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VOLUME 220 — 2020

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[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

1. MOOLDHAN ADVISORY SYSTEM P. LTD. AND OTHERS

(Company Appeal (AT) No. 266 of 2019)

2. JUGGILAL KAMLAPAT JUTE CO. LTD.

(Company Appeal (AT) No. 294 of 2019)

v.

YASHDEEP TREXIM P. LTD. AND OTHERS

JARAT KUMAR JAIN J. ***(Judicial Member)***,
BALVINDER SINGH and
DR. ASHOK KUMAR MISHRA ***(Technical Members)***

March 16, 2020.

HF ▸ Remanded

OPPRESSION AND MISMANAGEMENT—PETITION FOR RELIEF—POWERS OF TRIBUNAL—INTERIM APPLICATION—NO REASON ASSIGNED WHILE DISPOSING OF APPLICATION—MATTER REMITTED—COMPANIES ACT, 1956, SS. 397, 398.

During the pendency of the petition filed under sections 397 and 398 of the Companies Act, 1956, the petitioner filed an application for various reliefs including of adding some parties on the ground that they were subsequent purchasers of the some of the properties of the company. An application was also filed by M for modification of the interim injunction order. The Tribunal without assigning any reason disposed of the appellant's application while disposing of the petitioner's application. On appeal :

Held, *(i) that the reliefs sought in the two applications were different. There was no reason assigned while disposing of the application filed by M. Hence, that order was to be set aside and the matter was to be remitted to the Tribunal.*

(ii) That the order directing the subsequent purchaser's right would be governed by the principle of lis pendens and the issue was kept open. It meant that the order was not final and there was no need for interference.

Company Appeals (AT) Nos. 266 and 249 of 2019.

Sachin Datta, Senior Advocate with *Satish Kumar Mishra*, Advocate for the appellant in Company Appeal (AT) No. 266 of 2019.

Buddy Ranganathan and *C. S. Chauhan*, Advocates for the appellant in Company Appeal (AT) No. 294 of 2019.

Avneesh Garg with *Atanu Mukherjee*, for respondent No. 1.

Sadapurna Mukherjee, for respondent No. 2.

ORDER

1 Heard learned counsel for the parties.

2 The National Company Law Tribunal, Kolkata Bench, Kolkata by the impugned order dated July 24, 2019 dispose of the applications I. A No. 222 of 2017 filed by Yashdeep Trexim P. Ltd. (petitioner) the respondent herein and I. A No. 352 of 2017 filed by Mooldhan Advisory System P. Ltd. and others (the appellant in Company Appeal (AT) No. 266 of 2019).

3 Being aggrieved Mooldhan Advisory System P. Ltd. (hereinafter referred as appellant No. 1) filed Company Appeal (AT) No. 266 of 2019. Whereas the appellant-Juggilal Kamlapat Jute Mills Co. Ltd. (hereinafter referred as appellant No. 2) filed Company Appeal No. 294 of 2019.

4 Yashdeep Trexim P. Ltd. (hereinafter referred as respondent No. 1) filed company petition under sections 397 and 398 of the Companies Act 1956, being C. P. No. 942 of 2012 before the Company Law Board, subsequently, the petition was transferred to National Company Law Tribunal, Kolkata Bench. During the pendency of this petition, Yashdeep Trexim P. Ltd. (petitioner before National Company Law Tribunal,) filed an application I. A No. 222 of 2017 for various reliefs including for adding some parties on the ground that they are subsequent purchaser of the some of the properties of the company.

5 The appellant Mooldhan Advisory System P. Ltd., filed an application I. A No. 352 of 2017 for seeking relief that the Tribunal has passed the interim injunction order to maintain status quo about fixed assets and shareholding pattern of the company, due to this order the Mooldhan Advisory System P. Ltd., is unable to comply the order passed by the SEBI. Therefore, it was prayed that the interim injunction order be modified.

After hearing learned counsel for the parties. The National Company Law Tribunal has disposed of the both applications by the impugned order, relevant portion is as under : 6

> "I. A. No. 222 of 2017 is filed by the petitioner for adding some parties on the ground that they are subsequent to the purchase of some of the properties of the company. Pending this petition, it is made clear that broad principles of lis pendens do apply as appearing in section 55 or 52 of the Transfer of Property Act are applicable. However, this point is kept open. Hence, they need not be made a party in this proceeding at this stage. I. A. No. 222 of 2017 stands disposed of. In view of the above order, I. A. No. 352 of 2017 also stands disposed of. In view of this, other matter stands adjourned. Matter to appear for further consideration on September 26, 2019."

Being aggrieved with this order these appeals are filed. 7

Learned counsel for appellant No. 1 submits that in both applications the reliefs are altogether different however, the learned National Company Law Tribunal while disposing of I. A. No. 222 of 2017 without assigning any reason disposed of the appellant's application I. A. No. 352 of 2017. Therefore, it will be appropriate that the matter be remitted to the National Company Law Tribunal for deciding the application I. A No. 352 of 2017 afresh. 8

Learned counsel for the respondents agreed that in both applications the reliefs are quite different and in the impugned order the National Company Law Tribunal has not assigned any reason while disposing of I. A. No. 352 of 2017. 9

Learned counsel for appellant No. 2 submits that earlier I. A. No. 223 of 2017 was filed by the R-1 sought same relief which is seeking in I. A. No. 222 of 2017, the application I. A. No. 223 of 2017 has already been dismissed and the order between the parties become final. Therefore, the same relief cannot be agitated by way of I. A. No. 222 of 2017. Hence, the impugned order be set aside so far as the I. A. No. 222 of 2017 is concerned. 10

On the other hand, learned counsel for the respondent No. 1 submits that by the impugned order the National Company Law Tribunal has not granted any of the relief and dispose of the application with this direction that the principle of lis pendence do apply to subsequent purchaser. Thus, the appellant cannot come within the definition of aggrieved person. Hence, appeal is not maintainable. 11

Considered the submissions of the parties. 12

We have carefully examined the matter it is apparent that the relief in both applications are quite different. The relief seeking in application I. A. No. 352 of 2017 is not covered with the relief of I. A. No. 222 of 2017 and 13

no reason assigned while disposing of I. A. No. 352 of 2017. Hence, we set aside the impugned order to the extent of I. A No. 352 of 2017. The matter is remitted to the National Company Law Appellate Tribunal, Kolkata with request that after giving reasonable opportunity of hearing to the parties decide application I. A. No. 352 of 2017 afresh by passing reasoned order expeditiously.

14 We have gone through the order which is already reproduced above it is apparent that the National Company Law Tribunal has rejected the prayer of respondent No. 1 for impleading subsequent purchaser as party to the proceedings. However, directed that the subsequent purchaser's right will be governed by principle of lis pendence and the issue is kept open. It means such order is not final.

15 We found no ground to interfere in the impugned order so far as the application I. A. No. 222 of 2017 is concerned. Thus, the impugned order is maintained so far as I. A. No. 222 of 2017 is concerned. However, in regard to I. A. No. 352 of 2017 is set aside.

16 Appeal No. 266 of 2019 is allowed. However, Appeal No. 294 of 2019 is dismissed. However no order as to costs.

[2020] 220 Comp Cas 4 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — JAIPUR BENCH]

UNIWORD TELECOM LTD.

v.

TAURUS EXPORTS P. LTD.

P. S. N. PRASAD *(Judicial Member)* and
RAGHU NAYYAR *(Technical Member)*

March 5, 2020.

HF ▶ Petitioner

INSOLVENCY RESOLUTION—PETITION BY OPERATIONAL CREDITOR—LIMITATION—ACKNOWLEDGMENT OF DEBT BY CREDITOR AFTER EXPIRY OF INITIAL LIMITATION PERIOD—SUBSEQUENTLY PARTIES ENTERING INTO MEMORANDUM OF UNDERSTANDING WHEREUNDER DEBTOR AGREEING TO MAKE PAYMENT WITHIN 6 MONTHS—PETITION FILED WITHIN LIMITATION FROM DATE OF MEMORANDUM OF UNDERSTANDING—ACKNOWLEDGMENT OF DEBT AND DEFAULT BY DEBTOR—PETITION TO ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 9—LIMITATION ACT, 1963, S. 18, ART. 137—INDIAN CONTRACT ACT, 1872, S. 25(3).

The operational creditor supplied goods to the corporate debtor. Since dues in respect of the supply remained unpaid, it filed a petition under section 9 of the Insolvency and Bankruptcy Code, 2016, as against the debtor after issuing a demand notice. The debtor filed a reply admitting the liability and stated that it was not in a position to clear the amount claimed by the creditor :

Held, *admitting the petition, (i) that the last invoice was issued on January 11, 2011. Thereafter, on July 20, 2015 and August 3, 2016 the corporate debtor had admitted the past dues, which were beyond the threshold of limitation. It was stated that the debtor was making every effort to effect payment of the relevant amount. Subsequently, the parties had executed a memorandum of understanding on August 16, 2018 whereby the debtor had agreed to make payment within six months, i. e., by February 15, 2019. Thus, in view of the section 25(3) of the Indian Contract Act, 1872 which overshadowed section 18 of the Limitation Act, 1963, the matter was within the purview of the limitation under article 137 of the 1963 Act.*

(ii) That it was evident from the ledger statement filed by the creditor, that the payment of the claim amount of Rs. 1,20,78,456.34 had been defaulted by the debtor and had been agreed as due and payable. The registered office of the corporate debtor was situated within the jurisdiction of the Tribunal. It was a fit case to initiate the corporate insolvency resolution process against the corporate debtor.

Company Petition No. (IB)-233/9/JPR/2019.

Saurabh Malpani, chartered accountant, for the applicant.

Prateek Kedawat for the respondent.

ORDER

The order of the Bench was delivered by

RAGHU NAYYAR ***(Technical Member)***.—This application has been filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Uniword Telecom Ltd., through its authorised signatory, Mr. Vijay Kumar Maurya ("applicant") claiming to be an operational creditor with a prayer for initiation of the corporate insolvency resolution process ("CIRP") against M/s. Taurus Exports Private Limited ("respondent"). 1

The applicant is a pubic limited company incorporated under the provisions of the Companies Act, 1956 on February 19, 1984 duly registered with the Registrar of Companies, Delhi, bearing CIN : 2

U51503DL1985PLC020193 and its office is located at A1/24, Azad Apartment, Aurobindo Marg, New Delhi-110 016.

3 The respondent is a private limited company incorporated under the provisions of the Companies Act, 1956 on September 6, 1991, duly registered with the Registrar of Companies, Jaipur, bearing CIN : U18101RJ1991PTC006177 and the Registered Office of the respondent company is at A-17, Krishna Nagar-1, Gandhi Nagar Mod, Jaipur, Rajasthan-302 015. The authorised share capital of the company is Rs. 35,00,000 (rupees thirty five lakhs only) and paid-up share capital is Rs. 34,81,100 (rupees thirty four lakhs eighty one thousand one hundred only), as per master data of the said company.

4 It is the case of the applicant that the applicant had sold connectors, feeder cables, surge arresters, etc., to the respondent and raised invoices worth Rs. 4,05,88,654 (rupees four crores five lakhs eighty eight thousand six hundred fifty four only), out of which there is a default of payment of Rs. 1,20,78,456.34 (one crore twenty lakhs seventy eight thousand four hundred fifty six only) against the invoices raised between August 19, 2010 to January 11, 2011.

5 The applicant had sent several reminder letters from July 6, 2015 to August 6, 2018 for payment of Rs. 1,20,78,456.34, which was duly confirmed by the respondent vide letters dated July 20, 2015 and August 3, 2016. Copy of all the letters and replies are annexed with the application.

6 According to the applicant, both the parties had signed a memorandum of understanding dated August 16, 2018, a copy whereof is annexed with the application as annexure N, wherein the respondent had agreed to pay the due amount of Rs. 1,20,78,456.34 within the time frame of 6 months from the date of the memorandum of understanding. However, no amount has been received by the applicant till now.

7 Thus, the applicant had issued a demand notice in Form No. 3 and Form No. 4 dated July 10, 2019 demanding payment of Rs. 1,20,78,456.34 to the respondent, which was duly received by the respondent through post on July 16, 2019. Copy of the tracking report as proof of service is also annexed with the application.

8 It is submitted that the respondent neither replied to the said notice nor made any payment after receiving the demand notice. The applicant therefore filed the present application under section 9 of the Insolvency and Bankruptcy Code, 2016. As claimed by the applicant, the respondent is liable to pay an amount of Rs. 1,20,78,456.34 as an outstanding amount, as mentioned in Part IV of Form 5 :

PART IV

Sl. No.	*Particulars of operational debt*	
1.	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due.	INR Rs. 1,20,78,456.34 (one crore twenty lakhs seventy eight thousand four hundred and fifty six only.
2.	Amount claimed to be in default and the date on which the default occurred.	Total amount of debt claimed to be in default is Rs. 1,20,78,456.34. Date of default : 11-1-2011

9 The respondent filed a reply on December 12, 2019 admitting the liability and stated that the company is not in a position to clear the amount claimed by the applicant.

10 On perusal of the records, it is noted that the last invoice was issued on January 11, 2011. Thereafter, on July 20, 2015 and August 3, 2016, the respondent had admitted the past dues, which were beyond the threshold of limitation. but stated that the respondent was making every effort to effect payment of the relevant amount. Subsequently, both parties had executed a memorandum of understanding on August 16, 2018, whereby the respondent had agreed to make payment within 6 months, i. e., by February 15, 2019. Thus, in view of the section 25(3) of the Indian Contract Act, 1872 which overshadowed section 18 of the Limitation Act, 1963, the matter is within the purview of the law of limitation under article 137 thereof.

11 Upon a detailed consideration of the application and documents filed, it is evident from the ledger statement filed by the applicant/operational creditor annexed with the application, that the payment of claim amount of Rs. 1,20,78,456.34 has been defaulted by the respondent/corporate debtor and has been agreed as due and payable. The registered office of the corporate debtor is situated in Jaipur and therefore, this Tribunal has jurisdiction to entertain and adjudicate this application. Hence, this Tribunal is of the view that it is a fit case to initiate the corporate insolvency resolution process (CIRP) against the respondent/corporate debtor as envisaged under the provisions of the Insolvency and Bankruptcy Code, 2016.

12 The applicant has named the interim resolution professional (IRP), and accordingly Mr. Anoop Bhatia, with the Registration No. IBBI/IPA-001/IP-P01142/2018-2019/11969 (e-mail : *ip.anoopbhatia@gmail.com*), is appointed as the interim resolution professional ("IRP") of the respondent/corporate debtor. The applicant has filed consent in form 2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules,

2016 stating therein that no disciplinary proceedings are pending against the named IRP, along with the certificate of registration of IRP.

13 The consequences of initiation of corporate insolvency resolution process shall be, inter alia, as follows :

(i) The resolution professional Mr. Anoop Bhatia, with the Registration No. IBBI/IPA-001/IP-P01142/2018-2019/11969 (e-mail : *ip.anoopbhatia@gmail.com*), is hereby appointed as the interim resolution professional (IRP) to take over the affairs of the respondent/corporate debtor and duties as required to be performed by him under the provisions of the Insolvency and Bankruptcy Code, 2016, including issue of publication in widely circulated newspapers as contemplated under the provisions of the Insolvency and Bankruptcy Code, 2016, and calling for the claims from the creditors of the corporate debtor and collating of the same shall be done.

(ii) Further, as a consequence of admission, moratorium as envisaged under section 14 of the Insolvency and Bankruptcy Code, 2016 is invoked in relation to the respondent/corporate debtor which will be in vogue during the CIRP of the respondent/corporate debtor. The IRP shall carry out the corporate insolvency resolution process strictly as per the timelines specified and as envisaged under the provisions of the Insolvency and Bankruptcy Code, 2016, in relation to the respondent/corporate debtor.

(iii) The said IRP shall act strictly in compliance with the provisions of the Insolvency and Bankruptcy Code, 2016. With a view to defray his expenses to be incurred and fees on account, the applicant/operational creditor is directed to deposit a sum of Rs. 2,00,000 (two lakhs only) to the account of IRP within 3 days from the date of this order. The IRP shall duly file the status report apprising this Tribunal about the progress of CIRP unfolding in relation to the respondent/corporate debtor. In terms of sections 17 and 19 of the IBC, 2016 all personnel of the respondent/corporate debtor including its promoters and board of directors, whose powers shall stand suspended, will extend all co-operation to the IRP during his tenure as such and the management of the affairs of the respondent/corporate debtor shall vest with the IRP.

(iv) In terms of section 9 of the Insolvency and Bankruptcy Code, 2016, a copy of this order shall be communicated to the applicant/operational creditor, respondent/corporate debtor as well as the interim resolution professional appointed by this Tribunal to carry out the CIRP at the earliest, not exceeding one week from today. A copy of this order shall also be communicated to IBBI for its records.

14 Accordingly, C. P. No. (IB)-233/9/JPR/2019 is admitted.

[2020] 220 Comp Cas 9 (NCLT)

[Before the National Company Law Tribunal — Kochi Bench]

P. M. ALICE AND OTHERS

v.

VYAPAR MANDIR PALARIVATTOM P. LTD. AND OTHERS

Ashok Kumar Borah ***(Judicial Member)*** and
Veera Brahma Rao Arekapudi ***(Technical Member)***

March 5, 2020.

HF ▶ Petitioner

Shares—Company's lien on shares—Articles of association—Articles excluding application of model article giving company lien on shares—Company has no right to exercise lien on shares for recovery of dues—No right to auction and allot shares to third parties ignoring right of fully paid-up shareholders—Companies Act, 2013, Sch. I, Table F, regln. 9—Companies Act, 1956, Sch. I, Table A, regln. 9.

Shareholders—Rights—No rental agreement between company and shareholder—Auction of shares by company for recovery of rental arrears—Mala fide and with ulterior motives—Companies Act, 2013, s. 59(1).

Register of members—Rectification of register—Transfer of shares—Sale of fully paid-up shares on failure to pay rental dues—Legal heirs of deceased shareholder legitimate equity shareholder—Transfer of shares without consent of shareholder, original share certificate and transfer—Direction to rectify register of members—Companies Act, 2013, s. 59(1).

