in IBBI (Resolution Process for Corporate Persons) Regulations, 2016 which are not covered above, are as under:

(a) The resolution plan should include the statement as to how it has dealt with the interests of all stakeholders including financial creditors and operational creditors of the corporate debtor.

[38 (1A) of CIRP Regulations]

(b) The resolution plan should include a statement giving details as to whether the resolution applicant or any of its related parties has at any time failed to implement or caused to the failure of implementation of any other resolution plan which was approved by the Adjudicating Authority.

[38 (1B) of CIRP Regulations]

(c) The resolution plan should provide the term of the plan and its implementation schedule.

[Regulation 38(2)(a) of CIRP Regulations]

(d) The resolution plan should also demonstrate that it addresses the cause of default; is feasible and viable; has provisions for its effective implementation; has provisions for approvals required and the timeline for the same. Further that the resolution applicant has the capability to implement the resolution plan.

[38(3) CIRP Regulations]

12. In view of the above provisions of the IB Code the resolution plan submitted before us has been examined as follows:

(i) On perusing the Resolution plan we observed that clause 3 of the Resolution Plan has a provision of CIRP cost of Rs. 25,00,000/- that is to be paid in priority over the payments to be made to any other creditors. The CIRP proposed under the resolution plan will be paid within a period of 7 days from the date of approval of the resolution plan by this Adjudicating Authority. Thereby, the resolution plan complies with section 30 (2) (a) of the IB Code.

(ii) There is only one financial creditor who has approved the resolution plan (100% votes). However, clause 3.4 of the resolution plan states that the Financial Creditors who did not vote in favour of the Resolution Plan would not be paid less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of the liquidation of the Corporate Debtor. Sub-clause 2 of clause 3.5 of the Resolution Plan states that payment to the Operational Creditors in such a manner as may be specified by the Board which shall not be less than the amount to be paid to such operational creditors in the event of a liquidation of the Company under section 53 of the IB Code. As the resolution plan complies with section 30 (2) (b) of the IB Code read with the regulation 38(1) (a) & 38 (1) (b) of CIRP Regulations, 2016.

(iii) In clause 15, Resolution Plan states that upon the Resolution Applicant acquiring the control over the Corporate Debtor, the existing board or interim board will be replaced by a new board of directors constituted with adequate representation from the members of the group and Independent Director. The resolution plan also proposes to appoint a CEO, CFO, Compliance Officer, and Auditor then it complies with section 30 (2) (c) of the IB Code read with Regulation 38 (2) (b) of the CIRP Regulations.

(iv) On or after approval of this Resolution Plan by this Adjudicating Authority, implementation of the resolution plan shall be supervised by the steering committee consisting of one representative from the Financial Creditor, one

representative from the Resolution Applicant, and a Resolution Professional. Thereby the resolution plan complies with section 30 (2) (d) of the IB Code read with regulations 38 (2) (c) of the CIRP Regulations.

(v) Clause 11.3 of the Resolution Plan states that the Resolution Plan is not in contravention of provisions of the Applicable law for time being in force. Thereby it complies with section 30 (2) (e) IB Code.

(vi) The plan conforms to section 30 (2) (f) of the IB Code as regard to other requirements as specified by the Board in the CIRP regulations which are not covered above and are discussed as under;

a) Sub-clause (b) of clause 11.3 of the resolution plan states that the Resolution plan has dealt with the interest of all stakeholders including financial and Operational Creditors which complies with Regulation 38 (1A) of CIRP Regulations, 2016.

b) Sub-clause (c) of clause 11.3 of the resolution plan states that as on the date of this resolution plan and on the basis of the records of the Resolution Applicant, the resolution applicant is eligible under section 29A of the IB Code to submit the resolution plan meaning thereby the resolution plan complies with regulation 38 (1B) of CIRP Regulations.

c) The Resolution Plan proposed to pay the CIRP cost within 10 days and to the Financial Creditor within 60 days from the date of approval of the resolution plan which

complies with Regulations 38 (2) (a) of the CIRP regulations.

d) On perusal of the resolution plan, it is inferred that the plan is feasible and viable, and has an effective implementation mechanism proposed under the resolution plan. It is proposed under the resolution plan that CIRP cost will be paid within 10 days and financial creditor within 60 days from the date of approval of the resolution plan. As per the affidavit dated 21.01.2022 filed by Mr. Patel Mishit Girishbhai authorized representative of the Resolution Applicant showing the financial soundness of the Resolution Applicant makes it clear that the resolution applicant has the capability to implement the resolution plan.

13. As far as reliefs and concessions claimed by the Resolution Applicant, the law has been well settled by the Hon'ble Supreme Court in the case of ***Ghanashyam Mishra and Sons Private*** Limited ***Vs. Edelweiss Asset Reconstruction Company Limited and Ors. reported in MANU/SC/0273/2021*** in the following words:

(i) "The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable.

(ii) We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central

Government, any State Government, or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I &B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief…"

14. In view of the above, we hold that the Resolution Applicant cannot be saddled with any previous claim against the Corporate Debtor prior to the initiation of its CIRP. The permits, licenses, leases, or any other statutory right vested in the Corporate Debtor shall remain with the Corporate Debtor and for the *continuation* of such statutory rights, the Resolution Applicant has to approach the concerned statutory authorities under relevant laws.

15. In view of the above, we are of the considered view that the Resolution Plan has complied with the provision of Section 30(2) of the IB Code and Regulations 38 and 39 (1) of CIRP Regulations. Accordingly, we allowed this present application with the following orders:-

O R D E R

I. Application is allowed.

II. The resolution plan of M/s. Steel Cube India LLP for Corporate Debtor i.e., M/s B D Overseas and Fiscal Services Limited stands allowed as per Section 30(6) of the IBC, 2016.

III. The approved 'Resolution Plan' shall become effective from the date of passing of this order. A copy of this approved plan is enclosed to this order.

IV. The order of moratorium dated 20.01.2020 passed by this Adjudicating Authority under Section 14 of the IB Code shall cease to have effect from the date of passing of this order.

V. The Resolution Professional shall forthwith send a copy of this Order to the participants and the Resolution Applicant(s).

VI. The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded in its database

VII. Accordingly, **IA/954 (AHM)/2020 in CP(IB) 203 (AHM)/2019** is allowed and stands disposed of in terms of the above directions.

VIII. A certified copy of this order, if applied for, is to be issued to all concerned parties upon compliance with all requisite formalities.

SD/-
KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

SD/-
DR. MADAN B GOSAVI
MEMBER (JUDICIAL)

Ramashish/Swetambary

Annexure - A.

3623

PRAMUKH 500™ TMT BAR

STEEL CUBE INDIA LLP
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+91 98249 88223 | www.pramukhtmt.in | steelcubeindia@gmail.com

2nd November 2020

To

Mr. Navin Srichand Kanjwani,
Resolution Professional of
B D Overseas and Fiscal Services Limited
708, Scarlet Gateway, Opp. Rivera Antillia,
Corporate Road, Prahlad Nagar
Ahmedabad, Gujarat - 380015

Dear Sir,

Sub: Revised Resolution Proposal Relating to B D Overseas and Fiscal Services Limited under Corporate Insolvency Resolution Process ("CIRP")

We Steel Cube India LLP **("SCI"** or **"the Resolution Applicant" or "Applicant")** are please to submit our Resolution Plan (s) for B D Overseas and Fiscal Services Limited **("BDO" or "Company")** based on the Information Memorandum, relevant information made available, data available in the public domain and discussions held with the Resolution Professional. The Original Resolution Plan was submitted on 7th September 2020 and after discussion and negotiation with the Committee of Creditor we proposed to revise our original Resolution Plan and this Revised Resolution Plan is submitted accordingly. This Resolution Plan is submitted pursuant to request for Resolution Plan **("RFRP")** dated 8th August 2020 inviting submission of Resolution Plan for the Company arising out of the order dated 20th January, 2020 of the Hon'ble NCLT, Ahmedabad and meeting with the Committee of Creditors and Resolution Professional. This Resolution Plan complies with the provisions of section 31 of the Insolvency and Bankruptcy Code 2016 **("IBC")** read with regulation 37, 38 & 39 of the Insolvency and Bankruptcy Board of

For, STEEL CUBE INDIA LLP

Partner

NAVIN SRICHAND KANJWANI IBBI/ IPA-002/ IP-N00347 2017-18 / 10997 INSOLVENCY PROFESSIONAL

India (Insolvency Resolution Process for Corporate Persons) regulations ,2016 **("CIRP regulations").**

In response of the public advertisement published on the website of IBBI dated 10th June, 2020 inviting Expressions of Interest **("EOI")** for submission of Resolution Plan for BDO, SCI had submitted the EOI on July 10, 2020 showing their interest for submission of Resolution Plan for BDO. In term of the EOI submitted, SCI submit that the Resolution Plan can be submitted / implemented by SCI itself, or its partners or through any of its associate company /firm or group companies or an SPV or through any of its associates firm and part of the group.

DEFINITIONS AND INTERPRETATIONS

In this Resolution Plan, unless inconsistent with subject or context thereof (1) capitalized terms defined by inclusion in quotations and/or parenthesis have the meanings so ascribed ; (2) All terms and words not defined in this Resolution Plan shall have the meaning ascribed to them under the relevant Applicable Laws; and (3) additional capitalized terms shall have the following meaning assigned to them in **ANNEXURE - 1.**

EXECUTIVE SUMMARY

Steel Cube India LLP, a Limited Liability Partnership Firm, having it's registered office at S R No. 64/P, Khata No. 272, AT and PO Navanagar, Navanagar Bus Stop, Himmat Nagar, Sabarkantha, Gujarat,383220 is pleased to submit this Resolution Plan **("Resolution Plan")** for B D Overseas and Fiscal Services Limited. The Resolution Plan is submitted, based on the limited information provided and in accordance with the Information Memorandum **("IM")**, site visit, subsequent discussions and written communications with the Resolution Professional **("RP")** and other terms and conditions stipulated in this Request for Resolution Plan (RFRP). It is assumed that all information contained in the IM, including but not restricted to for the Secured Financial Creditors, Unsecured Financial Creditors, Operational Creditors and Claims from Workmen and Employees of the Company provided in the IM are true, correct, complete and not misleading in any respect. SCI

For, STEEL CUBE INDIA LLP

Partner

NAVIN SRICHAND KANJHANI
INSOLVENCY PROFESSIONAL

proposes to implement the Resolution Plan by itself or its partners or through any of its associate company /firm or group companies including through a special purpose vehicle **("SPV")** set up by any of the entities forming part of the Group companies **("Applicant")** in the manner described in this Resolution Plan and seeks the support of all the stakeholders of the Company in this regard. Any action proposed to be undertaken by the Applicant for the implementation of the Resolution Plan, will be undertaken, either directly, or indirectly through or with the affiliates, subsidiaries or associates of the Applicant either Individually or Collectively as set out in this Resolution Plan.

The Applicant has taken in to account the interest of all the stakeholders of the Company and therefore believes that the Resolution Plan will create a sustainable structure that will enable the Company to continue as a "going concern". We are very keen to work with the stakeholders of the Company and are confident of delivering on this Resolution Plan in an expeditious and time-bound manner after receiving necessary approvals.

STEEL CUBE INDIA LLP is incorporated pursuant to section 12(1) of the Limited Liability Partnership Act, 2008 in India under Ministry of Corporate Affairs, Government of India. Company LLP number is AAG-8682 and his registered office is S R No. 64/P, Khata No. 272, AT and PO Navanagar, Navanagar Bus Stop, Himmat Nagar, Sabarkantha, Gujarat, 383220,India.

The Company is engaged in the business of manufacturing of TMT Bar and Steel Rods. The company is promoted by Vireshvar Iron and Steel Private Limited, Sharveshvar Alloys Private Limited and Champeshvar Iron and Steel Limited. All this promoters are in the business of Manufacturing of Steel. The company has achieved turnover of Rs. 121.36 Crore in 2019-20.

Partners of the LLP

Sr. No.	Name of Partner	Percentage of Holding
1	Vireshvar Iron And Steel Private Limited	25
2	Sharneshvar Alloys Private Limited	25
3	Champeshvar Iron And Steel Private Limited	20
4	Hcube Impex Llp	20

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Designated Partner

5	Shree Akshar Pharmaceutical Private Limited	10
	Total	100

Proposal for Creditors

Applicant proposed to pay INR 4.30 Crore in following manner to various stakeholders as per the terms of this Resolution Plan:-

(INR in Cr)

Payment to	Amount Claim	Amount Proposed to be Paid
Financial Creditors (Secured)	21.29	4.05
CIRP Cost (Estimated)	0.25	0.25
Total	21.64	4.30

In addition, the Applicant proposes to infuse requisite funds for meeting capex and working capital requirements.

RESOLUTION PLAN

1. OVERVIEW

1.1 Proceedings under the IB Code were instituted against the Company by Vedant Tradelink Private Limited and the Adjudicating Authority admitted the application and initiated the Corporate Insolvency Resolution Process for the Company. Pursuant to the order dated January 20, 2020, Mr. Navin Srichand Kanjwani, was appointed as the Interim Resolution Professional and thereafter, was confirmed as Resolution Professional for the Company by the committee of creditors ("Resolution Profession") on June 05, 2020. The Resolution Professional has provided an IM containing certain information relating to the Company and subsequent details have been provided by Resolution Professional through Virtual Data Room.

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Designated Partner

1.2 We thank the Resolution Professional and the Committee of Creditors **("COC")** for inviting the Resolution Applicant to submit a Resolution Plan for the Company.

1.3 The IM and subsequent information shared by the Resolution Professional may not suffice and give all the requirement that an Resolution Applicant may need to submit a Resolution Plan. This Resolution Plan, therefore has been proposed based on the information given in the IM, during Pre-resolution Plan meeting with the RP, site visit and on the assumptions and other terms and conditions stated in this RFRP. The Resolution Applicant is submitting this Resolution Plan for ensuring that the Company remains as a going concern.

1.4 Liquidation value of the Company is not known to the Applicant and therefore the Resolution Plan has been prepared on the assumption that the liquidation value of the Company is less then the admitted debt for Financial Creditors which aggregates to approximately INR 21.29 Crore.

2. CREDITORS ANALYSIS

According to list of creditors as per information provided in IM, total claims amounts to INR 21.29 Cr, with admitted ("Admitted Debt") being INR 21.29 Cr. The breakup of the claims is as follows:

Description	Amount submitted (INR CR)	Amount admitted (INR CR)
Financial Creditors of the Company (Financial Creditors)	21.29	21.29
Total Claims	**21.29**	**21.29**

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Designated Partner

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3. MANDATORY CONTENTS OF THE PLAN

3.1 Payment of Insolvency Resolution Process Cost

(1) As per the IBC, the CIRP costs are to be paid in priority over payments to be made to any other creditors and the CIRP costs shall, amongst other things, include the costs, fees and charges incurred by Resolution Professional, in running the operations of the Company as a going concern.

(2) Applicant has estimated the CIRP cost to be Rs. 25,00,000 (Rupees Twenty Five Lakh Only) Any change in the CIRP cost (increase or decrease) would be proportionately adjusted against the payments to be made to Secured Financial Creditors so that overall financial obligation of the Resolution Applicant remains unchanged.

(3) The amount proposed to be paid will be paid within a period of 7 days from the date of approval of this Resolution Plan by the Adjudicating Authority.

3.2 Proposal for Workmen / Employees

(1) As per IM and further information as provided by Resolution Professional, there is nil amount due to the workmen/ employees of the Corporate Debtor.

(2) The Applicant states that if there are any claim from the Workmen / Employee dues whether due or contingent, asserted or unasserted, crystallized or un-crystallized, known or unknown , disputed or undisputed, whether or not set out in the IM, the balance sheets of the Company of the Workmen/Employee, in relation to any period prior to the Plan Effective Date or arising on account of the acquisition of control by the Applicant over the Company pursuant to this Resolution Plan, will be written off in full and shall be deemed to be permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan and the Company or the Applicant shall at no point of time be, directly or indirectly,

held responsible or liable in relation thereto and overall financial obligation of the Resolution Applicant shall remain unchanged.

3.3 Proposal for Financial Creditors

(1) Given below is the amount claimed by the Financial Creditors of the Company and admitted thereof as per the IM:

Sr No	Category of creditor	Amount claimed (in INR Cr)	Amount of claim Admitted (in INR Cr)
1.	Financial Creditors	21.29	21.29

(2) According to the list of Financial Creditors, the total claims filed by the Financial Creditors is INR 21.29 Cr and same has been admitted by the Resolution Professional ("Admitted Financial Debt"). The Applicant understand that there are no non-fund-based bank guarantees / letter of credit outstanding, invoked /uninvoked other than those included in the Admitted Financial Debt and accordingly the Admitted Financial Debt would not get modified during the process or after the implementation of the Resolution Plan.

(3) Towards the Admitted Financial Debt of the Financial Creditors Resolution Applicant proposed to make payment as under;

Proposal for Financial Creditors

Particulars	Admitted Financial Debt	Amount Proposed to be Paid

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Central Bank of India (Secured Financial Creditors)	21,29,27,509	4,05,00,000

Payment Schedule / Terms of Payment to Financial Creditors :-

- The amount proposed will be paid within a period of 60 days from the date of Approval of this Resolution Plan by the Adjudicating Authority.

(4) Other than as specified in section 3.3 (1) to (3) , any and all other claims or demands made by or liabilities or obligations owed or payable to (including any demand for any losses or damages, principal, interest, compound interest, penal interest, liquidated damages, any actual or potential Financial Creditors of the Company or in connection with any debt of the Company (including any transactions in derivatives), whether admitted or not, due or contingent, asserted or unasserted, crystallized or uncrystallized, known or unknown, disputed or undisputed, present or future, whether or not set out in the Balance Sheet of the Company, in relation on any period prior to the Resolution Plan date or arising on account of the acquisition of control by the Applicant over the Company pursuant to this Resolution Plan, will be written off in full and shall be deemed to be permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan and the Company or the Applicant shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto.

(5) Any encumbrance or any other form of collateral (whether over immovable, movable assets, fixed deposits or cash or any other rights or privileges and including without limitation, any guarantee, security, letter of credit or pledge provided by the Company) that was created/granted /arranged in connection with any financial debt or any other debt or obligation of the Company at any time prior to the Resolution Plan completion

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date, shall automatically be released and all liabilities and obligation of the Company in relation to such Encumbrance or other form of collateral shall stand permanently extinguished upon full and final payment of amount as proposed in this Resolution Plan without the requirement of any further action on part of any party and the Company or the Applicant. All title deeds and other documents (including charge documents, if any) held by the Financial Creditors or on their behalf shall be immediately returned to the Company on Plan Implementation Date.

(6) Notwithstanding the above, on the Plan Implementation Date and upon discharge of Financial Creditors in the manner set out in section 3.3, all relevant persons including the Financial Creditors shall redeliver and shall cause to be delivered to the Company, all documents (including loan agreements, guarantees, security documents, title deeds, lease agreement, demand promissory notes, powers of attorneys, post –dated cheques, other negotiable instruments, share certificates encumbered with the Financial Creditors and all other documents to the extent applicable) and collateral, if any of the Company in relation or such assets that are in possession of or deposited with such Financial Creditors or any other person for the benefit of any of the creditors of the Company.

(7) Notwithstanding the above, upon the approval of the Resolution Plan by the NCLT under section 31 of the IBC, on and from the Plan Implementation Date:

(a) Discharge certificates, no objection certificate and all other documents issued for the release of the Encumbrances, security interest and charges will be deemed to be approved by each creditors of the Company including Financial Creditors

(b) Any event of default having occurred on part of the Company under any of the Financing Documents entered into by the Company on its own behalf or on

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behalf of any subsidiaries, joint ventures or associates to secure or guarantee any of their liabilities, prior to the Plan Effective Date, shall be waived in entirety and all rights under the existing finance documents in relation thereto shall stand extinguished ;

(c) All the outstanding negotiable instruments issued by the Company or by any person on behalf of the Company including demand promissory notes, post – dated cheques and letters of credit, shall stand terminated and the Company's liability under such instruments shall stand extinguished; and,

(d) All notification with regards to defaults filed with Credit Information Bureau (India) Limited (CIBIL), any information utility, RBI or any other regulatory Authority shall be withdrawn by the respective Financial Creditors.

3.4 Dissenting members of the COC

Liquidation value of the Company is not known to the Applicant. In terms of IBC, and under regulation made thereunder, the amount payable in respect of Financial Creditors who do not vote in favour of the Resolution Plan would 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 liquidation of the Company.

3.5 Proposal for Operational Creditors

(1) As per IM and further information as provided by Resolution Professional, there is nil amount due to Operational Creditors of the Corporate Debtor.

(2) In terms of IBC, Resolution Plan should provide for the payment to operational creditors in such manner as may be specified by Board which shall not be less than the amount to be paid to such operational creditors in the event of a liquidation of the Company under section 53 of the IBC or the

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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 or priority in sub-section (1) of section 53. Resolution Applicant is not aware of the Liquidation Value of the Company and but considering the level of debts dues and payable to the Secured Financial Creditors Resolution Applicant has taken a view that no amount would have been payable to the Operational Creditors in terms of section 53 of the IBC. No amount has been proposed by Resolution Applicant in respect of any amount due to operation creditors whether admitted or not, due or contingent, asserted or unasserted, crystallized or un crystallized, known or unknown, disputed or undisputed, present or future, whether or not set out in the Balance Sheet of the Company or IM, in relation on any period prior to the Resolution Plan date or arising on account of the acquisition of control by the Applicant over the Company pursuant to this Resolution Plan and shall be written off in full and shall be deemed to be permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan and the Company or the Applicant shall at no point of time be, directly or indirectly , held responsible or liable in relation thereto.

3.6 Treatment of amounts claimed under ongoing litigations

(1) All civil inquiries, investigations, notices, cause of action, suits, claims, disputes, litigation, arbitration or other judicial, regulatory or administrative proceedings against, the Company or the affairs of the Company, specifically set out in the IM (i.e. details of all material litigations and ongoing investigations or proceedings of this plan) in relation to any period prior to the Resolution Plan effective date or on account of acquisition of control by the Applicant over the Company pursuant to this Resolution Plan, shall be stand settled as per the terms of as set out in Para 3.7 of the Resolution Plan. By

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virtue of the order of the NCLT approving this Resolution Plan, all new inquiries, investigations notices, suits, claims, disputes, litigation, arbitration or other judicial, regulatory or administrative proceeding, will not be initiated or admitted if these relate to any period prior to the Resolution Plan effective date or on account of the acquisition of control by the Applicant over the Company, pursuant to this Resolution Plan, against the Company or any of its employees or directors who were appointed or who remain in employment or directorship after the Resolution Plan effective date.

3.7 Outstanding Govt. Dues, Taxes. Etc.

(1) As per IBC, Statutory liabilities considered to be at par with operational creditors, accordingly, the payment due to outstanding Govt. Dues, taxes, etc. should not be less than the liquidation value payable to the operational creditors in the event of a liquidation of the Company under section 53 of the IBC. The Statutory liabilities payable by Company includes, without limitation, claims under all taxes and provident fund payments. As set out in section 3.5(2) of this Resolution Plan, the Resolution Applicant is not aware of the Liquidation Value of the Company and but has taken a view that no amount would have been payable to the Statutory Creditors in terms of section 53 of the IBC.

(2) As per IM and further information as provided by Resolution Professional, there is nil amount due to Statutory Creditors of the Corporate Debtor.

(3) Of the statutory dues, there may be any litigations are pending at various stages by or against the Company and therefore the said dues are presently of contingent nature. The liability of the Company would crystallize for such payments only upon final judicial pronouncement in this regard and after adjustments of the tax deducted at source/ advance tax/

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outstanding refunds and other deposits made by Company to the respective statutory agencies. The said statutory dues are treated at par with the operational creditors and accordingly will be paid on equal footing with the operational creditor. Accordingly, Nil amount proposed to be paid towards statutory dues of the authorities.

(4) Without prejudice to section 3.7 (1) above, all liabilities (including without limitation, for any penalty, interest, fines of fees) or obligations of the Company, in relation to; (A) any unmet export obligations under the export promotion capital goods licenses held by the Company (whether subsisting or not) (B) any investigation, inquiry or show – cause, (C) any non-compliance of any applicable laws, rules, regulations, directions, notifications, circulars, guidelines, policies licenses, approvals, consents or permission; (D) change of control, transfer charges, unearned increase, compensation , or any other such liability whatsoever under any contract, agreement, lease, license, approval , consent or permission to which the Company are entitled; (E) any leasehold rights or freehold rights to movable or immovable properties in the possession of the Company (including but not limited to the leases, letter of intent or other agreements/contracts/ arrangements for immovable property entered into by the Company with the Central Government and State Government); (F) any contracts, agreement or commitments made by the Company, (G) any show cause notices, demand notices, issued by any regulatory, Government Authority; and (H) any excise , customs , service tax , goods and service tax demand notices in each of the foregoing cases whether admitted or not, due or contingent, asserted or unasserted, crystallized or un-crystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the IM, the Balance sheets of the Company, in relation to any period prior to the plan effective

For. STEEL CUBE INDIA LLP

Partner

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date or arising on account of the acquisition of control by the Applicant over the Company pursuant to this Resolution Plan, will be written off in full and will be deemed to be permanently extinguished by virtue of the order of the NCLT Approval this Resolution Plan and all such investigation, inquiries or show-cause in relation to the foregoing shall be disposed of, and the Company or the Applicant shall at no point of time be, directly or indirectly , held responsible or liable in relation thereto.

(5) Any and all rights and entitlements of the Governmental Authorities including but not limited to be Central Government, the State Governments any regulatory or local authority or body or any agency or instrumentally thereof (or any other party or entity under any agreement, lease, license, approval, consent or permission) whether admitted or not due or contingent, asserted or unasserted, crystallized or un-crystallised, known or unknown , disputed or undisputed, present or future, in relation to any period prior to the plan effective date or arising on account of the acquisition of control by the Applicant over the Company pursuant to this Resolution Plan, shall be deemed to be permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan and the Company or the Applicant shall at no point of time, directly or indirectly, have any obligation, liability or duty in relation thereto.

3.8 Proposal for Acquiring Management Control

(1) Upon approval of the Resolution Plan by the Adjudicating Authority and payment of the first installment as envisaged under this Resolution Plan, the Resolution Applicant shall be handed over the charge and operations of the Company and all assistance in this regard would be provided by the Resolution Professional and Committee of Creditors for the same.

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(2) The existing Board of Directors of the Company shall resign from the Board and co-operate with the Resolution Applicant in complying with the provisions of the Companies Act, 2013 with regards to filing of necessary forms with the office of Registrar of Companies. If the existing Board of Directors fail to submit their resignation, they shall be deemed to have ceased to be the Directors of the Company and Company would be entitled to file necessary forms with the office of ROC. If any technical issues arise for such filing the office of the Registrar of Companies shall provide necessary assistance to the Resolution Applicant for the change of Board including but not restricted to opening of special window to permit the incoming directors to complete the change in Director(s) as envisaged under the present Resolution Plan.

(3) Simultaneously with the resignation / cessation of the existing Board the Resolution Applicant shall nominate such number of Directors (including independent Directors) as are necessary to comply with the provisions of the Companies Act, 2013.

(4) The Company's issued, Subscribed and Fully paid up share capital as on 31st March, 2019 is as follows:

Sr. No.	Particulars	Amount (INR)
	Equity Share Capital	
1	66,98,600 equity shares of INR 10 each	6,69,86,000
	Total	**6,69,86,000**

For, STEEL CUBE INDIA LLP

Designated Partner

NAVIN SRICHAND KALYANI INSOLVENCY PROFESSIONAL IBBI/IPA-002/IP-N00347/2017-18/10997

Thus, the issued, subscribed and fully paid up share capital of the Company aggregates to INR 6.70 Cr (share capital). We understand that there is no change in issued, subscribed and paid up share capital of the Company post the above date.

(5) **Capital Reduction**

a. As provided earlier in this Resolution Plan the Liquidation value of the Company is not sufficient to cover debt of the Financial Creditors of the Company in full. Therefore, the Liquidation Value of the Equity Shareholder is estimated to be Nil

b. It is proposed that the entire equity share capital of the company shall be fully cancelled and stand reduced to Zero.

c. The Capital reduction shall be affected as part of this Resolution Plan itself, without having follow the process under Section 66 of the CA 2013 separately, and the order of the NCLT sanctioning this Resolution Plan shall be deemed to be an and order under Section 66 of the CA 2013 confirming the capital reduction. The Company will comply with any procedural requirement with respect to filing of requisite forms if required with the office of Registrar of Companies.

d. The approval of this Resolution Plan by the NCLT shall be deemed to have waived all the procedural requirement in terms of Section 66 of CA 2013 and the NCLT (Procedure for Reduction of Share Capital) Rules 2016.

e. The amount of reduction in the equity share capital of the Company shall be credited to Capital Reserves of the Company.

f. For Avoidance of doubt, the approval of COC to the Resolution Plan shall be deemed to be the consent of the all the authorities from

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whom such approval is necessitated whether arising from any agreement or applicable laws.

(6) Infusion of Fund by Applicant

(i) To enable the implementation of the Resolution Plan, Applicant may incorporate / use a Special Purpose Vehicle ("SPV"). The SPV shall be funded by way of equity infusion by Applicant or its Promoters/Relatives/ Associates/ Investors ("Subscribers") and debt raised at the SPV/ Applicant Level.

(ii) Simultaneously, with the Capital Reduction, the Applicant will make necessary subscription for allotment of 8,70,000 (Eight Lakh and Seventy Thousand) equity shares of Rs. 10 each at par aggregating to Rs. 87,00,000 (Rupees Eighty Seven Lakhs only) in order to enable the Company to make necessary allotment of equity shares to the Subscribers.

(iii) It is clarified that the approval of NCLT shall constitute adequate approval for issuance and allotment of equity shares by the Company to the Subscribers in accordance with Section 42 and Section 62(1) (c) of CA 2013 and accordingly, no approval or consent shall be necessary under any Applicable Law for making such allotment other than from the Board of Directors of the Company constituted post approval of the Resolution Plan.

7 Disbursement of Sustainable Debt

a. Upfront amount infused by the Applicant will be disbursed to the Financial Creditors / Operation Creditors / Due of Workmen/

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employees in the manner as Setout in Section 3 of this Resolution Plan.

b. It is further clarified that the amount of Payment shall first be applied towards the interest Component of the Admitted Debt and then against the principal amount of the Admitted Debt.

9. This resolution Plan has been prepared on the assumption that all necessary approvals to the extent required, shall be provided by the concerned Government Authorities. In the event such approvals are not granted or in case of change in applicable law or under any other material circumstances, then notwithstanding anything contained in this Resolution Plan, but without prejudice to the financial commitments set forth in this Resolution Plan with respect to each creditor of the Company (including quantum of payment or settlement to be made to such creditor and the timeline within which the payment settlement is to be made), the Applicant shall be entitled to revise the acquisition structure (including, the implementation thereof) in compliance with applicable law, after prior intimation and approval of the Committee of Creditors.

10. It is further clarified that all the commitments, bank guarantees, corporate guarantees or any other obligation, extended by the Company as on plan effective date shall stand cancelled upon approval of Resolution Plan by Adjudicating Authority.

11. **General**

11.1 Upon the approval of the Resolution Plan, necessary steps will be taken to file the copy of the Resolution Plan with various Governmental Authorities, including Tax Authorities/ Department, other Government Departments, and before various courts, tribunals and regulatory authorities where proceeding

For, STEEL CUBE INDIA LLP

Designated Partner

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with respect to the Company are pending, for disposal of all such proceedings.

11.2 No action shall be taken by any authority against the property of the Corporate Debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor.

11.3 Declaration to the effect that the Resolution Plan is not in contravention of provisions of Applicable Law

a. The Applicant states that this Resolution Plan is not in contravention of the provisions of any applicable laws.

b. Statement in relation to how the Resolution Plan has dealt with interests of all stakeholders, including financial and operational creditors of the Company

i. As set out above in section 3.2 to 3.7 of the Resolution Plan, the Resolution Plan for the Company has dealt with the interests of all stakeholders in Company, including the Financial Creditors and operational creditors of the Company.

ii. Unless otherwise expressly stated in this Resolution Plan, No creditor, existing shareholder or any other stakeholders of the Company shall be entitled to receive any settlement more than the proportionate settlement payable to a similar placed class of creditors, shareholders or stakeholders, as stand in this Resolution Plan.

c. Statement in Compliance of Section 29A of the IBC:

i. The Resolution Applicant confirms that, as on the date of this Resolution Plan and on the basis of the records of the Resolution Applicant, the Resolution Applicant is eligible under section 29A of the IBC to submit the Resolution Plan.

For, STEEL CUBE INDIA LLP

Designated Partner

NAVIN SRICHAND KANCHAN IBBI/ IPA-002/ IP-N000347 2017-18 / 10997 INSOLVENCY PROFESSIONAL

d. Concessions, reliefs and dispensation sought

i. The Applicant request for the reliefs, concessions and dispensations set out in ANNEXURE - 2 of this plan in order for the Resolution Plan be successful and each of these may be included, shall be deemed to be included in such order.

e. Additional Terms

i. Binding, further assurance

Upon approval of this Resolution Plan by the NCLT, this Resolution Plan shall be binding on the Company and all other stakeholders of Company including but not limited to Employees, Members, Creditors, Governmental Authorities, Resolution Professional involved in the Resolution Plan and/or otherwise concerned or connected with the Company. Any breach of the terms of this Resolution Plan or /defaults in the performance of the obligations hereunder by any of the foregoing persons shall cause irreparable damage to the Applicant and its proposal to revive the Company. Accordingly, in case of such breach or default, the Resolution Applicant shall have the right to an injunction or other equitable relief including specific performance of the terms hereof.

As the Resolution Plan shall be binding on each of the stakeholders mentioned above, all such persons including but not limited to the Resolution Professional, Employees, Guarantors, Creditors and stakeholders/members shall use their best efforts to do or cause to be done, such further acts, deeds, matters and things and execute such further documents as may be reasonably required by the Applicant to give full effect to the terms of this Resolution Plan in accordance with its terms and conditions. if required by

Applicant as the evidence of discharge, the creditors of the Resolution Plan shall provide all documentation and/or execute documents evidencing the full and final discharge of their claims.

ii. Confidentiality

By the receipt and deliberation of this Resolution Plan, the Resolution Professional and the Financial Creditors of the Company agree and undertake that they shall not reveal, and shall ensure that their directors, officers, managers, employees (including those on secondment), affiliates, legal, financial and professional advisors and bankers (collectivity, representatives) to whom confidential information is made available do not reveal, to any third party, any confidential information, without the prior written consent of the Applicant provided however that the provisions of this section shall not be applicable to any disclosure pursuant to applicable law subject to any practicable arrangements to protect confidentially. The Applicant shall be entitled to injunctive relief, specific performance and other remedies to enforce this section.

iii. Conflict

In the event of any repugnancy or inconsistency between this Resolution Plan and any other documents, the provisions contained in this Resolution Plan shall prevail for all purposes and to all intents.

iv. Entire Resolution Plan

The Resolution Plan along with its annexures constitutes the entire Resolution Plan of the Applicant within the meaning of section 30 of the IBC and regulation 38 of the CIRP regulations and supersedes and cancels any prior oral or written plan, agreement or understanding in this regard.

For, STEEL CUBE INDIA LLP

Partner

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v. Finality of settlement

The Resolution Professional published a notice on 14th February 2020 inviting all potential claimants to submit their proofs of claim on or before 26th February 2020. This was published in newspapers in accordance with Applicable Law. The Applicant assumes that all creditors of the Company that have any claims against the Company have filed their claims and the verifiable claims have been admitted by Resolution Professional and disclosed in the information memorandum. Accordingly, the Applicant and the Company shall have no responsibility or liability in respect of any claims against the Company attributable to the period prior to the plan effective date or arising on account of the acquisition of control by the Applicant over the Company pursuant to this Resolution Plan, other than any payments specified to be made under this Resolution Plan and all claims along with any related legal proceedings, including criminal proceedings , shall stand irrevocably and unconditionally abated, settled and extinguished in perpetuity.

f. Performance through group Company

i. The Resolution Applicant may perform any of its obligations under the Resolution Plan, in part or in full, either directly or indirectly, through or with, any direct or indirect group companies, as designated by the Resolution Applicant, either individually or collectively (and the term **"Applicant"** shall be read to include SCI and each designated entity). It is clarified that: (i) such designated entities could be incorporated; and (ii) each member of the board of directors of either the Applicant or shall otherwise not make the Resolution Applicant ineligible under section

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29A of the IBC. The Resolution Applicant shall collectively perform all the obligations under the plan required of an Applicant.

ii. The Applicant undertakes that all designated entities described above shall be eligible under section 29A of the IBC and necessary documents evidencing the same shall be provided, if called for by the RP.

12. OVERVIEW OF THE RESOLUTION APPLICANT

STEEL CUBE INDIA LLP is incorporated pursuant to section 12(1) of the Limited Liability Partnership Act, 2008 in India under Ministry of Corporate Affairs, Government of India. Company LLP number is AAG-8682 and his registered office is S R No. 64/P, Khata No. 272, AT and PO Navanagar, Navanagar Bus Stop, Himmat Nagar, Sabarkantha, Gujarat, 383220,India.

The Company is engaged in the business of manufacturing of TMT Bar and Steel Rods. The company is promoted by Vireshvar Iron and Steel Private Limited, Sharveshvar Alloys Private Limited and Champeshvar Iron and Steel Limited. All this promoters are in the business of Manufacturing of Steel. The company has achieved turnover of Rs. 121.36 Crore in 2019-20.

Partners of the LLP

Sr. No.	Name of Partner	Percentage of Holding
1	Vireshvar Iron And Steel Private Limited	25
2	Sharneshvar Alloys Private Limited	25
3	Champeshvar Iron And Steel Private Limited	20
4	Hcube Impex Llp	20
5	Shree Akshar Pharmaceutical Private Limited	10
	Total	**100**

13. BUSINESS PLAN

Refer Annexure - 3

For, STEEL CUBE INDIA LLP

Designated Partner

14. INDICATIVE TIMELINE OF EVENTS FOR IMPLEMENTATION OF PROPOSED PLAN

a. Obtaining of approvals for implementation of the Resolution Plan:

On and from the date of the approval of the Resolution Plan by the NCLT , the obligation of the Applicant to implement the Resolution Plan shall be subject to receipt of the said approval by the Applicant of the Company, as the case may be, of the requisite consent, approval or permission of the appropriate Governmental Authority, the Applicant's shareholders, as may be necessary for the effective implementation of the Resolution Plan.

For the avoidance of doubt, in the event, the above condition precedent is not fulfilled, any guarantees / EMD provided by the Applicant shall not be liable to be invoked / forfeited and no other action shall be taken against the Applicant or group entities/ affiliates/ subsidiaries. Further, if the above condition precedent is not satisfied before the expiry of the term of this Resolution Plan, this Resolution Plan shall not be effective or operative and the Applicant and the SPV shall have no obligations whatsoever under this Resolution Plan or otherwise to any person or governmental authority.

b. Indicative timelines for implementation of the Resolution Plan;

i. The Applicant assumes that the Resolution Professional will take all necessary actions and execute all documents/agreement as may be required to maintain the Company as a going concern until the Applicant acquires control over the Company in the manner set out in this Resolution Plan .subject to obtaining approvals as started above, the Applicant process to implement this Resolution Plan as per the following indicative timelines;

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NAVIN SEJCHAND KANJWANI * INSOLVENCY PROFESSIONAL IBBI/ IPA-002/ IP-N00347 2017-18 / 10997

Step	Action	Timeline (in business days)
Step 1	Approval of the Resolution Plan by Adjudicating Authority	T
Step 2	Payment of CIRP costs	T+7 business days
Step 3	Capital reduction of equity share capital of the Company	T + 60 business days
Step 4	Infuse of funds by ways of equity or convertible securities or subordinate convertible loans or any other appropriate means	T+ 60 business days
Step 5	Upfront Payment to the Financial Creditors of the Company	T+ 60 business days
Step 6	Payment of Deferred Amount of Secured Financial Creditors	T+ 60 business days
Step 7	Receipt of NOC from lenders- simultaneously with payment of upfront amount	T+ 75 business days

T means date of approvals of the Resolution Plan by the NCLT.
All Dates are tentative dates and are subject to change.

15. **MANAGEMANT OF THE COMPANY**

a. **Formation of Board**

i. It is proposed that upon the Applicant acquiring control over the Company, the existing board or interim board will be replaced by a new board of directors constituted with adequate representation from the members of the group and independent directors in compliance with Applicable

For, STEEL CUBE INDIA

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Laws. The existing director shall assist for filing of relevant forms/ documents with the Registrar of Companies for change in Directorship.

b. Appointment of CEO, CFO and Company Secretary

i. Applicant has been informed that Key Management Personal of the Company have already left the Company. The Applicant propose to fill the office of CEO, CFO, Company Secretary and Compliance officer with appropriate persons of its own choice.

c. Appointment of Auditors (Statutory and Internal)

i. The Applicant shall have the right to replace the existing auditors (statuary and internal) of the Company and appoint new auditors as deemed fit by the Applicant upon acquisition of the control over the Company by the Applicant pursuant to the Resolution Plan.

d. Appointment of Employees

i. Upon Acquisition of the control over the Company by the Applicant in this manner set out in this Resolution Plan, the Applicant proposes to employ requisite employee in the Company to bring in operational efficiencies in the Company.

16. TERM OF THE RESOLUTION PLAN, SUPERVISION AND IMPLEMENTATION SCHEDULE

a. The Term of the Resolution Plan shall commence on the Date of Submission of the Resolution Plan to the Resolution Professional and shall remain valid unless there is notification in this regard. Notwithstanding anything contained in this Resolution Plan (except to the extent set out in section 14(b) of this Resolution Plan), if any part of this Resolution Plan is approved by the COC; or (ii) if

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approved by the NCLT with any variance, then in the form and substance acceptable to the COC and the Applicant. Upon approval of the Resolution Plan by the NCLT, this Resolution Plan shall ipso facto from part of the NCLT order approving the Resolution Plan.

b. Supervision of Plan : On or after approval of this Resolution Plan by NCLT and until the Plan Implementation Date, Steering Committee consists of One Representative from Consenting Secured Financial Creditor, One Representative of Resolution Applicant and Resolution Professional to be supervise the Implementation of Plan. All major business decisions impacting the interest of Secured financial creditors shall be made by said committee in consultation with Resolution Applicant only. Examples of major decision include but not limited to, sale of assets, assuming of non-trade liabilities etc. Steering Committee shall decide about remuneration payable to the Resolution Professional, the frequency of reporting and meetings to have effective implementation and supervision of Resolution Plan. It is proposed that Applicant will bear the cost of Steering Committee.

c. The implementation schedule for the Resolution Plan set out in section 14(b) of this Resolution Plan.

17. OTHER KEY TERMS PERTAINING TO THE ACQUSITION OF CONTROL OF THE COMPANY

a. **Maintenance of the Company by the Resolution Professional as a going concern:**

Execute all such documents/agreements as may be required to maintain to the Company as a going concern until the Applicant acquires control over the Company in the manner set out in this Resolution Plan.

For, STEEL CUBE INDIA LLP

Partner

NAVIN SRICHAND KANJWANI IBBI/IPA-002/IP-N00347/2017-18/10997

b. None of the Resolution Professional, Creditors (including any Financial Creditors, Operational creditor), Governmental Authority, or any other stakeholder involved in this Resolution Plan or otherwise connect with this Resolution Plan, the COC, nor the Company shall (i) take any of the actions specified in section 28 of the IBC; (ii) take any action or omission that could reasonably be expected to have a material adverse impact, direct or indirect, on the Resolution Plan or its successful implementation; or (iii) institute or continue any proceeding against the Company or transfer, encumber, alienate or dispose of any of the assets or interest of the Company or enforce any Encumbrance or security interest created by the Company or on the securities of the Company, without the prior written consent of the Applicant.

c. **Applications for Approvals:** The Applicant assumes that the Resolution Professional will sign all applications on behalf of the Company that are proposed be made to any other Governmental Authorities in order to obtain the necessary approvals for implementation of this Resolution Plan within the timelines set out herein.

d. **Treatment of Contracts:** All Contracts , Deeds , Bonds, Agreements, Indemnities or other similar rights or entitlements whatsoever, schemes, arrangements and other instruments, permits, rights, entitlements, licenses (including the licenses granted by any Governmental Authority, Statutory or Regulatory Bodies) for the purpose of carrying on the business of the Company, and in relation thereto, and those relating to tenancies, privileges, powers, facilities of every kind and description of whatsoever nature in relation to the Company , or to the benefit of which the Company may be eligible and which are subsisting or having effect immediately before the order was passed by the NCLT pursuant to the order of the NCLT sanctioning the Resolution Plan and on this Resolution Plan becoming effective be deemed to and

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continue to be valid and subsisting, and any termination initiated pursuant to the initiation of the CIRP for any reason shall be deemed to have not been terminated. Such contracts, shall continue to be in full force and continue as effective and shall be the legal and enforceable rights and interests of the Company, which can be enforced and acted upon as fully and effectually as if there were no default or liabilities accrued or to be accrued. In relation to the same, any procedural requirements required to be fulfilled solely by the Company (and not by any of its successors), shall be deemed to be fulfilled by the Company.

e. Treatment of permits: with effect from the plan effective date, all permits held or availed of by, and all rights and benefits that have accrued to ,the Company , shall without any further act, instrument or deed shall remain valid ,effective and enforceable on the same terms and conditions to the extent permissible in applicable laws.

f. Approvals : All approvals necessary under applicable laws including but not limited to CA 2013 , Foreign Exchange Management Act and all other statutory and regulatory approvals required for the implementation of the Resolution Plan shall be deemed to have been complied with pursuant to NCLT order approving the Resolution Plan

g. The payment to persons contemplated in this Resolution Plan (including section 3(1)) shall be the Company`s and the Applicant `s full and final performance and satisfaction of all its obligations to such persons and all claims (including , for the avoidance of doubt , any unverified portion of their claims) of such persons against the Company shall stand irrevocably and unconditionally settled and extinguished in perpetuity on the plan effective date.

h. As set out in the RFRP, EMD paid along with Resolution Plan shall be returned to the Applicant within period of 7 days on Rejection

of Plan by COC or by Adjudicating Authority. Further, the Resolution Professional shall refund EMD on submission of Performance Bank Guarantee within a period of 7 days as stipulated in RFRP. The Applicant further reserves right to claim Interest for delay in refund of Earnest money Deposit.

i. The Applicant propose a grace period of 90 days shall be allowed for servicing of each of the respective instalment. However an interest @ 9% per annum shall be paid for the grace period availed by the applicant for the amount and period of delay.

We hereby agree to infuse the funds as proposed in the financial proposal. we understand that the Resolution Professional and/ or the COC have further right to renegotiate the terms of this resolution proposal and the decision of the Resolution Professional and /or The COC in selection of the selected Applicant and / or the successful Applicant shall be final and binding on us. Capitalized terms used but not defined herein shall have the meaning given to the term in the RFRP.

Yours faithfully

For Steel Cube India LLP

For, STEEL CUBE INDIA LLP

Designated Partner

Designated Partner

(Mishith Girishbhai Patel)

Date: 02-11-2020

Place: Ahmedabad

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PRAMUKH 500™ TMT BAR
STEEL CUBE INDIA LLP
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+91 98249 88223 | www.pramukhtmt.in | steelcubeindia@gmail.com

Part II - FINANCIAL PROPOSAL

Proposal for the Financial Creditors of the Company in detail including:

To,

Mr. Navin Srichand Kanjwani,
Resolution Professional of
B D Overseas and Fiscal Services Limited
708, Scarlet Gateway, Opp. Rivera Antillia,
Corporate Road, Prahlad Nagar
Ahmedabad, Gujarat - 380015

Dear sir,

Sub: Financial Proposal relating to B D Overseas & Fiscal Services Limited ("Company")

1. **Proposal for Creditors of the Company in details including:**
   Refer to section 3.2 to 3.7 of part I of Resolution Plan

2. **Acquisition of Management Control**
   Refer the section 3 (8) of part I of the Resolution Plan

3. **Financial Support from the Parent/ Ultimate Parent / Group Company**

   The Applicant will arrange for infusion of funds by way of equity or convertible securities or subordinate convertible loans or any other

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appropriate means, to be used to settle the sustainable debt. Necessary support, if any, will be provided by the group Company.

Sources of Fund

SN	Particulars	FY21
A	**Source of Funds**	
1	EMD with RP	0.05
2	Equity / Unsecured Loan from incoming partner	4.25
3	Loan from Bank	6.00
	Sub Total	**10.30**
B	**Uses of Funds**	
1	Payment towards CIRP Cost	0.25
2	Payment to Secured Creditors	4.05
7	Initial expenditure to start factory	3.00
8	Working Capital requirement	3.00
	Sub Total	**10.30**

The Resolution Applicant propose to infuse Rs 10.30 Crore inform of fresh equity of Rs. 0.87 Crore and Rs 3.43 Crore as Unsecured Loan to meet the payment proposed to be made to various stake holders and Bank Loan of Rs. 6 Crore to meet initial expenditure to start operation and initial working capital requirement to run the unit as set out in the Business Plan annexed with the resolution plan in Annexure – 3.

Details of Sources of Fund

The Resolution Applicant proposed to infuse Equity Capital of Rs. 0.87 Crore from the partners of the firm and their relatives.

It is also proposed infuse Rs. 3.43 Crore in form of unsecured Loan.

Resolution Applicant proposed to give Guarantee for this resolution plan.

For, STEEL CUBE INDIA LLP

Designated Partner

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We acknowledge that the proposal for additional debt from the Lenders is not envisaged as part of this Financial Proposal. We understand that the members of the Committee of Creditors have further right to renegotiate the terms of this Financial Proposal and the decision of the Resolution Professional and / or the Committee of Creditors in selection of the Selected Applicant and / or the Successful Applicant shall be final and binding on us.

Yours faithfully

For Steel Cube India LLP

For, STEEL CUBE INDIA LLP
Designated Partner

Designated Partner

Name: Mishith Girishbhai Patel
Date: 02-11-2020
Place: Ahmedabad

ANNEXURE 1

PART A – DEFINITIONS

Defined Term	Meaning
Admitted Financial Debt or Admitted	Shall have the meaning ascribed to such term under Section 3.3 of the Resolution Plan
Admitted Workmen and Employees	Shall have the meaning ascribed to such term under Section 3.2 of the Resolution Plan
Applicant	SCI or any of its Group Company including a Special Purpose Vehicle ("SPV") set up by any of the entities forming part of the Group Companies
Applicable Law(s)	All applicable statutes, enactments or acts of any legislative body in India, laws, ordinances, rules, bye-laws, regulations, notifications, guidelines, policies, directions, directives and orders of any Governmental Authority or any licenses, consents or approvals granted by any Governmental Authority,
Board/ Board of Directors	Board of directors of the Company
CA 2013	The Companies Act, 2013 (as amended from time to time) and or Companies Act, 1956 (to the extent applicable)
Capital Reduction	Shall have the meaning ascribed to such term this Resolution Plan
CBDT	Central Board of Direct Taxes
Claim(s)	A right to payment, right to remedy arising pursuant to a contract, under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, matured, unmatured, secured or unsecured, contingent, crystallised or fructified, of any nature whatsoever
CEO	Chief Executive officer
CFO	Chief Financial officer

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CIBIL	Credit Information Bureau (India) Limited
CIRP	Corporate Insolvency Resolution Process
CIRP Costs	The costs arising on account of the CIRP as determined in accordance with Section 5(13)(e) of the IBC read with Regulation 31 of the CIRP Regulations
CIRP Regulations	The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
COC	Committee of Creditors of the Company
Company	shall mean B D Overseas and Fiscal Limited, a Company incorporated in India under the Companies Act 1956, having its registered office at A/1113 Siddhi Vinayak Tower-A,B/H Dcp Off Off S.G. Highway, Sur. No. 212/2,Near Katariya House Makarba Ahmedabad Gujarat - 380051
Cr	Crore
EOI	Expression of Interest
FY	Financial Year
Encumbrance	Any mortgage, pledge, options, equitable interest, assignment by way of security, hypothecation, right of other Person, claim, security interest, encumbrance, title defect, title retention agreement, voting trust agreement, interest, lien, charge, restriction or limitation of any nature whatsoever, encroachment, right of way, easementary rights, including restriction on use, voting rights, transfer, receipt of income or exercise of any other right related to ownership, or any other security interest of any kind whatsoever, or any arrangement, whether conditional or otherwise, to create any of the above and includes any arrangement that has the commercial effect of an encumbrance or security interest
EBITDA	Earnings Before Interest, Taxes, Depreciation & Amortization
BDO	B D Overseas and Fiscal Services Limited
Financial Creditor	Shall have the meaning ascribed in 3.3 of the Resolution Plan
Financial	Shall have the meaning ascribed in 3.3 of the Resolution Plan

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NAVIN SRICHAND KANJWANI INSOLVENCY PROFESSIONAL IBBI/ IPA-002/ IP-N00347 2017-18 / 10997

Financial Proposal	Shall mean the detailed proposal to be submitted by the Applicant in accordance Part II of this plan
Governmental Authority(s)	The President of India, the GOI, the Governor and the Government of any State in India, any Ministry or Department of the same, any municipal or local government authority, any authority or private body exercising powers conferred by Applicable Law and any Court, Tribunal, Commission or other Judicial or Quasi-Judicial Body, and shall include, without limitation, any stock exchange, depository and any regulatory body
Group Company(s)	any Company shall mean and include (i) a Company which, directly or indirectly, holds 26% (twenty six percent) or more of the share capital of the said Company or (ii) a Company in which the said Company, directly or indirectly, holds 26% (twenty six percent) or more of the share capital or (iii) a Company in which the said Company, directly or indirectly, has the power to direct or cause to be directed the management and policies of such Company whether through the ownership of securities or agreement or any other arrangement or otherwise or (iv) a Company which, directly or indirectly, has the power to direct or cause to be directed the management and policies of the said Company whether through the ownership of securities or agreement or any other arrangement or otherwise or (v) a Company which is under common control with the said Company, and control shall mean the ownership of at least 26% (twenty six percent) of the share capital of a Company or power to direct or cause to be directed the management and policies of such Company whether through the ownership of securities or agreement or any other arrangement or otherwise.

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IBC	The Insolvency and Bankruptcy Code, 2016 (as amended from time to time) and the allied rules and regulations including the CIRP Regulations (as amended from time to time)
IM or Information Memorandum	Information memorandum on received in August 2020 for the CIRP of the Company by the Resolution Professional, as amended or modified from time to time.
INR or Rs.	Indian Rupee, the lawful currency of the Republic of India
Liquidation Value	Meaning as defined in IBC
LODR	SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015
MCA	Ministry of Corporate Affairs
MT	Metric Tonnes
MTPA	Million Tonnes Per Annum
NCLT or Adjudicating	Ahmedabad Bench of the National Company Law Tribunal as constituted under Section 408 of the CA 2013
Non-Compliance	Any delay, default, non-compliance, breach, violation, contravention by the Company, any member or shareholder of the Company or any Person associated with the Company in any manner under the terms of Applicable Law or any agreement or arrangement binding on the Company along with all fines, penalties, default interest, damages, and any amounts of whatsoever nature in relation thereto
Operational Creditors	Shall have the meaning ascribed to such term under Section 3.5 of this Resolution Plan
Permits	All consents, licenses, permits, permissions, authorisations, rights, clarifications, approvals, clearances, confirmations, declarations, waivers, exemptions, registrations, filings from or relating to any Governmental Authority under Applicable Law including but not limited to the permits

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Plan Effective Date	Shall mean the date on which the Resolution Proposal is accepted and approved by the Adjudicating Authority, in accordance with the terms of this RFP and provisions of Applicable Law or such date as may be agreed between the Resolution Applicant and the COC, on which the Resolution Plan shall become operative.
Plant Implementation Date	Shall mean the date on which the whole amount proposed to be paid in this Resolution Plan to various stakeholders are paid by the Applicant.
Potential Workmen Dues	Shall have the meaning ascribed to such term under Section 3.2 of this Resolution Plan
PAT	Profit After Tax
ROC	Registrar of Companies
Resolution Applicant	Steel Cube India LLP
Resolution Plan	Proposed Insolvency Resolution Plan in relation to the Company submitted by Applicant in terms of the IM on August 2020
Resolution Professional or RP	Shall mean Mr. Navin Srichand Kanjwani, appointed as the resolution professional for BDO by COC, and any replacement of resolution professional appointed by the COC
RFRP	Request for Resolution Plan
RBI	The Reserve Bank of India
SEBI	The Securities and Exchange Board of India
Share Capital	Shall have the meaning ascribed to such term under Section 3.8(5) of this Resolution Plan
SCI	Steel Cube India LLP
SPV	Special Purpose Vehicle
Sustainable Debt	Shall have the meaning ascribed to such term under Section 3.5(4)(1) of this Resolution Plan

For, STEEL CUBE INDIA LLP

Designated Partner

NAVIN SRICHAND KANJWANI * INSOLVENCY PROFESSIONAL 1681/ IPA-002/ IP-N00347 2017-18/ 10997

Taxation or Tax or Taxes	All forms of taxes and statutory, governmental, state, provincial, local governmental or municipal impositions, duties, contributions and levies and whether levied by reference to income, profits, book profits, gains, net wealth, asset values, turnover, goods, services, stamp duty, added value or otherwise and shall further include payments in respect of or on account of Tax, whether by way of deduction at source, advance tax, minimum alternate tax or otherwise or attributable directly or primarily to the demerged Company, the resulting Company, the transferor Company or the transferee Company or any other Person and all penalties, charges, costs and interest relating thereto
TPA	Tonne Per Annum
Workmen	Workmen of the Company as defined under Section 2(s) of the Industrial Disputes Act, 1947

For, STEEL CUBE INDIA LLP

Designated Partner

NAVIN SRICHAND KANJWANI
IBBI/IPA-002/IP-N00347/2017-18/10997
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Annexure – 2

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Concessions, Reliefs and Dispensation

1. The Central Board of Direct Taxes (CBDT) or any other relevant Government Authority to exempt the Resolution Applicant and the Company from the applicability of and payment of all Taxes under the Income Tax Act, 1961 (including Section 115JB), including any liability under the Minimum Alternate Tax which may arise on account of the transactions envisaged under this Resolution Plan either on the Resolution Applicant, the Acquiring entity or the Company or any other Person who is likely to be impacted due to implementation of the Resolution Plan, The Adjudicating Authority shall pass the order to that effect.
2. The CBDT and or any other Government Authority to allow the Company to enjoy and avail in future any tax benefits, deductions, exemptions as per the relevant provisions of the applicable law which the Company and /or BDO was entitled to as on the Plan Effective Date for the balance period as per the relevant provisions of the Applicable Law.
3. All license and Government Approvals held by the Company, which expires prior to the Plan Effective Date or within a period of six (6) months thereafter, shall be renewed / extended by the relevant Government Authorities, and the Company shall be permitted to continue to operate its business and assets in the manner operated prior to submission of this Resolution Plan until renewal / extension of such licenses and approvals. The relevant Government Authorities will provide a reasonable period of time after the Plan effective Date in order for the Resolution Applicant to assess the status of the licenses and Governmental Approvals required by the Company and to procure that the Company applies for the same.
4. The Collector of Stamps, Revenue Department, of any State Government and the Ministry of Corporate Affairs to exempt the Resolution Applicant and the Company, from the levy of Stamp Duty and fees applicable in relation to this Resolution Plan and its implementation, including any stamp duty and registration costs, as applicable.

For, STEEL CUBE INDIA LLP

Designated Partner

NAVIN SRICHAND KANJWANI * INSOLVENCY PROFESSIONAL IBBI/IPA-002/IP-N00347/2017-18/10997

5. The relevant State Pollution Control Boards to approve renewal of the Consents to operate obtained by the Company under the applicable provision of the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981.
6. All Government Entities to waive all past Non-Compliances of the Company under Applicable Laws, and the Company, Applicant shall not be liable for any Non-Compliances under Applicable Laws for the period prior to the Plan Effective Date.
7. All fuel supply agreement entered into by BDO, shall be assigned to the Company on approval of this Resolution Plan pursuant to operation of Law and without requiring any act or deed either on part of the Company and /or BDO.
8. The right of any Person (whether exercisable now or in the future and whether contingent or not) to call for the allotment, issue, sale or transfer of shares or loan capital of the Company or the Applicant, whether on a change of control, or otherwise, shall stand unconditionally and irrevocably extinguished.
9. The Company shall entitle to review, modify or terminate contracts (including contracts with parties that were related parties of the Company) prior to the Insolvency Commencement Date which impose onerous conditions hindering the restructuring for the Company.
10. The relevant Government Authority to exempt the Resolution Applicant and the Company from the applicability of and payment of all Taxes under the Central Goods and Service Tax Act, 2017 which may arise on account of the transaction envisaged under this Resolution Plan either on the Resolution Applicant, the Acquiring Entity or the Company or any other Person who is likely to be impacted due to implementation of the Resolution Plan, and the Adjudicating Authority shall pass an order to that effect.
11. NCLT Approves the Capital Reduction as contemplated under this Resolution Plan of the equity share of the Company, without requiring compliance with the provision of Section 66(1) and (2) of the Companies Act, 2013.

For, STEEL CUBE INDIA LLP

Designated Partner

NAVIN SRICHAND KANJWANI
IBBI/IPA-002/IP-N00347/2017-18/10997
INSOLVENCY PROFESSIONAL

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12. The CBDT to consider to provide relief to the Company from all direct tax litigation pending at different level and provide waiver from all Tax dues including interest and penalty on such litigations.
13. The Central Board of Excise and Customs / respective value-added Tax/ Entry Tax authorities / Director General of foreign trade to consider and providing relief to the Company from all litigation pending at different levels and provide waiver from tax dues including interest and penalty on such litigation.
14. The Respective Government Authorities to consider providing relief from applicability of and payment of Taxes under Provisions of the Goods and Service Taxes which may arise as a result of implementation of the Resolution Plan either on the Resolution Applicant or the Company or SPV or any other Person who is likely to be impacted due to implementation of the Resolution Plan.
15. All Government Authorities to waive the Non-Compliances of the Company prior to the Plan Effective Date, including but not limited to CA 2013, the Industrial Disputes Act, 1947, and the relevant shops and establishment acts and rules, circulars and regulations of each of the above legislations.
16. The Ministry of Environmental, Forest and Climate Change, the Central Pollution Control Board, the Gujarat Pollution Control Board and all other Government Authorities concerned to waive any Non-Compliances by the Company under Applicable Law pertaining to environmental and forests (including but not limited to the Environmental Protection Act, 1986, Indian Forest Act, 1927, The Forest Act, 1980, the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the rules made there under each of the aforesaid legislations)
17. All Government Authorities to grant any relief, concessions or dispensation as my be required for implementation of the transactions contemplated under Resolution Plan in accordance with its terms and conditions.

For, STEEL CUBE INDIA LLP

Designated Partner

RAVIN SRICHAND KANJWANI
IBBI/IPA-002/IP-N00347/2017-18/10997
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Annexure – 3

Business Plan

Set out below is the business plan for the Company Applicant intends to pursue upon acquisition of control over the Company pursue to this Resolution Plan. This business plan is based on due diligence conducted by the Applicant on the Company and is subjects to change and refinement depending upon further information becoming available to the Applicant, changes in global investment scenarios and market conditions, among other relevant factors;

- Highlights of the proposed business plan are as under;

- The Applicant propose to incur initial capex of Rs. 3 Crore for Start of Commercial Operation of the Company.
- The applicant expecting Net Sales of Rs. 100 Crore for 1st Year (considering full year of operation) with 10% growth every year.

For, STEEL CUBE INDIA LLP

Designated Partner

NAVIN SRICHAND KANJWANI IBBI/ IPA-002/ IP-N00347 2017-18/ 10997 INSOLVENCY PROFESSIONAL

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19th November 2020

To

Mr. NavinSrichandKanjwani,
Resolution Professional of
B D Overseas and Fiscal Services Limited
708, Scarlet Gateway, Opp. Rivera Antillia,
Corporate Road, Prahlad Nagar
Ahmedabad, Gujarat - 380015

Dear Sir,

Sub: Addendum to Revised Resolution Proposal Relating to B D Overseas and Fiscal Services Limited under Corporate Insolvency Resolution Process ("CIRP") submitted on 2nd November 2020.

We Steel Cube India LLP **("SCI"** or **"the Resolution Applicant" or "Applicant")** are please to submit addendum to Revised Resolution Plan for B D Overseas and Fiscal Services Limited **("BDO" or "Company")** submitted on 2nd November 2020.

There was some contradictory statement in the Revised Resolution Plan submitted by us. In view of the same We hereby issue this addendum to said Revised Resolution Plan submitted by us. This addendum shall be read in conjunction to the Revised Resolution Plan dated 2nd November 2020. All other contents mentioned in the Revised Resolution Plan dated 2nd

For, STEEL CUBE INDIA LLP

Designated Partner

November 2020 shall remain unchanged.

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In response to above we submit as under:-

Paragraph 17(h)of Revised Resolution Plan for other key terms pertaining to the Acquisition of Control of the Company replaced by following:-

> *"h. As set out in the RFRP, EMD paid along with Resolution Plan shall be returned to the Applicant within period of 7 days on Rejection of Plan by COC or by Adjudicating Authority."*

Paragraph 17(i) of Revised Resolution Plan for other key terms pertaining to the Acquisition of Control of the Company is omitted.

The addendum shall be read in conjunction with our Revised Resolution Plan dated 2nd November 2020. All other terms and conditions & Other Content mentioned in Revised Resolution Plan dated 2nd November 2020 shall remain unchanged and would apply to this addendum also.

Yours Faithfully

For Steel Cube India LLP

(Mishith Patel)

Designated Partner

2020 SCC OnLine SAT 453

In the Securities Appellate Tribunal[†]

(BEFORE TARUN AGARWALA, PRESIDING OFFICER AND DR. C.K.G. NAIR, MEMBER AND M.T. JOSHI, MEMBER (JUDICIAL))

Monnet Ispat & Energy Limited. … Appellant;

Versus

Securities and Exchange Board of India … Respondent.

Appeal No. 238 of 2020

Decided on October 29, 2020, [Order Reserved on : 22.10.2020]

Advocates who appeared in this case:

Mr. Tarun Gulati, Senior Advocate with Mr. Kumar Sambhav, Mr. Shubhabrata Chakraborti, and Ms. Madhura Kulkarni, Advocates i/b Juris Corp and Mr. Ajay Kadhao, Authorised Representative for the Appellant;

Mr. Mustafa Doctor, Senior Advocate with Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates i/b K Ashar and Co. for the Respondent.

The Judgment of the Court was delivered by

TARUN AGARWALA, PRESIDING OFFICER:— The present appeal has been filed against the order of the Adjudicating Officer dated 26th June, 2020 imposing a penalty of Rs.6,00,000 for violating Regulations 52(4) and 54(2) of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as 'LODR Regulations, 2015') during the period from 2013 to 2014.

2. The facts leading to the filing of the present appeal is, that the Adjudicating Officer issued a show cause notice dated 18th October, 2019 alleging that the appellant had issued non-convertible debenture securities in 2013-14 but failed to make the necessary disclosures as required under the LODR Regulations.

3. In response to the show cause notice, the appellant replied that on 15th June, 2017 Reserve Bank of India directed the lenders to commence insolvency proceedings against the appellant under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC') based on which the State Bank of India filed a petition before the National Company Law Tribunal, Mumbai bench (hereinafter referred to as 'NCLT') for the commencement of the corporate insolvency resolution process. The petition was admitted on 18th July, 2017 and a resolution

professional was appointed. Thereafter, resolution professional invited prospective investors to submit a resolution plan. A consortium comprising of AION Investments Private II Limited and JSW Steel Limited submitted a resolution plan and eventually after undergoing due process, NCLT by an order dated 24th July, 2018 approved the resolution plan. On this basis, the consortium acquired the management control of the company on 31st August, 2018. New Board of Directors was accordingly appointed and necessary disclosure of this fact was made to the stock exchange.

4. The contention of the appellant before the adjudicating officer was that in view of the resolution plan being approved by the NCLT, all financial liabilities, past or future is deemed to be extinguished by virtue of the NCLT order and that no show cause notice or fresh proceedings against the appellant could be initiated nor any penalty could be imposed. It was further stated that action, if any, can be initiated by the respondent against the erstwhile promoters or against those persons who were in charge of the management of the company prior to the commencement of the resolution plan.

5. The adjudicating officer without considering as to whether proceedings could be initiated against the appellant in view of the resolution plan being approved by the NCLT under IBC skirted the issue by holding that it is beyond her ambit to comment as to whether such proceedings could be initiated against the new management or the erstwhile management and that her role under the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as 'Adjudication Rules, 1995') is to adjudge the alleged violation by the appellant. For facility, the extract of the findings of the adjudicating officer on this aspect is extracted hereunder:

> *"As regards, the various contentions of the Noticee that the instant or such proceedings need to be initiated against erstwhile management and not the current/new management/Noticee, it is beyond my ambit to comment on the same. My role within contours of Adjudication Rules, 1995, is to adjudge the alleged violation by the Noticee which is mentioned in the AO communique shared with the Noticee……"*

6. The adjudicating officer thereafter proceeded and found that since necessary disclosures under regulations 52(4) and 54(2) of the LODR Regulations were not made, the adjudicating officer imposed a penalty of Rs.6,00,000. The appellant being aggrieved by the aforesaid order has filed the present appeal.

7. We have heard Mr. Tarun Gulati, the learned Senior Advocate assisted by Mr. Kumar Sambhav, Mr. Shubhabrata Chakraborti, and Ms.

Madhura Kulkarni, Advocates and Mr. Ajay Kadhao, Authorised Representative for the Appellant and Mr. Mustafa Doctor, Senior Advocate assisted by Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates for the Respondent.

8. The issue that arises for consideration in the present appeal is, whether the impugned order imposing penalty upon the appellant for alleged contravention during the period prior to the approval of the resolution plan could be passed by the adjudicating officer. The submissions of the learned senior counsel for the appellant is, that no show cause notice could be issued nor the impugned order could be passed which is contrary to the approved resolution plan and which is binding on the respondent under section 31 and 32A of the IBC.

9. In this regard section 31(1) of the IBC reads as follows:

> *"**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, 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:*
>
> *PROVIDED that the Adjudicating Authority shall, before passing the order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation."*

10. On a perusal of section 31(1) of the IBC, it is apparently clear that the resolution plan is binding not only on all creditors but also on central government, state government or local authority to whom statutory dues are owed. The immunities applicable to the appellant will be in accordance with the approved resolution plan. The Supreme Court in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta*, (2019) 153 CLA 275 (SC) held as follows:—

> *"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 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."

11. The aforesaid decision makes it clear that the terms of an approved resolution plan are imperative and are binding on all creditors including government and local authorities. In this regard, it would be appropriate to peruse the relevant portion of the resolution plan approved by the NCLT which is extracted hereunder:

"(a) Paragraph 1(d)(v) of Part I of the Resolution Plan

"All financial liabilities (including without limitation, for any penalty, interest, fines or fees) and other liabilities and obligations which may have a financial impact on the Company, in relation to (A) any unmet export obligations under the Export Promotion Capital Goods Licenses held by the Company (whether subsisting or not); (B) any mining leases or rights (including such mining leases or rights as may have lapsed, expires or may have been cancelled) and/or agreements in relation to mining rights held by, the Company, its subsidiaries or its associates (other than the bank guarantees required to be provided by the Company in relation to the mines allocated to the Company (i.e. Gare Palma IV/7 coal mine, the Hahaladdi iron-ore mine, the Gaitra limestone mine and the Guma-Pausari limestone mine); (C) any investigation, inquiry or show-cause, whether civil or criminal. (D) any non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals consents or permissions; (E) change of control, transfer charges, unearned increase, compensation, or any other such liabilities whatsoever under any contract, agreement, lease, license, approval, consent, privilege or permission to which the Company or its subsidiaries, joint ventures or associates are entitled. (F) any leasehold rights or freehold rights to movable or immovable properties or the possession of the Company; (G) any contracts, agreements or commitments made by the Company; and (H) cross subsidies availed by the Company in relation to the power generation by the Company, whether admitted or not, due or contingent, asserted or unasserted, crystallised or uncrystallised, known or unknown, secured or unsecured, disputed or undisputed, present or future, whether or not set out in the A/L Statement, the balance sheets of the Company or the profit and loss account statements of the Company or the February 21 Creditors List, in relation to any period prior to the Acquisition or arising on account of the Acquisition will be written off in full and will be deemed to be permanently extinguished by virtue of the order of the NCLT approving this

Resolution Plan, and the Company and/or the Consortium shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto. It is clarified that the extinguishment of liabilities as set out in this section 1(d)(v) shall not prejudice the imposition of any liability on the Existing Promoters or any existing or former members of the management of the Company including pursuant to any investigation, inquiry or show-cause, whether civil or criminal, against the Existing Promoters or any existing or former members of the management of the Company. It is further clarified that the Consortium and the members of the Board of Directors and management of the Company who are appointed on or after the Acquisition shall not be liable, in any manner whatsoever, for any criminal action or liability in relation to any inquiries, investigations, notices, causes of action, suits, claims, disputes, litigations or other judicial, regulatory or administrative proceedings against, or in relation to, or in connection with the Company or the affairs of the Company in relation to any period prior to the Acquisition or arising on account of the Acquisition."

(Emphasis Supplied)

(b) Paragraph 1e(iv) of Part I of the Resolution Plan

"Other than the proceedings set out in Part B of Annexure 4 all inquiries, investigations, notices, causes of action, suits, claims, disputes, litigations, arbitration, or other judicial, regulatory or administrative proceedings against, or in relation to, or in connection with the Company or the affairs of the Company (other than against the Existing Promoters or any existing or former members of the management of the Company), pending or threatened, present or future, (including without limitation, the proceedings specifically set out in Annexure 2 and Part A of Annexure 4), in relation to any period prior to the Acquisition or arising on account of the Acquisition shall be deemed to be withdrawn or dismissed and all liabilities or obligations in relation thereto, whether or not set out in the A/L Statement, the balance sheets of the Company or the profit and loss account statements of the Company or the February 21 Creditors List, will be deemed to have been written off in full and permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan, and the Company and/or Consortium shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto. By virtue of the order of the NCLT approving this Resolution Plan all new inquiries, investigations, notices, suits, claims, disputes,

litigations or other judicial, regulatory or administrative proceedings against, or in relation to, or in connection with the Company or the affairs of the Company in relation to any period prior to the Acquisition or arising on account of the Acquisition."

(Emphasis Supplied)

12. A perusal of the aforesaid resolution plan indicates:—

(a) Extinguishment of all financial liabilities of the Appellant, including any penalty, whether contingent, assessed, known or unknown, in relation to any period prior to the acquisition.

(b) Deemed withdrawal or dismissal of inquiries, investigations, causes of action, regulatory proceeding against the Appellant in relation to any period prior to the acquisition.

(c) Extinguishment of liability in relation to any new enquiry, investigations, causes of action, regulatory proceeding against the Appellant in relation to any period prior to the acquisition.

13. In view of the aforesaid clear terms of the resolution plan, the show cause notice could not be issued to the appellant for the alleged contravention relating to the period prior to the acquisition and, consequently, the impugned order could not be passed against the appellant.

14. In *Ultra Tech Nathdwara Cement Ltd.* v. *Union of India*, 2020 SCC OnLine Raj 1097, the Rajasthan High Court referred to a speech of the Hon'ble Finance Minister in the Parliament clarifying the legislative intent of the amendment under section 31(1) of IBC in the following terms:

"IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but, largely, yes, it is IBC.

There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan."

15. In view of the aforesaid, it is clear that once the resolution plan is approved by the appropriate authority the same is binding on all concerned including the respondent.

16. The Rajasthan High Court in *Ultra Tech Nathdwara Cement Ltd.* v. *Union of India* (supra) held as under:—

"66. Section 31(1) of the Code makes it clear that once a

resolution plan is a 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 state as it were.

67. 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 a appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. As 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 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, the NCLAT judgment must also be set aside on this count."

[Emphasis supplied]

17. It is also stated here that what could not done by SEBI when the moratorium under section 14(1) of the IBC was in force cannot certainly be done after a resolution plan is approved and becomes binding on all creditors including government and local authority under section 31 of the IBC.

18. In the light of the aforesaid, we are of the opinion that once a resolution plan has been approved it becomes binding on all creditors including the government and local authorities including the respondent under section 31(1) of the IBC. It is no longer open to the respondent to issue a show cause notice or adjudicate and pass an order of penalty upon the appellant. Consequently, the impugned order cannot be sustained and is quashed. The appeal is accordingly allowed with no order as to costs.

19. Before parting, we are constrained to observe total abdication of power which is vested with the adjudicating authority under the SEBI Act, the Rules and the Regulations. The adjudicating officer is required to adjudicate under the Adjudication Rules, 1995. One of the foremost duties is to find out as to whether the charge levelled against the appellant could be fastened upon it. Once a contention has been raised that no proceedings can be initiated or penalty could be imposed upon

the appellant after the passing of the resolution plan, the adjudicating officer was required to deal with the matter and could not skirt this issue by holding that it was beyond her ambit to deal with such condition or comment on the same. Such observation made by the adjudicating officer is indicative of the lack of clarity, quasi-judicial thought in legally deciding the matter. We will not say anything further and leave it to the Chairman of the SEBI to consider and issue appropriate direction on the administrative side to the adjudicating officer in question.

20. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Presiding Officer on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

———

† Mumbai Bench

2022 SCC OnLine SAT 2268

In the Securities Appellate Tribunal[†]

(BEFORE TARUN AGARWALA, PRESIDING OFFICER AND MEERA SWARUP, MEMBER (TECHNICAL))

Tata Steel Limited … Appellant;

Versus

Securities and Exchange Board of India SEBI Bhavan … Respondent.

Misc. Application No. 642 of 2022 and Appeal No. 180 of 2022

Decided on December 20, 2022

Advocates who appeared in this case:

Mr. Zal Andhyarujina, Senior Advocate with Mr. Jahaan Dastur, Mr. Vijay Purohit, Mr. Shashank Gautam, Ms. Devna Arora, Mr. Arvind Thapliyal, Ms. Nikita Bangera, Mr. Siddhant Grover and Ms. Saravna Vasanta, Advocates i/b. P&A Law Offices for the Appellant.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Sumit Rai, Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Purvi Jain, Mr. Niket Dalal and Ms. Hubab Sayyed, Advocates i/b. Vidhii Partners for the Respondent.

The Judgment of the Court was delivered by

TARUN AGARWALA, PRESIDING OFFICER (Oral):— The present appeal has been filed against the order dated 14th February, 2022 passed by the Adjudicating Officer imposing a penalty of Rs. 2 lakhs for violation of Regulations 51(1), 51(2), read with Part B of Schedule III (Clauses A1, A4, A9), 52(4), 52(5), 54(2), 57(1) and 13(3) of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as ("LODR Regulations').