The applicants, the wife, daughter and son, respectively, of the deceased shareholder holding 100 shares of Rs. 100 each, filed a petition under section 59(1) of the Companies Act, 2013, seeking rectification of the register of members of the respondent-company and filed an application therein for an interim order restraining the respondent-company from holding the annual general meeting or extraordinary general meeting. The applicants contended that the first applicant was entitled to be shareholder of the company by virtue of transmission of shares held by the deceased shareholder to the extent of 100 equity shares since the second applicant and third applicant had relinquished their rights over the shares held by their late father, that despite request by the first applicant and reminders to the company for transmission of shares in her

favour and submission of necessary documents no transmission had been effected by the company, and on the contrary the company had offered the share for sale in lieu of rental arrears and that the company had 32 shareholders out of which the names of 12 shareholders were illegally struck off the register of members and their shareholding from the share register :

Held, *allowing the application, that clause 6(1) of the model articles of association given in Table F in Schedule I to the 2013 Act clearly mentions that regulation 9 of Table A of Schedule I to the Companies Act, 1956 shall not apply, which means that clause 9 of Table F (dealing with exercise of lien by the company on shares) was not applicable to the company. In terms of clause 6(2)(b) of the articles of association the company could exercise lien for recovery of dues. The paramount lien was extendable to dividends payable by the company. The articles of association of the company did not prescribe the process to be followed for recovery of dues payable by the shareholders. The company fell under the category of "unpaid seller" in terms of section 46 of the Sale of Goods Act, 1930 and could exercise only the rights mentioned therein. In the absence of delineated process to exercise paramount lien, the company could exercise lien only to the extent of retention of goods, in this case shares. The company had no right to auction and allot the shares to third parties ignoring the rights of fully paid-up shareholders. The claim to rental dues by the company was not supported by rental or lease agreement which was agreed to by the shareholder. The company had auctioned the shares without the consent of the shareholders and without the original share certificate and transfer form in their possession. The entire act of the company to auction the shares appeared to be mala fide and with ulterior motives. The applicants were to be declared the legitimate equity shareholders. The register of members of the company was to rectified by re-entering the total number of 100 equity shares belonging to the deceased shareholder in the share register of the company and the total shareholding restored to as existing prior to February 8, 2019 forthwith. The company was restrained from conducting tender for sale of 100 shares, from allotting or effecting transfer of any shares belonging to the late shareholder without the express consent of the applicants as legal heirs to any members or non-members till rectification of the share register.*

TRIVENI SHANKAR SAXENA *v.* STATE OF UTTAR PRADESH [1992] AIR 1992 SC 496 (para 24) *and* JAGATJIT DISTILLING AND ALLIED INDUSTRIES LTD. *v.* BHARATH NIDHI LTD. [1978] ILR 1978 Delhi 526 (para 28) *referred to.*

C. A. No. 35/KOB/2019.

Philip Mathew for the petitioners.

P. P. Zibi Jose, Practising Company Secretary, for the respondents.

ORDER

This company application has been filed by (1) Mrs. Alice P. M. (hereinafter called "applicant No. 1"), (2) Neethu Joy (hereinafter called "applicant No. 2") (3) Nithin Joy (hereinafter called "applicant No. 3") under section 59(1) of the Companies Act, 2013 against M/s. Vyapar Mandir Palarivattom P. Ltd. (hereinafter called the "first respondent") (CIN : U70101KL1986PTC004619 Mr. Kaniyamparambil Madhavan Babu (hereinafter called the "second respondent") and the Registrar of Companies (hereinafter called the "third respondent"). 1

The first respondent-company was incorporated as a private limited company on December 4, 1986 under the provisions of the Companies Act, 1956 with an authorised share capital of Rs. 20,00,000 divided into 20,000 equity shares of Rs. 100 each. The paid-up capital of the company is Rs. 3,90,000 divided into 3900 equity shares of Rs. 100 each. The object of the company as per the memorandum of association is to carry on the business of acquiring land by purchase, lease or otherwise and constructing structures such as shopping complexes, hotel complexes or housing complexes and let out, lease or sell. The registered office of the respondent-company is situated at Palarivattom, Cochin, Ernakulam-682 025. 2

The applicants had filed the above said petition under section 59(1) of the Companies Act, 2013 for seeking an interim relief to restrain the respondent-company from holding the annual general meeting or extra-ordinary general meeting along with the main relief, i. e., rectification of the register of members of the respondent-company. 3

The averments made by the applicant's counsel are as follows :

Counsel for the applicants submitted that the applicants are the legal heirs, i. e., the wife, daughter and son, respectively, of the late Antony Joy, the original shareholder holding 100 shares of Rs. 100 each under Folio No. 50. The first applicant is entitled to be shareholder of the company by virtue of transmission of shares held by the late Antony Joy to the extent of 100 equity shares since the second applicant and third applicant have relinquished their rights over the shares that belonged to their late father. The first applicant had requested for transmission of shares in favour of her on April 27, 2018. On the company's requisition dated May 15, 2018, the first applicant had submitted necessary documents along with consent from the second applicant and third applicant for transmission of shares of the late Antony Joy vide letter dated June 26, 2018. But till today no transmission 4

has been effected by the first respondent-company despite a reminder dated November 12, 2018. On June 28, 2019, the first respondent-company issued letter to all shareholders through the second respondent stating that out of the total 3900 equity shares of Rs. 100 each, 1650 equity shares constituting 34.61 per cent. stands vested in the company on account of rental arrears and the same is offered for sale. The board of directors have fixed July 8, 2019, as the last date for receiving the tender at the registered office and the board will meet thereafter at the earliest to finalise the sale/transfer. The company has 32 shareholders out of which the names of 12 shareholders are illegally struck off from the register of members and their shareholdings thereby omitted by the company from its share register.

5 Counsel for the applicants further submitted that as per the articles of association, it is clear that the respondent-company still adopts Table A of the First Schedule to the Act and there is no amendment of its articles of association as per section 5(9) of the Act. According to regulation 29 of Table A and regulation 32(1) of the articles of association, it is clear that a fully paid-up share is not subject to any forfeiture. Counsel further stated that the first respondent-company, is governed by clause 6(2) and (3) of the articles of association where the lien can be exercised only on the dividends payable on the shares and cannot be extended or stretched beyond the scope of clause 6(2) and (3). Therefore, to direct the petitioner to surrender her shares as well as shop Nos. 13 and 44 for alleged arrears of rent by the petitioners through circumventing and by passing the specific law, namely, the Kerala Buildings (Lease and Rent Control) Act, 1965 wherein the legal remedies in the event of non-payment of rent by a tenant to the landlord specifically are provided to the exclusion of usually available other remedies. By issuing the aforesaid letter, dated February 8, 2019 the first respondent-company has taken law in its hands and the action which made the vesting of shares of the applicants in the respondent-company. The vesting of shares of the applicants in the respondent-company, by exercising lien on fully paid-up shares is clearly ultra vires the provisions of the Act since lien cannot be exercised on fully paid up shares. As per article 6(3), the company's lien shall extend to dividend only. No procedure has been mentioned in the articles for exercising lien and the first respondent-company through the second respondent issued illegal tender for sale notice of 1650 fully paid-up shares including the applicants' 100 shares.

6 Counsel for the applicants submitted that the first respondent-company have no power or legal right to issue new shares to third parties. The company has no right to issue new duplicate share certificate in the place of original share certificate held and kept by the applicants in their custody. If

the company ventures to issue duplicate share certificate while the original ones are in the custody of the applicants, it will also amount to an act of fraud committed on the applicants by the delinquent directors of the first respondent for which the applicants can take appropriate action against acts of fraud under section 447 of the Act, 2013. Counsel for the applicants stated that the applicants undertakes to take out advertisement of the hearing of the petition 14 days prior to the date of hearing as provided in and required by rule 35 read with rule 70 of the National Company Law Tribunal Rules, 2016.

The averments made by the respondent's counsel are as follows :

Counsel for the respondents submitted that as per section 59(1) if the **7** name of any person is, without sufficient cause, entered in the register of members of a company or after having been entered in the register, is without sufficient cause omitted therefrom or if a default is made or unnecessary delay takes places in entering in the register, the fact of any person having become or ceased to be a member, the person entitled to get relief under section 59(1) from this Bench. The applicants are in default of arrears of rent for shop Nos. 13 and 44 which are in her possession. The applicants were asked to pay arrears of rent by a letter dated January 23, 2019 and the company had warned that her shares will have first and paramount lien under clause 6(2) of the articles of association of the first respondent. This letter has been deliberately suppressed in the application.

The respondents issued another letter dated February 8, 2019 intimating **8** her that on account of non-payment of rent arrears, 100 shares held by the applicants were sold to recover the rental arrears through an open tender process and transferred the shares to another person who is not made a party in this petition. Counsel further submitted that the statutory auditors have been warning the first respondent about the Income-tax Act, 1961 violations and also the non-compliance with the Benami Property Transaction Act, 2016 which prohibits holding of immovable properties in the third party names. The benami holding of the shops actually occupied by the original 30 shareholders cannot be continued to be in the company as it is very clear that it is a benami holding. It is stated that the board has taken the legal advice and informed all stakeholders that they have to regularize their possession of shops by registration of sale deed or alternatively enter into a rental agreement with the company till such time they are ready for registration of sale deed.

Counsel for the respondents further submitted that the applicants were **9** misquotes the provisions of Table A relating to forfeiture of shares with the present subject matter of the application. The provisions of the Kerala

Buildings (Lease and Rent Building) Act, 1965 is not applicable as the applicants have not signed any rental agreement with the company. The company is empowered under article 6(2) of the articles of association to exercise paramount lien on the shares of the respondent-company. The power of lien on dues to the company by the shareholder as per article 6(2)(b) is the first step to recover the dues and it is only natural that the subject shares are vested for the purpose of recovery of dues which are within the powers of the board.

10 Counsel for the respondents stated that the petitioner is aware of the circumstances of the subject matter as the relevant issue of transfer of shops either through sale deed or through rental agreement was topics of discussion among the shareholders for the past 3 years on account of change in the circumstances on account of elapse of 33 years. Further due notices were sent to the applicants before the subject event matter was put into effect. There is no fraud in the procedure adopted by the company as alleged by the applicants as the sale was affected after due deliberations in a board meeting in the interest of the company.

11 Counsel for the respondents further submitted that the shares are already disposed of and transferred to another person on payment of the tender amount. The respondents have acted within the powers given by the articles of association read with the Companies Act and the vesting of shares and subsequent disposal of the subject shares was done in good faith for recovery of rent dues in the interest of the company. Therefore, it is submitted that the company application should be dismissed with exemplary cost to the respondents.

Rejoinder submitted by counsel for the applicants :

12 Counsel for the applicants submitted that the original share certificate is still with the applicants and the applicants have not executed any share transfer instrument for the purpose of transferring of shares to any third parties. The alleged share transfer of the shares belonging to the applicants was effected by the company in total violation of section 56(1). It is alleged that the respondent-company asked the applicants to pay arrears of rent for the period from April 1, 2018 to December 31, 2018 by a letter dated January 23, 2019. It is submitted that the applicants are in occupation of shop room No. 13 and 44 for last 22 years and no lease agreement exists between the applicants and the respondent-company in respect of these shop rooms and no quantum of monthly or yearly rent has ever been fixed between the parties by any contract. In the absence of a registered lease deed as contemplated under section 107 of the Transfer of Property Act, 1882, the question of any lessor-lessee relationship beyond the period of

one year is inadmissible in law. Even according to the respondent-company and the second respondent, the Kerala Buildings (Lease and Rent) Act, 1956 is not applicable in this instant application.

Counsel for the respondent further submitted that for effecting the **13** transfer of shares, the procedures contemplated under clause 7(1) to (j) including share valuation for the purpose of finding out the fair value shares has to be made. The valuation of shares, to find out the fair value, has to be found out by the auditor of the company and in case of any dispute, such dispute has to be settled by recourse to the Indian Arbitration Act, 1940. Further submitted that in the absence of the procedure contemplated under clause 7 of the articles of association and in violation of section 56 of the Act, no transfer of shares can be effected and if such transfer of shares is effected by the respondent-company, such transfer of shares is null and void.

Counsel for the applicants further submitted that the annual general **14** meeting for the year 2018-2019 will have to be conducted afresh in accordance with section 26 of the Companies Act, 2013. It is submitted that the first respondent and the second respondent admitted that service charge only collected from time to time and no rent was collected, therefore, the Kerala Building (Lease and Rent Control) Act, 1956 is not applicable in the present case. According to section 107 of the Transfer of Property Act, 1882 the lessor cannot make any claim for rental arrears in the absence of a registered instrument. The company does not have any document to show even trace of an agreement of lease, much less a registered lease deed.

Further counsel submitted that there is no violation of the provisions of **15** the Income-tax Act, 1961 as alleged by the respondent. The Benami Property Transactions Act, 2016 is not attracted in the present case as alleged by the first and second respondents. Hence, pleaded to grant the prayers as mentioned in the application.

Findings :

In order to arrive at a decision in the matter, we have framed the fol- **16** lowing issues :

(i) Whether the company by exercising paramount lien can sell off the shares of a shareholder for recovering the dues ?

(ii) Whether the action of the first respondent-company is backed up by any contractual agreement to recover the "rental dues" by auctioning the shares ?

(iii) Whether due process is followed by the company in auctioning and allotting the shares to a third party ?

17 As regards point No. (i) : To arrive at a definitive conclusion as regards issue (i) we have gone through the articles of association of the first respondent-company and the model articles of association given in Schedule I, Table F of the Companies Act, 2013. The respondent submitted that Table F is the replica of Table A in the earlier Companies Act, 1956.

As per clause 6(1) of the articles of association of the company which is as under :

"6. (1) Regulation 9 of Table A shall not apply."

18 The articles of association 6(1) clearly mention that regulation 9 of Table A of the 1956 Act shall not apply, which means clause 9 of Table F is not applicable to the first respondent-company. As per clause 6(2)(b) of the articles of association of the respondent-company paramount lien can be exercised by the respondent-company for recovery of dues. The paramount lien is extendable to dividends payable by the first respondent also.

19 However, the articles of association of the first respondent-company do not prescribe the process to be followed for recovery of such dues payable from the shareholders. The learned practising company secretary for the first respondent and second respondent averts that in the absence of a clearly laid down process clauses 10, 11, 12 of the model articles of association as prescribed under Table F is applicable. Therefore, the first respondent-company auctioned the shares of the petitioner to recover dues in exercise of the paramount lien.

20 The plain reading of clause 10 of the model articles of association in Table F shows that it flows from clause 9 as given in Table F. But the articles of association of the respondent-company tell us that clause 9 as mentioned in Table A of the earlier Act is not applicable. Therefore, clauses 10, 11, 12 which flow from clause 9 of the model articles of association also are not applicable to the first respondent-company. We therefore, are not willing to go with the argument submitted by the learned practising company secretary in this regard.

21 In the light of the above findings, the only option left to the respondent-company is to exercise lien which was detailed in the Sale of Goods Act, 1930 duly understanding the nature of instrument which was auctioned, i. e., shares in this case.

Section 2(7) of the Sale of Goods Act, 1930 defines "goods" which is as under :

"2(7). *Definitions.*—'Goods' means every kind of 'movable property' other than actionable claims and money ; and includes stock and shares, growing crops, grass, and things attached to or forming

part of the land which are agreed to be severed before sale or under the contract of sale."

To get further clarity on this issue, we have gone through section 44 of **22** the Companies Act, 2013 which reads as under :

"44. *Nature of shares or debentures*.—The shares or debentures or other interest of any member in a company shall be 'movable property' transferable in the manner provided by the articles of the company."

The above two definitions show that shares are "movable property" and covered under the definition of "goods" under the Sale of Goods Act, 1930.

This above finding leads us to another question, what are the rights of **23** the holder of the lien ? The Sale of Goods Act, 1930 defines "Unpaid seller's rights", which is akin to the issue in the present application.

"46. *Unpaid seller's rights*.—(1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a) a lien on the goods for the price while he is in possession of them ;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them ;

(c) a right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer."

In our view the respondent-company in the instant application will fall **24** under the category of "unpaid seller" who can exercise the above rights only. Nothing more. It is settled law as decided by the hon'ble Supreme Court of India in its judgment in *Triveni Shankar Saxena* v. *State of Uttar Pradesh*, AIR 1992 SC 496 (in paragraphs 17 to 22) that a lien is only a right to retain which is rightfully and continuously in possession belonging to another until the claims are satisfied. It can be acquired either by contract or by operation of law. It is the right of retention of goods.

In the light of the above discussion and in the absence of delineated **25** process to exercise paramount lien, the respondent-company can exercise lien to the extent of retention of goods ; in this case shares which can be extendable payable to the shareholder.

26 We therefore, are not agreeable with the submissions made by the respondent-company in this regard. We firmly believe that they have no right to unilaterally sell the shares which are in the possession of the shareholder, without the consent.

27 As regards point No. (ii) we have not come across any agreement showing that shops under occupation of the applicants are given on lease to them by the respondent-company. As averred by counsel for the respondent-company, the company was collecting service charges from the shops as no agreement was in place. In the absence of a written agreement a documentary evidence to support their action, the very action of the respondent-company was without any basis. Any unilateral action by one party, will not bind the others and will be set aside. Further the contention that the shops are under benami holding and not conforming to the Income-tax Act is not supported by any valid notice from the income-tax authorities or any credible report to support this argument. Even if we go by the submissions of the learned practising company secretary for the respondents, we have not come across any steps taken by the respondent-company to regularise the position in respect of the shops which are the property of the respondent-company. During the arguments the Bench asked the practising company secretary representing the company whether the company has taken any steps to get the shop vacated by the occupants for their rental arrears. The respondents submitted that they have not taken any action in this regard.

28 As regards point No. (iii) the articles of association of the company are silent about the process to be followed to ensure paramount lien. However, in the respondent-company, the lien was exercised for recovery of rental dues by auction the shares. Here the respondents exercised the right to lien to recover the arrears of rent from the shareholder who has not agreed to execute a rental/lease agreement. In this context we examined another judgment of the hon'ble High Court of Delhi in *Jagatjit Distilling and Allied Industries Ltd* v. *Bharath Nidhi Ltd.,* ILR 1978 Delhi 526 :

> "Emphasised the difference between a lien and a pledge--in the former, there is no power of sale or disposition of the goods, whereas in the latter case there is power to sell on default. A lien is merely a personal right of retention. One who has a lien has only a right of detaining the res until the money owning is paid : a lien disappears if possession is lost, and there is no right of sale. Sale on default is an incident of pledge. A pledge is assignable. A lien cannot be taken in execution, as the lien is merely a personal right."

In the instant application, the respondent auctioned the shares without **29**
the consent of shareholders and without the original share certificate and transfer form in their possession. The earlier action appears to be illegal and not as per the Companies Act, 2013. As such the answer to the third point is also negative.

Accordingly, the company has no right to auction and allot the shares to **30**
third parties ignoring the right of fully paid-up shareholders. The rental dues claimed by the respondent-company are not supported by a rental/ lease agreement which is agreed by the shareholder. We therefore go with the averments made by the applicants that the entire acts of the company to auction the shares appear to be mala fide and with ulterior motives.

Order

In the light of our above findings, we came to the conclusion that the applicant has a strong case and accordingly pass the following order :

I. The applicants are declared as the legitimate equity shareholders under Folio No. 50.

II. We hereby direct the rectification of the register of members of the respondent-company by re-entering the total number of 100 equity shares belonging to the late husband of the first applicant and late father of the second applicant and third applicant in the share register of the company and further ordering to restore the total shareholding of the applicants as it existed prior to February 8, 2019 forthwith.

III. The respondent-company is restrained from conducting tender for sale of 100 shares from allotting or effecting transfer of any shares belonging to the late husband of the first applicant and late father of the second applicant and third applicant without the express consent of the applicants herein as legal heirs to any members or non-members till rectification of the share register.

IV. The respondent-company is directed to file the register of members after carrying out the rectifications as per this order, with the Registrar of Companies within a period of one month.

V. The respondent-company is directed to pay Rs. 25,000 to the petitioner towards the costs and damages sustained by the petitioners in this regard.

[2020] 220 Comp Cas 20 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — NEW DELHI BENCH—IV]

DAKSHNESHWAR INFRASTRUCTURE P. LTD. AND OTHERS, *In re*

MS. INA MALHOTRA *(Judicial Member)* and
HEMANT KUMAR SARANGI *(Technical Member)*

February 3, 2020.

HF ▸ Applicant

SCHEME OF AMALGAMATION—MEETINGS OF SHAREHOLDERS AND UNSECURED CREDITORS—BOARDS OF DIRECTORS OF TRANSFEROR AND TRANSFEREE COMPANIES APPROVING SCHEME—CONSENT AFFIDAVITS OF SHAREHOLDERS AND UNSECURED CREDITORS FILED—MEETINGS OF SHAREHOLDERS AND UNSECURED CREDITORS TO BE DISPENSED WITH—DIRECTIONS GIVEN TO COMPLY WITH STATUTORY PROCEDURES—COMPANIES ACT, 2013, ss. 230, 231, 232.

On a joint petition filed under sections 230 to 232 of the Companies Act, 2013, by transferor-companies Nos. 1-9 in connection with the scheme of amalgamation for merging with the transferee-company :

Held, *that the boards of directors of transferor companies Nos. 1 to 9 and the transferee company by their respective meetings held on May 4, 2019 had unanimously approved the proposed scheme of amalgamation. In view of the consent affidavits of shareholders and unsecured creditors, the requirement of convening the meeting of the shareholders and unsecured creditors was to be dispensed with. As there was no secured creditor, the question of convening their meeting did not arise. Notices were to be sent to the Central Government through the office of the Regional Director (Northern Region), the income-tax authorities, Registrar of Companies, official liquidator and other sectoral regulators or authorities as required under sub-section (5) of section 230 of the Companies Act, 2013, who had significant bearing on the operation of the applicant-companies with copy of required documents and disclosures required under the provisions of the Act read with the Companies (Compromises, Arrangement, and Amalgamation) Rules, 2016.*

Company Application (CAA) No. 127/ND/2019.

Ravi Sharma, Advocate.

ORDER

The order of the Bench was delivered by

SMT. INA MALHOTRA ***(Judicial Member)***.—This is a joint petition filed by way of a first motion under sections 230-232 of the Companies Act, 2013 (hereinafter referred to as "the Act") by applicant-companies Nos. 1-9 (transferor companies Nos. 1-9) in connection with the scheme of amalgamation (hereinafter referred to as "the scheme") for merging its business with M/s. Strawberry Fields Televentures P. Ltd. (applicant-company No. 10/transferee company). 1

As per averments, the registered offices of transferor companies Nos. 1 to 9 as well as that of transferee company No. 10 are situated in the National Capital Territory of Delhi, falling within the territorial jurisdiction of this court. 2

Applicant No. 1/transferor No. 1-company was incorporated under the Act on January 30, 2008 under the name and style of "Dakshneshwar Infrastructure P. Ltd." having CIN U45400 DL2008 PTC173366. Its authorized share capital and issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each. 3

The main object of applicant-company No. 1 is in the field of real estate for developing residential, commercial and industrial buildings.

Applicant No. 2/transferor No. 2-company was incorporated on July 23, 2008 under the Act under the name and style of "Good Luck Infraprojects P. Ltd." having CIN U45400 DL2008 PTC181235. Its authorized share capital and issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each. 4

Applicant-company No. 2 is also in the business of real estate of residential, commercial and industrial buildings.

Applicant No. 3/transferor No. 3-company was incorporated on March 20, 2008 under the Act under the name and style of "Bride and Style Magazines P. Ltd." having CIN U22211 DL2008 PTC175683. Its authorized share capital and issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each. 5

It is engaged in the business of printing, publishing and sale of newspapers and other periodicals including book, magazines, etc.

Applicant No. 4/transferor No. 4-company was incorporated on February 27, 2008 under the Act under the name and style of "Run Properties P. Ltd." having CIN U45400 DL2008 PTC174652. Its authorized share capital and issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each. 6

The main object of applicant-company No. 4 is in the field of real estate for developing residential, commercial and industrial buildings.

7 Applicant No. 5/transferor No. 5-company was incorporated on August 20, 2008 under the Act under the name and style of "VNL Teleservices P. Ltd." having CIN U64201 DL2008 PTC182242. Its authorized share capital and issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each.

Applicant-company No. 5 is engaged in the business of software and hardware development.

8 Applicant No. 6/transferor No. 6-company was incorporated on October 16, 2008 under the Act under the name and style of "India Mobility Research P. Ltd." having CIN U64201 DL2008 PTC184310. Its authorized share capital is Rs. 5,00,000 while its issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each.

The main objects of applicant-company No. 6 is engaged in the business of development and import/export of Intellectual Property in the field of mobile technology.

9 Applicant No. 7/transferor No. 7-company was incorporated on March 5, 2008 under the Act under the name and style of "NMG Projects P. Ltd." having CIN U45200 DL2008 PTC174920. Its authorized share capital and issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each.

Applicant-company No. 7 is engaged in the business of real estate of residential, commercial and industrial buildings.

10 Applicant No. 8/transferor No. 8-company was incorporated on February 11, 2009 under the Act under the name and style of "Skylight Estates P. Ltd." having CIN U70101 DL2009 PTC187502. Its authorized share capital is Rs. 5,00,000 while its issued, subscribed and paid-up capital is Rs. 2,32,000 divided into 23,200 equity shares of Rs. 10 each.

The main object of applicant-company No. 1 is in the field of real estate for developing residential, commercial and industrial buildings.

11 Applicant No. 9/transferor No. 9-company was incorporated on December 4, 2007 under the Act under the name and style of "Cellpassion Networks P. Ltd." having CIN U64200 DL2007 PTC171061. Its authorized share capital and issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each.

Applicant-company No. 9 is engaged in the business of rendering, maintaining, hiring, etc., any kind of communication services.

Applicant No. 10/transferee No. 10-company was incorporated under the Act on April 19, 2007 under the name and style of "Strawberry Fields Televentures P. Ltd." having CIN U74999 DL2007 PTC162323. Its authorized share capital and issued, subscribed and paid-up capital is Rs. 1,00,000 divided into 10,000 equity shares of Rs. 10 each. 12

The main object of transferee company No. 10 is in the field of manufacturing, processing, designing, import/export of all types of telecom equipments.

As per averments, the transferor companies are desirous of amalgamating with the transferee company and have formulated a scheme of amalgamation. 13

Copies of the memoranda of association and articles of association along with their latest audited balance-sheets, as on March 31, 2019 and reports of the statutory auditors of all applicant-companies Nos. 1 to 10 have been filed. 14

It has also been certified by the statutory auditors of each of the applicant-companies that the accounting treatment as adhered in the scheme is in compliance with the Accounting Standards prescribed under section 133 of the Companies Act, 2013.

It has been stated on behalf of the applicant-companies that the scheme of amalgamation is necessitated and justified on grounds that : 15

(a) The applicant-companies are group companies under the same management and amalgamation would result in reduction of the companies within the group, engaged in similar activities which will result into reduction in administrative, managerial and other overheads expenses resulting in optimal utilization of various resources due to consolidation of activities.

(b) The amalgamation would result in the creation of a company with much larger asset based and a net worth with strong financials enabling further growth and the development of the said transferee company.

(c) The scheme shall be beneficial and in the interest of all stakeholders of the transferor and the transferee companies including their shareholders, creditors and employees.

(d) Would result in cancellation of inter company transactions giving rise to greater efficiency in operations and management of the businesses and shall improve internal controls and compliances of the company.

The appointed date of the scheme is April 1, 2019.

So far as the share exchange ratio is concerned, in terms of the scheme, it has been determined in accordance with the report on valuation of 16

shares and share exchange ratio dated April 22, 2019 issued by M/s. R. N. Marwah and Co., LLP, Chartered Accountants, New Delhi, as per the settled principles of valuation. The share exchange ratio is based on net asset value.

The board of directors of transferor companies Nos. 1 to 9 and transferee company/applicant No. 10 vide their respective meetings held on May 4, 2019 have unanimously approved the proposed scheme of amalgamation. Copy of the board resolutions passed have been filed.

17 Vide the present application, a prayer is made for dispensation of convening meetings in view of the following facts :

(A) *In respect of transferor company No. 1/applicant-company No. 1 :*

• It has three shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has two unsecured creditors who have accorded their consent vide affidavits placed on record.

In view of the consent affidavits of its three shareholders and two unsecured creditors being on record, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

(B) *In respect of transferor company No. 2/applicant-company No. 2 :*

• It has three equity shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has fourteen unsecured creditors who have accorded their consent vide affidavits placed on record.

In view of the consent accorded by its three shareholders and fourteen unsecured creditors, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

(C) *In respect of transferor company No. 3/applicant-company No. 3 :*

• It has two shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has one unsecured creditor who have accorded its consent vide affidavits placed on record.

In view of the consent affidavits of its two shareholders and one unsecured creditor being on record, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

(D) *In respect of transferor company No. 4/applicant-company No. 4 :*

• It has two shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has two unsecured creditors who have accorded their consent vide affidavits placed on record.

In view of the consent affidavits of its two shareholders and two unsecured creditors being on record, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

(E) *In respect of transferor company No. 5/applicant-company No. 5 :*

• It has two shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has two unsecured creditors who have accorded their consent vide affidavits placed on record.

In view of the consent affidavits of its two shareholders and two unsecured creditors being on record, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

(F) *In respect of transferor company No. 6/applicant-company No. 6 :*

• It has two shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has one unsecured creditor who have accorded its consent vide affidavits placed on record.

In view of the consent affidavits of its two shareholders and one unsecured creditor being on record, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

(G) *In respect of transferor company No. 7/applicant-company No. 7 :*

• It has three shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has one unsecured creditor who have accorded its consent vide affidavits placed on record.

In view of the consent affidavits of its three shareholders and one unsecured creditor being on record, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

(H) *In respect of transferor-company No. 8/applicant-company No. 8 :*

• It has three shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured or unsecured creditor as certified by the chartered accountant.

In view of the consent affidavits of its three shareholders being on record, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured or unsecured creditor, the question of convening their meeting does not arise.

(I) *In respect of transferor-company No. 9/applicant-company No. 9 :*

• It has two shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has one unsecured creditor who have accorded its consent vide affidavits placed on record.

In view of the consent affidavits of its two shareholders and one unsecured creditor being on record, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

(J) *In respect of transferee company No. 10*

• It has two equity shareholders who have accorded their consent vide affidavits placed on record.

• It has no secured creditors as certified by the chartered accountant.

• It has five unsecured creditors who have accorded their consent vide affidavits placed on record.

In view of the consent accorded by its two shareholders and five unsecured creditors, the requirement of convening the meeting of the shareholders and unsecured creditors is dispensed with. Further, as there is no secured creditor, the question of convening their meeting does not arise.

The proposed scheme of amalgamation is annexed along with the present application. **18**

It is submitted that the proposed arrangement is sought to be made under the provisions of sections 230 to 232 of the Companies Act, 2013 and the scheme if sanctioned by this Tribunal, will take effect from the date of on which certified copy of the order of sanctioning of proposed scheme, passed by this Tribunal is filed with the Registrar of Companies. **19**

It has also been submitted that there are no proceedings pending inquiry or investigation in respect of the applicant-company. **20**

While dispensing with the meetings, this Bench also directs that notices be sent to the Central Government through the office of the Regional Director (Northern Region), the Income-tax Authorities, Registrar of Companies, NCT of Delhi and Haryana, official liquidator and other sectoral regulators or authorities as required under sub-section (5) of section 230 of the Companies Act, 2013 who may have significant bearing on the operation of the applicant-companies along with copy of required documents and disclosures required under the provisions of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. Copies of the notices along with the proof of dispatch be filed before this Bench along with the affidavit of compliance. **21**

All the aforesaid directions are to be complied with strictly in accordance with the applicable law including forms and formats contained in the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 as well as the provisions of the Companies Act, 2013 by the applicant. **22**

As sequel to the above, the present application stands allowed by dispensing with the meetings of shareholders and unsecured creditors of the applicant-companies.

[2020] 220 Comp Cas 28 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

KAYNET FINANCE LTD. AND ANOTHER

v.

VERONA CAPITAL LTD. AND ANOTHER

BANSI LAL BHAT J. ***(Judicial Member)*** and
BALVINDER SINGH ***(Technical Member)***

December 13, 2019.

HF ▶ Respondent

COMPANY—RESTORATION OF NAME OF COMPANY—APPLICATION FOR RESTORATION OF NAME ALLOWED—INTERVENTION APPLICATION—CAN BE FILED ONLY BY AGGRIEVED PERSON WHOSE LEGAL RIGHTS INFRINGED—COMPANIES ACT, 2013, S. 252.

UBI JUS IBI REMEDIUM—INTERPRETATION.

The maxim "ubi jus ibi remedium" means that unless there is infringement of a legal right warranting a legal action, there is no remedy available in law. This rests on the edifice that whenever the law gives a right or prevents an injury, the affected person whose right has been infringed will have a remedy by way of legal action before a competent court of law. Based on this principle of jurisprudence, the courts insist that the person seeking a legal remedy should be one whose legal rights have been jeopardized or are in jeopardy. Only such person whose legal rights have been infringed can be permitted to seek legal remedy. It is only invasion of legal rights that warrants grant of a legal remedy. Where a person has no legal interest, he cannot seek judicial intervention as he has no grievance in the eye of law.

CHIRANJIT LAL CHOWDHURI *v.* UNION OF INDIA [1950] SCR 869 *relied on.*

The legal right sought to be enforced must ordinarily be the right of the petitioner himself who complains of infraction of such right and seeks legal remedy before a court of law. Merely because a company happens to be a public company, it is not open to any member of the public to move the court seeking directions to interfere in the management and affairs of the company.

The petition filed by respondent No. 1 under section 252 of the Companies Act, 2013, was allowed and the appellants' intervention application filed in the petition on the ground that they had filed a civil suit against the company was rejected. On appeal on the ground that the petition was not maintainable,

and that the appellants being "persons concerned" under section 252 of the Act had locus to seek intervention :

Held, *that the appellants having failed to pay the amounts admissible under the NSE award and BSE award to respondent No. 1 fell in the category of "debtors" of respondent No. 1 and to escape their current liability of Rs. 35 crores including interest to respondent No. 1 had resorted to the unfair tactic of filing a frivolous application seeking intervention in the petition only to frustrate the process of law. The appellants could not be heard to say that M, admittedly a shareholder of respondent No. 1 having stakes in the company, was not entitled to seek restoration of the name of the company in the Register of Companies. The appellants had failed to prove their locus and their mala fide intention to thwart the course of law was writ large on the face of their attempted intervention. The appellants could not claim to be "aggrieved persons" and had no locus to seek intervention in the petition. Their legal rights were neither jeopardized nor infringed. The intervention application dismissal whereof gave rise to the instant appeal was filed with a mala fide intention to stall the process of law and evade the liability judicially determined. The appellants were imposed with costs quantified at Rs. 2 lakhs.*

Order of the National Company Law Tribunal affirmed.

CHIRANJIT LAL CHOWDHURI *v.* UNION OF INDIA [1950] SCR 869 (para 7) *referred to.*

Company Appeal (AT) Nos. 417 and 418 of 2018.

Kunal Kataria, *Mahesh Agarwala*, *Rajeev Kumar* and *Arnav Behari*, for the appellants.

Ms. Mansi Vora and *Ms. Priti Vora*, shareholders of respondent No. 1. *Krinshnendu Dutta*, Senior Advocate (addressed arguments in part) with *Ashim Sood*, *Ms. Roopali Singh*, *Ms. Sayobanki Basu* and *Ms. Senu Nizar*, Advocates for the respondents.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

BANSI LAL BHAT J. ***(Judicial Member)***.—The appellants, "Kaynet Finance Ltd." and "Kaynet Capital Ltd.", have preferred the instant appeal arising out of two impugned orders both dated November 30, 2018 passed by the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as the "Tribunal") by virtue whereof Company Petition No. 3713 of 2018 filed by respondent No. 1-"Verona Capital Ltd.", under section 252 of the Companies Act, 2013 (hereinafter referred to as the "Act") was allowed and the appellants' intervention application being I. A. 1

No. 1250 of 2018 was rejected. The impugned orders have been assailed on the ground that the company petition was not maintainable, the appellants being "persons concerned" under section 252 of the Act had locus to seek intervention and the impugned orders suffered from serious legal infirmity and were passed without jurisdiction.