2. The show cause notice alleged the following violations:

Alleged Violations	**Filing for**
Reg. 40(10) r/w 40(9) of the LODR Regulations	(Half yearly disclosures) March 2016 September 2016, March 2017 September 2017, March 2018 September 2018
Reg. 13(3) of the LODR Regulations	(quarterly disclosures) December 2015, March 2016 June 2016, September 2016, December 2016, March 17

	June 2017, September 2017, December 2017, March 18 June 2018, September 2018, December 2018
Reg. 7(3) of the LODR Regulations	(Half yearly disclosures) March 2016 September 2016, March 2017 September 2017, March 2018 eptember 2018

3. With regard to violation relating to Regulation 40(10) read with 40(9) of the LODR Regulations the AO not found any violation and these charges have been dropped.

4. With regard to violation of Regulation 13(3) of the LODR Regulations the AO has found the appellants to be guilty of non-disclosure for the quarter ended March, 2016, September, 2018 and December, 2018 ONLY.

5. With regard to violation relating to Regulation 7(3) the AO has dropped all these charges.

6. In the instant case, the Company had gone into CIRP in July, 2017 under the IBC and in view of the decision of this Tribunal in *Monnet Ispat & Energy Ltd.* v. *SEBI*, ***Appeal no. 238 of 2020 decided on 29th October, 2020***, no penalty can be levied on the new 4 management which came into the picture on 18th May, 2018. The violation, if any, committed for the quarter ended March, 2016 was of the previous management which cannot be imposed upon the new management.

7. Insofar as the non-disclosure for the quarter ended September, 2018 and December, 2018 is concerned, no charge has been levied against the appellant in the show cause notice and, consequently, no penalty can be imposed for this violation.

8. In view of the aforesaid, the impugned order cannot be sustained. The impugned order is quashed. The appeal is allowed. It would be open to the respondent to issue a fresh show cause notice for the alleged violation, if so advised. In the circumstances of the case there shall be no order as to costs. Misc. application no. 642 of 2022 is also disposed of accordingly.

9. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned 5 parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

———

† Mumbai Bench

THE SUPREME COURT CASES

(2021) 5 SCC

(2021) 5 Supreme Court Cases 1

(BEFORE ROHINTON FALI NARIMAN, NAVIN SINHA AND K.M. JOSEPH, JJ.)

3J

MANISH KUMAR .. Petitioner;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

Writ Petitions (C) No. 26 of 2020† with Nos. 19, 27-28, 33, 47, 53, 73, 75, 163-66, 173, 176-77, 182, 191, 209-210, 228-29, 257, 267, 328, 333, 337, 341, 374, 388, 390, 393, 402, 579, 642, 714, 783, 805-806, 850 of 2020 and Transferred Case (C) No. 228 of 2020, decided on January 19, 2021

A. **Constitution of India — Art. 14 — Law enacting or modifying economic measure — Challenge to validity of — Approach of Court in such cases — Explained in detail — Freedom of legislature to experiment, and modify rights granted by it based on experience and actual working of economic measure — Wisdom of original or modified provision(s) — Not subject to judicial scrutiny if provision(s) in question are otherwise compliant with the Constitution — Wider latitude given to legislature in economic matters essentially arises from separation of powers under the Constitution**

— Since the Insolvency and Bankruptcy Code, 2016 undoubtedly bears the brand of an economic measure upon its face, and in true spirit, being one of the most significant and dynamic economic experiments indulged in by the law giver, not by becoming servile to Parliament, but by way of time hallowed deference to the sovereign body experimenting in such matters, the Court will lean heavily in favour of such a law

— A law cannot operate in a vacuum — In the concrete world, when the law is put into motion in practical experiences, bottlenecks that would flow from its application, are best envisaged by the law givers — Solutions to vexed problems made manifest through experience, would indeed require a good deal of experimentation, as long as it passes muster in law — It is no part of the Court's function to probe into what it considers to be more wise

† Under Article 32 of the Constitution of India

or a better way to deal with a problem — There is a wide latitude allowed in the legislature in these matters — The examination cannot be extended to find out whether there is mathematical precision or wooden equality established — The working of the statute may produce further issues, all of them may not be fully perceived as which may not be wholly foreseen by the law giver — The freedom to experiment must be conceded to the legislature, particularly, in economic laws — If problems emerge in the working of law and which require legislative intervention, the Court cannot be oblivious to the power of the legislature to respond by stepping in with necessary amendments — There is nothing like a perfect law, and as with all human institutions there are bound to be imperfections — Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — Generally

B. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) second proviso [as inserted vide Act 1 of 2020] and S. 21(6-A)(b) — S. 7(1) second proviso imposing conditions on allottees of same real estate project for filing of insolvency applications, namely, that: (i) application for initiating corporate insolvency resolution process must be filed jointly; (ii) by not less than 100, or, not less than 10% of the total number of allottees under the *same* real estate project, whichever is *less* — Vires of, upheld**

— Sub-classification i.e. classification within the same class, as in the present case of allottees of real estate project falling within the class of financial creditors, for applicability of such proviso — Validity of — Test of intelligible differentia and differentia having a rational nexus with the object of the law, namely, object of maintaining speed in the CIRP and also the balancing of interest of all the stakeholders — Satisfaction of — Wisdom of legislature — Non-interference with — Availability of effective alternative remedies to allottees under RERA/Consumer Protection Act — Absence of similar power of waiver of Government re the threshold requirement prescribed under impugned proviso, as had existed under Ss. 397 to 399 of the Companies Act, 1956 — Failure of legislature to adopt joint application procedure in impugned proviso along the lines of Or. 1 R. 8 CPC as adopted under Consumer Protection Act — Relevance of — Differential treatment of allottees of real estate projects being unsecured creditors of corporate debtors like the operational creditors, whether a case of hostile discrimination

— Allottees are financial creditors but the features which set them apart are: (i) Numerosity; (ii) Heterogeneity: differences between a seemingly homogeneous group i.e. while a vast majority of allottees may see reason in either giving time and reposing faith in existing management of real estate project or successfully invoking the other remedies available to them, an individual allottee, out of the heterogeneous group, could throw the spanner in the works and bring the entire real estate project itself to a possible doom; and (iii) Individuality in decision-making i.e. unlike a bank or a financial institution, where the decision-making process is more institutionalised, an individual allottee, left free to file an application under S. 7, would exhibit a high level of subjectivity

— Held, if legislature taking into consideration sheer numbers and heterogeneity of a group of creditors viz. allottees of a real estate projects, finds this to be an intelligible differentia which distinguishes allottees from other financial creditors, then it is not for the Court to sit in judgment over the wisdom of such a measure — Legislature became alive to the peril of the entire object of the Code being derailed by permitting individual players crowding the docket of authorities under the Code, and resultantly reviving the very state of affairs which compelled the legislature to script a new dawn in this area of law — Also, post insertion of the impugned proviso, allottee continues to be a financial creditor and all that is envisaged is the legislative value judgment that a critical mass is indispensable for allottees to be present, before the Code can be activised — Upholding the amendment, held, the law under scrutiny is an economic measure and in dealing with the challenge on the anvil of Art. 14 of the Constitution, the Court will not adopt a doctrinaire approach — Further, representatives of the people are expected to operate on democratic principles and the presumption is that they are conscious of every fact, which would go to sustain the constitutionality of the law — Civil Procedure Code, 1908 — Or. 1 R. 8 — Principles under re joint or class action, held, not binding on legislature — Legislature is free to devise any mechanism for joint or class application it deems fit subject to being violative of the Constitution — Wisdom of mechanism devised by legislature is beyond scope of judicial review — Constitution of India, Art. 14

C. **Constitution of India — Art. 14 — Sub-classification — Permissibility of — Held, principles which govern the legitimacy of a sub-class within a class are based essentially on the very principles which are discernible in regard to reasonable classification under Art. 14**

— What constitutes reasonable classification must depend upon the facts of each case, the context provided by the statute, the existence of intelligible differentia which has led to the grouping of the persons or things as a class and the leaving out of those who do not share the intelligible differentia — Further, it must bear rational nexus to the object(s) sought to be achieved — Thus, so long as the above requirements are met, the law does not interdict creation of a class within a class

D. **Constitution of India — Art. 14 — Primary legislation — Challenge on the ground of malice — Impermissibility of — Held, while malice may furnish a ground in an appropriate case to veto administrative action, it is trite that malice does not furnish a ground to attack primary legislation**

E. **Constitution of India — Art. 14 — Held, a legislature cannot be cribbed, cabined or confined by the doctrine of promissory estoppel or estoppel: it acts as a sovereign body — Theory of promissory estoppel applies only to executive and administrative action**

F. **Constitution of India — Art. 14 — Validity of primary legislation — Test of manifest arbitrariness — Principles reiterated**

G. **Constitution of India — Art. 245 — Validity of statute — Grounds on which may be challenged — Reiterated**

Upholding the amendments to the Code, the Supreme Court

Held :

Challenge to plenary legislation: grounds

A law can be successfully challenged if contrary to the division of powers, either Parliament or the State Legislature usurps power that does not fall within its domain thus, rendering it incompetent to make such law. Secondly, a law made contravening fundamental rights guaranteed under Part III of the Constitution would be visited with unconstitutionality and declared void to the extent of its contravention. Needless to say, a law within the meaning of Article 19 of the Constitution would remain valid qua a non-citizen. Thirdly, apart from fundamental rights, the supremacy of the Constitution vis-à-vis the ordinary legislation, even when the law is plenary legislation, is preserved with a view that legislation must be in conformity with the other provisions of the Constitution. (Para 56)

State of Gujarat v. *Shri Ambica Mills Ltd.*, (1974) 4 SCC 656 : 1974 SCC (L&S) 381, *followed*

A law, if it manifested reasonable classification for treating different persons or things differently, the law would pass muster. (Para 57)

The guarantee of Article 14 is not confined to it being a prohibition against equals being discriminated against or unequals being treated alike. State action must be fair and not arbitrary if it is to pass muster in a court of law. The test of manifest arbitrariness applies to invalidate primary legislation as well as subordinate legislation under Article 14 of the Constitution. Manifest arbitrariness must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. Arbitrariness in the sense of manifest arbitrariness applies to negate primary legislation as well under Article 14 of the Constitution. (Para 59)

State of W.B. v. *Anwar Ali Sarkar*, (1952) 1 SCC 1, *per Vivian Bose, J.*; *E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165; *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277; *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1; *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39 : (2019) 2 SCC (Cri) 84; *K.S. Puttaswamy (Privacy-9 J.)* v. *Union of India*, (2017) 10 SCC 1; *Hindustan Construction Co. Ltd.* v. *Union of India*, (2020) 17 SCC 324 : 2019 SCC OnLine SC 1520, *followed*

Indian Express Newspapers (Bombay) (P) Ltd. v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121, *cited*

Furthermore, a law, be it the offspring of a legislature, it falls foul of Article 14 if it is found to be vague. (Para 61)

Shreya Singhal v. *Union of India*, (2015) 5 SCC 1 : (2015) 2 SCC (Cri) 449, *followed*

It has been furthermore urged that the provisions of law impugned in the present case were created by way of pandering to the real estate lobby and succumbing to their pressure or by way of placating their vested interests. Such an argument is nothing but a thinly disguised attempt at questioning the law of the legislature based on malice. A law is made by a body of elected representatives of the people. When they act in their legislative capacity, what is being rolled out is ordinary law. Should the same legislators sit to amend the Constitution, they would be acting as members of the Constituent Assembly. Whether it is ordinary legislation or an amendment to the Constitution, the activity is one of

making the law. While malice may furnish a ground in an appropriate case to veto administrative action it is trite that malice does not furnish a ground to attack a plenary law. (Para 62)

K. Nagaraj v. *State of A.P.*, (1985) 1 SCC 523 : 1985 SCC (L&S) 280, *followed*

State of H.P. v. *Narain Singh*, (2009) 13 SCC 165, *affirmed*

Yet another ground which has been urged in these cases is that when the Supreme Court decided *Pioneer*, (2019) 8 SCC 416, the Union of India defended the amendment to the Code which included the insertion of the Explanation to Section 5(8)(*f*) of the Code. It was this Explanation which made it clear that homebuyers would be financial creditors. That now the rights of the financial creditors are sought to be limited by the very same legislature that conferred them. That thus, the supreme legislature is in such circumstances estopped by the principle of promissory estoppel from enacting the impugned enactment. (Para 63)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *considered*

A supreme legislature cannot be cribbed, cabined or confined by the doctrine of promissory estoppel or estoppel. It acts as a sovereign body. The theory of promissory estoppel serves only as an effective deterrent to prevent injustice from a Government or its agencies which seek to resile from a representation made by them, without just cause. (Para 64)

Union of India v. *Godfrey Philips (India) Ltd.*, (1985) 4 SCC 369 : 1986 SCC (Tax) 11, *followed*

Reasonableness of classification under Section 7(1) second proviso

It is well settled that a legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not "per se" amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonably arbitrary; that it does not rest on any rational basis having regard to the objects which the legislature has in view. (Para 211)

Ameerunnissa Begum v. *Mahboob Begum*, 1953 SCR 404 : AIR 1953 SC 91, *followed*

Nagpur Improvement Trust v. *Vithal Rao*, (1973) 1 SCC 500, *relied on*

Vithalrao v. *LAO*, 1969 Mah LJ 272; *Union of India* v. *Tarsem Singh*, (2019) 9 SCC 304 : (2019) 4 SCC (Civ) 364, *referred to*

There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. (Para 214)

State of J&K v. *Triloki Nath Khosa*, (1974) 1 SCC 19 : 1974 SCC (L&S) 49, *followed*

Murthy Match Works v. *CCE*, (1974) 4 SCC 428 : 1974 SCC (Tax) 278, *affirmed*

Ram Krishna Dalmia v. *S.R. Tendolkar*, 1959 SCR 279 : AIR 1958 SC 538; *State of U.P.* v. *Kartar Singh*, (1964) 6 SCR 679 : AIR 1964 SC 1135 : (1964) 2 Cri LJ 229; *Govind Dattatray Kelkar* v. *Chief Controller of Imports & Exports*, AIR 1967 SC 839 : (1967) 2 SCR 29; *United States* v. *Butler*, 1936 SCC OnLine US SC 12 : 80 L Ed 477 : 297 US 1 (1936), *cited*

Tresolini and Shapiro: *American Constitutional Law*, 3rd Edn. (Macmillan, 1970), *cited*

A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase "similarly situated" mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good. (Para 217)

State of Gujarat v. *Shri Ambica Mills Ltd.*, (1974) 4 SCC 656 : 1974 SCC (L&S) 381; *Special Courts Bill, 1978, In re*, (1979) 1 SCC 380; *Ajoy Kumar Banerjee* v. *Union of India*, (1984) 3 SCC 127 : 1984 SCC (L&S) 355, *followed*

Subramanian Swamy v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36, *relied on*

Tigner v. *State of Texas*, 1940 SCC OnLine US SC 85 : 84 L Ed 1124 : 310 US 141 (1940), *cited*

Joseph Tussman and Jacobusten Brook: "The Equal Protection of the Law", 37 California Law Rev 341 (1949); "Developments in the Law — Equal Protection", (1969) 82 Harv Law Rev 1065 at p. 1127; "General Theory of Law and State", p. 161, *cited*

The classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule or even the rules in question. It is a mistake to assume *a priori* that there can be no classification within a class. The principles which govern the legitimacy of a sub-class within a class, are based essentially on the very principles which are discernible in regard to reasonable classification under Article 14 of the Constitution. It is clear that the law does not interdict the creation of a class within a class absolutely. Should there be a rational basis for creating a sub-class within a class, then, it is not impermissible. A class within a sub-class, is indeed not antithetical to the guarantee of equality under Article 14 of the Constitution. (Paras 225 to 231)

Lord Krishna Sugar Mills Ltd. v. *Union of India*, (1960) 1 SCR 39 : AIR 1959 SC 1124; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1, *followed*

State of W.B. v. *Rash Behari Sarkar*, (1993) 1 SCC 479; *State of Kerala* v. *Aravind Ramakant Modawdakar*, (1999) 7 SCC 400, *affirmed*

Sansar Chand Atri v. *State of Punjab*, (2002) 4 SCC 154 : 2002 SCC (L&S) 770, *explained* and *followed*

Thomas v. *State of Kerala*, 1974 SCC OnLine Ker 75, *referred to*

All India Station Masters' & Asstt. Station Masters' Assn. v. *Central Railway*, (1960) 2 SCR 311 : AIR 1960 SC 384; *S.G. Jaisinghani* v. *Union of India*, AIR 1967 SC 1427; *State of J&K* v. *Triloki Nath Khosa*, (1974) 1 SCC 19 : 1974 SCC (L&S) 49, *cited*

Allottees are, indeed, financial creditors as per the Code. They do possess certain characteristics, however, which appear to have appealed to the legislature as setting them apart from the generality of financial creditors. These features, which set them apart, have been clearly indicated in the stand of the Union. They are:

(*i*) Numerosity;
(*ii*) Heterogeneity;
(*iii*) The individuality in decision-making. (Para 232)

Section 7 of the Code always contemplated the possibility of a joint application. The impugned amendments incorporating provisos 1 and 2 to Section 7(1) of the Code only build upon the edifice erected already by way of Sections 21(6-A) and 25-A of the Code based on the experience of the legislature as also the report of the expert body. (Para 233)

Swiss Ribbons (P) Ltd. v. *Union of India*, (2019) 4 SCC 17, *affirmed*

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *referred to*

In the case of the allottees of a real estate project, it is the approach of the legislature that in a real estate project there would be large number of allottees. There can be hundreds or even thousands of allottees in a project. If a single allottee, as a financial creditor, is allowed to move an application under Section 7 of the Code, the interests of all the other allottees may be put in peril. This is for the reason that as stakeholders in the real estate project, having invested money and time and looking forward to obtaining possession of the flat or apartment and faced with the same state of affairs as the allottee, who moves the application under Section 7 of the Code, the other allottees may have a different take of the whole scenario. Some of them may approach the authority under the RERA. Others may, instead, resort to the fora under the Consumer Protection Act, though, the remedy of a civil suit is, no doubt, not ruled out. Ordinarily, the allottee would have the remedies available under RERA or the Consumer Protection Act, as the more effective option. In such circumstances, if the legislature, taking into consideration, the sheer numbers of a group of creditors viz. the allottees of real estate projects, finds this to be an intelligible differentia, which distinguishes the allottees from the other financial creditors, who are not found to possess the characteristics of numerosity, then, it is not for the Court to sit in judgment over the wisdom of such a measure. (Para 235)

The enquiry must not end with finding that there is an intelligible differentia, to be found in the numerosity, heterogeneity and individuality in decision-making of the allottees. The law further requires that the differentia must have a rational nexus with the object of the law. (Para 236)

The object of the law is clear. A radical departure was contemplated from the erstwhile regime, which was essentially contained in the Sick Industrial Companies (Special Provisions) Act, 1985, and which manifested a deep malaise, which impacted the economy itself. To put it shortly, the procedures involved under SICA, simply meant procrastination in matters, where speed and dynamic decisions were the crying need of the hour. The value of the assets of the company in distress, was wasted away both by the inexorable and swift passage of time and tardy rate at which the forums responded to the problem of financial distress. The Code was an imperative need for the nation to try and catch up with the rest of the world, be it in the matter of ease of doing business, elevating the rate of recovery of loans, maximisation of the assets of ailing concerns and also, balancing the interests of all stakeholders. The Code purports to achieve the object of maximisation of the assets of corporate bodies, inter alia, which have slipped into insolvency. Present a default, which, no doubt, is not barred by time (subject to the power of the Authority under Section 5 of the Limitation Act), the insolvency resolution process can be triggered. It falls into two stages. In the first stage or the calm period, every

attempt is contemplated to rescue the corporate debtor from falling into liquidation. No doubt the moratorium under Section 14 is inevitable. The most significant feature of the Code is the seemingly inexorable time-limit, which is fixed under Section 12. (Paras 237 and 238)

The speed with which the processes can be conducted and completed under the Code is based on the volume of the litigation. The adjudicating authorities and the appellate bodies viz. NCLAT, are authorities under other enactments, as well. They are hard-pressed for time. The matters, which are covered by the Code, may present convoluted facts. The issues may bristle with complications, both in points of law and also facts. If, out of a large body of financial creditors belonging to a sub-group, as for instance allottees of a real estate project, were to be given the freedom to activise the Code, then, the possibility of multiple individual actions, is a spectre, which the legislature, must be presumed to be aware of. In other words, the legislature became alive to the peril of entire object of the Code, being derailed by permitting the individual players crowding the docket of the Authorities under the Code, and resultantly, reviving the very state of affairs, which compelled the legislature to script a new dawn in this area of law. Instead, having regard to the numerosity of allottees in a real estate project, the legislature has thought it fit to adopt a balanced approach by not taking the allottee out of the fold of the financial creditors altogether. The allottee continues to be a financial creditor. All that is envisaged is the legislative value judgment that a critical mass is indispensable for allottees to be present before the Code, can be activised. The purport of the critical mass of applicants would ensure that a reasonable number of persons similarly circumstanced, form the view that despite the remedies available under the RERA or the Consumer Protection Act or a civil suit, the invoking of the Code is the only way out, in a particular case. (Para 242)

Essar Steel India Ltd. Committee of Creditors v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443, *explained* and *relied on*

In short, numerosity of the allottees of a real estate project, necessitated, in the view of the legislature, as gleaned from the provisions, to condition an absolute right, which does have a clear rational nexus with the object sought to be achieved. (Para 243)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *relied on*

One of the objects is the balancing of the interests of all stakeholders. By imposing a threshold limit of either hundred allottees or if the number of allottees going by the criteria of one-tenth of the allottees is, even less than hundred, then, the said number of allottees must agree to invoke the Code. This is again, based on the intelligible differentia of heterogeneity. By heterogeneity, is meant, differences between a seemingly homogeneous group. All allottees of a real estate project form a class. All of them have stakes in the prompt and effective completion of the real estate project. What the allottee would legitimately look forward to is the completion of the project and the handing over of the possession of the flat or apartment in due time. The achievement of this object, which must be attributed reasonably to each and every allottee, as his goal, may be possible in the views of different allottees differently. (Paras 244 and 245)

There is a plurality of remedies, which the law provides to allottees. More importantly, the outcome of activising the Code, is almost like an uncertain wager. The outcome of invoking the Code by individual allottees would be apart from clogging the dockets of the adjudicating authorities with even more voluminous files leading to greater delay, that at the instance of such individual allottees, what would be perceived as an avoidable calamity, is perpetuated. In other words, while a vast majority of allottees may see reason in either giving time and reposing faith in existing management of real estate project or successfully invoking the other remedies available to them, an individual allottee, out of the heterogeneous group, would throw the spanner in the works and bring the entire real estate project itself to a possible doom. Under the newly added Explanation to Section 33(2), at any time, after the constitution of the Committee of Creditors, there can be liquidation. (Para 246)

The third distinguishing feature of allottees from a financial creditor proper like a bank or financial institution, which has correctly been projected by the Union, is the difference in individuality in decision-making process, attributed to the allottees. This means that unlike a bank or a financial institution, where the decision-making process is more institutionalised, an individual allottee, left free to file an application under Section 7, would exhibit a high-level of subjectivity. (Para 247)

Thus, in light of all of the above conclusions, this is not a case where there is no intelligible differentia which does not have a rational nexus with the object to be achieved. The law under scrutiny is an economic measure. In dealing with the challenge on the anvil of Article 14 of the Constitution, the Court will not adopt a doctrinaire approach. Representatives of the people are expected to operate on democratic principles. The presumption is that they are conscious of every fact, which would go to sustain the constitutionality of the law. A law cannot operate in a vacuum. In the concrete world, when the law is put into motion in practical experiences, bottlenecks that would flow from its application, are best envisaged by the law givers. Solutions to vexed problems made manifest through experience, would indeed require a good deal of experimentation, as long as it passes muster in law. It is no part of the Court's function to probe into what it considers to be more wise or a better way to deal with a problem. (Para 249)

In economic matters, the wider latitude given to the law giver is based on sound principle and tested logic over time. In fact, though there is no rigid separation of powers in India, as it obtains in the United States, there is broadly separation of powers, which in fact, has been recognised as a basic feature of the Constitution. In any case, the Court errs in the judicial veto of legislation, in a manner of speaking, it is usurping the power, which is earmarked to another organ of the State viz. the legislature. The large number of validating Acts would produce undeniable proof of the same. (Paras 250 and 251)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225, *relied on*

Allottees to be from same real estate project: the requirement is not unconstitutional

In regard to a real estate project, all persons, who are treated as allottees as per the definition of "allottee" in Section 2(*d*) of the RERA, would be entitled to be treated as allottees for the purpose of Section 5(8)(*f*) (Explanation) and also,

for the purpose of the impugned provisos. All that is required is that the allottees must relate to same real estate project. In other words, if a promoter has a different real estate project, be it in relation to apartments, in the case an application under Section 7 of the Code, those would not be reckoned in computing one-tenth as well as the total allotments. (Para 176)

The rationale behind confining allottees to the same real estate project, is to promote the object of the Code. Once the threshold requirement can pass muster when tested on the anvil of a challenge based on Articles 14, 19 and 21 of the Constitution, then, there is both logic and reason behind the legislative value judgment that the allottees, who must join the application under the impugned provisos, must be related to the same real estate project. The connection with the same real estate project is crucial to the determination of the critical mass, which the legislature has in mind, as a part of its scheme to streamline the working of the Code. If it is to embrace the total number of allottees of all projects which a promoter of a real estate project may be having, it will make the task of the applicant himself, more cumbersome. Moreover, complaints, relating to different projects, may be different. Thus, the requirement of the allottees being drawn from the same project for meeting the threshold requirements in the impugned proviso, stands to reason and does not suffer from any constitutional blemish. (Para 177)

The power of waiver by the Central Government, being denied, unlike under the Companies Act

The Central Government, having regard to the scheme of the Companies Act, is intricately interconnected with the management of the companies. It had powers of investigation into the affairs of the companies under Section 235 and Section 237 of the Companies Act, 1956. The purport of Sections 397 and 398 of the Companies Act, 1956 include the conduct of the affairs of the company in any manner prejudicial to the public interest or also, no doubt, prejudicial to member or members. In such circumstances, clothing the Central Government with the power to waive the threshold requirements and permitting the application to be presented by even a single member, is in sync with the scheme of the Companies Act. The role of the Central Government is different under the Code. In fact, the Central Government does not have any role, as such under the Code. It acts only through the designated Authorities under the Code. The Code is about insolvency resolution and on failure liquidation. The scheme of the Code is unique and its objects are vividly different from that of the Companies Act. Consequently, if the legislature felt that threshold requirement representing a critical mass of allottees alone, as provided for in the impugned proviso, would satisfy the requirement of a valid institution of an application under Section 7 of the Code, it cannot be dubbed as either discriminatory or arbitrary. (Paras 189 to 192)

Order 1 Rule 8 CPC and Section 12 of the Consumer Protection Act, 1986 and the contentions based on the same

It is important to not be oblivious to the scheme of the Code and to distinguish it from a civil suit laid invoking Order 1 Rule 8 CPC or a consumer complaint presented by one consumer, sharing the same interest with numerous others, again invoking Order 1 Rule 8 CPC. (Para 194)

As to whether the procedure contemplated in Order 1 Rule 8 CPC would have been more suitable than the one provided under the impugned proviso to Section 7(1) of the Code, or more appropriate and even more fair, is a matter, entirely in the realm of legislative choice and policy. Having regard to the scheme of the Code there cannot be scintilla of doubt that what the petitioners are seeking to persuade Court to hold, is to make a foray into the forbidden territory of legislative value judgment. This is all the more so, when the dangers lurking behind full play being given to Order 1 Rule 8 CPC in the context of invocation of proceedings under the Code, appear to be fairly clear. Invalidating a law made by a competent legislature, on the basis of what the Court may be induced to conclude, as a better arrangement or a more wise and even fairer system, is constitutionally impermissible. If, the impugned provisions are otherwise not infirm, they must pass muster. Hence, this contention of the petitioner is rejected. (Paras 193 to 197)

Essar Steel India Ltd. Committee of Creditors v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443, *relied on*

T.N. Housing Board v. *T.N. Ganapathy*, (1990) 1 SCC 608, *referred to*

Amendments not violative of Pioneer, (2019) 8 SCC 416

It is clear that the impugned proviso does not set at naught the ruling in *Pioneer*, (2019) 8 SCC 416. In a challenge by real estate developers upholding the provisions in the manner done including the Explanation in Section 5(8)(*f*) and allaying the apprehension about abuse by individual allotees, cannot detract from the law giver amending the very law on its understanding of the working of the Code at the instance of certain groups of applicants and the impact it produces on the economy and the frustration of the sublime goals of the law. (Paras 198 to 200)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *considered*

Swaraj Infrastructure (P) Ltd. v. *Kotak Mahindra Bank Ltd.*, (2019) 3 SCC 620 : (2019) 2 SCC (Civ) 136; *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17; *Ram Krishna Dalmia* v. *S.R. Tendolkar*, 1959 SCR 279 : AIR 1958 SC 538; *V.C. Shukla* v. *State (Delhi Admn.)*, 1980 Supp SCC 249 : 1980 SCC (Cri) 849; *State of Gujarat* v. *Shri Ambica Mills Ltd.*, (1974) 4 SCC 656 : 1974 SCC (L&S) 381; *Venkateshwara Theatre* v. *State of A.P.*, (1993) 3 SCC 677; *Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311, *cited*

Allottees v. Operational creditors: Impugned proviso whether a case of hostile discrimination

As far as the argument relating to violation of Article 14 of the Constitution qua operational creditors is concerned, there is no merit in the same. Quite apart from the fact that under the Code they are dealt with under different provisions and a different procedure is entailed thereunder, even the decisions of the Supreme Court relied on by the allottees have treated the financial creditor differently from the operational creditor. (Para 254)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *followed*

Innoventive Industries Ltd. v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356; *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17, *affirmed*

Nagpur Improvement Trust v. *Vithal Rao*, (1973) 1 SCC 500; *Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36, *cited*

Preserving the corporate debtor as a going concern while securing the highest recovery for all creditors is the objective of the Code. Financial creditors are therefore clearly different from operational creditors. There is obviously an intelligible differentia between the two which has a direct relation with the object to the object which is to be achieved by the Code. (Para 260)

While it may be true that the allottee is not a secured creditor and he is not in the position of a bank or the financial institution, the contentions of the petitioners that there is hostile discrimination forbidden by Article 14 of the Constitution, are untenable. (Para 266)

There cannot be any doubt that intrinsically a financial creditor and an operational creditor are distinct. An operational creditor is one to whom money is due on account of goods or services supplied to the debtor. The financial creditor on the other hand, is so described, on account of there being the element of borrowing. This distinction is indisputable. (Para 266.1)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *relied on*

What is unique to the real estate developer vis-à-vis operational debts is that the developer is the debtor as an allottee funds his own apartment by paying amounts in advance. On the other hand, in case of operational debt, the person who has supplied the goods and services, becomes the creditor and the corporate debtor is one who has availed such services. Another distinction noticed is that an operational creditor has no interest or stake in the corporate debtor. The allottee is, on the other hand, vitally concerned with the financial health of the corporate debtor. Should financial ruin occur, the real estate project will come to a naught. Should such an event take place also, the allottee would not be in a position to either claim or get compensation or even refund with interest. (Para 266.2)

Thirdly, there is no consideration for the time value of money in the operational debt. This is not so in the case of an allottee. The non-availability of documentary evidence in respect of operational debts as against information available under the RERA qua real estate developers is yet another feature. (Para 266.3)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *relied on*

An action under the Code by way of an application under Section 7 of the Code is an action in rem. The recovery of the amounts paid is not what is primarily contemplated under the Code. The fruits of litigation launched under Section 7 of the Code by an allottee of a real estate project can be rather dismal. It is only such allottee who has completely lost faith in management of the real estate project concerned, who would come under Section 7 of the Code in the hope that some other developer will take over and complete the project. At the same time, such an adventure would be in the teeth of an impending peril, that should things do not go as planned, corporate demise follows and the allottee would stand reduced to receiving whatever little may remain and found on the basis that he is a mere unsecured creditor in the order of priority prescribed under Section 53 of the Code. A more rosy result is likely for an allottee invoking remedies under the RERA, as there is a greater likelihood that the project could be completed or the full amount of refund together with penalty is awarded. (Para 268)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *relied on*

The vires of the impugned provisions must be judged without turning a blind eye to the distinction between the wisdom and the legislative value judgment behind the statute being immune from judicial scrutiny on the one hand and a hostile discrimination falling foul of the mandate of equality under Article 14 of the Constitution, being fatal to the statute. (Para 269)

In this case, while it may be true that the allottees are unsecured creditors and in that regard, they are similar to the operational creditors and it also may be true that many contracts under real estate projects, may not involve large sums as the subject-matter of advances by banks and other financial institutions, the similarity between the two ends there. What is of greater importance are the distinctions and the most vital point which sets them apart, in the matter of pronouncing on the vires of the provisos under Section 7 of the Code is the numerosity of the allottees, and what is more not being homogeneous in what they want in a particular situation, since the law has indeed endowed the allottees with different remedies, having different implications, be it under the Consumer Protection Act or under RERA. If the legislature felt that having regard to the consequences of an application under the Code, when such a large group of persons, pull at each other, an additional threshold be erected for exercising the right under Section 7, certainly, it cannot suffer a constitutional veto at the hands of the Court exercising judicial review of legislation. (Para 270)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *relied on*

Swiss Ribbons (P) Ltd. v. *Union of India*, (2019) 4 SCC 17, *affirmed*

It is to be noted also that it is not a case where the right of the allottee is completely taken away. All that has happened is a half-way house is built between extreme positions viz. denying the right altogether to the allottee to move the application under Section 7 of the Code and giving an unbridled licence to a single person to hold the real estate project and all the stakeholders thereunder hostage to a proceeding under the Code which must certainly pass inexorably within a stipulated period of time should circumstances exist under Section 33 of the Code into corporate death with the unavoidable consequence of all allottees and not merely the applicant under Section 7 being visited with payment out of the liquidation value, the amounts which are only due to the unsecured creditor. (Para 271)

It must be remembered that, the point of distinction between a financial creditor in this case, the allottees of a real estate project, and the operational creditors, as contained in Section 7 on the one hand and Sections 8 and 9 are preserved. In other words, the operational creditor still has to cross the threshold of not being shut off from the application not being processed in the teeth of the defence allowed to the corporate debtor in regard to an operational creditor. All that has happened is the legislature in its wisdom has found that the greater good lies in conditioning an absolute right which existed in favour of an allottee by requirements which would ensure some certain element of consensus among the allottees. It must be remembered that the requirement is 100 allottees or a mere one-tenth of the allottees, whichever is lower. This is a number which goes to policy and lies exclusively within the wisdom of the legislature. (Para 272)

H. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) second proviso [as inserted vide Act 1 of 2020] r/w S. 5(8)(f) Expln. (ii) — Threshold figure of 100 allottees, or, 1/10th of allottees under same real estate project as required under S. 7(1) second proviso — Determination of — "Allottees" under same "real estate project" for the purposes of the Code are to be determined as per respective definitions thereof in Ss. 2(d) and 2(zn) of the RERA, since S. 5(8)(f) Expln. (ii) of the Code so provides — Who are "allottees" under same "real estate project", and categories of persons included thereunder as per the definitions in RERA — Explained in detail**

— Real Estate (Regulation and Development) Act, 2016 — Ss. 2(d) and 2(zn) — Words and Phrases — "Allottees under same real estate project"

I. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) second proviso [as inserted vide Act 1 of 2020] — Threshold figure of 100 allottees, or, 1/10th of allottees under same real estate project as required under — Determination of — Rules for, in case of joint/multiple allotments — Explained**

— Held, (i) it does not matter whether a person has one or more allotments in his name or in the name of his family members — As long as there are independent allotments made to him or his family members, all of them would qualify as separate allottees and they would count both in the calculation of the total allotments, as also in reckoning the figure of hundred allottees or one-tenth of the allottees, whichever is less — (ii) In the case of a joint allotment of an apartment, plot or a building to more than one person, the allotment can only be treated as a single allotment — Companies Act, 1956 — S. 399(2) — Companies Act, 2013, S. 244(1) Expln.

J. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) second proviso [as amended vide Act 1 of 2020] — Threshold figure of 100 allottees, or, 1/10th of allottees under same real estate project as required under — Determination of — Plea of non-availability of information regarding allottees — Untenability of**

— Held, S. 11(1)(b) of the RERA makes it mandatory for the promoter to make available information regarding the bookings — Further, the law giver has created a mechanism, namely, the association of allottees through which the allottees are expected to gather information about the status of the allotments including the names and addresses of the allottees — Court cannot proceed on basis of contention of petitioners that impugned provisos are unworkable and arbitrary as promoters of real estate projects operate in defiance of the mandatory statutory provisions — If there is defiance of the law by promoters, allottees are not helpless — They can always seek proper redress in the appropriate forum — No doubt, it becomes the duty of all the authorities to ensure that the promoters will stringently abide by their duties under the RERA and State Acts concerned — Real Estate (Regulation and Development) Act, 2016, Ss. 11(1)(b) and 19(9)

Held :

"Allottees" under a "real estate project" for the purposes of the Code are to be determined as per the respective definitions thereof in Sections 2(*d*) and 2(*zn*) of the RERA, since Explanation (*ii*) to Section 5(8)(*f*) of the Code provides that "allottee" and "real estate project" shall have the meanings, respectively, assigned to them in clauses (*d*) and (*zn*) of Section 2 of the RERA. (Para 147)

If we break down Section 2(*d*) of the RERA, it yields the following component parts:

(*1*) An allottee may be an allottee of a plot or an apartment or a building. A real estate project may relate to plots or apartments or buildings; or plots/ buildings or plots/apartments. The contract may contemplate the assignment of the undivided interest in the land upon which the construction is made to the allottee but the allottee is the allottee of the building or the apartment as defined in the RERA. Moreover, in cases where cooperative societies are promoters, in regard to such societies the allottees could be the members or non-members thereof.

(*2*) An allottee, in the case of an apartment, which expression includes flats, among other structures, would include the following categories of persons. It would include a person to whom the apartment is allotted. It would also include a person to whom the apartment is sold, whether as freehold or leasehold.

(*3*) Thirdly, it would include a person to whom the promoter has transferred the apartment, otherwise than by way of a sale.

(*4*) Lastly, it would include persons who have acquired the allotment through sale, transfer or otherwise, with the caveat that it will not include a person to whom the apartment is given on rent. Whatever has been mentioned about apartments, is equally true qua allotment of plots or buildings. (Paras 149 and 150)

The task of ascertaining who will be an allottee as also the question as to what will be the total number of allottees and therefore what would constitute one-tenth of total number of allottees within the meaning of the impugned proviso to Section 7(1) of the Code, must depend upon the nature of the real estate project in question. It will depend on what is offered by the promoter under the project. It may be real estate project which seeks to develop a building and sale of the building. It may be a project for the construction of apartments with the agreements to convey the undivided interest of land also. It may be a project which envisages converting an existing building or a part into an apartment. It may be a project for merely development of land into plots and sale of the plotted land as such. It may be also that the same person may also develop either apartments or building to be sold. In this regard we may remember the Explanation in Section 2(*zk*)(*vi*) of the RERA defining the word "promoter". (Para 151)

A conspectus of the provisions of the RERA would show that having regard to the legislative intention the term "allottees" as defined in Section 2(*d*) of the RERA must be understood undoubtedly on its own terms predominantly. But at

the same time the other provisions which form part of RERA and therefore the scheme of RERA must also be borne in mind. The argument that the definition of "allottee" suffers from over inclusiveness and under inclusiveness needs to be considered. Under inclusiveness and over inclusiveness are aspects of the guarantee under Article 14 of the Constitution. Equals must be treated equally. Unequals must not be treated equally. What constitutes reasonable classification must depend upon the facts of each case, the context provided by the statute, the existence of intelligible differentia which has led to the grouping of the persons or things as a class and the leaving out of those who do not share the intelligible differentia. No doubt it must bear rational nexus to the objects sought to be achieved. (Para 152)

Coming to the definition of the word "allottee" it appears to be split up into three categories broadly, they are—plot, apartment and buildings. In the context of the impugned proviso to Section 7(1) of the Code, it must be remembered that if an applicant is able to garner a magical figure of 100 allottees, then he can present the application under Section 7 of the Code. This is for the reason that the further requirement of one-tenth of total number of allottees is meant to apply in a situation only if one-tenth of the total number of allottees is *less* than 100. This is for the reason that the word "whichever" has been used. (Para 153)

The question of who are the allottees under a particular real estate project must be decided with reference to real nature of the real estate project in which the applicant is an allottee. If it is in the case of an apartment, then necessarily all persons to whom allotment had been made would be treated as allottees for calculating the figure mentioned in the impugned proviso. The word "allotment" does mean allotment in the sense of documented booking as is mentioned in Section 11(1)(*b*) of the RERA in regard to apartment or plot with which we are largely concerned. Such detail regarding the quarterly up-to-date list of the number and the types of apartments is to be uploaded as provided in Section 11 of the RERA. It is this information incidentally, which is the reservoir of data which the legislature intends that the allottees can use even though it is not necessarily confined to them. (Para 154)

The allottee would also include a person who acquires the allotment either through sale, transfer or otherwise. The transferee of the allotment is contemplated. There can be no difficulty in including such assignee of the allotment as also the allottee for the purpose of complying with the threshold requirement under the impugned proviso. Thus, all allottees and all assignees of allotment would qualify both to be considered for the purpose of calculating the total number of allottees but confined to the particular real estate project and therefore for arriving at the figure of 100 allottees or one-tenth of the allottees as the case may be. (Para 154)

Then, there is a third category, which is introduced by the expression "sold" (whether as "leasehold" or "freehold" or otherwise transferred by the promoter). Here a question may arise, if the word "sold" is applied to the expression "plot", then undoubtedly the transferee would be an allottee. If the sale is to the allottee in a real estate project which is a hybrid project consisting of development of land into plots and also development of buildings as is contemplated under Section 2(*zk*) of the RERA then the transferee of the plot undoubtedly would be

an allottee. He may have a complaint regarding the default by the promoter in the matter of development of the plot under hybrid project. As far as sale whether "freehold" or "leasehold" of an apartment or a building is concerned, once an apartment or building is sold, it presupposes that the construction of the building or the apartment is complete ordinarily. No doubt, he may also have complaints against the promoter which may be addressed under the RERA. For the purpose of the proviso to Section 7(1) of the Code, going by the definition of allottee in the RERA, undoubtedly, such transferee of an apartment or building, is to be treated as an allottee. (Para 154)

Thus, in cases of partially completed real estate projects, allottees to whom constructed apartments are already handed over after sale and allottees of apartments in remaining parts of the project where there is no construction or only construction which is pronouncedly lagging behind the schedule, are to be treated on a par for the purposes of the impugned proviso to Section 7(1) of the Code. This is not the case of an over inclusive definition nor a case of unequals being treated unequally. The reason is that in such cases of partially completed projects where some completed apartments are purported to be sold or handed over to some only of the allottees, if there is insolvency, the project would remain incomplete. Common areas/common facilities would not become available. The feature which attract a buyer is the whole project which is completed. The apartment owner may very well refuse to accept delivery as he may insist upon the completion of the project with all its promised facilities. Section 17 of the RERA contemplates the transfer of title to the common areas to the association of allottees. Obviously, such a thing would not be possible ordinarily unless the construction is complete. In other words, unlike an allottee of a different project under the same promoter the different allottees as contained in the definition of the word "allottee" would have room for common complaints. A realistic and pragmatic approach is not to be eschewed or abandoned. (Paras 154 and 156)

A mere charge of either under inclusiveness or over inclusiveness which is not difficult to make, hardly suffices to persuade the Court to strike down a law. There is a wide latitude allowed in the legislature in these matters. The examination cannot be extended to find out whether there is mathematical precision or wooden equality established. The working of the statute may produce further issues, all of them may not be fully perceived as which may not be wholly foreseen by the law giver. The freedom to experiment must be conceded to the legislature, particularly, in economic laws. If problems emerge in the working of law and which require legislative intervention, the Court cannot be oblivious to the power of the legislature to respond by stepping in with necessary amendment. There is nothing like a perfect law and as with all human institutions there are bound to be imperfections. What is significant is however for the Court ruling on constitutionality, the law must present a clear departure from constitutional limits. (Para 155)

Section 11(1)(*b*) of the RERA contemplates details of booking qua apartments and plots. This is sufficient to reject the argument that it could be based on a total number of the units promised. What is required is allotment and not promised flats as per a brochure. It is also not the total constructed units. This is as what is relevant under the impugned provisos read with Section 5(8)(*f*) Explanation of the Code and

Section 2(*d*) of the RERA read with Section 11(1)(*b*) of the RERA and the rules made thereunder is the "booking" of apartments or plots. What is allotted or booked may be more than what is constructed if there is a mismatch at any given point of time. It is the number of units allotted. Now, the allotment and the agreement to sell are not irreconcilable with each other and may signify the same. (Para 157)

The further contention that 10% is dynamic and what is 1/10 in the morning may fall short by night if more allotment is made, is untenable in law. The provisions of the Companies Act, 1913 (Section 153-C), Section 399 of the Companies Act, 1956 and Section 244 of the Companies Act, 2013 contain similar provisions. The mere difficulties in given cases, to comply with a law can hardly furnish a ground to strike it down. As to what would constitute the real estate project, it must depend on the terms and conditions and scope of a particular real estate project in which allottees are a part of. These are factual matters to be considered in the facts of each case. (Para 158)

Holdings by family members, etc. and joint holdings of a unit: single allottee?

It is true that in the impugned proviso, introduced in Section 7(1), there is no indication as to how the number of allottees are to be reckoned in the case of more than one person. (Para 182)

The Explanations in Sections 14 and 15 of the RERA cannot be read into the definition of "allottee" in Section 2(*d*) of the RERA, as, in Sections 14 and 15, a perusal of Explanations, makes it clear that they are enacted for the purpose of Sections 14 and 15, respectively. The definition of "allottee" from Section 2(*d*) of the RERA has to be taken as it is for the purposes of the impugned proviso to Section 7(1) of the Code. Therefore, for the purpose of the impugned proviso to Section 7(1) of the Code it does not matter whether a person has one or more allotments in his name or in the name of his family members. As long as there are independent allotments made to him or his family members, all of them would qualify as separate allottees and they would count both in the calculation of the total allotments, as also in reckoning the figure of hundred allottees or one-tenth of the allottees, whichever is less. (Para 186)

Furthermore, on a proper understanding of the definition of the word "allottee" in Section 2(*d*) of the RERA and the object, for which the requirement of hundred allottees or one-tenth has been put in the impugned proviso to Section 7(1) of the Code, and also, not being oblivious to Section 399(2) of the Companies Act, 1956, as also the Explanation in Section 244(1) of the Companies Act, 2013, in the case of a joint allotment of an apartment, plot or a building to more than one person, the allotment can only be treated as a single allotment. This for the reason that the object of the impugned proviso to Section 7(1) of the Code, admittedly, is to ensure that there is a critical mass of persons (allottees), who agree that the time is ripe to invoke the Code and to submit to the inexorable processes under the Code, with all its attendant perils. (Paras 187 and 188)

Availability of information re allottees under a real estate project

As far as allottees are concerned in regard to apartments and plots, Section 11(1)(*b*) of the RERA makes it mandatory for the promoter to make available information regarding the bookings. Moreover, the State Acts provide for updation of information in case of transfer and assignment. The Court cannot

proceed on the basis of the contention of the petitioners that the impugned provisos are unworkable and arbitrary on the basis that the Court must take notice of the "reality" which is that the promoters do not make available information as required of them. The burden, it is well settled, to prove all facts to successfully challenge the statute is always on the petitioner. If there is defiance of the law by promoters, the allottees are not helpless. They can always seek proper redress in the appropriate forum. No doubt, it becomes the duty of all the authorities to ensure that the promoters will stringently abide by their duties under the RERA and State Acts concerned. (Paras 203 to 205)

Section 19(9) of the RERA makes it a duty on the part of the allottee to participate towards the formation of the association or cooperative society or the federation of the same. The possession of the common areas is also to be handed over to the association of the allottees. The law giver has therefore created a mechanism, namely, the association of allottees through which the allottees are expected to gather information about the status of the allotments including the names and addresses of the allottees. The Court cannot proceed on the basis in a case which involves a challenge to a statute that the information to be gathered under the statute will not be available on the basis that the statute will not be worked as contemplated by the law giver. (Para 206)

K. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) first and second provisos & Expln. thereto [before and after amendment vide Act 1 of 2020] and S. 4 — Default necessary for initiation of insolvency process under S. 7(1) in case of joint application — Against whom required to exist — Proceedings under the Code — In rem nature of i.e. bindingness of, on all stakeholders regardless of who is part of the proceedings — Relevance of**

— Held, default can be qua *any* of the applicants in a joint application, or even a person who is not an applicant but belongs to the class in question, as proceedings under the Code being in rem would bind all stakeholders of a particular class: such as all allottees under the same real estate project or all debenture or security holders belonging to the same class — Change brought about by introduction of first and second provisos to S. 7(1) is only that apart from establishing the factum of default against any of the relevant person(s), applicant must present application endorsed by the requisite number of such persons as introduced by the provisos

L. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) & Expln. thereto [before and after amendment vide Act 1 of 2020] and Ss. 238-A and 4 — Limitation — Joint application when time-barred — So long as default against even one person belonging to the relevant class, for instance against even one allottee in respect of the same real estate project, or, against even one debenture or security holder belonging to the same class, is not time-barred, joint application would not be time-barred — Moreover, even in case of delay, condonation of delay can be sought under S. 5 of the Limitation Act, 1963 as per the requirements thereof — Limitation Act, 1963, S. 5**

M. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) first and second provisos [as amended vide Act 1 of 2020] — Application whether compliant with all pre-conditions therefor, including compliance with threshold requirements of either proviso, held, has to be reckoned as on date of presentation of application and not as on date of admission of such application**

N. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) first and second provisos [as amended vide Act 1 of 2020] — Application filed in compliance with threshold requirements of either proviso — Court fees payable thereon, held, is fixed sum of Rs 25,000 as prescribed by the Rules, irrespective of number of applicants**

Held :

The problem of default and limitation

Section 6 of the Code declares that where any corporate debtor commits default, a financial creditor, an operational creditor or a corporate debtor may itself initiate CIRP in the manner provided in Chapter 2. Section 7 of the Code continues to declare that a financial creditor either by itself or jointly by other creditors or any other Central Government notified person, file an application before the adjudicating authority, *when a default has occurred*. The Explanation to Section 7(1) of the Code makes it clear that a financial debt, which is owed to any other financial creditor of the corporate debtor would suffice to make an application on the basis that the default has occurred. (Paras 162 to 164)

The requirement of the Code in regard to an application by a financial creditor does not mandate that the financial debt is owed to the applicant in terms of the Explanation. This is for the reason that the CIRP and which, if unsuccessful, is followed by the liquidation procedure is in all a proceeding, in rem. The law giver has envisaged in the Code, an action, merely for setting in motion the process initially. The litmus test on the anvil of which, the adjudicating authority will scrutinise the matter, is only the existence of the default, as defined in Section 4 of the Code. As on date, the amount of default is pegged at Rs 1 crore. Present a financial debt which has not been paid, the doors are thrown open for the processes under the Code to flow in and overwhelm the corporate debtor. The further barrier is limitation, no doubt vide Section 238-A of the Code and the Limitation Act, 1963, would, indeed apply, right from the inception of the Code. The relevant provision applicable is Article 137 of the Limitation Act, and also, at the same time, Section 5 of the Limitation Act, providing for condonation of delay in appropriate cases is also applicable. (Paras 167 and 168)

Innoventive Industries Ltd. v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356; *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528, *affirmed*

Since the Code undoubtedly bears the brand of an economic measure upon its face, and in true spirit, being one of the most significant and dynamic economic experiments indulged in by the law giver, not by becoming servile to Parliament, but by way of time hallowed deference to the sovereign body experimenting in such

matters, the Court will lean heavily in favour of such a law. The complaint of the petitioners that an increase in the required strength of applicants, will create legal knots which do not admit of solution, cannot be accepted, as the law can indeed be worked, even with the extra burden which is cast on the persons covered by the provisos. (Para 169)

It is indisputable that in order to successfully move an application under Section 7 that there must be a default which must be in a sum of Rs 1 crore. It is equally clear that the amount of Rs 1 crore need not be owed by the corporate debtor in favour of the applicant. It must be noted that the Explanation to Section 7(1) of the Code existed even prior to the provisos being inserted. It is open to a financial creditor, to move an application in the company of another financial creditor or more than one other financial creditor. In fact, a perusal of the Rules, would indicate that irrespective of the number of applicants the court fee would remain Rs 25,000. This answers the alleged vagueness about court fees where the provisos are given effect to. Thus, dehors the impugned provisos in terms of the Explanation in Section 7(1), a financial debt need not be owed to the applicant and as joint application by more than one applicant was and is contemplated, the resultant position would be that any number of applicants, without any amount being due to them, could move an application under Section 7 of the Code, provided that they are financial creditors and there is a default in a sum of Rs 1 crore even if the said amount is owed to none of the applicants but to any another financial creditor. This position has not undergone any change even with the insertion of the provisos. In other words, even though the provisos require that in the case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of the allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of the applicants. (Para 170)

The change that is brought about by the impugned provisos is only that apart from establishing the factum of default, an allottee seeking to invoke the provisions of the Code must present the application under Section 7 of the Code endorsed by the requisite number introduced by the proviso. Since, default can be qua any of the applicants, and even a person, who is not an applicant, and the action is, one which is understood to be in rem, in that, the procedures, under the Code, would bind the entire set of stakeholders, including the whole of the allottees, there is no merit in the contention of the petitioners based on the theory of default, rendering the provisions unworkable and arbitrary. (Para 171)

Question may arise as to how the application would have to be filled up, if there are hundred allottees in a given case to comply with the requirement of the proviso:

(*1*) Even in the case of any application filed by more than one applicant, if the requirements of the Code are otherwise fulfilled, there can be cases where the applicants can file a single application by giving the details of all applicants.

(2) Secondly, the application is contemplated to be an application in rem. One or more financial creditors activates the Code with reference to the threshold figure of Rs 1 crore, being in default. The Authority is alerted and

it verifies this aspect, finding that the debt is established under Section 7(5) of the Code, and further that it is not barred by limitation or if he invokes the power under Section 5 of the Limitation Act, to condone the delay, the curtains are raised for the Code to be applied since the default in the sum may be owed to any financial creditor. It suffices that the said sum can be claimed as a sum in default in terms of the Explanation in Section 7(1) of the Code. Undoubtedly, the record of default, as contemplated in the Code, which need not be the record of default with the information utility alone, has to be furnished. If the default is qua all the applicants, then also, as long as the statutory requirements regarding the amount, and it not being barred, are fulfilled, it will be open to the applicants to plead the same. Undoubtedly, if the debt, in a sum of Rs 1 crore, happens to be set up, which is barred, then, unless Section 5 of the Limitation Act is successfully invoked, the applicants would risk rejection of the application, which cannot be stated to be unfair as it is in accordance with law. (Para 173)

If the law contemplates that the default in a sum of Rs 1 crore can be towards *any* financial creditor even if he is not an applicant, the fact that the debt is barred as against some of the financial creditors, who are applicants, whereas, the application by some others, or even one who have moved jointly, fulfil the requirement of default, both in terms of the sum and it not being barred, the application would still lie. (Para 175)

The point of time to comply with the threshold requirements

There can be no doubt that the requirement of the threshold under the impugned proviso in Section 7(1) of the Code, must be fulfilled as on the date of the filing of the application. (Para 178)

The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation. (Para 180)

Rajahmundry Electric Supply Corpn. Ltd. v. *A. Nageshwara Rao*, AIR 1956 SC 213, *affirmed*

In the matter of presentation of an application under Section 7, if the threshold requirement under the impugned provisos, stands fulfilled on the date of filing of the application, the requirement of the law must be treated as fulfilled. (Para 181)

O. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) first proviso [as inserted vide Act 1 of 2020] and Ss. 21(6-A)(a) and 25(3-A) — Condition imposed on debenture or security holders of the same class that application for initiating corporate insolvency resolution process is to be filed jointly by not less than one hundred or not less than one-tenth of the total number of creditors — Vires of, upheld — Furthermore, statutory mechanism mandating availability of information on debenture holders and security holders of a corporate debtor, under S. 88 of the Companies Act, 2013 is adequate**

— Held, the legislative understanding is clear that in regard to such creditors bearing the hallmark of large numbers they are required to be treated differently — Further, if they are not treated differently it would spell chaos and the objects of the Code would not be fulfilled — Held, insisting on a threshold in regard to these categories of creditors would lead to a halt of indiscriminate litigation — Otherwise, indiscriminate legislation would result in an uncontrollable docket explosion as far as the authorities which work the Code are concerned — Also, the Code and object of the Code and the unique features which set apart the creditors involved in this case from the generality of the creditors, the challenge being to an economic measure and the consequential latitude that is owed to the legislature renders the principle of absurdity wholly inapposite — Companies Act, 2013 — S. 88 — Constitution of India, Art. 14 (Paras 276 to 282 and 207 to 209)

Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1, *relied on*

Vasant Ganpat Padave v. *Anant Mahadev Sawant*, (2019) 19 SCC 577 : (2020) 4 SCC (Civ) 447, *distinguished*

Shayara Bano v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277, *referred to*

P. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) third proviso (as inserted by Act 1 of 2020) — Nature of, held, is retrospective — S. 7(1) third proviso is not a mere matter of procedure and it affects substantive vested rights i.e. it affects a vested right of action, as all vestive requirements had been satisfied by the applications which are affected by it — Validity of said third proviso, upheld, despite its being retrospective, as requirements of a valid retrospective law, held, are satisfied**

— Deemed withdrawal under said third proviso of the affected application, in case of non-compliance with conditions imposed within prescribed period of thirty days — Not a bar to filing of fresh application on the same default/cause of action — Delay in filing subsequent application — Condonation of

— Held, deemed withdrawal under third proviso would not bar a fresh application by the same party after complying with first or second proviso, as the case may be, on the same default — As effect of S. 7(1) third proviso is a one-time measure, directions issued under Art. 142 of the Constitution re condonation of delay in, and re court fees to be paid on, filing of fresh applications on the same default after complying with first or second proviso, as the case may be — Clarified, that over and above benefit of abovesaid directions under Art. 142 of the Constitution re condonation of delay, applicants concerned would be entitled to take benefit of S. 5 of the Limitation Act for condonation of delay in accordance with law — Moreover, applicants concerned were also free to file fresh applications based on any different default against any creditor of the same class taking the benefit of S. 7(1) Expln., if the same is not time-barred

Q. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7 — Right of action under, when accrues or becomes a vested right — Satisfaction of all vestive conditions therefor — Need for**

— There cannot be a vested right of action under S. 7 merely by reason of the existence of S. 7 — It must depend upon the vestive facts which would vest the right of action in conjunction with S. 7 — Thus, there is a right which is vested in the cases where the petitioners had filed applications fulfilling the requirements under unamended S. 7 of the Code — In fact, very act of filing the application even satisfies the apparent test propounded by the Union of India, that the right under S. 7 is only one to take advantage of the statute and unless the advantage is actually availed it does not create an accrued right — When applications were filed under the unamended provisions of S. 7, it would transform into a vested right — The vested right is to proceed with the action till its logical and legal conclusion — It cannot be accepted as contended that a vested right to emerge requires an order under S. 7(5) — General Clauses Act, 1897, S. 6

R. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 7(1) — Temporal operation of the three provisos thereto inserted vide Act 1 of 2020 — First and second provisos to S. 7(1), held, have only prospective operation — Third proviso is retrospective — Validity of all three provisos upheld**

S. **Statute Law — Accrued/Vested rights when affected/saved — Vested or accrued right — What is — Right when vests or accrues — All vestive requirements or conditions must stand satisfied — Vested right of action — When accrues — Satisfaction of vestive requirements — Power of legislature to take away vested or accrued rights vide retrospective law — Scope of — Retrospective law — What is — Grounds on and manner in which validity of retrospective law is to be tested, particularly when it is an economic measure, including on grounds of manifest arbitrariness, reasonableness and fairness — Law summarised**

— Held, manner in which a particular statute carrying retrospective effect will impair vested rights will depend on the facts of each case — Hence, question as to validity of the retrospective law is a matter to be judged on a consideration of the facts, the period of time over which the retrospective law operates, the impact of the law on the vested rights, the public interest, the nature of the right which is the subject-matter of the law and the terms of the law — What however must not be lost sight of is whether the law in question is an economic measure in which case, the legislature has much more latitude—*see in detail* Shortnote *A* — General Clauses Act, 1897 — S. 6 — Constitution of India — Arts. 14, 19, 21 and 300-A — Words and Phrases — "Vested right", "vestive conditions", "retrospective"

T. **Jurisprudence — Juridical relationships — Rights, liberties, powers and immunities and their correlatives, explained — Right of action whether strictly speaking a "power"**

— Legal rights are, in a wider sense, of four distinct kinds — They are rights, liberties, powers and immunities — Duty is the correlative of a right, while, no-rights correspond to liberties — Liabilities have a nexus with the power exercised by another person, with regard to whom, the liability exists in another party — When somebody has an immunity against another, it disables the latter, and thus, it constitutes a disability for him — The term "right" is often used in the wide sense to include liberty by which it is meant to have one left free to do as he pleases — A power may be defined as ability conferred upon a person by law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons — It may be asked whether a right of action is a right or a power: is there a duty with anyone in the case of a right to an action — This need not be probed further as a power is also a right in the wider sense — Words and Phrases — "Right", "liberty", "power", "immunity"

U. **Civil Procedure Code, 1908 — S. 9 — Right to file civil suit — Nature and scope of — Contrasted with statutory rights of action**

— There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute, one may, at one's peril, bring a suit of one's choice — However, this does not apply to a statutory right of action which is not a civil suit, nor is in lieu of a civil suit

Held :

Vested rights and retrospectivity

Rights are "vested" when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights. The concept of vested right is not confined to a property right. A right of action, should conditions otherwise exist, can also be a vested right. Such a right can be created by a statute and even on a repeal of such a statute, should conditions otherwise exist, giving a right under the repealed statute, the right would remain an accrued right. (Paras 366, 367 and 402)

A right vests when all the facts have occurred which must by law occur in order for the person in question to have the right. A right is contingent when some but not all of the vestive facts, as they are termed, have occurred. Thus, a mere right, assuming it to be properly so called, existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment. (Paras 340 and 346.5)

Bibi Sayeeda v. *State of Bihar*, (1996) 9 SCC 516; *Bansidhar* v. *State of Rajasthan*, (1989) 2 SCC 557; *Bombay Stock Exchange* v. *V.S. Kandalgaonkar*, (2015) 2 SCC 1 : (2015) 1 SCC (Civ) 694; *New India Insurance Co. Ltd.* v. *Shanti Misra*, (1975) 2 SCC 840, *relied on*

Isha Valimohamed v. *Haji Gulam Mohd. & Haji Dada Trust*, (1974) 2 SCC 484, *affirmed on this point*

Gopeshwar Pal v. *Jiban Chandra Chandra*, 1914 SCC OnLine Cal 95 : ILR (1914) 41 Cal 1125 : AIR 1914 Cal 806; *Hamilton Gell* v. *White*, (1922) 2 KB 422 (CA), *approved*

Lalji Raja & Sons v. *Hansraj Nathuram*, (1971) 1 SCC 721; *Ogden Industries (P) Ltd.* v. *Lucas*, 1970 AC 113 : (1969) 3 WLR 75 (PC), *distinguished*

Isha Valimahmad v. *Haji Gulam Mohmad Haji Dada*, 1970 SCC OnLine Guj 15; *V. Dhanapal Chettiar* v. *Yesodai Ammal*, (1979) 4 SCC 214; *Abbott* v. *Minister for Lands*, 1895 AC 425 (PC), *referred to*

Lala Soni Ram v. *Kanhaiya Lal*, 1913 SCC OnLine PC 7; *Commr. of Public Works (Cape Colony)* v. *Logan*, 1903 AC 355 (PC); *Colonial Sugar Refining Co. Ltd.* v. *Irving*, 1905 AC 369 (PC); *Jackson* v. *Woolley*, (1858) 8 El & Bl 784 : 120 ER 292, *cited*

P.J. Fitzgerald: *Salmond on Jurisprudence*, 12th Edn., *relied on*

Black's Law Dictionary, 6th Edn.; *Webster's Comprehensive Dictionary*, International Edn., *cited*

A statute is not retrospective merely because it affects existing rights. This is, however, in regard to the future operation of law qua the existing rights. If the existing right is modified or taken away and it is to have operation only from the date of new law, it would obviously have only prospective operation and it would not be a retrospective law. (Para 406)

What then is retrospectivity? It is ordinarily the new law being applied to cases or facts, which came into existence prior to the enacting of the law. A retrospective law, in other words, either supplants an existing law or creates a new one and the legislature contemplates that the new law would apply in respect of a completed transaction. It may amount to reopening, in other words, what is accomplished under the earlier law, if there was one, or creating a new law, which applies to a past transaction. (Para 408)

A statute is regarded as retrospective if it operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. (Para 393)

The manner in which a particular statute carrying retrospective effect will impair the rights will depend on the facts of each case. (Para 416)

K.S. Paripoornan v. *State of Kerala*, (1994) 5 SCC 593, *relied on*

Craies on Statute Law, 7th Edn., p. 387; *Halsbury's Laws of England*, *relied on*

The right created by a statute, can be taken away by a statute. Every sovereign legislature is clothed with competence to make retrospective laws. It is open to the legislature, while making retrospective law, to take away vested rights. If a vested right can be taken away by a retrospective law, there can be no reason why the legislature cannot modify the vested rights. (Paras 399 and 404)

Vijay v. *State of Maharashtra*, (2006) 6 SCC 289; *State Bank's Staff Union (Madras Circle)* v. *Union of India*, (2005) 7 SCC 584 : 2005 SCC (L&S) 994, *affirmed*

Whenever any amendment is brought in force retrospectively or any provision of the Act is deleted retrospectively, in this process rights of some are bound to be affected one way or the other. In every case the exercise by the legislature by introducing a new provision or deleting an existing provision with retrospective effect *per se* does not amount to violation of Article 14 of the Constitution. (Para 395)

Rather, when a statute made by the sovereign legislature is found to have retrospective operation and it affects vested rights, such law must pass muster under Articles 14, 19, 21 and 300-A of the Constitution. When the challenge is made under Article 14 of the Constitution: (*i*) the Court must consider whether the law, in its retrospectivity, manifests forbidden classification; and/or (*ii*) whether the law, in its retrospectivity, produces manifest arbitrariness. If a law is alleged to be violative of Article 19(1)(*g*) of the Constitution, the Court, in an action by a citizen, would, in the first place, find whether the right claimed, falls, within the ambit of Article 19(1)(*g*), and if so, then whether the law in question amounts to a reasonable restriction of the right under Article 19(6). The Court will further enquire as to whether such a law is made, inter alia, by way of placing reasonable restrictions by looking into the public interest. In the case of law, which is found to be not unfair, it would also not fall foul of Article 21 of the Constitution. (Paras 411, 433 and 436)

In the context of a challenge on the ground of manifest arbitrariness under Article 14, the test to be applied has been articulated as to whether it is capricious, irrational, does not disclose any principle, betrays absence of proportionality or whether it is excessive and, finally, without any determining principle. The golden thread which runs through the grounds making up the doctrine of manifest arbitrariness, injustice, undoubtedly, consists of total absence of public interest, of which the sovereign legislature as the supreme law giver, is the undoubted custodian. (Paras 412, 413 and 434)

The action of the State must be fair and reasonable. The question as to validity of the retrospective law is a matter to be judged on a consideration of the facts, the period of time over which the retrospective law operates, the impact of the law on the vested rights, the public interest, the nature of the right which is the subject-matter of the law and the terms of the law. (Paras 433 and 436)

The doctrine of fairness, indeed, has been present in the mind of the courts, whenever a law, described as retrospective, comes up for interpretation with or without a challenge to the law. The question of fairness will have to be answered in respect of a particular statute by taking into account various factors viz. value of the rights which the statute affects; extent to which that value is diminished or extinguished by the suggested retrospective effect of the statute; unfairness of adversely affecting the rights; clarity of the language used by Parliament and the circumstances in which the legislation was created. (Paras 414 and 434)

What however must also not be lost sight of is whether the law in question is an economic measure. (Para 434)

Shayara Bano v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277; *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*, (1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL), *relied on*

State Bank's Staff Union (Madras Circle) v. *Union of India*, (2005) 7 SCC 584 : 2005 SCC (L&S) 994, *affirmed*

State Bank Staff Union v. *Union of India*, 2000 SCC OnLine Mad 561, *referred to*

Commr. of Urban Land Tax v. *Buckingham & Carnatic Co. Ltd.*, (1969) 2 SCC 55; *Stott* v. *Stott Realty Co.*, (1939) 284 NW 635 : 288 Mich 35; *Cauvery Water Disputes Tribunal, In re*, 1993 Supp (1) SCC 96 (2), *cited*

G.P. Singh: *Principles of Statutory Interpretation*, *referred to*

Whenever a statute or statutory provision is repealed or amended, whatever rights are expressly saved by the "savings" provision in the repealing or amending statute stand saved. But, that does not mean that rights which are not saved by the "savings" provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(*c*) of the General Clauses Act, 1897. The distinction between what is, and what is not a right preserved by the provisions of Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal or amendment of a statute is a right acquired or accrued under it and not a mere "hope or expectation of", or liberty to apply for, acquiring a right. (Paras 368 and 370)

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. (Para 373.5)

In *B.K. Educational Services*, (2019) 11 SCC 633, it was inter alia held that the new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish a vested right of action by providing for a shorter period of limitation. The petitioners are seeking to lay store by the principle that a new law cannot extinguish a vested right of action even if it be pertaining to the period of limitation. (Paras 379.2 and 379.3)

D.C. Bhatia v. *Union of India*, (1995) 1 SCC 104; *New India Insurance Co. Ltd.* v. *Shanti Misra*, (1975) 2 SCC 840; *M.S. Shivananda* v. *Karnataka SRTC*, (1980) 1 SCC 149 : 1980 SCC (L&S) 131; *Bansidhar* v. *State of Rajasthan*, (1989) 2 SCC 557; *Director of Public Works* v. *Ho Po Sang*, 1961 AC 901 : (1961) 3 WLR 39 : (1961) 2 All ER 721 (PC), *relied on*

Ambalal Sarabhai Enterprises Ltd. v. *Amrit Lal & Co.*, (2001) 8 SCC 397; *CIT* v. *Shah Sadiq & Sons*, (1987) 3 SCC 516 : 1987 SCC (Tax) 270; *Vinod Gurudas Raikar* v. *National Insurance Co. Ltd.*, (1991) 4 SCC 333; *Union of India* v. *Harnam Singh*, (1993) 2 SCC 162 : 1993 SCC (L&S) 375; *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528, *affirmed*

Gopeshwar Pal v. *Jiban Chandra Chandra*, 1914 SCC OnLine Cal 95 : ILR (1914) 41 Cal 1125 : AIR 1914 Cal 806; *Meharban-I-Doston* v. *G. Venkata Subba Row*, 1915 SCC OnLine Mad 69 : ILR (1916) 39 Mad 645, *approved*

West v. *Gwynne*, (1911) 2 Ch 1 : 1910 W 976 (CA), *considered*

Kanaya Ram v. *Rajender Kumar*, (1985) 1 SCC 436, *impliedly distinguished*

ArcelorMittal (India) (P) Ltd. v. *Satish Kumar Gupta*, (2019) 2 SCC 1; *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17, *distinguished on this point*

Hitendra Vishnu Thakur v. *State of Maharashtra*, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087; *Howrah Municipal Corpn.* v. *Ganges Rope Co. Ltd.*, (2004) 1 SCC 663, *summarised*

Rameshwar v. *Jot Ram*, (1976) 1 SCC 194; *M.P. Steel Corpn.* v. *CCE*, (2015) 7 SCC 58 : (2015) 3 SCC (Civ) 510; *Mohinder Kumar* v. *State of Haryana*, (1985) 4 SCC 221; *D.C. Bhatia* v. *Union of India*, (1995) 1 SCC 104; *Ganges Rope Co. Ltd.* v. *State of W.B.*, 1997 SCC OnLine Cal 298, *referred to*

State Bank's Staff Union (Madras Circle) v. *Union of India*, (2005) 7 SCC 584 : 2005 SCC (L&S) 994; *Ritesh Agarwal* v. *SEBI*, (2008) 8 SCC 205; *K.S. Paripoornan* v. *State of Kerala*, (1994) 5 SCC 593; *Darshan Singh* v. *Ram Pal Singh*, 1992 Supp (1) SCC 191; *Pyare Lal Sharma* v. *Jammu & Kashmir Industries Ltd.*, (1989) 3 SCC 448 : 1989 SCC (L&S) 484; *P.D. Aggarwal* v. *State of U.P.*, (1987) 3 SCC 622 : 1987 SCC (L&S) 310; *Govind Das* v. *CIT*, (1976) 1 SCC 906 : 1976 SCC (Tax) 133; *Banshidhar* v. *State*, 1976 SCC OnLine Raj 45, *cited*

Legal rights are, in a wider sense, of four distinct kinds. They are rights, liberties, powers and immunities. Duty is the correlative of a right, while, no rights correspond to liberties. Liabilities have a nexus with the power exercised by another person, with regard to whom, the liability exists in another party. When somebody has an immunity against another, it disables the latter, and thus, it constitutes a disability for him. The term "right" is often used in the wide sense to include liberty by which it is meant to have one left free to do as he pleases. (Para 337)

A power may be defined as ability conferred upon a person by law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. It may be asked whether a right of action is a right or a power. Is there a duty with anyone in the case of a right to an action? This need not be probed further as a power is also a right in the wider sense. (Paras 337 and 338)

Garikapati Veeraya v. *N. Subbiah Choudhry*, AIR 1957 SC 540 : 1957 SCR 488, *considered*

There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute, one may, at one's peril, bring a suit of one's choice. However, this does not apply to a statutory right of action which is not a civil suit, nor is in lieu of a civil suit. (Paras 386 and 387)

Mardia Chemicals Ltd. v. *Union of India*, (2004) 4 SCC 311; *Abbott* v. *Minister for Lands*, 1895 AC 425 (PC), *distinguished*

Ganga Bai v. *Vijay Kumar*, (1974) 2 SCC 393, *cited*

Effect of Section 7(1) proviso and nature of rights affected by it

The first and the second provisos in Section 7, the impugned first and second provisos have only prospective operation. The first and second provisos are valid. They can survive even if the third proviso is struck down. The third proviso is on the other hand dependant on the first and second provisos and cannot survive their invalidation. (Para 389)

The third proviso to Section 7 of the Code is a one-time affair. It is intended only to deal with those applications under Section 7 which were filed prior to 28-12-2019, when, by way of the impugned Ordinance, initially, the threshold requirements came to be introduced by the first and the second impugned provisos. In other words, the legislative intention was to ensure that no application under Section 7 could be filed after 28-12-2019, except upon complying with the requirements of the first and second provisos. The legislature did not stop there. It has clearly intended that the threshold requirement it imposed, will apply to all those applications which were filed prior to 28-12-2019 as well, subject to the exception that the applications, so filed, had not been admitted under Section 7(5). Moreover, it is also clear that the consequence of failure to comply with the threshold requirement in regard to applications which have been filed earlier, was that they would stand withdrawn. (Paras 331.1 to 331.3)

The vested right under Section 7 of the Code cannot exist merely by reason of Section 7. It must depend upon the vestive facts which would create the right in conjunction with Section 7 of the Code. Thus, there is a right which is vested in the cases where the petitioners have filed application fulfilling the requirements

under unamended Section 7 of the Code. The very act of filing the application even satisfies the apparent test propounded by the Union of India, that the right under Section 7 is only one to take advantage of the statute and unless advantage is actually availed it does not create an accrued right. When applications were filed under the unamended provisions of Section 7, at any rate it would transform into a vested right. The vested right is to proceed with the action till its logical and legal conclusion. It cannot be accepted as contended that a vested right to emerge still requires an order under Section 7(5) of the Code. (Paras 389 and 390)

Qua the financial creditors covered by the third proviso, having invoked, at any rate unamended Section 7, they had a vested right. They had undoubtedly a vested right to have their actions carried to its logical and legal end. No doubt, the question of admission of the application arises under Section 7(5) of the Code. It is open to the adjudicating authority to reject the application but that does not mean that the applicants had no vested right of action. The possibility of a plaint being rejected under Order 7 Rule 11 CPC or an appeal being dismissed under Order 41 Rule 11 CPC without notice being issued to the respondent or the fact that the suit can be dismissed at later stages, cannot detract from the right of the plaintiff or the appellant, being a substantive right. The same principle should suffice to reject the contention, based on admission under Section 7(5) alone, giving rise to the vested right in regard to an applicant under Section 7 of the Code. (Paras 400 and 401)

As far as the nature of the right in question is concerned, which would include the value of the rights, it is a right of action. The right of action is, undoubtedly, a vested right once the vestive requirements have all been satisfied. The role of the applicant essentially fades out after the admission of the application is made under Section 7(5). The right, which is given, is a right in rem. It is not a mere personal right, in the sense that it is right in rem. The applicant is not even required to plead the default qua him as the default to any financial creditor, in the requisite sum, provided it is not barred under Article 137 of the Limitation Act, 1963, suffices. The consequences of the application would be that it may land the applicant and also all the stakeholders, in liquidation of the corporate debtor. (Para 415)

P.D. Aggarwal v. *State of U.P.*, (1987) 3 SCC 622 : 1987 SCC (L&S) 310, *considered*

Darshan Singh v. *Ram Pal Singh*, 1992 Supp (1) SCC 191, *distinguished*

E.P. Royappa v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, *cited*

In this regard, no support can be drawn from Section 6 of the General Clauses Act, 1897 by the petitioners. Section 6 makes it clear that the rights or privileges which may be asserted are subject to the amending law not being couched contrary to such rights/privileges. In this case it is precisely because the third proviso to Section 7(1) of the Code covers the applications filed prior to the amendment which had not been admitted, that the petitioners have challenged the provision. (Para 396)

Further, the plea to invoke the principle of reading down the proviso is as the terms of the third proviso to Section 7(1) of the Code are clear. The said third proviso does not admit of more than one interpretation at least in terms of the

matter covered by it. The only area left is the impact of the withdrawal which is to happen. (Paras 397 and 398)

DTC v. *Mazdoor Congress*, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213, *followed*

As far as the clarity of the language used in Section 7(1) third proviso, there does not appear to be any ambiguity, and what Parliament intended is, completely free from doubt. The only area where any ambiguity can be said to exist—is the effect of the application being treated as withdrawn. The further aspect, which is to be borne in mind, is the circumstances in which the legislation is created. It is here that the mischief rule and the aspect of public interest looms large. At the end of the day, the tussle is between the individual right versus the public interest. Now, public interest is a concept, which is capable of embracing, within its scope, the interest of different sections of the public. This would include the sections of the public to which the applicant himself belongs. Public interest would, undoubtedly, also encompass, the economy of the country, which can be understood in terms of all the objects, for which the Code was enacted. They would include the speed with which the Code is worked. It would include, also, safeguarding the interests of all the stakeholders. This may necessarily include the corporate debtor as a stakeholder, being protected from applications, which are perceived as frivolous or not representing a critical mass. (Para 416)

P.D. Aggarwal v. *State of U.P.*, (1987) 3 SCC 622 : 1987 SCC (L&S) 310, *referred to*

The financial creditors covered by the third proviso were clothed with a statutory right under the unamended Section 7. This right was available to be exercised by an individual creditor, by himself or jointly with others even prior to the amendment. The imposition of a threshold requirement under the first two provisos inserted in Section 7(1) by the amendment, being a mandatory and irreducible minimum even, if it is to be achieved as and after the date of the amendment, constitutes an intrusion into the substantive right of action which stood vested in the individual creditor prior to the amendment. The action of the creditor was not a completed transaction. As regards his conduct in the past viz. moving under Section 7, it is incomplete but the action was commenced. But the law (the third proviso) impairs the past action qua the future. (Paras 417 to 419)

This is a case where the law in question is retrospective. Imposing the threshold requirement under the third proviso, is not a mere matter of procedure. It impairs vested rights. It has conditioned the right instead, in the manner provided in the first and the second proviso. The first and second proviso operate only in the future i.e. prospectively. In that sense, the legislature has purported to equate persons who had not filed applications with persons like the petitioners who had filed the applications under the unamended law. (Paras 419 and 435)

All the applicants affected by the third proviso share the common characteristic of being applicants in applications which were not admitted. In fact, most of the applications would appear to have been filed in the year 2019. Enquiring further into the different stages in these applications, would go against the principle that the court does not look to mathematical nicety or perfection in the law. The Court also bears in mind the principle that the law is an economic measure. (Para 420)

Effect of deemed withdrawal under the third proviso

Since withdrawal of applications affected thereby is ordained by the third proviso to Section 7(1) of the Code, such withdrawal does not qualify as "withdrawal" under Rule 8 of the Insolvency and Bankruptcy (Application of Adjudicating Authority) Rules, 2016 on request. (Para 429)

It is held that withdrawal under the third proviso to Section 7(1) of the Code would not bar a fresh application by the same party on the same cause of action, after complying with the provisions of the first or second proviso, as the case may be, on the same default. (Paras 429, 431 and 440)

In regard to applications, including applications under Article 137 of the Limitation Act, the law giver has not contemplated expressly excluding the time spent in pursuing another proceeding which stood withdrawn. On the terms of Section 14 of the Limitation Act, since Section 14(1) read with Section 14(3), contemplates withdrawal of a suit with permission under Order 23 Rule 1(4)(*b*) CPC to enable exclusion of the period spent in a suit which is withdrawn and Section 14(2) is what applies to applications including one under Article 137 of the Constitution, the period spent in the application when it is withdrawn under the third proviso cannot be excluded under Section 14(3) of the Limitation Act. (Paras 426 and 430)

Even if an application deemed to be withdrawn under the third proviso to Section 7(1) of the Code is found to be time-barred upon the withdrawal, having regard to the Explanation to Section 7(1), it will always be open to the applicant to set up a different default to any financial creditor from the same class and move an application under Section 7(1) afresh. application, with reference to any of the large number of creditors, suffices. (Para 430)

Furthermore, delay can be condoned under Section 5 of the Limitation Act. Moreover, it is here that power under Article 142 of the Constitution is fit to be exercised, to direct that if fresh applications are filed by the petitioners after complying with the first and second proviso, then on applications being filed under Section 5 of the Limitation Act, in regard to the period of pendency of applications, the authority shall condone the delay. (Para 431)

B.K. Educational Services (P) Ltd. v. *Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528, *relied on*

There is a determining principle, namely, the perception from experience about how the entire object of the Code would stand jeopardised if applications already filed could go on even when a fair and reasonable number of kindred souls are not available to support it. Once there is a principle, it cannot be capricious, excessive or disproportionate unless it is found that the time given under the proviso is manifestly arbitrary. A vested right under a statute can be taken away by a retrospective law. A right given under a statute can be taken away by another statute. We cannot ignore the fact that there was considerable public interest behind the insertion of the three impugned provisos to Section 7(1) of the Code. The sheer numbers, in which applications proliferated, combined with the results it could produce, cannot be brushed aside as an irrational or capricious aspect to have been guided by in making the law. Being an economic measure, the wider latitude available to the law giver, cannot be lost sight of. (Para 437)

The issue, which, however remains, is the period of 30 days made available under the third proviso to Section 7(1) of the Code. It is difficult to hold that within the time-limit of 30 days it is impossible to comply with the requirements. We have to take the law as it is and deal with it on the touchstone of, whether the law is manifestly arbitrary. By virtue of the statutory mechanism, there appears to be an information grid available under the law. (Paras 438, 439 and 444)

In regard to the first and the second provisos, they have only prospective operation. The creditors covered by these provisos, are not subjected to any time-limit (except, no doubt, the bar under Article 137 of the Limitation Act), in the matter of garnering the requisite support. However, prescribing a time-limit in regard to pending applications, cannot per se be described as arbitrary, as otherwise, it would be an endless and uncertain procedure. The applications would remain part of the docket and also become a Damocles' sword overhanging the debtor and the other stakeholders with deleterious consequences also qua the objects of the Code. (Para 441)

The impugned amendments are upheld subject to the following directions under Article 142 of the Constitution:

(*i*) If any of the petitioners move applications in respect of the same default, as alleged in their applications, within a period of two months from the date of this judgment, also compliant with either the first or the second proviso under Section 7(1), as the case may be, then, they will be exempted from the requirement of payment of court fees. (Paras 447.1 and 446)

(*ii*) Secondly, it is directed that if applications are moved under Section 7 by the petitioners, within a period of two months from today, in compliance with either of the provisos, as the case may be, and the application would be barred under Article 137 of the Limitation Act, on the default alleged in the applications, which were already filed, if the petitioner file applications under Section 5 of the Limitation Act, 1963, the period of time spent before the adjudicating authority, the adjudicating authority shall allow the applications and the period of delay shall be condoned in regard to the period, during which, the earlier applications filed by them, which is the subject-matter of the third proviso, were pending before the adjudicating authority. (Para 447.2)

(*iii*) It is clarified that the time-limit of two months is fixed only for conferring the benefits of exemption from court fees and for condonation of the delay caused by the applications pending before the adjudicating authority. In other words, it is always open to the petitioners to file applications, even after the period of two months and seek the benefit of condonation of delay under Section 5 of the Limitation Act, in regard to the period, during which, the applications were pending before the adjudicating authority, which were filed under the unamended Section 7, as also thereafter. (Para 447.3)

Chitra Sharma v. *Union of India*, (2018) 18 SCC 575; *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409 : 1979 SCC (Tax) 144; *Thirumalai Chemicals Ltd.* v. *Union of India*, (2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458; *DMRC* v. *Tarun Pal Singh*, (2018) 14 SCC 161 : (2018) 4 SCC (Civ) 488; *State of Karnataka* v. *Karnataka Pawn Brokers Assn.*, (2018) 6 SCC 363 : (2018) 3 SCC (Civ) 750; *Ashutosh Gupta* v. *State of Rajasthan*, (2002) 4 SCC 34 : 2002 SCC (L&S) 465; *Gujarat Agro Industries Co. Ltd.* v. *Ahmedabad Municipal Corpn.*, (1999) 4 SCC 468; *J.P. Srivastava & Sons (P) Ltd.* v.