2 The necessary facts bearing upon the litigation culminating in filing of this appeal are required to be briefly noticed. Respondent No. 1-"Verona Capital Ltd." was struck off from the Register of Companies on the ground that the company was not carrying on any business and there were no business operations for the past two financial years and that the company had not applied for obtaining the status of a "dormant company". The Registrar of Companies, Mumbai (second respondent) published public notice STK-7 for striking off the company on August 18, 2017. Respondent No. 1 through its director filed Company Petition No. 3713 of 2018 under section 252 of the Act before the Tribunal praying for restoration of its name in the Register of Companies maintained by the Registrar of Companies, Mumbai that the company was prepared to file the annual returns and financial statements for the period spanning financial years 2008-09 to 2016-17 besides any other documents as may be required by the Registrar of Companies, Mumbai. The company petition was resisted by the respondent-Registrar of Companies, Mumbai on the ground that the company had failed to file statutory returns for a continuous period of two years, which led Registrar of Companies to believe that the company had ceased to do its business warranting the name of company being struck off from the register of Registrar of Companies. It appears that respondent No. 1 herein produced audited report and financial statements for the years 2008-09 to 2016-17 and income-tax returns for assessment years 2009-10 and 2010-11 before the Tribunal to demonstrate that the company was in operation. Further proof was laid to establish that the company had earned profits and conducted business from the financial years 2009-10 till 2014-15. Restoration of company was also sought on the ground that certain claims of the company against some corporate bodies were pending litigation, benefit whereof would accrue to the company only in the event of its revival besides benefitting the exchequer by way of taxes. Thus, revival of the company was also projected as involving public interest. The Tribunal, upon according consideration to the issues raised allowed the restoration of the company's name on the register of Registrar of Companies as it was of the view that ordering restoration of name of the company would be "just" and "proper". I. A. No. 1250 of 2018 preferred by the appellants seeking intervention in the proceedings under section 252 of the

Act was dismissed by the Tribunal holding that the appellants failed to establish their locus standi besides demonstrating that any harm would be caused to them in the event of company's name being restored in the register of companies.

3 It is contended on behalf of the appellants that respondent No. 1 had Zero revenue from operations and did not carry on any business as is reflected in the balance-sheets and profit and loss accounts filed by respondent No. 1 for financial years ending March 31, 2016 and March 31, 2017. It is therefore contended that the Tribunal has passed the order without appreciating the factual position. It is submitted that respondent No. 1 had obtained loans to the tune of Rs. 140 crores from various entities including the family trust under the control of one Nikhil Gandhi, Chairman of SKIL group of companies, which are currently being investigated by ED, SFIO and other investigating agencies for their involvement in IL & FS loan scandal. It is submitted that respondent No. 1 is in fact put up by Nikhil Gandhi to trade in the Indian Securities Market. It is further submitted that the appellants wanted to bring on record some material facts in public interest to show that a Shell Company was being sought to be restored. Referring to the intervention application, it is submitted that the appellants have filed a civil suit before City Civil and Sessions Court Mumbai against respondent No. 1 and its three erstwhile directors for recovery of moneys, thus they are "persons concerned" under section 252 of the Act. It is further submitted that any adverse decision in the proceedings was bound to affect the appellants, thus they were party aggrieved having locus to maintain the appeal. It is further submitted that various litigations between appellants and respondent No. 1 commenced only after the company was struck off by Registrar of Companies and there was no active litigation pending between the appellants and respondent No. 1 at the time of striking off the company. Thus, the impugned orders were legally untenable.

4 Per contra, it is submitted by and on behalf of respondent No. 1 that since the appellants' prayer for intervention in the company petition stands rejected in terms of one impugned order, though passed on the same date when the impugned order allowing the company petition was passed, the appellants are precluded from maintaining appeal against second impugned order whereunder the company petition for restoration of the company on the register of Registrar of Companies was allowed. It is further submitted that the appellants are the debtors and not members, shareholders, directors or even creditors of the company, thus, have no locus standi to seek intervention. Besides they cannot be termed as persons

aggrieved under section 252(1) of the Act. It is further submitted that the filing of civil suit by the appellants against respondent No. l would in fact justify restoration of the name of the company but for seeking intervention appellants can neither be termed as "persons concerned" nor "aggrieved persons". It is submitted that the appellants have fraudulently siphoned off amount to the tune of Rs. 112 crores and respondent No. 1 is involved in active litigation for its recovery. The amounts were fraudulently siphoned off by the appellants as respondent No. 1 had appointed the appellants as its stock brokers to effect transactions on NSE and BSE. It is further submitted that after lodging of FIR against the appellants they have fabricated the record and filed frivolous suit against respondent No. 1 which is presently pending trial before the Mumbai City Civil Court. It is further submitted that respondent No. 1 has been successful in its proceedings against the appellants, who have been directed by various Fora to pay a total amount of Rs. 35 crores with interest to respondent No. 1. It is submitted that the petition filed by appellant No. 1 under section 34 of the Arbitration and Conciliation Act, 1996 to set aside the NSE award stands dismissed by the hon'ble Bombay High Court on June 24, 2019. No interim relief has been granted in appeal under section 37. SLP filed by appellant No. 1 has been dismissed by the hon'ble apex court. The appeal under section 37 too has been dismissed by the hon'ble Bombay High Court. However, it is submitted, the appellants have failed to pay amounts under the awards to respondent No. 1. It is submitted that both NSE and BSE have since withdrawn trading facilities from the appellants, appropriated the security deposit of appellants and released the security deposit amount in favour of respondent No. 1. It is therefore submitted that the appellants are debtors of respondent No. 1 owing moneys to it and as of now the appellants have to pay Rs. 35 crores including interest to respondent No. 1. Both NSE and BSE have initiated proceedings against the appellants. It is further submitted that respondent No. 1 had registered a complaint against the appellants and its directors with the Economic Offences Wing (EOW) on March 12, 2018 which has led to registration of an FIR and during investigation appellants bank accounts have been frozen. Another complaint for fabrication of respondent's ledger statements and balance-sheet of the appellants had been lodged with EOW. As regards competence of Ms. Mansi Vora, it is submitted that she is a shareholder of respondent No. 1 entitled to file application for restoration of the company.

5 Heard learned counsel for the parties and perused the record. There can be no dispute with the proposition that once the appellants' prayer for seeking intervention in company petition has been rejected by the Tribunal

in terms of the first impugned order whereby I. A. No. 1250 of 2018 was rejected, their appeal qua the second impugned order passed in C. P. No. 1373 of 2018 allowing restoration of the name of the company under section 252 of the Act is not maintainable. Admittedly, the appellants were not the members, shareholders, directors, creditors or workmen of the company falling within the ambit of section 252(3) of the Act and the documentary evidence staring in their face in the form of awards and other relevant material portrays their capacity as "debtors". It is indisputable that in their capacity as "debtors" they could not claim to be the "aggrieved persons" qua the order of restoration of name of company and the appeal preferred against striking off of the name of the company from the register of companies at their instance would not lie. The appeal to the extent of such impugned order stands dismissed. Having regard to this position, the sole question for consideration in this appeal is whether the appellants did have locus to seek intervention in the company petition preferred under section 252 of the Act.

Section 252(1) provides that an order of the Registrar notifying a company as dissolved under section 248 may be assailed in an appeal before the Tribunal within three years from the date of order of the Registrar. Such appeal can be preferred by any "aggrieved person". If such "aggrieved person" is able to satisfy the Tribunal that the name of the company has been unjustifiably removed from the register of companies, the Tribunal may order restoration of the name of the company in the register of companies. The first proviso to sub-section (1) of section 252 provides that before passing any order in appeal the Tribunal shall provide reasonable opportunity of making representations and of being heard to the Registrar, the company and all the "persons concerned". In the instant case, admittedly, the order of removal of name of company from the register of companies has been passed by the Registrar in exercise of the powers vested in him under section 248 of the Act on being satisfied that the company was not carrying on any business or operation for the two immediately preceding financial years. The appellant has not questioned vesting of such powers in the Registrar and its exercise conforming to the procedure laid down in section 248 of the Act and in view of the same it cannot be said that there is a material irregularity in removing the name of the company. As regards the appellant being aggrieved of restoration of the name of the company and the merits of the case not justifying such restoration in the register of companies, be it seen that the appellant can be heard as regards merits only if he is the "person aggrieved". The expression "person concerned" in first proviso to sub-section (1) of section 252 has

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reference to only such person, i. e., the "person aggrieved" and none else. No other interpretation is possible on the plain language and purposive interpretation of the provision engrafted in section 252(1) of the Act. The "person aggrieved", in the context of removal of name of a company from the register of companies can be no person other than the company, any member or creditor or workmen, who are the necessary stakeholders, their fortunes being linked with the fate of the company. If the company sinks or ceases to exist, their interests are bound to suffer. However, same does not hold good as regards a "debtor", who would benefit rather than being harmed by striking off of the company from the register of companies. It is in this context that the issue of locus of the appellant in seeking intervention in company petition preferred against order passed by the Registrar of Companies under section 248 of the Act has to be appreciated.

7 The maxim "ubi jus ibi remedium" means that unless there is infringement of a legal right warranting a legal action, there is no remedy available in law. This rests on the edifice that whenever law gives a right or prevents an injury, the affected person whose right has been infringed will have a remedy by way of legal action before a competent court of law. Based on this principle of jurisprudence, the courts insist that the person seeking a legal remedy should be one whose legal rights have been jeopardized or are in jeopardy. This, put in simple terms, means that only such person can be permitted to seek legal remedy whose legal rights have been infringed. It is only invasion of legal rights that warrants grant of a legal remedy. Where a person has no legal interest, he cannot seek judicial intervention as he has no grievance in the eye of law. This principle of law has been judicially recognized and further reiterated by the hon'ble apex court in *Chiranjit Lal Chowdhuri* v. *Union of India* reported in [1950] SCR 869.

8 It is well-settled that the legal right sought to be enforced must ordinarily be the right of the petitioner himself who complains of infraction of such right and seeks legal remedy before a court of law. The principle of locus standi may have been diluted to some extent by allowing public interest litigation in regard to enforcement of certain rights concerning the public at large, however, it does not detract from the broader principle that in case of any statutory violation, a right to seek remedy is conferred upon the statutory authorities like the Registrar of Companies entrusted with matters governing the companies or on members, creditors and other persons interested in the company. Even in case of a class action, a minimum threshold is prescribed. Merely because a company happens to be a public company, it is not open to any member of the public to move the court seeking directions to interfere in the management and affairs of the company.

Adverting to the facts of the instant case be it seen that the appellants **9**
sought intervention in company petition on the ground that they had filed a civil suit against the company. This ground, though does not justify intervention in company petition as "person aggrieved", in fact warrants the company's name being restored in the register of companies, more so, as the company is said to be even now involved in active litigation for recovery of moneys allegedly siphoned off by the appellants fraudulently which according to respondent is a staggering amount of Rs. 112 crores. Allegedly, appellants generated false debits and issued fabricated contract notes to respondent No. 1 thereby fraudulently siphoning off the amount of Rs. 112 crores while engaged as stock brokers by respondent No. 1 to effect transactions at the stock exchanges. According to respondent, the appellants fabricated ledger document to siphon off the amounts and filed a frivolous suit against the company after case was registered against them before EOW. The suit is stated to be pending trial before the Mumbai City Civil Court. It appears from record that the appellants are debtors to respondent No. 1 in whose favour NSE arbitral award dated April 18, 2018 for an amount of Rs. 17,52,47,517.10 with interest stands passed and appeal preferred against the same under section 37 of the Arbitration and Conciliation Act, 1996 stands dismissed. BSE arbitral award also appears to have granted claims in favour of respondent No. 1. It is evident that the appellants having failed to pay the amounts admissible under the NSE Award and BSE Award to respondent No.1 fall in the category of "debtors" of respondent No. 1 and to wriggle out of their current liability of Rs. 35 crores including interest to respondent No. 1 have resorted to the unfair tactics of filing a frivolous application for seeking intervention in the company petition only to frustrate the process of law. In the given circumstances, appellants cannot be heard to say that Ms. Mansi Vora, admittedly a shareholder of respondent No. 1 having stakes in the company, was not entitled to seek restoration of name of respondent No. 1 in the register of companies. The appellants have miserably failed to prove their locus and their mala fide intention to thwart the course of law is writ large on the face of their attempted intervention.

For the foregoing reasons, we find that the appellants could not claim to **10**
be the "aggrieved persons" and had no locus to seek intervention in company petition. Neither of their legal rights was jeopardized nor was any of their legal right infringed. We are convinced that the intervention application dismissal whereof give rise to the instant appeal was filed with a mala fide intention to stall the process of law and evade the liability judicially determined. The appeal is accordingly dismissed and the appellants

are saddled with costs quantified at Rs. 2 lakhs (rupees two lakhs only) which shall be deposited with the Registrar, National Company Law Appellate Tribunal within thirty days. In peculiar circumstances of this case, we direct that 50 per cent. of the amount of costs shall be released in favour of respondent No. 1 as and when realized.

[2020] 220 Comp Cas 36 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — NEW DELHI—BENCH-III]

AAJ FINANCE AND CREDIT LTD.[1]

v.

KELTECH INFRASTRUCTURES LTD.

R. VARADHARAJAN *(Judicial Member)* and
K. K. VOHRA *(Technical Member)*

September 13, 2019.

HF ▶ Respondent

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—DISBURSEMENT OF LOAN AMOUNT IN TERMS OF MEMORANDUM OF UNDERSTANDING—SUBSEQUENT BUILDER BUYER AGREEMENT CONVERTING LOAN AS CONSIDERATION FOR FLAT—CREDITOR AS HOME BUYER ENTITLED TO FILE PETITION—PERIOD MENTIONED IN AGREEMENT NOT LAPSED AND POSSESSION OF FLAT OFFERED BEFORE DATE OF POSSESSION IN AGREEMENT—NO DEFAULT ESTABLISHED AS ON DATE OF FILING OF PETITION—PETITION FILED PREMATURELY AND DISMISSED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

A memorandum of understanding dated May 30, 2013 was executed between the parties for the grant of loan of Rs. 50 lakhs by the financial creditor to the corporate debtor at 2 per cent. interest per month against mortgage of two flats by the corporate debtor to the financial creditor. On June 1, 2013 after approval from the board of directors of the financial creditor, payment of loan to the corporate debtor was made through cheque for amount of Rs. 50 lakhs and it was acknowledged by the corporate debtor. On June 3, 2013 upon the persuasion of the financial creditor, an agreement of buyer and seller was executed between the parties for the properties which were kept as security to the loan. No charge was ever created on these properties. Fresh

1. This order has been affirmed by the National Company Law Appellate Tribunal : see [2020] 220 Comp Cas 43 (NCLAT) *infra*.—Ed.

memorandums of understanding dated June 1, 2014, June 1, 2015 and June 1, 2016 were executed between the parties on the terms of the previous memorandum of understanding. On July 2016, all the cheques of interest payments were honoured except three cheques, which were dishonoured. Since, then no other cheques were deposited in the bank. The financial creditor issued a letter on May 2, 2017 seeking repayment of dues but this letter was returned unserved. Another letter demanding for the repayment of the entire dues was issued by the financial creditor was sent on June 5, 2017 but was never replied by the corporate debtor. A demand notice was issued by the financial creditor on October 27, 2017 but it did not receive any reply. It filed a petition under section 7 of the Insolvency and Bankruptcy Code, 2016 :

Held, *dismissing the petition, (i) that the financial creditor was a home buyer taking into consideration section 5(8)(f) of the Code read with* Explanation *provided thereunder. It was entitled to maintain the petition under the Code as a home buyer in case of default on the part of the corporate debtor as the promoter.*

(ii) That in terms of the agreement dated October 1, 2016 the promoter was required to complete the building within 12 months from the date of signing the agreement or within further a grace period of 180 days. The parties had agreed to appropriate the loan amount granted earlier as the consideration for the flat purchase. The execution of the agreement dated October 1, 2016 was not denied by the parties. The agreement was to be the fresh bargain as entered into between the parties thereby giving a go by to the earlier memorandum of understandings as well as the loan transaction of Rs. 50 lakhs. From the terms of the agreement the possession of the flat booked should be given on April 1, 2018 as the agreement dated October 1, 2016 stipulated that possession would be given within 18 months, i. e., 12 months plus grace period of 6 months. The petition was filed on January 4, 2018 well before the period fixed under the agreement dated October 1, 2016. As on the date of filing of the petition no default was established, especially when possession also seemed to have been offered before the completion of the date for possession as given in the agreement. The petition had been filed prematurely. [However, this would not curtail the right of the financial creditor to approach other judicial forums.]

PIONEER URBAN LAND AND INFRASTRUCTURE LTD. *v.* UNION OF INDIA [2019] 217 Comp Cas 1 (SC) (para 15) *referred to.*

I. B. No. 28/(ND)/2018.

Arun Saxena and ***Saral Sharma*** for the applicant.

Ms. Krishna Mohan K. Menon and *Ms. Parul Sachdeva* for the respondent.

ORDER

1 This is an application which has been filed by the applicant under the provisions of the Insolvency and Bankruptcy Code, 2016, who claim to be the financial creditor against the respondent-company which has been termed as the corporate debtor. The transaction leading to filing of the present application as reflected in the application is stated to be as under :

(a) On May 30, 2013 a memorandum of understanding was executed between the parties for the grant of loan of Rs. 50,00,000 by the financial creditor to the corporate debtor at 2 per cent. interest per month along with the mortgage of two flats by the corporate debtor to the financial creditor wherein the charge in relation to which was never created in favour of the financial creditor.

(b) On June 1, 2013 after the approval from the board of the financial creditor, payment of loan to Keltech Infrastructure Ltd., was made through cheque for amount of Rs. 50 lakhs and the same was acknowledged by the corporate debtor.

(c) On June 3, 2013 upon the persuasion of the financial creditor, an agreement of buyer/seller was executed between the parties for the above stated properties which were kept as security to the loan. It is pertinent to note that no charge was ever created on these properties.

(d) On June 1, 2014 a fresh memorandum of understanding was executed between the parties on the terms of the previous memorandum of understanding, except the details of cheques for payment of interest and some change of dates of the cheques. The said memorandum of understanding also provided for the mortgage of same two flats by the corporate debtor to the financial creditor wherein the charge was never created in favour of the financial creditor.

(e) On June 1, 2015 a fresh memorandum of understanding was entered between the parties on the terms of the previous memorandum of understanding's except the cheque numbers and dates for the payment of interest, the said memorandum of understanding also provided for the mortgage of same two flats by the corporate debtor to the financial creditor wherein the charge was never created in favour of the financial creditor.

(f) Again on June 1, 2016 a fresh memorandum of understanding was entered into between the parties on the terms of the previous memorandum of understanding's except the cheque numbers and dates for the payment of interest, the said memorandum of understanding also provided for

the mortgage of same two flats by the corporate debtor to the financial creditor wherein the charge was never created in favour of the financial creditor.

(g) On July 2016, all the cheques of interest payments were honoured except three cheques, which were dishonoured. Since, then no other cheques were deposited in the bank.

(h) On May 2, 2017 the financial creditor issued a letter seeking repayment of dues but this letter was returned unserved.

(i) On June 5, 2017 another letter demanding for the repayment of the entire dues was issued by the financial creditor but was never replied by the corporate debtor.

(j) On October 27, 2017 a demand notice was issued by the financial creditor which was never replied.

(k) From December 2017, neither of the letters were replied nor any payment was made by the corporate debtor.

Consequent to the issue of notice by this Tribunal, the corporate debtor **2**
filed a reply in which the following contentions have been taken :

(a) The corporate debtor states that debt stands discharged, the creditor has suppressed the fact of entering into builder buyer agreement to sell dated October 1, 2016 with the debtor. The said agreement to sell was entered for sale of a flat, the said flat was allotted to the creditor as repayment of the principal payment made by cheques bearing No. 378105 dated May 31, 2013.

(b) The existence of BBA agreement, the financial creditor in their demand letters dated May 2, 2017 and June 5, 2017 sent to the respondent demanding repayment of dues, wilfully concealed it.

(c) As per the BBA/agreement to sell dated October 1, 2016, both parties agreed to the arrangement of sale of flat to the financial creditor in lieu of principal payment of Rs. 50,00,000 received from the creditor.

(d) The corporate debtor stated that there is no default as loan stands repaid by virtue of agreement dated October 1, 2016, the financial creditor has placed reliance on several memorandum of understandings entered between the parties which were renewed from time-to-time. However, the creditor has concealed the crucial agreement dated October 1, 2016 wherein the creditor had agreed to purchase the flat offered by the debtor towards repayment of loan.

(e) The corporate debtor states that earlier memorandum of understandings are different from BBA dated October 1, 2016.

3 The petitioner has also filed a detailed rejoinder to the observations of the respondent, vide diary No. 9042, dated November 19, 2018 which are as follows :

(a) Despite signing the memorandum of understanding, no security was created by the corporate debtor in favour of the financial creditor and now the corporate debtor is challenging the existence of memorandum of understanding itself.

(b) It is submitted that builder buyer agreement was only entered for the security as the said charge was never created in compliance of the provisions of the Companies Act, 2013. The builder buyer agreement was signed by the financial creditor as a part of document required for the purpose of creation of charge in favour of the financial creditor, the corporate debtor did not complete other document such as filing of CHG-1 in compliance with the provision of section 78 of the Companies Act, 2013. The corporate debtor is portraying wrong picture of the said BBA as satisfaction of the debt, which in fact was never intended between the parties which is evident from signing of memorandum of understandings already on record.

(c) It is admitted fact that the financial creditor has reminded the corporate debtor about the due of the loan and interest vide its notice dated May 2, 2017 and June 5, 2017, it is to be noted that after receipt of these notices, the corporate debtor did not whisper even a single word about the discharge of debt by execution of so called BBA on October 1, 2016, and as to why the corporate debtor did not respond to the notices of the financial creditor and make it clear the debt has also been discharged, then why corporate debtor has taken more than 8 months to file the reply to the petition if the reply was so simple that debt was discharged. In fact it is an afterthought of the corporate debtor related to BBA with the alleged discharge of debt.

4 Oral arguments were also heard and order was reserved on July 31, 2019. Written submissions were also filed by both parties on August 5, 2019. We have gone through the documents filed by both parties and heard the arguments and perused written submissions made by both counsel. The Tribunal observed that various memorandum of understandings had been entered by the corporate debtor and the security was created in the form of mortgage of flats but there was no charge created in the records of registrar of companies. The interest on the loan was admittedly paid by the corporate debtor till June, 2016 but after that the interest was also not paid by the corporate debtor.

The reply as filed by the corporate debtor and documents annexed to **5**
therewith shows that an agreement dated October 1, 2016 has been entered into between the corporate debtor and financial creditor from which the following facts have been recited :

> "And whereas the promoter is allowed to construct residents flats, etc., and the same are allowed to be sold or transferred to any person by the promoter under the terms and conditions of the sale of the said plot by the CIPL and the allottee/buyer has examined the relevant papers. And whereas the promoter to construct on the aforesaid plot a multistoreyed building to be called 'Kumar Golf Vista' with a number of flats got prepared building has been undertaken in accordance therewith. And whereas the allottee/buyer has examined the building plans, designs and specifications of the proposed residential complex being available for inspection at 7, I. P. Building, UGF-2 and 3, E-109, Pandav Nagar, NH-24, Delhi-110 092.
>
> And whereas the promoter is also entering into separate agreements with several other persons regarding other flats in the said complex under construction by the promoter."

From the recitals above, it is evident that the financial creditor has cho- **6**
sen to enter into an agreement, for whatever reasons best known to it, in the project, "Kumar Golf Vistas" for a flat. Thereby virtually, making the financial creditor as a home buyer taking into consideration section 5(8)(f) of the Insolvency and Bankruptcy Code, 2016 read with *Explanation* provided thereunder and enabling it to maintain petition under the Insolvency and Bankruptcy Code, 2016 as a "home buyer" in case of default on the part of the corporate debtor named as the promoter therein.

In terms of clause 5(i) of the agreement the promoter was required to **7**
complete the building within 12 months from the date of signing the agreement and also providing under clause 5(ii) a grace period of 180 days. The price of the flat, namely, K-708, under clause 3(a) is fixed as Rs. 49,59,375. However, it is important to note from clause 5(ii) the following words which are material for the purpose of the case in hand and which read as follows :

> "However, all the payments/demands have been received by the builder within the scheduled time."

The above wordings in clause 5(ii) clearly evidence that the parties have **8**
virtually agreed to appropriate the loan amount granted earlier as the consideration for the flat purchase as otherwise the wordings as extracted above is an anomaly. It is pertinent to note that the execution of the agreement dated October 1, 2016 is not denied by the parties. Hence,

considering the said agreement to be the fresh bargain as entered into between the parties thereby giving a go by to the earlier memorandum of understandings as well as the loan transaction of Rs. 50 lakhs.

9 Still, the financial creditor will be entitled to maintain a petition under section 7 of the Insolvency and Bankruptcy Code, 2016, in case of a default in handing over possession of the flat, being the subject-matter of the agreement within the time schedule and for the refund of the money made available under the agreement along with compensation if any contemplated.

10 From the records, it is seen that the letter of offer of possession is enclosed dated March 7, 2018 by the corporate debtor in its reply. From the terms of the agreement and as given in paragraph supra in relation to time limit for possession to be given, taking into consideration the grace period of 6 months and well as contracted period of 12 months, the possession of flat booked should be given on April 1, 2018 (as the agreement dated October 1, 2016 stipulated that the possession will be given within 18 months, i. e., 12 months plus grace period of 6 months). It is also required to note that the petition was filed on January 4, 2018 well before the period fixed under the agreement dated October 1, 2016.

11 From the dates it is quite evident that there is subsequent agreement dated October 1, 2016 wherein the parties seem to have entered into a fresh bargain as narrated in the earlier portion of the order.

12 It is evident from above that the petitioner had given advance for purchase of a flat for which formal agreement was signed on October 1, 2016.

13 We find that on the date of filing of the petition as a (home buyer) no default stands established, more so, when the possession also seems to be offered before the completion of the date of possession as given in the agreement, namely, April 1, 2018.

14 In the circumstances this petition had been filed premature and the Tribunal dismiss it on the said count.

15 However, this will not curtail the right of financial creditor to approach other judicial forums or even this forum in terms of judgment in Writ Petition (Civil) No. 43 of 2019 *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [2019] 217 Comp Cas 1 (SC).

[2020] 220 Comp Cas 43 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

AAJ FINANCE AND CREDIT LTD.

v.

KELTECH INFRASTRUCTURE LTD.

A. I. S. CHEEMA, A. B. SINGH J. ***(Judicial Members)*** and **KANTHI NARAHARI *(Technical Member)***

March 5, 2020.

HF ▸ Respondent

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—DISBURSEMENT OF LOAN IN TERMS OF MEMORANDUM OF UNDERSTANDING—SUBSEQUENT BUILDER BUYER AGREEMENT BETWEEN PARTIES CONVERTING LOAN INTO CONSIDERATION FOR FLAT—PERIOD MENTIONED IN AGREEMENT NOT LAPSED AND POSSESSION OF FLAT OFFERED BEFORE COMPLETION OF POSSESSION DATE AS GIVEN IN AGREEMENT—DISMISSAL OF PETITION AS PREMATURE—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

On an appeal against an order dismissing the petition filed by the appellant under section 7 of the Code :

Held, *dismissing the appeal, that there was no reason to disagree with the Adjudicating Authority that after the earlier memorandums of understanding the parties entered into an arrangement as seen in the builder buyer agreement dated October 1, 2016. Although in the primary stage, after the memorandum of understanding dated May 30, 2013 two buyer or seller agreements dated June 3, 2013 were executed that arrangement had been given up when the parties entered into three fresh memorandums of understanding dated June 1, 2014, June 1, 2015 and June 1, 2016 referring to earlier cheque of loan dated June 1, 2013. The record showed that the latest arrangement between the parties was the builder buyer agreement dated October 1, 2016 and even possession had been offered on March 7, 2018, which could not be said to be beyond the period stipulated in the agreement. There was no reason to admit the petition under section 7 of the Code.*

Order of the National Company Law Tribunal in AAJ FINANCE AND CREDIT LTD. *v.* KELTECH INFRASTRUCTURES LTD. [2020] 220 Comp Cas 36 (NCLT) *affirmed.*

AAJ FINANCE AND CREDIT LTD. *v.* KELTECH INFRASTRUCTURES LTD. [2020] 220 Comp Cas 36 (NCLT) (para 1) *referred to.*

Company Appeal (AT) (Insolvency) No. 1248 of 2019.

Arun Sharma and *Saral Sharma* for the appellant.

Niraj Kr. Singh for the respondent.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 A. I. S. CHEEMA J. ***(Judicial Member)***.—The appellant/financial creditor has filed this appeal against the respondent/corporate debtor against impugned order dated September 13, 2019 passed in I. B. No. 28/ND/2018—*Aaj Finance and Credit Ltd.* v. *Keltech Infrastructures Ltd.* [2020] 220 Comp Cas 36 (NCLT) passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi, Bench III, vide which the Adjudicating Authority dismissed the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (I and B Code in short) which was filed by the appellant.

2 It has been argued and it is the case of the appellant that on May 30, 2018 a memo of understanding was executed between the parties. The said document is at annexure 2 (colly) page 50. As per this "memo of understanding", the appellant gave a loan of Rs. 50 lakhs by cheque dated June 1, 2013 to the respondent/corporate debtor for 12 months with monthly interest of 2 per cent. The loan was given for a period of 12 months. The respondent issued post dated cheques for next 12 months. For security the parties agreed that the respondent will mortgage two flats bearing No. K-1/1802, K-1/2102 from plot No. GH-01 B, Sector 16 Noida Extension G. Noida (West) in favour of the appellant. It is claimed that the said flats were offered only as security and actually mortgage was never executed.

3 It is stated that the appellant in view of the "memo of understanding" had issued cheque of Rs. 50 lakhs dated June 1, 2013 which amount was received by the corporate debtor. On June 3, 2013 between the parties there was execution of two "buyer/seller agreements" (pages 137 and 139) providing for agreement by the appellant to buy the above two flats. The appellant however, claims that even this was only by way of security for the amount which was advanced as loan.

4 After such buyer/seller agreement, it appears from record that between the parties still similar memo of understanding's like one dated May 30, 2013 were executed on June 1, 2014 (page 52), June 1, 2015 (page 54) and June 1, 2016 (page 56) in each of which agreements, the respondent similarly issued post dated cheques, each time for 12 months. According to the appellant, till July 2016 all the post-dated cheques were honoured except three, where after other cheques were not deposited in the bank. The appellant claims that in view of this situation, the appellant issued letters

on May 2, 2017 (page 283) and June 5, 2017 (page 187) asking for repayment of the loan. First letter returned unserved and the second letter was not replied, the appellant claims that then notice dated October 27, 2017 (page 189) was sent but the same was also not replied.

The appellant claims that there was debt due and there was default and **5** hence the application under section 7 was filed on January 4, 2018.

On behalf of the respondent, the case put up before the Adjudicating **6** Authority as per the reply (page 234) and which is argued in appeal also is that the appellant suppressed material facts in the application under section 7 of the Insolvency and Bankruptcy Code, 2016. The respondent claims that the appellant had entered into an agreement dated October 1, 2016 (page 263) whereby the respondent agreed to transfer the property bearing No. K-708, 7th Floor in Block No. K-1, Crossing Republic, Sector 6 in NH 24, Gaziabad for Rs. 50 lakhs. As per the agreement, the construction of the building was to be completed within 12 months from the date of signing of the agreement, subject to force majeure conditions and timely payment by the buyer. In case of delay in completion of the unit attributable to the promoter, after 180 days of the period of 12 months the promoter (respondent) would pay penalty to the buyer at Rs. 5 per square feet per month. The respondent has claimed that the said flat was allotted to the appellant as repayment of the principal payment paid by cheque Bearing No. 378105 dated May 31, 2013. It is argued that the appellant has acknowledged execution of such agreement in the letters dated May 2, 2017 (page 283) and June 5, 2017 (page 187) which were sent by the appellant. The agreement however, was suppressed when the application under section 7 was filed. According to the respondent the parties as per this agreement, agreed to the arrangement of sale of the flat to the appellant in place of the repayment of the principle amount of Rs. 50 lakhs. It is stated agreement in no way shows or states that the flat in question was towards security. It is stated that the appellant suppressed in the application this genuine transfer of property transaction. The flat is ready for possession and registry of 52 flats in the concerned building have already been completed. The respondent showed photographs of the premises before the Adjudicating Authority. The respondent claims that the respondent has continuously communicated and offered possession of the said premises to the appellant. Letter dated March 7, 2018 (page 290) is pointed out by the respondent as the document by which possession was offered to the appellant. The respondent claims that the agreement dated October 1, 2016 is substituted mode of performance of contract and repayment of principle amount by way of transfer of property which was agreed upon.

7 In a transaction of loan, the parties may agree to convert the relationship into that of builder buyer. Nothing prohibits the parties. The latest admitted document between the parties is the agreement dated October 1, 2016 as of buyer-seller. In an application under section 7 of the Insolvency and Bankruptcy Code, 2016 it is not possible in the summary jurisdiction to enter into detailed analysis at the instance of a party that real transaction is different. Such exercise may be possible in a suit when there is dispute regarding the real nature of transaction. This however, is not possible in summary proceeding under the Insolvency and Bankruptcy Code, 2016, the main object of which is not recovery of money but to see if resolution of a corporate debtor is necessary.

8 The appellant in response to the defence of the respondent is claiming that even this agreement dated October 1, 2016 was only a means of creating security for the repayment of money of loan. The document does not say so and we cannot travel beyond.

9 The Adjudicating Authority after hearing the parties and considering the documents, observed that there were various 'memo of understanding's entered between the parties and security was created in the form of offer of two flats by way of mortgage but no charge as such was created. The interest amounts had been paid till June, 2016. The Adjudicating Authority then referred to the contents of the agreement dated October 1, 2016 to find that the appellant had chosen to enter into such agreement for flat in "Kumar Golf Vistas (page 47)" and in view such agreement, the appellant became home buyer taking into considerations section 5(8)(f) of the Insolvency and Bankruptcy Code, 2016 read with *Explanation*. The Adjudicating Authority then referred to the contents of the agreement dated October 1, 2016 and calculated the period of 12 months and grace period of 180 days to find that the possession had been offered within given time. The Adjudicating Authority, held that the application under section 7 was filed on January 4, 2018 which was much before the period of 12 months plus 180 days as stated in the agreement dated October 1, 2016 and thus observed that it was premature petition and dismissed the same.

10 The appellant claims that during the pendency of proceeding under section 7 of the Insolvency and Bankruptcy Code, 2016, the director of the respondent had entered into settlement, copy of which has been filed at annexure-4A (page 91) and offered two cheques. One cheque was of Rs. 25 lakhs and another was of Rs. 45 lakhs. The cheque of Rs. 25 lakhs was offered for encashment and the cheque of Rs. 45 lakhs were offered as security in case, the respondent fails to complete the registry of one flat of the value of Rs. 45 lakhs.

Learned counsel for the appellant argued that the conduct of the respondent needs to be seen that after execution of such document, another director of the respondent sent letter dated April 3, 2018 (annexure A1-Diary No. 18124) resiling from such agreement entered into by the earlier director Mr. Narendra Kumar and claiming that he was not well.

Although, these documents are being pointed out to us, fact remains that these do not appear to have been brought to the notice of the Adjudicating Authority as impugned order nowhere deals with the same. Even if we are to look into these documents, it can be stated that there is dispute regarding this settlement which is admittedly stated to be during the pendency of the application under section 7 of the Insolvency and Bankruptcy Code, 2016. The same cannot be taken note of, in the absence of the same being brought on record of the Adjudicating Authority to record the settlement, if really such agreement had been entered into.