Gwalior Sugar Co. Ltd., (2005) 1 SCC 172; *Anjum Hussain* v. *Intellicity Business Park (P) Ltd.*, (2019) 6 SCC 519 : (2019) 3 SCC (Civ) 334; *Karnail Kaur* v. *State of Punjab*, (2015) 3 SCC 206 : (2015) 2 SCC (Civ) 259; *School Board Election for the Parish of Pulborough, In re*, (1894) 1 QB 725 (CA), *cited*

V. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 11 Expln. II [as inserted vide Act 1 of 2020] — Said Expln. II providing the clarification that the corporate debtor even though falling within the ambit of clauses (a) to (d) of S. 11, is not precluded from initiating corporate insolvency resolution process against another corporate debtor — Validity of, upheld — Expln. II to S. 11 — Clarificatory in nature and hence, shall apply to all pending applications**

— Rejecting the challenge to Expln. II, held, the intention of the legislature was always to target the corporate debtor only insofar as it purported to prohibit application by the corporate debtor against itself, to prevent abuse of the provisions of the Code and it could never had been the intention of the legislature to create an obstacle in the path of the corporate debtor, in any of the circumstances contained in S. 11, from maximising its assets by trying to recover the liabilities due to it from others

— Also, even if, in effect, in a particular case, an Explanation does widen the terms of the main provision, it would become the duty of the court to give effect to the will of the legislature

— Interpretation of Statutes — Internal Aids — Explanation — Widening of scope of main provision vide an Explanation — Permissibility of (Paras 296 to 310)

Held :

If on a true reading of an Explanation it appears that it has widened the scope of the main section, effect is to be given to the legislative intent notwithstanding the fact that the legislature named that provision as an Explanation. In all these matters the courts have to find out the true intention of the legislature. (Para 296)

It must be remembered that the legislature speaks through the medium of the words it uses. The nomenclature, it gives to the device cannot control the express language which it employs. If, in effect, in a particular case, an Explanation does widen the terms of the main provision, it would become the duty of the court to give effect to the will of the legislature. (Para 297)

Hiralal Rattanlal v. *State of U.P.*, (1973) 1 SCC 216 : 1973 SCC (Tax) 307, *followed*

Sonia Bhatia v. *State of U.P.*, (1981) 2 SCC 585, *relied on*

S. Sundaram Pillai v. *V.R. Pattabiraman*, (1985) 1 SCC 591, *clarified* and *distinguished*

Shayara Bano v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277; *Virtual Soft Systems Ltd.* v. *CIT*, (2007) 9 SCC 665, *referred to*

Abhay N. Manudhane v. *Gupta Coal (India) (P) Ltd.*, 2019 SCC OnLine NCLAT 935; *Burmah Shell Oil Storage & Distributing Co. of India Ltd.* v. *CTO*, (1961) 1 SCR 902 : AIR 1961 SC 315 : (1960) 11 STC 764; *Bihta Coop. Development Cane Mktg. Union Ltd.* v. *Bank of Bihar*, (1967) 1 SCR 848 : AIR 1967 SC 389 : (1967) 37 Comp Cas 98; *Dattatraya Govind Mahajan* v. *State of Maharashtra*, (1977) 2 SCC 548; *CIT* v. *Bipinchandra Maganlal & Co. Ltd.*, AIR 1961 SC 1040 : (1961) 2 SCR 493 : (1961) 41 ITR 290, *cited*

The impugned Explanation came to be inserted by the impugned amendment. The intention of the legislature was always to target the corporate debtor only insofar as it purported to prohibit application by the corporate debtor against itself, to prevent abuse of the provisions of the Code. It could never have been the intention of the legislature to create an obstacle in the path of the corporate debtor, in any of the circumstances contained in Section 11, from maximising its assets by trying to recover the liabilities due to it from others. Not only does it go against the basic common sense view but it would frustrate the very object of the Code, if a corporate debtor is prevented from invoking the provisions of the Code either by itself or through his resolution professional, who at later stage, may, don the mantle of its liquidator. The provisions of the impugned Explanation, thus, clearly amount to a clarificatory amendment. A clarificatory amendment, it is not even in dispute, is retrospective in nature. The Explanation merely makes the intention of the legislature clear beyond the pale of doubt. The argument of the petitioners that the amendment came into force only on 28-12-2019 and, therefore, in respect to applications filed under Sections 7, 9 or 10, it will not have any bearing, cannot be accepted. The Explanation, in the facts of these cases, is clearly clarificatory in nature and it will certainly apply to all pending applications also. (Para 310)

W. **Insolvency and Bankruptcy Laws — Insolvency and Bankruptcy Code, 2016 — S. 32-A [as inserted vide Act 1 of 2020] — S. 32-A providing immunity to a corporate debtor — Immunities granted and conditions required to be complied with — Working of S. 32-A, explained in detail — Validity of, upheld — Constitution of India, Art. 14 (Paras 317 to 329)**

Essar Steel India Ltd. Committee of Creditors v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443, *referred to*

Insolvency Law Committee Report, February 2020; Standing Committee of Lok Sabha, 6th Report, March 2020, *referred to*

VN-D/67514/CV

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The Judgment of the Court was delivered by

K.M. JOSEPH, J.— The petitioners have approached this Court under Article 32 of the Constitution of India. They call in question Sections 3, 4 and 10 of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 (hereinafter referred to as "the impugned amendments" for short). Section 3 of the impugned amendment, amends Section 7(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code" for short). Section 4 of the impugned amendment, incorporates an additional Explanation in Section 11 of the Code. Section 10 of the impugned amendment inserts Section 32-A in the Code.

2. Section 7(1) of the Code before the amendment read 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.
>
> * * *
>
> *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."

3. The amendment to the same by Section 3 of the impugned amendment incorporates three provisos to Section 7(1), which reads as under:

> "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."

4. Section 11 before the amendment read as follows:

"**11.** ***Persons not entitled to make application***.—The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely—

(*a*) a corporate debtor undergoing a corporate insolvency resolution process; or

(*b*) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(*c*) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(*d*) a corporate debtor in respect of whom a liquidation order has been made.

Explanation I.—For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor."

5. The Explanation which was inserted through the impugned amendment reads as follows:

"*Explanation II.*—For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (*a*) to (*d*) from initiating corporate insolvency resolution process against another corporate debtor."

6. Section 32-A inserted through the impugned amendment reads as follows:

"**32-A.** ***Liability for prior offences, etc***.—(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the adjudicating authority under Section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—

(*a*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(*b*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (*j*) of Section 2 of the Limited Liability Partnership Act, 2008, or an "officer who is in default", as defined in clause (60) of Section 2 of the Companies Act, 2013, or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the adjudicating authority under Section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

(*i*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(*ii*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or court.

Explanation.—For the purposes of this sub-section, it is hereby clarified that—

(*i*) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(*ii*) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and cooperation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

Who are the petitioners?

7. More than the lion's share of the petitioners are allottees under real estate projects and hereinafter referred to as "allotees". They have trained the constitutional gun at the impugned provisos.

8. Under the second proviso, a new threshold has been declared for an allottee to move an application under Section 7 for triggering the insolvency resolution process under the Code. The threshold is the requirement that there should be at least 100 allottees to support the application or 10% of the total allottees whichever is less. Moreover, they should belong to the same project. Almost all (except in two petitions) the petitioners also had under the erstwhile regime which permitted even a single allottee to move an application under Section 7, filed petitions singly or with less than the number required under the proviso and they are visited with the provisions of the third proviso as per which such of those applications under Section 7 which had not been admitted would stand withdrawn within 30 days, if the newly declared threshold of 100 allottees or 10% of the allottee whichever is lower, was not garnered by the applicant/applicants.

9. In some of the petitions, the petitioners are moneylenders, that is, they have stepped in to provide finance for the real estate projects. They are also visited with the requirement which is imposed upon them under the first impugned proviso which is on similar lines as those comprised in the second proviso.

10. Then, there is, no doubt, Section 32-A, which stands impugned by the creditors and allottees.

The Code

11. The Code was enacted in the year 2016. It is one of the most important economic measures contemplated by the State to prevent insolvency, to provide last mile funding to revive ailing businesses, maximise value of assets of the entrepreneurs, balance the interest of all the stakeholders and even to alter the order of priority of payment of Government dues. The Code is divided into five parts. The first part is shortest portion. Part II deals with what we are concerned with in these cases and it purports to deal with insolvency resolution and liquidation for corporate persons. "Corporate person" has been defined in Section 3(7) as follows:

> "**3. (7) "corporate person"** means a company as defined in clause (20) of Section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (*n*) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;"

12. Section 3(8) defines "corporate debtor" which provides that a corporate debtor means a person who owes a debt to any person.

13. We may notice that Chapter II of Part II which consists of Sections 6 to 32 deals with the corporate insolvency resolution process. Chapter III deals with ordinary liquidation process in regard to corporate person. Chapter IV of

Part II consisting of four sections deals with fast-track insolvency resolution process. Chapter V which consists of Section 59 only deals with voluntary liquidation of corporate person. Chapter VI deals with miscellaneous aspects. Chapter VII Part II deals with penalties.

14. Part III deals with insolvency resolution and bankruptcy code for individuals and partnership firms. It may be noticed at once that partnership firms with limited liability as defined in the Limited Liability Partnership Act, 2008 fall within the definition of the word "corporate person" and insolvency and liquidation process in regard to the same is found in Part II of the Code. It is in regard to insolvency resolution and bankruptcy for the other partnership firms which one has to look to the provisions of Part III. Part III begins with Section 78 and ends with Section 187. The further provisions relate to the regulation of insolvency professional agencies and information utilities. They are all key instrumentalities for the effective working of the Code. Equally, it may be apposite to bear in mind Section 238-A. It reads as follows:

> "**238-A.** ***Limitation***.—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."

15. Shri Krishna Mohan Menon, learned counsel for the petitioners (allottees) in some of the petitions has addressed the following submissions before us:

15.1. The impugned amendment clearly falls foul of the mandate of Articles 14, 19(1)(*g*), 21 and 300-A of the Constitution. The amendment by virtue of Section 3 of the Amendment Act introducing the second proviso in Section 7(1) of the Code makes a hostile discrimination between financial creditors, the category, to which the petitioners belong and the other financial creditors.

15.2. Secondly, it is contended that the amendment imposing a threshold restriction is afflicted with the vice of palpable and hostile discrimination qua operational creditors. The purported protection sought to be accorded to the real estate developer, cannot form the premise for inflicting violation of constitutionally protected freedom under Article 19(1)(*g*) just as much as it also constitutes an insupportable invasion of the grand mandate of equality.

15.3. Next, the learned counsel would submit that there are inherent leakages in the impugned provisions which would make it unworkable. Thereafter, the learned counsel would submit that the impugned amendment is also bad in law for the reason that it is manifestly arbitrary. Yet another argument addressed by Shri Krishna Mohan Menon, learned counsel is that the amendment has the legally pernicious effect of creating a class within a class, a result, which is frowned upon by the law.

16. The learned counsel would expatiate and submit that under the Code, the law provides for a period of 14 days for the adjudicating authority to decide whether an application under Section 7 should be admitted. Section 12 declares an inflexible time-limit for the insolvency resolution process to be terminated.

The whole purport of the provisions of the Code and the manner in which it is structured is geared to achieve a laudable object. The Code aims at improving the ranking of India in the matter of ease of doing business. It is an economic measure which is intended to transform India into a country which would attract capital and investment. The Code has indeed resulted in a transformation of attitudes of the key players, in that it has come to be perceived as a law not merely on paper but one with teeth to it. The learned counsel would point out that this Court in its decision in *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*[1] has elaborately dealt with the apprehension that allowing the homebuyers like the petitioners who finance the builder's activities to invoke the CIRP process will lead to misuse of the provisions and allayed the unfounded fears. Yet the legislature has ventured to place unjustifiable clogs on the right of one category of financial creditors alone which is impermissible.

17. Shri Krishna Mohan Menon, learned counsel, submits that the spectre of a speculative investor running riot and playing havoc has been adequately addressed by this Court. There is no worthwhile data of misuse by homebuyers. He points out the judgments passed by NCLAT where the financial creditors, who are homebuyers, approach the Tribunal and the cases reflect gross and inordinate delay of nearly five years justifying the approach made by the homebuyers under the Code. In other words, there were genuine cases where the debtor had become insolvent and hence the homebuyer had complete justification in knocking at the doors of the competent Tribunal under the Code. The learned counsel took us through the reports of the Parliamentary Committee and complained that no reasons are discernible to justify the amendments. Equally, he commended for our acceptance the observations in the dissent notes and contended that they fortify the submissions.

18. In regard to the comparison sought to be made, with similar requirements in Sections 397, 398 read with Section 399 of the Companies Act, 1956 and Sections 241 and 244 of the Companies Act, 2013, Shri Krishna Mohan Menon would submit that there are significant distinctions.

19. Firstly, the learned counsel would submit that in the case of shareholders approaching the Tribunal under the Companies Act, they would be armed with the details regarding shareholding which are always available having regard to the scheme of the Companies Act. On the other hand, he points that in regard to homebuyers who have sunk their hard-earned money in real estate projects there is no system under which they could obtain data or information regarding the persons similarly circumstanced and whose cooperation and support is necessary under the impugned amendment to activise the Code.

20. Secondly, the learned counsel for the petitioners would submit that having regard to the Explanation in Section 244 of the Companies Act, 2013, it brings about clarity in regard to the situation where there is a joint holding. The absence of any such similar provision in Section 7 of the Code is emphasised in an attempt at persuading the court to overturn the law. Shri Menon would

1 (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

further point out the practical difficulties in the working of the amended law. He submits that the date of default of various homebuyers may be different. Therefore, to forge a common complaint impelling a group of homebuyers to come together is "impracticable and not workable". He would submit that the legislature cannot be permitted to take away through one hand what it has given by the other.

21. The learned counsel would further contend that as far as the third proviso is concerned while accepting the position that the 14 days' period for disposal of the matter under the Code has been understood to be directory and not mandatory, at the same time, it cannot be the law that a case should grace the docket endlessly and never witness an end and the retrospectivity which it reflects clearly renders it arbitrary.

22. Shri Shikhil Suri, learned counsel for the petitioner in Writ Petition (Civil) No. 191 of 2020 would submit that the impugned amendment is arbitrary being in the teeth of the principles laid down in *Pioneer*[1]. The object of the law would stand defeated, he contends. The Ordinance would not only deprive the petitioner of her right under Section 7 but it also violates Article 14 of the Constitution of India. The threshold limit is unreasonable and arbitrary. It is excessive and irrational. It is not in public interest. He also points out that there exists adequate shield against a single allottee misusing the Code. The threshold is thrust upon only on the homebuyer and is not applicable across the board for other financial creditors. It is discriminatory. There is no rationale. It treats equals unequally and unequals as equals. There is no intelligible differentia. The law does not permit classes among financial creditors. There is breach of the guarantee of equal protection of law. The threshold in Section 4, namely, default of rupees one crore is the one which applies to all creditors. It is inexplicable as to how only in regard to homebuyers, a different threshold should be insisted upon. The remedy of the homebuyer is defeated. The Ordinance was brought in haste without proper discussion and debate. The amendment takes away the vested right of the homebuyers. There is no intelligible differentia bearing a nexus with the object and purpose of the Act. Shri Suri also emphasised the practical difficulties involved in arranging the necessary numerical strength under the impugned provision.

23. Shri Piyush Singh, learned counsel for the petitioners would submit that once the right is conferred to make an application, then it cannot come conditioned with threshold limit as is provided in the impugned provisos. Secondly, he would point out that there is manifest arbitrariness. That apart, he would also contend that there is hostile discrimination qua other corporate debtor. The builder who is a corporate debtor, in other words, is given a more favourable treatment than other corporate debtors which is afflicted with the vice of hostile discrimination. He also complained of both under and over inclusiveness in the impugned provisions. Next, the learned counsel submits that the very object is discriminatory. Drawing our attention to both

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

Chitra Sharma v. *Union of India*[2] and *Pioneer*[1], he would highlight that having regard to the background in which the rights of the homebuyer were recognised as being one of that of a financial creditor, the amendment is clearly impermissible. He would also submit that having regard to the stand taken by the Government in the case before this Court, in particular, *Pioneer*[1], the principles of promissory estoppel will apply and prevent enactment of the impugned provisions. He would expatiate and submit that the conditions which have been imposed render the remedy illusory.

24. The learned counsel drew our attention to Order 1 Rule 8 of the Code of Civil Procedure and also took us to the Explanation therein. He would submit that the proviso is not on similar lines as Order 1 Rule 8. This is for the reason that under the procedure under Order 1 Rule 8, the numerical stipulation in the impugned provisos is not insisted upon. Once persons having same interest institute a civil suit, after following the procedure all persons having the same interest become involved and what is more would be bound by the decision. Section 12 of the Consumer Protection Act which also captures and embodies the principle of Order 1 Rule 8 ensures the protection of class interest and also protect class interest without putting stiff barriers as threshold limits as done by the impugned amendment.

25. Shri Piyush Singh, learned counsel pointed out that the real estate owners do not take any loan from financial institutions. They raise capital exclusively from the allottees virtually. In such circumstances, to put this threshold limit is clearly impermissible. He drew our attention to the judgment of the Court in *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*[3], to buttress his submission regarding availability of principles of promissory estoppel. There is manifest arbitrariness in the provisions. He complained that the RERA has not been constituted in all the States. He also made an attempt at pointing out the perception that the amendment is to confer an unmerited advantage on the builder. This he purported to do by drawing our attention to an article in a newspaper. He essentially projected this argument as a thinly disguised argument of malice against the law giver. He also sought to draw support from the judgment of this Court in *Nagpur Improvement Trust* v. *Vithal Rao*[4]. He reiterated the principle of hostile discrimination. The learned counsel drew our attention to the definition of the word "allottee" in RERA. It is here that he complained of the provision being under inclusive and over inclusive. The legislature, he points out, should have waited and at best could have acted if there is impeachable and empirical evidence warranting such a drastic incursion into the vested right of the homebuyer. He also highlights that in law there can only be one default. A homebuyer who before the amendment could by himself set the law into motion, is now left at the mercy of similarly circumstanced

2 (2018) 18 SCC 575
1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1
3 (1979) 2 SCC 409 : 1979 SCC (Tax) 144
4 (1973) 1 SCC 500

persons which itself is rendered impossible by the absence of an information generating mechanism which is accessible.

26. Shri Piyush Singh would also point out that the dates of the agreements of different homebuyers would be different. Depending on the dates of the agreements being different, it is incontrovertible, he points out that the date of default would be different. He would pose the question as to how in such circumstances the law could insist upon a homebuyer assembling together other homebuyers and that too one hundred in number or one-tenth of the total number of allottees. Allottees are spread all over the world. It is inconceivable as to how the provision can be worked in a reasonable and fair manner.

27. Shri Rahul Rathore, learned counsel for the petitioners in some of the writ petitions would apart from adopting the contentions, contend that insolvency has been predicated project-wise. He would submit that under the impugned amendment, the allottees are to be culled out from among a particular project. In other words, the requirement under the provision is that the applicants must be 100 allottees or one-tenth of the allottees of a particular real estate project. He would point out that a corporate body may be having different projects. If that be so, there is no rationale in insisting that the said corporate body has become insolvent, qua the particular project in which the applicants are interested. Insolvency, in other words, would be a financial malaise, which afflicts the corporate body as a whole, qua all its projects. If the allottees can be drawn from other projects undertaken by the company then maybe it may have rendered the provisions more reasonable appears to be the argument of the petitioner. But this is not so. The provisions are irrational.

28. Shri Rahul Rathore, learned counsel submits that the homebuyer is a person who invests his lifetime savings. He is in a weak position already. Instead of conferring protection on him, the homebuyer is being saddled with more oppressive and burdensome conditions. There is no platform for the exchange and availability of information with details regarding the allottees. The Limitation Act applies as held by this Court. He would also appear to rely on the theory of a single default. The conditions are impossible to fulfil. The homebuyer is being shut out at the very threshold.

29. Shri Dinesh C. Pandey, learned counsel would also contend that Section 6 of the General Clauses Act would protect all the pending applications.

30. Shri Dhruv Gupta, learned counsel appearing in WP (C) No. 177 of 2020 complained against retrospectivity spelt out by the impugned provisions. The right which was a vested right was substantive in nature. The law could only be prospective. He draws our attention to the judgment of this Court in *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*[5]. He also lays store by the principles laid down by this Court in *Swiss Ribbons (P) Ltd.* v. *Union of India*[6] and also in *Pioneer*[1].

5 (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528
6 (2019) 4 SCC 17
1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

31. Ms Purti Marwaha Gupta, learned counsel in WP (C) No. 75 of 2020 adopted the contentions of Shri Krishna Mohan Menon. The learned counsel would make submissions qua Section 32-A which is yet another provision which is challenged. She drew our attention to *Sections 2(1)(u) and 20* of the Prevention of Money Laundering Act, 2002. She would submit but for Section 32-A, the properties which are acquired could be attached but that is pre-empted by Section 32-A. The civil remedies open are taken away in regard to acts of crime. Section 14 of the Act which deals with moratorium is referred to in this regard.

32. Shri A.D.N. Rao, learned counsel would submit that a substantive right cannot be taken away by a procedural requirement. The homebuyers have been conferred the substantive right to invoke the Code by moving an application under Section 7. This right cannot be taken away by providing for a procedure and what is more which is impossible to attain. He drew our attention to the decision of this Court in *Garikapati Veeraya* v. *N. Subbiah Choudhry*[7]. He would submit that the law as on the date of initiation should prevail and it cannot be taken away by the amendment which is made subsequently. Apparently, the learned counsel is making his submission qua the third proviso inserted in Section 7(1) of the Code. He seeks to draw support from the judgment of this Court in *Thirumalai Chemicals Ltd.* v. *Union of India*[8].

33. Shri A.D.N. Rao, learned counsel also contends that a proviso cannot override the main provision. In this regard, he relied upon the judgment of this Court in *DMRC* v. *Tarun Pal Singh*[9]. He would in fact point out with reference to facts that the orders were reserved in the application under Section 7 in November 2019. The proviso came to be inserted on 28-12-2019. Resultantly, when the order came to be pronounced regarding admission of the application under Section 7, the authorities stood overtaken by the amendment. All of this is for no fault of the litigant who at the time when the application was moved was governed by a different regime which did not contain the harsh and arbitrary provisions. He would also point out practical difficulty in finding out other allottees.

34. Smt Tasleem Ahmadi, learned counsel would submit that an amendment as impugned in this case has the effect of setting at naught the directions and decision of this Court. She would complain that an amendment has been engrafted without removing the premise on which *Pioneer*[1] was decided. She drew our attention to the judgment of this Court in *State of Karnataka* v. *Karnataka Pawn Brokers Assn.*[10] (paras 16, 20, 23 and 24).

35. Shri Aditya Parolia, learned counsel would submit that while the legislature has the freedom to experiment, the power does not exist beyond certain limits. It cannot create provisions which are arbitrary. Unequals are

7 AIR 1957 SC 540 : 1957 SCR 488
8 (2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458
9 (2018) 14 SCC 161 : (2018) 4 SCC (Civ) 488
1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1
10 (2018) 6 SCC 363 : (2018) 3 SCC (Civ) 750

treated equally. The objections of the homebuyers were not discussed. The draft was not discussed. In this regard he points to the dissent of Shri T.K. Rangarajan. There is no intelligible differentia to distinguish the homebuyers from the other creditors. The class action under the Consumer Protection Act is denied under the code. Even a decree-holder under the aegis of RERA is denied relief. He also points out the lack of information required to properly work the statute. Allottees are spread across the globe. The real estate investor siphons off major amounts. The default is in rem.

36. Shri Pallav Mongia, learned counsel would point out that homebuyers would continue to be financial creditors. The proviso cannot take away the said right. Unequals are being made equal. Information regarding allottees is not available. He refers to the report of the Parliamentary Committee. He also complains about the absence of undisputed documents. As regards information relating to allottees he would make the point that the Code itself does not provide for a mechanism for a homebuyer to glean information. The homebuyer is being called upon to collect information with reference to another enactment, namely, RERA. This should be treated as fatal to the constitutionality of the impugned amendments. The learned counsel would further submit that the provision is bad for it being vague. The argument of vagueness is addressed with reference to the following:

1. The date of default.

2. The court fee payable when there is more than one applicant.

3. The threshold amount of default stipulated under Section 4, namely, Rs one crore at present.

4. He also would complain against the retrospectivity involved.

37. Shri Rana Mukherjee, learned Senior Counsel appears in writ petition where the first proviso is called in question, he represents the cause of moneylenders. He drew our attention to para 43 of *Pioneer*[1]. He pointed out that the requirement that the applicants must be of the same class and there must be 100 of them rendered the provisions unachievable. He drew our attention to Sections 244 and 245 of the Companies Act, 2013. He pointed out that the threshold under the said Act could be relaxed whereas under the code the law giver has inflicted the requirement as an inflexible mandate. He also complained of there being no information qua the requirement of 10%. He drew our attention to Rule 8-A. The learned Senior Counsel would submit that actually Parliament had in mind the homebuyer. The insertion of the 1st proviso betrays a mistaken roping in of the category of creditors represented by his clients. He sought to draw considerable support from the judgment of this Court in *Vasant Ganpat Padave* v. *Anant Mahadev Sawant*[11] of his compilation. Shri Rana Mukherjee commended for our acceptance the principle that the law must be considered having regard to consequences it produces. He requested that

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

11 (2019) 19 SCC 577 : (2020) 4 SCC (Civ) 447 : (2019) 12 Scale 579

the court may bear in mind the requirement that the law in its application must produce fair results.

38. Per contra, the stand of the Union, as projected through Smt Madhavi Divan, learned ASG, and through the written submissions submitted, can be summed up as follows: The impugned amendments are perfectly valid. The amendments are part of an economic measure. There was a Report of an Expert Committee. The Expert Committee recommended imposing a threshold amendment in respect of certain classes of financial creditors. It is modelled on the Companies Act. There are other statutory examples of such threshold requirements. The impugned provisions conform to the principle of reasonable classification. Intelligible differentia distinguishes the allottees and debenture holders and security holders covered by the provisos from the other financial creditors. The amendments were necessitated from experience. There is a rational nexus between the differentia and the objects. The amendment, as far as the impugned provisos are concerned, are essentially an extension of Section 21(6-A) and Section 25-A of the Code, under which, the debenture holders and security holders, on the one hand, and allottees, on the other, are treated differently. The provisions are not manifestly arbitrary, they are, indeed, workable. Having regard to the Explanation in Section 7(1), the default qua any financial creditor, even if, he is not an applicant, can be made use of by other allottees or debenture holders and security holders.

39. It is pointed out further that the constitutional validity of Sections 21(6-A) and 25-A of the Code, was upheld by this Court in *Pioneer*[1]. In this regard, attention is also drawn to the observations of this Court in para 43 of *Pioneer*[1]. On the strength of the said observations, it is contended that this Court has recognised that allottees/homebuyers are not a homogeneous group. This Court also recognised, it is pointed out, that the deposit-holders and security-holders form a sub-class/class of financial creditors, who are treated a little differently, on account of the sheer number of such creditors coupled with the heterogeneity within the group that may cause difficulties in the decision-making process. The provisions were introduced for ironing out the logistical/procedural complications that may arise on account of the peculiar nature of these groups. The provisions impugned in the present litigation merely supplement Section 21(6-A) and Section 25-A of the Code. The rationale in the said judgment should be applied in this case also. It is further pointed out that the challenge in *Pioneer*[1] was mounted by the developers and the homebuyers accepted the provisions, as being necessary to iron out the creases. The ASG drew support from judgments of this Court which are as follows:

(*i*) *Ameerunnissa Begum* v. *Mahboob Begum*[12];

(*ii*) *State of J&K* v. *Triloki Nath Khosa*[13];

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

12 1953 SCR 404 : AIR 1953 SC 91

13 (1974) 1 SCC 19 : 1974 SCC (L&S) 49

(*iii*) *Murthy Match Works* v. *CCE*[14];

(*iv*) *Ajoy Kumar Banerjee* v. *Union of India*[15];

(*v*) *Ashutosh Gupta* v. *State of Rajasthan*[16].

40. It is contended that there is a rational nexus with the objects of the Code insofar as the impugned provisos are concerned and the classification is permissible under Article 14 of the Constitution. She drew our attention to the Statements of Objects and Reasons appended to the amendment Bill to the Code, 2019, which introduced sub-section (3-A) in Section 25-A. It reads as follows:

> "**2.** The Preamble to the Code lays down the objects of the Code to include "the insolvency resolution" in a time-bound manner for maximisation 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 maximisation. 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 authorised representative.
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> * * *
>
> **3.** (*d*) to insert sub-section (3-A) in Section 25-A of the Code to provide that an authorised representative under sub-section (6-A) 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;"

41. It was submitted that thus, the Statement of Objects and Reasons recognises the heterogeneity within the class and the need to streamline, smoothen and facilitate the process so as to avoid unnecessary delay. There is also a concern about extensive litigation causing delays and hampering the maximisation of value, it is pointed out. Multiple applications by members of this large class of financial creditors, in such a class, would also add to the burden of the adjudicating authority, choke up its docket and delay the process. This would be counterproductive to the object of the Code which seeks to ensure time-bound resolution process for the maximisation of total value of assets. Reference is made to the Report of the Insolvency Law Committee, dated February 2020, which recommended the insertion of a minimum number of financial creditors in a class. It reads as follows:

14 (1974) 4 SCC 428 : 1974 SCC (Tax) 278
15 (1984) 3 SCC 127 : 1984 SCC (L&S) 355
16 (2002) 4 SCC 34 : 2002 SCC (L&S) 465

"ii. *Application for Initiation of CIRP by Class of Creditors*—As CIRP can be initiated by a single financial creditor, such as a homebuyer or a deposit holder, that belongs to a certain class of creditors following a minor dispute, it might exert undue pressure on the corporate debtor and might jeopardise the interests of the other creditors in the class who are not in favour of such initiation. It is being recommended that there should be a requirement for a minimum threshold number of certain financial creditors in a class for initiation of the CIRP. So, an amendment to Section 7(1) to provide that for a class of creditors falling within clause (*a*) or (*b*) of Section 21(6-A), the CIRP may only be initiated by at least a hundred such creditors or 10% of the total number of such creditors in a class.

* * *

4. APPLICATION FOR INITIATION OF CIRP BY CLASSES OF CREDITORS

4.1. Section 7 of the Code allows a financial creditor to initiate a CIRP against a corporate debtor upon the occurrence of default, either by itself, or jointly with other financial creditors.

4.2. It was brought to the Committee that for classes of financial creditors referred to in sub-clauses (*a*) and (*b*) of Section 21(6-A) of the Code — such as deposit holders, bondholders and homebuyers — there was a concern that the CIRP can be initiated by only one or few such financial creditors following minor disputes. This may exert undue pressure on the corporate debtor, and has the potential to jeopardise the interests of the other creditors in the class who are not in favour of the initiation of CIRP. This may also impose additional burden upon the adjudicating authority to hear objections to heavily disputed applications. The Committee noted that this may be antithetical to the value of a time-bound resolution process, as the already over-burdened adjudicating authorities are unable to list and admit all such cases filed before them.

4.3. The Committee discussed that classes of creditors such as homebuyers and deposit holders have every right as financial creditors to initiate CIRP against a corporate debtor that has defaulted in the repayment of its dues. *However, it was acknowledged that initiation of CIRP by classes of similarly situated creditors should be done in a manner that represents their collective interests. It was felt that a CIRP should be initiated only where there is enough number of such creditors in a class forming a critical mass that indicates that there is in fact large-scale agreement that the issues against a corporate entity need to be resolved by way of a CIRP under the Code. This may well be a more streamlined way of allowing a well-defined class of creditors to agree upon initiating what is a collective process of resolution under the Code.*

4.4. *In this regard, and specific to the interests of homebuyers, the Committee also noted that in cases where a homebuyer cannot file an application for initiation of CIRP for having failed to reach the aforesaid critical mass, she would still have access to alternative fora under the RERA and under consumer protection laws. For instance, as recognised*

by the Supreme Court in Pioneer Urban Land & Infrastructure Ltd. v. *Union of India*[1]*, the remedies under the Code and under the RERA operate in completely different spheres*. The Code deals with proceedings *in rem*, under which homebuyers may want the corporate debtor's management to be removed and replaced so that the corporate debtor can be rehabilitated. On the other hand, the RERA protects the interests of the individual investor in real estate projects by ensuring that homebuyers are not left in the lurch, and get either compensation or delivery of their homes. *Thus, if there is a failure to reach a critical mass for initiation of CIRP, it may indicate that in such cases another remedy may be more suitable.*

4.5. ***Accordingly, it was agreed that there should be a requirement to have the support of a threshold number of financial creditors in a class for initiation of CIRP.***

4.6. In this regard, the Committee considered if a cue may be taken from the requirements for filing of class actions suits as provided under the Companies Act, 2013. Class action suits may inter alia be filed by a hundred members or depositors or by at least 5% of the total number of members or depositors of the company.* Similar to this requirement, and keeping with the extant situation of classes of creditors under the Code, it was suggested that Section 7 of the Code could be amended in respect of such classes of creditors to allow initiation by a collective number of at least a hundred such creditors or at least ten per cent of the total number of such creditors forming part of the same class. ***Thus, the Committee agreed that Section 7(1) of the Code may be amended to provide that for classes of creditors falling within clauses (a) and (b) of Section 21(6-A), the CIRP may only be initiated by at least a hundred such creditors, or ten per cent of the total number of such creditors in a class.***

4.7. *The Committee also noted that the collective number of homebuyers that form the threshold amount for initiation of a CIRP, should belong to the same real estate project. This would allow homebuyers that have commonality of interests i.e. allottees under the same real estate project, to come together to take action for initiating CIRP against a real estate developer. ***Thus, in such cases, the CIRP may be initiated by at least a hundred such allottees or ten per cent of the total number of such allottees belonging to the same real estate project.*

4.8. *However, to ensure that there is no prejudice to the interests of any such creditor in a class whose application has already been filed but not admitted by the adjudicating authority, the Committee agreed that a certain grace period may be provided within which such creditor in a class may modify and file its application in accordance with the abovestated threshold requirements. However, if the creditor is unable to fulfil the*

1 (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

** **Ed.**: The matter between asterisks has been emphasised in original.

* Companies Act, 2013, Section 245 read with the National Company Law Tribunal Rules, 2016, Rule 84

*threshold requirements to file such modified application within the grace period provided, the application filed by such creditor would be deemed withdrawn.***" (emphasis supplied)

42. It was submitted that in the Statement of Objects and Reasons to the Second Amendment Bill, 2019, promulgated as an Ordinance, and thereafter, as the impugned Act, it was, inter alia, stated that it was necessitated to prevent potential abuse of the Code by certain classes of financial creditors, inter alia. This was necessary to prevent the derailing of the time-bound CIRP, which was designed to secure the maximisation of value of the assets. The provision only supplements the protection under Sections 65 and 75 of the Code. The intelligible differentia is projected as follows:

42.1. Numerosity.

42.2. Heterogeneity.

42.3. Lack of special expertise and individuality in decision-making. It is sought to be contrasted with institutional decision-making which is associated with banks and financial institutions.

42.4. Typicality in determination of default. In other words, in the case of banks and financial institutions, records of public utilities, would show a default. In the case of allottees, records must be accessed through data publicly available under RERA.

43. The object and rationale of the impugned provisions are stated to be as follows:

43.1. Preventing multiple individual applications, which has the effect of not only crowding the docket of the adjudicating authority and further holding up a process in which time is of the essence.

43.2. Safeguarding the interest of hundreds or even thousands of allottees who may oppose the application of a single homebuyer.

43.3. Balancing the interest of members of the same sub-class as also other financial creditors and other operational creditors. The availability of remedies to the members of the sub-class under RERA, in the case of allottees.

43.4. Lastly, the process becomes smoother and cost-effective. Unnecessary financial bleeding of the corporate debtor who is already in difficulty, is avoided.

44. It was submitted that time is of the essence of the Code. Proceedings are in the nature of proceedings *in rem*. It impacts the rights of creditors, including similarly placed creditors. It is therefore, reasonable and logical to place the threshold. The minimum threshold is a minimum requirement. The threshold is kept low and reasonable. This Court has upheld sub-classification provided there is a rational basis. She drew support from the following decisions:

(*i*) *Indra Sawhney* v. *Union of India*[17].

(*ii*) *Lord Krishna Sugar Mills Ltd.* v. *Union of India*[18].

** **Ed.**: The matter between asterisks has been emphasised in original.

17 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

18 (1960) 1 SCR 39 : AIR 1959 SC 1124

(*iii*) *State of Kerala* v. *N.M. Thomas*[19].

(*iv*) *State of W.B.* v. *Rash Behari Sarkar*[20].

(*v*) *State of Kerala* v. *Aravind Ramakant Modawdakar*[21].

45. Ms Divan, learned ASG sought to distinguish the judgment of this Court in *Sansar Chand Atri* v. *State of Punjab*[22], which was relied on by the petitioners on the basis that this Court in the said case, only frowned upon creating a class within a class without rational basis. In this case, there was a rational basis for creating a sub-class. Differential treatment is also contemplated under UNCITRAL Legislative Guide and the Guidelines.

46. It was submitted that there is no basis in the contention that the amendments go against the law laid down in *Pioneer*[1]. The question involved in the said case was not whether there can be a different treatment to the real estate allottees for the purpose of initiating CIRP. Secondly, it is pointed out that the legislature is free to make laws to deal with problems that manifest with experience. The numerical threshold was felt necessary with experience and recommendations of an Expert Committee. There has been a manifold increase of claim petitions filed by single or handful of allottees resulting in already overburdened adjudicating authorities being flooded with such petitions. The amendment is consistent with the *Pioneer*[1] judgment. The uniqueness of the allottees as a class of financial creditors, has been recognised in *Pioneer*[1]. The fact that they constituted a distinct and separate class of financial creditors meriting distinct treatment, has been approved in *Pioneer*[1]. The minimum threshold requirement is a procedural requirement. There is no deviation from *Pioneer*[1] in a manner which is irreconcilable with it. The legislation, being an economic measure, free play in the joints must be accorded to the legislature. The impugned amendment is reasonable, minimal and proportionate. *The data gathered by the respondent discloses that between June 2016 and 5-6-2018, there were 253 cases filed by allottees in the NCLT. However, between 6-6-2018 and 28-12-2019, as many as 2201 cases were filed by the allottees. Thereafter, pursuant to the Ordinance between 29-12-2019 and 26-8-2020, there is a sharp fall, as, nearly in eight months, only 130 cases were filed.* It is pointed out that the argument, based on estoppel and malice against the legislature, is untenable. There can be no estoppel against the legislature and the decision of this Court in *Union of India* v. *Godfrey Philips (India) Ltd.*[23], is relied on. The concept of transferred malice is alien in the field of legislation. In this regard, reference is placed on decisions of this Court in *K. Nagaraj* v. *State of A.P.*[24] and *State of H.P.* v. *Narain Singh*[25].

19 (1976) 2 SCC 310 : 1976 SCC (L&S) 227
20 (1993) 1 SCC 479
21 (1999) 7 SCC 400
22 (2002) 4 SCC 154 : 2002 SCC (L&S) 770
1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1
23 (1985) 4 SCC 369 : 1986 SCC (Tax) 11
24 (1985) 1 SCC 523 : 1985 SCC (L&S) 280
25 (2009) 13 SCC 165

47. It was submitted that the right to file an application under Section 7 is a statutory right and it can be conditioned. Reliance is placed on the judgment of this Court in *Gujarat Agro Industries Co. Ltd.* v. *Ahmedabad Municipal Corpn.*[26]. There is no inherent or absolute right to file an application under Section 7 of the Code. The legislature is well within its power to impose conditions for the exercise of such statutory rights. It is further contended that the third proviso inserted in Section 7(1) does not affect any vested right of the creditors who have already filed applications for initiating CIRP. A vested right has been the subject-matter of several decisions. In this regard reliance is placed on the following judgments:

(*i*) *Howrah Municipal Corpn.* v. *Ganges Rope Co. Ltd.*[27]

(*ii*) *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[28].

(*iii*) *Swiss Ribbons (P) Ltd.* v. *Union of India*[6].

(*iv*) *Karnail Kaur* v. *State of Punjab*[29].

(*v*) *Essar Steel India Ltd. Committee of Creditors* v. *Satish Kumar Gupta*[30].

48. It was submitted that the mere right to take advantage of a statute is not a vested right. In this regard, the following case law is relied upon:

(*i*) *Director of Public Works* v. *Ho Po Sang*[31].

(*ii*) *M.S. Shivananda* v. *Karnataka SRTC*[32].

(*iii*) *Lalji Raja & Sons* v. *Hansraj Nathuram*[33].

(*iv*) *Kanaya Ram* v. *Rajender Kumar*[34].

49. It was submitted that the third proviso is enacted to protect the collective interests of others in a class of creditors. Before admission of the application for insolvency, no vested right accrues in favour of the allottee. The amendment, therefore, cannot be said to have retrospective application in a manner that impairs vested rights. Prior to admission, there is no vested right. Insistence on compliance with the new provisos cannot be regarded as having retrospective operation taking away vested rights. It is done to avoid needless multiplicity and to ensure that no single allottee would be able to achieve admission and its consequences, without having a threshold of his compatriots on board.

26 (1999) 4 SCC 468
27 (2004) 1 SCC 663
28 (2019) 2 SCC 1
6 (2019) 4 SCC 17
29 (2015) 3 SCC 206 : (2015) 2 SCC (Civ) 259
30 (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
31 1961 AC 901 : (1961) 3 WLR 39 : (1961) 2 All ER 721 (PC)
32 (1980) 1 SCC 149 : 1980 SCC (L&S) 131
33 (1971) 1 SCC 721
34 (1985) 1 SCC 436

50. Placing reliance on the judgment of this Court, in *Garikapati Veeraya*[7], it is contended by Ms Divan, learned ASG that even a vested right can be taken away by the legislature, if a subsequent enactment so expressly provides or if it is so by necessary implication. A minimum threshold requirement is a common feature of class action litigation. There are several legislations which provide for a minimum threshold in order to initiate class action. Section 245 of the Companies Act, 2013 and Section 241 of the said Act are relied upon. Sections 397 and 398 of the Companies Act, 1956, read with Section 399, contemplated a minimum threshold requirement for seeking relief under Sections 397 and 398. Reference is placed on the Bhabha Committee Report (Company Law Committee) in 1952. So also, is support, sought to be drawn from the judgment of this Court in *J.P. Srivastava & Sons (P) Ltd.* v. *Gwalior Sugar Co. Ltd.*[35] Under the Consumer Protection Act, this Court, rendered the judgment in *Anjum Hussain* v. *Intellicity Business Park (P) Ltd.*[36] A minimum threshold adds authenticity and weightage to the claim in a class action, proving it to be a common grievance and not a mere obstruction in the work of the opposite party. Reference is made to Rule 23 of the Federal Rules of Civil Procedure in the United States, which provide for class action suits. The said Rules contemplate numerosity, commonality, typicality and adequacy of representation. It is pointed out that joint filing was not only not alien to Section 7 but it was interwoven into its very DNA. Even as originally enacted, Section 7 contemplated joint filing by financial creditors. Uniqueness of the Code lies in the fact that the financial creditors may file an application based on a default that occurred in respect of the third-party financial creditor, who may choose not to file an application itself. At the triggering stage, an application under Section 7 partakes the character of an application in rem proceeding rather than in personam one. The impugned amendment merely extends the same rationale.

51. It is further pointed out that debenture trustees are defined in Regulation 2(*bb*) of the Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993, as a trustee of a trust deed for securing any issue of debentures of a body corporate. Debenture is a long-term bond issued by a company or an unsecured loan that a company issues without a pledge of assets, as, for example, interest bearing bond. Debenture trustees are registered under Chapter 2 of the said Regulations. The Regulations provide for responsibilities and duties of debenture trustees. In the case of a debenture-holder and other security-holder, there is a debenture trustee to protect their interest from the inception under SEBI.

52. As far as absence of information, so far as debenture holders are concerned, it was pointed out that necessary information regarding them is available in the public domain, under Section 88(1)(*b*) and Section 88(1)(*c*) of the Companies Act, 2013, which obliges every company to maintain a register

7 *Garikapati Veeraya* v. *N. Subbiah Choudhry*, AIR 1957 SC 540 : 1957 SCR 488
35 (2005) 1 SCC 172
36 (2019) 6 SCC 519 : (2019) 3 SCC (Civ) 334

of its debenture holders and security holders. A penalty for non-compliance is contemplated under Section 88(5). Section 94 of the Companies Act, 2013 provides that registers, required to be maintained by the Company under Section 88, shall be kept in the registered office. Without payment of fees, the register is open to inspection by any member, debenture holder or other security holder. Extracts and copies of such register can be obtained. Reference is also made to Rule 4 of the Companies (Management and Administration) Rules, 2014, which contemplates a separate register in Form FMG-II for debenture holders. It contains all details of the debenture holder, including the email id, address, etc. Thus, there is a reservoir of information available for complying with the requirement under the first proviso.

53. As regards the allottees are concerned, the submission, is as follows: reference is made to Section 19 of RERA. Thereunder, Section 19(9) obliges every allottee of a real estate project to participate towards the association of allottees. Section 11(4)(*e*) of RERA also obliges the promoter to enable the formation of such an association. RERA compels the constitution of such an association, prior to the allotment. This is for the reason that an association plays an important role during the development of the project. It is pointed out that under Section 8 of RERA, upon lapse of or revocation of the registration, the authority is obliged to take such action, as it may deem fit, including the carrying out of the remaining development works. The association of allottees have been given the right of first refusal for carrying out the remaining development works. Section 11(4) contemplates the obligations to be discharged by the promoter towards the association.

54. Reference is also made to Section 4(2)(*c*) of RERA. Under Section 17 of the RERA, the promoter is to execute a registered conveyance in regard to the undivided proportionate title in the common areas to the association of the allottees. Physical possession of the common areas is to be handed over to the association of the allottees. Under Section 31 of RERA, the association can file complaint with the authority. Apart from this, it is also pointed out that under Section 11(1)(*b*), the promoter is bound to create a webpage on the website of the RERA Authority and enter thereon the quarterly up-to-date list of the number and the types of the plots/apartments as may be booked.

55. Shri Sajan Poovayya, learned Senior Counsel who appears on behalf of Respondent 4 in Writ Petition No. 191 of 2020, which is a builder, also supported the Union. The second proviso, he contends is a logical and legitimate method to strike a fair balance between all stakeholders. It makes the Code workable. The object of the Amendment Act is to prevent the use of the Code for an extraneous purpose and not to shield and protect an errant real estate developer. He has referred to the facts pertaining to his client by way of an example of the misuse which has happened under the earlier regime. He drew support from para 41 of the judgment in *Pioneer*[1]. The second proviso is an independent provision to make the Code workable. Shri Sajan Poovayya

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

drew our attention to para 43 of this Court in *S. Sundaram Pillai* v. *V.R. Pattabiraman*[36a]. As regards the information, he also pointed out Section 11 of RERA, pointing to the information which is available in public domain. Illustratively, he drew our attention to the Haryana Real Estate Regulatory Authority, (Gurugram, Quarterly Progress Report Regulations), 2018, under which the format provides various details which include the names of the allottees and the date of booking, inter alia. He also points out that there is no unfair discrimination.

Challenge to plenary legislation: grounds

56. The grounds on which plenary law can be challenged are well established. In the first two decades decisions of this Court unerringly point to three grounds which render legislation vulnerable. A law can be successfully challenged if contrary to the division of powers, either Parliament or the State Legislature usurps power that does not fall within its domain thus, rendering it incompetent to make such law. Secondly, a law made contravening fundamental rights guaranteed under Part III of the Constitution of India would be visited with unconstitutionality and declared void to the extent of its contravention. Needless to say, a law within the meaning of Article 19 of the Constitution would remain valid qua a non-citizen (see in this regard *State of Gujarat* v. *Shri Ambica Mills Ltd.*[37]). Thirdly, apart from fundamental rights, the supremacy of the Constitution vis-à-vis the ordinary legislation, even when the law is plenary legislation, is preserved with a view that legislation must be in conformity with the other provisions of the Constitution.

57. While on breaches of the fundamental rights, furnishing a plank of attack against plenary law, it is necessary to notice a challenge to law under Article 14, was essentially confined to the law, being class legislation. In other words, a law, if it manifested reasonable classification for treating different persons or things differently, the law would pass muster. Interestingly, even while the theory of reasonable classification had come to be proclaimed in the first year of the Republic, and what is more followed in *State of W.B.* v. *Anwar Ali Sarkar*[38], the following doubts were expressed by Vivian Bose, J.: (SCC pp. 50-51, paras 49-50)

> "*49*. I can conceive of cases where there is the utmost good faith and where the classification is scientific and rational and yet which would offend this law. Let us take an imaginary case in which a State Legislature considers that all accused persons whose skull measurements are below a certain standard, or who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their substandard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely simply this that the Judges would not consider that

36a (1985) 1 SCC 591
37 (1974) 4 SCC 656 : 1974 SCC (L&S) 381
38 (1952) 1 SCC 1 : AIR 1952 SC 75

fair and proper. However much the real ground of decision may be hidden behind a screen of words like "reasonable", "substantial", "rational" and "arbitrary" the fact would remain that Judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a Judge is called upon to crystallise a vague generality like Article 14 into a concrete concept.

50. Even in England, where Parliament is supreme, that is inevitable, for, as Dicey tells us in his *Law of the Constitution*:

> 'Parliament is the supreme legislator, but from, the moment Parliament has uttered its will as lawgiver, that will become subject to the interpretation put upon it by the Judges of the land, and the Judges, who are influenced by the feelings of Magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or the Houses of Parliament, if the Houses were called upon to interpret their own enactments.' "

58. But the following caveat by the learned Judge is worth noticing: (*Anwar Ali Sarkar case*[38], SCC p. 51, para 51)

> "*51. This, however, does not mean that Judges are to determine what is for the good of the people and substitute their individual and personal opinions for that of the Government of the day, or that they may usurp the functions of the legislature.* That is not their province and though there must always be a narrow margin within which Judges, who are human, will always be influenced by subjective factors, their training and their tradition makes the main body of their decisions speak with the same voice and reach impersonal results whatever their personal predilections or their individual backgrounds. It is the function of the legislature alone, headed by the Government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it falls to the lot of Judges to determine where those limits lie, the basis of their decision cannot be whether the court thinks the law is for the benefit of the people of not. Cases of this type must be decided solely on the basis whether the Constitution forbids it." (emphasis supplied)

59. The seed of this idea had a muted growth. It was in the decision of this Court in *E.P. Royappa* v. *State of T.N.*[39] that this Court laid bare a new dimension in the majestic provisions of Article 14. This Court took the view that arbitrariness and fairness are sworn enemies. The guarantee of Article 14 is not confined in other words to it being a prohibition against equals being

38 *State of W.B.* v. *Anwar Ali Sarkar*, (1952) 1 SCC 1 : AIR 1952 SC 75
39 (1974) 4 SCC 3 : 1974 SCC (L&S) 165

discriminated against or unequals being treated alike. State action must be fair and not arbitrary if it is to pass muster in a court of law. It is essentially following the dicta laid down as aforesaid that this Court in *Shayara Bano* v. *Union of India*[40], wherein one of us (Rohinton F. Nariman, J.), speaking for the majority, held as follows: (*Shayara Bano case*[40], SCC p. 99, para 101)

> "*101.* It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[41] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. *Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.*" (emphasis supplied)

60. This view, namely, that be it a plenary law if it is found to be manifestly arbitrary it becomes vulnerable has been followed in the following decisions, among other judgments:

(*i*) *Navtej Singh Johar* v. *Union of India*[42].

(*ii*) *Joseph Shine* v. *Union of India*[43].

(*iii*) *K.S. Puttaswamy (Privacy-9 J.)* v. *Union of India*[44].

(*iv*) *Hindustan Construction Co. Ltd.* v. *Union of India*[45].

61. Yet another ground recognised by this Court is that a law, be it the offspring of a legislature, it falls foul of Article 14 if it is found to be vague — (see in this regard *Shreya Singhal* v. *Union of India*[46]). It must be elaborated and we must remember that the case involved overturning Section 66-A of the Information Technology Act which purported to create a criminal offence, the ingredients of which were found to be vague.

62. While, on the basis, furnished under law, for impugning the plenary legislation, we may notice two grounds, which have been urged before us by some of the petitioners. It has been urged that the law was created by way of pandering to the real estate lobby and succumbing to their pressure or by way of placating their vested interests. Such an argument is nothing but a thinly

40 (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277
41 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
42 (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1
43 (2019) 3 SCC 39 : (2019) 2 SCC (Cri) 84
44 (2017) 10 SCC 1
45 (2020) 17 SCC 324 : 2019 SCC OnLine SC 1520
46 (2015) 5 SCC 1 : (2015) 2 SCC (Cri) 449

disguised attempt at questioning the law of the legislature based on malice. A law is made by a body of elected representatives of the people. When they act in their legislative capacity, what is being rolled out is ordinary law. Should the same legislators sit to amend the Constitution, they would be acting as members of the Constituent Assembly. Whether it is ordinary legislation or an amendment to the Constitution, the activity is one of making the law. While malice may furnish a ground in an appropriate case to veto administrative action it is trite that malice does not furnish a ground to attack a plenary law (see in this regard *K. Nagaraj* v. *State of A.P.*[24] and *State of H.P.* v. *Narain Singh*[25]).

63. Yet another ground which has been urged in these cases is that when this Court decided *Pioneer*[1] the Union of India defended the amendment to the Code which included the insertion of the Explanation to Section 5(8)(*f*) of the Code. It was this Explanation which made it clear that homebuyers would be financial creditors. All grounds urged by the financial creditors were fiercely countered by the very same Union of India by contending that the homebuyers are financial creditors and what is more, there existed sufficient safeguards against abuse of power by the individual homebuyers. What is contended before us by some of the petitioners is that the supreme legislature is in such circumstances estopped by the principle of promissory estoppel from enacting the impugned enactment.

64. A supreme legislature cannot be cribbed, cabined or confined by the doctrine of promissory estoppel or estoppel. It acts as a sovereign body. The theory of promissory estoppel, on the one hand, has witnessed an incredible trajectory of growth but it is incontestable that it serves as an effective deterrent to prevent injustice from a Government or its agencies which seek to resile from a representation made by them, without just cause [see in this regard *Union of India* v. *Godfrey Philips (India) Ltd.*[23] — para 13].

Unravelling the working of the Code as regards corporate debtor

65. The Code was passed by Parliament in the year 2016 however, under Section 1(3) provisions were to come into force on such day as the Central Government was to appoint. The provisions of the Code stand enforced from 2017.

66. Part II of the Code applies to matters relating to Insolvency Resolution and Liquidation for Corporate Persons where the minimum amount of default is Rupees one crore as it stands (Section 4). Under Section 6 of the Code when any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself is permitted to initiate the corporate insolvency resolution process (hereinafter referred to as "CIRP") in respect of the corporate debtor in the manner provided under Chapter II. Chapter II consists of Section 6 to Section 32-A. Section 7(1) provides that a financial creditor by himself

24 (1985) 1 SCC 523 : 1985 SCC (L&S) 280
25 (2009) 13 SCC 165
1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1
23 (1985) 4 SCC 369 : 1986 SCC (Tax) 11

or joining 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 under Section 7 for initiating the CIRP before the adjudicating authority when a default has occurred. The "adjudicating authority" defined in Section 5(1) of the Code is NCLT constituted under Section 408 of the Companies Act, 2013.

67. The unamended Section 7(1) read 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 may file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred.
>
> *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."

68. The three impugned provisos which we have already noted and which have been inserted vide the impugned amendment have been sandwiched in between the provisions of sub-section (1) and the Explanation. Sub-section (2) of Section 7 provides that the financial creditor shall make the application which shall be in such manner and form and accompanied by such fee as may be prescribed.

69. Section 3(26) defines the word "prescribed" as meaning prescribed by rules made by the Central Government. Section 239, *inter alia*, confers power on the Central Government to make rules for carrying out the provisions of the Code. Accordingly, the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 came to be made and were enforced from 1-12-2016.

70. Rule 4 reads as under:

> "**4.** ***Application by financial creditor***.—(1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under Section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
>
> (2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.
>
> (3) The applicant shall dispatch forthwith, a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor.
>
> (4) In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf."

71. Rule 8 contemplates withdrawal of application. It reads as follows:

"**8.** ***Withdrawal of application***.—The adjudicating authority may permit withdrawal of the application made under Rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission."

72. It must be noticed that Rules 6 and 7 deal with applications by operational creditors and corporate applicants, respectively. Rules 10(1), (2) and (3) read as follows:

"**10.** ***Filing of application and application fee***.—(1) Till such time the rules of procedure for conduct of proceedings under the Code are notified, the application made under sub-section (1) of Section 7, sub-section (1) of Section 9 or sub-section (1) of Section 10 of the Code shall be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016.

(2) An applicant under these Rules shall immediately after becoming aware, notify the adjudicating authority of any winding-up petition presented against the corporate debtor.

(3) The application shall be accompanied by such fee as specified in the Schedule."

73. Form 1 is the application prescribed in relation to an application to be filed by the financial creditor. It reads as follows:

"**FORM 1**

[*See* sub-rule (1) of Rule 4]

APPLICATION BY FINANCIAL CREDITOR(S) TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS* UNDER CHAPTER II OF PART II UNDER CHAPTER IV OF PART II OF THE CODE

[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

[Date]

To,

The National Company Law Tribunal

[Address]

From,

[Names and addresses of the registered officers of the financial creditors]

In the matter of [name of the corporate debtor]

Subject: Application to initiate corporate insolvency resolution process in the matter of [name of the corporate debtor] under the Insolvency and Bankruptcy Code, 2016.

Madam/Sir,

[Names of the financial creditor(s)], hereby submit this application to initiate a corporate insolvency resolution process in the matter of [name of corporate debtor]. The details for the purpose of this application are set out below:

* strike out whichever is not applicable

PART I

PARTICULARS OF APPLICANT (PLEASE PROVIDE FOR EACH FINANCIAL CREDITOR MAKING THE APPLICATION)		
1.	NAME OF FINANCIAL CREDITOR	
2.	DATE OF INCORPORATION OF FINANCIAL CREDITOR	
3.	IDENTIFICATION NUMBER OF FINANCIAL CREDITOR	
4.	ADDRESS OF THE REGISTERED OFFICE OF THE FINANCIAL CREDITOR	
5.	NAME AND ADDRESS OF THE PERSON AUTHORISED TO SUBMIT APPLICATION ON ITS BEHALF (ENCLOSE AUTHORISATION)	
6.	NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF (ENCLOSE AUTHORISATION)	

PART II

PARTICULARS OF THE CORPORATE DEBTOR		
1.	NAME OF THE CORPORATE DEBTOR	
2.	IDENTIFICATION NUMBER OF CORPORATE DEBTOR	
3.	DATE OF INCORPORATION OF CORPORATE DEBTOR	
4.	NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE)	
5.	ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR	
6.	DETAILS OF THE CORPORATE DEBTOR AS PER THE NOTIFICATION UNDER SECTION 55(2) OF THE CODE— (*I*) ASSETS AND INCOME (*II*) CLASS OF CREDITORS OR AMOUNT OF DEBT (*III*) CATEGORY OF CORPORATE PERSON (WHERE APPLICATION IS UNDER CHAPTER IV OF PART II OF THE CODE)	

PART III

PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL		
1.	NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL	

PART IV

PARTICULARS OF FINANCIAL DEBT		
1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	

PART V

	PARTICULARS OF FINANCIAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]
1.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)
2.	PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)
3.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)
4.	DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)
5.	THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)
6.	A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)
7.	COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891) (ATTACH A COPY)
8.	LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT

I, hereby certify that, to the best of my knowledge, [name of proposed insolvency professional], is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.

[Name of the financial creditor] has paid the requisite fee for this application through [state means of payment] on [date].

Yours sincerely,

Signature of person authorised to act on behalf of the financial creditor
Name in block letters
Position with or in relation to the financial creditor
Address of person signing

Instructions

Please attach the following to this application:

Annex I	Copies of all documents referred to in this application.
Annex II	Written communication by the proposed interim resolution professional as set out in Form 2.
Annex III	Proof that the specified application fee has been paid.
Annex IV	Where the application is made jointly, the particulars specified in this form shall be furnished in respect of all the joint applicants along with a copy of authorisation to the financial creditor to file and act on this application on behalf of all the applicants."

74. The Schedule prescribes the fees which is contemplated under Rule 10(3). It, inter alia, provides that for an application by a financial creditor *(whether solely or jointly a sum of Rupees twenty-five thousand)*. Sub-section (3) of Section 7 provides that financial creditor along with the application shall furnish record of the default recorded by the information utility or all such other record or evidence before as may be specified. The word "specified" has been defined in Section 3(32) as meaning specified by regulations made by the Board and the term "specify" is to be construed accordingly.

75. Section 7(3)(*b*) requires the financial creditor who makes the application to furnish the name of the resolution professional proposed as an interim resolution professional (hereafter referred to as "RP" and "IRP" respectively). Section 5(27) defines the word "resolution professional" for the purpose of Part 2 to mean an insolvency professional appointed to conduct the CIRP and includes an interim resolution professional. In turn Section 3(19) defines "insolvency professional" as the person enrolled under Section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under Section 207.

76. Sub-section (5) of Section 7 proclaims that when adjudicating authority is satisfied that a default has occurred and the application under sub-section is complete and that there are no disciplinary proceedings pending against the proposed resolution professional, it may by order admit an application. Inter alia on the ground that default has not occurred, it is open to adjudicating authority to reject the application. If rejection is intended, the proviso obliges the adjudicating authority to issue a notice to rectify any defect in the application [this is for the reason that under sub-section (5) apart from there being no default, if there is any disciplinary action against the proposed resolution professional, the application is liable to be rejected]. This is apart from the application being otherwise defective. The application is to contain other information as may be specified under regulations by the Code. The adjudicating authority is required by the letter of the law and indeed we may say so, in accordance with the spirit, to ascertain within 14 days of the receipt of the application if there is any default from the records of information utility or on the basis of other evidence made available by the financial creditor under sub-section (3) (in *Pioneer*[1], the period has been understood as directory). "Information utility" has been defined in Section 3(21), as a person who is registered with the Board as information utility under Section 210. The word "Board" has been defined in Section 3(1) to be the "Insolvency and Bankruptcy Board of India" which is established under sub-section (1) of Section 188.

77. Section 7(6) declares that the CIRP shall commence from the date of admission of the application under sub-section (5).

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

78. Section 8 read with Section 9 deals with application for initiation of the CIRP by an operational creditor. Section 10 deals with an application by the corporate applicant. The words "corporate applicant" are defined to refer to the corporate debtor and other entities associated with it. More about it at a later stage. It is thereafter that law giver has in Section 11 proscribed applications which should otherwise be maintainable. This is a provision in which we will devote more time later on in this judgment. Section 12 places the time-limit.

79. Section 12 has a marginal note which is to the following effect:

> "**12.** ***Time-limit for completion of insolvency resolution process.***—(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.
>
> (2) The resolution professional shall file an application to the adjudicating authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the Committee of Creditors by a vote of seventy-five per cent of the voting shares.
>
> (3) On receipt of an application under sub-section (2), if the adjudicating authority is satisfied that the subject-matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:
>
> Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once:
>
> Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:
>
> 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."

80. Coming to sub-section (2), the CIRP is to be completed within 180 days from the date of admission of the application to initiate the process. As far as an application by a financial creditor is concerned, the date of admission is the date of the order admitting the application. Under sub-section (2) however, if the Committee of Creditors by a vote of 66% of the voting share instructs the RP to extend the period of CIRP beyond 180 days, the RP is bound to file an application. The adjudicating authority on receipt of the application can extend the period of 180 days for a maximum period of 90 days. Such extension

can be granted only once. With effect from 16-8-2019, two provisos have been inserted.

81. The provisos were added in fact as noted in para 74 of *Essar Steel*[30] to overcome what was laid down in *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[28] decided by this Court on 4-10-2018. In the latter decision in *ArcelorMittal*[28], this Court purported to hold that the time taken in legal proceedings must be excluded. Under the first proviso, the CIRP has to be mandatorily completed within a period of 330 days from the insolvency commencement date. This period of 330 days is to include any extension granted under sub-section (3) by the adjudicating authority and also the time taken in legal proceedings in relation to the resolution process of the corporate debtor. However, in *Essar Steel India Ltd. Committee of Creditors*[30], this Court struck down the word "mandatorily" as being manifestly arbitrary and in violation of Article 19(1)(*g*) and proceeded to hold as follows: (*Essar Steel India Ltd. Committee of Creditors case*[30], SCC p. 628, para 127)

> "*127.* ... 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 days 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 factors owing to which the fault cannot be ascribed to the litigants before the adjudicating authority and/or 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 Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 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." (emphasis in original)

30 *Essar Steel India Ltd. Committee of Creditors* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443

28 (2019) 2 SCC 1

82. At this juncture, it must be noted that under the first proviso inserted by the amendment dated 16-8-2019, reference to the period of 330 days is made with regard to the insolvency commencement date. The "insolvency commencement date" has been defined in Section 5(12). Section 5(12) reads as follows:

> "**5. (12) "insolvency commencement date"** means the date of admission of an application for initiating corporate insolvency resolution process by the adjudicating authority under Sections 7, 9 or Section 10, as the case may be:"

There was a proviso but it stands omitted by Act 1 of 2020 (with effect from 28-12-2019).

83. In this regard, it is to be noticed that the scheme appears to be that the name of the RP to act as the IRP is to be indicated in the application. While admitting the application under Section 7(5), the adjudicating authority is to appoint the proposed resolution professional. In fact, Section 16(2) of the Code contemplates such appointment. We may refer to Section 12-A which was inserted with effect from 6-6-2018. Section 12-A reads as follows:

> "**12-A.** ***Withdrawal of application admitted under Sections 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."

The above provision dealing with withdrawal of application after admission may be contrasted with Rule 8 which apparently deals with withdrawal before admission.

84. Section 16 of the Code, however, indicates that the adjudicating authority shall appoint an interim resolution professional within 14 days from the insolvency commencement date. We have already noted the definition of the words "insolvency commencement date" as the date of admission. Section 13 contemplates steps to be taken upon admission under Section 7, inter alia:

84.1. A moratorium contemplated under Section 14 is to be declared.

84.2. A public announcement of the initiation of the CIRP and inviting claims against the corporate debtor is to be made.

84.3. The appointment of the IRP—the appointment is to be done in the manner as provided in Section 16. The announcement is to be made immediately after the appointment of resolution professional:

85. Section 14 deals with moratorium:

> "**14.** ***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 off 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 licence, permit, registration, quota, concession, clearance 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 licence, 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."

86. It will be noticed that while Section 6 read with Section 7 contemplates that a financial creditor may move the application individually, he may also move the application jointly with other financial creditors. Even if a single

financial creditor was to be the applicant, after the appointment of the interim resolution professional, the applicant ceases to be in seisin of the lis. The provisions of Section 17 are to be noticed. It reads as follows:

> "**17.** ***Management of affairs of corporate debtor by interim resolution professional.***—(1) From the date of appointment of the interim resolution professional—
>
> *(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;*
>
> *(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;*
>
> (c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;
>
> (d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.
>
> (2) The interim resolution professional vested with the management of the corporate debtor, shall—
>
> (a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
>
> (b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
>
> (c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
>
> (d) have the authority to access the books of accounts, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and
>
> (e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor."

87. Section 17 contemplates that the management of the affairs of the corporate debtor will vest with the IRP. *This takes effect from the date of the appointment of the interim resolution professional.* Furthermore, the powers of the Board of Directors who are partners of the corporate debtors shall stand suspended.

88. Virtually, the entire control of the management including all the acts and authority indicated in sub-section (2) is to be carried out by interim resolution professional and authority exercised by him. Section 18 details the duties of the IRP. It reads as follows:

"**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, the term "assets" shall not include the following, namely—

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

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

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

89. It will be noticed that amongst his duties, is the duty to constitute a Committee of Creditors. The constitution of the Committee of Creditors and the method of voting and the extent of the same are found detailed inter alia in Section 21. Since much may turn on the said provision we refer to the same:

> "**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 (6-A) 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 or completion of such transactions as may be prescribed, prior to the insolvency commencement date.
>
> (3) Subject to sub-sections (6) and (6-A), 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—
>
> (*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.

(6-A) 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.

(6-B) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (6-A) 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 (6-A).

(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."

90. Sections 22(1) and (2) read as follows:

"**22.** ***Appointment of resolution professional.***—(1) The first meeting of the Committee of Creditors shall be held within seven days of the constitution of the Committee of Creditors.

(2) The Committee of Creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional."

91. Section 23 reads as follows:

"**23.** ***Resolution professional to conduct corporate insolvency resolution process.***—(1) Subject to Section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:

Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of Section 31 or appointing a liquidator under Section 34 is passed by the adjudicating authority.

(2) The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.

(3) In case of any appointment of a resolution professional under sub-section (4) of Section 22, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional."

92. Section 24 deals with the meeting of Committee of Creditors. Now that resolution professional has been appointed, as contemplated under Section 22, Section 24(2) declares that all the meetings of the Committee of Creditors shall be convened by resolution professional.

93. Section 25 speaks about the duties of the resolution professional. Sections 25(2), (*h*) and (*i*) read as follows:

"**25. (2)(*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."

94. Section 25-A, which was inserted with effect from 6-6-2018 will be separately dealt with. No doubt, Section 27 contemplates that a Committee of Creditors may at any time during the CIRP replace the resolution professional as provided in the section. Section 28, no doubt, constrains the resolution professional in regard to the matters provided therein. The approval of the Committee of Creditors is required in such matters. It includes making any change in the management of corporate debtor and its subsidiary [Section 28(1)(*j*)]. Section 30 contemplates that resolution applicant may submit a resolution plan.

95. The "resolution applicant" has been defined in sub-section (25) of Section 5 which reads as follows:

> "**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."

96. The "resolution plan" has been defined in Section 5(26). The same reads as under:

> "**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.
>
> *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;"

97. The resolution professional has to examine each resolution plan received by him on the basis of the invitation made by the resolution professional under Section 25(1)(*h*) and ascertain whether the plan is in conformity with the various criteria mentioned in Section 30(2) of the Code. The matter is thereafter put up by the resolution professional before the Committee of Creditors. All resolution plans which conform with the conditions in sub-section (2) of Section 30 are, in fact, to be placed before the Committee of Creditors. The Committee of Creditors may approve the resolution plan after considering its feasibility and viability, the manner of distribution proposed, which may take into account the hurdles, priority amongst creditors as laid down in sub-section (1) of Section 53 including the priority and the value of security interest of secured creditors and such other requirements as may be specified by the Board. There are other details with which we are not concerned in Section 30.

98. Section 31 requires approval of the resolution plan by the adjudicating authority. It reads inter alia as follows:

> "**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, 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:

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."

99. The scope of these provisions have been dealt with in the decision of this Court in *Essar Steel India Ltd. Committee of Creditors* v. *Satish Kumar Gupta*[30] *and ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[28] *among other decisions authored by one of us (R.F. Nariman, J.).*

100. Sub-section (2) of Section 31 enables the adjudicating authority to reject the resolution plan. Section 31(3) contemplates that after the approval of the resolution plan that the moratorium order passed by the adjudicating authority under Section 14 shall cease to have effect. Section 32-A will be separately dealt with.

101. Section 33, which is in Chapter III in Part II, compels announcing the death knell of the corporate debtor. That is if, before the expiry of insolvency resolution process period or the maximum period permitted which is CIRP under Section 12, inter alia, a resolution plan is not received or though received is rejected by the adjudicating authority, then under Section 33, order is to be passed. The curtains are wrung down on the insolvency resolution process. The corporate debtor goes into liquidation. The adjudicating authority is bound to pass an order requiring corporate debtor to be liquidated as provided in Chapter III Part II. Section 33(2) contemplates that before the confirmation of the resolution plan if the Committee of Creditors so approved by not less than 66% of the voting decide to liquidate the corporate debtor, the adjudicating authority is to pass the liquidation order.

102. Section 33(5) may be noticed at this stage:

"**33. (5)** Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the adjudicating authority."

103. An Explanation has been added to Section 33(2) of the Code.

"*Explanation*.—For the purposes of this sub-section, it is hereby declared that the Committee of Creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of Section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum."

30 (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
28 (2019) 2 SCC 1

The Real Estate (Regulation and Development) Act, 2016 and its scheme (hereinafter referred to as "RERA", for short)

104. The Real Estate Regulation and Development Bill was introduced in the Rajya Sabha in 2013. Noticing the fact that though the Consumer Protection Act, 1986 is available as a forum in the real estate market for the buyers, the recourse is only curative and is not adequate to address all the concerns of the buyers and promoters in the said sector, it was felt that there should be a Central legislation in the interest of effective consumer protection, uniformity and standardisation of business practices and transactions in the real estate sector. The Bill was passed by both the Houses of Parliament and received the assent of the President of India on 25-3-2016. By 1-5-2017, the provisions of the Act came into force, even though, certain sections have come into force earlier on 1-5-2016.

105. We may advert to the following definition clauses. Section 2(*b*) defines "advertisement", as follows:

> "**2. (*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;"

106. Section 2(*c*) defines "agreement for sale", as follows:

> "**2. (*c*) "*agreement for sale*"** means an agreement entered into between the promoter and the allottee;"

107. Section 2(*d*), which is at the centre stage of the controversy, defines the word "allottee", which reads as follows:

> "**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;"

108. As can be seen, the word "allottee" includes, plot, apartment or building. The words "apartment" and "building" are defined. Section 2(*e*) defines the word "apartment" and it reads as follows:

> "**2. (*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;"

109. Section 2(*j*) defines the word "building" and it reads as follows:

"**2. (*j*)** "**building**" includes any structure or erection or 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;"

110. Section 2(*s*) defines "development" and it reads as follows:

"**2. (*s*)** "**development**" with its grammatical variations and cognate expressions, means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes redevelopment;"

111. "Development works" is defined in Section 2(*t*) and it reads as follows:

"**2. (*t*)** "**development works**" means the external development works and internal development works on immovable property;"

112. The word "promoter" is defined in Section 2(*zk*) and it reads as follows:

"**2. (*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 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 cooperative housing finance society and a primary cooperative 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.

Explanation.—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 person who sells apartments or plots are different person, 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;"

113. Section 2(*zn*) defines "real estate project", it reads as follows:

"**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;"

114. Section 3 prohibits any promoter from advertising, marketing, etc. or even inviting persons to purchase any plot, apartment or building in any real estate project or part of it without there being registration. Sub-section (2), however, exempts certain projects from the requirement of registration and it reads as follows:

"**3. (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 metres 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 metres 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.

Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter shall obtain registration under this Act for each phase separately."

115. Section 7 contemplates revocation of registration. It is relevant to note Section 7(1), which reads as follows:

"**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.

Explanation.—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 intended to be offered;

(*d*) the promoter indulges in any fraudulent practices."

116. We may also further notice Section 7(3). It read as follows:

"**7. (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."

117. We may further bear in mind Section 8 and it reads as follows:

"**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."

118. Section 11 deals with the functions and duties of a promoter and is of considerable importance, and it reads as follows:

"**11.** ***Functions 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, 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.

(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;

(*e*) enable the formation of an association or society or cooperative 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 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."

119. Section 14 declares that 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.

120. Sub-section (2) of Section 14, reads as follows:

"**14. (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.

Explanation.—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 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.

Explanation.—For the purpose of this clause, 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, 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."

121. A similar Explanation, as found in Section 14, regarding what the word "allottee" means for the purpose of Section 15 is found in Section 15. Section 15 deals with obligations of promoter in the case of transfer of a real estate project to a third party and Section 15(1) reads as follows:

"**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 or buildings as the case may be, in the real estate project made by the erstwhile promoter."

122. Section 17(1) of the RERA, reads as follows:

"**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 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."

123. Section 18 deals with the right of the allottee to obtain the amount given by the allottee and even compensation. It reads as follows:

"**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 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 sub-section 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."

124. Finally, Section 19 deals with the rights and obligations of an allottee and it reads as follows:

"**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 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 (*l*) 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 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 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."

125. The Act contemplates setting up of a Real Estate Regulatory Authority, a Central Advisory Council and the Real Estate Appellate Tribunal. Offences and penalties are provided for to give teeth to the Act. Section 71 gives the power of adjudication of compensation. Section 72 provides for the factors to be taken into consideration for adjudging the quantum of compensation or interest under Section 71. Section 79 enacts a bar of jurisdiction of the civil court in regard to any matter in which the Authority, the Adjudicating Officer or the Appellate Tribunal is empowered by the Act to determine. An injunction cannot be issued by any court or other Authority in respect of any action taken or to be taken in pursuance of the power conferred by or under the Act under the RERA.

126. Section 85 deals with the power to make regulations. Section 85(2) reads as follows inter alia:

"**85. (2)** In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely—

* * *

(*c*) such other information and documents required under clause (*f*) of sub-section (1) of Section 11;

(*d*) display of sanctioned plans, layout plans along with specifications, approved by the competent authority, for display under clause (*a*) of sub-section (3) of Section 11;

(*e*) preparation and maintenance of other details under sub-section (6) of Section 11;"

127. Section 88 of RERA, read 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."

128. It is also important to notice, at once, Section 89 and it reads as follows:

"**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."

129. The only Act, which is repealed is the Maharashtra Housing (Regulation and Development) Act, 2012.

130. A perusal of Section 88 reveals, on the one hand, that the provisions of the RERA, are 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 that the RERA will prevail over any other inconsistent law. The result is that while all cognate laws, which are not inconsistent with RERA will continue to operate within their own sphere, the provisions, which are, however, inconsistent with RERA, will not survive after RERA has come into force.

131. In this regard, we may notice, the Delhi Apartment Ownership Act, 1986. Section 2 deals with the application of the Act and it reads as follows:

"**2.** ***Application.***—The provisions of this Act shall apply to every apartment in a multi-storeyed building which was constructed mainly for residential or commercial or such other purposes as may be prescribed, by—

(*a*) any group housing cooperative society; or

(*b*) any other person or authority,

before or after the commencement of this Act and on a freehold land, or a leasehold land, if the lease for such land is for a period of thirty years or more:

Provided that, where a building constructed, whether before or after the commencement of this Act, on any land contains only two or three apartments, the owner of such building may, by a declaration duly executed and registered under the provisions of the Registration Act, 1908 (16 of 1908), indicate his intention to make the provisions of this Act applicable to such building, and on such declaration being made, such owner shall execute and register a Deed of Apartment in accordance with the provisions of this Act, as if such owner were the promoter in relation to such building."

132. Section 3(*b*) defines the word "allottee" as follows:

"**3. (*b*) "allottee"**, in relation to an apartment, means the person to whom such apartment has been allotted, sold or otherwise transferred by the promoter;"

133. Section 3(*c*) defines "apartment" and it reads as follows:

"**3. (*c*) "apartment"** means a part of any property, intended for any type of independent use, including one or more rooms or enclosed spaces located on one or more floors or any part or parts thereof, in a multi-storeyed building to be used for residence or office or for the practice of any profession, or for the carrying on of any occupation, trade or business or for such other type of independent use as may be prescribed, and with a direct exit to a public street, road or highway, or to a common area leading to such street, road or highway, and includes any garage or room (whether or not adjacent to the multi-storeyed building in which such apartment is located) provided by the promoter for use by the owner of such apartment for parking any vehicle or, as the case may be, for the residence of any domestic aide employed in such apartment;"

134. Section 3(*e*) defines "apartment owner" and it reads as follows:

"**3. (*e*) "apartment owner"** means the person or persons owning an apartment and an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment;"

135. Section 3(*f*) defines "association of apartment owners" as follows:

"**3. (*f*) "Association of Apartment Owners"**,—

(*i*) in relation to a multi-storeyed building not falling within sub-clause (*ii*), means all the owners of the apartments therein;

(*ii*) in the case of the multi-storeyed buildings in any area, designated as a block, pocket or otherwise, means all the owners of the apartments in such block, pocket or other designated area,

acting as a group in accordance with the bye-laws;"

136. Sections 4, 4(1), (2) and (3), read as follows:

"**4. *Ownership of apartments*.**—(1) Every person to whom any apartment is allotted, sold or otherwise transferred by the promoter, on or after the commencement of this Act, shall, save as otherwise provided in Section 6, and subject to the other provisions of this Act, be entitled to the exclusive ownership and possession of the apartment so allotted, sold or otherwise transferred to him.

(2) Every person to whom any apartment was allotted, sold or otherwise transferred by the promoter before the commencement of this Act shall, save as otherwise provided under Section 6 and subject to the other provisions of this Act, be entitled, on and from such commencement, to the exclusive ownership and possession of the apartment so allotted, sold or otherwise transferred to him.

(3) Every person who becomes entitled to the exclusive ownership and possession of an apartment under sub-section (1) or sub-section (2) shall be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the Deed of Apartment and such percentage shall be computed by taking, as a basis, the value of the apartment in relation to the value of the property."

137. Section 5 provides that subject to the provisions of Section 6, the apartment owner may transfer his apartment and his right is heritable.

138. Section 14 provides for registration for the deed of apartment, which is to be executed under Section 13.

139. Section 15 declares that there shall be an association of apartment owners in relation to the apartment and property pertaining thereto and for the management of common areas and facilities. Model bye-laws are to be framed by the Administrator and the association of apartment owners can make departure from the model bye-laws only with the prior approval of the Administrator.

140. There are similar laws made in the States which relate to the right of the apartment owners. We will revert back to the specific questions which have been raised by the petitioners.

The contentions

141. The contention which is raised is that under the impugned provisos inserted in Section 7(1) of the Code, an application by an allottee, can be made only if there are hundred allottees or a number representing one-tenth of the total number of allottees, whichever is less, with a further rider that the allottees must be part of the same real estate project. It is contended that the word "allottee" is to be understood in the sense in which the word has been defined in the RERA. If that is so, it is contended that the impugned amendment would be inflicted with the vice of vagueness and it is arbitrary.

142. What is to be the meaning of the word "allottees"? The following questions are posed:

142.1. (*i*) Is the total number of the allottees to be calculated qua the units promised?

Or

142.2. (*ii*) Is it to be based on the number of units constructed or is it to be the number of units allotted or units where the agreement to sell is entered into?

143. There is an information asymmetry. There is no published data available of status of allotted units. No builder shares the information. It is impossible for the buyers to obtain the information. Ten per cent of allotted units, even if it is assumed to be qua letter of allotment, is a dynamic figure and keeps changing. A buyer may calculate ten per cent of the hundred units allotted by morning and it may become 110 by night rendering the filing impossible.

144. Further, it is complained that it is not clear as to whether in determining allottees, in a real estate project, whether it is a tower? The entire colonisation? Or an SPV? Ten per cent of a real estate allottees could mean ten per cent of the

allotted units or ten per cent of the total legal persons, who have bought into the project, particularly, in cases of multiple ownership of the same property. The provision, in fact, renders group members prone to corruption by cash settlement by the builder. The coram will be disrupted, if one or two members are bought off or even legally settled. This will necessitate fresh filing.

Findings

145. We have referred to the definition of the word allottee and real estate project and Section 3 of the Act which requires prior registration. We have also referred to the definition of real estate project. In all these definition clauses, the words "as the case may be" are found after the words plot, apartment or building. Thus, the Act is meant to regulate the dealings in plots, apartments and buildings. A real estate project, in other words, as defined, is the development of a building or apartments or the development of land into plots or apartments. The development is contemplated as being towards selling apartments, plots or buildings. It would also necessarily include common areas. The expression "apartment", as defined in RERA, is a very comprehensive one. It takes in, blocks, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suite, tenement, unit or by any other name and which is a separate and self-contained part of any immovable property. It includes any 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. It may be 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, trade or any other type of use, which is ancillary.

146. "Building" has been defined as including any structure or erection or part of any structure and intended to be used for residential or commercial purposes, inter alia. Thus, an allotment under RERA can be in relation to a plot, an apartment or a building. In other words, a project, would be in relation to plots, apartments or buildings. It could also be for a composite one for plots and apartments or for plots and buildings. We have noticed the expansive definition of the word apartment and flats are comprehended within the definition of the word apartment. We have also noticed in this regard, the definition of the word apartment, in the Delhi Apartment Ownership Act, 1986. We have also seen that under the Delhi Apartment Ownership Act, allottee has been defined in relation to an apartment to mean the person to whom such apartment has been allotted, sold or otherwise transferred by the promoter.

147. For appreciating the meaning of the word "allottee", for the purpose of the Code, undoubtedly, it is necessary to travel to Sections 2(*d*) and 2(*zn*) of RERA for the reason that in Section 5(8)(*f*) of the Code, the following Explanation was inserted by Act 26 of 2018 w.e.f. 6-6-2018. This provision has been upheld by this Court in *Pioneer*[1]:

"**5. (8)(*f*)** * * *

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

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;"

148. Real estate project may relate to plots, apartments, or buildings or plots/apartments and plots/buildings. As far as the expression "allottee" is concerned, since the Code in the Explanation to Section 5(8)(*f*), incorporates the definition of the word "allottee" in RERA, for the purpose of the provisos in question, we must necessarily seek light only from the expression "allottee" defined in Section 2(*d*) of RERA.

149. If we break down Section 2(*d*), it yields the following component parts:

149.1. An allottee may be an allottee of a plot or an apartment or a building. A real estate project may relate to plots or apartments or buildings; or plots/buildings or plots/apartments.

149.2. An allottee, in the case of an apartment, which expression includes flats, among other structures, would include the following categories of persons. It would include a person to whom the apartment is allotted. It would also include a person to whom the apartment is sold, whether as freehold or leasehold.

149.3. Thirdly, it would include a person to whom the promoter has transferred the apartment, otherwise than by way of a sale.

149.4. Lastly, it would include persons who have acquired the allotment through sale, transfer or otherwise, with the caveat that it will not include a person to whom the apartment is given on rent. Whatever we have mentioned about apartments, is equally true qua allotment of plots or buildings.

A miscellany of contentions regarding allottees

150. The definition of the word "promoter" in RERA may be noticed in this regard. It includes a person who constructs or causes to be constructed an independent building or apartments or convert an existing building or a part thereof into apartments for the purpose of selling or some of the apartments to other persons. In regard to such a person, it is clear that there is no allotment of any plot as such. It may be another matter that the contract may contemplate the assignment of the undivided interest in the land upon which the construction is made to the allottee but the allottee is the allottee of the building or the apartment as defined in the Act. Coming to clause (*ii*) of Section 2(*zk*) defining "promoter", it contemplates a developer who develops land into a project. The promoter in such a case may also put up construction on any of the plots for the purpose of sale either with or without structures thereon. Therefore, this category of promoter and therefore real estate project would be a hybrid project which involves the development of the land into plots, sale of plots alone after development or sale of the plot with the construction thereon.

Coming to clause (*iii*) of the definition of "promoter" it includes any public body or development authority in respect of allottees of building or apartments constructed by such authority or body on lands owned by them or placed at their disposal by the Government. There may be such promoters who are development authorities or public bodies, if they own plots or have plots at their disposal by the Government which is then, allotted. The allotment must be for the purpose of selling. The plots and the apartments must be intended for sale. In regard to Apex Level Cooperative Housing Society or Primary Cooperative Housing Society, they are treated as promoters in regard to apartments or buildings for its purpose or in respect of allottees, apartments or buildings. This necessarily means that in regard to such societies the allottees could be the members or non-members. Clause (*v*) also includes person who acts as builder, coloniser, contractor, developer, estate developer or any other name or claiming to be the power of attorney of the holder of the land on which the building, apartment constructed or the plot developed for sale. This must be further understood in the light of the definition of the real estate project in Section 2(*zn*). It defines as meaning the various activities. It consists of the following:

1. Development of the building
2. A building which consists of apartments
3. Converting an existing building or a part thereof into apartment
4. The development of land into plots or apartments as the case may be.

151. The aforesaid activities must be for the purpose of sale of all or some of the apartments, plot or building along with the common areas and other work and rights. The task of ascertaining who will be an allottee as also the question as to what will be the total number of allottees and therefore what would constitute one-tenth of total number of allottees must depend upon the nature of the real estate project in question. It will depend on what is offered by the promoter under the project. It may be real estate project which seeks to develop a building and sale of the building. It may be a project for the construction of apartments with the agreements to convey the undivided interest of land also. It may be a project which envisages converting an existing building or a part into an apartment. It may be a project for merely development of land into plots and sale of the plotted land as such. It may be also that the same person may also develop either apartments or building to be sold. In this regard we may remember the Explanation in Section 2(*zk*)(*vi*) defining the word "promoter". The said section reads as under:

> "**2. (*zk*) "promoter"** means—
>
> (*i*)-(*v*) * * *
>
> (*vi*) such other person who constructs any building or apartment for sale to the general public.
>
> *Explanation*.—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 person 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;"

152. Therefore, a conspectus of the provisions would show that having regard to the legislative intention the term "allottees" as defined in Section 2(*d*) must be understood undoubtedly on its own terms predominantly. But at the same time the other provisions which form part of the Act and therefore the scheme must also be borne in mind. The argument that the definition of "allottee" suffers from over inclusiveness and under inclusiveness needs to be considered. Under inclusiveness and over inclusiveness are aspects of the guarantee under Article 14. Equals must be treated equally. Unequals must not be treated equally. What constitutes reasonable classification must depend upon the facts of each case, the context provided by the statute, the existence of intelligible differentia which has led to the grouping of the persons or things as a class and the leaving out of those who do not share the intelligible differentia. No doubt it must bear rational nexus to the objects sought to be achieved.

153. Coming to the definition of the word "allottee" it appears to be split up into three categories broadly, they are—plot, apartment and buildings. In the context of the impugned proviso, it must be remembered that if an applicant is able to garner a magical figure of 100 allottees, then he can present the application under Section 7 of the Code. This is for the reason that the further requirement of one-tenth of total number of allottees is meant to apply in a situation only if one-tenth of the total number of allottees is less than 100. This is for the reason that the word "whichever" has been used. No doubt in the context of one-tenth of the allottees, the greater the number of total number of allottees, the greater will be the number of one-tenth. In other words, if the total number of allottees is less, then, one-tenth of the total number will be less, and if in such circumstances, it is lesser than hundred, such number of allottees can make application under Section 7 under the impugned provisos. Therefore, in calculating the total number of allottees in one sense is a double-edged sword as the more is the numerator, the more will be the resultant figure required under the proviso.

154. Be that as it may, as we have noticed the question must be decided with reference to real nature of the real estate project in which the applicant is an allottee.

154.1. If it is in the case of an apartment, then necessarily all persons to whom allotment had been made would be treated as allottees for calculating the figure mentioned in the impugned proviso. The word "allotment" does mean allotment in the sense of documented booking as is mentioned in Section 11(1)(*b*) in regard to apartment or plot with which we are largely concerned. Such detail regarding the quarterly up-to-date list of the number and the types of apartments are to be uploaded as provided in Section 11. It is this information incidentally, which is the reservoir of data which the legislature intends that the allottees can use even though it is not necessarily confined to them.

154.2. The allottee would also include a person who acquires the allotment either through sale, transfer or otherwise. The transferee of the allotment is contemplated. There can be no difficulty in including such assignee of the allotment as also the allottee for the purpose of complying with the threshold requirement under the impugned proviso. Thus, all allottees and all assignees of allotment would qualify both to be considered for the purpose of calculating the total number of allottees but confined to the particular real estate project and therefore for arriving at the figure of 100 allottees or one-tenth of the allottees as the case may be.

154.3. Then, there is a third category, which is introduced by the expression "sold" (whether as "leasehold" or "freehold" or otherwise transferred by the promoter). Here a question may arise, if the word "sold" is applied to the expression "plot", then undoubtedly the transferee would be an allottee. If the sale is to the allottee in a real estate project which is a hybrid project consisting of development of land into plots and also development of buildings as is contemplated under Section 2(*zk*) then the transferee of the plot undoubtedly would be an allottee. He may have a complaint regarding the default by the promoter in the matter of development of the plot under hybrid project. As far as sale whether "freehold" or "leasehold" of an apartment or a building is concerned, once an apartment or building is sold, it presupposes that the construction of the building or the apartment is complete ordinarily. No doubt, he may also have complaints against the promoter which may be addressed under the RERA. For the purpose of the proviso in question, going by the definition, undoubtedly, such transferee of an apartment or building, is to be treated as an allottee.

154.4. Let us take an example. A promoter constructs several apartments. An apartment is defined so as to include "flat". It can be residential or commercial. Assume that the promoter has constructed and completed construction, five out of the fifteen floors (which constitutes the project), on the basis of the occupation certificate, as different from the completion certificate, as the latter certificate is given only on the completion of the project. He assigns and transfers the apartment to those allottees to whom he allotted the apartment when he has completed the construction. Such transferees would be allottees under the RERA. The question, however, may arise from the point of view of the impugned proviso as to what is the common feature between such an allottee to whom the constructed apartment is already handed over after sale and the allottee of the remaining floors where there is no construction or only construction which is pronouncedly lagging behind the schedule. The question may arise whether banding together such allottees under the definition clause make out the case of over inclusive classification. Are unequals being treated equally?

155. A mere charge of either under inclusiveness or over inclusiveness which is not difficult to make hardly suffices to persuade the court to strike down a law. There is a wide latitude allowed in the legislature in these matters. The examination cannot be extended to find out whether there is mathematical precision or wooden equality established. The working of the statute may produce further issues, all of it may not be fully perceived as which may not be wholly foreseen by the law giver. The freedom to experiment must be conceded

to the legislature, particularly, in economic laws. If problems emerge in the working of law and which require legislative intervention, the court cannot be oblivious to the power of the legislature to respond by stepping in with necessary amendment. There is nothing like a perfect law and as with all human institutions there are bound to be imperfections. What is significant is however for the court ruling on constitutionality, the law must present a clear departure from constitutional limits.

156. In the example of an apartment which is sold where the project is not complete, we bear in mind the following features: In such cases if there is insolvency, the project would remain incomplete. Common areas/common facilities would not become available. The feature which attracts a buyer is the whole project which is completed. The apartment owner may very well refuse to accept delivery as he may insist upon the completion of the project with all its promised facilities. Section 17 of RERA contemplates the transfer of title to the common areas to the association of allottees. Obviously, such a thing would not be possible ordinarily unless the construction is complete. In other words, unlike an allottee of a different project under the same promoter the different allottees as contained in the definition of the word "allottee" would have room for common complaints. A realistic and pragmatic approach is not to be eschewed or abandoned. Thus, we cannot see merit in the contention.

157. We have noticed Section 11(1)(*b*) of RERA. It contemplates details of booking qua apartments and plots. This is sufficient to reject the argument that it could be based on a total number of the units promised. What is required is allotment and not promised flats as per a brochure. It is also not the total constructed units. This is as what is relevant under the impugned provisos read with Section 5(8)(*f*) Explanation and Section 2(*d*) of RERA read with Section 11(1)(*b*) and the rules made thereunder is the "booking" of apartments or plots. What is allotted or booked may be more than what is constructed if there is a mismatch at any given point of time. It is the number of units allotted. Now, the allotment and the agreement to sell are not irreconcilable with each other and may signify the same.

158. The further contention that 10% is dynamic and what is 1/10 in the morning may fall short by night if more allotment is made, is untenable in law. The provisions of the Companies Act, 1913 (Section 153-C), Section 399 of the Companies Act, 1956 and Section 244 of the Companies Act, 2013 contain similar provisions. The mere difficulties in given cases, to comply with a law can hardly furnish a ground to strike it down. As to what would constitute the real estate project, it must depend on the terms and conditions and scope of a particular real estate project in which allottees are a part of. These are factual matters to be considered in the facts of each case.

The problem of default and limitation

159. It is urged on behalf of the petitioners that the provisos requiring support of one hundred persons or one-tenth of the allottees, whichever is lower, is unworkable and arbitrary having regard to the provisions of the Code. There can only be one default in a complaint, it is contended. When the required number of allottees may have to be drawn from allottees who may have entered into agreements with the builder on different dates, the date of default would be

different. This would adversely impinge on the absolute right which otherwise exists with an allottee to make an application under Section 7 of the Code.

160. Per contra, the learned Additional Solicitor General would draw attention to Explanation to Section 7(1). She would further contend that as long as there is a default which need not be qua the applicant or applicants, an application would be maintainable and there is no merit in this contention.

161. In this context, it is necessary to recapture Section 4 of the Code. It reads as follows:

> "**4.** ***Application of this Part.***—(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:
>
> Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees."

The amount is now fixed at Rs 1 crore.

162. It is thereafter that Section 6 declares that where any corporate debtor commits default, a financial creditor, an operational creditor or a corporate debtor may itself initiate CIRP in the manner provided in Chapter 2.

163. Section 7 continues to declare that a financial creditor either by itself or jointly by other creditors or any other Central Government notified person, file an application before the adjudicating authority, *when a default has occurred*. It is thereafter that the following Explanation is present, no doubt, after the impugned provisions, after the amendment:

> "**7.(1)** * * *
>
> *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."

164. The Explanation makes it clear that a financial debt, which is owed to any other financial creditor of the corporate debtor would suffice to make an application on the basis that the default has occurred. Default has been defined in Section 3(12) of the Code as follows:

> "**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 repaid by the debtor or the corporate debtor, as the case may be;"

165. Interpreting these provisions and the Rules as well, this Court in *Innoventive*[47], held as follows: (SCC p. 438, para 28)

> "*28.* When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to **any** financial creditor of the *corporate debtor — it need not be a debt owed to the applicant financial creditor*. Under Section 7(2), an application is to be made under

47 *Innoventive Industries Ltd.* v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356

* **Ed.**: The word between two asterisks has been emphasised in original.

sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to adjudicating authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be." (emphasis supplied)

166. It is true that Section 238-A (inserted with effect from 6-6-2018) of the Code provides that the provisions of the Limitation Act shall be applicable as far as may be to the proceedings or appeals before the adjudicating authority and the NCLAT, as the case may be, inter alia. Interpreting this provision, inter alia, the Court in *B.K. Educational Services (P) Ltd.*[5], has held that Article 137 in Schedule I of the Limitation Act, 1963, will apply in regard to an application under Sections 7 and 9 of the Code. This Court held, inter alia, as follows: (SCC p. 664, para 42)

> "*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*."

5 *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528

167. In fact, the Court, in the said case, in the course of its judgment, gives an example of a debt which is due since 1990 and which has become barred but which is sought to be revived through the medium of Section 7 of the Code which law came into being in 2016. It is to avoid such situations that this Court noted that even if Section 238-A was inserted after the original enactment, the Limitation Act, 1963, would, indeed apply, right from the inception of the Code. It is to be noticed that this Court has applied Article 137, and also, at the same time, countenanced the applicability of Section 5 of the Limitation Act, providing for condonation of delay in appropriate cases.

168. It is, therefore, clear that the requirement of the Code in regard to an application by a financial creditor does not mandate that the financial debt is owed to the applicant in terms of the Explanation. This is for the reason that apparently that the CIRP and which, if unsuccessful, is followed by the liquidation procedure is in all a proceeding, in rem. The law giver has envisaged in the Code, an action, merely for setting in motion the process initially. The litmus test on the anvil of which, the adjudicating authority will scrutinise the matter, is only the existence of the default, as defined in Section 4 of the Code. As on date, the amount of default is pegged at Rs 1 crore. Present a financial debt which has not been paid, the doors are thrown open for the processes under the Code to flow in and overwhelm the corporate debtor. The further barrier is limitation, no doubt, as noticed in *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*[5].

169. As with anything in life, not only will imperfections stand out and mathematical nicety be flouted, a law may end up seemingly trampling upon the interests of a few or even many. Since, the Code undoubtedly bears the brand of an economic measure upon its face, and in true spirit, being one of the most significant and dynamic economic experiments indulged in by the law giver, not by becoming servile to Parliament, but by way of time hallowed deference to the sovereign body experimenting in such matters, this Court will lean heavily in favour of such a law. The complaint of the petitioners that an increase in the required strength of applicants, will create legal knots which do not admit of solution, do not appeal to us and we intend to lay bare how the law can indeed be worked, even with the extra burden which is cast on the persons covered by the provisos.

170. It is indisputable that in order to successfully move an application under Section 7 that there must be a default which must be in a sum of Rs 1 crore. It is equally clear that the amount of Rs 1 crore need not be owed by the corporate debtor in favour of the applicant. It must be noted that the Explanation existed even prior to the provisos being inserted. It is open to a financial creditor, to move an application in the company of another financial creditor or more than one other financial creditor. In fact, a perusal of the Rules, which we have already extracted, would indicate that irrespective of the number of applicants the court fee would remain Rs 25,000. This answers the alleged vagueness about court fees where the provisos are given effect to. Thus, dehors

5 (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528

the impugned provisos in terms of the Explanation in Section 7(1), a financial debt need not be owed to the applicant and as joint application by more than one applicant was and is contemplated, the resultant position would be that any number of applicants, without any amount being due to them, could move an application under Section 7, provided that they are financial creditors and there is a default in a sum of Rs 1 crore even if the said amount is owed to none of the applicants but to any another financial creditor. This position has not undergone any change even with the insertion of the provisos. In other words, even though the provisos require that in the case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of the allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of the applicants. We have taken an extreme example to illustrate how the Code can possibly be worked.

171. In practice, it may be unlikely, however, that persons would come together as applicants under the Code, if they are real estate allottees, particularly knowing what the admission of application under Section 7 entails, and the destiny of an application which has reached the stage of compulsory winding up under Section 33. However, taking a more likely example viz. of the corporate debtor operating in the real estate sector and an allottee moving an application upon there being amounts due to him, prior to the amendment, undoubtedly, a single allottee could set the ball in motion and all he had to satisfy is default to him or any other financial creditor. The change that is brought about is only that apart from establishing the factum of default, he must present the application endorsed by the requisite number introduced by the proviso. Since, default can be qua any of the applicants, and even a person, who is not an applicant, and the action is, one which is understood to be in rem, in that, the procedures, under the Code, would bind the entire set of stakeholders, including the whole of the allottees, we can see no merit in the contention of the petitioner based on the theory of default, rendering the provisions unworkable and arbitrary.

172. In this regard, it is necessary to notice Form 1, in which, an application is to be maintained under Section 7 of the Code read with Rule 4 of the Rules. In the said Form, in Part IV, there are two columns. The first column is total amount of debt granted, dates of disbursement. Under the second column in Part IV, the applicant must show the amount claimed to be in default and the date on which the default occurred (the applicant is required to attach the workings for computation of the amount and days of default in tabular form). Part V deals with particulars of the financial debt (documents, records and evidence of default). The applicant is called upon to attach copy of record of default with information utility, if any. The applicant may attach list of any other document to prove the existence of the default, as can be seen from clause 8 of Part V.

173. In this regard, question may arise as to how the application would have to be filled up, if there are hundred allottees in a given case to comply with the requirement of the proviso.

173.1. In the very first place, we must notice that as far as the workability of this provision in such a situation is looked at, it cannot be called into question, having regard to one aspect in particular. Even before the amendment, and what is more also, after the amendment, a joint application is permissible (though not mandated) in respect of all classes of financial creditors. This means, even in the case of any application filed by more than one applicant, if the requirements of the Code are otherwise fulfilled, there can be cases where the applicants can file a single application by giving the details which we have adverted to.

173.2. Secondly, we must bear in mind again, that the application is contemplated to be an application in rem. One or more financial creditors activises the Code with reference to the threshold figure of Rs 1 crore, being in default. The Authority is alerted. He verifies this aspect, finding that the debt is established under Section 7(5), and further that it is not barred by limitation or if he invokes the power under Section 5 of the Limitation Act, to condone the delay [as contemplated in *B.K. Educational Services (P) Ltd.*[5]], the curtains are raised for the Code to be applied since the default in the sum may be owed to any financial creditor. It suffices that the said sum can be claimed as a sum in default in terms of the Explanation in Section 7(1). Undoubtedly, the record of default, as contemplated in the Code, which need not be the record of default with the information utility alone, has to be furnished. If the default is qua all the applicants, then also, as long as the statutory requirements regarding the amount, and it not being barred, are fulfilled, it will be open to the applicants to plead the same. Undoubtedly, if the debt, in a sum of Rs 1 crore, happens to be set up, which is barred, then, unless Section 5 of the Limitation Act is successfully invoked, the applicants would risk rejection of the application, which cannot be stated to be unfair as it is in accordance with law. What we are indicating is that in view of the special provision, contained in the Explanation to Section 7(1), the arguments appear to be farfetched.

174. We must bear in mind that when we reasonably contemplate, a state of insolvency, while in law, the corporate debtor, being in default to a single financial creditor in a sum of Rs 1 crore, is sufficient, it is highly unlikely that the corporate debtor would not be similarly financially in dire straits towards the other creditors (allottees).

175. Another aspect, which is raised, is that in the example of a hundred allottees, if they have agreements, under which, the date of default is different, how is the application to be drafted and processed? What, if the debt is barred qua some of the applicants, whereas, it is not so in regard to the other applicants. Taking a cue from the Explanation to Section 7(1), all that would be required is, to plead the default, no doubt, in the sum of Rs 1 crore, which is not barred as the cause of action. In other words, if a law contemplates that the default in a sum of Rs 1 crore can be towards any financial creditor, even if he is not an applicant, the fact that the debt is barred as against some of the financial creditors, who are applicants, whereas, the application by some others, or even

5 *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528

one who have moved jointly, fulfil the requirement of default, both in terms of the sum and it not being barred, the application would still lie.

Allottees to be from same real estate project: is it unconstitutional?

176. We have referred to the definition of the word "allottee" in Section 2(*d*) of the RERA. In regard to a real estate project, all persons, who are treated as allottees, as per the definition of allottee would be entitled to be treated as allottees, for the purpose of Section 5(8)(*f*) (Explanation) and also, for the purpose of the impugned *provisos*. All that is required is that the allottees must relate to same real estate project. In other words, if a promoter has a different real estate project, be it in relation to apartments, in the case of an application under Section 7, those would not be reckoned in computing one-tenth as well as the total allotments.

177. The rationale behind confining allottees to the same real estate project is to promote the object of the Code. Once the threshold requirement can pass muster when tested in the anvil of a challenge based on Articles 14, 19 and 21, then, there is both logic and reason behind the legislative value judgment that the allottees, who must join the application under the impugned provisos, must be related to the same real estate project. The connection with the same real estate project is crucial to the determination of the critical mass, which legislature has in mind, as a part of its scheme, to streamline the working of the Code. If it is to embrace the total number of allottees of all projects, which a promoter of a real estate project, may be having, in one sense, it will make the task of the applicant himself, more cumbersome. It becomes a sword, which will cut both ways. This is for the reason that the complaints, relating to different projects, may be different. With regard to one project of a promoter of real estate project, maybe, in the advanced stage, the allottees in a particular project, may not have much of a complaint. The complaint, in relation to yet another project, may be more serious. If the complaint in respect of the latter, attracts the attention of a critical mass of allottees, and the proposed applicant is part of that project in the said project, then, it may be easier for the allottees to fulfil the statutory mantra in the impugned provisos, with the junction of likeminded souls. If, on the other hand, the requirement was to make a search for allottees of different projects, as would be the case, if the entirety of the allottees, under different projects, were to be reckoned, the task would have been much more cumbersome. The requirement of the allottees, being drawn from the same project, stands to reason and also does not suffer from any constitutional blemish, as pointed out.

The point of time to comply with the threshold requirements

178. The question, then arises, as to the alleged lack of clarity about the point of time, at which the requirements of the impugned provisos, are to be met. Is it sufficient, if the required number of allottees join together and file an application under Section 7 and fulfil the requirements, at the time of presentation? Or, is it necessary that the application must conform with the numerical strength, under the new proviso, even after filing of the application,

and till the date, the application is admitted under Section 7(5)? There can be no doubt that the requirement of a threshold under the impugned proviso, in Section 7(1), must be fulfilled as on the date of the filing of the application. In this regard, we find support from an early judgment of this Court, which was rendered under Section 153-C of the Companies Act, 1913. Section 153-C is the predecessor to Sections 397 and 398 read with Section 399 of the Companies Act, 1956. Its most recent avatar is contained in Sections 241 and 242 of the Companies Act, 2013 read with Section 244. In fact, Section 399(3) of the Companies Act, 1956, read as follows:

> "**399.** (**3**) Where any members of a company are entitled to make an application by virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them."

179. In the decision of this Court in *Rajahmundry Electric Supply Corpn. Ltd.* v. *A. Nageshwara Rao*[48], the provision in question viz. Section 153-C of the Companies Act, 1913 dealt with the power of the Court to Act, when the Company acts in a prejudicial manner or oppresses any part of its members. It, inter alia, provided that no application could be made by any member, in the case of a company having a share capital unless the member has obtained consent, in writing, of not less than one hundred in number of the members of the company or not less than one-tenth in number of the members, whichever is less. There was also an alternate requirement, to which, resort could be made in regard to company, not having share capital. There was another mode of fulfilling the threshold requirement. In the facts of the said case, the number of the members of the company were 603. Sixty-five members consented to the application. The problem, however, arose as it was contended that 13 of the members who had consented, had, subsequent to the presentation of the application, withdrawn their consent.

180. This Court went on to hold as follows: (*Rajahmundry Electric Supply case*[48], AIR p. 215, para 5)

> "*5.* … We have no hesitation in rejecting this contention. The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation. In our opinion, the withdrawal of consent by 13 of the members, even if true, cannot affect either the right of the applicant to proceed with the application or the jurisdiction of the court to dispose of it on its own merits."

181. In the matter of presentation of an application under Section 7, if the threshold requirement, under the impugned provisos, stands fulfilled, the requirement of the law must be treated as fulfilled. The contention, relating to the ambiguity and consequent unworkability and the resultant arbitrariness, is clearly untenable and does not appeal to us. If an allottee is able to, in

48 AIR 1956 SC 213

other words, satisfy the requirements, as on the date of the presentation, the requirement of the impugned law is fulfilled.

Holdings by family members, etc. and joint holdings of a unit; single allottee?

182. One of the contentions, which is raised is that in Section 399(2) of the Companies Act, 1956, it was provided that in applying the threshold test of requisite number of members, to join in an application under Sections 397 and 398, where any share or shares are held by two or more persons, they shall be counted only as one member. Section 244 of the Companies Act, 2013, corresponds to Section 399 of the Companies Act, 1956. The Explanation in Section 241(1) contains an identical provision as in Section 399(2). It is, however, pointed out by the petitioners that in the matter of an allotment, being made to more than one person, of an apartment or other real estate property, it is not laid down as to how the matter is to be dealt with. It is vague. It is arbitrary. It is true that in the impugned proviso, introduced in Section 7(1), there is no indication as to how the number of allottees are to be reckoned in the case of more than one person. It will be of interest to note that in Section 14 of the RERA, the promoter is forbidden from making any additions and alterations in the sanctioned plans, layout plans and specifications, the nature of the fixtures, fittings and amenities, which are agreed to be undertaken, without the consent of that person. Of course, minor additions or alterations, in circumstances provided in the proviso, can be carried out.

183. Thereafter, Section 14(2)(*ii*) contemplates that any other alterations in the sanctioned plans, layout plans and specifications or the common area within the project, cannot be carried out except with the previous written consent of at least two-thirds of the allottees, other than the promoter, who had agreed to take the apartments in such building. In this context, there is an Explanation. The Explanation purports to declare that if an allottee has taken more than one apartment or plot in his name or in the name of his family, it will be treated as a single allotment. In the case of persons, such as companies or firms or association of individuals, bookings in its name or in the name of associated entities or related enterprises, are to be treated as a single allotment.

184. Similarly, Section 15 of RERA interdicts transfer or assignment of his majority rights and liabilities to a third party, without obtaining the prior written consent of two-thirds of the allottees and also without the prior written approval of the Authority. A similar Explanation, as is found in Section 14, which we have already described, is to be found in Section 15. Such an Explanation is, however, not found in the definition of "allottee" in Section 2(*d*) of RERA.

185. The object of the Explanation, both in Sections 14 and 15, is apparent. It is to avoid defeating the object, which would occur, if members of the same family, monopolise a project or associated and related concerns of a company, firm or association, corner the allotments. It is also possible that they may be hand-in-glove with the promoter, which would result in defeating the rights of the other allottees, as the figure of two-thirds, would cease to represent the interest of the actual two-third majority, which is intended by the legislature, be it in a matter or alterations or additions in the sanctioned plans or layout

plans, etc. or in the matter of the promoter getting out of the project in regard to his majority rights, by transfer or assignment. These Explanations are intended to hold the promoter responsible to the sanctioned plans as also to prevent the promoter from wriggling out of his majority rights, without a real majority, as would be represented by two-thirds of the separate allottees, agreeing to the same.

186. We cannot read the Explanations in Sections 14 and 15 into the definition of "allottee" in Section 2(*d*), as, in Sections 14 and 15, a perusal of Explanations, makes it clear that they are enacted for the purpose of Sections 14 and 15, respectively. We would have to take the definition of the "allottee" from Section 2(*d*), as it is. Therefore, it does not matter whether a person has one or more allotments in his name or in the name of his family members. As long as there are independent allotments made to him or his family members, all of them would qualify as separate allottees and they would count both in the calculation of the total allotments, as also in reckoning the figure of hundred allottees or one-tenth of the allottees, whichever is less.

187. As far as the situation projected about, there being no clarity regarding whether, if there is a joint allotment of an apartment to more than one person, is it to be taken as only one allottee or as many allottees as there are joint allottees, it would appear to us, on a proper understanding of the definition of the word "allottee" in Section 2(*d*) and the object, for which the requirement of hundred allottees or one-tenth has been put, and also, not being oblivious to Section 399(2) of the Companies Act, 1956, as also the Explanation in Section 244(1) of the Companies Act, 2013, in the case of a joint allotment of an apartment, plot or a building to more than one person, the allotment can only be treated as a single allotment. This for the reason that the object of the statute, admittedly, is to ensure that there is a critical mass of persons (allottees), who agree that the time is ripe to invoke the Code and to submit to the inexorable processes under the Code, with all its attendant perils.

188. The object of maintaining speed in the CIRP and also the balancing of interest of all the stakeholders, would be promoted by the view that as in the case of the Companies Acts, 1956 and 2013, that for the purpose of complying with the impugned provisos in Section 7(1), while the allottee can be of any of the categories, fulfilling the description of an allottee in Section 2(*d*) of RERA, as interpreted earlier by us joint allottees of a single apartment, will be treated as only one allottee. Any other view can lead to clear abuse and defeating of the object of the Code. If, for instance, a single apartment is taken in the name of hundred persons, a single allottee, who in turn comprises of relatives or family members or friends, can move an application, even though the position ante would be restored, which means that only the allottee qua one apartment, plot or building, is before the Authority and it would not really represent a critical mass of the allottees in the real estate project concerned. Therefore, we have no hesitation in rejecting the contentions of the petitioner on having made the said interpretation.

The power of waiver, being denied, unlike the Companies Acts

189. There is another argument, which is pressed before us as one, which distinguishes the impugned provisions from those contained in the Companies Act. Section 399(4) of the Companies Act, 1956, read as follows:

> "**399. (4)** The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the Tribunal under Section 397 or 398, notwithstanding that the requirements of clause (*a*) or clause (*b*), as the case may be, of sub-section (1) are not fulfilled."

190. It is, therefore, contended that the said provision rendered the threshold requirement in Section 399(1), a fair one. This is for the reason that where it was found just and equitable by the Central Government, it could authorise any member or members to apply under Section 397 or Section 398, even though the numerical strength of members, as required in Section 399(1), did not come forward to present the application.

191. We are called upon to pronounce on the constitutionality of the law. Having regard to the salutary object and the distinguishing features, which clearly distinguish the allottees and also the creditors falling in the first proviso from the other creditors, both financial and operational, we see no merit in the contention. It is another matter that we may entertain the belief that it would have been more wise on the part of the legislature to have incorporated a safety valve to provide for situations where without complying with threshold requirement, a single allottee could move the application. In this regard, we should also bear in mind the scope of an application under Sections 397 and 398.

192. The Central Government, having regard to the scheme of the Companies Act, is intricately interconnected with the management of the companies. It had powers of investigation into the affairs of the companies under Section 235 and Section 237. The purport of Sections 397 and 398 include the conduct of the affairs of the company in any manner prejudicial to the public interest or also, no doubt, prejudicial to member or members. In such circumstances, clothing the Central Government with the power to waive the requirement and permitting the application to be presented by even a single member, is in sync with the scheme of the Companies Act. The role of the Central Government is different under the Code. In fact, the Central Government does not have any role, as such under the Code. It acts only through the designated Authorities under the Code. The Code is about insolvency resolution and on failure liquidation. The scheme of the Code is unique and its objects are vividly different from that of the Companies Act. Consequently, if the legislature felt that threshold requirement representing a critical mass of allottees, alone would satisfy the requirement of a valid institution of an application under Section 7, it cannot be dubbed as either discriminatory or arbitrary.

A look at Order 1 Rule 8 of the Code of Civil Procedure, 1908 (the CPC) and Section 12 of the Consumer Protection Act, 1986 and the contentions based on the same

193. The argument of the petitioners is that under Order 1 Rule 8 CPC, where there are numerous persons having the same interest in one suit, one or more such persons can, with the permission of the court, sue or be sued or may defend such suit on behalf of or for the benefit of all persons so interested, at the instance of a single person with whom numerous persons share the same interest. The court, after giving permission, is to give notice of the institution of the suit as provided. Thereupon, any person, on whose behalf or for whose benefit the suit is instituted or defended, can apply to the court, to be made a party. Finally, sub-rule (6) of Order 1 Rule 8 declares that the decree passed in the suit under Order 1 Rule 8, shall be binding on all persons, on whose behalf or for whose benefit, the suit is instituted or defended, as the case may be.

193.1. The Explanation in Order 1 Rule 8 of CPC, reads as follows:

> "*Explanation*.—For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

193.2. This provision is sought to be contrasted with the provisos inserted by the impugned amendment. It was sought to be contended that the procedure contemplated in Order 1 Rule 8, on the one hand, countenances the setting in motion of a civil suit by a single person, no doubt with the permission of the court and after a notice is given, as provided therein, any of the persons, who have the same interest, can come forward and seek to be made a party. By the device, embedded in Order 1 Rule 8, the interest of all the persons, who are having the same interests, is best safeguarded. Should he wish to oppose the applicant, he is free to do so. Should he wish to, on the other hand, support the plaintiff, it is equally open to him to adopt such a course. At the end of the proceedings, when the decree is passed, it shall be binding on all the persons, for whose benefit or on whose behalf, the suit is laid even by a single person.

193.3. On the other hand, for reasons, which are entirely arbitrary, it is pointed out that a most cumbersome and unachievable threshold requirement is thrust upon a class of the financial creditors alone, by requiring that should an allottee wish to invoke Section 7 of the Code, he should muster the support of at least 99 other allottees or one-tenth of the total number of allottees, whichever is lower. Again, it is emphasised that matters are made worse by insisting that the allottees must be drawn from the same project.

193.4. It is, similarly, submitted that the Consumer Protection Act also has embraced the principle of Order 1 Rule 8 CPC, as can be seen from Section 12 of the Consumer Protection Act. The definition of the word "complainant", in Section 2(1)(*b*)(*iv*) of the Consumer Protection Act, 1986, includes one or more consumer, where there are numerous persons having the same interest.

193.5. Section 12 of the Consumer Protection Act provides for the manner in which a complaint is to be made. Section 12(1)(*c*) reads as follows:

> "**12. (1)(*c*)**. one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or"

193.6. The last provision, in a string of provisions, which provide the scheme in regard to an action modelled on Order 1 Rule 8 CPC, is found in Section 13(6) of the Consumer Protection Act, 1986. It reads as follows:

> "**13. (6)** Where the complainant is a consumer referred to in sub-clause (*iv*) of clause (*b*) of sub-section (1) of Section 2, the provisions of Rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to a complaint or the order of the District Forum thereon."

193.7. Thus, the procedure, under Order 1 Rule 8, is squarely made applicable to the proceedings under the Consumer Protection Act, in a situation, where, there are more than one consumer, having the same interest. It is true that the words "same interest", have been understood in the light of the Explanation under Order 1 Rule 8 CPC and therefore, it is not necessary that all the numerous persons, within the meaning of the Consumer Protection Act or in a civil suit, need to establish that they have the same cause of action. What is essential is that they have the same interest. Interpreting the words "same interest", it is still further true that the Court in *T.N. Housing Board* v. *T.N. Ganapathy*[49], has held that what is required is only community of interest. This was a case where a suit was filed by allottees of plots of low income groups against the appellant Housing Board seeking injunction from demanding and collecting any additional price and the suit was held maintainable under Order 1 Rule 8, even though separate demand notices were issued to each allottee.

194. In appreciating this argument, it is important to not be oblivious to the scheme of the Code and to distinguish it from a civil suit laid invoking Order 1 Rule 8 or the consumer complaint presented by one consumer, sharing the same interest with numerous others, again invoking Order 1 Rule 8. It is true that once Order 1 Rule 8 is made applicable, a single plaintiff or a consumer, in a civil suit or a consumer complaint respectively, can set the ball rolling. All the persons, having the same interest, are free to join in the proceedings. Irrespective of whether they join or not, a decree or order, which is pronounced, will bind all the persons having the same interest. The procedure, under Order 1 Rule 8, if it had been made applicable in regard to an application by the allottee of a real estate project, would indeed have made it very easy for a single allottee to invoke Section 7 of the Code and it would also have countenanced the participation of the other allottees, should they have wished to be made parties upon the publication of the notice contemplated in Order 1 Rule 8(2).

49 (1990) 1 SCC 608

195. So far so good. Now, we will examine the other side of the story and that is the object of the Code and the scheme of the Code. Under the Code, once an application is moved and is admitted under Section 7, the stage is set for resolving the insolvency. The resolution of the insolvency may be attained by replacing the existing management. The law giver has contemplated last mile funding. It has, however, fixed a time-limit, as contemplated in Section 12 of the Code, no doubt as explained by this Court. Once the application is admitted under Section 7(5), initially, the interim resolution professional ("IRP") would supplant the very management by virtue of the suspension of the powers of the management, as contemplated in the Code. The IRP may or may not continue as the resolution professional ("RP") but an RP is, undoubtedly, to be appointed under the scheme of the Code. The management passes into the hands of the RP. Thereafter, depending upon the receipt of the resolution plan and its acceptability to the Committee of Creditors and finally the approval by the adjudicating authority of the resolution plan, which is approved by the Committee of Creditors, depends the resolution of the insolvency. All of this is to be completed within a period of 330 days again subject to the limit not being "mandatory" as explained by the Court in *Essar Steel*[30]. Should this not happen, the adjudicating authority is obliged, under Section 33, to pass an order for winding up of the corporate debtor.

196. Section 53 provides for the priority in the matter of payment of the amounts which are collected by way of liquidation value. The allottees would rank as unsecured creditors. The inevitable conclusion is that unlike in an ordinary civil suit or in a consumer complaint, the drastic consequences, as the inexorable liquidation of the corporate debtor, contemplated under the Code, is the inevitable consequence, of the application reaching the stage of Section 33 of the Code. Liquidation could take place even earlier under Section 33(4).

197. As to whether the procedure contemplated in Order 1 Rule 8 is suitable, more appropriate and even more fair, is a matter, entirely in the realm of legislative choice and policy. Having regard to the scheme of the Code, which we have detailed above, there cannot be scintilla of doubt that what the petitioners are seeking to persuade us to hold, is to make a foray into the forbidden territory of legislative value judgment. This is all the more so, when the dangers lurking behind full play to Order 1 Rule 8 being given appear to be fairly clear. We have, therefore, no hesitation in rejecting this contention, which no doubt, at first blush, may appear attractive. We only need add that invalidating a law made by a competent legislature, on the basis of what the court may be induced to conclude, as a better arrangement or a more wise and even fairer system, is constitutionally impermissible. If, the impugned provisions are otherwise not infirm, they must pass muster.

30 *Essar Steel India Ltd. Committee of Creditors* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443

Are the amendments violative of Pioneer case[1]

198. In *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*[1], certain amendments to the Code were challenged. The challenged provisions included the Explanation added to Section 5(8)(*f*).

199. The challenge was made in a batch of writ petitions filed by a group of real estate developers. This Court was invited to adjudicate upon the constitutionality on a wide range of grounds. It is important to cull out the findings rendered by the Court in the said decision as much reliance has been placed by the petitioners on the decision:

199.1. The Code is a legislation which deals with economic matters and, therefore, the legislature must be given free play in the joints.

199.2. The legislative judgment in economic choices must be given a certain degree of deference by the Courts.

199.3. The amendment by which the Explanation was inserted in Section 5(8) was clarificatory in nature and allottees/homebuyers were included in the main provision i.e. Section 5(8)(*f*) from the inception of the Code.

199.4. The Amending Act did not infringe Articles 14, 19(1)(*g*) read with Article 19(6) or 300-A of the Constitution of India.

199.5. RERA and the Code must be held to co-exist, and in the event of a clash, RERA must give way to the Code. The Code and RERA operate in completely different spheres.

199.6. Para 30 of the judgment in *Pioneer Urban Land & Infrastructure Ltd.*[1] reads as follows: (SCC pp. 476-77)

> "*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,

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

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, the Court in *Swaraj Infrastructure (P) Ltd.* v. *Kotak Mahindra Bank Ltd.*[50] 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)."

199.7. It is apposite to advert to para 41 in the nature of the contentions raised in this case. To quote: (*Pioneer Urban Land & Infrastructure Ltd. case*[1], SCC pp. 489-90)

"*41*. It is also important to remember that the Code is not meant to be a debt recovery mechanism (see para 28 of *Swiss Ribbons*[6]). It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/homebuyer who prefers an application under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer, which has then to pass muster under the Code i.e. that it must be approved by at least 66% of the Committee of Creditors and must further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction, or pay out or refund amounts. Depending on the kind of resolution plan that is approved, such homebuyer/allottee may have to wait for a very long period for the successful completion of the project. He may never get his full money back together with interest in the event that no suitable resolution

50 (2019) 3 SCC 620 : (2019) 2 SCC (Civ) 136

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

6 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

plan is forthcoming, in which case, winding up of the corporate debtor alone would ensue. On the other hand, if such allottee were to approach the Real Estate Regulatory Authority under RERA, it is more than likely that the project would be completed early by the persons mentioned therein, and/or full amount of refund and interest together with compensation and penalty, if any, would be awarded. *Thus, given the bona fides of the allottee who moves an application under Section 7 of the Code, it is only such allottee who has completely lost faith in the management of the real estate developer who would come before NCLT under the Code hoping that some other developer takes over and completes the project, while always taking the risk that if no one were to come forward, corporate death must ensue and the allottee must then stand in line to receive whatever is given to him in winding up. Given the reasons of the Insolvency Committee Report, which show that experience of the real estate sector in this country has not been encouraging, in that huge amounts are advanced by ordinary people to finance housing projects which end up in massive delays on the part of the developer or even worse i.e. failure of the project itself, and given the state of facts which was existing at the time of the legislation, as adverted to by the Insolvency Committee Report, it is clear that any alleged discrimination has to meet the tests laid down in Ram Krishna Dalmia*[51], *V.C. Shukla*[52], *Shri Ambica Mills Ltd.*[37], *Venkateshwara Theatre*[53], *Mardia Chemicals*[54]." (emphasis supplied)

199.8. On the possibility of the Code being misused by a single allottee, we may notice the following: (*Pioneer Urban Land & Infrastructure Ltd. case*[1], SCC pp. 500-01, para 51)

"*51.* One other argument that is made on behalf of the counsel for the petitioners is that allottees of flats/apartments who do not want refunds, but who want their flats/apartments constructed so that they may occupy and live in their flats/apartments, will be jeopardised, as a single allottee who does not want the flat/apartments, but wants a refund of amounts paid for reasons best known to him, can trigger the Code and upset the construction and handing over of such flats/apartments to the vast bulk of allottees of a project who may be genuine buyers who wish to occupy such flats/apartments as roofs over their heads. Another facet of this argument is that the bulk of such persons will never be on the Committee of Creditors, as they may not be persons who trigger the Code at all. These arguments are met by the fact that all the allottees of the project in question can either join together under the Explanation to Section 7(1) of the Code, or file their own

51 *Ram Krishna Dalmia* v. *S.R. Tendolkar*, 1959 SCR 279 : AIR 1958 SC 538
52 *V.C. Shukla* v. *State (Delhi Admn.)*, 1980 Supp SCC 249 : 1980 SCC (Cri) 849
37 *State of Gujarat* v. *Shri Ambica Mills Ltd.*, (1974) 4 SCC 656 : 1974 SCC (L&S) 381
53 *Venkateshwara Theatre* v. *State of A.P.*, (1993) 3 SCC 677
54 *Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311
1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

individual petitions after the Code gets triggered by a single allottee, stating that in addition to the construction of their flat/apartment, they are also entitled to compensation under RERA and/or under the general law, and would thus be persons who have a "claim" i.e. a right to remedy for breach of contract which gives rise to a right to compensation, whether or not such right is reduced to judgment, and would therefore be persons to whom a liability or obligation in respect of a "claim" is due. Such persons would, therefore, have a voice in the Committee of Creditors as to future plans for completion of the project, and compensation for late delivery of the flat/apartment. This contention, therefore, also has no legs to stand upon."

199.9. This Court also held that the erstwhile management is free to offer a resolution plan in the event of an application under Section 7, being admitted in favour of an allottee, subject, no doubt, to Section 29(A) of the Code, which may be accepted.

200. It is clear that the impugned provisos do not set at naught the ruling of the Court in *Pioneer*[1]. In a challenge by real estate developers upholding the provisions in the manner done including the Explanation in Section 5(8)(*f*) and allaying the apprehension about abuse by individual allotees cannot detract from the law giver amending the very law on its understanding of the working of the Code at the instance of certain groups of applicants and the impact it produces on the economy and the frustration of the sublime goals of the law.

Information asymmetry

201. The contention on behalf of the petitioner's both in regard to the debenture holders and security holders as also the allottees is that the provisos are unworkable. This is for the reason that information relating to allottees in respect of real estate projects and the debenture holders and security holders in regard to the first proviso is not available. In regard to shareholders with respect to Section 399 of the Companies Act, 1956 and Section 244 of the Companies Act 2013, it is pointed out that the threshold requirements can be fulfilled having regard to the documented information regarding the shareholding available in law. This is not the position it is pointed out in regard to the categories covered by provisos one and two. This renders the provisions manifestly arbitrary.

202. Per contra, the stand of the Union is as follows. As far as allottees in a real estate project are concerned, there is information available under the provisions of the Real Estate Regulation Act. Firstly, it is pointed out that the said Act contemplates an association of allottees. The association plays an important role. The promoter has to take a lead in the formation of the association. The allottees are also obliged to take interest in the formation of the association. Once the association is formed, the law giver contemplates naturally that information relating to allotment would become available. The provisions of the Act, which we have referred to earlier, are emphasised.

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

Secondly, it is pointed out that under Section 11 of the Act as also the rules the promoter is bound to open a webpage and post information relating to allotments. This is to be updated. Therefore, there is no merit in the contention. Similar submissions are made in regard to debenture holders and security holders. It is submitted that information is available in terms of Section 88 of the Companies Act, 2013. It is open to any of the security holders or debenture holders to inspect the registers and ascertain about security holders and debenture holders.

203. As far as allottees are concerned in regard to apartments and plots, Section 11(1)(*b*) of the RERA makes it mandatory for the promoter to make available information regarding the bookings. We have conflated bookings with allotments. We cannot proceed on the basis of the contention of the petitioners that the impugned provisos are unworkable and arbitrary on the basis that the court must take notice of the "reality" which is that the promoters do not make available information as required of them. The burden it is well settled to prove all facts to successfully challenge the statute is always on the petitioner. There cannot be a priori reasoning, and there is no burden on the State. If there is defiance of the law by promoters, the allottees are not helpless. They can always seek proper redress in the appropriate forum. No doubt, we also would observe that it becomes the duty of all the authorities to ensure that the promoters will stringently abide by their duties under the Act.

204. Section 11(1)(*b*) of the RERA speaks about information being made available regarding bookings which can be understood as the "allotments". The word "allottee" as defined in Section 2(*d*) also takes in a person who subsequently acquires the allotment through sale, transfer or otherwise. In Section 11(1)(*b*) there is reference to bookings. If the information is to be limited to the original booking then the information about assignment just mentioned may not be made available.

205. In this regard we may notice the Haryana Real Estate Regulatory Authority, Gurugram (Quarterly Progress Report) Regulations, 2018. Regulation 4 provides inter alia that the promoter shall upload on the webpage which he has to create for the project within 15 days from the expiry of each quarter, namely, the list of number and types of apartments/plots booked. Our attention has also been drawn to the format for Quarterly Progress Report to be submitted under the Haryana Regulations. A perusal of the report would show that the promoter is obliged to submit the names of the allottees. Obviously, if there is change in the allotment the changed name should be reflected in the Report. This must undoubtedly be ensured by the authorities stringently.

206. We also find merit in the contention of the Union that the association of allottees has to be formed under the mandate of the law it is expected to play an important role. Information will certainly be forthcoming in regard to allotments upon the allottees becoming members of the association as required. We cannot ignore the role of the association in the matter of becoming the

transferee of the common areas, being clothed with the right of first refusal within the meaning of Section 7 of the Act and also the right to complain otherwise under the Act. This aspect of the association of allottees is not a matter of mere trifle. The allottees cannot truly possess and enjoy their properties be it an apartment or building without their having right of common areas. The promoter is bound under Section 17 to transfer title to the common areas to the association. Section 19(9) of RERA makes it a duty on the part of the allottee to participate towards the formation of the association or cooperative society or the federation of the same. The possession of the common areas is also to be handed over to the association of the allottees. The law giver has therefore created a mechanism, namely, the association of allottees through which the allottees are expected to gather information about the status of the allotments including the names and addresses of the allottees. We cannot proceed on the basis in a case which involves a challenge to a statute that the information to be gathered under the statute will not be available on the basis that the statute will not be worked as contemplated by the law giver. Hence, we reject the contentions of the allottees.

207. In regard to the debenture holders and security holders also we would see no merit in the contentions. There is a statutory mechanism, which is comprised in the provisions of the Companies Act, 2013, namely, Section 88. Section 88(1) reads as follows:

> "**88.** ***Register of members, etc.***—(1) Every company shall keep and maintain the following registers in such form and in such manner as may be prescribed, namely—
>
> (*a*) register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;
>
> (*b*) register of debenture-holders; and
>
> (*c*) register of any other security holders."

208. Violation of Section 88(1) is made punishable under Section 88(3).

209. There is no case established that the version of the Union about availability of information contained in the registers which can be perused is not correct. Again, the burden is on the petitioners and they have not discharged their burden.

The first and second provisos classification

Down memory lane: Article 14 and reasonable classification

210. Both sides have placed reliance on a large number of decisions in relation to reasonable classification under Article 14 of the Constitution. Even in the first decade of the Republic, this Court has, in a large number of cases, settled the principles in regard to what constitutes hostile discrimination and what is reasonable classification. Since, we would be in the region of platitude, if we were to chronicle the principles laid down in each of those cases, we think it suffices to refer to some of the decisions of this Court alone.

211. In *Ameerunnissa Begum*[12], which involved the challenge to law made by the Nizam as Raj Pramukh of the former State of Hyderabad, we need notice the following: (AIR p. 94, para 11)

> "*11*. The nature and scope of the guarantee that is implied in the equal protection clause of the Constitution have been explained and discussed in more than one decision of this Court and do not require repetition. It is well settled that a legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not "per se" amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonably arbitrary; that it does not rest on any rational basis having regard to the objects which the legislature has in view."

212. In *Nagpur Improvement Trust*[4], the petitioner before the High Court alleged discriminatory proceedings for acquiring his land under the Improvement Trust Act instead of the Land Acquisition Act. This Court while dismissing the appeal and affirming the view[55] of the High Court that there was hostile discrimination proceeded to lay down as follows: (SCC pp. 506-07, paras 26 & 28-29)

> "*26*. It is now well settled that the State can make a reasonable classification for the purpose of legislation. It is equally well settled that the classification in order to be reasonable must satisfy two tests: (*i*) the classification must be founded on intelligible differentia, and (*ii*) the differentia must have a rational relation with the object sought to be achieved by the legislation in question. In this connection it must be borne in mind that the object itself should be lawful. *The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.*
>
> * * *
>
> *28*. It would not be disputed that different principles of compensation cannot be formulated for lands acquired on the basis that the owner is old or young, healthy or ill, tall or short, or whether the owner has inherited the property or built it with his own efforts, or whether the owner is a politician or an advocate. Why is this sort of classification not sustainable? Because the object being to compulsorily acquire for a public purpose, the object is

12 *Ameerunnissa Begum* v. *Mahboob Begum*, 1953 SCR 404 : AIR 1953 SC 91
4 *Nagpur Improvement Trust* v. *Vithal Rao*, (1973) 1 SCC 500
55 *Vithalrao* v. *LAO*, 1969 Mah LJ 272

equally achieved whether the land belongs to one type of owner or another type.

29. Can classification be made on the basis of the public purpose for the purpose of compensation for which land is acquired? In other words can the legislature lay down different principles of compensation for lands acquired say for a hospital or a school or a government building? Can the legislature say that for a hospital land will be acquired at 50% of the market value, for a school at 60% of the value and for a government building at 70% of the market value? All three objects are public purposes and as far as the owner is concerned it does not matter to him whether it is one public purpose or the other. *Article 14 confers an individual right and in order to justify a classification there should be something which justifies a different treatment to this individual right.* It seems to us that ordinarily a classification based on the public purpose is not permissible under Article 14 for the purpose of determining compensation. The position is different when the owner of the land himself is the recipient of benefits from an improvement scheme, and the benefit to him is taken into consideration in fixing compensation. Can classification be made on the basis of the authority acquiring the land? In other words can different principles of compensation be laid if the land is acquired for or by an Improvement Trust or Municipal Corporation or the Government? It seems to us that the answer is in the negative because as far as the owner is concerned it does not matter to him whether the land is acquired by one authority or the other." (emphasis supplied)

It is also correct that this decision has come to be relied upon by this Court recently in *Union of India* v. *Tarsem Singh*[56].

213. What is emphasised before us by the petitioners is the principle that the object itself cannot be discriminate. It is pointed out that the object in the case of impugned provisos between different sections of financial creditors is such discrimination. Further the corporate debtors are discriminated again in that builders are accorded special treatment qua other corporate debtors.

214. In *Triloki Nath Khosa*[13], this Court was called upon to pronounce on subordinate legislation which according to writ petitioners denied them the guarantee of Article 14. This Court held, inter alia, as follows: (SCC pp. 29-31, paras 18-19, 21 & 31-32)

"*18.* This submission is erroneous in its formulation of a legal proposition governing onus of proof and it is unjustified in the charge that the record discloses no evidence to show the necessity of the new Rule. '*11.* (*b*) *there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.*' (*Ram*

56 (2019) 9 SCC 304 : (2019) 4 SCC (Civ) 364
13 *State of J&K* v. *Triloki Nath Khosa*, (1974) 1 SCC 19 : 1974 SCC (L&S) 49

Krishna Dalmia[51], AIR p. 547, para 11.) *A rule cannot be struck down as discriminatory on any a priori reasoning.*

> '*15.* ... That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the Rules offend Article 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration.' [*State of U.P.* v. *Kartar Singh*, (1964) 6 SCR 679 : AIR 1964 SC 1135 at p. 1138, para 15]

The burden thus is on the respondents to set out facts necessary to sustain the plea of discrimination and to adduce "cogent and convincing evidence" to prove those facts for '*there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification*'.[57] In *Govind Dattatray Kelkar* v. *Chief Controller of Imports & Exports*[58] (at AIR p. 842, para 12) Subba Rao, C.J., speaking for the Court has cited three other decisions of the Court in support of the proposition that

> '*unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by pleading the necessary material before the Court that the said classification is unreasonable and violative of Article 16 of the Constitution*'.
>
> *19. Thus, it is no part of the appellants' burden to justify the classification or to establish its constitutionality.* ...
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> * * *
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> *21.* ... Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis. ...
>
> * * *
>
> *31.* Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterised by different and distinct attainments. *Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.*
>
> *32.* Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. *It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were*

51 *Ram Krishna Dalmia* v. *S.R. Tendolkar*, 1959 SCR 279 : AIR 1958 SC 538
57 *State of U.P.* v. *Kartar Singh*, (1964) 6 SCR 679 : AIR 1964 SC 1135 at p. 1138, para 15 : (1964) 2 Cri LJ 229
58 AIR 1967 SC 839 : (1967) 2 SCR 29 at p. 34

such an inquiry permissible it would be open to the Courts to substitute their own judgment for that of the legislature or the rule-making authority on the need to classify or the desirability of achieving a particular object." (emphasis supplied)

215. Krishna Iyer, J. in his concurring judgment laid down inter alia as follows: (*Triloki Nath Khosa case*[13], SCC p. 42, para 57)

"*57.* Mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality."

216. The case in *Murthy Match Works*[14], involved a challenge to the levy of excise duty on matchbox directed against medium sized manufacturers and it was impugned as being discriminatory. This Court's conclusions are apposite and are as follows: (SCC pp. 437-38, paras 13-15 & 18)

"There can be hostile discrimination while maintaining façade of equality.

13. Right at the threshold we must warn ourselves of the limitations of judicial power in this jurisdiction. Stone, J. of the Supreme Court of the United States has delineated these limitations in *United States* v. *Butler*[59] thus: (SCC OnLine US SC para 71)

'*71. ... 1.* The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. *One is that courts are concerned only with the power to enact statutes, not with their wisdom.* The other is that while unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, *the only check upon our exercise of power is our own sense of self-restraint.* For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic Government.'

14. In short, unconstitutionality and not unwisdom of a legislation is the narrow area of judicial review. In the present case unconstitutionality is alleged as springing from lugging together two dissimilar categories of match manufacturers into one compartment for like treatment.

15. Certain principles which bear upon classification may be mentioned here. It is true that a State may classify persons and objects for the purpose of legislation and pass laws for the purpose of obtaining revenue or other objects. *Every differentiation is not a discrimination. But classification can be sustained only if it is founded on pertinent and*

13 *State of J&K* v. *Triloki Nath Khosa*, (1974) 1 SCC 19 : 1974 SCC (L&S) 49

14 *Murthy Match Works* v. *CCE*, (1974) 4 SCC 428 : 1974 SCC (Tax) 278

59 1936 SCC OnLine US SC 12 : 80 L Ed 477 : 297 US 1 (1936) : Tresolini and Shapiro, *American Constitutional Law*, 3rd Edn. (Macmillan, 1970).

real differences as distinguished from irrelevant and artificial ones. The constitutional standard by which the sufficiency of the differentia which form a valid basis for classification may be measured, has been repeatedly stated by the Courts. *If it rests on a difference which bears a fair and just relation to the object for which it is proposed, it is constitutional*. To put it differently, the means must have nexus with the ends. *Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context, we have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification*. Of course, in the last analysis Courts possess the power to pronounce on the constitutionality of the acts of the other branches whether a classification is based upon substantial differences or is arbitrary, fanciful and consequently illegal. *At the same time, the question of classification is primarily for legislative judgment and ordinarily does not become a judicial question. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature warily treads*. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation.

* * *

18. Another proposition which is equally settled is that merely because there is room for classification it does not follow that legislation without classification is always unconstitutional. The Court cannot strike down a law because it has not made the classification which commends to the Court as proper. Nor can the legislative power be said to have been unconstitutionally exercised because within the class a sub-classification was reasonable but has not been made." (emphasis supplied)

217. In *State of Gujarat* v. *Shri Ambica Mills Ltd.*[37], this Court has laid down certain principles relating to under inclusive and over inclusive classification. This is, no doubt, apart from holding that a law which contravenes fundamental rights of the citizens may continue to be valid as regards non-citizens. As regards classification and the vice of under inclusive and over inclusive classification we may notice the following statement of the law: (SCC pp. 675-78, paras 54-55, 58, 62 & 64-66)

"*54*. A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase "similarly situated" mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated

37 (1974) 4 SCC 656 : 1974 SCC (L&S) 381

with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.

55. A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.

* * *

58. The piecemeal approach to a general problem permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt. Administrative expedients must be forged and tested. Legislators, recognising these factors, may wish to proceed cautiously, and courts must allow them to do so.[60]

* * *

62. In short, the problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think (see *Tigner* v. *State of Texas*[61]).

* * *

64. Laws regulating economic activity would be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with respect to criminal procedure, etc. The prominence given to the equal protection clause in many modern opinions and decisions in America all show that the Court feels less constrained to give judicial deference to legislative judgment in the field of human and civil rights than in that of economic regulation and that it is making a vigorous use of the equal protection clause to strike down legislative action in the area of fundamental human rights.[62]

* * *

60 See Joseph Tussman and Jacobusten Brook, "The Equal Protection of the Law", 37 California Law Rev 341 (1949).

61 1940 SCC OnLine US SC 85 : 84 L Ed 1124 : 310 US 141 (1940)

62 See "Developments in the Law — Equal Protection", (1969) 82 Harv Law Rev 1065 at p. 1127.

65. The question whether, under Article 14, a classification is reasonable or unreasonable must, in the ultimate analysis depend upon the judicial approach to the problem. The great divide in this area lies in the difference between emphasising the actualities or the abstractions of legislation. The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to the diversities.

* * *

66. That the legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry, that exact wisdom and nice adaption of remedies cannot be required, that judgment is largely a prophecy based on meagre and uninterpreted experience, should stand as reminder that in this area the Court does not take the equal protection requirement in a pedagogic manner[63]." (emphasis supplied)

218. In the decision of this Court in *Special Courts Bill, 1978, In re*[64], a Bench of seven learned Judges of this Court laid down certain propositions. We need only allude to those propositions which are apposite for deciding the fate of these cases before us: (SCC pp. 424-26, para 72)

"*72*. ... (*1*) The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

(*2*) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(*3*) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

63 See "General Theory of Law and State", p. 161.
64 (1979) 1 SCC 380

(*4*) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(*5*) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(*6*) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(*7*) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (*1*) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (*2*) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(*8*) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned.

* * *

(*11*) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public.

Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

(*12*) Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

(*13*) A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination."

219. In *Ajoy Kumar Banerjee* v. *Union of India*[15], this Court, inter alia, held, while dealing with the challenge to a scheme, as amended by employees of insurance companies, on the grounds that it violated the fundamental rights of Articles 14, 19(1)(*g*) and 31 of the Constitution. This Court held inter alia as follows: (SCC p. 159, para 50)

"*50*. … Whether the same results or better results could have been achieved and better basis of differentiation evolved is within the domain of legislature and must be left to the wisdom of the legislature."

220. In the Constitution Bench decision of this Court in *Subramanian Swamy* v. *CBI*[65] the issue was the constitutional validity of Section 6-A of the Delhi Special Police Establishment Act, 1946. Section 6-A declared that CBI shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 except with the previous approval of the Central Government where the allegation was in relation to employees of the Central Government of the level of Joint Secretary and above and also officers appointed by the Central Government in public sector corporations controlled by the Central Government. It is dealing with this challenge that this Court went on to hold after referring to the earlier case law including the judgment of this Court in *Special Courts case*[64] that it is well settled that the courts do not substitute their views as to what the policy is.

221. The Constitution Bench held as follows: (*Subramanian Swamy case*[65], SCC p. 722, para 49)

"*49*. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court

15 (1984) 3 SCC 127 : 1984 SCC (L&S) 355
65 (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36
64 *Special Courts Bill, 1978, In re*, (1979) 1 SCC 380

and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. *The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.*" (emphasis supplied)

222. It was found in *Subramanian Swamy case*[65] that the classification made in Section 6-A on the basis of status in Central Government service is not permissible under Article 14 of the Constitution. The Court posed the question as to whether there is sound differentiation between corrupt public servant based on their status. As noted, the provision was found to be unconstitutional.

223. In the context of the argument that a sub-class cannot be created within a class, the following decisions of this Court were relied upon by the Union to contend that it depends on the availability or absence of a rational basis.

224. In *Lord Krishna Sugar Mills Ltd.* v. *Union of India*[18], the petitioners challenged the constitutionality of the Sugar Export Promotion Act, 1958 apart from certain orders passed thereunder. The contention taken by the petitioners was that since the declared object of the Act was to earn foreign exchange, compelling only sugar manufacturers which manufactured by vacuum pan process to export sugar was discriminatory. They also pointed out that manufacturers of commodities other than sugar were not compelled to export in the same manner and there was further discrimination. It was while repelling this contention that the Court laid down as follows: (AIR p. 1131, para 21)

"*21.* In our opinion, this argument is without substance. The power of Parliament to make laws in relation to foreign exchange is manifest. Entry 36 of the Union List specifically confers jurisdiction on Parliament to legislate in relation to foreign exchange. That Entry, if interpreted widely, would embrace within itself not only laws relating to the control of foreign exchange but also to its acquisition to better the economic stability of the country. The need for foreign exchange to finance the various development schemes was, very properly, not disputed. It is, thus, plain that the object of the Act is in the public interest. If we are to exist as a progressive

65 *Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36
18 (1960) 1 SCR 39 : AIR 1959 SC 1124

nation, it is very necessary that we carve out a place for ourselves in the international market. The beginning has to be made, and many a time, it is at a great loss. That the Central Government has selected the sugar industry for an export programme does not mean that it cannot make a classification of the commodities, bearing in mind which commodity will have an easy market abroad for the purpose of earning foreign exchange. During the Suez crisis, sugar was exported in large quantities from this country, and earned 12.4 crores as foreign exchange. There is nothing on the record to show that export of other commodities was not also undertaken, though it was pointed out in arguments that manganese ore was also exported in a similar manner to earn foreign exchange. It is quite obvious that the Central Government cannot order the export of all and sundry manufactured commodities from the country, without being assured of a market in foreign countries. Necessarily, the Government can only embark upon an export policy in relation to those products, for which there is an easy and readily available market abroad. For this reason also, sugar produced by the vacuum pan process may have been selected, because such sugar is perhaps in demand abroad and not sugar produced by any other process. It must be realised that goods manufactured in our country have to stand heavy competition from goods produced abroad, and even this export can only be made at great sacrifice, and is made only to earn foreign exchange, which would not, otherwise, be available."