The admitted document executed between the parties, which is latest in **11**
terms of time is the agreement dated October 1, 2016 and considering the contents of the same, we do not find any reason to disagree with the Adjudicating Authority that after the earlier 'memo of understanding's parties entered into the execution of an arrangement as seen in the builder buyer agreement dated October 1, 2016. No doubt, in the primary stage, after the "memo of understanding" dated May 30, 2013 two buyer/seller agreements dated June 3, 2013 were executed but then that arrangement appears to have been given up when parties entered into further three fresh 'memo of understanding's dated June 1, 2014, June 1, 2015 and June 1, 2016 referring to earlier cheque of loan dated June 1, 2013. In these circumstances, where record shows the latest arrangement between the parties of builder buyer agreement dated October 1, 2016 and even possession has been offered on March 7, 2018 (page 290), which cannot be said to be beyond the period stipulated in the agreement, we do not find any reason to admit the application under section 7 as was filed by the appellant. We do not find any reason to interfere in the dismissal of such application.

There is no substance in the appeal. The appeal is dismissed. No costs.

[2020] 220 Comp Cas 48 (Sikkim)

[IN THE SIKKIM HIGH COURT]

BLUEFERN VENTURES P. LTD. AND OTHERS

v.

UNION OF INDIA AND OTHERS

ARUP KUMAR GOSWAMI C. J.

November 27, 2019.

WRIT—MAINTAINABILITY—EXISTENCE OF ALTERNATIVE REMEDY—BANK—ENFORCEMENT OF SECURITY INTEREST—CHALLENGE TO NOTICE ISSUED BY BANK CALLING FOR PAYMENT—DEBTS RECOVERY TRIBUNAL EMPOWERED TO EXAMINE ALL ISSUES INCLUDING MEASURES TAKEN BY SECURED CREDITOR—CASE PRESENTED BY BORROWER NOT FALLING WITHIN EXCEPTIONS ENABLING EXERCISE OF DISCRETIONARY POWER BY COURT—WRIT PETITION DISMISSED—CONSTITUTION OF INDIA, art. 226—SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002, s. 13(2).

The petitioners challenged the notice issued by the bank under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 contending that the amount due was less than twenty per cent. of the principal amount and interest thereon and also that it was not served with the notice :

Held, *dismissing the petition, that an effective remedy was available to an aggrieved person before the Debts Recovery Tribunal and that the Act was a code unto itself. No case was made out for exercise of power under article 226 of the Constitution of India, as the case presented by the petitioners did not come within the exceptions carved out which alone enabled the High Court to exercise discretionary power under article 226 of the Constitution of India despite availability of statutory alternative remedy. [Liberty granted to the petitioners to approach the jurisdictional Debts Recovery Tribunal for redressal of its grievances, if so advised.]*

UNITED BANK OF INDIA *v.* SATYAWATI TONDON [2010] 158 Comp Cas 251 (SC), AGARWAL TRACOM P. LTD. *v.* PUNJAB NATIONAL BANK [2018] 1 SCC 626 *and* CIT *v.* CHHABIL DASS AGARWAL [2013] 357 ITR 357 (SC) *relied on*.

Cases referred to :

Agarwal Tracom P. Ltd. *v.* Punjab National Bank [2018] 1 Comp Cas-OL 60 (SC) (para 6, 13)

Authorised Officer, State Bank of Travancore *v.* Mathew (K. C.) [2018] 2 Comp Cas-OL 131 (SC) (paras 6, 11)

CIT *v.* Chhabil Dass Agarwal [2013] 357 ITR 357 (SC) (paras 11, 12)

Mardia Chemicals Ltd. *v.* Union of India [2004] 120 Comp Cas 373 (SC) (para 9)

Thansingh Nathmal *v.* Mazid (A.), Superintendent of Taxes [1964] AIR 1964 SC 1419 (para 12)

Titaghur Paper Mills Ltd. *v.* State of Orissa [1983] 142 ITR 663 (SC) (para 12)

United Bank of India *v.* Satyawati Tondon [2010] 158 Comp Cas 251 (SC) (para 6, 9, 11)

W. P. (C) No. 18 of 2018.

Jorgay Namka and *Simeon Subba* for the petitioners.

None appeared for respondent No. 1.

Santosh Kumar Chettri, Assistant Government Advocate, for respondent No. 2.

Sudesh Joshi for respondents Nos. 3 and 4.

JUDGMENT[1]

ARUP KUMAR GOSWAMI C. J.—Heard Mr. Jorgay Namka, learned counsel appearing for the petitioners. Also heard Mr. Sudesh Joshi, learned counsel appearing for respondents Nos. 3 and 4 as well as Mr. S. K. Chettri, learned Assistant Government Advocate, Sikkim appearing for respondent No. 2. None appears for Union of India, respondent No. 1. **1**

By filing this petition under article 226 of the Constitution of India, the petitioners pray for setting aside a notice dated January 18, 2017 issued under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), a notice dated December 19, 2017 issued under section 13(4) of the SARFAESI Act and a possession notice dated January 16, 2018 issued by the authorised officer under section 13(12) of the SARFAESI Act read with rule 9 of the Security Interest (Enforcement) Rules, 2002, for short, the Rules. Prayers are also made for a direction to respondent No. 1 to set up a Debt Recovery Tribunal at Gangtok, Sikkim and in the interim, to assign the Debt Recovery Tribunal, Siliguri to deal with the cases pertaining to the State of Sikkim as well as for a probe against the Branch Manager, respondent No. 3, for making the loan accounts of the petitioners as non-performing assets (NPA). **2**

1. Oral judgment.

3 It is averred in the petition that notice under section 13(2) was not served upon the petitioners and they came to learn about the aforesaid notice in the month of December 2017 when petitioner No. 2 was served with the notice under section 13(4) of the SARFAESI Act.

4 Perusal of the averments made in the writ petition goes to show that a symbolic possession of land and building, as indicated in the possession notice, had been taken over.

5 It is contended by Mr. Namka that issuance of the notice dated January 18, 2017 under section 13(2) is not maintainable in view of section 31(j) of the SARFAESI Act, as the amount due from the petitioners is less than 20 per cent. of the principal amount and the interest thereon. Therefore, availability of alternative remedy under section 17 of the SARFAESI Act against the notice under section 13(4) shall not come in the way of entertaining this petition under article 226 of the Constitution of India. It is submitted by Mr. Namka that the provision of rule 8(1) of the Rules was also not followed.

6 By relying upon the judgments of the hon'ble Supreme Court in the cases of (i) *United Bank of India* v. *Satyawati Tondon* reported in [2010] 158 Comp Cas 251 (SC) ; [2010] 8 SCC 110, (ii) *Authorised Officer, State Bank of Travancore* v. *K. C. Mathew* reported in [2018] 2 Comp Cas-OL 131 (SC) ; [2018] 3 SCC 85 and (iii) *Agarwal Tracom P. Ltd.* v. *Punjab National Bank* reported in [2018] 1 Comp Cas-OL 60 (SC) ; [2018] 1 SCC 626, Mr. Joshi has submitted that in view of the alternative statutory remedy available to the petitioners, this court may not exercise its jurisdiction under article 226 of the Constitution of India. It is submitted by him that the account of the petitioners was rightly declared to be NPA. He contends that the argument of Mr. Namka that the notice under section 13(2) is not maintainable in view of section 31(j) is wholly fallacious as the statement of account demonstrates that amount due from the petitioners is far in excess of 20 per cent. of principal amount and interest thereon. In any view of the matter, if the petitioners have any grievance with the same or any action taken by the bank under the SARFAESI Act, they may avail of remedy in accordance with law under section 17 of the SARFAESI Act, he submits.

7 Mr. Joshi also submits that the Debt Recovery Tribunal set up at Siliguri has jurisdiction to entertain applications under section 17 of the SARFAESI Act pertaining to the State of Sikkim. This submission is disputed by Mr. Namka.

8 The notice under section 13(2) was issued by respondent No. 4 in respect of two loans taken by M/s. Bluefern Ventures P. Ltd., petitioner No. 1, which are indicated as TL-1 and TL-2. Sanctioned amount in respect of

TL-1 was Rs. 1,033 lakhs (rupees ten crores thirty three lakhs) and sanctioned amount in respect of TL-2 was Rs. 1,861 lakhs (rupees eighteen crores sixty one lakhs). Outstanding in respect of TL-1 and TL-2 was shown as Rs. 9,02,56,238 and Rs. 19,02,96,114.31, respectively, totalling Rs. 28,05,52,352.31.

In *United Bank of India* v. *Satyawati Tondon* [2010] 158 Comp Cas 251 (SC), the hon'ble Supreme Court at paragraphs 28, 43 and 55 observed as follows (pages 262, 266 and 272) : **9**

"This court in *Mardia Chemicals Ltd.* v. *Union of India* [2004] 120 Comp Cas 373 (SC) ; [2004] 8 SCC 110 then held that the borrower can challenge the action taken under section 13(4) by filing an application under section 17 of the SARFAESI Act and a civil suit can be filed within the narrow scope and on the limited grounds on which they are permissible in the matters relating to an English mortgage enforceable without intervention of the court. In paragraph 31 of the judgment, the court observed as under (SCC page 362) :

'In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. *The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest*.' (emphasis[1] supplied)

. . . Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial

1. Here printed in italics.

bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing of remedy under article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

It is a matter of serious concern that despite repeated pronouncement of this court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under article 226 for passing orders which have serious adverse impact on the right of the banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

10 A perusal of above judgment goes to show that an effective remedy is available to an aggrieved person before the Debt Recovery Tribunal and that the SARFAESI Act is a code unto itself. The hon'ble Supreme Court also sounded a note of caution that the High Courts should exercise their discretion to exercise jurisdiction under article 226 of the Constitution of India in matters relating to right of banks and other financial institutions to recover their dues with greater caution, care and circumspection.

11 In *Authorised Officer, State Bank of Travancore* v. *K. C. Mathew* [2018] 2 Comp Cas-OL 131 (SC) ; [2018] 3 SCC 85, the hon'ble Supreme Court reiterated the judgment of *United Bank of India* v. *Satyawati Tondon* [2010] 158 Comp Cas 251 (SC) ; [2010] 8 SCC 110 and had disapproved the approach of the High Court in entertaining the writ petition. The hon'ble Supreme Court further held that normal rule is that a writ petition under article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in *CIT* v. *Chhabil Dass Agarwal* reported in [2013] 357 ITR 357 (SC) ; [2014] 1 SCC 603.

12 In paragraph 15 of *CIT* v. *Chhabil Dass Agarwal* reported in [2013] 357 ITR 357 (SC) ; [2014] 1 SCC 603, the hon'ble Supreme Court observed as follows (page 377 of 357 ITR) :

"Thus, while it can be said that this court has recognised some exceptions to the rule of alternative remedy, i. e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal* v. *A. Mazid, Superindent of Taxes*, AIR 1964 SC 1419,

Titaghur Paper Mills Ltd. v. *State of Orissa* [1983] 142 ITR 663 (SC) ; [1983] 2 SCC 433 ; [1983] SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

13 In *Agarwal Tracom P. Ltd.* v. *Punjab National Bank* [2018] 1 Comp Cas-OL 60 (SC) ; [2018] 1 SCC 626, the hon'ble Supreme Court held that section 17(2) empowers the Tribunal to examine all the issues arising out of the measures taken under section 13(4) including the measures taken by the secured creditor under rules 8 and 9 for disposal of the secured assets of the borrower.

14 On due consideration, I find that no case is made out for exercise of power under article 226 of the Constitution of India, as the case presented by the petitioners do not come within the exceptions carved out which alone enable the court to exercise discretionary power under article 226 of the Constitution of India despite availability of statutory alternative remedy.

15 Accordingly, this writ petition is disposed of, granting liberty to the petitioners to approach the jurisdictional Debts Recovery Tribunal for redressal of their grievances, if so advised. If any such approach is made by the petitioners within a period of 45 days from today, the jurisdictional Debts Recovery Tribunal will decide the same on its merit without raising the question of limitation. It is made clear that this court has expressed no opinion on the merits and all contentions are left open to be decided by the Debt Recovery Tribunal.

16 Before parting with the records, this court further observes that this court has not gone into the question as to whether a direction is to be given to the authorities for setting up of a Debts Recovery Tribunal at Gangtok, Sikkim, inasmuch as such a prayer is made collaterally to the challenges made to the notices under section 13(2) and (4) of the SARFAESI Act and the possession notice dated January 16, 2018, which are the fundamental assailments in this petition.

17 No costs.

[2020] 220 Comp Cas 54 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — KOLKATA BENCH]

UNION BANK OF INDIA[1]

v.

SURANA METALS LTD.

MADAN B. GOSAVI *(Judicial Member)* and
VIRENDRA KUMAR GUPTA *(Technical Member)*

December 6, 2019.

HF ▸ Applicant

INSOLVENCY RESOLUTION—APPLICATION FILED BY FINANCIAL CREDITOR AGAINST GUARANTOR—EXISTENCE OF DEFAULT—APPLICATION TO BE ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

On an application filed under section 7 of the Insolvency and Bankruptcy Code, 2016, to initiate the corporate insolvency resolution process against the corporate debtor on the ground that the corporate debtor being the guarantor of the principal borrower had committed default in paying financial debt :

Held, *that the corporate debtor was the guarantor of the individual. It had executed a deed of guarantee in the year 2008. It thereby undertook to repay the debt in case of default by the original borrower. The financial creditor proved that the financial debt was due and payable by the corporate debtor and it had committed default in paying the debt. The application was filed well within the period of limitation. The application was to be admitted, a moratorium was to be declared and an interim resolution professional was to be appointed.*

GAURAV HARGOVINDBHAI DAVE *v.* ASSET RECONSTRUCTION COMPANY (INDIA) LTD. [2019] 8 Comp Cas-OL 250 (SC) (para 8) *referred to.*

C. P. I. B. No. 346/KB/2019.

Ranajit Chowdhury for the financial creditor.

Nimish Mishra, *Gaurav Singh* and *L. P. Sharma* for the corporate debtor.

ORDER

The order of the Bench was delivered by

1 MADAN B. GOSAVI ***(Judicial Member)***.—This application under section 7 of the Insolvency and Bankruptcy Code, 2016, is filed by the financial

1. This order has been affirmed by the National Company Law Appellate Tribunal : see [2020] 220 Comp Cas 59 (NCLAT) *infra*.—Ed.

creditor-Union Bank of India against M/s. Surana Metals Ltd.-corporate guarantor of the M/s. Mahaveer Construction, a proprietary concern to start the corporate insolvency resolution process (in short "CIRP") of the corporate debtor on the ground that the corporate debtor being guarantor of the principal borrower committed default in paying financial debt of Rs. 23,90,35,759 (rupees twenty three crores ninety lakhs thirty five thousand seven hundred and fifty nine only).

The following facts are not in dispute : **2**

2.1. In the year 2008, the financial creditor granted and disbursed in favour of M/s. Mahaveer Construction the term loan of Rs. 9,60,00,000 (rupees nine crores sixty lakh only). The corporate debtor herein executed deed of guarantee in favour of the bank. The guarantee is continuing guarantee. The principal borrower-M/s. Mahaveer Construction is a proprietary concern of which Mr. Laxmi Pat Surana is a sole proprietor. Mr. Laxmi Pat Surana is also the director of M/s. Surana Metals Ltd. It shows that Mr. Laxmi Pat Surana took a loan from the bank in his individual capacity and executed deed of guarantee for the same loan as the director of M/s. Surana Metals Ltd. (the corporate debtor).

2.2. Borrower Laxmi Pat Surana committed default in paying the loan. However, he acknowledged and admitted debt on March 3, 2012, May 27, 2015. Despite acknowledgment of loan and making promise, he defaulted in paying the same. Hence, on December 3, 2018 the bank sent notice of demand to the borrower as well as the corporate debtor calling them to clear their dues. The financial creditor states that in spite of repeated demands, the corporate debtor committed default in paying the financial debt. Hence, this proceeding is filed to start CIRP of the corporate debtor.

2.3. The corporate debtor suggested name of one, Mr. Sunil Mohan Acharya, 245/1, Bhattacharya Para, 6 No. Jheelpar Road, Ward No. 15, New Barrackpur, North 24 Pargana, Kolkata-700 131, e-mail : *sunilmohanacharya58@gmail.com* having registration No. IBBI/IPA-N000174/2018-19/12120 for appointment of IRP.

The corporate debtor served with the notice of this application. It appeared though Mr. Laxmi Pat Surana, director of the original borrower. He filed affidavit-in-reply. **3**

We have gone through that reply. It is seen that the corporate debtor raised two defenses to contest this application **4**

(i) Claim is time barred.

(ii) He being guarantor of the loan of the individual and not the corporate person, this proceeding is not maintainable under section 5A of the Insolvency and Bankruptcy Code, 2016.

5 We heard learned counsel for the financial creditor and learned counsel for the corporate debtor at length. We have gone through the evidence on record.

6 It is not in dispute that the loan of Rs. 9,60,00,000 (rupees nine crores sixty lakhs only) was granted and disbursed by the bank to Mr. Laxmi Pat Surana, proprietor of M/s. Mahaveer Construction. He is also the director of M/s. Surana Metals Ltd. It is not in dispute that the corporate debtor executed deed of guarantee in favour of the bank and thereby undertook to repay the loan upon default by the original borrower to pay the same. It is also not in dispute that the guarantee is the continuing guarantee.

7 It is seen from the evidence on record that not only the original borrower but also the corporate debtor admitted and acknowledged the debt time and again on May 27, 2015 (exhibit J1) and December 8, 2018 (exhibit K). The corporate debtor replied the notice issued by the bank clearly admitting the debt. We have gone through his reply to the notice. We hold that his reply is in form of admission of debt and nothing else. The corporate debtor contended that recovery proceeding is pending in Debts Recovery Tribunal, Kolkata against the corporate debtor. It cannot be said that debt become due and payable. We hold that it is admission of debt and his only defence is that it is yet to become due and payable. In this case, by virtue of guarantee in favour of the bank, the corporate debtor undertook to clear loan of the original borrower in case original borrower commit default and it is duty of the corporate debtor to clear the outstanding. His defence is that debt is yet to become due is not sustainable.