225. In *State of Kerala* v. *N.M. Thomas*[19], this Court was dealing with the challenge to the judgment[66] of the High Court by which it had upheld the challenge by the respondent to a rule which granted power to the appellant State to grant further exemption to the members of Scheduled Castes and Scheduled Tribes to pass the departmental test necessary for being considered for promotion. The learned ASG drew support from the following statement in the judgment by K.K. Mathew, J.: (SCC p. 348, para 83)

"*83*. A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law. In other words, the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule or even the rules in question. It is a mistake to assume *a priori* that there can be no classification within a class, say, the lower division clerks. If there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, I see no objection to a further classification within the class. It is no doubt a paradox that though in one sense classification brings about inequality, it is promotive of equality if its object is to bring those who share a common characteristic under a class for differential treatment for sufficient and justifiable reasons. In this view, I have no doubt that the

19 (1976) 2 SCC 310 : 1976 SCC (L&S) 227
66 *Thomas* v. *State of Kerala*, 1974 SCC OnLine Ker 75

principle laid down in *All India Station Masters' & Asstt. Station Masters' Assn.* v. *Central Railway*[67]; *S.G. Jaisinghani* v. *Union of India*[68] and *State of J&K* v. *Triloki Nath Khosa*[13] has no application here."

226. In *Indra Sawhney* v. *Union of India*[17], this Court held: (SCC p. 730, para 802)

"*802.* ... This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis."

227. In *State of W.B.* v. *Rash Behari Sarkar*[20], exemption was granted under the Bengal Amusements Act, 1922 as amended in 1981 from entertainment tax for theatre groups which were bona fide and which performed not for monetary gain which tax exemption was not given to theatre groups which performed for monetary gains. Both were theatre groups. Noticing however, the distinction between the theatre groups, this Court went on to hold as follows: (SCC p. 485, para 4)

"*4.* Equality means equality in similar circumstances between same class of persons for same purpose and objective. It cannot operate amongst unequals. Only likes can be treated alike. But even amongst likes the legislature or executive may classify on distinction which are real. *A classification amongst groups performing shows for monetary gains and cultural activities cannot be said to be arbitrary. May be that both the groups carry out the legislative objective of promoting social and educational activities and, therefore, they are likes but the distinction between the two on monetary gains and otherwise is real and intelligible. So long the classification is reasonable it cannot be struck down as arbitrary. Likes can be treated differently for good and valid reasons. The State in treating the group performing theatrical shows for advancement of social and educational purpose, differently, on basis of profit-making from those formed exclusively for cultural activities cannot be said to have acted in violation of Article 14.*" (emphasis supplied)

228. In *State of Kerala* v. *Aravind Ramakant Modawdakar*[21], reduction in taxes was given to inter-State stage carriage operators which benefit was not extended to intra-State stage carriage operators. The Court though noted, that both the inter-State operators and intra-State operators were, in a generic sense, State carriage operators, there was a distinction between the two. It is apposite to refer to what this Court laid down in para 10 of the judgment. (SCC p. 408)

"*10.* The validity of Section 22 of the Act has not been questioned which section empowers the State in public interest to grant exemptions in such a manner as it deems fit to a class of people. *Once we hold*

67 (1960) 2 SCR 311 : AIR 1960 SC 384
68 AIR 1967 SC 1427
13 (1974) 1 SCC 19 : 1974 SCC (L&S) 49
17 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1
20 (1993) 1 SCC 479
21 (1999) 7 SCC 400

that the contract carriages covered by intra-State permits and inter-State permits can form two distinct and separate classes within the larger class of contract carriages, we find it difficult to hold that this classification is either unreasonable or it lacks a nexus to the object or is violative of Article 14." (emphasis supplied)

229. In *Sansar Chand Atri* v. *State of Punjab*[22], relied upon by the petitioners, for contending that Article 14 frowns upon creation of a sub-class within a class, the case turned on its facts. What is significant, however, is the reasoning. The question, in short, was whether the appellant was an ex-serviceman or not, on the basis of the provisions of the Punjab Recruitment of Ex-Servicemen Rules, 1982, as amended by Notification dated 22-9-1992. The contention of the respondent was that since the appellant was discharged from the army on his own request, he could not be treated as an ex-serviceman. After considering the Rules, as amended and on the facts, it was held as follows: (SCC p. 159, para 9)

"*9.* ... If the contention raised on behalf of the Service Commission and the State Government that since the appellant has been discharged from the army at his own request, he cannot be treated as an ex-serviceman, is accepted then it will create a class within a class without rational basis and, therefore, becomes arbitrary and discriminatory. It will also defeat the purpose for which the provision for reservation has been made."

230. We have already adverted to the decision of this Court in relation to the taboo, which is alleged by the petitioners against creating a class within a class.

231. We are of the view that the principles, which governed the legitimacy of the sub-class within a class, is based, essentially, on the very principles, which are discernible in regard to reasonable classification under Article 14. It is clear that the law does not interdict the creation of a class within a class absolutely. Should there be a rational basis for creating a sub-class within a class, then, it is not impermissible. This is the inevitable result of an analysis of the judgments relied upon by the petitioner themselves viz. *Sansar Chand Atri* v. *State of Punjab*[22]. The decisions, which have been relied upon by the Union and which we have adverted to, clearly indicate that a class within a sub-class, is indeed not antithetical to the guarantee of equality under Article 14.

232. Now, let us apply the principles, which are indisputable to the facts before us. Allottees are, indeed, financial creditors. They do possess certain characteristics, however, which appear to have appealed to the legislature as setting them apart from the generality of financial creditors. These features, which set them apart, have been clearly indicated in the stand of the Union. They are:

(*i*) Numerosity;

(*ii*) Heterogeneity;

(*iii*) The individuality in decision-making.

22 (2002) 4 SCC 154 : 2002 SCC (L&S) 770

233. Section 21(6-A) and Section 25-A, constitutionality of which has been upheld by this Court in *Pioneer*[1], would go to show that the debenture holders and security holders would be covered by Section 21(6-A)(*a*). As far as the allottees of a real estate project are concerned, they would be governed by Section 21(6-A)(*b*). Both these categories have a common feature. The distinguishing hallmark which separates them from the generality of the financial creditor is numerosity. In fact this aspect has been noticed by this Court in *Swiss Ribbons*[6] (para 49). By the sheer numbers of these creditors, they have come in for special treatment under Section 21(6-A). Another feature, which is to be noticed in this regard is heterogeneity. Lastly, there is also the aspect of individualised decision-making. Authorised representatives are contemplated in regard to these categories of financial creditors under Section 21(6-A). The manner in which these authorised representatives are to vote is also provided in Section 25-A. There is another aspect also to be noticed. Section 7 always contemplated the possibility of a joint application. The impugned amendments incorporating provisos 1 and 2 only builds upon the edifice erected already by way of Sections 21(6-A) and 25-A based on the experience of the legislature as also the report of the expert body. This certainly is a highly important input which persuades us further that the classification in regard to these classes of financial creditors does not represent forbidden classification.

234. Section 25-A of the Code, reads as follows:

> "**25-A.** ***Rights and duties of authorised representative of financial creditors***.—(1) The authorised representative under sub-section (6) or sub-section (6-A) 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.

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

6 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

(3-A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6-A) 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 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 12-A, 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."

235. We will expatiate on these aspects. In the case of the allottees of a real estate project, it is the approach of the legislature that in a real estate project there would be large number of allottees. There can be hundreds or even thousands of allottees in a project. If a single allottee, as a financial creditor, is allowed to move an application under Section 7, the interests of all the other allottees may be put in peril. This is for the reason that as stakeholders in the real estate project, having invested money and time and looking forward to obtaining possession of the flat or apartment and faced with the same state of affairs as the allottee, who moves the application under Section 7 of the Code, the other allottees may have a different take of the whole scenario. Some of them may approach the Authority under the RERA. Others may, instead, resort to the fora under the Consumer Protection Act, though, the remedy of a civil suit is, no doubt, not ruled out. Ordinarily, the allottee would have the remedies available under RERA or the Consumer Protection Act, as the more effective option. In such circumstances, if the legislature, taking into consideration, the sheer numbers of a group of creditors viz. the allottees of real estate projects, finds this to be an intelligible differentia, which distinguishes the allottees from the other financial creditors, who are not found to possess the characteristics of numerosity, then, it is not for this Court to sit in judgment over the wisdom of such a measure.

236. The enquiry, we realise, must not end with finding that there is an intelligible differentia, to be found in the numerosity, heterogeneity and individuality in decision-making of the allottees. The law further requires that the differentia must have a rational nexus with the object of the law.

237. The object of the law is clear. A radical departure was contemplated from the erstwhile regime, which was essentially contained in the Sick Industrial Companies (Special Provisions) Act, 1985, and which manifested a deep malaise, which impacted the economy itself. To put it shortly, the procedures involved under the Act, simply meant procrastination in matters,

where speed and dynamic decisions were the crying need of the hour. The value of the assets of the company in distress, was wasted away both by the inexorable and swift passage of time and tardy rate at which the forums responded to the problem of financial distress. The Code was an imperative need for the nation to try and catch up with the rest of the world, be it in the matter of ease of doing business, elevating the rate of recovery of loans, maximisation of the assets of ailing concerns and also, balancing the interests of all stakeholders. The Code purports to achieve the object of maximisation of the assets of corporate bodies, inter alia, which have slipped into insolvency. Present a default, which, no doubt, is not barred by time (subject to the power of the Authority under Section 5 of the Limitation Act), the insolvency resolution process can be triggered. It falls into two stages. In the first stage or the calm period, every attempt is contemplated to rescue the corporate debtor from falling into liquidation. No doubt the moratorium under Section 14 is inevitable.

238. The most significant feature of the Code is the seemingly inexorable time-limit, which is fixed under Section 12. On the application being admitted under Section 7(5), an interim resolution professional makes his appearance. In him, vest the powers to manage the affairs of the corporate debtor. He may be replaced by a resolution professional or he may be appointed as a resolution professional. The most striking feature of the Code is the constitution of the Committee of Creditors and the role, which it plays.

239. In short, the show is run by the resolution professional, subject to the control of the Committee of Creditors. The resolution of insolvency is essentially sought through the instrument of a resolution plan to be submitted by a resolution applicant. Various restrictions are cast, in regard to a resolution applicant, through the device of Section 29-A of the Code. A resolution plan is intended to resuscitate an ailing corporate debtor and keep it going as a going concern.

240. The importance of rescuing ailing businesses in the form of infusing new life in such concerns, cannot be understated. Its significance lies in various directions. There would be various categories of creditors, of which, the legislative choice appears to show some degree of preference for the financial creditors, particularly in the form of banks and financial institutions. One of the chief goals of the Code is to prevent the loss of the value of capital. If the recovery of the loan is effected at the earliest, it translates into the availability of the recovered capital for being lent to other entrepreneurs, and this is an aspect, which goes to the root of the matter. With every passing hour, not unnaturally, depreciation will claim its victim in the form of diminution of value of the assets. Should insolvency pass into the stage of liquidation, the loss is not only of the businesses concerned, but it also would represent a loss for the Nation. This is, undoubtedly, apart from the impairment of the interests of all stakeholders. The stakeholders would include the financial creditors and the operational creditors, as well. Employees of the failed business, would take a direct hit. Therefore, the Code accords the highest importance to speed in the matter of undergoing the process of insolvency.

241. Section 12 contemplates, in short, a maximum period of 330 days from the date of the insolvency commencement date, which we have already explained. Though, the word "mandatorily" has been struck down by this Court in the decision in *Essar Steel India Ltd. Committee of Creditors*[30], this Court has only balanced the interest of all concerned, by permitting an enlargement of the time, only in those cases, where the delay occurs not on account of the fault of the players concerned and it is based on the principle *actus curiae neminem gravabit*, which means that the act of Court shall prejudice no man. This Court has not undermined the timeline fixed by the legislature and, in fact, it has underlined the importance of conforming to the time-limit. Speed, indeed, continues to be of the essence of the Code.

242. The speed, with which the processes can be conducted and completed, is based on the volume of the litigation. The adjudicating authorities and the appellate bodies viz. NCLAT, are authorities under other enactments, as well. They are hard-pressed for time. The matters, which are covered by the Code, may present convoluted facts. The issues may bristle with complications, both in points of law and also facts. If, out of a large body of financial creditors belonging to a sub-group, as for instance allottees of a real estate project, were to be given the freedom to activise the Code, then, the possibility of multiple individual actions, is a spectre, which the legislature, must be presumed to be aware of. In other words, the legislature became alive to the peril of entire object of the Code, being derailed by permitting the individual players crowding the docket of the authorities under the Code, and resultantly, reviving the very state of affairs, which compelled the legislature to script a new dawn in this area of law. Instead, having regard to the numerosity, the legislature has thought it fit to adopt a balanced approach by not taking the allottee out of the fold of the financial creditors altogether. The allottee continues to be a financial creditor. All that is envisaged is the legislative value judgment that a critical mass is indispensable for allottees to be present before the Code, can be activised. The purport of the critical mass of applicants would ensure that a reasonable number of persons similarly circumstanced, form the view that despite the remedies available under the RERA or the Consumer Protection Act or a civil suit, the invoking of the Code is the only way out, in a particular case.

243. As held by this Court, in *Pioneer*[1], after having analysed, what awaits an allottee, moving an application under Section 7 of the Code, as contrasted with what he could get under RERA or what we note under the Consumer Protection Act and finding that the Code would be ordinarily activised by an allottee, when he feels that the solution lies in the remedy provided under the Code viz. replacing the management of the real estate project with a new management, this Court took notice of the fact that should insolvency resolution reach a stage of liquidation, being unsecured creditors, the allottees would not even get the amount, which they have invested. In fact, after insertion of the

30 *Essar Steel India Ltd. Committee of Creditors* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

Explanation to Section 33(2) at any time after a Committee of Creditors is constituted such an eventuality is possible. In short, numerosity of the allottees of a real estate project, necessitated, in the view of the legislature, as gleaned from the provisions, to condition an absolute right, which does have a clear rational nexus with the object sought to be achieved.

244. We have noticed, one of the objects is the balancing of the interests of all stakeholders. By imposing a threshold limit of either hundred allottees or if the number of allottees going by the criteria of one-tenth of the allottees is, even less than hundred, then, the said number of allottees must agree to invoke the Code. This is again, based on the intelligible differentia of heterogeneity. By heterogeneity, is meant, differences between a seemingly homogeneous group. All allottees of a real estate project form a class. All of them have stakes in the prompt and effective completion of the real estate project.

245. We must proceed on the basis that what the allottee would legitimately look forward is the completion of the project and the handing over of the possession of the flat or apartment in due time. The achievement of this object, which must be attributed reasonably to each and every allottee, as his goal, may be possible in the views of different allottees differently.

246. As noted, there is a plurality of remedies, which the law provides. More importantly, the outcome of activising the Code, is almost like an uncertain wager. The outcome of invoking the Code by individual allottees would be apart from clogging the dockets of the adjudicating authorities with even more voluminous files leading to greater delay, that at the instance of such individual allottees, what would be perceived as an avoidable calamity, is perpetuated. In other words, while a vast majority of allottees may see reason in either giving time and reposing faith in existing management of real estate project or successfully invoking the other remedies available to them, an individual allottee, out of the heterogeneous group, would throw the spanner in the works and bring the entire real estate project itself to a possible doom. Under the newly added Explanation to Section 33(2), at any time, after the constitution of the Committee of Creditors, there can be liquidation.

247. The third distinguishing feature, which has been projected by the Union, is the difference in individuality in decision-making process, attributed to the allottees. This means that unlike a bank or a financial institution, where the decision-making process is more institutionalised, an individual allottee, left free to file an application under Section 7, would exhibit a high level of subjectivity.

247.1. As the learned ASG points out, and which is also part of the argument, based on both, numerosity and heterogeneity, what Parliament has instated upon is, the presence of the commendable value of exhibiting concern for the other allottees, who may think completely differently about the wisdom of invoking the Code. Here again, this distinguishing feature, which becomes an intelligible differentia, in the view of the legislature, and which cannot be shown to be demonstrably a mere pretence, it bears a rational nexus with the objects of the Code, which we have already delineated.

248. To recapitulate [the submissions], the individual allottee, with a high level of subjectivity in decision-making, may take a plunge at invoking the Code, without having a more global view of the consequences, which will follow. Any such attempt would only be dubbed as frivolous. This attempt by individual allottees would have the following consequences:

(*i*) It would crowd an already heavy docket;

(*ii*) It would consequently slow down the processes under the Code, even with respect to matters, which may be more genuine and require greater and more timely attention;

(*iii*) It will defeat the object of balancing the interests of all stakeholders. We must indicate that the aspect about delaying of the processes, when allottees are pulling at each other, having conflicting views about the appropriateness of the Code being invoked, is the clear prospect of allottees coming into collision in the fora by way of opposing the application, would be an undeniable reality. This is despite the fact that it could always be argued by the individual allottee that what the law mandates in Section 4, is only the proving of the fact of default in a sum of Rs 1 crore, as things stand. It is also the argument of the petitioners that since what is relevant for the other financial creditors, is proving the default of Rs 1 crore, the insistence on a threshold for allottees alone, makes it discriminatory. Allottees being financial creditors, must be assumed to know what is in their best interest. What is given through one hand, cannot be taken away by another, is another allied submission. It is also contended that there is no empirical evidence of their being misused, after the judgment of this Court in *Pioneer*[1], upholding the rights of the allottees, including debunking the argument that a lone ranger will end up abusing the system.

248.1. This aspect, in fact, is countered by the learned ASG, by reeling out facts. Between 2016, when the Code was enacted and June 2018, there were 241 applications by the allottees. In the aftermath of the amendment i.e. from 6-6-2018, there was a sudden spurt of applications by allottees (2201 cases in a short span of about eighteen months). This is again sought to be contrasted by a mere 130 applications, which came to be filed from 29-12-2019, over a period of eight months till August 2020. There is also the case for the Union that an expert body viz. the Committee has recommended for the threshold. This recommendation was born out of experience of the pitfalls, which follow, allowing a completely free hand to individual allottees to move the application. We are not impressed by reference to the discordant notes struck, both by reason of the nature of jurisdiction we exercise as also the merit we see otherwise in the rationale behind the law.

249. We see considerable merit in the stand of the Union. This is not a case where there is no intelligible differentia. The law under scrutiny is an

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

economic measure. As laid down by this Court, in dealing with the challenge on the anvil of Article 14, the Court will not adopt a doctrinaire approach. Representatives of the people are expected to operate on democratic principles. The presumption is that they are conscious of every fact, which would go to sustain the constitutionality of the law. A law cannot operate in a vacuum. In the concrete world, when the law is put into motion in practical experiences, bottlenecks that would flow from its application, are best envisaged by the law givers. Solutions to vexed problems made manifest through experience, would indeed require a good deal of experimentation, as long as it passes muster in law. It is no part of a court's function to probe into what it considers to be more wise or a better way to deal with a problem.

250. In economic matters, the wider latitude given to the law giver is based on sound principle and tested logic over time. In fact, though there is no rigid separation of powers in India, as it obtains in the United States, there is broadly separation of powers, which in fact, has been recognised as a basic feature of the Constitution (see *Kesavananda Bharati* v. *State of Kerala*[69]).

251. In any case, the Court errs in the judicial veto of legislation, in a manner of speaking, it is usurping the power, which is earmarked to another organ of the State viz. the legislature. The large number of validating acts would produce undeniable proof of the same.

Allottees v. Operational creditors

252. One of the contentions raised by the petitioners is as regards the hostile discrimination between petitioner (allottees) and operational creditors. The advantages which, financial creditors have over operational creditors is referred to.

253. In regard to the advantages, which the financial creditors enjoyed over operational creditors, which constituted also differences between them, the following are highlighted, apart from the difference in procedure, by which, the operational creditor could stand ousted, if the corporate debtor could set up a plausible dispute:

253.1. Firstly, it is pointed out that the financial creditor is on the Committee of Creditors and manages the affairs of the debtor with the resolution professional; the operational creditors have no such power.

253.2. Financial creditors decide who is to be the resolution professional.

253.3. The financial creditors approve or disapprove the resolution plan.

253.4. Almost, all, major decisions require the sanction of financial creditors.

253.5. Financial debts enjoy priority over third party, operational claims under Section 53 in liquidation. It is despite all this, post the impugned amendment, a large number of financial creditors covered by the provisos are required to initiate a proceeding. It is palpably arbitrary. The financial creditors in the category of the allottees are now worse off.

69 (1973) 4 SCC 225

254. As far as the argument relating to violation of Article 14 qua operational creditor is concerned, we are of the view that there is no merit in the same. Quite apart from the fact that under the Code they are dealt with under different provisions and a different procedure is entailed thereunder, even the decisions of this Court relied on by the allottees have treated the financial creditor differently from the operational creditor.

255. In *Innoventive Industries Ltd.* v. *ICICI Bank*[47], this Court elaborately analysed the scheme of the Code and the distinction between the financial creditors and the operational creditors. This Court noticed that in the case of application, under Section 8, by an operational creditor, the corporate debtor within ten days of the notice, issued under Section 8 can bring to the notice of the operational creditor, the existence of the dispute or a record of a proceeding in a court or before an arbitrator. This exercise, successfully carried out by the corporate debtor, will enable it to get out of the purview of the Code. In case of a financial creditor, if the debt is due, that it is payable unless it is interdicted by some law or it has not become due, the default, contemplated under the Code, has occurred and the application, filed by the financial creditor, must be admitted and the matter proceeded with.

256. In *Swiss Ribbons*[6] the classification in controversy was between operational and financial creditor. Apart from dealing with the policy behind the Code and the reasons which led to it, this Court inter alia held as follows: (SCC pp. 64-65, 68-69 & 111, paras 42-43, 49-51 & 119)

> "*42*. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.
>
> *43*. A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a "default" occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the adjudicating authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the adjudicating authority has to be satisfied that a default has occurred, when it may, by order, admit the

47 (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356
6 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the adjudicating authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected.

* * *

49. It is obvious that debenture-holders and persons with home loans may be numerous and, therefore, have been statutorily dealt with by the aforesaid change made in the Code as well as the Regulations. However, as a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor.

50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

* * *

119. It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail." (emphasis supplied)

It must be remembered that the principles laid down came to be made in the context of challenge to the provisions of the Code pointing out violation of Article 14 insofar as the classification between operational creditor and financial creditor was alleged to be contrary to Article 14.

257. In *Pioneer*[1] the case and the decision is closer to the facts before us. The challenge was to the amendments to the Code including the Explanation added to Section 5(8) to the Code. As we have noted, the Explanation purports to clarify that any loan raised from an allottee under the real estate project is to be deemed to be an amount having commercial effect of borrowing. Apart from the said provision, there were other provisions also called in question. This Court proceeded to find inter alia as follows:

257.1. The amendment by way of insertion of Explanation in Section 5(8)(*f*) was only clarificatory of the existing law. The allottees of flats and apartments were subsumed within the provisions of Section 5(8)(*f*). In other words, an allottee was a financial creditor. After a conspectus of the provisions of the Code and the RERA, this Court also held that the RERA and the Code co-

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

exist and in the event of the confrontation, the Code will hold sway. RERA was thus found to be not a special statute which will override the general statute, namely, the Code.

257.2. Dealing with the challenge to the amendment to the Code on the ground that there is violation of Article 14 on the basis that the equals are being treated unequally and unequals are being treated equally this Court found it unacceptable. This Court found the amendment to be an economic measure.

257.3. This Court also pointed out the perils associated with an allottee pursuing remedy under the Code in para 41 and thereafter went on to hold as follows: (*Pioneer case*[1], SCC pp. 490-92, paras 42-43)

> "*42*. It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code. It was vehemently argued by the learned counsel on behalf of the petitioners that if at all real estate developers were to be brought within the clutches of the Code, being like operational debtors, at best they could have been brought in under this rubric and not as financial debtors. Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the homebuyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money—the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees. In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is

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significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains from the time value of money. The fact that the allottee makes such payments in instalments which are coterminous with phases of completion of the real estate project does not any the less make such payments as payments involving "exchange" i.e. advances paid only in order to obtain a flat/apartment. What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project. One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information provided by the real estate developer compulsorily under RERA. This information, like the information from information utilities under the Code, makes it easy for homebuyers/allottees to approach NCLT under Section 7 of the Code to trigger the Code on the real estate developer's own information given on its webpage as to delay in construction, etc. It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real estate developers as financial debtors. This being the case, it is clear that there cannot be said to be any infraction of equal protection of the laws.

43. Shri Shyam Divan relying upon *Nagpur Improvement Trust* v. *Vithal Rao*[4], SCC para 26 and *Subramanian Swamy* v. *CBI*[65], SCC paras 44, 58 and 68 argued that the object of the amendment is itself discriminatory in that it seeks to insert into a "means and includes" definition a category which does not fit therein, namely, real estate developers who do not, in the classical sense, borrow monies like banks and financial institutions. According to him, therefore, the object itself being discriminatory, the inclusion of real estate developers as financial debtors should be struck down. We have already pointed out how real estate developers are, in substance, persons who avail finance from allottees who then fund the real estate development project. The object of dividing debts into two categories under the Code, namely, financial and operational debts, is broadly to sub-divide debts into those in which money is lent and those where debts are incurred on account of goods being sold or services being rendered. We have no doubt that real estate developers fall squarely within the object of the Code as originally enacted insofar as they are financial debtors and not operational debtors, as has been pointed out hereinabove. So far as unequals being treated as equals is concerned, homebuyers/allottees can be assimilated with other individual financial creditors like debenture-holders and fixed-deposit holders, who have advanced certain amounts to the corporate debtor. For example, fixed-deposit holders, though financial creditors, would be like real estate allottees in that they are unsecured creditors. Financial contracts in the case of these individuals need not

4 (1973) 1 SCC 500
65 (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36

involve large sums of money. Debenture-holders and fixed-deposit holders, unlike real estate holders, are involved in seeing that they recover the amounts that are lent and are thus not directly involved or interested in assessing the viability of the corporate debtors. Though not having the expertise or information to be in a position to evaluate feasibility and viability of resolution plans, such individuals, by virtue of being financial creditors, have a right to be on the Committee of Creditors to safeguard their interest. Also, the question that is to be asked when a debenture-holder or fixed-deposit holder prefers a Section 7 application under the Code will be asked in the case of allottees of real estate developers — is a debt due in fact or in law? Thus, allottees, being individual financial creditors like debenture-holders and fixed-deposit holders and classified as such, show that they are within the larger class of financial creditors, there being no infraction of Article 14 on this score."

258. Thus, we notice the following aspects: in *Swiss Ribbons*[6] on the basis of the challenge involved to the legislation, this Court noted that a financial creditor can trigger the Code either by itself or jointly with other financial creditors when a default occurs. The procedure in regard to operational creditors is however different. At the stage prior to admission of the application, it is open to the corporate debtor to show that the debt is disputed in which event the application stands rejected. *In para 49, this Court took the view that the debenture holder and the persons with home loans may be numerous and therefore have been statutorily dealt with by the changes made in the Code*. But as a general rule it was found that financial creditors which involved banks and financial institutions will be certainly smaller than the operational creditors. Further it was held that most financial creditors particularly banks and financial institutions are secured creditors whereas most operational creditors are unsecured.

259. In para 50 of *Swiss Ribbons*[6] this Court distinguished between secured and unsecured creditors and noted that a divide existed from the earliest of the Companies Acts both in UK and in India. Financial creditors generally lend on a term loan or for working capital. Operational creditors are creditors on account of supply of goods and services. The sums involved in the financial contracts are generally large sums in contrast with amounts involved in operational credit which are generally less. Repayment schedules are different. Other distinctions are noticed between the two. It is further found that even more importantly financial creditors are involved with the assessing of viability of the corporate debtor from the very beginning. This enables the financial creditor to indulge in restructuring of the loan.

260. Preserving the corporate debtor as a going concern while securing the highest recovery for all creditors is the objective of the Code. Financial creditors were therefore clearly different from operational creditors. There is obviously

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an intelligible differentia between the two which has the direct relation with the object to the object which is to be achieved by the Code.

261. This Court in *Swiss Ribbons*[6] further noticed in the context of challenge to Section 53 of the Code which deals with the manner of distribution of assets of corporate debtor in liquidation proceedings, that there is difference in relative importance between financial debt which are secured and operational debts which are unsecured. The distinction was found in the relative importance of two types of debts when it comes to the objects sought to be achieved. This Court was of the view when repayment takes place in regard to financial creditors it leads to fresh infusion of capital into the economy which results in the money being available to be lent to other businessmen.

262. In *Swiss Ribbons*[6], dealing with the challenge to the provisions based on Article 14 of the Constitution of India, this Court adopted the following reasoning. Financial creditors were essentially identified as being banks and other financial institutions. Banks and financial institutions, are generally secured creditors. The procedure adopted by these institutions, right from the time the loan is applied for, and it being processed, the largeness of the sums involved, the method of repayment, the rearrangement of the repayment of the loan, the study conducted, in fact, before the loan is given the control, which the banks and the financial institutions retain over the debtor, and finally, the importance of the repayment to such institutions, for the economic stability and progress of the country, by way of the recovered amounts being infused a fresh capital for other entrepreneurs, was contrasted with the operational debtors, who were, in the first place, unsecured creditors, generally. Operational creditors are creditors to whom the corporate debtor owes money for having availed goods and services. The features which mark out the banks and financial institution were found inapplicable to the operational creditors.

263. Coming to *Pioneer*[1], this Court has recognised that allottees under a real estate project are unsecured creditors (*see* para 61, wherein it is so found). Equally, it is noted in para 43 as follows: (SCC p. 492)

> "*43.* … For example, fixed-deposit holders, though financial creditors, would be like real estate allottees in that they are unsecured creditors."

264. It is further found that financial contracts in the case of these individuals, (allottees) need not involve large sums of money [*see* para 43 of *Pioneer*[1]].

265. It could be urged, therefore, that the real foundation on the basis of which, this Court justified the difference in procedure under Section 7 on the one hand and Sections 8 and 9 on the other hand between financial creditors and operational creditors, is that after conflating financial creditors with banks and financial institutions and noting them to be secured creditors, lending large sums of money, both of which features are not present in the case of an allottee

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under a real estate project as allottees remain unsecured creditors and also their contract need not involve large sums of money, they should, therefore, fall to be treated at least like the operational creditors with whom they bear the greater resemblance. What is complained of is before the impugned amendments, allottees being treated as part of the larger group of financial creditors, could invoke the provisions of Section 7 singly and without having to garner the support of any fellow traveller. The operational debtor could also, likewise, file such an application without having to search around for kindred souls. After the amendment, however, the advantageous position which was occupied by the allottee as a financial creditor, has been extinguished and the allottee is worse off than even an operational creditor. This is for the reason that a single operational creditor could all by himself, activise the Code whereas the allottee is left far behind. This amounts to treating the allottee with discrimination.

266. While it may be true that the allottee is not a secured creditor and he is not in the position of a bank or the financial institution, the contentions of the petitioners that there is hostile discrimination forbidden by Article 14, is untenable.

266.1. There cannot be any doubt that intrinsically a financial creditor and an operational creditor are distinct. An operational creditor is one to whom money is due on account of goods or services supplied to the debtor. The financial creditor on the other hand, is so described, on account of there being the element of borrowing. This distinction is indisputable. The other distinctions are articulated with clarity in para 42 of the judgment of this Court in *Pioneer*[1] which we have already adverted to.

266.2. As noticed by this Court, what is unique to the real estate developer vis-à-vis operational debts is that the developer is the debtor as an allottee funds his own apartment by paying amounts in advance. On the other hand, in case of operational debt, the person who has supplied the goods and services, becomes the creditor and the corporate debtor is one who has availed such services. Another distinction noticed is that an operational creditor has no interest or stake in the corporate debtor. The allottee is, on the other hand, vitally concerned with the financial health of the corporate debtor. Should financial ruin occur, the real estate project will come to a naught. Should such an event take place also, the allottee would not be in a position to either claim or get compensation or even refund with interest.

266.3. Thirdly, as again noticed by this Court, there is no consideration for the time value of money in the operational debt. This is not so in the case of an allottee. The non-availability of documentary evidence in respect of operational debts as against information available under the RERA qua real estate developers is yet another feature which was noticed in *Pioneer*[1] dealing with the differences between an operational debtor and an allottee.

267. The operational debtor is concerned with the payment of the amount due to it for the goods and services supplied. When an allottee invests money in a real estate project, his primary and principal concern is that the project

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is completed and he gets possession of the apartment or the flat. The problem really arises as there are many stakeholders whose interests are affected. It cannot be in dispute that under the law, an allottee can seek remedies under the RERA. An allottee can also seek remedies under the Consumer Protection Act or even file a suit. No doubt, Section 71 of the RERA permits a person who has filed a complaint in respect of matters governed by Sections 12, 14, 18 and 19 of RERA to withdraw the complaint and file the same before the Adjudicating Officer under RERA. There are a large number of cases where allottees seek refuge either under the RERA or under the Consumer Protection Act.

268. An action under the Code by way of an application under Section 7 is an action in rem. The recovery of the amounts paid is not what is primarily contemplated under the Code. In para 41 of the judgment of this Court in *Pioneer*[1], this Court has painted the rather dismal but realistic picture of the fruits of litigation launched under Section 7 by an allottee of a real estate project. This Court has gone on to hold that only such allottee who has completely lost faith in management would come under Section 7 in hope that some other developer will take over and complete the project. At the same time, this Court noticed that such an adventure would be in the teeth of an impending peril, that should things do not go as planned, corporate demise follows and the allottee would stand reduced to receiving whatever little may remain and found on the basis that he is a mere unsecured creditor in the order of priority prescribed under Section 53 of the Code. This Court has painted a more rosy picture for an allottee approaching under the RERA, as there is a great likelihood, it is noted that the project could be completed or the full amount of refund together with penalty is awarded.

269. Thus, the vires of the impugned provisions must be judged without turning a blind eye to the distinction between the wisdom and the legislative value judgment behind the statute being immune from judicial scrutiny on the one hand and a hostile discrimination falling foul of the mandate of equality under Article 14, being fatal to the statute.

270. In this case, while it may be true that the allottees are unsecured creditors and in that regard, they are similar to the operational creditors and it also may be true that many contracts under real estate projects, may not involve large sums as the subject-matter of advances by banks and other financial institutions, the similarity between the two ends there. What is of greater importance is the distinctions which we have already noted and the most vital point which sets them apart, in the matter of pronouncing on the vires of the provisos under Section 7 is the numerosity of the allottees, and what is more not being homogeneous in what they want in a particular situation, since the law has indeed endowed the allottees with different remedies, having different implications, be it under the Consumer Protection Act or under RERA. If the legislature felt that having regard to the consequences of an application under the Code, when such a large group of persons, pull at each other, an additional

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threshold be erected for exercising the right under Section 7, certainly, it cannot suffer a constitutional veto at the hands of Court exercising judicial review of legislation. In fact, this Court in *Pioneer*[1] was invited to hold that the allottees were more like operational creditors than financial creditors and many aspects were pointed out and this Court after referring to the differences pointed out to it in a tabular form in [para 48], rejected the contentions. The rejection is supported with reference to the findings in *Swiss Ribbons*[6] which is alluded to in para 32 of *Pioneer*[1].

271. It is to be noted also that it is not a case where the right of the allottee is completely taken away. All that has happened is that a half-way house is built between extreme positions viz. denying the right altogether to the allottee to move the application under Section 7 of the Code and giving an unbridled licence to a single person to hold the real estate project and all the stakeholders thereunder hostage to a proceeding under the Code which must certainly pass inexorably within a stipulated period of time should circumstances exist under Section 33 into corporate death with the unavoidable consequence of all allottees and not merely the applicant under Section 7 being visited with payment out of the liquidation value, the amounts which are only due to the unsecured creditor.

272. It must be remembered that, the point of distinction, between a financial creditor in this case, the allottees of a real estate project and the operational creditors, as contained in Section 7 on the one hand and Sections 8 and 9 are preserved. In other words, the operational creditor still has to cross the threshold of not being shut off from the application not being processed in the teeth of the defence allowed to the corporate debtor in regard to an operational creditor. All that has happened is the legislature in its wisdom has found that the greater good lies in conditioning an absolute right which existed in favour of an allottee by requirements which would ensure some certain element of consensus among the allottees. It must be remembered that the requirement is a mere one-tenth of the allottees. This is a number which goes to policy and lies exclusively within the wisdom of the legislature. Hence, we have no hesitation in repelling the contentions in this regard.

Debenture holders/Security holders: The challenge to the first impugned proviso

273. Shri Rana Mukherjee, learned Senior Counsel in WP (C) No. 579 of 2020 would submit that the first proviso appears to be clearly the result of a mistake. It is contended that the target of the legislature was the problem created by individual allottees invoking Section 7 of IBC. As far as his clients are concerned, they are debenture holders and other security holders to whom debt is owed by the corporate debtor. There is no rational basis for imposing a threshold requirement upon the security holders. Reference is made to the mention of "class".

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274. The learned counsel would commend to us the principle of absurdity. It is pointed out that the principle of absurdity should guide this Court to read down the first proviso to not apply it in regard to security holders and debenture holders. In this regard our attention has been drawn to the decision of this Court in *Vasant Ganpat Padave* v. *Anant Mahadev Sawant*[11]. It is further brought to the notice of the Court that the provision suffers from manifest arbitrariness. Counsel relies upon the judgment of this Court in *Shayara Bano* v. *Union of India*[40] decision which witnessed the striking down of the law relating to triple talak. Per contra, it is *the stand* of the Union that Sections 21(6-A)(*a*) and (*b*) read with Section 25-A of the Code contemplated certain classes of financial creditors as falling in a separate class by themselves.

275. It is the stand of the Union that in regard to certain classes of creditors, financial creditors i.e. having regard to the large numbers, they were to be treated differently. It is accordingly that with the insertion of sub-section (6-A) in Section 21 with clause (*a*) dealing with security holders including debenture holders which would cover the petitioners that an authorised representative was to be appointed to be on the Committee of Creditors

276. Section 25-A provides for the rights and liabilities of the authorised representatives who include the authorised representatives of debenture holders, security holders and finally the allottees. As far as allottees are concerned, it is the stand of the Union that they would fall under Section 21(6-A)(*b*) whereas the security holders including debenture holders to whom the corporate debtor owes money would fall under Section 21(6-A)(*a*). In regard to both these categories, in other words, the feature which stands out is the large number of the creditors as also the large number of allottees. No doubt, in the case of allottees there are other distinguishing features as well. The interplay of the Consumer Protection Act, the provisions of the Real Estate Regulation Act, the balancing of the interests of the allottees in the sense of the optimal securing of the stake of the allottees in the continuance of the real estate project itself would only strengthen the classification further in regard to allottees. However, that is not to say that in regard to the debentures and security holders they can individually be permitted to set in motion CIRP. In regard to the question of availability of information with respect to similarly placed debenture holders or security holders, the contention of the Union is that under Section 88 of the Companies Act information is generated regarding debenture holders and security holders. Anyone can inspect the records of the company and glean information with which application can be moved under the first proviso to Section 7(1). In regard to them also it is the case of the Union that the principle of heterogeneity applies. Equally, it is the case of the Union that the individual creditor in the said class would make a highly individualised and subjective decision in regard to whether an application under Section 7 must be moved and this is sought to be contrasted with the institutional decision-making which would come into play in regard to banks and other financial institutions.

11 (2019) 19 SCC 577 : (2020) 4 SCC (Civ) 447 : (2019) 12 Scale 579
40 (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277

277. We are of the view that the first proviso is invulnerable. As pointed out by the learned Additional Solicitor General with the insertion of sub-section (6-A) in Section 21 as also Section 25-A, the intention of the legislature is to treat the financial creditors differently. They are marked by unique features in terms of numerosity and heterogeneity is clear. Section 21(6-A)(*a*) reads as follows:

> "**21. (6-A)** 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;"

278. Section 25-A provides as follows:

> "**25-A.** ***Rights and duties of authorised representative of financial creditors***.—(1) The authorised representative under sub-section (6) or sub-section (6-A) 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.
>
> (3-A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6-A) 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 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 12-A, the authorised representative shall cast his vote in accordance with the provisions of sub-section (3)."

279. These provisions were unsuccessfully challenged before this Court as evident from the decision in *Pioneer*[1]. As pointed out on behalf of the Union, in the said case the challenge was mounted by the promoters of real estate projects.

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

These provisions have been accepted by creditors like the petitioners covered by sub-section (6-A).

280. The impact of the insertion of sub-section (3-A) in Section 25-A is to be noticed.

280.1. As already seen Section 25-A, inter alia, deals with the exercise of rights and the liabilities of authorised representative of creditors like debenture holders and allottees. After the insertion of sub-section (3-A) in Section 25-A, the majority of the creditors of a class is permitted to call the shots. Its view, in other words, will hold sway. This is subject to the Code otherwise. The legislative understanding is clear that in regard to such creditors bearing the hallmark of large numbers they are required to be treated differently. If they are not treated differently it would spell chaos and the objects of the Code would not be fulfilled. It is an extension of this basic principle which has led to the insertion of the impugned proviso. Insisting on a threshold in regard to these categories of creditors would lead to the halt to indiscriminate litigation which would result in an uncontrollable docket explosion as far as the authorities which work the Code are concerned. The debtor who is apparently stressed is relieved of the last straw on the camel's back, as it were, by halting individual creditors whose views are not shared even by a reasonable number of its peers rushing in with applications. Again, as in the case of the allottees, this is not a situation where while treating them as financial creditors they are totally deprived of the right to apply under Section 7 as part of the legislative scheme.

280.2. The legislative policy reflects an attempt at shielding the corporate debtor from what it considers would be either for frivolous or avoidable applications. What we mean by avoidable applications is a decision which would not be taken by similarly placed creditors keeping in mind the consequences that would ensue not only in regard to persons falling in the same category but also the generality of creditors and other stakeholders.

280.3. All that the amendment is likely to ensure is that the filing of the application is preceded by a consensus at least by a minuscule percentage of similarly placed creditors that the time has come for undertaking a legal odyssey which is beset with perils for the applicants themselves apart from others.

280.4. As far as the percentage of applicants contemplated under the proviso it is clear that it cannot be dubbed as an arbitrary or capricious figure. The legislature is not wanting in similar requirements under other laws. The provisions of the Companies Act, 2013 and its predecessors contained similar provisions.

280.5. Allowing what is described as "lone ranger" applications beset with extremely serious ramifications which are at cross-purposes with the objects of the Code. This is apart from it in particular spelling avoidable doom for the interest of the creditors falling in the same categories. The object of speed in deciding CIRP proceedings would also be achieved by applying the threshold to debenture holders and security holders. The dividing line between wisdom

or policy of the legislature and limitation placed by the Constitution must not be overlooked.

281. The contention based on the applicability of the absurdity doctrine on the principle that the result which, "all mankind without speculation would unite in rejecting" can have no application to the provision. The Code and object of the Code and the unique features which set apart the creditors involved in this case from the generality of the creditors, the challenge being to an economic measure and the consequential latitude that is owed to the legislature renders the principle of absurdity wholly inapposite.

282. There is no scope also having regard to their identification in para 49 of *Pioneer*[1] with reference to their numerosity. They cannot be heard to complain about their inclusion within the terms of the 1st proviso. Also Section 21(6-A)(*a*) read with Section 25-A puts the matter beyond the pale of doubt.

283. There is no basis for the petitioners to draw any support from the decision of this Court in *Vasant Ganpat Padave* v. *Anant Mahadev Sawant*[11]. The facts in the said case presented a clear situation which invited the application of the principle.

The challenge to Explanation II to Section 11 of the Code

284. The petitioner, in Writ Petition No. 267 of 2020, challenges the aforesaid Explanation.

285. As already noticed, the Amendment Act, 2020 received the assent of the President of India on 13-3-2020 and it is deemed to have come into force on 28-12-2019 (be it remembered that the Ordinance, inserting the same Explanation, had been brought into force on 28-12-2019).

286. The case of the petitioner, in brief, is as follows: Respondent 3 is a subsidiary company of the petitioner. Respondent 2 is also a corporate body. There were certain transactions between Respondents 2 and 3. Alleging default by Respondent 3, Respondent 2 had filed an application under Section 9 (the application to be filed by an operational creditor) against Respondent 3. Respondent 2 had filed the application under Section 9 of the Code on 24-8-2018. It is the further case of the petitioner that Respondent 2, on the other hand, was itself undergoing a CIRP and the CIRP application had been admitted against the second respondent on 12-9-2017. It is pointed out that Respondent 3 has taken a contention that Respondent 2 was disentitled to file an application under Section 11(*a*) of the Code as Respondent 2 was itself facing a CIRP.

287. It is further contended that during the pendency of the proceeding against the second respondent, the adjudicating authority has passed an order on 19-11-2018 to liquidate Respondent 2 under Section 34 of the Code. This development invites the wrath of Section 11(*d*) as well. However, the adjudicating authority had, on 24-8-2019, erroneously admitted the application

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1

11 (2019) 19 SCC 577 : (2020) 4 SCC (Civ) 447 : (2019) 12 Scale 579

filed by Respondent 2 under the Code. An appeal was carried by the petitioner against the same, which is pending. It is while so, that the Ordinance came to be promulgated on 28-12-2019 adding Explanation II to Section 11 vis-à-vis followed by passing of the impugned, Amending Act on similar lines.

288. The contention of the petitioner can be summed up as follows: An Explanation cannot modify the main provision to which it is an Explanation. Section 11(*a*) and Section 11(*b*) unequivocally bar a corporate debtor from filing a CIRP application qua another corporate debtor under Section 7 and Section 9 of the Code. Support is sought to be drawn from the exposition of the law qua an explanation laid down in *S. Sundaram Pillai* v. *V.R. Pattabiraman*[70] and *Sonia Bhatia* v. *State of U.P.*[71] It is complained that the label of an Explanation has been used to substantially amend, which is an arbitrary and irrational exercise of power.

289. It was pointed out that the word "includes" in Explanation I to Section 11 would indicate that an application for CIRP is barred not only against itself but also against any other corporate debtor when the applicant corporate debtor is found placed in circumstances expressed in Section 11. It is further contended that the impugned amendment, effectively repeals Sections 11(*a*) and 11(*d*). If the purport of the Explanation, which is impugned, is that the intention of the law was to only bar an application for CIRP by a corporate debtor against itself, then, it will be unworkable and practically impossible. Explanation II is manifestly arbitrary. Support is sought to be drawn from *Shayara Bano*[40]. It was further contended that the amendment cannot be used retrospectively and take away the vested right. In fact, it is contended that a clarificatory amendment is prospective but Explanation II is in reality a substantive provision. Attempt is made to lay store by the judgment of this Court in *Virtual Soft Systems Ltd.* v. *CIT*[72], wherein this Court was dealing with Section 271 of the Income Tax Act, 1961, in which, an Explanation was added. The section in question, was a penal provision.

290. It was further contended that the law has been settled by National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) that a corporate debtor, covered by Sections 11(*a*) and 11(*d*), cannot file application for CIRP against another corporate debtor. The impugned amendment cannot be used retrospectively in cases instituted before 28-12-2019, which is the day on which the impugned amendment came into force. It is submitted that the amendment is violative of Article 14 and the relevant law.

291. Respondent 2, in its submissions, contends as follows: Respondent 3 owes Respondent 2, more than a sum of Rs 26 crores, which is 20% of the liquidation value of Respondent 2. It is further contended that the notes on clause explains the purpose of the provision. The amendment is defended as

70 (1985) 1 SCC 591
71 (1981) 2 SCC 585
40 *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277
72 (2007) 9 SCC 665

reasonable and not arbitrary. It is pointed out that it will be contrary to the object of the Code if the debt due to the corporate debtor cannot be secured. The duties of the resolution professional under the Code to protect and preserve the assets of the corporate debtor are pointed out. An order of the appellate adjudicating authority in support of Respondent 2 is also pointed out. Explanation II, it is pointed out, only clarifies what was always the correct position.

292. The learned Additional Solicitor General, appearing on behalf of the Union of India would also support the amendment. Reference is made to the Report dated February 2020 of the Insolvency Law Committee, which, inter alia, reads as follows:

> "**6. *Eligibility of a corporate debtor to initiate CIRP against other persons***
>
> 6.1. Under Sections 11(*a*) and (*d*) of the Code, corporate debtors "*undergoing a corporate insolvency resolution process*" and "*in respect of whom a liquidation order has been made*" are not permitted to file an application to initiate CIRP. It was brought to the Committee that this has created confusion over whether a corporate debtor which is undergoing CIRP or liquidation process, may file an application to initiate CIRP against other corporate persons who are its debtors.
>
> 6.2. The Committee noted that different adjudicating authorities had taken different approaches regarding the right of a resolution professional to initiate CIRP against other corporate debtors. On the one hand, the right of the resolution professional to initiate CIRP against other corporate debtors was upheld by relying on the statutory duty of the resolution professional to recover outstanding dues of the corporate debtor under Section 25(2)(*b*). On the other hand, the resolution professional had been prevented from doing so, on the basis of a literal interpretation of Section 11(*a*). While the appellate authority had dismissed the appeals filed against some of these orders without endorsing either of these approaches, in *Abhay N. Manudhane* v. *Gupta Coal (India) (P) Ltd.*[73], it had taken the latter approach and denied the liquidator the right to file an application to initiate CIRP against other corporate debtors [in the context of Section 11(*d*)].
>
> 6.3. However, according to the Notes on Clauses to Section 11, the section was enacted to prevent '*repeated recourse to the corporate insolvency resolution process in order to delay repayment of debts due or to keep assets out of the reach of creditors*' and to "*ensure finality of the liquidation order*" by preventing a corporate debtor to initiate CIRP after a liquidation order is passed. Thus, it is clear that Section 11 aims at preventing a corporate debtor from abusing the statutory process under Chapter II of Part II of the Code by repeatedly initiating CIRP against itself or by initiating CIRP even after a liquidation order is passed against it. The Committee discussed that if Section 11 were instead, interpreted to prevent the resolution professional or the liquidator of a corporate debtor from

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initiating CIRP against other defaulting entities, it would cause serious detriment to the ability of a corporate debtor to recover its dues from its debtors." (emphasis in original)

Analysis

293. Before we address the argument with regard to the provisions of the Code, it is necessary to cull out the principles applicable in regard to the function of an Explanation.

294. A Bench of three learned Judges, in an off quoted judgment in *S. Sundaram Pillai*[70] came to elaborately examine the scope of an Explanation. Incidentally, the Court had to deal with an Explanation which was appended to a proviso and, therefore, its judgment also deals with the principles applicable in regard to a proviso. On a conspectus of various decisions, this Court made a survey of the earlier case law. We may refer to paras 49, 50, 52 and, finally, its conclusions in para 53 as follows: (SCC pp. 612-13)

"*49*. The principles laid down by the aforesaid authors are fully supported by various authorities of this Court. To quote only a few, in *Burmah Shell Oil Storage & Distributing Co. of India Ltd.* v. *CTO*[74] a Constitution Bench decision, Hidayatullah, J. speaking for the Court, observed thus: (AIR p. 321, para 20)

'*20*. Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain clause (1)(*a*) of the Article and not vice versa. It is an error to explain the Explanation with the aid of the Article, because this reverses their roles.'

50. In *Bihta Coop. Development Cane Mktg. Union Ltd.* v. *Bank of Bihar*[75] this Court observed thus: (AIR p. 393, para 8)

'*8*. ... The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section.'

* * *

52. In *Dattatraya Govind Mahajan* v. *State of Maharashtra*[76] Bhagwati, J. observed thus: (SCC p. 563, para 9)

'*9*. ... It is true that the orthodox function of an explanation is to explain the meaning and effect of the main provision to which it is an explanation and to clear up any doubt or ambiguity in it. ... Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any a priori considerations.'

70 *S. Sundaram Pillai* v. *V.R. Pattabiraman*, (1985) 1 SCC 591
74 (1961) 1 SCR 902 : AIR 1961 SC 315 : (1960) 11 STC 764
75 (1967) 1 SCR 848 : AIR 1967 SC 389 : (1967) 37 Comp Cas 98
76 (1977) 2 SCC 548

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.' "

295. It is important to actually understand the scope of an Explanation. We have already noticed the summary of the conclusions of this Court in *S. Sundaram Pillai*[70] at para 53. It may give the impression that an Explanation, in those circumstances, does not widen the boundaries of the main provision to which it is an Explanation.

296. However, it is apposite that we hearken back to what this Court said on an earlier occasion. In a judgment rendered by four learned Judges in *Hiralal Rattanlal* v. *State of U.P.*[77] this Court had, while considering the scope of an Explanation in a taxing statute viz. the United Provinces Sales Tax Act, 1948, had this to say: (*Hiralal Rattanlal case*[77], SCC pp. 224-25, paras 22 & 25)

"*22.* It was next urged that on a true construction of Explanation II to Section 3-D, no charge can be said to have been created on the purchases of split or processed pulses. It was firstly contended that an Explanation cannot extend the scope of the main section, it can only explain that section. In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear. Ordinarily a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so-called proviso has substantially altered the main section. In *CIT*

70 *S. Sundaram Pillai* v. *V.R. Pattabiraman*, (1985) 1 SCC 591
77 (1973) 1 SCC 216 : 1973 SCC (Tax) 307

v. *Bipinchandra Maganlal & Co. Ltd.*[78] this Court held that by the fiction in Section 10(2)(*vii*) second proviso read with Section 2(6-C) of the Indian Income Tax Act, 1922 what is really not income is, for the purpose of computation of assessable income, made taxable income.

* * *

25. On the basis of the language of the Explanation this Court held that it did not widen the scope of clause (*c*). *But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the legislature named that provision as an Explanation. In all these matters the courts have to find out the true intention of the legislature*." (emphasis supplied)

297. Even though, in a later decision in *S. Sundaram Pillai*[70], this Court had adverted to this judgment when it came to culling out the propositions, the aspect about an Explanation, widening the scope of a provision, has not been expressly spelt out. It must be remembered that the legislature speaks through the medium of the words it uses. The nomenclature, it gives to the device, cannot control the express language, which it employs. If, in effect, in a particular case, an Explanation does widen the terms of the main provision, it would become the duty of the court to give effect to the will of the legislature.

298. In fact, with respect to the decision in *S. Sundaram Pillai*[70], it may be necessary to dissect the provisions which fell for consideration.

299. The Court, in the said case, was dealing with the law relating to restrictions on eviction of the tenant prevailing in Tamil Nadu. The substantive provision conferred a right on the landlord to evict a tenant, should he wilfully fail to pay the rent. There was a proviso, however, which empowered the court to grant time to the tenant subject to the limit of 30 days, should it be found that the non-payment of the rent was not wilful. It was to this proviso that an Explanation was added. The Explanation, in turn, provided that if the landlord gave a notice to the tenant to pay the rent and rent remained unpaid for a period of two months, it would be construed as a case of wilful default.

300. The arguments, which were addressed before this Court, included the contention that even if a notice was given within the meaning of the Explanation, it would not control the duty of the Court to find out whether there was wilful default.

301. It was, while the Court dealt with these arguments, inter alia, that the Court proceeded to lay down two propositions. Firstly, in a case where no notice was given by the landlord, within the meaning of the Explanation, it was for the court to find out, on the facts and circumstances, as to whether there was wilful default. The second proposition, which was laid down was, even if a notice was given under the Explanation and there was default in payment, it would be treated as a case of wilful default unless the tenant was able to establish that

78 AIR 1961 SC 1040 : (1961) 2 SCR 493 : (1961) 41 ITR 290
70 *S. Sundaram Pillai* v. *V.R. Pattabiraman*, (1985) 1 SCC 591

he was prevented from making payment on account of circumstances which prevented him from doing so.

302. We may also notice a still later judgment of this Court in *Sonia Bhatia*[71]. In the said case, the question fell for consideration under the law relating to land reforms.

302.1. Sub-section (6) of Section 5 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 provided that the transfer made by a person, after a certain date, was to be ignored. There was a proviso, which, however, excepted certain transfers. One of the conditions to be met before a case could fall within the proviso was that the transfer must have been made for valuable consideration.

302.2. To the said proviso, there was again an Explanation I followed by Explanation II. It reads as follows:

> "*Explanation I.*—For the purposes of this sub-section, the expression "transfer of land made after the twenty-fourth day of January, 1971", includes—
>
> (*a*) a declaration of a person as a co-tenure-holder made after the twenty-fourth day of January, 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971;
>
> (*b*) any admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect, made in any other deed or instrument or in any other manner.
>
> *Explanation II.*—The burden of proving that a case falls within clause (*b*) of the proviso shall rest with the party claiming its benefits."

302.3. The transfer in the said case was a gift which attracted the wrath of the main provision which meant that the transfer had to be ignored, and the land, which was the subject-matter of the gift, had to be included in the ceiling account of the donor.

302.4. This Court appreciated the scope of the legislation to be just that and rejected the argument based on the terms of the Explanation and held as follows:

> "*24.* In *Bihta Coop. Development Cane Mktg. Union Ltd.* v. *Bank of Bihar*[75] this Court was called upon to consider the Explanation to Section 48(1) of the Bihar and Orissa Cooperative Societies Act, 1935. Therein this Court observed: (AIR p. 392, para 6)
>
> '*6.* ... The question then arises whether the first Explanation to the section widens the scope of sub-section (1) of Section 48 so as to include claims by registered societies against non-members even if the

71 *Sonia Bhatia* v. *State of U.P.*, (1981) 2 SCC 585
75 (1967) 1 SCR 848 : AIR 1967 SC 389 : (1967) 37 Comp Cas 98

same are not covered by clause (*e*).' " (*Hiralal Rattanlal case*[77], SCC pp. 224-25, para 24)

303. We have made a brief survey of some of the case law by way of expounding the true province of an Explanation.

304. Coming to the facts of the instant case, it is necessary to analyse the limbs of Section 11. Sections 7, 9 and 10, read with Section 5, provide for the procedure to be adopted by the adjudicating authority in dealing with applications for initiating CIRP by the financial creditor, operational creditor and corporate debtor. It is after that Section 11 makes its appearance in the Code. It purports to declare that an application for initiating CIRP cannot be made by categories expressly detailed in Section 11. Section 11(*a*) vetoes an application by a corporate debtor, which is itself undergoing a CIRP. An argument sought to be addressed by the petitioner is that the purport of the said provision is that it prohibits not only a corporate debtor, which is undergoing a CIRP, from initiating a CIRP against itself, which, but for the fact, it is undergoing a CIRP, would be maintainable under Section 10 of the Code, but it also proscribes an application by a corporate debtor for initiating a CIRP against another corporate debtor. It appears to be clear to us, and this will be corroborated by the further provisions as well, that the real intention of the legislature was that the prohibition was only against the corporate debtor, which is already faced with the CIRP filed by either a financial creditor or operational creditor, jumping into the fray with an application under Section 10. This appears to be clear from the reports which have been placed before us.

305. Coming to Section 11(*b*), it again disables a corporate debtor which has completed CIRP twelve months preceding the date of the making of the application from invoking the Code. It may be demystified as follows:

305.1. On the strength of the application made under Sections 7, 9 or 10, CIRP is initiated and it is completed at a certain point of time. This section is aimed at preventing a further application not eternally but for a period of twelve months after the expiry of the insolvency resolution process. Quite apart from the fact that even the petitioners do not lay store by Section 11(*b*) and their case is premised on Sections 11(*a*) and 11(*d*), the importance of Section 11(*b*) is that it sheds light regarding the intention of the legislature to be that the corporate debtor cannot initiate CIRP against itself under any of the limbs of Section 11, in the circumstances detailed therein. Section 11(*c*) again disentitles corporate debtor, apart from a financial creditor who has violated any terms of a resolution plan, which was approved twelve months before the making of the application.

305.2. In other words, after the adjudicating authority approves a resolution plan under Section 31 of the Code, should a corporate debtor, inter alia, transgress upon any of the terms of the resolution plan and it still ventures to again approach the adjudicating authority with an application under Section 10 and attempt to restart the process all over again within a period of twelve months from the date of approval, this is declared impermissible under Section 11(*c*).

77 *Hiralal Rattanlal* v. *State of U.P.*, (1973) 1 SCC 216 : 1973 SCC (Tax) 307

306. Finally, coming to Section 11(*d*), it disentitles the making of an application to initiate CIRP by a corporate debtor in respect of whom a liquidation order has been made. We have already noticed the scheme of the Code. The legislature intends to have a two-stage approach to the problem of insolvency as regards the corporate debtor. On the basis of an application by the eligible person, a CIRP is initiated. If it is admitted, a Committee of Creditors is constituted before the curtains are wrung down on the insolvency resolution process by the inexorable passage of time, which is fixed under Section 12. If a resolution plan finds approval at the hands of the Committee of Creditors and also the adjudicating authority, liquidation is staved off. Should there be no resolution plan within the time-limit or the resolution plan is not approved, the curtains rise for the process of liquidation process to be played out in terms of the Code. The first act of the drama consists of the order of liquidation to be passed under Section 33 of the Code. It is this order which is referred to in Section 11(*d*). There is also an order of liquidation permissible earlier, under Section 33(4). No doubt after the introduction of the Explanation to Section 33(2), an order of liquidation may be passed in terms thereof. Once, this order is passed, the legislature intended that a corporate debtor, in regard to whom the CIRP was initiated and which has culminated in the order of liquidation being passed after no resolution of the insolvency took place, cannot again initiate a fresh CIRP, putting under the carpet, as it were, a whole process in the recent past. In fact, to use the words "recent past" may not be correct for unlike Sections 11(*b*) and 11(*c*), in a case, where there is an order for liquidation under Section 33, then, an application under Section 10, would not be maintainable. The person disentitled under Section 11(*d*) would be the corporate debtor and the disentitlement is qua itself.

307. Now, let us turn to the first Explanation. The Explanation declares that for the purpose of Section 11, a corporate debtor includes a corporate applicant in respect of such corporate debtor. There is an argument raised on behalf of the petitioners which surrounds the word "included". The contention appears to be that before the insertion of Explanation II, which is challenged before us, under Section 11, not only was an application for initiating CIRP by a corporate debtor against itself prohibited in the circumstances referred to in Section 11 but it also contemplated that the CIRP could not be filed by the corporate debtor in circumstances covered by Section 11 against another corporate debtor. Otherwise, there was no meaning in using the word "includes".

308. In order to appreciate this argument, it is necessary to set out the definition of the word "corporate applicant" in the Code:

> "**5. (5)** "**corporate applicant**" means—
>
> (*a*) corporate debtor; or
>
> (*b*) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
>
> (*c*) an individual who is in charge of managing the operations and resources of the corporate debtor; or
>
> (*d*) a person who has the control and supervision over the financial affairs of the corporate debtor;"

309. It is to be noticed that under Section 10 of the Code, a corporate debtor can file an application for CIRP, when there is a default by itself. The persons, who can make application under Section 10, are those who are alluded to as in the definition of the word "corporate applicant". In other words, an application by the corporate debtor for initiating a CIRP, when there is a default by the corporate debtor, can be made not only by the corporate debtor but also any of the other three categories falling in clauses (*b*), (*c*) and (*d*) of the provision which defines the word "corporate applicant". It is to ensure that there was clarity regarding the question as to whether, while in Section 11, there is a prohibition against the corporate debtor in various circumstances and it is disabled from moving an application under Section 10 against itself, there is no reference to the other persons who are covered by the definition of the word "corporate applicant". It is hence that Explanation I was inserted. In other words, it was to ensure that in the circumstances contemplated in Section 11, an application under Section 10 could not be made by any of the categories of persons mentioned in the definition of the word "corporate applicant".

310. Now, let us consider finally the impugned Explanation. The impugned Explanation came to be inserted by the impugned amendment. Apparently, interpreting Section 11, there appears to have been some cleavage of opinion. This is apparent from the case set up on behalf of the petitioners and the case set up on behalf of the Union of India. The intention of the legislature was always to target the corporate debtor only insofar as it purported to prohibit application by the corporate debtor against itself, to prevent abuse of the provisions of the Code. It could never have been the intention of the legislature to create an obstacle in the path of the corporate debtor, in any of the circumstances contained in Section 11, from maximising its assets by trying to recover the liabilities due to it from others. Not only does it go against the basic common sense view but it would frustrate the very object of the Code, if a corporate debtor is prevented from invoking the provisions of the Code either by itself or through his resolution professional, who at later stage, may, don the mantle of its liquidator. The provisions of the impugned Explanation, thus, clearly amount to a clarificatory amendment. A clarificatory amendment, it is not even in dispute, is retrospective in nature. The Explanation merely makes the intention of the legislature clear beyond the pale of doubt. The argument of the petitioners that the amendment came into force only on 28-12-2019 and, therefore, in respect to applications filed under Sections 7, 9 or 10, it will not have any bearing, cannot be accepted. The Explanation, in the facts of these cases, is clearly clarificatory in nature and it will certainly apply to all pending applications also.

311. We may notice that these are petitions filed under Article 32 of the Constitution of India, essentially, complaining of violation of fundamental right under Article 14 of the Constitution insofar as the challenge to the Explanation is concerned, a strained effort is made to describe this amendment as manifestly arbitrary. To build up this argument, an attempt is made to contend that an Explanation cannot widen the provisions or whittle down its scope. We are afraid, that this venture of attempting to persuade us to hold

that an Explanation would be trespassing the limits of its province, should it widen the scope of the main provisions, itself has no legs to stand on, as explained earlier. We are unable to understand how it could be described as being arbitrary for the legislature to clarify its intention through the device of an Explanation. The further attempt to persuade us to overturn the provision on the score that the Explanation attempts to achieve the result of a repeal of Sections 11(*a*) and 11(*d*), is totally meritless. We are clear in our mind that on a proper understanding of Sections 11(*a*) and 11(*d*), it does nothing of the kind. Sections 11(*a*) and 11(*d*) remain intact in the manner we have propounded.

312. We must record our understanding of the efforts of the petitioner in the light of the application which is pending and the appeal also which is preferred by the petitioner in NCLAT. We are really concerned and can be called upon only to pronounce on the vires of the statute on the score that it is unconstitutional on any ground known to law. The only ground which is urged before us is the violation of Article 14. This ground does not merit acceptance. The challenge is repelled.

Is Section 32-A unconstitutional?

313. Section 32-A is challenged by allottees in Writ Petition No. 75 of 2020. The petitioners in Writ Petition No. 27 of 2020 and Writ Petition No. 579 of 2020, who are creditors (moneylenders) also challenge Section 32-A.

314. The petitioners contend that immunity granted to the corporate debtors and its assets acquired from the proceeds of crimes and any criminal liability arising from the offences of the erstwhile management for the offences committed prior to initiation of CIRP and approval of the resolution plan by the adjudicating authority further jeopardises the interest of the allottees/creditors. It will cause huge losses which is sought to be prevented under the provisions of the Prevention of Money Laundering Act, 2002.

315. Section 32-A is arbitrary, ultra vires and violative of Article 300-A and Articles 14, 19 and 21.

316. The stand of the Union, on the other hand, is as follows:

316.1. Section 32-A provides immunity to the corporate debtor and its property when there is approval of the resolution plan resulting in the change of management of control of corporate debtor. This is subject to the successful resolution applicant being not involved in the commission of the offence. Statutory basis has now been given under Section 32-A to the law laid down by this Court in the decision of *Essar Steel India Ltd. Committee of Creditors*[30]. This Court took the view therein that successful resolution applicant cannot be faced with undecided claim after its resolution plan has been accepted. The object is to ensure that a successful resolution applicant starts off on a fresh slate.

30 *Essar Steel India Ltd. Committee of Creditors* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443

316.2. The relevant extracts of the Statement of Objects and Reasons relied upon by the Union of India are as follows:

"Statement of Objects and Reasons

* * *

2. A need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency, in case the company goes into corporate insolvency resolution process or liquidation, to prevent potential abuse of the Code by certain classes of financial creditors, *to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions, 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, 2016.*

3. The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019, inter alia, provides for the following, namely—

* * *

(*vii*) to insert a new Section 32-A so as to provide that the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease under certain circumstances."

316.3. Reliance is also placed on the report of the Insolvency Law Committee. Relevant extracts which have been relied on are as follows:

"**PREFACE**

v. Liability of corporate debtor for offences committed prior to initiation of CIRP—In order to address the issue of liability that falls upon the resolution applicant for offences committed prior to commencement of CIRP, it has been recommended that a new section should be inserted which provides that when the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise.

The newly inserted section as mentioned above shall also include protection of property from enforcement action when taken by successful resolution applicant. Also, it was recommended that cooperation and assistance to authorities investigating the offences committed prior to commencement of CIRP shall be continued by any person who is required to provide such assistance under the applicable law.

* * *

CHAPTER 1: RECOMMENDATIONS REGARDING THE CORPORATE INSOLVENCY RESOLUTION PROCESS

* * *

17. *Liability of corporate debtor for offences committed prior to initiation of CIRP**

17.1. Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29-A, read with Section 35(1)(*f*), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.

17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively.

Liability where a resolution plan has been approved

17.3. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the resolution plan it had submitted for approval of the adjudicating authority. Without relief from imposition of such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower *on an average*, even where the corporate debtor did not commit any offence and was not subject to investigation, due to *adverse selection* by resolution applicants who might be apprehensive that they

* Recommendations contained herein have been implemented pursuant to Section 10 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty bound to penalise the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.

17.5. The Committee noted that the proceedings under the Code, which are designed to ensure maximisation of value, generally require transfer of the corporate debtor to bona fide persons. In fact, Section 29-A casts a wide net that disallows any undesirable person, related party or defaulting entity from acquiring a corporate debtor. Further, the Code provides for an open process, in which transfers either require approval of the adjudicating authority, or can be challenged before it. Thus, the CIRP typically culminates in a change of control to resolution applicants who are unrelated to the old management of the corporate debtor and step in to resolve the insolvency of the corporate debtor following the approval of a resolution plan by the adjudicating authority.

17.6. Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the CIRP must be investigated and penalised, the liability must be affixed only upon those who were responsible for the corporate debtor's actions in this period. However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29-A.

17.7. *Thus, the Committee agreed that a new section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party,*

promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.

17.8. *Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased.*

Actions against the Property of the corporate debtor

17.9. The Committee also noted that in furtherance of a criminal investigation and prosecution, the property of a company, which continues to exist after the resolution or liquidation of a corporate debtor, may have been liable to be attached, seized or confiscated. For instance, the property of a corporate debtor may have been at risk of attachment, seizure or confiscation where there was any suspicion that such property was derived out of proceeds of crime in an offence of money laundering. It was felt that taking actions against such property, after it is acquired by a resolution applicant, or a bidder in liquidation, could be contrary to the interest of value maximisation of the corporate debtor's assets, by substantially reducing the chances of finding a willing resolution applicant or bidder in liquidation, or lowering the price of bids, as discussed above.

17.10. *Thus, the Committee agreed that the property of a corporate debtor, when taken over by a successful resolution applicant, or when sold to a bona fide bidder in liquidation under the Code, should be protected from such enforcement action, and the new section discussed in Para 17.7 should provide for the same. Here too, the Committee agreed that the protection given to the corporate debtor's assets should in no way prevent the relevant investigating authorities from taking action against the property of persons in the erstwhile management of the corporate debtor, that may have been involved in the commission of such criminal offence.*

17.11. *By way of abundant caution, the Committee also recognised and agreed that in all such cases where the resolution plan is approved, or where the assets of the corporate debtor are sold under liquidation, such approved resolution plan or liquidation sale of the assets of the corporate debtor's assets would have to result in a change in control of the corporate debtor to a person who was not a related party of the corporate debtor at the time of commission of the offence, and was not involved in the commission of such criminal offence along with the corporate debtor.*

Cooperation in Investigation

17.12. While the Committee felt that the corporate debtor and bona fide purchasers of the corporate debtor or its property should not be held liable for offences committed prior to the commencement of insolvency, *the Committee agreed that the corporate debtor and any person who may be required to provide assistance under the applicable law should continue to provide assistance and cooperation to the authorities investigating an*

offence committed prior to the commencement of the CIRP. Consequently, the Committee recommended the new section should provide for such continued cooperation and assistance." (emphasis supplied)

316.4. The Additional Solicitor General also places reliance on the Sixth Report of the Standing Committee of Lok Sabha made in March 2020. The relevant portions according to the learned ASG are as follows:

"3.8. The stakeholders on the above clause furnished the following suggestion:

'Though the Bill gives immunity to the corporate debtor (company as a legal entity) from prior offences, the individuals responsible for committing such offences on behalf of the debtor will still be held liable. The question is whether the debtor should be absolved of all kinds of prior offences with such a blanket immunity.'

3.9. The Secretary, Ministry of Corporate Affairs during the sitting held on 15-1-2020 remarked:

'If the bidder, who is coming and participating under the court supervised competitive process, does not get security and is not indemnified, there may be a problem.'

3.10. Further, the Ministry furnished the following comment on the above suggestion:

'... this provision would only apply where the CIRP culminates in a change in control to a completely unconnected resolution applicant. As such, a resolution applicant has nothing to do with the commission of any pre-CIRP offence whatsoever, and the corporate debtor is now fundamentally not the same entity as the one that committed the crime.'

3.11. The Committee is in agreement with the intent of this amendment to safeguard the position of the resolution applicant(s) by ring-fencing them from prosecution and liabilities under offences committed by erstwhile promoters, etc. The Committee understands the need for treating the company or the corporate debtor as a cleansed entity for cases which result in change in the management or control of the corporate debtor to a person who was not a promotor or in the management or control of the corporate debtor or related party of such person, or to a person against whom there is material evidence and pending complaint or report by the investigating authority filed in relation to the criminal offence. The Committee agrees that this provision is essential to provide the resolution applicant(s) a fair chance to revive the unit which otherwise would directly go into liquidation, which may not be as beneficial to the economy. The Committee believes that this ring-fencing is essential to achieve revival or resolution without imposing additional liabilities on the resolution applicant, arising from mala fide acts of the previous promoter or management."

316.5. Apart from the fact that it is intended to give a clean break to the successful resolution applicant, it is pointed out that it is hedged in with ample safeguards to avoid any exploitation. The same are as follows:

> "106. Section 32-A was inserted to give a clean break to successful resolution applicants from the erstwhile management by shielding them and immunising them from prosecution and liabilities for offences that may have been committed prior to the commencement of the CIRP. Further, ample safeguards have been incorporated in the said provision to prevent any exploitation, namely:
>
> (*i*) The immunity is attracted only when a resolution plan is approved by the adjudicating authority under Section 31 and the resolution plan results in the change in management or control of the corporate debtor.
>
> (*ii*) The immunity is granted only to the corporate debtor and its property, where such property is covered under the resolution plan approved by the adjudicating authority under Section 31, from any liability or prosecution with regard to offences committed prior to the commencement of the corporate insolvency resolution process.
>
> (*iii*) Any person who was a promoter or in the management or control of the corporate debtor or a related party or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business and who was directly or indirectly involved in the commission of such offence shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased.
>
> (*iv*) Section 32-A does not bar an action against the property of any person other than the corporate debtor against whom such an action may be taken under such law as may be applicable.
>
> (*v*) Notwithstanding the immunity given under Section 32-A, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and cooperation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

317. Section 32-A has been divided into three parts consisting of sub-sections (1) to (3). Under sub-section (1), notwithstanding anything contained, either in the Code or in any other law, liability of a corporate debtor, for an offence committed prior to the commencement of the CIRP, shall cease. Further, the corporate debtor shall not be liable to be prosecuted for such an offence. Both these immunities are subject to the following conditions:

317.1. A resolution plan, in regard to the corporate debtor, must be approved by the adjudicating authority under Section 31 of the Code.

317.2. The resolution plan, so approved, must result in the change in the management or control of the corporate debtor.

317.3. The change in the management or control, under the approved resolution plan, must not be in favour of a person, who was a promoter, or in the management and control of the corporate debtor, or in favour of a related party of the corporate debtor.

317.4. The change in the management or control of the corporate debtor must not be in favour of a person, with regard to whom the relevant investigating authority has material which leads it to entertain the reason to believe that he had abetted or conspired for the commission of the offence and has submitted or filed a report before the relevant authority or the Court. This last limb may require a little more demystification. The person, who comes to acquire the management and control of the corporate person, must not be a person who has abetted or conspired for the commission of the offence committed by the corporate debtor prior to the commencement of the CIRP. Therefore, abetting or conspiracy by the person, who acquires management and control of the corporate debtor, under a resolution plan, which is approved under Section 31 of the Code and the filing of the report, would remove the protective umbrella or immunity erected by Section 32-A in regard to an offence committed by the corporate debtor before the commencement of the CIRP. To make it even more clear, if either of the conditions, namely, abetting or conspiring followed by the report, which have been mentioned as aforesaid, are present, then, the liability of the corporate debtor, for an offence committed prior to the commencement of the CIRP, will remain unaffected.

318. The first proviso in sub-section (1) declares that if there is approval of a resolution plan under Section 31 and a prosecution has been instituted during the CIRP against the corporate debtor, the corporate debtor will stand discharged. This is, however, subject to the condition that the requirements in sub-section (1), which have been elaborated by us, have been fulfilled. In other words, if under the approved resolution plan, there is a change in the management and control of the corporate debtor, to a person, who is not a promoter, or in the management and control of the corporate debtor, or a related party of the corporate debtor, or the person who acquires control or management of the corporate debtor, has neither abetted nor conspired in the commission of the offence, then, the prosecution, if it is instituted after the commencement of the CIRP and during its pendency, will stand discharged against the corporate debtor. Under the second proviso to sub-section (1), however, the designated partner in respect of the liability partnership or the officer in default, as defined under Section 2(60) of the Companies Act, 2013, or every person, who was, in any manner, in charge or responsible to the corporate debtor for the conduct of its business, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. This is despite the extinguishment of the criminal liability of the corporate debtor under sub-section (1). Still further, every person, who was associated with the corporate debtor in any manner, and, who was directly or indirectly involved in the commission of such offence, in terms of the report submitted and report filed by the investigating authority, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor.

319. Thus, the combined reading of the various limbs of sub-section (1) would show that while, on the one hand, the corporate debtor is freed from the liability for any offence committed before the commencement of the CIRP, the statutory immunity from the consequences of the commission of the offence by the corporate debtor is not available and the criminal liability will continue to haunt the persons, who were in charge of the assets of the corporate debtor, or who were responsible for the conduct of its business or those who were associated with the corporate debtor in any manner, and who were directly or indirectly involved in the commission of the offence, and they will continue to be liable.

320. Coming to sub-section (2) of Section 32-A, it declares a bar against taking any action against property of the corporate debtor. This bar also contemplates the connection between the offence committed by the corporate debtor before the commencement of the CIRP and the property of the corporate debtor. This bar is conditional to the property being covered under the resolution plan. The further requirement is that a resolution plan must be approved by the adjudicating authority and, finally, the approved plan, must result in a change in control of the corporate debtor not to a person, who is already identified and described in sub-section (1). In other words, the requirements for invoking the bar against proceeding against the property of the corporate debtor in relation to an offence committed before the commencement of the CIRP, are as follows:

320.1. There must be resolution plan, which is approved by the adjudicating authority under Section 31 of the Code.

320.2. The approved resolution plan must result in the change in control of the corporate debtor to a person, who was not — (*a*) a promoter; (*b*) in the management or control of the corporate debtor; or (*c*) a related party of the corporate debtor; (*d*) a person with regard to whom the investigating authority, had, on the basis of the material, reason to believe that he has abetted or conspired for the commission of the offence and has submitted a report or a complaint. If all these aforesaid conditions are fulfilled then the law giver has provided that no action can be taken against the property of the corporate debtor in connection with the offence.

321. The Explanation to sub-section (2) of Section 32-A has clarified that the words "*an action against the property of the corporate debtor in relation to an offence*", would include the attachment, seizure, retention or confiscation of such property under the law applicable to the corporate debtor. Since the word "include" is used under sub-clause (*i*) of the Explanation, the word "action" against the property of the corporate debtor is intended to have the widest possible amplitude. There is a clear nexus with the object of the Code. The other part of the clarification, under the Explanation, is found in the second sub-clause of Explanation (*ii*).

322. Under the second limb of the Explanation to Section 32-A(2), the law giver has clearly articulated the point that as far as the property of any person, other than the corporate debtor or any person who had acquired the property of

the corporate debtor through the CIRP or liquidation process under the Code and who otherwise fulfils the requirement under Section 32-A, action can be taken against the property of such other person.

323. Thus, reading sub-section (1) and sub-section (2) of Section 32-A together, two results emerge:

323.1. Subject to the requirements embedded in sub-section (1) of Section 32-A, the liability of the corporate debtor for the offence committed under the CIRP, will cease.

323.2. The property of the corporate debtor is protected from any legal action again subject to the safeguards, which we have indicated.

323.3. The bar against action against the property, is available, not only to the corporate debtor but also to any person who acquires property of the corporate debtor under the CIRP or the liquidation process. The bar against action against the property of the corporate debtor is also available in the case of a person subject to the same limitation as prescribed in sub-section (1) and also in sub-section (2), if he has purchased the property of the corporate debtor in the proceedings for the liquidation of the corporate debtor.

324. The last segment of Section 32-A makes it obligatory on the part of the corporate debtor or any person, to whom immunity is provided under Section 32-A, to provide all assistance to the investigating officer qua any offence committed prior to the commencement of the CIRP.

325. The contentions of the petitioners appear to be that this provision is constitutionally anathema as it confers an undeserved immunity for the property which would be acquired with the proceeds of a crime. The provisions of the Prevention of Money-Laundering Act, 2002 (for short "the PMLA") are pressed before us. It is contended that the prohibition against proceeding against the property, affects the interest of stakeholders like the petitioners who may be allottees or other creditors. In short, it appears to be their contention that the provisions cannot stand the scrutiny of the Court when tested on the anvil of Article 14 of the Constitution of India. The provision is projected as being manifestly arbitrary. To screen valuable properties from being proceeded against, result in the gravest prejudice to the homebuyers and other creditors. The stand of the Union of India is clear. The provision is born out of experience. The Code was enacted in the year 2016. In the course of its working, the experience it has produced, is that, resolution applicants are reticent in putting up a resolution plan, and even if it is forthcoming, it is not fair to the interest of the corporate debtor and the other stakeholders.

326. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it

hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.

327. It must be remembered that the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor. The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject-matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto. These ingredients are also insisted upon for claiming exemption of the bar from actions against the property. Significantly every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor.

328. The corporate debtor and its property in the context of the scheme of the Code constitute a distinct subject-matter justifying the special treatment accorded to them. Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgment of the legislature. Erecting a bar against action against the property of the corporate debtor when viewed in the larger context of the objectives sought to be achieved at the forefront of which is maximisation of the value of the assets which again is to be achieved at the earliest point of time cannot become the subject of judicial veto on the ground of violation of Article 14.

329. We would be remiss if we did not remind ourselves that attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgment and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some, it cannot unless it strikingly ill squares with some constitutional mandate, suffer invalidation.

330. There is no basis at all to impugn the section on the ground that it violates Articles 19, 21 or 300-A.

Vested right; retrospectivity; the third proviso in Section 7

331. We will recapitulate the third proviso, at this juncture.

> "**7.** ***Initiation of corporate insolvency resolution process by financial creditor.***— * * *
>
> * * *
>
> 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."

331.1. A perusal of the same, makes it clear that the third proviso is a one-time affair. It is intended only to deal with those applications, under Section 7, which were filed prior to 28-12-2019, when, by way of the impugned Ordinance, initially, the threshold requirements came to be introduced by the first and the second impugned provisos.

331.2. In other words, the legislative intention was to ensure that no application under Section 7 could be filed after 28-12-2019, except upon complying with the requirements in the first and second provisos. The legislature did not stop there. It has clearly intended that the threshold requirement it imposed, will apply to all those applications, which were filed, prior to 28-12-2019 as well, subject to the exception that the applications, so filed, had not been admitted, under Section 7(5).

331.3. In other words, the legislature intended that in every application, filed under Section 7, by the creditors covered by the first proviso and by the allottees governed by the second proviso, should also be embraced by the newly imposed threshold requirement for which, it was intended, should be complied within 30 days from the date of the Ordinance. However, this restriction was not to apply to those applications which stood admitted as on the date of the Ordinance. It is also clear that the consequence of failure to comply with the threshold requirement, in regard to applications, which have been filed earlier, was that they would stand withdrawn.

332. In this regard, several contentions are raised.

332.1. It is pointed out by the learned counsel for the petitioners, apart from the plea of discrimination, which is alleged against the first and second provisos, that the third proviso, makes a clear incursion into a vested right. The impugned third proviso is afflicted with the vice of manifest arbitrariness.

332.2. It is contended that the petitioners, who had moved an application under the erstwhile regime, were legally entitled to make such an application, whether it is by a single allottee or jointly. This was a substantive right. Availing such substantive right, under a statute, when the application stood instituted, they had the right to continue with the proceeding unimpaired and unhindered

by the new threshold requirement, which cannot be made applicable in their cases. It is contended that when there is a repeal of a statute, the existing rights are saved. In this case, there was an existing right with the petitioners to institute the application under Section 7 and, therefore, this right cannot be imperilled by enacting the amendment.

332.3. It is pointed out that the statutory time-limit to decide an application, was fourteen days. This Court, in *Pioneer*[1], also stressed the importance of disposing matters, within the period, even though, it may have laid down that the period is not inflexibly mandatory and that it is directory. In the case of the petitioners, the applications were pending for more than a year. Classifying the applications under the same head, is arbitrary and irrational. The petitioners have spent substantial sums towards court fee, legal and other expenses, in addition to considerable time. There is no provision to ameliorate their losses. Withdrawals and fresh filing would derail the insolvency process.

332.4. Our attention is drawn to the judgment of this Court in *Hitendra Vishnu Thakur* v. *State of Maharashtra*[79], wherein this Court laid down that statute, which affects substantive right, is presumed to be prospective, unless made retrospective expressly or by necessary intendment. Every litigant has a vested right in substantive matters but no such right exists in procedural law. The law relating to right of action and right of appeal, even though remedial, is substantive in nature. 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 accomplished transactions.

332.5. Reliance is placed similarly on the judgment of this Court in *Ambalal Sarabhai Enterprises Ltd.* v. *Amrit Lal & Co.*[80]. The period of 30 days is far too short and that too, under an amendment, which is itself impossible to comply with. In this regard, also judgment of this Court in *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*[5], is referred to. The proviso cannot be applied retrospectively. The proviso is penal, arbitrary, unjust and unfair. Reliance is placed on *School Board Election for the Parish of Pulborough, In re*[81].

333. Per contra, the stand of the respondents in this regard, is as follows:

333.1. The third proviso does not affect any rights of the creditors in question. By merely filing an application under Section 7, no absolute right is created. In this regard, reliance is placed on judgments of this Court in *Howrah Municipal Corpn.* v. *Ganges Rope Co. Ltd.*[27], *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[28], *Swiss Ribbons (P) Ltd.* v. *Union of India*[6], *Karnail Kaur*

1 *Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1
79 (1994) 4 SCC 602 : 1994 SCC (Cri) 1087
80 (2001) 8 SCC 397
5 (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528
81 (1894) 1 QB 725 (CA)
27 (2004) 1 SCC 663
28 (2019) 2 SCC 1
6 (2019) 4 SCC 17

v. *State of Punjab*[29], *Essar Steel India Ltd. Committee of Creditors* v. *Satish Kumar Gupta*[30].

333.2. It is further contended that the mere right to take advantage of a statue is not a vested right. And in this regard our attention is drawn to the following judgments — *Director of Public Works* v. *Ho Po Sang*[31], *M.S. Shivananda* v. *Karnataka SRTC*[32]; *Lalji Raja & Sons*[33] and *Kanaya Ram* v. *Rajender Kumar*[34].

333.3. The impugned third proviso is intended to protect the collective interest of others in a class of creditors. Before admission of an application, there is no vested right. Therefore, it does not have retrospective application, in a manner that impairs vested right. This requirement would ensure that there is no needless multiplicity and no single allottee would be able to achieve admission and its consequences without having a certain minimum number of compatriots on board. Even vested right can be taken away by the legislature (*Garikapati Veeraya* v. *N. Subbiah Choudhry*[7]).

334. The first question, which we would have to answer, is whether the right under the unamended Section 7 was a vested right of the financial creditors or allottees covered by Provisos 1 and 2, respectively.

335. This brings us squarely to the question as to what constitutes a vested right. The learned ASG contends that there is no vested right till the application is admitted. It is also contended that the right was only one to take advantage of a statute.

336. In *Salmond on Jurisprudence*, the following characteristics have been found indispensable to constitute a right:

> "41. The characteristics of a legal right
>
> Every legal right has the five following characteristics:
>
> (1) It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, or the person of inherence.
>
> (2) It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of the duty, or as the person of incidence.
>
> (3) It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right.
>
> (4) The act or omission relates to some thing (in the widest sense of that word), which may be termed the object or subject-matter of the right.

29 (2015) 3 SCC 206 : (2015) 2 SCC (Civ) 259
30 (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
31 1961 AC 901 : (1961) 3 WLR 39 : (1961) 2 All ER 721 (PC)
32 (1980) 1 SCC 149 : 1980 SCC (L&S) 131
33 *Lalji Raja & Sons* v. *Hansraj Nathuram*, (1971) 1 SCC 721
34 (1985) 1 SCC 436
7 AIR 1957 SC 540 : 1957 SCR 488

(5) Every legal right has a title, that is to say, certain facts or event by reason of which the right has become vested in its owner."

337. Legal rights are, in a wider sense, of four distinct kinds. They are rights, liberties, powers and immunities. Duty is the correlative of a right, while, no rights correspond to liberties. Liabilities have a nexus with the power exercised by another person, with regard to whom, the liability exists in another party. When somebody has an immunity against another, it disables the latter, and thus, it constitutes a disability for him. Salmond notes further that the term right is often used in the wide sense to include liberty by which it is meant to have one left free to do as he pleases.

338. We may notice the following discussion relating to powers and liabilities:

"2. Powers and liabilities— Yet another class of legal rights consists of those which are termed powers. Examples of such are the following: the right to make a will, or to alienate property; the power of sale vested in a mortgagee; a landlord's right of re-entry; the right to marry one's deceased wife's sister; *the power to sue and to prosecute*; the right to rescind a contract for fraud; a power of appointment; the right of issuing execution on a judgment; the various powers vested in Judges and other officials for the due fulfilment of their functions. All these are legal rights—they are legally recognised interests—they are advantages conferred by the law—but they are rights of a different species from the two classes which we have already considered. ... *My right to make a will corresponds to no duty in anyone else*. A mortgagee's power of sale is not the correlative of any duty imposed upon the mortgagor;

* * *

A power may be defined as ability conferred upon a person by law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. ..." (emphasis supplied)

339. It may be asked whether a right of action is a right or a power. Is there a duty with anyone in the case of a right to an action? We need not probe this further as a power is also a right in the wider sense. The right to sue and right to appeal has been so recognised as we will notice.

340. As far as the distinct kind of legal rights are concerned, in the classification made by Salmond[82] which counts nine distinct legal classifications of legal rights, we notice the following discussion of classification between vested and contingent rights. To quote:

"Vested and contingent rights— A right vests when all the facts have occurred which must by law occur in order for the person in question to have the right. A right is contingent when some but not all of the vestive facts, as they are termed, have occurred. A grant of land to *A* in fee simple

82 See, *Salmond on Jurisprudence*, 12th Edn., P.J. Fitzgerald.

will give *A* a vested right of ownership. A grant to *A* for life and then to *B* in fee simple if he survives *A*, gives *B* a contingent right. It is contingent because some of the vestive facts have not yet taken place, and indeed may never do so: *B* may not survive *A*, if he does, his formerly contingent right now becomes vested. A contingent right then is a right that is incomplete.

A contingent right is different, however from a mere hope of spes. If *A* leaves *B* a legacy in his will, *B* has no right to this during *A*'s lifetime. He has no more than a hope that he will obtain a legacy; he certainly does not have an incomplete right, since it is open to *A* at any time to alter his will."

341. In *Garikapati Veeraya*[7], the suit was filed on 22-4-1949. The High Court decreed the suit in an appeal by the plaintiff on 4-3-1955. The petitioner before this Court contended that since the valuation of the suit was more than Rs 10,000, in terms of Clause 39 of the Letters Patent, 1865, an appeal was maintainable before the Supreme Court. No doubt this involved the argument that the appeal in fact lay to the Federal Court as all appeals would lie to the Federal Court in view of the abolition of the Privy Council in 1949. Since, the Federal Court was replaced by the Supreme Court, the appeal lay before this Court.

342. After consideration of the case law we notice the following principles which have been laid down by this Court: (*Garikapati Veeraya case*[7], AIR p. 553, para 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)

343. It is clear that the institution of a suit leads to the inference that the right of appeal is preserved. There is a vested right of appeal. The vested right of appeal accrues to the litigant and exists from the day of the institution of the lis (suit). Therefore, while the remedy of an appeal may be provided under the

7 *Garikapati Veeraya* v. *N. Subbiah Choudhry*, AIR 1957 SC 540 : 1957 SCR 488

statute that right becomes a vested right only from the point of time that the suit is filed either by the appellant or the opposite party. All of this undoubtedly is subject to a subsequent enactment not interfering with the right of an appeal.

344. In *Lalji Raja & Sons* v. *Hansraj Nathuram*[33], this Court inter alia held as follows: (SCC p. 728, para 16)

> "*16*. That a provision to preserve the right accrued under a repealed Act 'was not intended to preserve the abstract rights conferred by the repealed Act. ... It only applies to specific rights given to an individual upon happening of one or the other of the events specified in statute' (see Lord Atkin's observations in *Hamilton Gell* v. *White*[83], KB p. 431). The mere right, existing at the date of repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause [see *Abbott* v. *Minister for Lands*[84] and *Ogden Industries (P) Ltd.* v. *Lucas*[85]]."

It is apposite to notice the context in which the said observations were made.

344.1. There was an ex parte decree passed by a court in West Bengal in 1949. It was transferred to a Court (Morena) in Old Madhya Bharat State. The execution petition was dismissed on the ground that it was an ex parte decree by a foreign court. This Court noted that Sections 38 and 39 of the Code of Civil Procedure did not apply on the day in question, and therefore, the transfer orders were without jurisdiction.

344.2. On 1-4-1951 the CPC was extended to former State of Madhya Bharat. The decree-holders sought a fresh transfer of the decree to the very same court as earlier, namely, Morena which had become part of the State of Madhya Pradesh to which CPC applied. The High Court upheld the contention of the judgment-debtor that the decree could not be executed as being of the foreign court. This Court reversed the High Court judgment.

344.3. The argument which was raised, was based on Section 20 of the Code of Civil Procedure (Amendment) Act, 1951, by which the Code was extended to Madhya Bharat. There was a repeal of the law that prevailed in the State when the amendment to the CPC in 1951 was made applicable. There was, however, also a proviso which saved rights, privileges, obligations and liabilities acquired, accrued or incurred. The contention therefore of the judgment-debtor was that the judgment-debtor's right to resist was preserved under the saving clause.

344.4. It was found by this Court that the provisions of CPC enforced in Madhya Bharat did not confer the right claimed by the judgment-debtor. All that happened as a result of the extension of the Code to the whole of India in 1951, was that the decrees which could have been executed in British India could now be executed in the whole of India. It is, therefore, in the context of a

33 (1971) 1 SCC 721
83 (1922) 2 KB 422 (CA)
84 1895 AC 425 (PC)
85 1970 AC 113 : (1969) 3 WLR 75 (PC)

repeal and as to whether right to take advantage of the repealed law constituted a right accrued under the usual saving clause that the observations made in para 16 are to be understood.

345. This Court made reference to a few decisions (para 16) including *Abbott* v. *Minister for Lands*[84]. We think, it is appropriate that we advert to the issues which were involved in the said cases.

346. In *Abbott*[84], the Privy Council had to deal with the following factual matrix, in short: the appellant effected a conditional purchase under Section 22 of the Crown Lands Alienation Act, 1861, adjoining the land which he had acquired in fee simple. He made certain applications, seeking to make further additional conditional purchases of certain adjoining lands as also seeking a lease. The questions which arose for the opinion of the Court were three in number.

346.1. Firstly, the question arose whether the conditional purchase which the appellant had made, constituted him the holder of an original conditional purchase, under Section 42 of the 1884 Act.

346.2. Still further, the question fell for decision as to whether Section 22 of the Crown Lands Act of 1884 reserved the right for the appellant the right to purchase additional conditional purchases of adjoining crown lands, which were allowed to the full area of 648 acres allowed by the repealed Act.

346.3. Thirdly, the question arose, as to whether supposing him to be entitled to the additional conditional purchase, was he entitled to the conditional lease which he had applied for?

346.4. Section 22 of the 1861 Act was repealed and in the later Act, there was no corresponding provision to Section 22 but there was a saving proviso which enabled the appellant, according to him, to make an additional conditional purchase, as if Section 22 remained in force. The saving clause saved all the accrued rights and liabilities.

346.5. Noticing the change in the condition of residence, which had been earlier imposed, being done away with, the Court went on to hold as follows: (*Abbott case*[84], AC p. 431)

> "It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to anyone who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far-reaching.
>
> It may be, as Windeyer, J. observes, that the power to take advantage of an enactment may without impropriety be termed a "right". But the question is whether it is a "right accrued" within the meaning of the enactment which has to be construed.
>
> Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words "obligations incurred or imposed". *They think that the mere right*

84 1895 AC 425 (PC)

assuming it to be properly so-called existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment." (emphasis supplied)

347. In *Hamilton Gell* v. *White*[83], upon a quit notice given by the landlord, the tenant sought to avail the benefit of Section 11 of the Agricultural Holdings Act, 1914 by successfully complying with one out of the two conditions for seeking the compensation. Before the tenant could comply with the further condition, which was that he should move the action within two months, after quitting the holding, Section 11 was repealed. He subsequently made his claim within three months, as limited by the repealed section. The matter went to an arbitrator. The arbitrator stated a special case. He raised two questions. Firstly, whether the tenant was entitled to claim compensation under the repealing Act of 1920 and, secondly, whether he could claim under the repealed Act notwithstanding the repeal. The first question was answered against the tenant, with which, the Court of Appeal agreed. As regards the second question, the Court was of the view that the tenant was entitled to succeed.

348. The following is the reasoning, in short: (*Hamilton Gell case*[83], KB p. 430)

"SCRUTTON, L.J. ... But it is not suggested by the appellant that his right to compensation was acquired by his giving notice of intention to claim it, what gave him the right was the fact of the landlord having given a notice to quit in view of a sale. *The conditions imposed by Section 11 were conditions, not of the acquisition of the right, but of its enforcement.* Section 38 says that repeal of an Act shall not (*c*) 'affect any right ... acquired ... under any enactment so repealed,' or (*e*) 'affect any investigation, legal proceeding, or remedy in respect of any such right.' *As soon as the tenant had given notice of his intention to claim compensation under Section 11 he was entitled to have that claim investigated by an arbitrator.* In the course of that arbitration he would no doubt have to prove that that right in fact existed, that is to say that the notice to quit was given in view of a sale, and he would also have to prove the measure of his loss. But he was entitled to have that investigation, which had been begun, continue, for Section 38 expressly provides that the investigation shall not be affected by the repeal. I should like to add that the arbitrator would be well advised to make his award complete. If he had continued his investigation and said: If it is found that the tenant had a right I assess the compensation at so much under the Act of 1908 and so much under the Act of 1920 we should have been able to give our final judgment." (emphasis supplied)

349. The decision thus turned on the point of time at which the right arose.

83 (1922) 2 KB 422 (CA)

350. Atkin, L.J., as he then was, agreed that the appeal should be allowed and went on to hold as follows: (*Hamilton Gell case*[83], KB p. 431)

> "ATKIN, L.J. ... It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has "acquired a right", which would "accrue" when he has quitted his holding, to receive compensation."

351. In *Ogden Industries (Pty) Ltd.* v. *Lucas*[85], the following facts in a case which originated in Australia may be noticed. An employee of the appellant died on 7-7-1965. His death was materially contributed by injuries, which, in turn, arose out of and in the course of his employment with the appellants. The employee was hospitalised in March 1965 for treatment and he again came to be hospitalised on 19-6-1965 and, thereafter, he died on 7-7-1965. He left behind him the respondent, his widow and two children under the age of 16, who were wholly dependent on the employee's earnings. The amount of compensation for the dependants would have been calculated under the Workers Compensation Act, 1958. The Act, however, was amended by the Workers Compensation (Amendment) Act, 1965. The Amendment Act came into force on 1-7-1965. The Amendment Act increased the benefits payable to the dependants. The High Court of Australia dismissed the appeal of the employer and affirmed the award of the Workman's Compensation Board paying the increased compensation under the Amending Act.

352. The Privy Council in *Lucas case*[85] was called upon to decide two questions. Firstly, the question was whether, as the Amendment Act came into operation after the original injury to the employee, his dependents were entitled to the increased rates prescribed by the Amending Act. Secondly, did the deceased, after 30-6-1965, suffer a further injury or aggravation, which gave him new title for the purpose of the Amendment Act.

353. The Court went on to hold as inter alia follows: (*Lucas case*[85], AC pp. 125-27)

> "Under the Act of 1958 the widow did not have to prove that she was in fact dependent upon the earnings of her husband though under the Amendment Act she has to do so. *Nevertheless, it is quite clear as a matter of law that no single person can say under either Act the moment before the death 'I shall be a dependant at the death if I so long live'. First, it must be established that the death was caused or contributed to by the accident, secondly, that the widow will be the deceased's widow at the date of death*

83 *Hamilton Gell* v. *White*, (1922) 2 KB 422 (CA)
85 1970 AC 113 : (1969) 3 WLR 75 (PC)

and not dead or married to some other man, and the children must show that they are under sixteen. None of these things can be ascertained (let alone proved) until after the moment of death of the worker. …

In their Lordships' opinion in Section 7(2)(*c*) the rights, privileges and obligations acquired or accrued on the one side and the liabilities incurred on the other side referred to in that paragraph are mutual and correlative.

… The object and intent of the Interpretation Act is to preserve rights and privileges acquired or accrued on the one side and the corresponding obligation or liability incurred by the person bound to observe or perform those rights or privileges on the other side; so that when a subsequent Act repeals or amends those rights, privileges and liabilities for the future that would not affect the pre-existing mutual rights and liabilities of the parties. … But in the view that their Lordships take there is for the purposes of the Interpretation Act no right in the dependants and no correlative liability upon the worker's employers until the moment of death. Therefore apart altogether from authority their Lordships are of opinion that *the Acts Interpretation Act has no application and the rights of the dependants and the corresponding liability of the employer must be tested and ascertained at the date of the death; at that time there was an obligation upon the employer under and by virtue of the Act of 1958 as amended by the Amendment Act to compensate the dependants in accordance with its provisions. That was the ground of decision of the majority of the High Court in their very careful judgments with which their Lordships agree.*" (emphasis supplied)

354. It will be, at once, noticed that the saving clause in the repealing Act, was not the basis for the judgment rendered in favour of the employee. The compensation was ordered based on the law prevalent at the time of death.

355. Now, it is necessary to refer to the judgment of this Court in *Isha Valimohamed* v. *Haji Gulam Mohd. & Haji Dada Trust*[86].

355.1. The facts in the said case are to be noticed in some detail for it may have bearing on the questions to be answered by us. The respondent landlord purported to terminate the tenancy in relation to a building by a notice dated 12-2-1964 on the ground inter alia of sub-letting. It must be noticed that at the time the subletting took place the building was covered by the Saurashtra Rent Control Act, 1951. The said Act provided that the landlord shall be entitled to recover possession in the case of subletting by the tenant. It is while this Act was in force that the tenant sublet the premises.

355.2. However, the Saurashtra Act came to be repealed by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 on 31-12-1963. Section 51 of the Bombay Act, inter alia, contained the saving clause that the repeal would not affect any right, privilege, obligation, liability accrued or incurred under any law so repealed.

86 (1974) 2 SCC 484

355.3. The notice terminating tenancy was issued on 12-2-1964 after the repeal of the "Saurashtra Act". The High Court took the view[87] that the landlord had an accrued right under saving clause of the Bombay Act. The suit was brought after the repeal.

356. This Court in *Isha Valimohamed case*[86] adopted the following reasoning:

356.1. If the notice under the Transfer of Property Act was necessary to determine the tenancy on the ground of subletting, then the High Court would not be correct that the respondent landlord had an accrued right before issue of notice. Thereafter, the Court went on to consider "*Hamilton*[83]" and "*Abbott*[84]" inter alia.

356.2. Thereafter, the Court went on to consider the argument as to whether the landlord had a privilege under the saving clause.

356.3. Thereafter, what is relevant is that this Court went on to find that the High Court was not right in proceeding on the basis of that notice which was necessary under the Transfer of Property Act to terminate on the ground that the appellant had sublet the premises.

357. It is apposite to notice the reasoning in para 16: (*Isha Valimohamed case*[86], SCC pp. 490-91)

> "*16*. Under the Transfer of Property Act, mere sub-letting, by a tenant, unless the contract of tenancy so provides, is no ground for terminating the tenancy. Under that Act a landlord cannot terminate a tenancy on the ground that the tenant had sub-let the premises unless the contract of tenancy prohibits him from doing so. The respondent landlord therefore could not have issued a notice under any of the provisions of the Transfer of Property Act to determine the tenancy, as the contract of tenancy did not prohibit sub-letting by the tenant. To put it, differently, under the Transfer of Property Act, it is only if the contract of tenancy prohibits sub-letting by tenant that a landlord can forfeit the tenancy on the ground that the tenant has sub-let the premises and recover possession of the same after issuing a notice. Section 111 of the Transfer of Property Act provides that a lease may be determined by forfeiture if the tenant commits breach of any of the conditions of the contract of tenancy which entails a forfeiture of the tenancy. If sub-letting is not prohibited under the contract of tenancy, sub-letting would not be a breach of any condition in the contract of tenancy which would enable the landlord to forfeit the tenancy on that score by issuing a notice. If that be so, there was no question of the respondent landlord terminating the tenancy under the Transfer of Property Act on the ground that the tenant had sub-let the premises. It is only under Section 13(1)(*e*) of the Saurashtra Act that a landlord was entitled to recover possession of the property on the basis that the tenant had sub-let

87 *Isha Valimahmad* v. *Haji Gulam Mohmad Haji Dada*, 1970 SCC OnLine Guj 15
86 *Isha Valimohamed* v. *Haji Gulam Mohd. & Haji Dada Trust*, (1974) 2 SCC 484
83 *Hamilton Gell* v. *White*, (1922) 2 KB 422 (CA)
84 *Abbott* v. *Minister for Lands*, 1895 AC 425 (PC)

the premises; and, that is because, Section 15 of that Act unconditionally prohibited a tenant from sub-letting. The Saurashtra Act nowhere insists that the landlord should issue a notice and terminate the tenancy before instituting a suit for recovery of possession under Section 13(1)(*e*) on the ground that the tenant had sub-let the premises. The position, therefore, was that the landlord was entitled to recover possession of the premises under Section 13(1) of the Saurashtra Act on the ground that the tenant sub-let the premises. It would follow that a right accrued to the landlord to recover possession under Section 13(1) of the Saurashtra Act when the tenant sub-let the premises during the currency of that Act and the right survived the repeal of that Act under proviso (2) to Section 51 of the Bombay Act and, therefore, the suit for recovery of possession of the premises under Section 13(1) read with clause (*e*) of the Saurashtra Act after the repeal of that Act on the basis of the sub-letting during the currency of the Saurashtra Act was maintainable. In this view, we think that the judgment[87] of the High Court must be upheld and we do so."

358. Thus, what is relevant, this Court in *Isha Valimohamed case*[86] went on to find under the Saurashtra Act, there was no requirement of any notice to terminate the tenancy. It was found that the landlord was entitled to recover the possession under the said Act, if there was subletting. In other words, the Court went on to hold that a right accrued to the landlord under the Saurashtra Act upon the appellant subletting the premises. It was during the pendency of the Saurashtra Act. This right survived the repeal of the Saurashtra Act and thus the suit under the Saurashtra Act was maintainable.

359. Apparently, the Court in *Isha Valimohamed case*[86] drew support from the principle in *Hamilton*[83]. We have already noticed the facts of *Hamilton*[83]. The question in short would appear to be as to when the right comes into existence? If, the right comes into existence then the remedy can be pursued by the party entitled.

360. This again would necessarily depend upon the terms of the repealing enactments as also the terms of the saving clause. In the absence of a saving clause, no doubt a party can also fall back on Section 6 of the General Clauses Act, 1897. This is again subject to what is held about the scope of a saving clause in *Bansidhar* v. *State of Rajasthan*[88] as will be noticed later on.

361. What is further significant to be noticed is that the decision involved a case where, though styled as a suit, the proceeding under the Saurashtra Act was a proceeding under a statute and the right was one created by the statute and what gave the right to the landlord was an act of subletting. The said right was what was not wiped out by the repeal. As already noticed the suit itself was filed after the repeal. The discussion on the distinction between a privilege and an accrued right in the said decision has been relied upon recently in a

87 *Isha Valimahmad* v. *Haji Gulam Mohmad Haji Dada*, 1970 SCC OnLine Guj 15
86 *Isha Valimohamed* v. *Haji Gulam Mohd. & Haji Dada Trust*, (1974) 2 SCC 484
83 *Hamilton Gell* v. *White*, (1922) 2 KB 422 (CA)
88 (1989) 2 SCC 557

judgment by one of us (R.F. Nariman, J.) in *Bombay Stock Exchange* v. *V.S. Kandalgaonkar*[89].

362. In *New India Insurance Co. Ltd.* v. *Shanti Misra*[90], the husband of the first respondent died as a result of a motor accident. The suit could be brought under Article 82 of the Limitation Act, 1963 within two years of the accident.

362.1. On 18-3-1967, the Government of Uttar Pradesh constituted the Claims Tribunal under Section 110 of the Motor Vehicles Act. The application of the respondents before the Tribunal was objected to by the appellant insurer. While deciding in favour of the respondents and holding that the application was maintainable before the Tribunal, this Court, inter alia, held as follows: (*Shanti Misra case*[90], SCC p. 843, para 3)

> "*3.* ... If action, before civil court was alive where no suit had been filed. In such cases the vested right of action was not meant to be extinguished. The remedy of either application under Section 110-A or a civil suit must be available; surely not both."

362.2. Thereafter, it was held, inter alia, as follows: (*Shanti Misra case*[90], SCC pp. 844-45, para 5)

> "*5.* On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. *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)

362.3. We may also notice that in regard to the question as to whether a new law of limitation could extinguish vested right of action, it was held, inter alia, as follows: (*Shanti Misra case*[90], SCC pp. 846, para 7)

> "*7.* ... (*2*) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy.

89 (2015) 2 SCC 1 : (2015) 1 SCC (Civ) 694
90 (1975) 2 SCC 840

Nor can it suddenly extinguish a vested right of action by providing for a shorter period of limitation."

362.4. It is important to notice para 9: (*Shanti Misra case*[90], SCC pp. 846-47)

"*9.* In *Gopeshwar Pal* v. *Jiban Chandra Chandra*[91] Jenkins, C.J. delivering the judgment on behalf of the majority of the Full Bench said at ILR p. 1141: (SCC OnLine Cal)

'Here the plaintiff at the time when the Amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act. It is not (in our opinion) even a fair reading of Section 184 and the Third Schedule of the Bengal Tenancy Act, as amended to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed.'

The majority of the Full Bench of the Madras High Court in *Meharban-I-Doston* v. *G. Venkata Subba Row*[92] has taken the same view following the Full Bench decision in *Gopeshwar Pal case*[91] at p. 650. Amendment of the law of limitation could not destroy the plaintiff's right of action which was in existence when the Act came into force. We are conscious of the distinction which was sought to be made in the application of these principles. It was said that the right could not be destroyed but recourse to suit would be available under the old law of limitation. We, however, think that giving retrospective effect to the change of law in relation to the forum, in the context of the object of the change, is imperative. That being so the principles aforesaid for overcoming the bar of limitation will be applicable."

363. This judgment in *Shanti Misra case*[90] has been followed in *Vinod Gurudas Raikar* v. *National Insurance Co. Ltd.*[93] and also in *Union of India* v. *Harnam Singh*[94] and recently also by this Court in *B.K. Educational Services*[5].

364. In *V. Dhanapal Chettiar* v. *Yesodai Ammal*[95], a Bench of seven learned Judges while taking the view that a notice to quit under Section 106 of the TP Act, 1882 was not necessary for an eviction petition under any of the State Rent Acts observed in regard to *Isha Valimohamed*[86] that the view taken in the said

90 *New India Insurance Co. Ltd.* v. *Shanti Misra*, (1975) 2 SCC 840
91 1914 SCC OnLine Cal 95 : ILR (1914) 41 Cal 1125 : AIR 1914 Cal 806
92 1915 SCC OnLine Mad 69 : ILR (1916) 39 Mad 645
93 (1991) 4 SCC 333
94 (1993) 2 SCC 162 : 1993 SCC (L&S) 375
5 *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528
95 (1979) 4 SCC 214
86 *Isha Valimohamed* v. *Haji Gulam Mohd. & Haji Dada Trust*, (1974) 2 SCC 484

case that the landlord could not have issued notice to determine the tenancy on the ground of subletting under any of the provisions of the Transfer of Property Act was not correct as a notice issued under Section 111(*h*) does not require any ground to be made out for termination of the tenancy. It was further held that the view taken in *Isha Valimohamed*[86], in this regard, would be taken only under Section 111(*g*).

365. In *D.C. Bhatia* v. *Union of India*[96], the Delhi Rent Control Act came to be amended with effect from 1-12-1988, by which amendment, the Act was not to apply to any premises, the monthly rent of which exceeded Rs 3500. Dealing with the tenants' contention that he had a vested right this Court took the view that if the tenant is sought to be evicted before the amendment, they could have taken advantage of the provisions of the Act to resist such eviction. But this was nothing more than the right to take advantage of the law and the tenant had statutory protection only as long as the law remains in force. We may only notice para 53. It read as under: (SCC p. 123)

> "*53*. The provisions of a repealed statute cannot be relied upon after it has been repealed. But, what has been acquired under the repealed Act cannot be disturbed. But, if any new or further step is needed to be taken under the Act, that cannot be taken even after the Act is repealed." (emphasis supplied)

366. In *Bibi Sayeeda* v. *State of Bihar*[97], the Court was dealing with the meaning of the word "Bazar" in the Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950). In the course of the said judgment the Court went on to hold that the right of the proprietor of a State to hold a "Mela" on its own land is a right in the estate being appurtenant to the ownership of his land. In the context of property rights undoubtedly the Court went on to make the following observations: (SCC p. 527, para 17)

> "*17*. The word "vested" is defined in *Black's Law Dictionary* (6th Edn.) at p. 1563 as:
>
> > '*Vested*. Fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent.'
>
> Rights are "vested" when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights.
>
> In *Webster's Comprehensive Dictionary*, (International Edn.) at p. 1397 "vested" is defined as:
>
> > '[L]aw held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interests.' "

86 *Isha Valimohamed* v. *Haji Gulam Mohd. & Haji Dada Trust*, (1974) 2 SCC 484
96 (1995) 1 SCC 104
97 (1996) 9 SCC 516 : AIR 1996 SC 1936

367. Though *Bibi Sayeeda case*[97] is a case which dealt with vested right qua property there is indeed authority for the proposition that the concept of vested right is not confined to a property right. In this regard we may profitably refer to the Special Bench judgment of the High Court of Calcutta in *Gopeshwar Pal* v. *Jiban Chandra Chandra*[91], referred to by this Court in *New India Insurance Co. Ltd.* v. *Shanti Misra*[90] wherein it was, inter alia, held: (*Gopeshwar Pal case*[91], SCC OnLine Cal : AIR paras 3 and 4)

> "*3*. On the contrary, the essential conditions of the two cases are so distinct that in our opinion it cannot be said that the earlier decision is, in relation to the circumstances of this case, affected by the judgment[98] of the Privy Council. It is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still, the intention to take away a vested right without compensation or any saving, is not to be imputed to the legislature, unless it be expressed in unequivocal terms [*Commr. of Public Works (Cape Colony)* v. *Logan*[99]]. *That this view is not limited to those cases where rights of property in the limited sense are involved, is shown by Colonial Sugar Refining Co. Ltd.* v. *Irving*[100], *where it was held that an Act ought not to be so construed as to deprive a suitor of an appeal in a pending action, which belonged to him as of right at the date of the passing of the Act. Equally is a right of suit a vested right*, and in *Jackson* v. *Woolley*[101], the Court of Exchequer Chamber declined, in the absence of something putting the matter beyond doubt, to put on an Act a construction that would deprive any person of a right of action vested in him at the time of the passing of the Act.
>
> *4*. William, J. said: 'It would require words of no ordinary strength in the statute to induce us to say that it takes away such a vested right.' " (emphasis supplied)

368. In *M.S. Shivananda* v. *Karnataka SRTC*[32], under an Ordinance, employees of the erstwhile State Carriage Operators were to be absorbed by the State Road Transport Corporation subject to certain conditions. The ratio was provided. The Ordinance was replaced by an Act. The ratio, however, stood altered. This affected the chances of absorption of the workers. This led to writ petitions. The question which fell to be decided was with reference to the effect of repeal and what constituted a right. The Court held inter alia as follows: (SCC pp. 156-57, paras 15-16)

> "*15*. The distinction between what is, and what is not a right preserved by the provisions of Section 6 of the General Clauses Act is often one

97 *Bibi Sayeeda* v. *State of Bihar*, (1996) 9 SCC 516 : AIR 1996 SC 1936
91 1914 SCC OnLine Cal 95 : ILR (1914) 41 Cal 1125 : AIR 1914 Cal 806
90 (1975) 2 SCC 840
98 *Lala Soni Ram* v. *Kanhaiya Lal*, 1913 SCC OnLine PC 7
99 1903 AC 355 (PC)
100 1905 AC 369 (PC)
101 (1858) 8 El & Bl 784 : 120 ER 292
32 (1980) 1 SCC 149 : 1980 SCC (L&S) 131

of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere "hope or expectation of", or liberty to apply for, acquiring a right. In *Director of Public Works* v. *Ho Po Sang*[31], All ER at p. 731 Lord Morris speaking for the Privy Council, observed: (AC p. 922)

> '... It may be, therefore, that under some repealed enactment, a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But *there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should be or should not be given. Upon a repeal, the former is preserved by the Interpretation Act. The latter is not.*'

It must be mentioned that the object of Section 31(2)(*i*) is to preserve only the things done and action taken under the repealed Ordinance, and not the rights and privileges acquired and accrued on the one side, and the corresponding obligation or liability incurred on the other side, so that if no right acquired under the repealed Ordinance was preserved, there is no question of any liability being enforced.

16. Further, it is significant to notice that the saving clause that we are considering in Section 31(2)(*i*) of the Act, saved things done while the Ordinance was in force; it does not purport to preserve a right acquired under the repealed Ordinance. It is unlike the usual saving clauses which preserve unaffected by the repeal, not only things done under the repealed enactment but also the rights acquired thereunder. It is also clear that even Section 6 of the General Clauses Act, the applicability of which is excluded, is not intended to preserve the abstract rights conferred by the repealed Ordinance. It only applies to specific rights given to an individual upon the happening of one or other of the events specified in the statute." (emphasis in original)

369. In *Kanaya Ram*[34] the predecessor-in-interest of the appellants had applied for purchase of the tenancy right under the Punjab Security of Land Tenures Act, 1953.

369.1. During the pendency of the proceedings before the Assistant Collector, certain persons were impleaded as respondents on the basis that they were the legal heirs of the landlord. Thereafter, their names were struck off as unnecessary. On the same day, the application of the predecessor-in-interest of the appellants was allowed. Thereafter, there was certain oral sales by the original landowner.

369.2. The contention which apparently was taken by the legal heirs of landlord upon his death was that the original landlord died during the pendency of the proceedings, and there was change in the status of the landowners against

31 1961 AC 901 : (1961) 3 WLR 39 : (1961) 2 All ER 721 (PC)
34 *Kanaya Ram* v. *Rajender Kumar*, (1985) 1 SCC 436

whom the application under Section 18(1) of the Act was made as on that date as his legal heirs became small landowners.

369.3. The Financial Commissioner before whom the matter reached, however, was of the view that the application made by the appellants predecessor being competent on the date it was filed, the rights of the parties had to be adjudicated on that basis.

369.4. The learned Single Judge of the High Court took the view, however, that the changed situation brought about by the death of the big landowner had to be taken into account in determining the right of the tenant.

369.5. Respondents 3 to 14 who were the legal heirs of the landlord instituted a suit against the transferees from the landlord on the basis that they were mere benamidars of the landowner and no title passed to them as the alleged sales were not effected by registered instruments under Section 54 which had been extended by the Government of Punjab with effect from 1-4-1955 to the State. The suit came to be decreed. They sought impleadment before the High Court on the ground that the Collector had in determining the surplus area of the land of the landowners held that the sales in favour of Respondents 1 and 2 were benami. The Collector found that on the death of the original landowners, Respondents 3 to 14 became small landowners. The Division Bench took the view that no oral sale could be made, and therefore, the transfers made in favour of Respondents 1 and 2 did not pass any title.

369.6. This Court, apart from noticing the fact that as the special leave had been refused against the main judgment the appeal was no longer tenable, it held that the original landowner was not impleaded by the predecessor-in-interest of the appellants in his application even though Respondents 3 to 14 were impleaded and they were subsequently deleted on the appellant's objection that they were not necessary parties.

369.7. This Court went on to distinguish the judgment in *Rameshwar* v. *Jot Ram*[102] as it was a case where the tenants after making the requisite application had made the necessary deposit of the first instalment of the purchase price. It was in such circumstances noted that the tenants had acquired a vested right to purchase the land and the case had gone beyond the stage of mere application under Section 18(1). This Court noted that the observation of the Court that the rights of the parties are determined "by the facts as they exist on the date of the action" must be held in the context in which they were made.

369.8. What is relevant is the following statement in the judgment in *Kanaya Ram*[34]: (SCC p. 441, para 10)

> "*10.* ... In the present case, Harditta Ram, the predecessor-in-title of the appellants, when he made the application for purchase under Section 18(1) of the Act, had a mere "hope or expectation of, or liberty to apply for, acquiring a right" and not a "right acquired or accrued" under Section 18(1). *It has been held ever since the leading case of Abbott* v.

102 (1976) 1 SCC 194
34 *Kanaya Ram* v. *Rajender Kumar*, (1985) 1 SCC 436

Minister for Lands[84] *that a mere right to take advantage of the provisions of an Act is not an accrued right. Abbott case*[84] *has been followed by this Court in a number of decisions.* In such a situation, the Court is bound to take into consideration the subsequent events and mould the relief accordingly. The decision in *Rameshwar case*[102] clearly turned on the legal fiction contained in Section 18(4)(*b*) of the Act and the death of the large landholder Teja during the pendency of the appeal before the Financial Commissioner on which inheritance opened and his legal heirs became small landholders, could not impair the vested rights acquired by the tenants by virtue of the order passed by the Prescribed Authority and the deposit by them of the first instalment of the purchase price as required under Section 18(4)(*a*)." (emphasis supplied)

370. While on the ambit of the saving clause we may notice *Bansidhar* v. *State of Rajasthan*[88] while dealing with the fact of saving clause in a repealing statute the Court held as follows: (SCC pp. 569-70, para 28)

> "*28.* A saving provision in a repealing statute is not exhaustive of the rights and obligations so saved or the rights that survive the repeal. It is observed by this Court in *CIT* v. *Shah Sadiq & Sons*[103]: (SCC p. 524, para 15)
>
> > '*15.* ... In other words whatever rights are expressly saved by the "savings" provision stand saved. But, that does not mean that rights which are not saved by the "savings" provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(*c*), General Clauses Act, 1897.'
>
> We agree with the High Court[104] that the scheme of the 1973 Act does not manifest an intention contrary to, and inconsistent with, the saving of the repealed provisions of Section 5(6-A) and Chapter III-B of "the 1955 Act" so far as pending cases are concerned and that the rights accrued and liabilities incurred under the old law are not effaced. The appellant's contention (*a*) is, in our opinion, insubstantial.
>
> *Re Contention (b)*"

371. The petitioners also rely on the judgment of this Court in *Hitendra Vishnu Thakur*[79] and *Ambalal Sarabhai Enterprises Ltd.*[80]

84 1895 AC 425 (PC)
102 *Rameshwar* v. *Jot Ram*, (1976) 1 SCC 194
88 (1989) 2 SCC 557
103 (1987) 3 SCC 516 : 1987 SCC (Tax) 270
104 *Banshidhar* v. *State*, 1976 SCC OnLine Raj 45
79 *Hitendra Vishnu Thakur* v. *State of Maharashtra*, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087
80 *Ambalal Sarabhai Enterprises Ltd.* v. *Amrit Lal & Co.*, (2001) 8 SCC 397

372. In *Hitendra Vishnu Thakur*[79], the case arose under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA Act).

372.1. Section 20(4) of the TADA Act, made Section 167 CrPC applicable with certain modifications. Clause (*b*) provided for a longer period, as the period for which remand could be ordered. By an amendment w.e.f. 22-5-1993, the period was reduced. Thereafter, however, another clause viz. clause (*bb*) was added, which contained a proviso. The proviso mandated that if it was not possible to complete the investigation within a period of 180 days on the report of the Public Prosecutor, indicating the progress of the investigation and the specific reasons for detention beyond 180 days, the designated court should extend the period up to one year.

372.2. It was in the context of this provision that this Court, after noting that the amendment was retrospective and applied to pending cases, in which, the investigation was not complete on the date of the Amending Act and the challan had not been filed in the Court, the Court culled out the following principles: (*Hitendra Vishnu Thakur case*[79], SCC p. 633, para 26)

> "*26.* * * *
>
> (*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.
>
> (*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."

372.3. Thereafter, the Court also went on to hold, however, that both the amendment clauses (*b*) and (*bb*) would apply retrospectively to all pending cases. Thus, it was found that the Amending Act was retrospective and both the clauses would apply to cases which were pending investigation on the date when the amendment came into force and where challan had not been filed till then.

79 *Hitendra Vishnu Thakur* v. *State of Maharashtra*, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087

373. In *Ambalal Sarabhai Enterprises Ltd.*[80], by an amendment to the Delhi Rent Control Act, while a petition for eviction by the respondent landlord was pending on the ground of subletting, exclusion of the jurisdiction of the Rent Controller with respect of tenancies fetching monthly rent exceeding Rs 3500 was brought into force.

373.1. The question arose, inter alia, as to whether the ground of illegal subletting was a vested right. It also fell for decision as to whether there was merit in the contention of the appellant tenant that after the amendment, the civil court alone had jurisdiction.

373.2. It was the contention of the tenant that he had no vested right and the amendment was not retrospective in operation, and therefore, the civil court alone would have jurisdiction. The landlord contended that in view of Section 6 of the General Clauses Act, 1897, the pending proceedings before the Rent Controller should at any rate continue even if his contention based on vested right was repelled.

373.3. This Court went on to hold that the tenant had no vested right by relying on the judgment of this Court in *Mohinder Kumar* v. *State of Haryana*[105] and also in *D.C. Bhatia* v. *Union of India*[96] (the latter of which decisions is relied upon by the respondent Union for the proposition that a right to take advantage of an enactment, would not create a vested right). Thereafter, this Court went on to hold that the landlord also did not have a vested right for seeking on the ground of eviction under Section 14 of the Delhi Rent Control Act.

373.4. It was found that Section 14 was only a protective right for a tenant and the various clauses which constituted a proviso to the protection from eviction by a landlord could not be construed as a vested right in favour of the landlord. Having so held, this Court went on to consider the effect of a repeal of Section 6 of the General Clauses Act. Therein, this Court went on to hold that the respondent landlord had a right to continue the proceedings before the Rent Control Board under Section 6 of the General Clauses Act. It would be an accrued right in terms of Section 6.

373.5. We need only notice paras 26, 35 and 36 of *Ambalal Sarabhai Enterprises Ltd.*[80]: (SCC pp. 410 & 415)

> "*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 crystallised on that date. The mandate of Section 6 of the General Clauses Act is simply to leave the pending proceedings

80 *Ambalal Sarabhai Enterprises Ltd.* v. *Amrit Lal & Co.*, (2001) 8 SCC 397
105 (1985) 4 SCC 221
96 (1995) 1 SCC 104

unaffected which commenced under the unrepealed provisions unless contrary intention is expressed. We find clause (*c*) of Section 6, refers to 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.

* * *

35. In cases where Section 6 is not applicable, the courts have to scrutinise and find whether a person under a repealed statute had any vested right. In case he had, then pending proceedings would be saved. However, in cases where Section 6 is applicable, it is not merely a vested right but all those covered under various clauses from (*a*) to (*e*) of Section 6. We have already clarified that right and privilege under it is limited to that which is "acquired" and "accrued". In such cases pending proceedings are to be continued as if the statute has not been repealed.

36. In view of the aforesaid legal principle emerging, we come to the conclusion that since proceeding for the eviction of the tenant was pending when the repealing Act came into operation, Section 6 of the General Clauses Act would be applicable in the present case, as it is the landlord's accrued right in terms of Section 6. Clause (*c*) of Section 6 refers to "any right" which may not be limited as a vested right but is limited to be an accrued right. The words "any right accrued" in Section 6(*c*) are wide enough to include the landlord's right to evict a tenant in case proceeding was pending when repeal came in. Thus a pending proceeding before the Rent Controller for the eviction of a tenant on the date when the repealing Act came into force would not be affected by the repealing statute and will be continued and concluded in accordance with the law as existed under the repealed statute." (emphasis in original)

374. In *Howrah Municipal Corpn.* v. *Ganges Rope Co. Ltd.*[27] the first respondent Company had applied for sanction for construction of its complex of seven floors.

374.1. By order dated 23-12-1993 the High Court directed sanction to be accorded for the plan up to the 4th floor provided other requirements are complied with. It was also observed that the company would be at liberty to seek further sanction if it was permissible. Sanction was given and construction completed as regards the four floors. Relying on the High Court order, sanction was sought for the remaining floors. The High Court passed an order expressing the expectation that the order would be passed within a period of four weeks relying upon the earlier order. There was correspondence between the parties.

374.2. While the matter was so pending, the building rules were amended restricting the height of buildings, inter alia. The height being restricted, the application for sanction of additional three floors was rejected. The High Court

27 (2004) 1 SCC 663

took the view[106] that the unamended rules and regulations on the date of submission of the application seeking sanction for further construction would govern the matter.

374.3. This Court on a conspectus of the rules found that the rules did not contemplate "deemed sanction" or "deemed refusal", and therefore, without express sanction there could not be construction. The contention however, was that the order of the High Court fixing a period to decide its pending application be treated as creating vested right in favour of the respondent. This Court held as follows: (*Howrah Municipal Corpn. case*[27], SCC p. 680, para 37)

> "*37.* The argument advanced on the basis of so-called creation of *vested right* for obtaining sanction on the basis of the Building Rules (unamended) as they were on the date of submission of the application and the order of the High Court fixing a period for decision of the same, is misconceived. The word "vest" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word "vest" has also acquired a meaning as "an absolute or indefeasible right" [see *K.J. Aiyer's Judicial Dictionary* (*A Complete Law Lexicon*), 13th Edn.]. The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to "ownership or possession of any property" for which the expression "vest" is generally used. What we can understand from the claim of a "vested right" set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a "legitimate" or "settled expectation" to obtain the sanction. In our considered opinion, such "settled expectation", if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such "settled expectation" has been rendered impossible of fulfilment due to change in law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such "vested right" or "settled expectation" is being sought to be enforced. The "vested right" or "settled expectation" has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are

106 *Ganges Rope Co. Ltd.* v. *State of W.B.*, 1997 SCC OnLine Cal 298
27 *Howrah Municipal Corpn.* v. *Ganges Rope Co. Ltd.*, (2004) 1 SCC 663

sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon." (emphasis in original)

375. In *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[28], a judgment rendered by one of us (R.F. Nariman, J.), this Court dealt with the very Code with which we are concerned. It concerned the scope of Section 29-A of the Code declaring ineligibility of certain categories of persons to be resolution applicants. In this context, this Court inter alia, while dealing with the scope of the Code as also the principle of piercing of corporate veil, and after an exhaustive survey of the Code and reiterating the principle that it is settled law that a statute is designed to be workable, a question was posed whether a resolution plan being turned down under Section 30(2) could be challenged. Answering this question, the Court held as follows: (SCC pp. 86-87, paras 79 & 82)

"*79*. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the adjudicating authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a resolution professional may only invite fresh resolution plans if no other resolution plan has passed muster.

* * *

82. Take the next stage under Section 30. A resolution professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the resolution professional to invite a fresh resolution plan within the time-limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the adjudicating authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place."

376. In *Swiss Ribbons*[6], while dealing with constitutional validity of Section 29-A of the Code declaring certain persons not to be eligible as resolution applicants, after referring to the decision in *ArcelorMittal (India) (P) Ltd.*[28], this Court held as follows: (*Swiss Ribbons case*[6], SCC pp. 97-98, paras 97-98)

"*97*. It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of

28 (2019) 2 SCC 1
6 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17

the requisites for its action is drawn from a time antecedent to its passing [see *State Bank's Staff Union (Madras Circle)* v. *Union of India*[107] (at para 21)]. In *Arcelormittal*[28], this Court has observed that a resolution applicant has no vested right for consideration or approval of its resolution plan as follows: (SCC p. 87, para 82)

> '*82*. Take the next stage under Section 30. A resolution professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the resolution professional to invite a fresh resolution plan within the time-limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the adjudicating authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place.'

98. This being the case, it is clear that no vested right is taken away by application of Section 29-A. However, Shri Viswanathan pointed out the judgments in *Ritesh Agarwal* v. *SEBI*[108] (at para 25), *K.S. Paripoornan* v. *State of Kerala*[109] (at paras 60-66), *Darshan Singh* v. *Ram Pal Singh*[110] (at para 35), *Pyare Lal Sharma* v. *Jammu & Kashmir Industries Ltd.*[111] (at para 21), *P.D. Aggarwal* v. *State of U.P.*[112] (at para 18), and *Govind Das* v. *CIT*[113] (at paras 6 and 11), to argue that if a section operates on an antecedent set of facts, but affects a vested right, it can be held to be retrospective, and unless the legislature clearly intends such retrospectivity, the section should not be construed as such. Each of these judgments deals with different situations in which penal and other enactments interfere with vested rights, as a result of which, they were held to be prospective in nature. *However, in our judgment in ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*[28], *we have already held that resolution applicants have no vested right to be considered as such in the resolution process*. Shri Mukul Rohatgi, however, argued that this judgment is distinguishable as no question of constitutional validity arose in this case, and no issue as to the vested right of a promoter fell for consideration. *We are of the view that*

107 (2005) 7 SCC 584 : 2005 SCC (L&S) 994
28 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
108 (2008) 8 SCC 205
109 (1994) 5 SCC 593
110 1992 Supp (1) SCC 191
111 (1989) 3 SCC 448 : 1989 SCC (L&S) 484
112 (1987) 3 SCC 622 : 1987 SCC (L&S) 310
113 (1976) 1 SCC 906 : 1976 SCC (Tax) 133

the observations made in ArcelorMittal[28] *directly arose on the facts of the case in order to oust the Ruias as promoters from the pale of consideration of their resolution plan, in which context, this Court held that they had no vested right to be considered as resolution applicants. Accordingly, we follow the aforesaid judgment. Since a resolution applicant who applies under Section 29-A(c) has no vested right to apply for being considered as a resolution applicant, this point is of no avail.*" (emphasis supplied)

377. We may observe that the decisions of this Court in *ArcelorMittal (India) (P) Ltd.*[28] and *Swiss Ribbons*[6] are inappropriate to the context of the cases before us.

378. We may also notice the decision of the Court of Appeal in *West* v. *Gwynne*[114]. The plaintiff in the said case who was the landlord of the property wrote to the defendant, his tenant for his consent for the proposed underlease. The defendant insisted however on receiving for himself one half of the surplus rental as a condition for the consent. The suit filed by the plaintiff was for a declaration that the defendant could not impose such a condition and that he could give the underlease without any further consent of the defendant.

378.1. In the year 1892 (after the lease), Section 3 of the Conveyancing and Law of Property Act, 1892 was enacted. The question which arose was whether it would apply to existing leases as well as and was of general application, or it should be confined to leases after the commencement of the Act. The said section provided that in all leases containing a covenant against assigning or underletting without licence or consent such covenant should, unless the lease contain an express provision to the contrary, be deemed subject to the proviso that no fine shall be payable for or in respect of such licence or consent.

378.2. The Court took the view that the words of the section were clear. In fact, we may profitably notice the words of Joyce, J. whose judgment was the subject-matter of the appeal "the section with which we have to deal with in this case is quite plain to everyone but a lawyer" (Ch p. 5).

378.3. The Court of Appeal took the view that the provision was a general enactment based on ground of public policy. Cozens Hardy, M.R. while agreeing with the general proposition that a statute is presumed not to have retrospective operation unless a contrary intention appears by express words or by necessary implication, held as follows: (*Gwynne case*[114], Ch p. 11)

> "... "Retrospective operation" is an inaccurate term. Almost every statute affects rights which would have existed but for the statute."

378.4. Buckley, L.J. went on to hold as follows: (*Gwynne case*[114] 114, Ch pp. 11-12)

> "... To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation

28 *ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1
6 *Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17
114 (1911) 2 Ch 1 : 1910 W 976 (CA)

is one matter. Interference with existing rights is another. *If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective*. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law." (emphasis supplied)

379. Reliance has been placed on the judgment of this Court in *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*[5] which was rendered by one of us (R.F. Nariman, J.).

379.1. By an amendment to the Code with effect from 6-6-2018 Section 238-A was inserted by which the Limitation Act, 1963, was made applicable to the proceedings and appeals before the authorities including the Appellate Tribunal. The question which fell for decision was whether the Limitation Act, 1963 would also apply in respect of application under Section 7 inter alia on and from the commencement of the Code on 1-12-2016 till the date of the amendment, that is, 6-6-2018.

379.2. In answering this question, this Court went on to hold that the CIRP can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred. In the course of its judgment in *B.K. Educational Services*[5], this Court referred (at SCC pp. 649-53, para 22) to the earlier judgment of this Court including the recent judgment of this Court in *M.P. Steel Corpn.* v. *CCE*[115]. In the said decision in *B.K. Educational Services*[5], this Court has relied upon (at SCC p. 650, para 22) the earlier judgment in *Shanti Misra*[90] wherein it was laid down inter alia as follows: (*Shanti Misra case*[90], SCC p. 846, para 7)

"*7.*... '... (*2*) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally, the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. *Nor can it suddenly extinguish a vested right of action by providing for a shorter period of limitation*.' " (emphasis in original)

379.3. This Court in *B.K. Educational Services case*[5] also held that the application filed in 2016 or 2017 cannot suddenly revive a debt which is no longer due as it is time-barred. Apparently, the petitioners are seeking to lay store by the principle that a new law cannot extinguish a vested right of action even if it be pertaining to the period of limitation.

380. A right of appeal is a vested right, as noticed. However, it becomes vested not because the right is created under the statute alone. It becomes

5 (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528
115 (2015) 7 SCC 58 : (2015) 3 SCC (Civ) 510
90 *New India Insurance Co. Ltd.* v. *Shanti Misra*, (1975) 2 SCC 840

vested, as noticed by this Court in *Garikapati Veeraya*[7], from the date of institution of the suit. What about a right to sue? In the case of a right to file a civil suit, equally there is a vested right to file a suit but the question would be as to when does it arise. From the line of argument pursued on behalf of the Union that in the case of the right to take advantage of an existing statute, there is no accrued right, which means also that there is no vested right, should we proceed on the basis that the concept of a vested right qua a civil suit, can be recognised only after the civil suit is filed, at a time when there is no law, ousting or barring a civil suit and a law is passed, during the pendency of a civil suit, which again does not expressly bar the suits, which had already been filed? Since we are in the regions of vested rights, and every right must have a title to the right, and since every civil suit is based on a cause of action, could it not be said that the right to sue becomes vested from the point of time when the cause of action arises? Since, for every civil suit, there is a period of limitation prescribed, could it not be said that since a period of limitation has been prescribed for instituting a suit, the right to sue becomes vested from the first day when the period of limitation starts to run?

381. Order 7 Rule 11 of the Code of Civil Procedure contemplates rejection of a plaint, if it does not disclose a cause of action. The cause of action in a suit, will consist of the facts, which, if not traversed by the defendant, will entitle the plaintiff to a decree.

382. The Schedule to the Limitation Act, 1963, consists of three columns. The third column, provides for the time, from which, the period begins to run for different suits. Article 19 provides for money payable for money lent. The period of three years, prescribed as period of limitation, begins to run from the point of time, when the loan is made. This means that, at any point of time, after the loan is made, but within three years, ordinarily, a civil suit is to be filed. In the example we have given, if a suit is filed towards the end of the three-year period, would it be said that the right to sue was not available from the first day, when the period of limitation began to run? We will take another example. Article 73 provides for a period of one year for a suit for compensation for false imprisonment. The time, from which the period begins to run, is when the imprisonment ends. Can it not be said that the prisoner, upon his incarceration coming to an end, is clothed with a vested right to sue? We would think, that he is given a right, which is vested in him, when the imprisonment ends. In fact, it is the illegal imprisonment which really creates the vested right but the period of limitation begins on sound policy only after his release.

383. Article 113 of the Limitation Act provides for suits for which there is no period provided in the Schedule. The period of 3 years provided begins to run when the right to sue accrues. If the right to sue "accrued" within the meaning of Article 113, can it still be said, that for the purpose of deciding, the effect of a law purporting to impact the right, there is no vested right or accrued right till the suit is filed? We will give another example and that is Article 30, which gives a right to sue on the bond subject to a condition. The period of

7 *Garikapati Veeraya* v. *N. Subbiah Choudhry*, AIR 1957 SC 540 : 1957 SCR 488

limitation is three years. The time begins to run when the condition is broken. The right to sue clearly could be said to arise, immediately upon the condition being broken.

384. We may, in this context also, notice that one of the five characteristics for a legal right to exist, is that every legal right has a title. It is further stated, in *Salmond on Jurisprudence* that every legal right has a title, which are apparently the facts or events by reason of which the right has become vested in its owner. Now, it must be noticed also, at this stage that the Limitation Act, in fact, contemplates the time, within which the suit must be brought, beginning necessarily on the supposition, that at least, on the very first day of the period of time, from which a plaintiff can sue, the right is already vested in him. This would reinforce us in our view that a vested right to sue could be said to accrue, and it would always precede the institution of the suit. At any rate, it could be said to exist from the very first day, on which the time begins to run, under the Limitation Act. Thus, a vested right to sue could be tested with reference not to the date on which the suit is filed as would be the case where a question arises, whether a right of appeal exists.

385. However, we must consider whether a right of suit is conferred by a statute. In this regard, we may notice the decision of this Court in *Mardia Chemicals Ltd.* v. *Union of India*[54].

386. In *Mardia Chemicals case*[54] the validity of certain provisions of the SARFAESI Act 2002, was questioned. Of relevance to us, in these cases is the discussion of this Court relating to the vires of Section 17(2). The said provision contemplated a pre-deposit of 75% of the amount by the applicant under Section 17 before the Tribunal. This Court found the condition of pre-deposit arbitrary and unreasonable. In this context, this Court also noted the distinction between a civil suit and an appeal and it was found that an application maintained under Section 17 was in the nature of a suit, it is apposite that we notice the following: (SCC pp. 352-54, paras 59-60 & 64)

> "*59*. We may like to observe that proceedings under Section 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case. We may refer to a decision of this Court in *Ganga Bai* v. *Vijay Kumar*[116] where in respect of original and appellate proceedings a distinction has been drawn as follows: (SCC p. 397, para 15)
>
> > '*15*. … There is a basic distinction between the right of suit and the right of appeal. *There is an inherent right in every person to bring a suit*

54 (2004) 4 SCC 311
116 (1974) 2 SCC 393

of civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.'

60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive, more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on the basis of a one-sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one-sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the authority concerned. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.

* * *

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (*i*) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (*ii*) there is no determination of the amount due as yet, (*iii*) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (*iv*) no special reason for double security in respect of an amount yet to be determined and settled, (*v*) 75% of the amount claimed by no means would be a meagre amount, and (*vi*) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution." (emphasis supplied)

Thus, a right to sue is not created by the statute. It is an inherent right unless it is barred by some law. Therefore, the principle that a right to take advantage of a statute not being an accrued right may not apply.

387. We may also use this occasion to repel the argument based on *Mardia Chemicals*[54] that the application under Section 7 is akin to a civil suit. The context of the application under Section 17 of the SARFAESI Act is completely different from that of the Code. The application under Section 17 of the SARFAESI Act was found to be in lieu of a suit. The allottee has other remedies unlike the applicant under Section 17. All the assets of the debtor are taken over. The situation cannot be compared. No doubt, the argument of the learned ASG is based on the right under Section 7 of the Code being a mere right to take advantage of a statute. In *Abbott*[84], in the context of a saving enactment, the Court observed that a mere right assuming it to exist in the members of the public or any class, then, to take advantage of an enactment, *without any act done by the individual, towards availing himself of that right*, could not be treated as an accrued right under the enactment. Therefore, the stand appears to be that the right under Section 7 is a mere right to take advantage of an enactment. It is the further case of the Union, apparently that, only upon an application being filed and what is more, it is admitted under Section 7(5), that a vested right would accrue.

388. We do not think that the principles which have been laid down, may apply in the case of a vested right of action. We take the view that a plaintiff has a vested right, depending on whether there is a cause of action and a period of limitation, which has begun to run, which necessarily involves, the existence of a vested right. In the case of an application under Section 7 of the Code, we may notice that it is a valuable right, no doubt, statutory in nature. It cannot be the law that a statute cannot create vested rights. Should the ingredients which the legislature contemplate exist in favour of a person as an action in law, it can also be described as a vested right. The application, under Section 7, is an application, which attracts the period of limitation, which has already been noticed. It commences from the time when the right to sue accrues. In every case, where the period of limitation began to run, in respect of debt prior to the Code coming into being, the right to sue would have arisen earlier. In this regard we may refer to *Isha Valimohamed*[86].

389. In regard to the effect of this finding on the challenge to the first and the second provisos in Section 7, we must immediately observe that the impugned first and second provisos have only prospective operation. We have already found that the provisos first and second are valid. They can survive, even if the third proviso is struck down. The third proviso is on the other hand dependant on the first and second provisos and cannot survive their invalidation. The vested right cannot exist merely by reason of Section 7. It must depend upon the vestitive facts which would create the right in conjunction with Section 7. We

54 *Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311
84 *Abbott* v. *Minister for Lands*, 1895 AC 425 (PC)
86 *Isha Valimohamed* v. *Haji Gulam Mohd. & Haji Dada Trust*, (1974) 2 SCC 484

need not probe the matter further in those cases where only the first and second provisos can be questioned. This is so in two writ petitions, WPs Nos. 228 and 850 of 2020, where, though there are no applications filed under Section 7 before the amendment, the third proviso is also challenged, which cannot be countenanced.

390. There is, in our view, a right which is vested in the cases where, the petitioners have filed application, fulfilling the requirements under unamended Section 7 of the Code. The very act of filing the application, even satisfies the apparent test propounded by the Additional Solicitor General, that the right under Section 7 is only one to take advantage of the statute and unless advantage is actually availed it does not create an accrued right. When applications were filed under the unamended provisions of Section 7, at any rate it would transform into a vested right. The vested right is to proceed with the action till its logical and legal conclusion. We are unable to accept the stand of the learned ASG, that a vested right to emerge still requires an order under Section 7(5) of the Code. It is no doubt a stage, when the authority finds there is default and takes the matter forward including appointing to begin with the IRP and ordering a moratorium. In this regard, it is to be noted that in the scheme of the Code, what takes place before admission, is that the applicant tries to establish the debt and default. This is akin to the stage of a trial in a suit. No doubt, this happens only if the application is free from defects. But this is a far cry from saying that a vested right of action did not inhere even on the version of the ASG upon the act of the creditor invoking the Code.

391. In *P.D. Aggarwal* v. *State of U.P.*[112], the Court was dealing with a challenge to statutory rules, inter alia, by which temporary Assistant Engineers who were working continuously since the date of their appointment in the cadre of Assistant Engineer were deprived of their services from the date of substantial appointment to the temporary post for the purpose of seniority.

391.1. This Court in the context of rules and the impact it had held as follows: (SCC p. 638, para 18)

> "*18.* It has been held by this Court in *E.P. Royappa* v. *State of T.N.*[39], SCC p. 38, para 85 and *Maneka Gandhi* v. *Union of India*[117], SCC pp. 283-84, para 7 that there should not be arbitrariness in State action and the State action must ensure fairness and equality of treatment. It is open to judicial review whether any rule or provision of any Act has violated the principles of equality and non-arbitrariness and thereby invaded the rights of citizens guaranteed under Articles 14 and 16 of the Constitution."

391.2. It was also after noting the facts stated as follows: (*P.D. Aggarwal case*[112], SCC p. 639, para 18)

> "*18.* ... Thus the 1969 and 1971 Amendments in effect take away from the officers appointed to the temporary posts in the cadre through Public Service Commission i.e. after selection by Public Service Commission,

112 (1987) 3 SCC 622 : 1987 SCC (L&S) 310
39 (1974) 4 SCC 3 : 1974 SCC (L&S) 165
117 (1978) 1 SCC 248 : AIR 1978 SC 597

the substantive character of their appointment. These amendments are not only disadvantageous to the future recruits against temporary vacancies but they were made applicable retrospectively from 1-3-1962 even to existing officers recruited against temporary vacancies through Public Service Commission. As has been stated hereinbefore that the Government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution."

391.3. We may notice two aspects. Firstly, it was a challenge to a statutory rule. The Court went on to observe that it could be overturned if it is arbitrary. We have already taken note that in regard to the challenge to a law made by the legislature under Article 14 that what is required is that a law must be manifestly arbitrary. The said concept has been explained in *Shayara Bano*[40] (para 101).

392. In *Darshan Singh* v. *Ram Pal Singh*[110], the appellants challenged certain alienations as being contrary to custom under the State law of the year 1920. The matter was at the appellate stage in suits filed by the appellants.

392.1. In 1973, the law was amended. On the basis of same, the High Court dismissed the suit on the basis of that, after the Amending Act came into force there could not be a challenge to the transfer. The contentions of the appellants was that the Amending Act could not be read as retrospective. The original enactment permitted challenging the transfer on the ground that the transfer was contrary to custom. It was this right which was sought to be subjected to certain conditions.

392.2. We may notice that this case did not involve a challenge to the amendment. In the course of the judgment, the Court took the view that what was taken away was the basic right to "contest" the transfer irrespective of whether it was in a suit or appeal. The Court concluded that by the Amending Act the custom was done away with.

393. In *K.S. Paripoornan* v. *State of Kerala*[109], the Constitution Bench had to consider whether Section 23(I-A) introduced by the Amending Act, 1984 was retrospective. In the majority judgment by S.C. Agrawal, J., we notice the following: (SCC pp. 634-35, para 64)

"*64*. A statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is declaratory in nature inasmuch as while a statute dealing with substantive rights is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature. *A statute is regarded as retrospective if it operates on cases*

40 *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277
110 1992 Supp (1) SCC 191
109 (1994) 5 SCC 593

or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. By virtue of the presumption against retrospective applicability of laws dealing with substantive rights transactions are neither invalidated by reason of their failure to comply with formal requirements subsequently imposed, nor open to attack under powers of avoidance subsequently conferred. They are also not rendered valid by subsequent relaxations of the law, whether relating to form or to substance. *Similarly, provisions in which a contrary intention does not appear neither impose new liabilities in respect of events taking place before their commencement, nor relieve persons from liabilities then existing, and the view that existing obligations were not intended to be affected has been taken in varying degrees even of provisions expressly prohibiting proceedings. (See: Halsbury's Laws of England, 4th Edn., Vol. 44, Paras 921, 922, 925 and 926.)*" (emphasis supplied)

394. In *State Bank's Staff Union (Madras Circle)* v. *Union of India*[107], an award was passed by the Industrial Tribunal, which was impugned before the High Court. When the matter was so pending, the State Bank of India Act came to be amended. The contention of the appellants was that the amendment was intended to nullify the decision[118] of the High Court, which was repelled. The Court also considered the power of the sovereign legislature to make retrospective legislation. The Court held as follows: (SCC pp. 592-94, paras 19-21 & 23-24)

"*19.* Every sovereign legislature possesses the right to make retrospective legislation. The power to make laws includes the power to give it retrospective effect. *Craies on Statute Law* (7th Edn.) at p. 387 defines retrospective statutes in the following words:

> '*Meaning of retrospective*—A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'

20. Judicial Dictionary (13th Edn.) by K.J. Aiyar, Butterworth, p. 857, states that the word "retrospective" when used with reference to an enactment may mean (*i*) affecting an existing contract; or (*ii*) reopening up of past, closed and completed transaction; or (*iii*) *affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "retrospective or retroactive law" as one which takes away or impairs vested or accrued rights acquired under existing laws. A retroactive law takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes*

107 (2005) 7 SCC 584 : 2005 SCC (L&S) 994
118 *State Bank Staff Union* v. *Union of India*, 2000 SCC OnLine Mad 561

a new duty, or attaches a new disability, in respect to transactions or considerations already past.

21. In *Advanced Law Lexicon* by P. Ramanatha Aiyar (3rd Edn., 2005) the expressions "retroactive" and "retrospective" have been defined as follows at p. 4124, Vol. 4:

'*Retroactive*. Acting backward; affecting what is past.

(Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. — Also termed *retrospective*. (*Black's Law Dictionary*, 7th Edn., 1999)

" "*Retroactivity" is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called "true retroactivity", consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as "quasi-retroactivity", occurs when a new rule of law is applied to an act or transaction in the process of completion. ... The foundation of these concepts is the distinction between completed and pending transactions. ...*" T.C. Hartley, *The Foundations of European Community Law*, p. 129 (1981).

* * *

Retrospective.—Looking back; contemplating what is past.

Having operation from a past time.

"... "Retrospective" is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. *In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisite for its action is drawn from a time antecedent to its passing*." (Vol. 44, *Halsbury's Laws of England*, 4th Edn., p. 570, Para 921.)'

* * *

23. In *Harvard Law Review*, Vol. 73, p. 692 it was observed that:

'It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called "small repairs". Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus the interest in the retroactive curing of such a defect in the

administration of the Government outweighs the individual's interest in benefiting from the defect.'

The above passage was quoted with approval by the Constitution Bench of this Court in *Commr. of Urban Land Tax* v. *Buckingham & Carnatic Co. Ltd.*[119] In considering the question as to whether the legislative power to amend a provision with retrospective operation has been reasonably exercised or not, various factors have to be considered. It was observed in *Stott* v. *Stott Realty Co.*[120] as noted in *Words and Phrases*, Permanent Edn., Vol. 37-A, p. 2250 that:

> '*The constitutional prohibition of the passage of "retroactive laws" refers only to retroactive laws that injuriously affect some substantial or vested right, and does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce on account of defects in the law or its omission to provide the relief necessary to secure such right.*'

24. Craies on Statute Law (7th Edn.) at p. 396 observes that:

> 'If a statute is passed for the purpose of protecting the public against some evil or abuse, it may be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right.' " (emphasis supplied)

395. The Court also repelled the argument that vested rights cannot be taken away by the legislature by way of retrospective legislation. In para 31, the Court held as follows: [*State Bank's Staff Union (Madras Circle)*[107], SCC pp. 595-96]

> "*31. The learned counsel for the appellant submitted that vested rights cannot be taken away by the legislature by way of retrospective legislation. The plea is without substance. Whenever any amendment is brought in force retrospectively or any provision of the Act is deleted retrospectively, in this process rights of some are bound to be affected one way or the other. In every case the exercise by the legislature by introducing a new provision or deleting an existing provision with retrospective effect per se does not amount to violation of Article 14 of the Constitution.* The legislature can change, as observed by this Court in *Cauvery Water Disputes Tribunal, In re*[121] the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. Such an act on the part of the legislature

119 (1969) 2 SCC 55
120 (1939) 284 NW 635 : 288 Mich 35
107 *State Bank's Staff Union (Madras Circle)* v. *Union of India*, (2005) 7 SCC 584 : 2005 SCC (L&S) 994
121 1993 Supp (1) SCC 96 (2)

amounts to exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the concept of separation of powers." (emphasis supplied)

Section 6 of the General Clauses Act, 1897

396. In this regard, no support can be drawn from Section 6 of the General Clauses Act, 1897. Section 6 makes it clear that the rights or privileges which may be asserted are subject to the law not being couched contrary to such rights/privileges. In this case it is precisely because the third proviso covers the applications filed prior to the amendment which had not been admitted, that the petitioners have challenged the provision.

Reading down

397. Further, the appeal to invoke the principle of reading down the proviso is untenable. In his judgment for the majority Sawant, J. in *DTC* v. *Mazdoor Congress*[122] held as follows: (SCC pp. 728-29, para 255)

> "*255.* It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible — one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."