8 Learned counsel for the corporate debtor submitted that claim is time barred. He pointed out date of default as January 3, 2010 and this proceeding is filed on February 13, 2019. According to him, it is time barred in view of the hon'ble Supreme Court ruling in the case of *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* [2019] 8 Comp Cas-OL 250 (SC) (Civil Appeal No. 4952 of 2019).

9 We have gone through the ruling. We hold that this ruling is not applicable in this case. In case before the hon'ble Supreme Court, the facts were after the date of default in the year 2011, there was no acknowledgment of debt by the corporate debtor in that proceeding. In this case, after the default in the year 2010, not only original borrower but also the corporate debtor admitted and acknowledgment the debt even in the year 2018. This proceeding is filed within period of limitation.

10 Learned counsel for the corporate debtor submitted that he cannot be the corporate debtor in view of the definition of corporate guarantor as stated in section 5A of the Insolvency and Bankruptcy Code, 2016. According to him,

since his client is guarantor to the individual and not corporate person, no proceeding can ; lie against his client under the Insolvency and Bankruptcy Code, 2016. We have considered about his above submission. Section 5A of the Insolvency and Bankruptcy Code, 2016 states corporate guarantor means the corporate person who is surety in contract guarantee to a corporate debtor. Section 3(8) of the IBC defines corporate debtor means corporate person who owes a debt of any person. In this case, it is not in dispute that by virtue of deed of guarantee, the corporate debtor herein who is the corporate person owes debt to the bank. Hence, the corporate definition in section 5A of the Insolvency and Bankruptcy Code, 2016 of corporate guarantor cannot be considered for exclusion of this proceeding from consideration for a simple reason that the definition is just explanatory definition as to who could be called as corporate guarantor. In this case, the corporate debtor is the guarantor of the individual. He executed deed of guarantee in the year 2008. He thereby undertook to repay the debt in case of default by the original borrower. The definition of the corporate guarantor relied on by him in section 5A cannot be used to show applicability or inapplicability of provisions of the IBC against him as it be just explanatory definition. Hence, we reject his argument.

In view of the evidence on record, we hold that the financial creditor proved that the financial debt is due and payable by the corporate debtor and he has committed default in paying the same. **11**

We find that application is filed well within period of limitation. financial creditor suggested name of one, Mr. Sunil Mohan Acharya, 245/1, Bhattacharya Para, 6 No. Jheelpar Road, Ward No. 15, New Barrackpur, North 24 Pargana, Kolkata-700 131, e-mail : *sunilmohanacharya58@gmail.com* having registration No. IBBI/IPAN000174/2018-19/12120 for appointment of IRP against whom no disciplinary proceeding appears to be pending. The application is defect free. Hence, we admit the same by following order : **12**

ORDER

(i) The application filed by the financial creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 for initiating the corporate insolvency resolution process against the corporate debtor, M/s. Surana Metals Ltd. is hereby admitted.

(ii) We declare a moratorium and public announcement in accordance with sections 13 and 15 of the Insolvency and Bankruptcy Code, 2016.

(iii) Moratorium is declared for the purposes referred to in section 14 of the Insolvency and Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of the corporate insolvency resolution

process and call for the submission of claims under section 15. The public announcement referred to in clause (b) of sub-section (1) of section 15 of the Insolvency and Bankruptcy Code, 2016 shall be made immediately.

(iv) Moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 prohibits the following :

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

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

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization 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.

(v) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.

(vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

(viii) 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.

(ix) Necessary public announcement as per section 15 of the Insolvency and Bankruptcy Code, 2016 may be made.

(x) Mr. Sunil Mohan Acharya, 245/1, Bhattacharya Para, 6 No. Jheelpar Road, Ward No. 15, New Barrackpur, North 24 Pargana, Kolkata-700131, e-mail : *sunilmohanacharya58@gmail.com* having registration No. IBBI/IPA-N000174/2018-19/12120 is appointed as interim resolution

professional for ascertaining the particulars of creditors and convening a committee of creditors for evolving a resolution plan.

(xi) The financial creditor to pay sum of Rs. 1,00,000 (rupees one lakh only) to insolvency resolution process as advance fees as per regulation 33(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which shall be adjusted from final bill.

(xii) In case, further funds are required by insolvency resolution process/RP and in the event of non-provision thereof, insolvency resolution process/RP can approach this Tribunal so that CIRP would not be hampered for want of funds.

(xiii) The resolution professional shall conduct CIRP in time bound manner as per regulation 40A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(xiv) Registry is hereby directed under section 7(7) of the Insolvency and Bankruptcy Code, 2016 to communicate the order to the financial creditor, the corporate debtor and to the IRP by speed post as well as through e-mail.

List the matter on January 23, 2020 for the filing of the progress report.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with ail requisite formalities.

[2020] 220 Comp Cas 59 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

LAXMI PAT SURANA

v.

UNION BANK OF INDIA AND ANOTHER

VENUGOPAL (M.) J. ***(Judicial Member)*, V. P. SINGH** and **ALOK SRIVASTAVA** ***(Technical Members)***

March 19, 2020.

HF ▸ Respondent

INSOLVENCY RESOLUTION—APPLICATION BY FINANCIAL CREDITOR—FINANCIAL DEBT—INCLUDES DEBT OWED TO CREDITOR BY PRINCIPAL BORROWER AND GUARANTOR—PENDENCY OF DEBT RECOVERY PROCEEDINGS NOT A BAR TO INITIATE INSOLVENCY PROCESS—APPLICATION NOT

BARRED BY TIME—APPLICATION ADMITTED AGAINST GUARANTOR—PROPER—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

A financial debt includes a debt owed to a creditor by the principal borrower and the guarantor. A just omission or failure on the part of a guarantor to pay the financial creditor, when the principal sum is claimed will come within the scope of default under sections 3 and 12 of the Insolvency and Bankruptcy Code, 2016. The proceedings under section 7 of the Code can be initiated by a financial creditor who had taken a guarantee in respect of debt against the guarantor for failure to repay the money borrowed by the principal borrower.

Pendency of debt recovery proceedings before the Tribunal would not prevent a financial creditor from initiating the corporate insolvency resolution process against the corporate debtor. A legal remedy must be alive for a legislatively fixed period of time.

BALAKRISHNAN (N.) *v.* KRISHNAMURTHY (M.) [1998] 7 SCC 123 *relied on*.

An acknowledgment does not create any new right but extends the limitation period. When a debtor makes an acknowledgment of his liability to pay a debt, it would mean that he admits a subsisting liability to pay. The burden lies on the creditor to prove that an acknowledgment was made within time. An acknowledgment in writing must indicate jural relationship of "debtor" and "creditor" between the parties.

SREEDEVI (P.) *v.* APPU (P.) [1991] AIR 1991 Ker 76 *and* SHAH GUR SARAN *v.* SHIB SINGH [1943] AIR 1943 All 393 [FB] *relied on.*

In an application filed under section 7 of the Code, the Adjudicating Authority held that the financial creditor had proved that a financial debt was due and payable by the corporate debtor and that a default was committed. On appeal :

Held, *dismissing the appeal, that the pendency of proceedings before the Debts Recovery Tribunal would not preclude the bank to file the application under section 7 of the Code before the Adjudicating Authority. If a party claiming the benefit of section 14 of the Limitation Act, 1963 had failed to secure relief in favour of earlier proceedings not because of any defect or jurisdiction or some other cause of like nature, he could not derive the benefit of the ingredients of section 14 of the Act. By virtue of the deed of guarantee the corporate debtor being a corporate person owed a debt to the bank. The corporate debtor was the guarantor and in the year 2008, had undertaken to repay the debt in case of default by the principal borrower. Under section 3(8) of the Code corporate debtor meant a corporate person who owed debt to any*

person. There was an acknowledgment of debt on various dates. There was an acknowledgment of debt by the principal borrower but also the corporate debtor on May 27, 2015 and December 8, 2018, respectively. The application filed before the Adjudicating Authority on February 13, 2019 was well within limitation and not barred by limitation.

Order of the National Company Law Tribunal in UNION BANK OF INDIA *v.* SURANA METALS LTD. [2020] 220 Comp Cas 54 (NCLT) *affirmed*.

Cases referred to :

B. K. Educational Services Ltd. *v.* Parag Gupta and Associates [2019] 212 Comp Cas 1 (SC) (para 25)

Balakrishnan (N.) *v.* Krishnamurthy (M.) [1998] 7 SCC 123 (para 24)

Gaurav Hargovindbhai Dave *v.* Asset Reconstruction Co. (India) Ltd. [2019] 8 Comp Cas-OL 250 (SC) (paras 2, 27)

Jignesh Shah *v.* Union of India [2019] 217 Comp Cas 139 (SC) (para 26)

Paramasivam (K.) *v.* Karur Vysya Bank Ltd. [2019] 8 Comp Cas-OL 635 (NCLAT) (para 18)

Shah Gur Saran *v.* Shib Singh [1943] AIR 1943 All 393 [FB] (para 28)

Sreedevi (P.) *v.* Appu (P.) [1991] AIR 1991 Ker 76 (para 28)

Union Bank of India *v.* Surana Metals Ltd. [2020] 220 Comp Cas 54 (NCLT) (para 1)

Company Appeal (AT) (Ins) No. 77 of 2020.

Abhijeet Sinha, Aditya, Sandeep Nagar, Kamesh Vedula for the appellant.

Ms. Nishi Chaudhary, Yashartha, Ms. Priya Choubey for the respondents.

Sunil Mohan Acharya for the Resolution Professional.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

VENUGOPAL (M.) J. ***(Judicial Member)***.—The appellant (promoter/ director and shareholder of Surana Metals Ltd.) has focused the present company appeal being dissatisfied with the impugned order dated December 6, 2019 in C. P. (I. B.) No. 346/KB/2019, dated December 6, 2019—(*Union Bank of India* v. *Surana Metals Ltd.* [2020] 220 Comp Cas 54 (NCLT)) passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench. 1

2 The Adjudicating Authority in the impugned order dated December 6, 2019 at paragraphs 8 to 10 had observed following (page 56) :

"Learned counsel for the corporate debtor submitted that claim is time barred. He pointed out date of default as January 3, 2010 and this proceeding is filed on February 13, 2019. According to him, it is time barred in view of the hon'ble Supreme Court ruling in case of *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Company (India) Ltd.* [2019] 8 Comp Cas-OL 250 (SC) (Civil Appeal No. 4952 of 2019).

We have gone through the ruling. We hold that this ruling is not applicable in this case. In the case before the hon'ble Supreme Court, the facts were after the date of default in the year 2011, there was no acknowledgment of debt by the corporate debtor in that proceeding. In this case, after the default in the year 2010, not only original borrower but also the corporate debtor admitted and acknowledgment the debt even in the year 2018. This proceeding is filed within period of limitation.

Learned counsel for the corporate debtor submitted that he cannot be the corporate debtor in view of the definition of corporate guarantor as stated in section 5A of the IBC, 2016. According to him, since his client is guarantor to the individual and not corporate person, no proceeding can ; lie again his client under the IBC, 2016. We have considered about his above submission. Section 5A of the IBC, 2016 states corporate guarantor means the corporate person who is surety in contract guarantee to a corporate debtor. Section 3(8) of the IBC defines corporate debtor means corporate person who owes a debt of any person. In this case, it is not in dispute that by virtue of deed of guarantee, the corporate debtor herein who is the corporate person owes debt to the bank. Hence, the corporate definition in section 5A of the IBC, 2016 of corporate guarantor cannot be considered for exclusion of this proceeding from consideration for a simple reason that the definition is just explanatory definition as to who could be called as corporate guarantor. In this case, the corporate debtor is the guarantor of the individual. He executed deed of guarantee in the year 2008. He thereby undertook to repay the debt in case of default by the original borrower. The definition of the corporate guarantor relied on by him in section 5A cannot be used to show applicability or inapplicability of the provisions of the IBC against him as it be just explanatory definition. Hence, we reject his argument."

And resultantly held that the first respondent/"financial creditor" had proved that "financial debt" was due and payable by the corporate debtor (M/s. Surana Metals Ltd.) and that a default was committed in paying the same. 3

Challenging the validity and legality of the impugned order dated December 6, 2019 passed by the Adjudicating Authority, learned counsel for the appellant submits that the first respondent/bank/"financial creditor" filed an application under section 7 of the I and B Code and as per section 3(7) and 3(8) of the I and B Code, the application can be filed only against the company and the same is not maintainable against the sole proprietorship firm (as in instant case) and as such what cannot be performed directly, cannot be performed indirectly. 4

Learned counsel for the appellant contents that as per section 5A of the I and B Code, 2016 to commence the insolvency proceedings against the "corporate guarantor", both the "principal debtor" and "guarantor", must be corporate entities/corporate debtor, as defined under section 3(7) and 3(8) of the Code. Furthermore, the insolvency proceedings cannot be initiated against the sole proprietorship firm of debtor and therefore, the first respondent/bank cannot initiate the "insolvency proceedings" against the appellant (guarantor company) too. 5

Learned counsel for the appellant refers to the "Report of the Insolvency Law Committee" (March, 2018-Ministry of Corporate Affairs, Government of India) whereby and whereunder at paragraph 23.1 it is mentioned as under : 6

> "23.1 Section 60 of the Code requires that the Adjudicating Authority for the corporate debtor and personal guarantors should be the National Company Law Tribunal which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. This creates a link between the insolvency resolution or bankruptcy processes of the corporate debtor and the personal guarantor such that the matters relating to the same debt are dealt in the same tribunal. However, no such link is present between the insolvency resolution or liquidation processes of the corporate debtor and the corporate guarantor. It was decided that section 60 may be suitably amended to provide for the same National Company Law Tribunal to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor. For this purpose, the term 'corporate guarantor' will also be defined."

Learned counsel for the appellant points out that section 5A of the Code is clear, unequivocal and unambiguous and if the Legislature had 7

enunciated to include the "(corporate guarantor)" in respect of a person and firm within the purview of the section 7 of the Code the same would have been provided in an explicit manner.

8 Learned counsel for the appellant advances an argument that the application filed by the first respondent/bank/"financial creditor" was barred by the plea of "limitation" and that the "account" was admittedly declared as "non-performing asset" on October 30, 2010 by the first respondent/bank and that the application under section 7 of the Code was filed on February 13, 2019, i. e., after more than nine years.

9 Learned counsel for the appellant points out that the letters dated March 3, 2012, May 27, 2015, October 24, 2016 issued by the principal borrower and produced by the first respondent/bank are not an acknowledgment of "debt" by any stretch of imagination, since there is no admission of liability. In effect, the aforesaid letters do not start the fresh period of limitation under section 18 of the Limitation Act, 1963 as averred by the bank.

10 Expatiating his plea, learned counsel for the appellant comes out with an argument that the acknowledgment must be made before the expiry of the period of limitation. Moreover, it is the stand of the appellant that the three letters were addressed by the principal borrower, i. e., sole proprietorship firm and not by the appellant and as such the said communications are not binding upon the "appellant"/"corporate guarantor"/"surety".

11 Yet another contention raised on behalf of the appellant is that the letter dated December 8, 2018 is a "privileged document" and the same was addressed as "without prejudice" and as such the same is inadmissible under the Indian Evidence Act, 1872.

12 Learned counsel for the appellant submits that the first respondent/bank had filed a reply before this Tribunal together with the letter dated December 3, 2019 and the said letter was not produced before the learned Adjudicating Authority (NCLT) Kolkata and hence the same is not to be relied upon.

13 In response, learned counsel for the first respondent contends that M/s. Mahaveer Construction (borrower) had borrowed money against the payment of interest from the first respondent/bank and M/s. Surana Metals Ltd. is being registered under the Companies Act, 2013. Hence, the plea is taken on behalf of the first respondent/bank that M/s. Surana Metals Ltd. comes within the purview of "corporate debtor" and the first respondent-bank comes within the ambit of "financial creditor" of M/s. Surana Metals Ltd. (corporate debtor) and therefore, the application under section 7 of the Code filed by the first respondent/bank is perfectly maintainable in law.

Learned counsel for the first respondent takes stand that the corporate guarantor (M/s. Surana Metals Ltd.) had duly executed the letters of the guarantors dated February 2, 2007, February 17, 2007 and August 3, 2008 in respect of the loan facilities signed by the bank to M/s. Mahaveer Construction, thereby comes within the purview of the definition "corporate guarantor" as per clause (a) of section 5(5) of the I and B Code. Added further, the "corporate guarantor" had acknowledged its debt against execution of the letters of guarantee and in its reply dated December 8, 2018 is not against the demand notice dated December 3, 2018 issued by the bank. 14

Learned counsel for the first respondent/bank for financial creditor submits that the limitation for filing of an application against the "corporate guarantor" begins from the acknowledgment, i. e., December 8, 2018, furnished by the "corporate guarantor". 15

Continuing further, the "corporate guarantor" in its reply admitted to the effect that loan of Rs. 945 lakhs and Rs. 245 lakhs was sanctioned to you to M/s. Mahaveer Construction of No. 12, Bonfield Lane, Kolkata-700 001. 16

Our corporate guarantee was issued in accordance with the provisions of the Companies Act, 1956 and as such the "corporate guarantor" on December 8, 2018 had admitted the execution of guarantee agreements on February 2, 2007, February 17, 2007, August 3, 2008, whereby the "corporate guarantor" had agreed to pay Rs. 12.05 crores and interest on such amount.

Learned counsel for the appellant emphatically takes a forceful stand that the "corporate debtor" as a "corporate person" being company under the Companies Act, 2013 and had given surety but in relation to a contract or guarantor or corporate debtor. Suffice it to make a pertinent mention that the "corporate debtor" had guaranteed surety in regard to this contract where debtor firm was proprietor concern. Besides these, the corporate debtor cannot shirk his liability to pay the debt to the "financial creditor"/ bank and also that the corporate guarantor had taken "guarantee" in respect of section 5(8) of the Code and M/s. Mahaveer Construction had borrowed the money against the payment of interest from the bank. 17

Learned counsel for the first respondent/bank refers to the judgment of this Tribunal in Company Appeal (AT) (Insolvency) No. 538 of 2019. *K. Paramasivam* v. *Karur Vysya Bank Ltd.* [2019] 8 Comp Cas-OL 635 (NCLAT). Wherein at paragraph 18 it is observed and held as under (page 639 of 8 Comp Cas-OL) : 18

> "Admittedly, the 'borrowers' have borrowed the money against payment of interest from the Bank and M/s. Maharaja Theme Parks

and Resorts Private Limited has taken the 'guarantee' in respect of the item referred to in clause (a) of section 5(8). In this background, we hold that the Bank comes within the meaning of 'financial creditor' of M/s. Maharaja Theme Parks and Resorts Private limited ('corporate debtor'). For the said reason, the application under section 7 is maintainable."