398. Now, the terms of the proviso are clear. It does not admit of more than one interpretation at least in terms of the matter covered by it. The only area left is the impact of the withdrawal which is to happen.

122 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213

399. We may also notice the judgment of this Court in *Vijay* v. *State of Maharashtra*[123]. The appellant was elected as a member of the Panchayat in 2000 and elected as the Sarpanch. He was further elected as Councillor of the Zila Parishad. An amendment was made with effect from 8-8-2003. Under the marginal note Disqualifications, Section 14, inter alia, disentitled a person from continuing as a Panchayat Member if he was elected a Councillor of the Zila Parishad. This Court found that it was a disqualifying law intended to have retrospective effect. We may notice para 12 which reads as follows: (SCC pp. 292-93)

> "*12*. The appellant was elected in terms of the provisions of a statute. The right to be elected was created by a statute and, thus, can be taken away by a statute. It is now well settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness. When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature. The appellant does not and cannot question the competence of the legislature in this behalf."

The case did not involve a challenge to the law. What is significant is the statement that the right created by a statute, can be taken away by a statute.

400. We find that qua the financial creditors covered by the third proviso, having invoked, at any rate unamended Section 7, they had a vested right.

401. They had undoubtedly a vested right to have their actions carried to its logical and legal end. No doubt, the question of admission of the application arises under Section 7(5) of the Code. It is open to the adjudicating authority to reject the application but that does not mean that the applicants had no vested right of action. The possibility of a plaint being rejected under Order 7 Rule 11 or an appeal being dismissed under Order 41 Rule 11 without notice being issued to the respondent or the fact that the suit can be dismissed at later stages, cannot detract from the right of the plaintiff or the appellant, being a substantive right. The same principle should suffice to reject the contention, based on admission under Section 7(5) alone, giving rise to the vested right in regard to an applicant under Section 7 of the Code.

402. A vested right is not limited to property rights. A right of action, should conditions otherwise exist, can also be a vested right. Such a right can be created by a statute and even on a repeal of such a statute, should conditions otherwise exist, giving a right under the repealed statute, the right would remain an accrued right (see *Isha Valimohamed*[86]).

403. No doubt, there may not be a vested right as regards mere procedure and while limitation, ordinarily, belongs to the domain of procedure, should new law shorten the existing period of limitation, such a law would not operate

123 (2006) 6 SCC 289
86 *Isha Valimohamed* v. *Haji Gulam Mohd. & Haji Dada Trust*, (1974) 2 SCC 484

in regard to the right of action which is vested (see *Shanti Misra*[90]). A party may not have a vested right of forum as distinct from the vested right of action (see *Shanti Misra*[90]).

404. Every sovereign legislature is clothed with competence to make retrospective laws. It is open to the legislature, while making retrospective law, to take away vested rights. If a vested right can be taken away by a retrospective law, there can be no reason why the legislature cannot modify the vested rights [see *State Bank's Staff Union (Madras Circle)*[107]].

405. In an action, where the law is not challenged, the court would ordinarily proceed as follows. It will presume that a law, which affects substantive rights, is meant to have prospective operation only. In the same way, as regards procedural laws or the laws relating to a mere matter of procedure or of forum, they carry retrospective impact.

406. A statute is not retrospective merely because it affects existing rights. This is, however, in regard to the future operation of law qua the existing rights. If the existing right is modified or taken away and it is to have operation only from the date of new law, it would obviously have only prospective operation and it would not be a retrospective law.

407. Declaratory, clarificatory or curative statutes are allowed to hold sway in the past. The very nature of the said laws involve the aspect of public interest which requires sovereign legislature to remove defects, clarify aspects which create doubt. The declaratory law again has the effect of the legislative intention being made clear. It may not be apposite in the case of these statutes to paint them with the taint of retrospectivity.

408. What then is retrospectivity? It is ordinarily the new law being applied to cases or facts, which came into existence prior to the enacting of the law. A retrospective law, in other words, either supplants an existing law or creates a new one and the legislature contemplates that the new law would apply in respect of a completed transaction. It may amount to reopening, in other words, what is accomplished under the earlier law, if there was one, or creating a new law, which applies to a past transaction.

409. "*Meaning of "retrospective"*—A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under any existing laws, or creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already past." (See *Craies on Statute Law*, 7th Edn., p. 387.)

410. In *Halsbury's Laws of England*, 4th Edn., p. 570, Para 921, it is, inter alia, stated as follows—

> "... In general, however, the courts regard as retrospective, any statute, which operates on cases or facts coming into existence before its commencement *in the sense that it affects, even if for the future only, the*

90 *New India Insurance Co. Ltd.* v. *Shanti Misra*, (1975) 2 SCC 840

107 *State Bank's Staff Union (Madras Circle)* v. *Union of India*, (2005) 7 SCC 584 : 2005 SCC (L&S) 994

character or consequences of transactions, previously entered into or of other past conduct." (emphasis supplied)

411. When a statute made by the sovereign legislature is found to have retrospective operation and the challenge is made under Article 14 of the Constitution, (*i*) the Court must consider whether the law, in its retrospectivity, manifests forbidden classification. (*ii*) Whether the law, in its retrospectivity, produces manifest arbitrariness, (*iii*) If a law is alleged to be violative of Article 19(1)(*g*), firstly, the Court, in an action by a citizen, would, in the first place, find whether the right claimed, falls, within the ambit of Article 19(1)(*g*). The Court will further enquire as to whether such a law is made, inter alia, by way of placing reasonable restrictions by looking into the public interest. In the case of law, which is found to be not unfair, it would also not fall foul of Article 21.

412. Where the law is challenged on the ground that it is violative of fundamental rights under Article 14, necessarily the court must enquire whether it is capricious, irrational, disproportionate, excessive and, finally, without any determining principle. [*See Shayara Bano case*[40].] The right of a citizen, or for that matter, any person under Article 14, is a right which is personal to him.

413. The golden thread which runs through the grounds making up the Doctrine of Manifest Arbitrariness, Injustice, undoubtedly, consists of total absence of public interest, of which the sovereign legislature as the supreme law giver, is the undoubted custodian.

414. Though made in the context of the power of the court in England, in regard to taking into consideration the concept of fairness, while deciding upon the issue of retrospectivity, we would think the following passage in *Principles of Statutory Interpretation* by Justice G.P. Singh, made relying upon the judgment of the House of Lords in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*[124], would furnish a safe and fairly comprehensive guide, even in the matter of determining the constitutionality of a retrospective law. Hence, we refer to the same and would approve of the same:

> "... It was observed that the question of fairness will have to be answered in respect of a particular statute by taking into account various factors viz. *value of the rights which the statute affects; extent to which that value is diminished* or extinguished by the suggested retrospective effect of the statute; *unfairness of adversely affecting the rights; clarity of the language used by Parliament and the circumstances in which the legislation was created*. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity is so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say." (emphasis supplied)

415. Having laid down the principles, we shall now apply the same to the facts of the present cases before us. As far as the nature of the right in question is concerned, which would include the value of the rights, it is a right

40 *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277
124 (1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)

of action. The right of action is, undoubtedly, a vested right. The role of the applicant essentially fades out after the admission of the application is made under Section 7(5). The scheme of the Code has been unravelled by us. The right, which is given, is a right in rem. It is not a mere personal right, in the sense that it is right in rem. The applicant is not even required to plead the default qua him as the default to any financial creditor, in the requisite sum, provided it is not barred under Article 137, suffices. The consequences of the application would be that it may land the applicant and also all the stakeholders, in liquidation of the corporate debtor.

416. As far as, the manner, in which, the value of the right is affected or if we may use the word "impaired", it is another most significant aspect, to be borne in mind. The manner, in which, a particular statute carrying retrospective effect, will impair, the rights will depend on the facts of each case. We have, for instance, noticed the clear unfairness, which, the Rule in question carried qua a set of employees in regard to their vested right, in *P.D. Aggarwal*[112]. The vested right, in fact, consisted of the right to have certain period reckoned for the purpose of seniority. As far as the clarity of the language used, there does not appear to be any ambiguity, and what Parliament intended is, completely free from doubt. The only area where any ambiguity can be said to exist—is the effect of the application being treated as withdrawn. The further aspect, which is to be borne in mind, is the circumstances in which the legislation is created. It is here that the mischief rule and the aspect of public interest looms large. At the end of the day, the tussle is between the individual right versus the public interest. Now, public interest is a concept, which is capable of embracing, within its scope, the interest of different sections of the public. This would include the sections of the public to which the applicant himself belongs. Public interest would, undoubtedly, also encompass, the economy of the country, which can be understood in terms of all the objects, for which the Code was enacted. They would include the speed with which the Code is worked. It would include, also, safeguarding the interests of all the stakeholders. This may necessarily include the corporate debtor as a stakeholder, being protected from applications, which are perceived as frivolous or not representing a critical mass.

417. We have noticed the statistics which have been made available by the Union. On the eve of the Ordinance on 27-12-2019, it would appear that 2201 applications came to be moved during a period of nearly eighteen months as in comparison to 253 applications during the preceding period representing a nearly 10-fold increase.

418. Now, the third proviso, thus, indeed, does not say that as on the date of filing of the applications, the law was what is contained in the first and the second provisos. In that sense, it could be said that it was not retrospective. We have found that when invoking the unamended Section 7 applications stood moved, they evinced creation of vested rights to continue with the proceeding. The applications were, no doubt, at the stage, prior to the admission under

112 *P.D. Aggarwal* v. *State of U.P.*, (1987) 3 SCC 622 : 1987 SCC (L&S) 310

Section 7(5). It is at this stage that through the device of the third proviso, Parliament has applied the principle of first and second proviso of threshold requirement, in respect of pending applications, which is made to appear as it would have operation in the future.

419. Now here we must address an argument of the third proviso going to mere procedure. The financial creditors covered by the third proviso were clothed with a statutory right under Section 7. This right was available to be exercised by an individual creditor, by himself or jointly with others. The imposition of a threshold requirement being a mandatory and irreducible minimum even, if it is to be achieved as and after the date of the amendment, constitutes an intrusion into the substantive right of action vested in the individual creditor. The action of the creditor was not a completed transaction. As regards his conduct in the past viz. moving under Section 7, it is incomplete but the action was commenced. But the law (the third proviso) impairs the past action qua the future. We would find as follows. Imposing the threshold requirement under the third proviso, is not a mere matter of procedure. It impairs vested rights. It has conditioned the right instead, in the manner provided in the first and the second proviso. We have already upheld the first and second proviso, which, in fact, operates only in the future. In that sense, the legislature has purported to equate persons who had not filed applications with persons like the petitioners who had filed the applications under the unamended law.

420. At this point, we must notice one argument, which is that, the law giver has discriminated between applicants under Section 7, which were pending at different stages. We may notice, in this regard, however, that all the applicants share the common characteristic of being applicants in applications which were not admitted. In fact, most of the applications would appear to have been filed in the year 2019. Enquiring further into the different stages in these applications, would go against the principle that the court does not look to mathematical nicety or perfection in the law. The court also bears in mind the principle that the law is an economic measure.

Clarity regarding "withdrawal" under the third proviso

421. One of the aspects to be considered is the clarity of a retrospective law. The requirement of compliance with the threshold numerical requirements under the first and second proviso is an integral and inseparable part of the third proviso. Let us have a look at the consequences that follow if the numerical strength cannot be cobbled up by the applicant. The proviso declares that in such an eventuality the application will be treated as withdrawn before admission. Rule 8, as noticed by us, provides for power with the Tribunal to allow withdrawal before admission. Does it mean that an applicant can file a fresh application after gathering together the requisite numbers? What is the impact of withdrawal under provisions under the general law? What is the impact of the law relating to the Limitation Act in respect of the application which has been withdrawn?

422. In the context of a civil suit, Order 23 CPC deals with withdrawal and adjustment of suit. Order 23 Rule (1)(4)(*b*) prohibits a fresh suit in respect of the same subject-matter (cause of action), if a suit is withdrawn without permission of the Court under Order 23 Rule 1(3).

423. In the facts of the case before us the third proviso does not indicate as to whether a fresh application after complying with the requirement of the ingredients of the first and second proviso is maintainable. It does not also indicate what would be the position even if such application is maintainable by the same applicant, with regard to the periods spent in the context of ruling of this Court that the Limitation Act applies and the relevant Article is Article 137 and therefore, any application filed beyond the period of three years from the date of the default is barred.

424. The other way of looking at these issues is that Order 23 Rule 1 CPC applies only in the case of a civil suit. In regard to the application under Article 137 which is what an application under Section 7 of the Code is, it could it be said that Order 23 Rule 1 CPC is inapplicable. Secondly, could it not be said that it is not a case of a voluntary withdrawal by the applicant and the withdrawal of the application is declared by the legislature, and therefore, Order 23 Rule 1 CPC would not apply.

425. Section 14 of the Limitation Act, 1963 reads as follows:

> "**14.** ***Exclusion of time of proceeding bona fide in court without jurisdiction***.—(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and 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.
>
> (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.
>
> (3) Notwithstanding anything contained in Rule 2 Order 23 of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
>
> *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;
>
> (*b*) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(*c*) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

426. A perusal of Section 14(1) of the Limitation Act shows that it is intended to exclude time in regard to a civil suit.

426.1. Section 14(2) covers cases relating to the applications for which period of limitation is fixed. It contemplates that if such applicant comes to court late with a time-barred application but is able to show that he has been prosecuting with due diligence another civil proceeding, for the same relief, the period, when he was so prosecuting the other proceeding, can be excluded where the proceeding was prosecuted in good faith in a court which from defect of jurisdiction or other cause of like nature is unable to entertain it.

426.2. It will be noticed that sub-section (3) of Section 14 deals only with the case falling under sub-section (1). In other words, it relates to civil suits. It enables a plaintiff in a subsequent suit to exclude the period which was consumed in prosecuting an earlier civil suit which latter suit stood withdrawn with permission granted by the court.

426.3. Therefore, in regard to applications, including applications under Article 137, it appears, the law giver has not contemplated expressly excluding the time spent in pursuing another proceeding which stood withdrawn.

427. In regard to power of withdrawal as already noticed Rule 8 of the Insolvency and Bankruptcy (Application of Adjudicating Authority) Rules, 2016 reads as follows:

"**8.** ***Withdrawal of application***.—The adjudicating authority may permit withdrawal of the application made under Rules 4, 6 or 7, as the case may be on a request made by the applicant before its admission."

428. The application made under Rule 4 is the application under Section 7 by the financial creditor. However, Rule 8 is silent as to any similar prohibition as is contained in Order 23 Rule 1(4)(*b*) CPC. Unless the principle of Order 23 Rule 1 which is based on public policy, is applied, a fresh application, compliant with the first two provisos in Section 7, may not be barred. In this regard, since under the Explanation in Section 7(1), default occurs when default qua any financial creditor is made out, the cause of action can become different, in which case, even the principle of Order 23 Rule 1, may not apply.

429. In this regard, since withdrawal is ordained by the third proviso, it would not be a withdrawal under Rule 8 on request. Secondly, even for the principle based on public policy to apply to a withdrawal under Rule 8, there must be a request and withdrawal. We do not pronounce on the effect of the same viz. withdrawal on request. Suffice it to conclude and hold that the withdrawal under the third proviso would not bar a fresh application by the same party after complying with the provision of the first or second proviso as the case may be on the same default.

430. As far as limitation is concerned, however, on the terms of Section 14, since Section 14(1) read with Section 14(3), contemplates withdrawal of a suit with permission under Order 23 Rule 1(4)(*b*) to enable exclusion of the

period spent in a suit which is withdrawn and Section 14(2) is what applies to applications including one under, Article 137, the period spent in the application when it is withdrawn under the third proviso cannot be excluded under Section 14(3) of the Limitation Act. However, it may be open to point out that application is not being entertained within the meaning of Section 14(2) on account of the law that mandates its withdrawal on account of the non-compliance of conditions for maintaining the application it would be. However, we need not pronounce on it, as we feel that having regard to the Explanation in Section 7, it will always be open to the applicant to set up a different default to any financial creditor and move afresh. This unique feature of the Code is highly relevant in determining the validity of the amendment. The application under Section 7 is not meant to be a recovery mechanism. The Code, as is clear from its title, deals with insolvency resolution, to begin with. If there is insolvency, the application, with reference to any of the large number of creditors, suffices.

431. Thus, withdrawal under the third proviso would not bar a fresh application even on the same cause of action. It can, at any rate, be condoned under Section 5 of the Limitation Act. It is here we would also exercise our power under Article 142 to direct that if fresh applications are filed by the petitioners after complying with the first and second proviso, then on applications being filed under Section 5, of the Limitation Act, in regard to the period of pendency of applications, the authority shall condone the delay. As far as the period after the withdrawal under the proviso, in view of the power again under Section 5 of the Limitation Act, certainly we see no reason as to why the periods spent cannot be explained in terms of *B.K. Educational Services (P) Ltd.*[5] In the above manner, we would interpret the implications of withdrawal.

432. We would consider the aspect of public interest, which can be gathered from the conditions obtaining, when the impugned amendment was made. Under the existing law, Section 7 of the Code permitted filing of applications by single applicants. It has been realised by the legislature that there is dire need to condition the absolute right in respect of certain classes of financial creditors. We have already upheld the classification enacted in the first and the second provisos. From the standpoint of public interest, every application maintained by a single applicant, is perceived as a veritable threat to the fulfilment of the objectives of the Code. The continuance of the applications could not, therefore, be in public interest. It is, as if, the legislature intended to apply its brakes in the form of asking the applicants to obtain the consensus of a minimum number of similar stakeholders, before the applications could be further processed.

433. Let us consider the impugned proviso with a different wording. What, if the proviso provided for a longer period of time to comply with the requirement under the first and second provisos? In such a scenario, once the numerical strength, contained in the first and second provisos, in regard to the persons covered by the same, has been found to be valid by us, the blemish that would remain is, no doubt, the legislature is interfering with the vested right,

5 *B.K. Educational Services (P) Ltd.* v. *Parag Gupta & Associates*, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528

in the manner done under the provisos read together. That a vested right can be the subject-matter of retrospective law, cannot be doubted. Since, the law made, under the Constitution, must pass muster, under Articles 14, 19, 21 and 300-A of the Constitution, the issue really boils down to, whether or not, it is manifestly arbitrary. The further question would arise, under Article 19, as to whether, the law would amount to a reasonable restriction of the right under Article 19(1)(*g*).

434. The doctrine of fairness, indeed, has been present in the mind of the courts, whenever a law, described as retrospective, comes up for interpretation with or without a challenge to the law. In the context of a challenge, on the ground of manifest arbitrariness, the test to be applied has been articulated as to whether it is capricious, irrational, does not disclose any principle, betrays absence of proportionality or whether it is excessive. We must also not lose sight of the fact that the law in question is an economic measure.

435. This is a case where the law giver has not left anything to speculation or doubt. We have already indicated about the effect of the proviso mandating the compulsory withdrawal of the application. We are of the view that this is a case, where the law, in question, is retrospective, in that, contrary to the requirement in the law, at the time, when the application was filed, a new requirement is placed, even though, it is sought to be done by superimposing this condition, not at the time, when the application was filed, which really is the relevant time to determine the question of maintainability of the application, with reference to what the law provided in regard to who can move the application but at the stage of the new law.

436. However, we cannot also lose sight of the fact that the legislature has power to impair and take away vested rights. The limitation that flows, however, is from both Articles 14 and 19 read with Article 21. It flows from the doctrine that the action of the State must be fair and reasonable. The question, as to validity of the retrospective law, is a matter to be judged on a consideration of the facts, the period of time, over which the retrospective law operates, the impact of the law on the vested rights, the public interest, the nature of the right, which is the subject-matter of the law and the terms of the law.

437. The nature of the right involved in this case, is the right of the financial creditors to move an application under Section 7. Though, Section 7 confers a right upon the financial creditor to file the application, the proceedings are one in rem. We have already dealt with the scope of the Code and the consequences it can produce on the stakeholders and also the real estate project. The legislature was faced with the situation, where it felt that the requirement, as to maintainability of the application under Section 7, must, in regard to pending applications, be modified in the manner done. There is a determining principle, namely, the perception from experience about how the entire object of the Code would stand jeopardised if applications already filed could go on even when a fair and reasonable number of kindred souls are not available to support it. Once there is a principle, it cannot be capricious, excessive or disproportionate unless we find that the time given under the proviso is

manifestly arbitrary. A vested right under a statute can be taken away by a retrospective law. A right given under a statute can be taken away by another statute. We cannot ignore the fact that there was considerable public interest behind such a law. The sheer numbers, in which applications proliferated, combined with the results it could produce, cannot be brushed aside as an irrational or capricious aspect to have been guided by in making the law. Being an economic measure, the wider latitude available to the law giver, cannot be lost sight of.

438. The issue, which, however remains, is the period of 30 days made available. Is it reasonable to expect that a single applicant could, under the aegis of the laws, collect information, and furthermore, gather the support of fellow travellers, also inclined to support the applicant, as required? The third proviso does not provide for the applicant applying before the Tribunal and seeking extension of the period. It could be also argued that by granting such extensions, no harm is caused to the stakeholders, insofar as, all this is done before the admission of the application, with which alone, the consequences, including the appointment of the interim resolution professional and the passing of an order of moratorium, would arise. But here again we would be foraying into areas of legislative value judgment and be proceeding on the basis of what would be a fairer law.

439. We have to take the law, therefore, as it is and deal with it on the touchstone of, whether the law is manifestly arbitrary. We have already, no doubt, found that by virtue of the statutory mechanism, there appears to be an information grid available under the law. Undoubtedly, we would have felt more reassured, if the period had been longer than it is. The law came as a bolt from the blue as it were.

440. As regards the compelled withdrawal under the third proviso of the pending applications is concerned, we hold as follows. Once the legislature intended that the pending applications must be made compliant with the threshold requirement, consequences for not doing so had to be provided. Otherwise, it would have created complete uncertainty and the applicant would have been dealt with in a manifestly arbitrary manner. Providing for the consequence of withdrawal before admission, which we have explained, does not have the consequence of preventing the fresh filing, even in regard to the same default, after complying, no doubt, with the requirement of the first or the second proviso, cannot be dubbed as arbitrary. No doubt, there is lack of clarity in this regard in the provision but on an understanding of the law, as we have expounded, the provision was capable of being understood in the manner done.

441. In regard to the first and the second provisos, they have only prospective operation. The creditors covered by these provisos, are not subjected to any time-limit (except, no doubt, the bar under Article 137 of the Limitation Act), in the matter of garnering the requisite support. However, prescribing a time-limit in regard to pending applications, cannot be, per se, described as arbitrary, as otherwise, it would be an endless and uncertain procedure. The applications would remain part of the docket and also become

a Damocles' sword overhanging the debtor and the other stakeholders with deleterious consequences also qua the objects of the Code.

442. Finally, the actual time provided. Is it manifestly unfair? Would not six weeks, two months or even more lengthier periods, be more fair? Undoubtedly, it would be, from the point of view of the applicants. Another way to approach the problem is, was it impossible for the creditor/creditors to seek information, get into touch with the other creditors and persuade them to join him/them. As far as court fees is concerned, there is no extra liability as the amount remains the same viz. Rs 25,000, irrespective of the number of applicants. If the condition in the third proviso was impossible to comply with, then, it would also be manifestly arbitrary. As far as availability of information is concerned, be it the mechanism of an association of allottees contemplated under the RERA or the requirement under the said Act to post details of the allotment, at least, in law, the legislature was not making a capricious command. So also, is the case with the creditors covered by the first proviso, having regard to the clear requirement of Section 88 of the Companies Act, 2013. There are registers, which can be perused and information gathered.

443. Another aspect of the matter is, if there is insolvency and it affects creditors, ordinarily, self-interest would guide them into following the best course available to them. We have also seen the presence of plural remedies. No doubt, calculation of one-tenth in a case, may, undoubtedly, require the quantification of total number of creditors. This would be necessary, no doubt, only if hundred creditors cannot be found to support the application.

444. We have noted the consequences of the deemed withdrawal, the nature of the right, the Explanation to Section 7, the objects of the Code, the factual matrix reflecting a tenfold increase in the applications, the pressure on the dockets of the bodies, which are charged with the imperative duty to deal with matters with the highest speed, the impact on similar stakeholders in the category and the sheer largeness of the class of creditors. The period could have been more fair to the petitioners by being longer but that is where we must bear in mind, the limits of our jurisdiction. Where would the Court draw the line? We find it difficult to hold that within the time-limit of 30 days it is impossible to comply with the requirements.

445. We have dealt with the aspect relating to the impact of the statutory withdrawal of the application. Secondly, we must also bear in mind that the Code was enacted in the year 2016. The period of the retrospective operation, would appear to be, spread over for a period of two years and for the most part, it relates to a period of one year. We have already found that the withdrawal under the third proviso, will not stand in the way of the applicant, invoking the same default and filing the application and even the principle of Order 23 Rule 1 CPC will not apply and will not bar such application. As far as limitation is concerned, we have explained as to what is to be the impact. The nature of the vested right and the impact of the law, the public interest, the sublime objects, which would be fulfilled, would, in the facts of this case, constrain us from

interfering, even though, this Court may have a different view about the period of time, which is allowed to the applicant.

446. Lastly, there remains a question of court fees. As far as court fees is concerned, it is true that in the circumstances of the case, there is compelled withdrawal of the applications. The other side of the picture is, even, according to the petitioners, the applications engaged the adjudicating authority and time was spent on the applications. In the circumstances of these cases, we would resort to our power under Article 142 of the Constitution to order as follows. We would direct that in case applications are moved by the applicants, who are petitioners before us, in regard to the very same corporate debtor, in the same real estate project, as far as allottees are concerned, the applicants shall be exempted from the requirement of paying court fee. This would obviously be a one-time affair. We, however, further make it clear that exemption from paying court fee, in the case of joint applicants, will be limited only to once, to a single application in future, in relation to the same subject-matter, as per the application. To make it clear, in a case where there are more than one applicants in the pending application in respect of real estate project, if they combine in future application, they would stand exempted. Secondly, in case, any of the applicants, if they were to move jointly with the requisite number under the second proviso, the exemption will be limited only to once. Meaning thereby, if exemption has been availed of by any one out of the joint applicants, in conjunction with others, then, the other joint applicants cannot claim exemption. If there are any applicants, falling under the first proviso, and who are among the petitioners, in regard to the same corporate debtor, they would also be entitled to the exemption from payment of the court fee.

Relief

447. We uphold the impugned amendments. However, this is subject to the following directions, which we issue under Article 142 of the Constitution of India:

447.1. If any of the petitioners move applications in respect of the same default, as alleged in their applications, within a period of two months from today, also compliant with either the first or the second proviso under Section 7(1), as the case may be, then, they will be exempted from the requirement of payment of court fees, in the manner, which we have detailed in the paragraph just hereinbefore.

447.2. Secondly, we direct that if applications are moved under Section 7 by the petitioners, within a period of two months from today, in compliance with either of the provisos, as the case may be, and the application would be barred under Article 137 of the Limitation Act, on the default alleged in the applications, which were already filed, if the petitioners file applications under Section 5 of the Limitation Act, 1963, the period of time spent before the adjudicating authority, the adjudicating authority shall allow the applications and the period of delay shall be condoned in regard to the period, during which, the earlier applications filed by them, which is the subject-matter of the third proviso, was pending before the adjudicating authority.

447.3. We make it clear that the time-limit of two months is fixed only for conferring the benefits of exemption from court fees and for condonation of the delay caused by the applications pending before the adjudicating authority. In other words, it is always open to the petitioners to file applications, even after the period of two months and seek the benefit of condonation of delay under Section 5 of the Limitation Act, in regard to the period, during which, the applications were pending before the adjudicating authority, which were filed under the unamended Section 7, as also thereafter.

448. The writ petitions and the transferred case will stand dismissed subject to the aforesaid directions and the observations contained in the judgment, and we only make it clear that the benefits of the directions, under Article 142, will be available also to the petitioners in the transferred case.

449. The intervention application [IA No. 67473 of 2020 in WP (C) No. 26 of 2020] is filed by allottees who have filed application under Section 7 on 20-9-2019. IA No. 32863 of 2020 in WP (C) No. 53 of 2020 is filed by the allottee for impleadment. He has filed application under Section 7 of the Code on 19-12-2019. IA No. 32869 of 2020 in WP (C) No. 53 of 2020 is filed by the allottees who have filed the same for impleadment. They have filed application under Section 7 on 17-9-2019. IA No. 15425 of 2018 in WP (C) No. 26 of 2020 is filed by a corporate debtor for impleadment. All the above IAs are disposed of in terms of the judgment as aforesaid.

450. We however make it clear that the directions we have issued under Article 142 regarding court fees and about condonation of delay will apply to the applicants who are allottees.

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(CRL) 1261/2024

BHUSHAN POWER & STEEL LIMITED .....Petitioner

Through: Mr. Abhishek Manu Singhvi, Sr. Adv., Mr. Vikas Pahwa, Sr. Adv., Mr. Raunak Dhillon, Ms. Madhavi Khanna, Ms. Isha Malik, Ms. Niharika Shukla, Advocates

versus

UNION OF INDIA & ANR. .....Respondent

Through: Mr. Zoheb Hossain, Spl. Counsel with Mr. Manish Jain, SPP with Mr. Vivek Gurnani, SC with Mr. Kartik Sabharwal, Mr. Pranjal Tripathi and Mr. Kaushik Maurya, Advocates.
Mr Satya Ranjan Swain (SPC), Advocate for Respondent no. 1/UOI

CORAM:
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

O R D E R

% 30.01.2025

1. The present petition has been filed under Article 226 of the Constitution of India read with Section 482 of the Criminal Procedure Code, 1973 (Cr.P.C.) seeking quashing of ECIR NO. DLZO-I/02/2019 under Section 3 and 4 of the Prevention of Money Laundering Act, 2002 (PMLA) and all consequential proceedings arising out of or emanating therefrom including the order issuing process dated 17.01.2020 passed by the Special Judge-05, CBI (PC Act), Rouse Avenue District Court qua the Petitioner Company.

2. Facts germane for deciding the present Petition are as under:

2.1 It is stated that 26.07.2017 the learned National Company Law Tribunal (NCLT) had admitted an application filed by the Punjab National Bank (PNB) under Section 7 of the Insolvency and Bankruptcy Code (IBC) initiating corporate insolvency resolution process (CIRP) against M/s Bhushan Power and Steel Limited (BPSL).

2.2 It is stated that during the CIRP of BPSL, JSW Steel Ltd. (JSW) emerged as the successful resolution applicant.

2.3 It is stated that in the meanwhile, on 05.04.2019, an FIR bearing RC No. RCBD1/2019/E/0002 was registered by the CBI against the Petitioner Company, its Chairman, Directors and other persons in respect of offences committed under sections 120-B r/w 420, 468, 471 & 477A of the Indian Penal Code, 1860 (IPC) & Section 13(2) r/w 13(1) (d) of the Prevention of Corruption Act, 1988 (PC Act).

2.4 It is stated that on 25.04.2019, the Enforcement Directorate (ED) recorded Enforcement Case Information Report bearing (ECIR) No. DLZO-1/02/2019, dated 25.04.2019 against the Corporate Debtor, on the basis of the scheduled offences as mentioned in the FIR bearing FIR/RC No. RCBD1/2019/E/0002 dated 05.04.2019 registered by the CBI, for suspected commission of money laundering.

2.5 It is stated that the NCLT passed an order dated 05.09.2019 *conditionally approving* the resolution plan of JSW under Section 31 of the IBC. However, NCLT while granting the protection to JSW against criminal proceedings qua the erstwhile management of the Petitioner Company, did not expressly grant protection from liability of the Petitioner Company for the

acts or omission of the previous management in relation to the period prior to approval of the resolution plan and passed the following order:

> *"127...*
> *i) The criminal proceedings initiated against the erstwhile Members of the Board of Directors and others shall not effect the JSW-H1 Resolution Plan Applicant or the implementation of the resolution plan by the Monitoring Agency comprising of CoC and RP. We leave it open to the Members of the CoC to file appropriate applications if criminal proceedings result in recovery of money which has been siphoned of or on account of tainted transactions or fabrication as contemplated under the various provisions of the Code or any other law. Those applications shall be considered in accordance with the prevalent law."*

2.6 It is stated that being aggrieved by the aforesaid order, JSW filed an appeal before the National Company Law Appellate Tribunal (NCLAT) to the extent of seeking protection from penal, financial liability and attachment of the Petitioner Company's assets on account of acts of omission or commission of the previous management of BPSL.

2.7 It is stated that 16.09.2019, the NCLAT permitted JSW to implead the Union of India (UOI) through the Ministry of Corporate Affairs (MCA) and the Directorate of Enforcement (DOE).

2.8 It is stated that on 10.10.2019, in exercise of the powers under sub section (1) of Section 5 of the PMLA, Provisional Attachment Order (POA) No. 11/2019 was passed provisionally attaching assets of the Corporate Debtor i.e. M/s Bhushan Power and Steel Ltd. being "*proceeds of crime*" as defined under Section 2(u) of the PMLA. The PAO also directed that the assets attached could not be transferred, disposed, parted with or otherwise

dealt with in any manner, whatsoever, unless specifically permitted by the DOE.

2.9 It is stated that the UOI through the MCA had also filed an affidavit dated 10.10.2019 taking a divergent view on the issue of attachment under the PMLA.

2.10 It is stated that on 14.10.2019, NCLAT vide an interim order stayed the order of provisional attachment dated 10.10.2019 passed by the ED and further prohibited the officers of the ED from attaching any property of M/s. Bhushan Power and Steel Ltd. without prior approval of the NCLAT. The NCLAT further directed the ED to release the assets to the resolution professional.

2.11 It is stated that thereafter on 25.10.2019, NCLAT adjourned the matter to give the different wings of the Central Government an opportunity to sit together and resolve the issues.

2.12 It is stated that on 28.12.2019, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 was notified and came into force with immediate effect. Paragraph '10' of the amendment ordinance introduced Section 32A in the IBC.

2.13 It is stated that on 17.01.2020 the ED filed a prosecution complaint inter-alia arraying M/s Bhushan Power and Steel Limited as an accused along with the erstwhile Chairman and Managing Director as well as other Director and officers of the Petitioner Company who were involved in the offence of money laundering in relation to the bank fraud to the tune of Rs. 47, 204 Crores. It is pertinent to mention that the erstwhile promoters and officers of the Petitioner Company were also implicated inter alia in terms of Section 70 of PMLA, which reads as under:

"70. **Offences by companies**.—(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and 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 contravention 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 punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of any company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation 134 [1].—For the purposes of this section,—

(i) "company" means any body corporate and includes a firm or other association of individuals; and

(ii) "director", in relation to a firm, means a partner in the firm.

[Explanation 2.—For the removal of doubts, it is hereby clarified that a company may be prosecuted, notwithstanding whether the prosecution or conviction of any legal juridical person shall be contingent on the prosecution or conviction of any individual.]"

2.14 It is stated that thereafter on 17.02.2020 the NCLAT passed its final judgment declaring the attachment of assets of the 'Corporate Debtor' by the

DOE pursuant to order dated 10.10.2019 as illegal and without jurisdiction in view of the Section 32A of the IBC.

2.15 It is stated that the ED had preferred an Appeal to the Supreme Court by way of Civil Appeal No. 3362/2020 challenging the order of the NCLAT quashing the provisional attachment order dated 10.10.2019.

2.16 It is stated that the appeal filed by the ED bearing Civil Appeal No. 3362/2020 came to be disposed of by the Supreme Court vide its order dated 11.12.2024 in the following manner:

> *"3. The issue involved in the instant Appeals pertained to the jurisdiction of the E.D. to attach the properties of the Corporate Debtor, which was undergoing Corporate Insolvency Resolution Process, particularly in the light of Section 32A of the Insolvency and Bankruptcy Code, 2016 (IBC).*
> *4. Today, the learned counsel Mr. Zoheb Hussain and learned S.G. Mr. Tushar Mehta appearing for the E.D. have submitted the Affidavit dated 11.12.2022 of Mr. Dipin Goel, Deputy Director, Directorate of Enforcement, New Delhi, and have prayed to dispose of these Appeals in the light of the said Affidavit. Mr. Zoheb Hussain also took the Court to the provisions contained in the sub-section(2) of Section 32A of the IBC and in sub-section(8) of Section 8 of the PMLA read with Rule 3A of the Prevention of Money Laundering (Restoration of Property) Rules, 2016 (hereinafter referred to as the said Rules) to submit that the NCLT had approved the Resolution Plan vide the order dated 05.09.2019 which was under challenge before the NCLAT in the Appeals filed by various parties, and in the meantime the competent authority of the PMLA vide the order dated 10.10.2019 had provisionally attached the properties of the Corporate Debtor. He further submitted that Section 32A came to be inserted in the IBC with effect from 28.12.2019, which did not have the retrospective effect, and hence, in view of the peculiar facts and circumstances of the case and without prejudice to the rights and contentions of the E.D. with regard to the investigation of the case registered against the accused-Promoters of the Corporate Debtor-Bhushan Power and Steel Ltd. and Others, the successful Resolution Applicant be permitted to take control of the attached*

properties treating the same as the restitution under Section 8(8) of the PMLA read with Rule 3A of the said Rules.

5. The learned senior counsel Mr. Abhishek Manu Singhvi appearing for the CoC and learned senior advocate Mr. Neeraj Kishan Kaul appearing for the successful Resolution Applicant have also stated that they have no objection if these Appeals are disposed of as prayed for in the light of the said Affidavit filed on behalf of the E.D.

6. In view of the above submissions made by the learned counsel for the E.D. and the learned counsel for the CoC and for the successful Resolution Applicant JSW, following order is passed without expressing any opinion on the merits of the Appeals and without prejudice to the rights and contentions of the respective parties in the connected Appeals and other proceedings, including the right of the E.D. to investigate into the cases registered against the accused-Promoters of the Corporate Debtor, under the PMLA.

ORDER

(i) The Appellant-E.D. is directed to handover and the Respondent successful Resolution Applicant JSW is directed to take over the control of the properties of Corporate Debtor-Bhushan Power and Steel Ltd., provisionally attached vide the order dated 10.10.2019 passed by the E.D., immediately in view of Section 8(8) of the PMLA read with Rule 3A of the said Rules.

(ii) It is clarified that this order is passed with the consensus of the learned counsels appearing for the concerned parties, considering the peculiar facts and circumstances of the cases, more particularly the fact that the order of provisional attachment was passed by the

E.D. after the Adjudicating Authority i.e., NCLT had approved the Resolution Plan submitted by the successful Resolution Applicant.

(iii)It is further clarified that the Court has not expressed any opinion on the interpretation of Section 32A (2) of IBC or on the powers of the E.D. to attach the property of the Corporate Debtor which is undergoing the Corporate Insolvency Resolution Process, or on any other legal issue involved in the other connected Appeals which are pending for consideration before this Court.

7. All the three Appeals stand disposed of in terms of the aforesaid order."

(Emphasis supplied)

Arguments on behalf of the Petitioner Company

3. Dr. Abhishek Manu Singhvi and Mr. Vikas Pahwa, learned senior counsels appearing on behalf of the Petitioner Company states that the liability of a Corporate Debtor for an offence committed prior to the commencement of CIRP shall cease and the Corporate Debtor shall not be prosecuted for such an offence once the resolution plan has been approved.

3.1 They further place reliance on the affidavit filed before the Supreme Court in Civil Appeal No. 3362/2020 wherein it has been stated that in the present case, since the provisional attachment order dated 10.10.2019 was issued after the resolution plan was approved under the Code on 05.09.2019, the resolution plan may prevail. Further, it is stated that under Section 8(8) of the PMLA, the confiscated properties can be restored to the claimant. It is stated that the ED agreed to applicability of the protection under Section 32A to the Petitioner Company in the present case. It is stated that the Supreme Court by way of its order dated 11.12.2024 has taken the aforesaid affidavit on record and directed restoration of confiscated properties of the Petitioner Company and reserved the right of the ED to investigate into the cases registered against the erstwhile promoters of the erstwhile Corporate Debtor, under the PMLA.

Arguments on behalf of Respondent No.2/Directorate of Enforcement

4. Mr. Zoheb Hossain, learned Special Counsel for the DOE, upon instructions, states that in light of the mandate of Section 32A (1) of the IBC, a Corporate Debtor cannot be prosecuted for an offence from the date the Resolution Plan has been approved, subject to fulfilment of the conditions laid down therein.

4.1 He states that in the present case, the Resolution Plan was approved on 05.09.2019 by the NCLT and on 17.02.2020 by the NCLAT. He states that the Resolution Plan in this case, however, is subject to further challenge in various petitions filed by stakeholders pending in the Supreme Court. He further states that in view of the *clean slate* theory propounded in the IBC, even if the Corporate Debtor in this case cannot be prosecuted further, since it has been taken over by a new management and resolution plan has been approved, nevertheless, the role of the Corporate Debtor in its earlier avatar which was involved in the case of bank fraud and the offence of money laundering to the tune of Rs 47,000 Crores, will have to be examined by the Courts to examine the involvement of the erstwhile Promoters/Directors, as the second proviso to Section 32A(1) itself permits prosecution of the erstwhile Promoters/Directors and other persons in charge of the Corporate Debtor in its earlier avatar notwithstanding the fact that the liability of the Corporate Debtor may have ceased.

5. The learned Senior Counsels appearing for the Petitioner Company do not deny the above proposition of law and have no objection, if the instant petition is disposed of in terms of the aforesaid submissions.

Findings and Analysis

6. In order to appreciate the submissions of the parties it would be appropriate to refer to Section 32A of IBC which reads as follows:

> ***"32A. Liability for prior offences, etc.--***(1) ***Notwithstanding anything to the contrary contained in this Code orany other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section***

> ***31**, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not--*
>
> *(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*
>
> *(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:*
>
> ***Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:***
>
> ***Provided further that every person who was a designated partner as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an officer who is in default, as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.**"*
>
> (Emphasis supplied)

6.1 A plain reading of the above provision would reveal that there is no dispute over the legal position that once a resolution plan has been approved by the adjudicating authority under Section 31 of IBC and the conditions specified in Section 32A of the IBC are fulfilled, the Corporate Debtor shall not be prosecuted for an offence committed prior to the commencement of the CIRP.

6.2 However, Section 32A of IBC also clarifies that any erstwhile officer of the Corporate Debtor who was in any manner in charge of, or responsible to the Corporate Debtor for the conduct of its business or associated with the Corporate Debtor in any manner or who was directly or indirectly involved in the commission of such offence prior to the commencement of CIRP as per the complaint filed by the investigating authority, shall continue to be prosecuted and punished for such an offence committed by the Corporate Debtor, notwithstanding that the Corporate Debtor's liability has ceased.

6.3 Considering the submissions made by the counsel appearing for the ED, which has not been objected to by the Senior Counsels for the Petitioner Company, it is clarified that the role of the Corporate Debtor, as elaborately stated in the prosecution complaint filed before the Special Court for PMLA cases under the PMLA, will necessarily have to be examined in the trial of the erstwhile promoters/directors of the Petitioner Company as it relates to the commission of the offence by the Petitioner Company in its earlier avatar as it was under the erstwhile management, when the offence was committed, more so when there are allegations under Section 70 of the PMLA

7. In the overall conspectus, the writ petition is being partly allowed with the above clarification and the impugned order dated 17.01.2020 passed by the Special Judge, CBI, Rouse Avenue District Court taking cognizance and issuing process and the consequential criminal proceedings in CC No.1/2020 only to the extent of the Petitioner Company are being hereby set aside.

7.1 Further, in view of the mandate under sub-section (1) of Section 32A of the IBC, the Petitioner Company, having undergone a successful resolution process under Section 31 of the IBC, shall not be prosecuted for the offences committed prior to the commencement of the CIRP.

7.2 It is clarified that the above order will be subject to the final outcome of the challenge to the approval of the resolution plan pending in various civil appeals filed by various stakeholders before the Supreme Court in Civil Appeal No(s). 1808/2024 and connected cases.

8. Needless to state that the observations made by this Court in the present order are only for the purpose of deciding the present petition and shall have no bearing on the merits of the case during the trial.

9. With the aforesaid observation the petition is disposed of along with pending applications if any.

10. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as a certified copy of the order for the purpose of ensuring compliance. No physical copy of order shall be insisted by any authority/entity or litigant.

MANMEET PRITAM SINGH ARORA, J

JANUARY 30, 2025/rhc/*sk*

Click here to check corrigendum, if any

ANNEXURE R5/13 **3912**

HIGH COURT OF TRIPURA
AGARTALA

WP(C) No. 260 of 2024

SREI Infrastructure Finance Limited, having its registered office at "Viswakarma", 86C, Topsia Road (South), Kolkata-700046 and its corporate office at Room No. 12 & 13, 6A, Kiran Shankar Roy Road, Kolkata – 700001; being represented by Mr. Sohan Kumar Jha being the Authorized Signatory as per resolution taken by Board of Directors dated 26.02.2024

..... Petitioner(s)

V E R S U S

1. State of Tripura represented by Director, Urban Development Department, Government of Tripura, 5th Floor, UD Bhawan, Sakuntala Road, near Rabindra Bhawan, Agartala, Tripura (W) PIN: 799001.

2. Chief Engineer, Urban Development Department, Government of Tripura, 5th Floor, UD Bhawan, Sakuntala Road, near Rabindra Bhawan, Agartala, Tripura (W) PIN : 799001

..... Respondent(s)

For petitioner(s)	:	Mr. Jishnu Saha, Sr. Advocate Mr. RG Chakraborty, Advocate Ms Suprana Sardar, Advocate
For Respondent(s)	:	Mr. SS Dey, Advocate General Mr. Kohinoor N Bhattacharyya, GA Mr. Raju Datta, Advocate Ms. A Chakraborty, Advocate
Date of hearing	:	18.09.2024
Date of pronouncement	:	***25.09.2024***
Whether fit for reporting	:	**YES**

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT AND ORDER

This writ petition seeks quashing of the order dated 5th October, 2023 issued by the respondents whereby the petitioner has been blacklisted for a period of three years and debarred from participating in the tender process for any work advertised by the Government of Tripura (Annexure-1 to the writ petition).

2. The order of blacklisting has been passed after approval of the resolution plan under Section 31 of the Insolvency and Bankruptcy Code, 2016 on 11th August, 2023 by the learned NCLT, Kolkata whereby the petitioner's management has been transferred to a new management. Earlier the petitioner was blacklisted vide order dated 6th March, 2023 and debarred from participating in any tender process for any work of the Government of Tripura. This was the subject matter of challenge in WP(C) No.271 of 2023 wherein this court vide order dated 29th May, 2023 quashed the blacklisting order dated 6th March, 2023. Thereafter, the impugned order of blacklisting has been passed.

3. The genesis of the dispute is the allotment of work for providing consultancy services for the Geographic Information System (GIS) based Master Plan Formulation for 20 cities in the State of Tripura under Tripura Town and Country Planning Act, 1975 as per the Request for Proposal issued on 23rd August, 2017 by the respondent.

4. As per the averments of the petitioner, the work was awarded after opening of price bids vide letter of acceptance dated 29th November, 2018 for a sum of Rs.4,77,90,000/- (Rupees Four Crore Seventy Seven Lakh and Ninety Thousand only). The petitioner furnished a Performance Bank Guarantee of Rs. 95,58,000/- (Rupees Ninety Five Lakhs and Fifty Eight thousand only) on 14th December, 2018. Parties entered into an agreement on 7th January, 2019 wherein the petitioner was engaged to provide consultancy services for the above work. The petitioner was asked to complete the work within 345 days from the date of signing of the contract vide letter dated 8th January, 2019. He submitted an inception report on 25th January, 2019. In the first meeting of the Consultancy Evaluation and Review Committee of the

AMRUT sub-scheme for formulation of Master Plan held on 26th March, 2019 it was decided that the petitioner would finalize the planning areas of 20 towns. The first installment of consultancy fee was also recommended for release. Thereafter, the petitioner submitted the base map of the master plan for the city of Agartala and 19 towns in Tripura on 15th November, 2019. A sum of Rs. 95,58,000/- (Rupees Ninety Five Lakhs and Fifty Eight thousand only) was sanctioned towards 20% of the consultancy fee on approval of the base map on 25th November, 2019. On 13th December, 2019 a cheque of Rs.84,11,040/- (Rupees Eighty Four Lakhs Eleven Thousand and Forty only) was issued in favour of the petitioner. The respondents granted extension of time for completion of the project on 21st December, 2019.

5. The respondents further issued a memorandum for sanction of Rs.9,58,443/- (Rupees Nine Lakhs Fifty Eight thousand Four hundred and Forty Three only) towards payment of income tax. The petitioner submitted the Differential Global Positioning System Survey Report for remaining three towns in Tripura on 5th February, 2020. On 7th February, 2020 the petitioner submitted the Revised Socio-Economic Report for 20 towns in the State of Tripura. On 17th February, 2020 it submitted the Secondary Data Collection Report which included the crime report for the last three years, education data, tourism data and industry data for 20 cities in Tripura for the project of Preparation of GIS based Master plan for Agartala and 19 cities in Tripura.

6. On 24th March, 2020 a nationwide lockdown was imposed by the Central Government to restrict the spread of Novel Corona Virus. This, according to the petitioner, brought the entire system to a standstill. Petitioner sought extension of timeline vide letter dated 14th August, 2020. The petitioner also informed that the planning area had increased by three-folds

which is not as per the agreement and requested the respondent to increase the consultancy fee proportionately and also the timeline for the period on 25th August, 2020.

7. On 24th December, 2020 the respondents granted time extension for completion of the project work till 30th June, 2021. Petitioner again sought extension of timeline vide letter dated 19th July, 2021. He submitted GIS data for Agartala & Khowai to the respondents on 4th August, 2021. The respondents further granted extension of time for completion of project till 31st December, 2021 vide letter dated 1st September, 2021. On 8th October, 2021 the petitioner was admitted into Corporate Insolvency Resolution Process (CIRP) by the National Company Law Tribunal, Kolkata Bench in CP (IB No. 295/KB/2021) under the Insolvency and Bankruptcy Code, 2016.

8. Further, correspondences ensued between the parties and the respondents provided time extension till 22nd July, 2022 vide letter dated 21st January, 2022. On 1st August, 2022 the respondents issued a communication to the petitioner granting extension of time regarding formulation of master plan for Agartala and 19 towns of Tripura up to 30th June, 2023. Thereafter, the Tripura Urban Planning and Development Authority (TUDA) vide letter dated 22nd September, 2022 expressed its dis-satisfaction with the progress and delay in the completion of project work despite extension of time granted to the petitioner. The petitioner replied on 22nd July, 2022.

9. On 15th December, 2022 a show cause notice was issued to the petitioner regarding termination of the contract under clause 2.9 of the Agreement. The petitioner furnished reply on 21st December, 2022. Again on 23rd December, 2022 the respondents issued another notice to the petitioner as

to why punitive action be not taken against it. Thereafter, on 27th December, 2022 the bank performance guarantee of Rs. 95,58,000/- (Rupees Ninety Five Lakhs and Fifty Eight thousand only) submitted by the petitioner was forfeited by the respondents. Petitioner submitted his reply to the 2nd Show cause notice on 28th December, 2022 reiterating his stand in the reply dated 21st December, 2022.

10. On 6th March, 2023 the notice of termination was issued in view of clause 2.9.1(a), 2.9.1(b), 2.9.1(g) and 2.9.1(h) of the agreement dated 7th January, 2019. The petitioner requested the respondents to withdraw the notice dated 14th March, 2023 vide letter dated 22nd March, 2023. Thereafter, the petitioner approached this court on 26th April, 2023 for quashing the letter dated 6th March, 2023 whereby the contract was terminated and the performance security of Rs. 95,58,000/- (Rupees Ninety Five Lakhs and Fifty Eight thousand only) was forfeited and also challenged the blacklisting and debarment of the petitioner.

11. This court vide order dated 29th May, 2023 passed in WP(C)271/2023 quashed the letter dated 6th March, 2023 in the following terms:

> **"[6] Learned Advocate General submits that having regard to the limited issue at hand it would be proper that the matter may be remitted to the competent authority to take a fresh decision as regards the issue of blacklisting.**
>
> **[7] We have considered the submissions of learned counsel for the parties and taken note of the limited gamut of facts in connection with the impugned order of blacklisting contained in the letter dated 06.03.2023 [Annexure-44]. It appears from a bare perusal of the two show-cause notices at Annexure-37 and Annexure-39 dated 15.12.2023 and dated 23.12.2022 that no notice in the eye of law had been issued upon the petitioner proposing to blacklist him and also indicating the proposed quantum of penalty of blacklisting. In this regard, it is apposite to quote the ratio rendered by the Apex Court in case of Gorkha Security Services versus Government (NCT of Delhi) and others reported in (2014) 9 SCC 105, paragraphs 21 and 22 of which are reproduced hereunder :**

> **"21.The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the notice understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.**
>
> **22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the notice to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfill the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:**
>
> **(i) The material/grounds to be stated which according to the department necessitates an action;**
>
> **(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit. We may hasten to add that even if it is not specifically mentioned in the show- cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."**
>
> **[8] The position in law has been consistently followed thereafter by the Apex Court as held in case of Vetindia Pharmaceuticals Limited versus State of Uttar Pradesh and another reported in (2021) 1 SCC 804. Perusal of the impugned order also shows that there is no reference of any show-cause preceding the order of blacklisting neither any reference to consideration of any reply thereto by the petitioner as there was no show- cause notice for blacklisting. Therefore, order of blacklisting is not only vitiated for lack of compliance of principles of natural justice but also shows complete non-application of mind.**
>
> **[9] As such, the impugned order of debarment and blacklisting as contained in the letter dated 06.03.2023 is quashed. However, the respondents are at liberty to take a fresh decision, in accordance with law, after a proper show-cause notice within a stipulated time. Let it be made clear that we have not made any comments on merits of the case.**
>
> **[10] The writ petition is allowed in the manner and to the extent indicated above.**
>
> **Pending application(s), if any, also stands disposed of."**

12. This court vide its order dated 15th May, 2023 passed in the same writ petition had clearly indicated that the issue of termination of agreement is not required to be gone into in writ jurisdiction as the petitioner has an alternative remedy through arbitration or before the competent Civil Court, more so, for the reason that the adjudication on the subject may involve

determination on disputed questions of fact and evidence as may be required to be adduced by the rival parties.

13. Thereafter, vide letter dated 6th June, 2023 the petitioner invoked the arbitration clause No. 8.2 of the agreement letter dated 7th January, 2019 for reference of the dispute relating to invocation of Performance Bank Guarantee by the respondents of Rs. 95,58,000/- (Rupees Ninety Five Lakhs and Fifty Eight thousand only).

14. The respondents on 10th July, 2023 issued another show cause notice for blacklisting the petitioner for a period of three years. The petitioner submitted its reply vide letter dated 25th July, 2023 and requested for withdrawal of the show cause notice. Thereafter on 11th August, 2023 the learned NCLT, Kolkata approved the resolution plan of the National Asset Reconstruction Company Ltd. (hereinafter referred to as "NARCL") of the successful resolution applicant of the petitioner under Section 31 of the IBC. The respondents replied to the letter dated 25th July, 2023 of the petitioner. Further replies were given by the petitioner on 17th August, 2023 reiterating its stand and refuting the allegations made in the letter dated 11th August, 2023. Finally, the impugned order was passed on 5th October, 2023 blacklisting the petitioner for a period of three years and debarring him from participating in any tender process for the works advertised by the Government of Tripura.

15. Thereafter, an Arbitral Tribunal was constituted on reference of the dispute raised by the petitioner. Petitioner had invoked the arbitration proceeding with a claim for damages due to illegal termination of the agreement and illegal invocation of the bank guarantee along with interest thereupon. However, after filing its claim statement it also sought quashing to the blacklisting order dated 5th October, 2023 and for restraining them from giving effect to the order of blacklisting till

disposal of the arbitration proceedings. The learned Arbitral Tribunal by a majority of 2:1 dismissed the application filed under Section 17 of the Act of 1996 and held that the order dated 5th October, 2023 was outside the purview of the arbitration proceedings. Thereafter the present writ petition has been preferred.

16. The following grounds have been raised on behalf of the petitioner to challenge the order of blacklisting dated 5th October, 2023:

17. That with the approval of the resolution plan of the petitioner under Section 31 of the Insolvency and Bankruptcy Code, 2016, all prior liabilities of the petitioner, apart from those provided for in the resolution plan, stood extinguished. The mandate of Section 31 of the Code is aimed at enabling the insolvent corporate debtor to start with a clean slate under the new management. Therefore, there could be no basis or justification for blacklisting the petitioner after approval of the resolution plan transferring the management of the petitioner to an entirely new entity. Reliance has been placed on the case of ***Ghanashyam Mishra & Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657***, paragraphs 61, 65, 93 and 102 in order to submit that one of the dominant objects of the I&B Code is for revival of the corporate debtor in order to make it a growing concern. The further case of the petitioner is that Section 32A of the Code was introduced with an objective that the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under Section 31, if the resolution plan results in the change in the management and control of the corporate debtor to a person

who was not a promoter or in the management and control of the corporate debtor. The object behind introducing Section 32A in the Code of 2016 has been referred to in the case of ***Manish Kumar Vs. Union of India & Anr., (2021) 5 SCC 1*** paragraphs 317 to 329.

17.1. It is submitted that sub-section (2) of Section 32A declares a bar against taking any action against the property of the corporate debtor. Section 3(27) of the Code defines "property" as including 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, property. Therefore, it is the submission of the petitioner that property of the corporate debtor would include its goodwill and reputation in the play and that any decision against such property of the corporate debtor will be barred. Reliance is also placed on the decision of ***P. Mohanraj & Ors., Vs Shah Brothers Ispat Private Ltd., (2021) 6 SCC 258***, paragraph 41 in support of the aforesaid submission. The new management should be allowed to make a clean break with the past and start with a clean slate as the amended provision has the objective of value maximization and the need to obviate lower recoveries to creditors as a result of corporate debtor continuing to be exposed to criminal liability. It is the submission of the petitioner that the provisions of this nature should receive purposive construction. Reliance is placed on the case of ***Ramesh Kymal Vs. Siemens Gamesa Renewable Power Private Limited, (2021) 3 SCC 224***, paragraph 31 while interpreting Section 10A of the Code.

17.2 Based upon the aforesaid decision, it is submitted that when a resolution plan takes off and the corporate debtor is brought back into the economic main stream, 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, 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 the shareholders/investors are able to maximize their investment. Petitioner has also referred to the decision in ***Bank of Baroda & Anr. Vs. MBL Infrastructures Limited & Anr, (2022) 5 SCC 661***, paragraph 43 on the purposive interpretation of Section 29A(h) of the Code where the Apex Court has once again relied on the observations in the case of ***Swiss Ribbons (P) Ltd. Vs. Union of India, (2019) 4 SCC 17.*** Further reliance has also been placed on the case of ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited & Ors., (2020) 8 SCC 401,*** paragraphs 28.4, 28.5 and 50.1 on the purposive interpretation of Section 43 of the Code.

18. Based on these submissions, it is urged that the blacklisting order dated 5th October, 2023 if not interfered shall have the effect of impairing the right of the new management of the petitioner to carry on the petitioner's business on a clean slate under the resolution plan. Reference is also made to Section 238 of the Code of 2016 which provides that the provisions of this Code will override other laws.

19. Learned Senior counsel for the petitioner has assailed the order of blacklisting based on the doctrine of proportionality. It has been argued that an order of blacklisting has civil consequences and operates to the prejudice of a commercial person not only in praesenti but also puts a taint which attaches far beyond and may well spell the death knell of the organization/Institution for all times to come. Reliance has been placed on the case of ***Vetindia pharmaceuticals Ltd. Vs. State of Uttar Pradesh & Anr,***

(2021) 1 SCC 804, in particular paragraph 12 thereof, to submit that a simplicitor breach of contract cannot justify an order of blacklisting. Reference has also been made to the case of ***JP Iscon Pvt. Ltd. Vs. State of Gujarat MANU/GJ/1647/2021***, paragraph 95 to 99, where the case of ***Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal & Anr., (1975) 1 SCC 70*** has been also relied upon. The Gujarat High Court has held that if a contractor is to be visited with the punitive measure of blacklisting on account of an allegation that he has committed a breach of a contract, the nature of his conduct must be so deviant or aberrant so as to warrant such a punitive measure. A mere allegation of breach of contractual obligations that is disputed, per se, does not invite any such punitive action.

20. Petitioner has also referred to similar observations made in the case of ***Medico Remedies Limited through its Director Harsu Mehta Vs. Municipal Corporation of Greater Mumbai and Others, 2020 SCC OnLine Bom 4498***, paragraph 25. Petitioner has relied upon a recent decision of the Apex Court in ***The Blue Dreamz Advertising Pvt. Ltd. & Anr. Vs. Kolkata Municipal Corporation & Ors., 2024 SCC OnLine SC 1896*** and submitted that where the case is of an ordinary breach of contract and the explanation offered by the person concerned raises a bona fide dispute, blacklisting/debarment as a penalty ought not to be resorted to as it tantamounts to civil death for a certain number of years inasmuch as the said person is commercially ostracized resulting in serious consequences for the person and those who are employed by him. Too readily invoking the debarment for ordinary cases of breach of contract where there is a bona fide dispute, is not permissible. Each case, no doubt, would turn on the facts and circumstances thereto.

21. It is the case of the petitioner that the respondent while passing the blacklisting order on 5th October, 2023 did not take into account that petitioner had been admitted into insolvency on 8th October, 2021 and its insolvency has been resolved by approval of the resolution plan of the successful resolution applicant on 11th August, 2023 which not only extinguished all liability of the petitioner apart from those provided for in the resolution plan, but also resulted in change of the management of the petitioner in its entirety. The respondents have failed to take into account the fact that the object of extinguishing all liability of the petitioner, apart from those provided for in the resolution plan, and the object of changing the management in its entirety, was to allow the petitioner, under the new management, to start on a clean slate. The impugned order is clearly arbitrary and passed mechanically without any application of mind. It is also in violation of the principles of natural justice as the respondents did not deal with the petitioner's contention in response to the notice of blacklisting dated 10th July, 2023. Petitioner had duly submitted its reply in detail on 25th July, 2023 and thereafter again on 11th August, 2023 and 17th August, 2023. The order of blacklisting is also bad as there is no finding that the petitioner's conduct was so deviant that it warranted the imposition of the penalty of blacklisting of the petitioner. Further, the respondent proceeded to pass the order of blacklisting notwithstanding the fact that the contract itself provided for furnishing of performance security by the petitioner, which the respondent had already invoked and encashed.

22. In the aforesaid factual background and legal submissions, learned senior counsel Mr. Jishnu Saha has prayed that the order of blacklisting deserves to be quashed as otherwise it would defeat the very

object of the revival of the company under the resolution plan approved by the NCLT, Kolkata under Section 31 of the I&B Code, 2016. The order also suffers on grounds of proportionality and violation of principles of natural justice as the grounds raised in the petitioner's reply have not been dealt with.

23. The State has been represented by Mr. SS Dey, learned Advocate General. It is contended that the order of blacklisting is liable to be upheld on the following grounds:

(i) The agreement was signed between the parties on 7th January, 2019 with full consent of the parties agreeing to all the terms and conditions to complete the work in all respects. Respondent No.2 extended time on several occasions for completion of the works but each time the duration lapsed. The petitioner never supplied the relevant inputs and deliverables to the respondent No.2.

(ii) The base maps provided by the petitioner failed to meet with the reality when ground checking was done by the respondent No.2 as the base maps did not concede with the satellite images received from NRSC and the said deviations were not even considered and there were other defects with the base maps submitted by the writ petitioners. The digitization work done by the petitioner was found to be very poor and not considerable, many of the features visible in the satellite images were not digitized at all or wrongly digitized, the draft base maps did not contain the revenue plot boundaries/settlement survey sheets and the classification and attached attributes were found to be not matching with ground reality.

(iii) Similarly, the socio-economic survey submitted by the writ petitioner was not acceptable by the respondent No.2 as the estimated error in the survey was found to be about 74%. An amount of Rs.95,58,000/- was accorded to the petitioner towards the payment of 20% consultancy fee for preparation of

the Master Plan of 20 towns of Tripura vide letter dated 25th November, 2019 and in addition to that, a cheque amounting to Rs.84,11,040/- was also issued in favour of the petitioner but only 1-2% of the work was completed by the petitioner and the documents submitted by the writ petitioner in support of their bill were also found to have errors both in presentation as well as in methodology.

(iv) In the CERC review meeting dated 03.11.2020 which was conducted in presence of the officials of the respondents and the representatives of the writ petitioner it was specifically observed that the progress of the project after 22 months from the date of work order was negligible.

(v) Similarly in the review meting dated 08.12.2020 it was specifically observed that the manpower deployment schedule submitted by the consultant was very sketchy and the deployment period was not clearly mentioned. On-site deployment of experts was negligible looking at the type of work in 20 cities at a time. No approval was sought from the respondents before engaging sub-consultant/Technical professional which attracted Clause No.3.6 of General Conditions of Contract.

(vi) The petitioner through its letter dated 17.11.2022 expressed their inability to carry out the project which is not a formal way to terminate the agreement from their part. The petitioner cannot simply walk away from the execution of the work putting the respondent in uncertainty.

(vii) The writ petitioner company made false statement and did not disclose the fact that CIRP Order was passed on 08.10.2021. Rather, on 17.11.2022 they expressed their inability to further carry on the work after more than 1(one) year from the date of passing of CIRP Order dated 08.10.2021, which showed that the petitioner did not have the intention to execute the work. This hampered the vision and work program of the

Government of Tripura to utilize the proposed master plan for different government works for the benefit of the people.

24. Therefore, failure of the petitioner to execute the work and its unprofessional conduct made it liable to be blacklisted and debarred for a period of three years. The impugned order of blacklisting has been passed after a proper show cause asking the writ petitioner as to why it should not be blacklisted for three years and debarred from participating in any such process under the government of Tripura. Only upon consideration of the petitioner's reply on 25th July, 2023, the impugned order dated 5th October, 2023 has been passed debarring the petitioner from participating in any tender process under the Government of Tripura for a period of three years. It is submitted that long before the resolution plan was approved by the National Company Law Tribunal, Kolkata vide order dated 11th August, 2023 the process for blacklisting was initiated by the respondent, i.e. vide show cause notice dated 10th July, 2023. The petitioner even did not inform the respondent No.2 regarding the passing of the order dated 11th August, 2023. The blacklisting order is not in contravention of the judgment passed by the NCLT, Kolkata which has been upheld by the Apex Court.

25. It has been argued that both proceedings are independent and separate in nature. Petitioner is vaguely trying to connect two separate issues. There is no bar on the respondent in passing the order of blacklisting on account of approval of the resolution plan by the learned NCLT vide order dated 11th August, 2023.

26. It is submitted that the petitioner has approached the Arbitral Tribunal against the order of blacklisting to which written objection was

submitted by the respondents. The learned Arbitral Tribunal has rejected the application of the petitioner by a reasoned order dated 17th February, 2024. Therefore, there is no right in favour of the petitioner to approach this court challenging the blacklisting order.

27. It is the case of the respondents that the Supreme Court has recognized the power of debarment/blacklisting as an effective method of disciplining deviant suppliers/contractors who have committed acts of omission and commission, in the facts and circumstances of the case.

28. Respondents have placed reliance on the case of ***State of Odisha & Ors. Vs. Panda Infraproject Limited, (2022) 4 SCC 706*** in support of the proposition that the impugned order of blacklisting does not suffer from any violation of principles of natural justice as it has been passed after due show cause notice upon the petitioner. Reliance is also placed on the case of ***Deep Industries Ltd. Vs. ONGC & Anr., (2020) 15 SCC 706*** wherein the Apex Court has observed that the High Court under Article 226 and 227 should be extremely circumspect in interfering with proceedings/orders passed under the Arbitration and Conciliation Act, 1996 and it should interfere only in cases where the orders are patently lacking in inherent jurisdiction. Therefore, once the Arbitral Tribunal has refused to interfere in the blacklisting order this court should not exercise its extra ordinary jurisdiction under Article 226 of the constitution of India.

29. The respondents have also placed reliance on the case of ***Sukanya Holdings (P) Ltd. Vs. Jayesh H Pandya & Others, (2003) 5 SCC 531***, para 16 thereof in order to submit that the splitting of the cause of action on the part of the petitioner by approaching this court against the order of

blacklisting is not proper. Reliance is also placed on the case of ***Rashtriya Ispat Nigam limited & Anr Vs. M/S Verma Transport Company, (2006) 7 SCC 275*** para 42 thereof and ***Sukanya Holdings (P) Ltd.(supra)***, particularly paragraphs 16 & 17 in support of their submission that the power to blacklist is independent of the power to recover dues. Mere pendency of such proceedings would not bar the exercise of power to blacklist. Permitting such a challenge to be made by in an independent proceeding would only lead to multiplicity of proceedings and conflicting views which are to be best avoided.

30. Learned counsel for the respondents has distinguished the judgments relied upon by the petitioner. While referring to the case of ***Ghanashyam Mishra & Sons Pvt. Ltd.*** (supra), it is submitted that the respondents have not initiated any claim against the petitioner and the respondents are not creditors of the petitioner firm. Moreover, the petitioner with mala fide intentions did not inform that they are undergoing resolution process. Therefore, the decision is not applicable. Further, in context of the decision in ***Vetindia pharmaceuticals Ltd.*** (supra) relied upon by the petitioner, it is submitted that the impugned order of blacklisting has been passed after due show cause notice upon the petitioner and consideration of his reply. Therefore, this case is also not applicable to the present case. The respondents have further distinguished the case of ***JP Iscon Pvt. Ltd.*** (supra) on the ground that the petitioner has not only committed breach of contract but suppressed information about the ongoing resolution process and by supplying faulty base maps whereas they have received more than 20% of the amount in advance but completed only 1.12% of the work even after repeated extension of time.

31. Respondents further contend that the decision in the case of ***Medico Remedies Limited*** (supra) rendered by the Bombay High Court does not help the petitioner's case as no liquidated damages have been charged from the petitioner. He has only been blacklisted after following the due process of law. According to the respondents, the case of ***The Blue Dreamz Advertising Pvt. Ltd.*** (supra) is also not applicable to the case of the present petitioner as the present case is not of ordinary breach of contract. The order of blacklisting was passed against the petitioner as he was found to be not reliable and trustworthy in the context of a commercial transaction. The respondents have suffered huge financial loss and dereliction in executing the work on the part of the petitioner which deserves exemplary action.

32. Based on these submissions, the respondents have opposed the challenge to the impugned order of blacklisting.

33. On the part of the State, it has also been argued by the learned Advocate General that the revival of the company does not exclude or protect the petitioner from the civil consequences arising from the breach of promise resulting in delay in execution of the work despite several extensions by the petitioner. It is the case of the respondents that while the I&B Code, 2016 provides for revival of the company and waiver from civil liabilities and also prosecution under Section 32A of the I&B Code, the legislature has consciously not provided for waiver of the imposition of penalty of blacklisting or debarment upon an agency like the petitioner for gross mis-conduct and also suppression of facts relating to the NCLT proceedings before the respondents. The order dated 8th October, 2021 passed by the learned NCLT, Kolkata whereby the petitioner was admitted to corporate

insolvency resolution process was not even brought to the notice of the respondents.

34. After the earlier order of blacklisting was set aside by this court on the ground of violation of principles of natural justice, the respondents have complied with the requirements of a proper show cause notice containing the ingredients of charge or misconduct and also the proposed penalty upon the petitioner and only after proper consideration of the reply of the petitioner, imposed the penalty of blacklisting which is proportionate to the established misconduct on the part of the petitioner in the execution of the project. The entire process of town planning has suffered because of delay in finalizing of the master plan due to the acts and omissions of the petitioner who was engaged for providing consultancy services for Geographic Information System for preparation of master plan for 20 cities in the State of Tripura.

35. Both the sides have relied upon decisions on the effect of approval of the resolution plan for the revival of the Company under I&B Code and also on the issue as to the proportionality of the penalty imposed upon the petitioner.

36. We have heard learned counsel for the parties. Upon consideration of the rival submissions of the learned counsel for the parties and the materials placed from record and also the impugned order dated 5th October, 2023 whereby the petitioner has been blacklisted for a period of three years and further debarred from participating in any tender process for works advertised by the Government of Tripura, the following question arises for determination:

- Whether the order of blacklisting dated 5th October, 2023 is proper in the eye of law and on facts?

37. Upon consideration of the rival submission of the parties in the gamut of the facts and circumstances of the case, as noted above, we are of the considered view that the impugned order of blacklisting for a period of three years and debarment of the petitioner from participating in the future tender processes for any work advertised by the Government of Tripura cannot be held to be proper in the eye of law for the reasons recorded hereinafter.

38. The object of revival of a sick company on approval of the resolution plan by the NCLT is intended to provide a clean slate for the company to ensure that the new management makes a clean break from the past. The resolution plan of the successful resolution applicant has been approved under Section 31 of the I&B Code by the learned NCLT vide its order dated 11th August, 2023 which is Annexure-2 to the writ petition. It records that on the date of approval of the resolution plan by the adjudicating authority all such claims which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan. It has referred to the decision of the Apex Court in ***Ghanashyam Mishra & Sons Pvt. Ltd*** (supra) wherein it has been held that once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Govt. any State Govt. or any local authority, guarantors and other stakeholders. The Apex Court also held that all dues including the

statutory dues owed to the Central Govt. any State govt. or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.

39. However, waiver sought in relation to guarantors would not be allowed to operate in view of the judgment of the Apex Court in ***Lalit Kumar Jain Vs. Union on India & Ors., 2021 SCC OnLine SC 396*** as sanction of a resolution plan and finality imparted to it by section 31 does not per se operate as a discharge of the guarantor's liability. With respect to the relief of waivers sought for all inquiries, litigations, investigations and proceedings the same shall be granted strictly as per the section 32A of the code and the provisions of the law as may be applicable.

40. In case of non-compliance of the order or withdrawal of the resolution plan, the payments already made by the Resolution Applicant shall be liable for forfeiture. The moratorium imposed under Section 14 of the Code shall cease to have effect from the date of the approval of the resolution plan passed by the NCLT. In the present case, the erstwhile management of the corporate debtor i.e. the present company has been replaced by a new management.

41. In the case of ***Ghanashyam Mishra & Sons Pvt. Ltd*** (supra) the apex court held that one of dominant objects of the I&B Code is to see that an attempt has to be made for revival of the corporate debtor and make it a running concern. The scheme of the I&B Code is therefore to make an attempt by divesting the erstwhile management of its powers and vesting it in

a professional agency to continue the business of the corporate debtor as a going concern until a resolution plan is drawn up. The moratorium ceases to operate under Section 14 once the adjudicating authority approves the resolution plan. Once the resolution plan is approved, the management is handed over under the plan to the successful applicant so that the corporate debtor is able to pay back its debts and get back on its feet. At paragraph 93 of the report, the Apex Court has again reiterated that the legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. The apex court held that one of the principal object of the I&B Code is to provide for revival of the corporate debtor and make it a growing concern.

42. In the case of ***Ghanashyam Mishra & Sons Pvt. Ltd*** (supra) the issues before the apex court were three-fold:

> **"(i) As to whether any creditor including the Central Government, State Government or any local authority is bound by the resolution plan once it is approved by an adjudicating authority under sub-section (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the I&B Code")?**
>
> **(ii) As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?**
>
> **(iii) As to whether after approval of resolution plan by the adjudicating authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the corporate debtor, which are not a part of the resolution plan approved by the adjudicating authority?"**

43. The answer to the aforesaid questions has been provided in paragraph 102 which is extracted hereinunder:

> **"102. In the result, we answer the questions framed by us as under:**
>
> **102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled**

> **to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.**
>
> **102.2. The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.**
>
> **102.3. Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued."**

44. In answering these issues, the Apex Court observed that the dominant purpose of the Code is for providing revival of the corporate debtor and to make it a going concern. At paragraph 93 of the judgment, the Apex Court held as under:

> **"93. As discussed hereinabove, one of the principal objects of the I&B Code is providing for revival of the corporate debtor and to make it a going concern. The I&B Code is a complete Code in itself. Upon admission of petition under Section 7 there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on-going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable."**

45. It is not in dispute that upon approval of the resolution plan by the NCLT vide order dated 11th August, 2023 (Annexure-2 to the writ petition) the erstwhile management of the company has been replaced by a new management. The entire allegation of the respondents is directed against the delay in execution of work on the part of the company represented

through its erstwhile management. A Company, being a juristic person, is managed by a set of promoters/directors. In this context, it is also necessary to look into the provision of Section 32-A of the Code which provides protection from criminal prosecution to the corporate debtor.

46. Section 32A provides for protection from liability of prior offences of a corporate debtor, i.e. offences committed prior to the commencement of the corporate insolvency resolution plan, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under Section 31, notwithstanding anything to the contrary contained in this Code or any other law for the time being in force.

47. It provides that the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the adjudicating authority under Section 31, and if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not –

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled.

48. Sub-section (2) of Section 32-A further provides that no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

> (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
>
> (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

49. The explanation to this sub-section clarifies that an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor. Sub-clause (ii) of this sub-section further provides that nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

50. Section 32-A of the I&B Code was introduced w.e.f. 28th December, 2019 by Amendment Act 1 of 2020. The provisions of Section 31

and Section 32-A when read together in the light of the opinion of the apex Court rendered in the case of ***Ghanashyam Mishra & Sons Pvt. Ltd*** (supra) and in the case of ***Swiss Ribbons (P) Ltd.*** (supra) do give an insight that the entire purpose of the I&B Code is to ensure the revival of the corporate debtor upon approval of the resolution plan by the adjudicating authority in order to ensure a clean slate to the new management of the corporate debtor so that it leads to value maximization of the assets of the company and obviate lower recovery to the creditors as a result of the corporate debtor continuing to be exposed to civil and criminal liability. The same view has been expressed by the apex court in the case of ***P. Mohanraj & Ors.*** (supra) at para 41 which is extracted hereunder:

> **41. Section 32-A cannot possibly be said to throw any light on the true interpretation of Section 14(1)(a) as the reason for introducing Section 32-A had nothing whatsoever to do with any moratorium provision. At the heart of the section is the *extinguishment* of criminal liability of the corporate debtor, from the date the resolution plan has been approved by the adjudicating authority, so that the new management may make a clean break with the past and start on a clean slate. A moratorium provision, on the other hand, does not extinguish any liability, civil or criminal, but only casts a shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. Also, Section 32-A(1) operates only after the moratorium comes to an end. At the heart of Section 32-A is the IBC's goal of value maximisation and the need to obviate lower recoveries to creditors as a result of the corporate debtor continuing to be exposed to criminal liability.**

51. In the case of ***Bank of Baroda & Anr.*** (supra) once again while interpreting Section 29A(h) of the I&B Code the supreme court relied upon the observations in ***Swiss Ribbons (P) Ltd.*** (supra) and at para 43 observed as under:

> **"43. The Code has got its laudable object. The idea is to facilitate a process of rehabilitation and revival of the corporate debtor with the active participation of the creditors. Thus, there are two principal actors in the entire process viz. (i) the committee of creditors, and (ii) the corporate debtor. The others are mere facilitators. There can never be any other interest than that of the committee of creditors and the corporate debtor. We do not wish to multiply the rationale behind the enactment except by quoting the decision of this Court in Swiss Ribbons (P) Ltd. v. Union of India [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , which has also found acceptance by the subsequent decision in Arun Kumar [Arun Kumar Jagatramka v. Jindal Steel &**

Power Ltd., (2021) 7 SCC 474] : (Swiss Ribbons case [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , SCC p. 55, paras 27-28)

> **"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.**
>
> **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."**"

52. Though the expression "blacklisting" has not been specifically used in the I&B Code but the dominant intent of the legislature is to relieve the corporate debtor and its new management from civil liabilities including taxation and also from criminal prosecution from past offences. It can well be understood that a penalty like blacklisting and debarment from participating in future tender against the revived company would only defeat the dominant

object of the I&B Code. As otherwise, the company would not be able to enter into any business on account of the scar and stigma operating due to blacklisting and debarment imposed in respect of a contract which could not been executed allegedly due to the wrong doings or negligence or deliberate misconduct on the part of the erstwhile management of the company.

53. Apart from wrecking vengeance on the corporate debtor operating with a new management which is not responsible for the past misdeeds of the erstwhile management, such an order of blacklisting would not serve any fruitful purpose. Rather it would defeat the corporate debtor from reviving itself after approval of the resolution plan by entering into new business. It is commonly known that nowadays in all such tender documents floated by the state or its instrumentalities or even by private parties, the bidders have to disclose their past history including whether they have been blacklisted or debarred earlier. In such circumstances, the considerations of the bids by the revived company would be vitiated, if its past continues to haunt it.

54. The petitioners have assailed the impugned order of blacklisting on the doctrine of proportionality as well. Relying upon the recent judgment of the apex court in the case of ***The Blue Dreamz Advertising Pvt. Ltd.*** (supra) it has been contended that in a ordinary breach of contract where a party raises a bona fide dispute, blacklisting/debarment as a penalty ought not to be resorted to as it amounts to civil death inasmuch as the said person is commercially ostracized resulting in serious consequences for the person and those who are employed by him.

55. On the part of the respondent State, detailed justification on merit of the allegations made by the company for the tardy progress and delay in execution in work against the petitioner has been adverted but it is also evident that for such acts of breach the respondents have terminated the agreement and forfeited the performance bank guarantee of the petitioner for Rs.95,58,000/-. The petitioner has claimed damages for illegal termination of the agreement and invocation of bank guarantee which is a subject matter of arbitration proceedings. The Arbitral Tribunal, however, refused to interfere in the order of blacklisting as it was beyond the claim and dispute raised in the arbitration proceeding.

56. From the above stand of the respondents, it can thus be seen that the order of blacklisting has been passed being guided by the past misdeeds or misconducts on the part of the erstwhile management of the Company in execution of the contract. Whether such an action could be justified against the company revived with a new management to start on a clean slate? The objectives of the I&B Code are not only to protect the interest of the debtors whose claims have been admitted in the resolution plan and the employees but also that the assets of such a corporate debtor are revived so that it does not lead to total waste and a loss to national economy.

57. On this count also, therefore, We are of the considered view that once action in the nature of forfeiture of performance bank guarantee to the tune of Rs.95,58,000/- has been imposed upon the company for the delay in the execution of the work of the contract, the order of blacklisting would not be proper in the eye of law. The penalty of blacklisting for a period of three years and debarment from future contracts with the Government of Tripura would thus be disproportionate as the petitioner would be practically unable

to enter into new contracts and undertake business in order to become a growing and running concern.

58. The Apex Court in ***Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam limited & Ors., (2014) 14 SCC 731*** has explained that "debarment" is an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. It has also been held "debarment" is never permanent. It would invariably depend upon the nature of the offence committed by the erring contractor. In the facts and circumstances of the case discussed above such disciplining of the revived company for the past deeds of its erstwhile management would be unwarranted and not serve the purpose and the objectives of the I&B Code.

59. The issue whether the petitioner had duly informed the respondents about its admission in the CIRP or not would not in the ultimate analysis make a difference on propriety of imposing the penalty of blacklisting and debarment once the resolution plan has been approved by the learned NCLT on 11th August, 2023 and the new management has taken over the company to ensure that the company starts on a clean slate.

60. The respondents have also further sought to distinguish the decision in ***Vetindia pharmaceuticals Ltd.*** (supra) on the ground that the order of blacklisting was passed after due consideration of his reply to the show cause notice. The interference in the order of blacklisting by this court is not on account of violation of principles of natural justice as the order has

been passed after due show cause notice upon the petitioner. Therefore, the decision in the case of ***Panda Infraproject Limited*** (supra) relied upon by the respondents is also not applicable for deciding the issue.

61. Further, the respondents have relied upon the case of ***Deep Industries Ltd.*** (supra) to submit that the High Court should not interfere under Article 227 of the Constitution of India in such matters. However, in the facts of the said case, the Apex Court had observed that the exercise of jurisdiction of the High Court under Article 227 of the Constitution of India to set aside an interlocutory order passed by an arbitrator when the appeals against the same under Section 37 were dismissed by the subordinate court was not proper. The High court must be extremely circumspect in interfering with the same. In the present case the arbitral tribunal by a majority of 2:1 has refused to interfere with the order of blacklisting as that was not one of the claims raised. As such, no adjudication on the challenge to the order of blacklisting was made by the learned arbitral tribunal. The petitioner thus had to approach this court under Article 226 of the Constitution of India against the impugned order of blacklisting. As such, the present case is also inapplicable to the present case.

62. The decision in ***Sukanya Holdings (P) Ltd.*** (supra) cited by the respondents is on the issue that the Arbitration and Conciliation Act does not provide for bifurcating the suit into two parts, one which is referred to the arbitration for adjudication and the other that is referred to the civil court and as such there was no provision for splitting the cause of parties in referring the subject matter of the suit to arbitrators by the Trial Court under Section 8 of the Arbitration and Conciliation Act.

63. The word "a matter" used in Section 8 indicates that the entire subject matter should be subject to arbitration agreement. In the present case, there is no suit pending as such in relation to the dispute between the parties arising out of the agreement though an arbitration proceeding has been commenced. However, the order of blacklisting was not an issue before the learned Arbitral Tribunal. Even otherwise, the order of blacklisting passed by the State or its instrumentality could be amenable to the writ jurisdiction. Therefore, reliance on the said decision is misplaced.

64. The respondents have taken a stand that challenge to the order of blacklisting in an independent proceeding would lead multiplicity of proceedings and conflicting views which are best avoided. However, as it appears that the learned Arbitral Tribunal has not entertained the plea against the order of blacklisting as no such claim was made before it. In such a case, refusal to entertain a challenge to the order of blacklisting by this Court under Article 226 of the Constitution of India would amount to denying a remedy available in law.

65. Though, the learned counsel for the respondents have sought to distinguish the judgments relied upon by the petitioner, such as ***Ghanashyam Mishra & Sons Pvt. Ltd.*** (supra) but such a plea is not tenable for the reasons recorded in the foregoing paragraphs. In the case of ***Ghanashyam Mishra & Sons Pvt. Ltd.*** (supra) the Apex Court while examining the dominant object of the I&B Code, 2016 had held that it is intended with an object to provide a clean slate to the company upon its revival. If the company is unable to undertake business only on account of the order of blacklisting and

debarment, the object of the resolution plan, as approved by the NCLT, would stand defeated.

66. Though the respondents have sought to distinguish the decision in the case of ***JP Iscon Pvt. Ltd.*** (supra) and ***The Blue Dreamz Advertising Pvt. Ltd.***(supra) on the ground that the petitioner had suppressed information of the ongoing resolution process and was not found to be reliable and trustworthy warranting the blacklisting of the petitioner but as held by us hereinbefore the order of blacklisting if allowed to perpetuate against the revived company with a new management would defeat the very dominant object of the I&B Code, 2016.

67. As noticed earlier, the grounds and the facts and circumstances of the case on which the respondents have justified the order of blacklisting are essentially allegations against the erstwhile management of the company in causing delay and tardy progress of the works allotted to it. However, upon approval of the Resolution Plan and the change in management, if the order of blacklisting is allowed to survive the past misconducts of the erstwhile management would continue to haunt the petitioner company and would not serve the purpose of revival of the company. Moreover, the respondents have already forfeited the performance bank guarantee of the petitioner for Rs.95,58,000/- for breach of terms and conditions of the contract.

68. Therefore, on consideration of the issues involved and the elaborate discussion made hereinbefore, we are persuaded to interfere in the matter on the ground that such order of blacklisting and debarment of the petitioner company after approval of the resolution plan with a new management would defeat the dominant aim and object of the Insolvency and

Bankruptcy Code, 2016 and in all likelihood defeat the very purpose of revival of the company.

69. Therefore, the impugned order dated 5th October, 2023 whereby the petitioner was blacklisted for a period of three years and debarred from participating in future contracts with the Government of Tripura is quashed.

70. The writ petition is allowed. No order as to costs.

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

(ARINDAM LODH), J **(APARESH KUMAR SINGH), CJ**

lodh

2024 SCC OnLine Bom 701

In the High Court of Bombay

(BEFORE B.P. COLABAWALLA AND SOMASEKHAR SUNDARESAN, JJ.)

Writ Petition (L) No. 9943 of 2023

Shiv Charan and Others … Petitioners;

Versus

Adjudicating Authority under the Prevention of Money Laundering Act, 2002, Department of Revenue and Another … Respondents.

Along With

Writ Petition (L) No. 29111 of 2023

Directorate of Enforcement Government of India, Ministry of Finance Department of Revenue … Petitioner;

Versus

Shiv Charan and Others … Respondents.

Writ Petition (L) No. 9943 of 2023

Decided on March 1, 2024, [Reserved on : 9TH January, 2024]

Advocates who appeared in this case :

Mr. Devang Vyas, ASG a/w. Mr. Ashish Chavan, Mr. Shelang Shah & Mr. Zishan Quazi, Advocates for Petitioner in WPL/29111/2023 and Respondents in WPL/9943/2023.

Mr. Vikram Nankani, Senior Advocate a/w. Mr. Mayur Khandeparkar, Ms. Akanksha Saxena, Mr. Aditya Ajgaonkar, G. Aniruth Purusothaman & Joshua Borges, Advocates for Petitioners in WPL/9943/2023 and Respondents in WPL/29111/2023.

The Judgment of the Court was delivered by

SOMASEKHAR SUNDARESAN, J.:— Rule. Respondents in each petition, waive service. By consent of parties, rule made returnable forthwith, and both the petitions are taken up for hearing and final disposal.

2. The implications of Section 32A of the Insolvency and Bankruptcy Code, 2016 (for short, the "***IBC, 2016***") for corporate debtors and their assets, upon approval of resolutions, and indeed for enforcement agencies that have attached assets of such corporate debtors, fall for consideration in the captioned Writ Petitions. Section 32A of the IBC, 2016 provides for immunity to corporate debtors and their assets, upon approval of a resolution plan, subject to certain conditions stipulated in that provision.

Factual Matrix:

3. The case at hand involves resolution of DSK Southern Projects Private Limited ("*Corporate Debtor*") under the IBC, 2016. The Corporate Debtor had been subjected to a Corporate Insolvency Resolution Process ("*CIRP*") since 9th December, 2021 at the instance of a financial creditor. Eventually, a resolution plan propounded by Mr. Shiv Charan, Ms. Pushpalata Bai and Ms. Bharti Agarwal ("*Resolution Applicants*") came to be approved by the Learned National Company Law Tribunal, Mumbai ("*NCLT*") by an order dated 17th February, 2023 ("***Approval Order***") passed under Section 31 of the IBC, 2016.

4. On 20th October, 2017 i.e. nearly four years prior to the commencement of the CIRP, various First Information Reports alleging, among others, offences of cheating and criminal breach of trust had been filed against the Corporate Debtor and its erstwhile promoters. The offences alleged, being "*scheduled offences*" under the Prevention of Money Laundering Act, 2002 (for short the "*PMLA, 2002*"), an Enforcement Case Information Report being ECIR/01/MBZO-II/2018 dated 8th March, 2018 ("*ECIR*") came to be filed by the Directorate of Enforcement ("*ED*"). The ECIR estimated the "*proceeds of crime*" to be in the order of Rs. 8,522.27 crores. Pursuant to the ECIR, an "*original complaint*" being O.C. No. 1104/2019 came to be filed by the ED, leading to attachment proceedings, amongst others, against the assets of the Corporate Debtor. Four bank accounts of the Corporate Debtor with an aggregate balance of Rs. 3,55,298/-, and 14 flats constructed by the Corporate Debtor valued at Rs. 32,47,55,298/- (aggregating to Rs. 32,51,10,596/-) were attached ("***Attached Properties***"). The attachment was levied initially, by way of a provisional attachment under Section 5 of the PMLA, 2002 on 14th February, 2019, and subsequently continued, by a confirmatory order dated 5th August, 2019 passed by the Adjudicating Authority under Section 8 of the PMLA, 2002. The attachment continued even after the commencement of the CIRP, and further continued even after approval of the resolution plan. It is the continuation such attachment that lies at the heart of these proceedings.

5. Writ Petition (L) No. 9943 of 2023 ("*WP 9943*"), is filed by the Resolution Applicants against the Adjudicating Authority under the PMLA, 2002 as Respondent No. 1 and the Deputy Director, ED, as Respondent No. 2. The Resolution Applicants seek quashing of the ECIR, the orders attaching the Attached Properties and the "*original complaint*", based on which the attachment was effected - all, insofar as they relate to the Corporate Debtor and its assets. The Resolution Applicants seek a writ directing the Respondents to release the

Attached Properties, pursuant to the Approval Order. The Approval Order [at Paragraph 17(e)], by relying upon Section 32A of the IBC, 2016, had explicitly directed the ED to release the Attached Properties.

6. Writ Petition (L) No. 29111 of 2023 ("***WP 29111***") is filed by the ED challenging the authority and legal capacity of the NCLT to pass orders invoking Section 32A of the IBC, 2016 in a manner that (according to the ED) renders nugatory, the PMLA, 2002 and its legislative objective. The ED did not seek quashing of the Approval Order, but has sought quashing of a subsequent order dated 28th April, 2023 ("*April 2023 Order*"), whereby, the NCLT directed the ED (yet again) to release the Attached Properties. The April 2023 Order disposed of an interim application being IA/383/2022 ("*IA 383*") that had been filed on 10th January 2022 (prior to the Approval Order) by the Resolution Professional, seeking a direction to the ED to release the Attached Properties on the premise that the attachment must come to an end once a moratorium under Section 14 of the IBC, 2016 comes into effect (in this case, with effect from 9th December, 2021). The NCLT ruled in the April 2023 Order that once the moratorium commenced, the attachment must abate, but nevertheless took note of the final approval contained in the Approval Order, and ruled that by reason of Section 32A, the Attached Properties must be released. Contentions of the Parties:

7. Mr. Devang Vyas, the Ld. Additional Solicitor General, representing the ED (and the Adjudicating Authority under the PMLA, 2002) in both petitions, drew our attention to the prayers in the respective petitions to submit that the Resolution Applicants have other appropriate, alternate and efficacious remedies at their disposal and they ought not to have filed a writ petition. In contrast, he submitted, the ED did not have an alternate efficacious remedy since its challenge is to the April 2023 Order, on the premise of an evident and inherent lack of jurisdiction of the NCLT to opine on matters that have implications on the PMLA, 2002. Therefore, he submitted, the ED's writ petition would indeed be maintainable.

8. Mr. Vyas would also contend that the prayers of the Resolution Applicants in WP 9943 as framed, were extreme and not worthy of being granted insofar as the Resolution Applicants want the Attached Properties i.e. the assets of the Corporate Debtor to be handed over to the Resolution Applicants. IA 383 had sought release of the Attached Properties prematurely - even before the resolution plan came to be approved - and it is that application that was allowed by the April 2023 Order. Mr. Vyas would also argue that the Resolution Applicants are treating the Writ Court as an Execution Court to execute an order of the NCLT, the statutory remedy for which, he would argue, lies elsewhere -

Section 424(3) of the Companies Act, 2013 ("*Companies Act*") and Rule 56 and 57 of the NCLT Rules, 2016 ("*NCLT Rules*").

9. In a nutshell, Mr. Vyas' core submissions can be summarized under three heads, namely:—

(i) The attachment by the ED had been provisionally made and finally confirmed well prior to the initiation of the CIRP i.e. before the protection of moratorium under the IBC, 2016 commenced. Therefore, when the CIRP started, it was public knowledge that the Attached Properties were the subject matter of the ED's attachment under the PMLA, 2002. Any person aggrieved by such attachment had a statutory right to appeal under Section 26(1) of the PMLA, 2002 and approach the designated Appellate Tribunal. Even where an attachment eventually leads to confiscation under Section 8(5) of the PMLA, 2002, any person with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offense of money laundering, is entitled to apply to the Special Court under Section 8(8) of the PMLA, 2002 seeking a direction to the Government to restore the confiscated property. Therefore, Mr. Vyas would argue, each of the avenues under Section 26(1) and Section 8(8) of the PMLA, 2002 was a distinct and specific alternate efficacious remedy available under the framework of the PMLA, 2002;

(ii) Section 32A of the IBC, 2016, cannot be read in a manner that renders nugatory the special objectives for which the PMLA, 2002 has been enacted. Towards this end, he would argue, the jurisdiction of the NCLT under Section 60(5) of the IBC, 2016 is a jurisdiction relating to interpreting the IBC, 2016 alone. In exercise of such jurisdiction, the NCLT ought not to traverse beyond the IBC, 2016 and enter upon the domain covered by the provisions of the PMLA, 2002. Mr. Vyas would argue that if the effect of a ruling on the IBC, 2016 by the NCLT could have implications for other special legislations such as the PMLA, 2002, the NCLT must refrain from ruling so, since it would indirectly be an interpretation of the provisions of the PMLA, 2002 and not just the provisions of the IBC, 2016;

(iii) Even if we were to hold that Section 32A enables exercise of jurisdiction by the NCLT over IBC, 2016 matters and the effect of such exercise could intrude into the PMLA's domain, care should be taken to ensure that the power of the ED to attach assets is not sought to be trampled upon even before a resolution plan is approved. No party can be heard to argue that because a CIRP gets underway (triggering a moratorium), and because it may eventually lead to an approved resolution plan, the ED must be directed to release its attachment to enable an effective resolution

of the Corporate Debtor. The note of caution that Mr. Vyas would sound is that the effect of Section 32A of the IBC, 2016 cannot stretch to curtailing the ED's powers to keep properties attached under the PMLA, 2002, after the CIRP starts and before a resolution plan is approved.

10. On the other hand, the core submissions of Mr. Vikram Nankani, the Learned Senior Counsel appearing for the Resolution Applicants in both Writ Petitions, may be summarised thus:—

(i) Section 32A, being a non-obstante provision, would override the provisions of the PMLA, 2002, should a conflict between themarise. The jurisdiction of Section 32A is attracted only after a resolution plan is approved under Section 31 of the IBC, 2016. Conflicts between the IBC, 2016 and the PMLA, 2002 may arise in the case of attachments by agencies such as the ED prior to the approval of the resolution plan, whether such attachment is effected before or after commencement of the CIRP. Such a conflict could be between the statutory moratorium triggered by Section 14 of the IBC, 2016 and the powers of attachment under the PMLA, 2002. However, that would have no relevance for the interpretation of Section 32A because the jurisdiction of Section 32A commences when the moratorium under Section 14 ends;

(ii) Section 32A is a special automatic framework where the only condition precedent is the approval of a resolution plan under Section 31 of the IBC, 2016. The resolution applicant is not required to knock on the doors of any forum to seek any positive grant of approval or endorsement so that the benefits of Section 32A may become available to the Corporate Debtor. Parliament has designed Section 32A to be a self-operating legal framework that discharges only the Corporate Debtor and its assets, taking care to enable attachments and proceedings to continue against other accused with the same charges. For the immunity under Section 32A to become available, the Corporate Debtor must meet the condition that there is a change in management and control of the Corporate Debtor in favour of persons unconnected with those in management and control of the Corporate Debtor when the alleged offense took place;

(iii) Any attachment under the PMLA, 2002 can only be in the nature of an interim measure that would aid the final measure of confiscation under Section 8(5). Since by reason of Section 32A of the IBC, 2016, the ultimate end of confiscation is protected against, it is only natural that the interim measure of attachment must come to an end upon approval of a resolution plan; and

(iv) The ED has not challenged the Approval Order, which approved the resolution plan under Section 31 of the IBC, 2016, and

already directed the ED to release the Attached Properties. Although the ED had originally not been a party to the CIRP, considering that IA 383 had made the ED a party, the ED clearly was a person aggrieved by the Approval Order, but chose not to challenge the Approval Order. Besides, even in WP 29111, the ED has not challenged the Approval Order but has only challenged the April 2023 Order. The controversy raised in IA 383 (whether the ED can continue its attachment upon the moratorium coming into effect) can be said to have become infructuous once the resolution plan got approved, and the Approval Order itself directed the ED to release the Attached Properties. Mr. Nankani would argue that even if the April 2023 Order were to be set aside, the ED would need to abide by the Approval Order.

Core Issue:

11. The core issue that falls for our consideration is whether the NCLT had the jurisdiction to direct the ED to release the Attached Properties, invoking Section 32A of the IBC, 2016, since Section 32A provides that all attachments over properties of a corporate debtor would cease once a resolution plan in respect of the said corporate debtor is approved.

12. It is true that IA 383 had originally raised a larger issue - whether any attachment of assets is at all permitted to be continued once a moratorium commences owing to initiation of a CIRP. Indeed, the moratorium under Section 14 of the IBC, 2016 is itself an interim measure and may come to an end when the corporate debtor heads to liquidation or is resolved with a resolution plan. However, in the facts of the instant case, we need not get into this facet of the law at all since the issue has been rendered moot by the actual final approval of a resolution plan, leading to the jurisdiction of Section 32A having been attracted.

13. Therefore, we do not intend to pronounce upon a question of law in a vacuum, when the need to interpret Section 14 of the IBC, 2016 has been overtaken by the approval of the resolution plan, triggering the commencement of the jurisdiction of Section 32A.

14. Besides, the ED has continued its attachment over the Attached Properties despite Section 32A of the IBC, 2016 being attracted. While the April 2023 Order has also ruled upon the effect of Section 14 on continued attachment, it is Section 32A that the NCLT has in fact invoked to direct the release of the Attached Properties. Therefore, the real question before us now is the legality of continuing the attachment levied on the properties of the Corporate Debtor under the provisions of the PMLA, 2002, in the teeth of the provisions of Section 32A of the IBC, 2016. We have restricted ourselves to answering that core question, which, in our opinion, is the only question involved in the

matter before us. As a necessary corollary to decide whether the NCLT had exceeded its jurisdiction, we would also need to examine the scope and jurisdiction of Section 60(5) of the IBC, 2016, under which the NCLT rules on questions of fact and law in relation to resolution proceedings.

Section 32A of the IBC, 2016:

15. For convenience, we first deal with Section 32A of the IBC, 2016, and the same is extracted below:—

"32A. Liability for prior offences, etc.— (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

PROVIDED that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

PROVIDED FURTHER that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate

debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation : For the purposes of this sub-section, it is hereby clarified that,-

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

[Emphasis Supplied]

16. A plain reading of the forgoing would show that Section 32A is a non-obstante provision. Its jurisdiction is attracted only when a resolution plan gets approved under Section 31. Besides, the immunity conferred by Section 32A is available if and only if the approved resolution plan results in a complete change in the character of ownership and control of the corporate debtor. Explicitly, Section 32A (1) stipulates that the liability of the corporate debtor for an offense committed prior to commencement of the CIRP shall cease. The

corporate debtor is explicitly protected from being prosecuted any further for such an offense, with effect from the approval of the resolution plan. Section 32A disentitles the corporate debtor from such immunity if the promoters or those in the management or control of the corporate debtor prior to the CIRP, or any related party of such persons, continues in management or control of the corporate debtor under the approved resolution plan. Likewise, the corporate debtor would be disentitled from immunity even if third parties, who were not promoters or persons in management or control of the corporate debtor come into management or control of the corporate debtor under the resolution plan but are persons who the Investigating Authority has reason to believe (based on material) had abetted or conspired for the commission of the offense in question.

17. Should the ingredients of Section 32A(1) be met, it enables an automatic discharge from prosecution, for the corporate debtor alone. The provision takes care to ensure that the immunity is available only to the corporate debtor and not to any other person who was in management or control or was in any manner, in charge of, or responsible to, the corporate debtor for conduct of its business, or was associated with the corporate debtor in any manner, and directly or indirectly involved in the commission of the offense being prosecuted. Such others who are charged for the offense would continue to remain liable to prosecution. Effectively, all other accused remain on the hook and it is the corporate debtor who alone gets the statutorily-stipulated immunity, and that too only when a resolution plan is approved under Section 31, and such resolution plan entails a clean break from those who conducted the affairs in the past at the time when the offense was committed. A complete dissociation of the individuals involved in the management and control at the time of commission of the alleged offense is a fundamental requisite for the immunity to become available.

18. Section 32A(2) goes a step further and also protects the property of the corporate debtor from any attachment and restraint in proceedings connected to the offense committed prior to the commencement of the CIRP. Once a resolution plan is approved under Section 31 and a change in control and management is effected under the resolution plan (the same ingredients as set out in Section 32A(1) are stipulated here too), the property of the corporate debtor would get immunity from further prosecution of proceedings. Clause (i) in the Explanation to Section 32A(2) removes all doubt about what the assets are given immunity from. The provision explicitly stipulates that an "*action against the property*" of the corporate debtor, from which immunity would be available, "*shall include the attachment, seizure, retention or confiscation of such property under such law*" as applicable.

The reference being to any action against the property under any law would evidently bring within its compass, attachments made under the PMLA, 2002.

19. Section 32A(2) also affords similar immunity without a successful resolution having been approved - where a successful sale of assets of the corporate debtor is effected to an unconnected purchaser in liquidation proceedings. In short, action against the property is prohibited so that the purchaser of the property in liquidation proceedings of the corporate debtor can enjoy it freely, and therefore pay the best value when bidding for it. Since that facet of the matter is not relevant to the facts at hand, we are not analysing it further.

20. Therefore, as a matter of law, once the resolution plan is approved with the attendant conditions set out in Section 32A being met, further prosecution against the corporate debtor and its properties, would cease. Section 32A(3) enjoins the corporate debtor to continue to cooperate with the enforcement agencies in the continued prosecution against the individuals in question.

21. Now, applying this position in law to the facts of the case, it is common ground that under the Approval Order, a resolution plan in respect of the Corporate Debtor was approved under Section 31 of the IBC, 2016. It is also common ground that none of the Resolution Applicants is a person in charge of or responsible for the commission of the alleged scheduled offense being prosecuted by the ED. It is not the ED's case that the Resolution Applicants are third parties who have aided and abetted the commission of the alleged offences. In short, it is common ground that all the ingredients of Section 32A of the IBC, 2016 are met. However, what the ED disputes is the power of the NCLT to rule upon the interpretation of Section 32A when the effect of such interpretation would lead to release of attachment of property that had been levied under the provisions of the PMLA, 2002.

Section 31 of the IBC, 2016:

22. To deal with this argument, one must necessarily look to the provisions of Section 31 of IBC, 2016 under which the Approval Order is passed, as well as Section 60(5) of the IBC, 2016 which is the provision under which the NCLT has passed its April 2023 order in IA 383.

23. Section 31 of the IBC, 2016 reads as under:—

"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, 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:

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.

(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."

[Emphasis Supplied]

24. As can be seen from the proviso to Section 31(1), the Adjudicating Authority (the NCLT) is enjoined with a duty to ensure that before passing any order for approval of the resolution plan, it should be satisfied that the resolution plan has provisions for its effective implementation. In other words, whilst passing any order under Section 31, the NCLT not only must follow the provisions of the IBC, 2016 but also make sure that the resolution plan approved by it can be effectively implemented. It is keeping this provision in mind that in the facts of the present case, the NCLT has directed the ED to raise its attachment on the properties of the Corporate Debtor as mandated by Section 32A of the IBC, 2016.

25. Therefore, we do not think that Mr. Vyas is correct in his submission that the NCLT does not have the power to direct the ED to raise its attachment that had been levied under the provisions of the PMLA, 2002. Equally, we find that driving a successful resolution

applicant to file an appeal under Section 26(1) of the PMLA, 2002 in order to raise the attachment levied on the properties of the corporate debtor or to Section 8(5) of the PMLA, 2002 (to reverse confiscation, which itself is rendered impossible by Section 32A of the IBC, 2016) is wholly unnecessary. This is for the simple reason that Section 32A itself mandates that once a resolution plan is approved, no action can be taken against the properties of the corporate debtor in relation to an offence committed prior to the commencement of the CIRP of the corporate debtor, where such property is covered under a resolution plan approved by it under Section 31 of the IBC, 2016. It is it is wholly untenable to contend that the NCLT, and which is the Adjudicating Authority constituted under the IBC, 2016, is incompetent and/or powerless to either interpret or to give effect to the provisions of the very Act under which it was constituted.

26. We are of the clear view that looking at the purpose and object of not only Section 31, but also Section 32A of the IBC, 2016, the NCLT had all powers to direct the ED to raise its attachment in relation to the attached properties of the corporate debtor once a resolution plan that qualifies for immunity under Section 32A was approved, and those very properties were the subject matter of the resolution plan. This is the clear mandate of the legislature as enshrined in Section 32A of the IBC, 2016.

Section 60(5) of the IBC, 2016:

27. This apart, even Section 60(5) of the IBC, 2016 empowers the NCLT to decide 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 a corporate debtor. The relevant portion of Section 60(5) is extracted below:—

"Section 60. Adjudicating Authority for corporate persons.

*(1) to (4) ******

(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."

[Emphasis Supplied]

28. A plain reading of the provision would show that Section 60(5) too is a non-obstante provison that confers on the NCLT, jurisdiction and powers to dispose of any question of law that arises in relation to the resolution proceedings. Parliament has explicitly conferred jurisdiction on the NCLT to entertain or dispose of any question of law or fact arising in relation to insolvency resolution proceedings of any corporate debtor under the IBC, 2016. Such questions of law and fact, needless to add, would include answering questions emerging from giving effect to Section 32A in relation to any corporate debtor that has successfully undergone a CIRP with an approved resolution plan that meets the ingredients to qualify for the immunity.

29. In the instant case, the NCLT was aware of the attachment effected by the ED over the Attached Properties well before the CIRP commenced. The NCLT applied Section 32A to the facts of the case before it, and rightly took cognizance of the attachment when approving the resolution plan. The NCLT has accurately answered the question of law arising under Section 32A, that the approval of the resolution plan brings the prosecution of the Corporate Debtor to an end under Section 32A(1) and the attachment of the Attached Properties to an end under Section 32A(2) read with the Clause (i) in the Explanation to Section 32A(2). Such an exercise of jurisdiction was wholly within the scope of power and jurisdiction explicitly conferred on the NCLT by Parliament under Section 60(5). No fault can be found with either the substance of the NCLT's exercise of such jurisdiction, or with the manner of its exercise. Whether the jurisdictional facts necessary to attract the immunity under Section 32A exist, is a mixed question of fact and law that the NCLT was entitled to entertain and dispose of. Once the jurisdictional facts are found to exist, whether the immunity becomes available is a question of law which is clearly within the domain of the NCLT's jurisdiction.

30. It should not be forgotten that both Section 32A and Section 60 (5) are non-obstante provisions that operate notwithstanding anything contained in any other law, including the PMLA, 2002. Therefore, there is no basis whatsoever to treat the provisions of attachment under the PMLA, 2002 as being uniquely carved out as an exception, when the legislature indeed chose to cover prosecution by, and attachment of assets, under the PMLA, 2002 as coming to an end by virtue of Section 32A of the IBC, 2016.

31. What is also evident is that the NCLT has not even interpreted or answered any question of law under the PMLA, 2002 in order to direct the release of the Attached Properties. The NCLT has answered questions of fact and found that the ingredients of Section 32A of the IBC, 2016 are met, and therefore, disposed of the question of immunity contained in Section 32A as being available to the Corporate Debtor.

The necessary corollary of such a declaration of law is that the ED must obey it to ensure that the rule of law is maintained. If a State agency does not discharge its duty as laid down in law, a writ would surely lie to direct such agency to adhere to the declaration of the law. Therefore, the argument that WP 9943 would not be maintainable is misconceived. Likewise, the argument that the April 2023 Order deserves to be quashed is also misconceived.

32. The facts at hand present a situation where a tribunal with explicit jurisdiction has duly and accurately exercised its powers, and an agency that is also duty-bound to follow the law as declared, has not discharged its duty, choosing to question the evident jurisdiction of the tribunal. Such a situation clearly lends itself to the parties affected by it, to invoke their constitutional remedy under Article 226 of the Constitution of India, seeking a direction that the agency must indeed comply with the law enshrined in Section 32A of the IBC, 2016.

IA 383 and its implications:

33. Whether IA 383, filed in 2022, was premature when the resolution plan was approved in February 2023 (by the Approval Order), is a question that is now moot. However, Mr. Vyas is right in apprehending that an endorsement of such an approach to the NCLT in anticipation of an approval of a resolution plan poses a question of whether Section 14 of the IBC, 2016 would override Section 8 of the PMLA, 2002. However, that debate is now wholly irrelevant to dispose of the case at hand. The NCLT indeed disposed of IA 383 only in April 2023, i.e. after the Approval Order sanctioned the resolution plan under Section 31 in February 2023. In our opinion, IA 383 had worked itself out and had been overtaken by the Approval Order passed by the NCLT. IA 383 was filed by the Resolution Professional raising the issue of the effect of Section 14 of the IBC, 2016 but the parties are no longer in a situation where Section 14 has any relevance. Mr. Nankani is quite right in pointing out that the jurisdiction of Section 32A commences when the jurisdiction of Section 14 ends. In fact, the Approval Order too explicitly brings to an end the moratorium under Section 14. Be that as it may, for good order's sake, it must be pointed out that unless and until a resolution plan is approved under Section 31 of the IBC, 2016, the jurisdiction of Section 32A would not even be attracted. It would not be possible for any person to invoke Section 32A on the premise of the likelihood of an approval of a resolution plan under Section 31 that may emerge in future. It is only when a resolution plan is approved under Section 31 that the rights contained in Section 32A would start to flow. We are informed that the conflict between the Section 14 of the IBC, 2016 and the power of the ED to effect new attachments or continue old attachments under the PMLA, 2002 is the subject matter of litigation before various other courts. For the proceedings before us,

it is wholly unnecessary to answer this issue.

Manish Kumar and its import:

34. The Hon'ble Supreme Court has had occasion to deal with the legislative intent and purpose underlying Section 32A of the IBC, 2016, albeit when considering a challenge to the constitutional validity of Section 32A. In doing so, the Hon'ble Supreme Court had the benefit of the Union of India's clear explanation and support for the view that corporate debtors must get to begin with a clean slate under Section 32A, making a clean break from their past. In *Manish Kumar* v. *Union of India* - (2021) 5 SCC 1 (Manish Kumar), the Hon'ble Supreme Court ruled that the immunity under Section 32A is a conscious and valid legislative conferment by Parliament. The Union of India had emphasized the vital need for introducing Section 32A and defended having piloted the provision through Parliament, giving insight into the legislative intent behind the provision, and that too when presented with how the provision would give immunity from an attachment under the PMLA, 2002.

35. Some extracts from Manish Kumar would bear iteration in the context of the case at hand, and hence are set out below:

> *325. The contentions of the petitioners appear to be that this provision is constitutionally anathema as it confers an undeserved immunity for the property which would be acquired with the proceeds of a crime. The provisions of the Prevention of Money-Laundering Act, 2002 (for short, "**the PMLA**") are pressed before us. It is contended that the prohibition against proceeding against the property, affects the interest of stakeholders like the petitioners who may be allottees or other creditors. In short, it appears to be their contention that the provisions cannot stand the scrutiny of the Court when tested on the anvil of Article 14 of the Constitution of India. The provision is projected as being manifestly arbitrary. To screen valuable properties from being proceeded against, result in the gravest prejudice to the home buyers and other creditors. The stand of the Union of India is clear. The provision is born out of experience. The Code was enacted in the year 2016. In the course of its working, the experience it has produced, is that, resolution applicants are reticent in putting up a resolution plan, and even if it is forthcoming, it is not fair to the interest of the corporate debtor and the other stakeholders.*
>
> *326. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to*

attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.

327. It must be remembered that the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor. The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto. These ingredients are also insisted upon for claiming exemption of the bar from actions against the property. Significantly every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor.

328. The corporate debtor and its property in the context of the scheme of the code constitute a distinct subject matter justifying the special treatment accorded to them. Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgment of the legislature. Erecting a bar against action against the property of the corporate debtor when viewed in the larger context of the objectives sought to be achieved at the forefront of which is maximization of the value of the assets which again is to be achieved at the earliest point of time cannot become the subject of judicial

veto on the ground of violation of Article 14.

329. We would be remiss if we did not remind ourselves that attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgment and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some it cannot unless it strikingly ill squares with some constitutional mandate suffer invalidation.

[Emphasis Supplied]

36. We hasten to add that we are not even suggesting that there is any estoppel against a State agency from defending an action on facts without disturbing the declared law. What is clear to us is that the legislative intent and objective underlying Section 32A has been made clear in Manish Kumar not only by the Hon'ble Supreme Court but also by the Union of India. Such an exposition has made it rather easy for us to appreciate the provision in its letter and spirit, and to apply it to the facts at hand.

37. In our opinion, when a resolution plan with the ingredients that qualify for immunity under Section 32A comes to be approved, quasi-judicial authorities including the Adjudicating Authority under the PMLA, 2002 (Respondent No. 1 in WP 9943) must take judicial notice of the development and release their attachment on their own. This is the only means of ensuring that the rule of law as stipulated in Section 32A of the IBC, 2016 runs its course. The Adjudicating Authority under Section 8 of the PMLA, 2002 is a quasi-judicial officer with a judicial role. The judicial role of an Adjudicating Authority is different from the role of a prosecuting executive. In discharging such role, the Adjudicating Authority, clothed with the character of a judicial officer, must act judiciously and discharge the mandate of Article 141 of the Constitution of India, which makes it clear that the law declared by the Hon'ble Supreme Court would bind all courts in the territory of India. The process of adjudication by the Adjudicating Authority under Section 8 of the PMLA, 2002 is inherently a quasi-judicial activity, akin to the quasi-judicial process of adjudication by the NCLT (in fact, in the IBC, 2016 the NCLT is the "***Adjudicating Authority***"). Once the law is declared by the Hon'ble Supreme Court, officers presiding over judicial proceedings must necessarily take judicial notice of the law as declared, and act in a manner consistent with the law as declared by the Hon'ble Supreme Court. If such Adjudicating Authority does not act in line with the law declared by the Hon'ble Supreme Court, it would present a fit case for writ petitions to be considered by a constitutional court to issue an appropriate writ or direction to remedy the situation.

38. We have no hesitation in holding that there is no scope whatsoever for the attachment effected by the ED over the Attached

Properties to continue once the Approval Order came to be passed. We are not opining on whether the attachment could have continued after commencement of the CIRP. We find that the NCLT has simply answered the question of law arising in relation to the resolution of the corporate debtor and that too within the limits of the jurisdiction conferred on it. It is Section 32A of the IBC, 2016, on which the NCLT based its declaration that the Attached Properties must be released, and that is entirely correct. Whether the ED was right in continuing the attachment between the commencement of the CIRP and before the Approval Order, is also something that the April 2023 Order deals with, but in our view that issue has been overtaken, as explained earlier in this judgment.

39. One does not even need to embark on interpreting the PMLA, 2002 to see whether the NCLT was right in its declaration that the attachment of the ED, insofar as it relates to the Attached Properties, would abate. It is a consequence of explicit statutory provisions that any prosecution of the Corporate Debtor would come to an end, without any discretion being conferred on any agency to positively declare that the immunity under Section 32A may be accorded.

40. The Adjudicating Authority under Section 8 of the PMLA, 2002 has been given powers to conduct quasi-judicial proceedings before deciding to make any attachment. Towards this end, the Adjudicating Authority is obligated to issue a show-cause notice, provide an opportunity of being heard and pass a reasoned order. Evidently, orders passed by the Adjudicating Authority are appealable orders under Section 26 of the PMLA, 2002. To enable the Adjudicating Authority to discharge its quasi-judicial function, Section 11 of the PMLA, 2002 confers on the Adjudicating Authority the same powers as are vested in a Civil Court under the Civil Procedure Code, 1908 in respect of discovery; inspection; enforcing attendance of witnesses and examining them on oath; compelling production of records; receiving evidence on affidavits; issuing commissions for examination of witnesses and documents; and any other matter which may be prescribed by making rules. Lest there be any doubt, Section 11(3) of the PMLA, 2002 explicitly states that every proceeding under Section 11 would be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Penal Code, 1860.

41. Regardless of whether Respondent No. 1 in WP 9943 (the Adjudicating Authority under the PMLA, 2002) discharges it's duty on its own accord (by taking judicial notice) or on the ED drawing its attention to the decision of the Hon'ble Supreme Court, to release the attachment by operation of Section 32A of the IBC, 2016, the NCLT (the Adjudicating Authority under the IBC, 2016), is clothed with the explicit power to answer questions of law relating to the resolution (and

that too notwithstanding anything contained in any other applicable law, which includes the PMLA, 2002. Section 60(5) clearly empowers the NCLT to answer the question of whether the statutory immunity under Section 32A has accrued to a corporate debtor. As a consequence, the NCLT is well within its jurisdiction and power to rule that prior attachment of the property of a corporate debtor that is subject matter of an approved resolution plan, must be released, if the jurisdictional facts for purposes of Section 32A exist.

42. We are unable to be persuaded by the argument made on behalf of the ED that the Corporate Debtor or the Resolution Applicants must necessarily be relegated to execution proceedings under Section 424 of the Companies Act, 2013 read with Rule 56 of the NCLT Rules. To begin with, every writ of mandamus directing an arm of the State to do something or every writ of prohibition directing an arm of the State not to do something could get labelled as an execution proceeding. The power of a constitutional court to issue a writ is meant, among others, to direct that an action be taken or be refrained from being taken. It is now trite law that constitutional courts indeed have the discretion to set right and enforce the rule of law as evident from the legislation and indeed the law declared by the Hon'ble Supreme Court, where the situation so warrants. Such discretion, where warranted, must be exercised.

43. In the instant case, the NCLT has ruled on the import of Section 32A of the IBC, 2016 in the Approval Order. The NCLT has once again ruled in the April 2023 Order on the import of Section 32A. Both these orders, unexceptionable for the reasons stated above, have been ignored by the ED. To suggest that the Resolution Applicants or the Corporate Debtor should yet again go to the same forum, this time under the execution jurisdiction and that the writ court should not remedy the conscious violation of the direction, is untenable. Besides, the ED itself has filed a writ petition seeking to challenge the April 2023 Order, when an appellate remedy of going to the National Company Law Appellate Tribunal was available to it. The ED did not appeal the Approval Order either within the limitation period. Therefore, while one may raise technical grounds that alternate remedies may exist in the law, a constitutional court adjudicating the two competing writ petitions based on the same set of facts, is indeed an efficacious remedy.

44. Mr. Vyas has contended that the NCLT may indeed interpret the provisions of the IBC, 2016 but when such interpretation could have an effect on actions taken under the PMLA, 2002, it should hold its hands. In our view, such a submission is misconceived. Both Section 32A and Section 60(5) in the IBC, 2016 being non-obstante provisions, there is no question of an interpretation of the IBC, 2016 rendering the provisions of the PMLA, 2002 nugatory. Parliament, when legislating

Section 32A, was fully aware of the provisions of the PMLA, 2002 and in fact, specially legislated that subject to the ingredients of Section 32A being met, the immunity must flow and the assets of the corporate debtor must get their full statutory protection, notwithstanding the provisions of, among others, the PMLA, 2002. Parliament was also aware that Section 60(5) was already in the IBC, 2016 and did not think it was necessary to carve out the provisions of the PMLA, 2002 from the scope of the other applicable law which the NCLT had jurisdiction to interpret.

45. The Resolution Applicants, in WP 9943 have indeed sought the quashing of the ECIR, the original complaint and the attachment orders insofar as they relate to the corporate debtor. We do not believe any measure of quashing is necessary in view of the explicit and clear statutory immunity for the corporate debtor and its properties by operation of law, as set out in Section 32A of the IBC, 2016. Such instruments of enforcement are simply rendered inoperative and ineffective insofar as they relate to the corporate debtor and its assets. No further act, deed or thing is required to be done, since the immunity fastens itself by operation of law from the point in time at which the resolution plan is approved. Therefore, there is no requirement for any partial quashing of the instruments of enforcement under the PMLA, 2002. These instruments of enforcement would simply have no effect whatsoever against the corporate debtor to its detriment. The corporate debtor would indeed be obligated to cooperate in the investigation and prosecution that would continue against the other accused.

Case Law Cited:

46. To our mind, the aforesaid analysis is adequate to dispose of the two writ petitions. Both sides have presented exhaustive and voluminous case law, moulding propositions and building on multiple elements of their propositions, to depict them as being backed by precedent. They have also filed their respective short written submissions, which has been useful in appreciating the propositions advocated by each side.

47. In the interest of brevity, and more so because it would be unnecessary, we do not intend to get into an exhaustive deliberation over every sub-strand of every argument presented to us. We have explained above, in detail, our opinion on every element we believe is essential to adjudicate the writ petitions. However, for completeness, some of the key facets canvassed, based on case law presented by both sides, is dealt with below.

48. A substantial part of the submissions made on behalf of the ED is founded on the structure of how the relief sought by the Resolution Applicants in WP 9943 seeks quashing of instruments of enforcement deployed under the PMLA, 2002 - such as the provisional attachment

order, the original complaint and the ECIR. We have already explained why we would not need to quash these instruments of enforcement. Such quashing is wholly necessary by the sheer formulation of Section 32A(1) and Section 32A(2) of the IBC, 2016. The position in law is that once Section 32A is attracted, such instruments of enforcement would continue in force, and would be pressed into service to prosecute the other accused and their properties - those other than the corporate debtors and properties of such accused, who do not enjoy immunity. Neither Paragraph 17(e) of the Approval Order nor the April 2023 Order purports to quash any of these instruments of enforcement deployed under the PMLA, 2002. We have explained above why the two orders of the NCLT are unexceptionable and present the accurate application of Section 32A to the corporate debtor and its assets.

49. Therefore, in our opinion, the judgments cited to buttress the proposition that the NCLT does not have jurisdiction to use its judicial discretion to adjudicate upon or to disturb enforcement actions taken under the PMLA, 2002 are wholly irrelevant. These are:—

(i) *Kiran Shah, Resolution Professional of KSL and Industries Ltd.* v. *Enforcement Directorate* - (Company Appeal (AT) (Insolvency) No. 817/2021;

(ii) *Embassy Property Developments Pvt. Ltd.* v. *State of Karnataka* - (2019 SCC OnLine SC 1542);

(iii) *Deputy Director, Office of the Joint Director, Directorate of Enforcement* v. *Asset Reconstruction Company India Ltd.* - (2020 SCC OnLine Mad 28090);

(iv) *Phoenix Tech Tower Ltd.* v. *AP Gems and Jewellery Park Pt. Ltd.* - (2020 SCC OnLine NCLT 12503);

(v) *Manohar Lal Vij* v. *The Directorate of Enforcement* - ([IB]-1205/[ND]/2019)

50. Likewise, the proposition that "***proceeds of crime***" cannot be an operational debt for the ED to stand as a creditor for purposes of IBC, 2016 is a complete distraction from the core issue at hand. At the heart of the two petitions is the implication of the immunity under Section 32A of the IBC, 2016 for an eligible corporate debtor. Once a corporate debtor is eligible for the immunity, the corporate debtor and its properties are outside the pale and reach of the ED's jurisdiction. By extinguishing any scope for continued action against the property of a corporate debtor covered by Section 32A of the IBC, 2016 and by enabling the proceeds of crime to be chased in the hands of the other accused, any action, as a matter of law, against the assets of the corporate debtor, would come to an end. No element of the PMLA, 2002 would matter any more once a corporate debtor falls within the scope of Section 32A of the IBC, 2016. The ED would not be a creditor at all,

and no debt would be owed by the corporate debtor to the ED. Therefore, whether the ED is to be classified as an operational creditor or a financial creditor is totally irrelevant. Section 32A simply accords immunity (i) to the corporate debtor from prosecution; and (ii) to the corporate debtor's assets from continuation of attachment under any other law in force, including the PMLA, 2002. Therefore, the following judgments cited on behalf of the ED to advance the aforesaid proposition, would have no relevance at all:—

(i) *Deputy Director of Enforcement, Delhi* v. *Asix Bank* - (2019 SCC OnLine Del 7854); and

(ii) *P. Mohanraj* v. *Shah Brothers Ispat Pvt Ltd.* - (2021 SCC OnLine SC 152) (*P Mohanraj*).

51. It is also noteworthy that Section 32A of the IBC, 2016 was introduced with effect from 28th December, 2019. It was a material legislative intervention to provide a shield to from prosecution and continued attachment of the properties of a qualifying corporate debtor from antecedent proceedings under any other law in force. Therefore, it is inappropriate to cite judgments rendered before the introduction of Section 32A to argue how the PMLA, 2002 stands on a separate footing and how its interface with the IBC, 2016 should be reconciled. The introduction of Section 32A was a conscious shift with a specific and conscious adoption of the non-obstante provision, with a legislative intent to give primacy to the IBC, 2016 in respect of corporate debtors who qualify for the immunity under Section 32A. Therefore, citing judgments rendered before the introduction of Section 32A to canvass how to interpret Section 32A, is wholly inappropriate. In fact, such judgments declaring the law as they did, are addressed by the conscious departure by way of substantive legislative changes through Section 32A. Such judgments that would be inappropriate to cite are:—

(i) *Deputy Director of Enforcement, Delhi* v. *Asix Bank* - (2019 SCC OnLine Del 7854) - decided on 2nd April, 2019; and

(ii) *Rai Foundation through its Trustee* v. *The Director, Directorate of Enforcement* (WP (Crl.) No. 100/2015) - decided on 20th February, 2015.

52. One judgment that each side in these proceedings has sought to draw our attention to is the case of *P. Mohanraj* (supra). This decision makes it clear that the Hon'ble Supreme Court considered the interplay between Section 14 of the IBC, 2016 and Section 32A to note that the former only casts a shadow on enforcement against the corporate debtor while the latter brings a complete cessation of prosecution against the corporate debtor. It was held that Section 32A(1), operates only after the moratorium under Section 14 comes to an end, and cannot have any bearing on interpretation of Section 14. We have

already opined above that the interplay between the operation of the moratorium under Section 14 of the IBC, 2016 and the power of attachment under the PMLA, 2002 became a redundant subject for purposes of these proceedings, once the resolution plan that qualifies for immunity under Section 32A was approved. We have consciously decided not to rule upon a question of law in a vacuum, when dealing with an issue that is of no relevance to dealing with the case at hand.

Summary of Conclusions:

53. As a result, we return the following findings and conclusions in disposing of the two writ petitions:—

i. The NCLT was well within its jurisdiction in declaring, both in the Approval Order (dated 17th February, 2023) under Section 31 of the IBC, 2016 and in the April 2023 Order (under Section 60(5) of the IBC, 2016), that the corporate debtor would stand discharged from the offences alleged to have been committed prior to the CIRP and that the Attached Properties as identified in the Approval Order became free of attachment from the time of approval of the resolution plan eligible for benefit of Section 32A. On facts, it is evident that the NCLT was accurate in the valid exercise of its explicit jurisdiction;

ii. The jurisdiction of Section 32A of the IBC, 2016 would be attracted from the point at which a qualifying resolution plan is approved under Section 31 of the IBC, 2016. The protections afforded by Section 32A would become available only when the resolution plan is so approved, and such resolution plan meets the other necessary ingredients to qualify for the immunity, namely, that there is a clean break with a change in ownership of, and control over, the corporate debtor;

iii. IA 383 could be regarded as having become infructuous since the Approval Order had already, and rightly, protected the corporate debtor and the Attached Properties from continued prosecution of the scheduled offenses and the offense of alleged money laundering under the PMLA, 2002. However, the April 2023 Order that disposed of IA 383 was founded on applying the provisions of Section 32A to the facts of the case;

iv. There is one other facet that makes the scheme and import of Section 32A of the IBC, 2016 clear, logical and reasonable. The attachment under Section 5 of the PMLA, 2002 is but a measure in aid of eventual potential confiscation under Section 8(5) of the PMLA, 2002. Confiscation of the property of the corporate debtor can only be effected upon conviction of the corporate debtor for an offence of money laundering. Where Section 32A(1) of the IBC, 2016 confers immunity to the corporate debtor from prosecution,

there can be no conviction that can follow. Consequently, it is but logical that the property of the corporate debtor would have protection from any continued attachment by reason of Section 32A(2). Therefore, when there is no potential in law for an eventual confiscation, the attachment, which is only an interim measure in aid of the final measure of confiscation must necessarily abate and come to an end, since it cannot continue in a vacuum.

v. We are not opining on the implications of Section 14 of the IBC, 2016 for continuation of a prior attachment during the course of a CIRP. In the facts at hand, the jurisdiction of Section 14 came to an end, and the jurisdiction of Section 32A commenced, on 17th February, 2023. Therefore, dealing with a conflict between the provisions of the PMLA, 2002 and Section 14 of the IBC, 2016 was rendered irrelevant with effect from 17th February, 2023;

vi. As a consequence of Section 32A of the IBC, 2016, the ED must now necessarily release the attachment on the Attached Properties, without being bogged down by the question of how to interpret the continuation of attachment after the commencement of the CIRP and before the Approval Order, and the implications for the same under Section 14 of the IBC, 2016. We are not opining on this facet of the law as it is wholly unnecessary to dispose of the case at hand. It is trite law that no court should rule on questions of law in a vacuum;

vii. The Approval Order, which interpreted questions of fact and answered the question of law on implications of Section 32A for the corporate debtor, has not been challenged by the ED - neither in an appeal from the Approval Order nor in WP 29111 filed before us. The ED's challenge is to the April 2023 Order that allowed IA 383 on the strength of Section 32A. The April 2023 Order does contain remarks about the interplay between Section 14 and the attachment but that is not the ratio of the April 2023 Order, which explicitly relies on Section 32A of the IBC, 2016 to direct the release of the Attached Properties. Even if purely for the sake of argument, the April 2023 Order were to be set aside, the Approval Order would hold the field and that order correctly requires the ED to release the Attached Properties owing to the operation of Section 32A of the IBC, 2016;

viii. The NCLT in its capacity as the Adjudicating Authority under the IBC, 2016 has only interpreted the provisions of Section 32A and applied them to the facts at hand, to declare that the attachment of the Attached Properties by the ED must come to an end. It is possible that in a given case, the application of Section 32A of the

IBC, 2016 may have an effect on existing and intended attachments and prosecution by enforcement agencies operating under laws such as the PMLA, 2002. However, since both Section 32A and Section 60(5) are non-obstante provisions, they would prevail, with no room for concern, real or imagined, about any conflict between legislations. We, therefore, hold that the interpretation by the NCLT in both, the Approval Order, and the April 2023 Order, did not at all render nugatory, the provisions of the PMLA, 2002 or its legislative objectives. The NCLT has merely given effect to the provisions of Section 32A of the IBC, 2016 in its terms and that is an accurate decision, as explained by us above; and

ix. Finally, quasi-judicial authorities wielding powers of a civil court in relation to the functioning of a State agency such as the ED, have a role that is distinct and separate from the executive authorities in the same agency. The former are inherently a statutory check and balance on the latter. As quasi-judicial authorities exercising the powers of civil courts and functioning within the territory of India, the law declared by the Hon'ble Supreme Court would bind the quasi-judicial authorities. As required under Article 141 of the Constitution of India, such quasi -judicial authorities must act consistent with the law declared by the Hon'ble Supreme Court rather than disobey the rule of law to give rise to avoidable litigation.

54. In the result, we rule that the attachment by the ED over the Attached Properties, being the four bank accounts of the Corporate Debtor, (with aggregate balances to the tune of Rs. 3,55,298/- and any interest earned thereon) and the 14 flats constructed by the Corporate Debtor valued at Rs. 32,47,55,298/-, came to an end on 17th February, 2023. Such release has occurred by operation of Section 32A of the IBC, 2016, and the ministerial act of communicating must be communicated by the Respondents in WP 9943 and the Petitioner in WP 29111 forthwith to the Corporate Debtor, marking a copy to the Petitioner in WP 9943, within a period of six weeks from the date of this judgment. Such a communication is necessary to enable the Attached Properties to be bankable assets that can be deployed into the revival of the Corporate Debtor in terms of the objective of resolution.

55. Rule is made absolute in the aforesaid terms and the two Writ Petitions are disposed of accordingly. In the circumstances of this case and in order to not create further scope of conflict between the parties, we have persuaded ourselves to pass no orders as to costs.

56. This judgment/order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this

judgment/order.

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2025 SCC OnLine NCLAT 108

In the National Company Law Appellate Tribunal[†]

(BEFORE ASHOK BHUSHAN, CHAIRPERSON, BARUN MITRA, MEMBER (TECHNICAL) AND ARUN BAROKA, MEMBER (TECHNICAL))

Interlocutory Application No. 6625 & 7235 of 2024

In

Company Appeal (AT) (Insolvency) No. 1495 of 2024

Vantage Point Asset Management Pte. Ltd. … Appellant;

Versus

Gaurav Misra Resolution Professional of Alchemist Infra Reality Ltd. … Respondent.

Interlocutory Application No. 6625 of 2024

And

In the Matter of:

Directorate of Enforcement, through its Deputy Director … Applicant;

Interlocutory Application No. 6625 & 7235 of 2024 and Company Appeal (AT) (Insolvency) No. 1495 of 2024 and Interlocutory Application No. 6625 of 2024

Decided on January 9, 2025

Advocates who appeared in this case :

For Appellant Applicant : Mr. Zoheb Hossain, SPP ED, Mr. Vivek Gurnani, Panel Counsel ED with Mr. Suradish Vats and Mr. Sai M. Sud, Advocates for the Applicant

Mr. Arun Kathpalia, Sr. Advocate with Mr. Palash S Singhai, Ms. Diksha Gupta and Ms. Harsha Sareen, Advocates for SRA.

For Respondents : Mr. Krishnendu Datta, Sr. Advocate with Ms. Varsha Banerjee, Advocate.

Ms. Prachi Johri and Ms. Abhipsa Sahu, Advocates for Intervenor

The Judgment of the Court was delivered by

ASHOK BHUSHAN, CHAIRPERSON

IA No. 6625 of 2024

This Application has been filed by Directorate of Enforcement, praying for recall of order dated 13.08.2024, by which Company Appeal (AT) (Ins.) No. 1495 of 2024 was allowed. The prayers made in the Application are as follows:

"a. Recall order dated 13.08.2024 passed by this Hon'ble Court in Company Appeal (AT) (Insolvency) No. 1495 of 2024;

b. Vacate the direction pertaining to lifting the Provisional Attachment order dated 24.01.2019;

c. Declare that the attached properties could never have formed part of the resolution plan and d. Pass such other orders/orders as this Hon'ble Tribunal may deem fit.

2. The brief background facts necessary to be noticed for deciding this Appeal are:

(i) The Corporate Debtor ("**CD**") - Alchemist Infra Realty Limited was subjected to Corporate Insolvency Resolution Process ("**CIRP**") by order dated 08.10.2021 passed by Adjudicating Authority in an Application under Section 7 filed by Technology Parks Ltd.

(ii) In the CIRP of the CD, Resolution Plan submitted by Vantage Point Asset Pte. Ltd. (hereinafter referred to as the "**Appellant**") was approved by order dated 04.07.2024 passed by NCLT, New Delhi Bench (Court-II) in CP(IB) No. 635/PB/20021 by allowing IA No. 01 of 2024 filed by the Resolution Professional ("**RP**") for approval of Resolution Plan. The Adjudicating Authority while approving the Resolution Plan also considered the prayers made by the Successful Resolution Applicant ("**SRA**") regarding relief/concession/waiver. The properties of CD were attached by the Directorate of Enforcement vide order dated 24.01.2019. The SRA had prayed before the Adjudicating Authority to issue direction to release the attachment of the assets enforced by Directorate of Enforcement ("**ED**"). The said relief prayed by the SRA was not granted. In paragraphs 60 and 61 of the judgment, the Adjudicating Authority made following observations:

"60. In sum and substance, the SRA/CD would be entitled to no other relief/concession/waiver except those, which are available to it as per the provisions of Section 31(1) and 32A of IBC, 2016. Nevertheless, the properties which are already attached by ED, under PMLA would not be released and it would be for the SRA to resort to the appropriate proceedings to seek remedy in this regard. In any case, the changed management covered under Sec. 32A(l)(a) & (2)(i) of IBC, 2016, would not be entitled for any criminal consequences for the offences committed by the ex-management of the CD prior to commencement of the CIRP. It is also noticed that though in the certificate furnished by the RP in Form-H prescribed under Regulation 39(4) of IBBI (CIRP) Regulations, 2016, as also in the Affidavit filed by him, the RP has authenticated that the SRA does not suffer any ineligibility under Sec. 29A of IBC, 2016, but in terms of provisions of Sec. 30 (1) of the Code, a Resolution Applicant should submit the

Resolution Plan along with an affidavit stating that he is eligible under Sec. 29A to submit a Resolution Plan, to the Resolution Applicant. We could not find any such affidavit filed by SRA on record. Nevertheless, in the interest of justice we deem it appropriate to give an opportunity to SRA to file the affidavit required in· terms of provisions of Sec. 29Aread with Sec. 30(1) of the IBC, 2016.

61. In the backdrop of aforementioned factual position, discussion, analysis and findings, the IA-01/2024 filed by the RP for approval of the Resolution Plan. is allowed. The Plan submitted by the SRA, certified by the RP is approved subject to filing of Affidavit of SRA under Section 29A r/w Sec. 30(1) of IBC, 2016 by the RP within 15 days of this Order. It is made clear That no relief/concession is accorded to the SRA. The relief sought regarding direction to ED to release the property of the CD attached by it is specifically rejected. It would be open to SRA to resort to the remedies available under PMLA for release of the attached properties in accordance with law. As has been noted hereinabove, the SRA has committed that it would implement the plan irrespective of the fact that no relief/concession sought by him is granted by this Tribunal. If the affidavit of SRA under Sec. 29A read with Sec. 30(1) of the Code is not filed within 15 days from the date of uploading of this order, the application for approval of plan would be deemed to be rejected and the security amount deposited by the SRA would stand forfeited."

(iii) From the above order, it is clear that relief sought regarding direction to ED to release property of CD attached by it, was specifically rejected. The Appellant aggrieved by the said order, filed the present Appeal, in which, following prayers were made:

"a. Pass an order setting aside the finding at Para 60 in the Impugned Order dated 04.07.2024 passed in IA No. 01 of 2024 in CP (IB) No. 635/PB/2021 by the Ld. Adjudicating Authority, New Delhi Bench II wherein the Adjudicating Authority refused to enlarge the protection of Section 32-A of IBC to uplift the attachment by Enforcement Directorate over the properties; and

b. Pass an order for release of properties and accounts seized and attached by Central and State Agencies including Enforcement Directorate, Income Tax, Himachal Pradesh Government/Authorities etc. to uphold the legislative scheme of Section 32-A of IBC;

c. Pass any such further or other order(s) as this Hon'ble Appellate Tribunal may deem fit and proper in the facts and circumstances of the case to grant justice to the Appellants."

(iv) The Appeal came to be considered by this Tribunal and by the impugned judgment dated 13.08.2024, this Tribunal allowed the Appeal. The operative portion of the order dated 13.08.2024 is as follows:

"23. In result, we allow the Appeal, set aside the findings recorded in the impugned order in paragraph 60 and observations made in the judgment, denying the benefit of Section 32-A to the SRA. The SRA is entitled to relief of extension of benefit of protection of Section 32-A to lift the attachment by Enforcement Directorate over the assets of the Corporate Debtor. We allow the reliefs as prayed in the Appeal and set aside the findings in paragraph 60 of the judgment and the observations in the judgment, denying the protection of Section 32-A of the IBC. The Appeal is allowed accordingly. There shall be no order as to costs."

The present Application has been filed by the ED praying for recall of the above order.

3. We have heard Shri Zoheb Hossain, learned Counsel appearing for the Applicant; Shri Arun Kathpalia, learned Senior Counsel appearing for the Appellant; and Shri Krishnendu Dutta, learned Senior Counsel appearing for the RP.

4. Shri Zoheb Hossain, learned Senior Counsel appearing for the Applicant - ED, submits that the order dated 13.08.2024 has been passed without giving an opportunity to the Applicant, whose rights were to be affected by the order of the Adjudicating Authority and the order, which is in violation of principles of natural justice, deserves to be recalled. It is submitted that order of attachment of the assets was passed by the ED on 24.01.2019, in pursuance of liberty obtained from Delhi High Court in Writ Petition No. 4974 of 2018 vide order dated 22.01.2019. It is submitted that against the order dated 22.01.2019 passed by learned Single Judge, an LPA No. 104 of 2019 was filed, in which LPA, the Delhi High Court passed an order that Petitioner (CD) shall not alienate the property in any manner during the pendency of the Appeal and further directed that *status quo* with regard to the property in question, which are the subject matter of provisional attachment shall be maintained. It is submitted that order passed by this Tribunal, directing for release of attachment is not in conformity with the order of the Division Bench of the Delhi High Court dated 13.02.2019. The learned Counsel further submits that the judgment of Delhi High Court on which reliance was placed by this Tribunal in order dated 13.08.2024, i.e. *Shiv Charan* v. *Adjudicating Authority under the Prevention of Money Laundering Act, 2022*, was questioned by the ED in Special Leave Petition (Civil) Diary No(s). 34194/2024, where the Hon'ble Supreme Court on 12.08.2024 issued Notice granting leave

against the judgment of Delhi High Court. It is submitted that judgment relied by this Tribunal in *Shiv Charan* (supra), had not become final and was subject to consideration before the Hon'ble Supreme Court. It is submitted that the Applicant is entitled to be given an opportunity before deciding the Company Appeal (AT) (Ins.) No. 1495 of 2024. The Appellant had not impleaded the ED as one of the Respondent in the Appeal, hence, the order impugned dated 13.08.2024 be recalled and the Appeal be heard afresh.

5. Shri Arun Kathpalia, learned Counsel appearing for the Appellant refuting the submission, submits that Applicant was neither necessary, nor proper party in the Appeal. This Tribunal passed the order allowing the Appeal after hearing the Appellant and the RP, who alone were necessary parties to the proceedings. The order passed by this Tribunal dated 13.08.2024 is in accordance with law and this Tribunal has rightly relied on the judgment of Delhi High Court in *Shiv Charan's case*. Further, this Tribunal has relied on the judgment of the Hon'ble Supreme Court in *Manish Kumar* v. *Union of India* - (2021) 5 SCC 1. The Applicant was not required to be heard while deciding this Appeal. Hence, no grounds have been made out to recall order dated 13.08.2024. It is submitted that SRA was entitled for the benefit of Section 32-A of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**"), which is statutory provision and the judgment of this Tribunal accepting the applicability of Section 32-A to the SRA is in accordance with statutory provisions of law as declared. It is submitted that insofar as Civil Appeal No. 9692- 9693 of 2024 filed by ED, the Hon'ble Supreme Court has adjourned the matter noticing that two wings of the Government of India are trying to resolve the issue.

6. Shri Krishnendu Datta, learned Senior Counsel appearing for the RP, also supported the submission of the Appellant and contends that no grounds have been made out by the Applicant to recall order dated 13.08.2024 passed by this Tribunal in Company Appeal (AT) (Ins.) No. 1495 of 2024.

7. We have considered the submissions of learned Counsel for the Applicant, learned Counsel for the Appellant and learned Counsel for the RP.

8. The question which has arisen for consideration in this Appeal is as to whether the judgment of this Tribunal dated 13.08.2024 allowing Company Appeal (AT) (Ins.) No. 1495 of 2024, deserve to be recalled. The ground to recall a judgment are well settled. A five Member Bench of this Tribunal in *Union of India* v. *Dinkar T. Venkatasubramanian* - 2023 SCC OnLine NCLAT 283 has dealt upon the grounds, on which an Application for recall of a judgment can be entertained.

9. From the facts as noticed above, it is clear that Adjudicating

Authority has specifically rejected the prayer of SRA, seeking a direction to ED to withdraw the attachment on the assets under PMLA Act, 2002. The Appeal filed by SRA was limited to the findings in paragraph 60 of the judgment as extracted above. The approval of Resolution Plan was not under challenge in the Appeal and the order of the Adjudicating Authority was dated 04.07.2024 was challenged, insofar as it refused to withdraw the attachment and further refused to extend the protection of Section 32- A. Learned Counsel for the Applicant has submitted that the Applicant is praying for recall of judgment and matter be heard again and at present the Applicant is not raising any issues pertaining to statutory scheme under Section 32-A and the law as governed under the IBC. The issue in question and the arguments shall be addressed when the Appeal is heard afresh.

10. One of the judgments, which has been relied by this Tribunal while delivering the judgment on 13.08.2024 was judgment of the Bombay High Court in *Shiv Charan*, which judgment has been referred and relied in paragraph 9, 10 and 17 of the judgment. The Applicant has brought on the record the order of the Hon'ble Supreme Court dated 12.08.2024, which was passed in Civil Appeal filed by ED, challenging order of the Bombay High Court in *Shiv Charan's case*. The order of the Hon'ble Supreme Court dated 12.08.2024 is as follows:

> "Application for exemption from filing a certified copy of the impugned judgment is allowed.
>
> Delay condoned.
>
> The issue raised in the petition requires hearing. Therefore, we grant leave.
>
> We direct the appellant to implead Union of India through Ministry of Finance and Ministry of Corporate Affairs as added respondents Amended cause title to be filed within a period of one week from today.
>
> The name of respondent No. 4-adjudicating authority is deleted from the array of parties.
>
> Mr. Ravi Raghunath, the learned counsel accepts notice on behalf of respondent Nos. 1 to 3.
>
> List for hearing on 16th October, 2024 in the first five matters.
>
> In the meanwhile, the order of attachment dated 14th February, 2019 will continue to operate. Needless to add that the contempt petition before the High Court will not proceed.
>
> The parties are free to file the brief submissions in writing one week before the next date."

11. The Hon'ble Supreme Court in the *Shiv Charan's case* granted leave and further directed the Appellant/Applicant to implead Union of

India through Ministry of Finance and Ministry of Corporate Affairs to decide the issues and also granted an interim order that order of attachment will continue to operate. Although, the judgment of this Tribunal was delivered on 13.08.2024, but the order dated 12.08.2024, could not be placed before this Tribunal, so that Tribunal be informed that issues are being considered by the Hon'ble Supreme Court. Learned Counsel for the Appellant submits that the said Appeal filed by ED being Civil Appeal No(s). 9692-9693 of 2024, wherein it was noticed by the Hon'ble Supreme Court that two wings of the Government of India are trying to resolve the issue.

12. We have noticed above that Adjudicating Authority has specifically rejected the prayer of the SRA praying to withdraw the attachment by ED dated 24.01.2019. The Appeal was filed against the said order of the Adjudicating Authority praying that direction be issued to the ED to withdraw the attachment.

13. In a proceeding before a Court or Tribunal, all necessary parties are to be impleaded, even if, a party is not a necessary party, which may be treated as a proper party, whose presence may be necessary for deciding the issues, which have come up before the Court or who may have some stake in the issues, which has arisen for adjudication. The Hon'ble Supreme Court in AIR 1963 SC 786 - *Udit Narain Singh Malpharia* v. *Additional Member Board of Revenue, Bihar* has laid down that a necessary party is one without whom no order can be made effectively; and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. It is useful to refer to paragraphs 7 and 10 of the judgment of the Hon'ble Supreme Court, which are as follows:

> "**7.** To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled : it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.
>
> "**10.** In addition, there may be parties who may be described as proper parties, that is parties whose presence is not necessary for making an effective order, but whose presence may facilitate the settling of all the questions that may be involved in the controversy. The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a parry or such a

party may suo motu approach the court for being impleaded therein."

14. This Tribunal in Company Appeal (AT) (Ins.) No. 1417 of 2019 - *Union of India* v. *Oriental Bank of Commerce* decided on 22.05.2010 had also occasion to consider as to who is the necessary party and who may be proper party. In paragraph 14 of the judgment, following has been laid down:

> "**14.** A necessary party is a person who ought to have been arrayed as a party and in whose absence no effective order can be passed by a Court of Law/Tribunal/Appropriate Authority. A proper party is a party who although not a necessary party is a person whose presence will enable the Authority to effectively, efficaciously, comprehensively and adequately adjudicate upon all the controversies centering around a given case."

15. Even if, the ED was not necessary party in the Appeal filed by the SRA, it would have been appropriate that ED was also heard while deciding the issue, which was raised in the Appeal. We, thus, are of the view that ED also needs to be heard before deciding the Appeal finally, which has the effect, not only on the issues raised in the Appeal, but has larger ramification.

16. We, thus, are of the view that ends of justice will be served in recalling judgment dated 13.08.2024 and giving an opportunity to the Applicant to be heard before the Appeal is decided afresh. We, however, make it clear that in the Appeal, there was no challenge to the approval of the Resolution Plan., which was approved by the Adjudicating Authority vide order dated 04.07.2024 allowing IA No. 01 of 2024. The Company Appeal (AT) (Ins.) No. 1495 of 2024 was filed on limited issue as noted above. We, thus, make it clear that the recall of the judgment dated 13.08.2024, shall have no bearing on the implementation of the Resolution Plan as approved on 04.07.2024 and the recall of judgment dated 13.08.2024 is only with respect to limited issue raised in the Appeal regarding withdrawal of the attachment by the ED on the assets of the CD.

17. In result, IA No. 6625 of 2024 is allowed. The judgment dated 13.08.2024 is recalled. We make it clear that recall of judgment dated 13.08.2024, shall have no effect on the order dated 04.07.2024 passed by Adjudicating Authority approving the Resolution Plan and the Resolution Plan shall be implemented as approved on 04.07.2024 and the recall of this judgment is only for consideration of limited issue as noted above. IA No. 7235 of 2024 is accordingly disposed of.

———

† Principal Bench New Delhi

IN THE HON'BLE NATIONAL GREEN TRIBUNAL,

WESTERN ZONE, AT PUNE

ORIGINAL APPEAL NO. 27 OF 2022

IN THE MATTER OF:

THAKORBHAI VALLABHBHAI KHALASI ...APPELLANT

VERSUS

MINISTRY OF ENVIRONMENT, FOREST

AND CLIMATE CHANGE & ORS. ...RESPONDENT

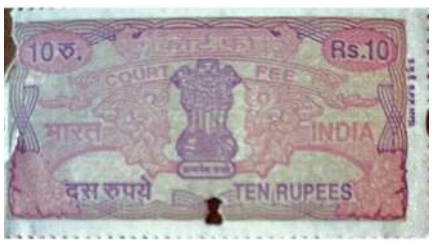
VAKALATNAMA

KNOW ALL to whom these presents shall come that I, Mr. Rajesh Raktate, Legal Counsel of ArcelorMittal Nippon Steel India Private Limited (earlier known as ArcelorMittal Nippon Steel India Limited), Respondent No. 5 herein, hereby appoint:

Ms. Shally Bhasin (D/216/1996(R)) 9051378773	**Mr. Chaitanya Safaya** (D/2427/2009) 9910479383	**Mr. Prateek Gupta** (D/2281/2016) 9051378773
Mr. Prateek Yadav (D/1687/2016) 9899146516	**Mr. Mrityunjoy Roy** (D/7267/2024) 9821670273	**Mr. Gaurav Arora** (D/2710/2017) 9650721143
Ms. Jyotsna Punshi (D/6486/2021) 8826919066	**Mr. Udbhav Nanda** (D/6558/2019) 9755749441	**Ms. Rachna D Dubey** (KAR/2584/2023) 7760550819

and the advocates of M/s. SHARDUL AMARCHAND MANGALDAS & CO., having their offices at Amarchand Towers, 216, Okhla Industrial Estate, Phase-III, New Delhi-110020 (Tel.: 41590700: 40606060) ("**Advocates**") to be the Advocates for me/us in the abovementioned case, to do all the following acts, deeds and things or any of them, that is to say:

1. TO ACT, appear and plead in the abovementioned case in this Court or any other Tribunal/Court in which the same may be tried or heard in the first instance or in Appeal or Letters Patent Appeal or Review or Revision or Execution or in any other stage of its progress until this final decision.



2. TO PRESENT Pleadings, Appeals, Letters Patent Appeal, Cross-Objections or Petitions for Execution, Review, Revision, withdrawal compromise or other Petitions or Affidavits or other documents as shall be deemed necessary or advisable for the prosecution of the said cause in all its stages.

3. TO WITHDRAW or compromise the said cause or submit to Arbitration any differences or disputes that shall arise touching or in any manner relating to the said cause.

4. TO RECEIVE moneys and grant receipts thereof for and to do all other acts and things which may be necessary to be done for the progress and in the course of the prosecution of the said cause.

5. TO EMPLOY any other Legal Practitioner authorising him to exercise the power and authority hereby conferred on the Advocates whenever he may think fit to do so.

AND I/WE hereby agree to ratify whatever the Advocates or their substitute/s responsible for the result of the said cause in consequence of his absence from the Court when the said cause is called up for hearing.

AND I/WE hereby agree that in the event of the whole or any part of the fees agreed by me/us to be paid to the Advocates remaining unpaid he shall be entitled to withdraw from the prosecution of the said cause until the same is paid.

IN WITNESS WHEREOF I/WE hereunto set my/our hand to these presents the contents of which have been explained to and understood by me/us, on this the 14 day of February, 2024.

Accepted subject to the terms regarding fees payable to

M/s. SHARDUL AMARCHAND MANGALDAS & CO

ArcelorMittal Nippon Steel India Limited

Jyotsna
JYOTSNA PUNSHI
(D/6486/2021)

Chaitanya Safaya
D/2427/2009
CHAITANYA SAFAYA

Mr. Rajesh Raktate
(Legal Counsel of
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Mr. Gaurav Arora
(D/2710/2017)

nanda D/6558/2019
(UDBHAV NANDA)

Rachna Dubey KAR/2584/2023

Ms. Rachna D Dubey
(KAR/2584/2023)

MRoy D/7267/2024

Mrityunjoy Roy
(D/7267/2024)
9821670273