19 Learned counsel for the first respondent/bank pointed out that the corporate debtor had acknowledged its debt against the execution of the letters of guarantee which runs as under :

Sl. No.	*Acknowledgment letter dated*	*Executed by*	*Page No. of the appeal*
1.	16-09-2010	Laxmi Pat Surana	196
2.	03-03-2012	Laxmi Pat Surana	197
3.	27-05-2015	Laxmi Pat Surana	140
4.	24-10-2016	Laxmi Pat Surana	198
5.	08-12-2018	Surana Metals Ltd.	141

Further, the corporate debtor had acknowledged that the reply dated December 8, 2018 sent against demand notice dated December 3, 2018 was issued by the bank for initiation of the proceedings under the Code. In this connection learned counsel for the first respondent refers to section 145 of the Indian Contract Act, 1872 to the fact that in every "contract" of "guarantee", there is an implied promise by the "principal debtor" to indemnify the surety.

20 Learned counsel for the appellant contends that the appellant is also the proprietor of the firm of M/s. Mahaveer Construction and that the proprietorship firm has no separate legal existence. It is not dispute that the term loan No. 1 was disbursed to an extent of Rs. 9,60,00,000 on September 11, 2007 and the second term loan was disbursed to an extent of Rs.2,45,00,000 on September 11, 2008 and the total sum disbursed was Rs. 12,05,00,000. The letter of guarantee for Rs. 9,60,00,000 was given on February 2, 2007, and on February 17, 2007, letter of guarantee was issued by the corporate debtor. On August 30, 2008 the letter of guarantee for Rs. 12,05,00,000 was given on August 30, 2008, etc. By means of "guarantee", to and in favour of the first respondent/bank, corporate debtor under took to clear the loan of the "principal borrower", in the event of the "principal borrower" committed default and it is the primordial duty of the "corporate debtor" to clear the due amount.

21 In the instant case the corporate debtor (M/s. Surana Metals Ltd.) had duly executed the letter of guarantor dated February 2, 2007, February 17,

2007 and August 3, 2008 for the loan facilities sanctioned by the bank to M/s. Mahaveer Construction also that the corporate debtor had acknowledged its debt on September 16, 2010, March 3, 2012, May 27, 2015, October 24, 2016, and executed by the appellant (vide page Nos. 196, 197, 140, 198) and on December 8, 2018 executed by the (M/s. Surana Metals Ltd.) page No. 141, respectively, against the execution of the letters of guarantee. Significantly, the corporate debtor in its reply dated December 8, 2018 had tacitly admitted the execution of guarantors agreement dated February 2, 2007, February 17, 2007, August 3, 2008 in and by which the corporate debtor had agreed to pay Rs. 12,05,00,000 crore and interest on such sum.

22 The "corporate debtor" being a "corporate person" and registered under the Companies Act, 2013 had guaranteed "surety" in regard to "contract" with "debtor firm" or "proprietary concern" as the case may be. As per section 145 of the Indian Contract Act, 1872 in respect of every "contract of guarantee", there is an implied promise of the "principal debtor" to indemnify the "surety".

23 It may not be out of place for this Tribunal to make a relevant mention that the "financial debt" includes a "debt" owed to a creditor by a "principal" and "guarantor". A just omission or failure to pay on the part of a guarantor to pay the "financial creditor", When the principal sum is claimed/demanded certainly, will come with the scope of "default" under sections 3 and 12 of the Code. The proceedings under section 7 of the Code can be triggered by a "financial creditor" who had taken guarantee in respect of "debt" against "guarantor" for failure to repay the money borrowed by the "principal borrower". To put it explicitly (M/s. Surana Metals Ltd.) is the "corporate debtor" and that the appellant is the proprietor of the firm of M/s. Mahaveer Construction.

24 It is to be pointed out that "pendency of debt recovery proceedings" before the Tribunal is not to prevent a financial creditor to initiate the CIRP against the corporate debtor. Be it noted that a legal remedy must be alive for a legislatively fixed period of time as per the decision *N. Balakrishnan* v. *M. Krishnamurthy* [1998] 7 SCC 123.

25 In *B. K. Educational Services Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) (Civil Appeal No. 23988 of 2017) it is held that "the right to sue therefore accrues when a default takes place. If the default had occurred three years before the date of filing of an application, the same will be barred under article 137 of the Limitation Act, 1963".

26 In the decision of the hon'ble Supreme Court in *Jignesh Shah* v. *Union of India* [2019] 217 Comp Cas 139 (SC) ; [2019] 10 SCC 750 at paragraph 28 it is among other things observed as under (page 163 of 217 Comp Cas) :

"Here again, the trigger point is the date on which default is committed, on account of which the company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, section 433(e) read with section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in section 434."

27 In *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Company (India) Ltd.* [2019] 8 Comp Cas-OL 250 (SC) ; [2019] 10 SCC 572 the hon'ble Supreme Court has observed that the respondent was declare "non-performing asset" on July 21, 2011 and section 7 application was filed in 2017 while the I and B Code was brought into force on December 1, 2016 and held that article 62 of the Limitation Act applies only to suits and application filed under section 7 falls within residuary article 137 of the Limitation Act and further the three years period had lapsed, the application under section 7 was held to be time barred.

28 An acknowledgment does not create any new right and it extends the limitation period as per the decision *P. Sreedevi* v. *P. Appu*, AIR 1991 Kerala 76. When a debtor makes an acknowledgment of his liability to pay a debt, it would mean that he was admitting a subsisting liability to pay. The burden lies on the creditor to prove that an acknowledgment was made within time as per the decision *Shah Gur Saran* v. *Shib Singh*, AIR 1943 All 393 [FB]. An acknowledgment in writing must indicate jural relationship as that of "debtor" and "creditor" between the parties.

29 As far as the present case present case is concerned the pendency of O. A. No. 310 of 2010 (filed on July 14, 2010) before the Debts Recovery Tribunal-III Kolkata will not preclude the first respondent/bank to file the application under section 7 of the Code before the Adjudicating Authority. If a party claiming the benefit of section 14 of the Limitation Act, 1963 had failed to secure relief in favour of earlier proceeding not because of any defect or jurisdiction or some other cause of like nature, he cannot derive the benefit of the ingredients of section 14 of the Act. By virtue of deed of guarantee corporate debtor being a "corporate person" owes debt to the bank. In the present case the "corporate debtor" is the guarantor and in the year 2008, undertook to repay the debt in case of default by the principal borrower. As per section 3(8) of the Code "corporate debtor" means a corporate person who owes debt of any person.

30 In the light of detailed qualitative and quantitative discussions aforesaid and also this Tribunal keeping in mind the present facts and circumstances

of the instant case in an integral fashion, which float on the surface case comes to an inescapable conclusion that there is an acknowledgment of "debt" on various dates like February 2, 2007, February 17, 2007, August 3, 2007 for the loan facilities availed of by Mahaveer Construction the letters of guarantee acknowledged by the corporate debtor (M/s. Surana Metals Ltd.) on September 16, 2010, March 3, 2012, May 27, 2015, October 24, 2016 executed by the appellant and on December 8, 2018 by the Surana Metals Ltd., etc. This apart, here is an acknowledgment of debt by the principal borrower but also the corporate debtor on May 27, 2015 and December 8, 2018, respectively. The object of specifying time limit for limitation is undoubtedly based on "public policy". The application projected before the Adjudicating Authority (NCLT) Kolkata Bench, on February 13, 2019 is well within limitation and not barred by limitation. Looking at from any angle, the present appeal sans merits and the same is dismissed without costs. The appellant is directed to furnish the certified copy of the impugned order of the Adjudicating Authority within one week from today and accordingly I. A. No. 199 of 2020 stands disposed of. I. A. No. 200 of 2020 stands closed.

[2020] 220 Comp Cas 69 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — AHMEDABAD BENCH]

PRANATPAL TRADELINK P. LTD. AND OTHERS, *In re*

HARIHAR PRAKASH CHATURVEDI and
MS. MANORAMA KUMARI ***(Judicial Members)***

March 28, 2019.

HF ▸ Petitioner

OFFENCES AND PROSECUTION—COMPOUNDING OF OFFENCES—FAILURE TO ENCLOSE BOARD'S REPORT WITH BALANCE-SHEET—BOARD'S REPORT ATTACHED WITH APPLICATION FOR COMPOUNDING—OFFENCE TO BE COMPOUNDED SUBJECT TO DEPOSIT OF COMPOUNDING FEES—COMPANIES ACT, 1956, S. 217(1).

On application by the directors of the company for compounding of offences of failure to attach the board's report with the balance-sheet as at March 31, 2011 as required under section 217(1) of the Companies Act, 1956 :

Held, *allowing the petition, that the contravention was technical in nature and due to some procedural lapses on the part of its directors the*

board's report was not enclosed with the company's balance-sheet as on March 31, 2011. However, the applicants had attached the board's report for the financial year 2010-11 with the compounding application, and had made good the alleged lapses. The applicants had further explained that failure to attach the board's report of the company with the balance-sheet was erroneous, but without any wrongful intention to its directors. Thus, the applicants had admitted their default, but had sought compounding of offence. The petition was to be allowed permitting petitioners Nos. 1 and 2 to compound the offence for violation of section 217(1) of the Companies Act, 1956, subject to deposit of the compounding fees by each of the applicants with the Registrar of Companies as directed.

C. P. No. 32/441/NCLT/AHM/2018.

Jaymeen Trivedi, Practising Company Secretary for the petitioners.

None for the Registrar of Companies.

ORDER

The order of the Bench was delivered by

1 HARIHAR PRAKASH CHATURVEDI ***(Judicial Member)***.—The present applicants, being directors of the company, viz., M/s. Pranatpal Tradelink P. Ltd., earlier filed an application before the Registrar of Companies, Gujarat, Dadra and Nagar Haveli, for compounding of offences against them for alleged violation of section 217(1) of the Companies Act, 1956 (Act, 1956).

2 Thereafter, the Registrar of Companies, Gujarat, forwarded their application along with its comments to this Tribunal to be decided on its merits. Thereafter, it is registered in this Tribunal as Company Petition No. 32/441/NCLT/AHM/2018.

3 The averments made in the present company application for compounding the offence alleged are stated hereunder :

3.1 M/s. Pranatpal Tradelink P. Ltd., is a company, and its registered office is situated at Block No. 304, 3639, G. S. C. B., Gota, Ta. Daskroi, Ahmedabad-382 481. Mr. Sandeep Vinodchandra Dave, i. e., applicant No. 1, director of the above said company, and he resigned from office of director on February 1, 2016. It is further stated that Mr. Hitesh Chinubhai Shah, i. e., applicant No. 2, is the director of the aforesaid company from June 7, 2010.

3.2 It is stated that both the applicants received show-cause notices dated November 10, 2017 from the Deputy Registrar of Companies, Gujarat, Dadra and Nagar Haveli, against alleged contravention of the provision

of section 217(1) of the Companies Act, 1956, the show-cause notice contains as such—

"Whereas M/s. Pranatpal Tradelink P. Ltd., is a company registered under the provisions of the Companies Act, 1956 (hereinafter referred to as the 'Act') in the State of Gujarat and having its registered office situated at Block No. 304, 3639, G. S. C. B., Gota, Tal. Dakroi, Ahmedabad-382 481.

and

Whereas, during the course of technical scrutiny of balance-sheet as at March 31, 2011 under section 206(1) of the Companies Act, 2013, it was observed that, inter alia, pointed out by this office vide point No. 4 of this office letter dated January 16, 2017 that the provisions of section 217(1) of the Companies Act, 1956 has been contravened as under :

'It is noticed from the balance-sheet of the company as at March 31, 2011 that the boards report is not attached with the balance-sheet as at March 31, 2011 as required under section 217(1) of the Companies Act, 1956. Therefore, the company and every officers of the company, have violated the provisions of section 217(1) of the Companies Act, 1956.'

and

Whereas, in view of the above observation, the provision of section 217(1) of the Companies Act, 1956 has been contravened and every officer of the company, in default, have rendered themselves liable to be prosecuted under section 218 of the Companies Act, 1956.

Now in view of what is stated hereinabove, you are hereby called upon to show cause as to why legal action under section 218 of the Companies Act, 1956 should not be initiated against the company and every officers of the company, in default.

Please note that if no satisfactory reply is received within 10 days from the date of this notice, it will be presumed that you have nothing to say in the matter and thereafter this office shall have no other alternative but to take legal action as afore stated.

The company and every officers of the company, in default are however at liberty to approach the compounding authority for compounding of the offences so committed, if they so desire, by filing appropriate compounding application in accordance with the provisions of the Companies Act, 2013."

3.3 It is explained and submitted by the applicants that the board of directors of the company had prepared a director's report for the financial year 2010-11 as per the provisions of section 217(1) of the Companies Act, 1956, the same was approved by the board of directors of the company in their board meeting dated August 10, 2011 and further circulated to the shareholders of the company in its annual general meeting held on September 3, 2011. It is further submitted that as per section 217(1) of the Companies Act, 1956, the board's report was to be attached to every balance-sheet laid before a company in general meeting. However, the Inspecting Officer pointed out that at the time of scrutiny of balance-sheet for the financial year 2010-11 and the board's report of the company was not attached with the balance-sheet as at March 31, 2011 which is mandatory under section 217(1) of the Companies Act, 1956.

3.4 The applicants further submitted that while submitting Form No. 23AC and ACA on MCA portal for the financial year 2010-11, by mistake another file was attached to the form, thus, the board report was lapsed to be filed. They further submitted that such violation of not attaching company's board report with the balance-sheet for the financial year 2010-11 was unintentional and with no mala fide intention of the directors.

3.5 The applicants further referred to the penal provision under section 217(5) of the Companies Act, 1956, which reads as under :

> "If any person, being a director of a company, fails to take all reasonable steps to comply with the provisions of sub-sections (1) to (3) or being the chairman, signs the board's report otherwise than in conformity with the provisions of sub-section (4), he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to twenty thousand rupees, or with both."

3.6 It is further pointed out that section 441 of the Companies Act, 2013 governs compounding of offence and provides that :

> "(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act (whether committed by a company or any officer thereof) with fine only, may with before or after the institution of any prosecution, be compounded by—
>
> (a) the Tribunal ; or
>
> (b) where the maximum amount of fine which may be imposed for such offence does not exceed five lakh rupees, by the Regional Director or any officer authorized by the Central Government,

on payment or credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorized by the Central Government, as the case may be, may specify."

For the aforesaid reasons, the applicants have prayed for compounding the alleged offence/statutory violation with following prayers : 4

"(a) that every officer of the company who is in default mentioned herein as applicant No. 1 and applicant No. 2 may be discharged as if no offence has been committed or allow composition of offence by imposing minimum possible compounding fees under the provisions of the Companies Act, 1956 as indicated in the show-cause notice."

In the present matter, the Registrar of Companies, Gujarat, Dadra and Nagar Haveli, has submitted a report dated February 27, 2018 by making some observations and comments, which are reproduced hereinbelow : 5

"Comments

It is submitted that during the course of technical scrutiny of the balance-sheet of the company as at March 31, 2011 it was observed that the boards report is not attached with the balance-sheet as at March 31, 2011 as required under section 217(1) of the Companies Act, 1956. Therefore, the officers of the company, in default have violated the provisions of section 271(1) of the Companies Act, 1956.

The applicants in paragraph No. 4.7 of the compounding application submitted that the violation of not attaching board report of the company with the balance-sheet of the company for the financial year 2010-11 was totally erroneously and there was no such wrongful intention to the directors.

The applicants have admitted the default and filed this compounding application for compounding of offence committed under section 217(1) of the Companies Act, 1956, which may be considered by this Tribunal on merits.

Fine provided in section

As per section 217(5) of the Companies Act, 1956, if any person, being a director of a company, fails to take all responsible steps to comply with the provisions of sub-sections (1) to (3), or being the chairman, signs the board's report otherwise than in conformity with the provisions of sub-section (4), he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to twenty thousand rupees, or with both."

6 By looking to the period of default of the alleged violation of section 217(1) of the Companies Act, 1956, this Tribunal is required to follow the relevant procedure for compounding of offences under section 621A of the Companies Act, 1956, which speaks that this Tribunal has been empowered to compound the offence punishable with imprisonment or with fine or with both. Therefore, this Tribunal took into consideration the period of default, as the alleged violation pertains to the financial year of 2010-11 which is against the provisions of section 217(1) of the Companies Act, 1956. The Central Government through the Ministry of Corporate Affairs, vide its Notification No. S. O. 1936(E), dated June 1, 2016 has declared that matters transferred from the Company Law Board to National Company Law Tribunal shall be disposed of by this Tribunal in accordance with the provisions of the Companies Act, 2013 or the Companies Act, 1956.

7 The provisions of section 441 of the Companies Act, 2013, also confers necessary power to this Tribunal, for compounding of certain offences. Section 441 of the Companies Act, 2013 came into force with effect from June 1, 2016 while the alleged breach of the statutory provisions of section 217(1) of the Companies Act, 1956 was detected by the Registrar of Companies, Gujarat, Dadra and Nagar Haveli, during the course of making scrutiny of company's balance-sheet of March 31, 2011 such violation/ offences are made punishable under section 217(5) of the Companies Act, 1956, but also made as compoundable under section 621A of the Companies Act, 1956. Hence, the issue involved in the present application needs to be dealt with above stated provisions specifically sections 217(5) and 621A of the Companies Act, 1956.

8 We have heard the submission of learned practising company secretary of the applicants and have gone through the contents of present compounding application.

9 By perusal of the material available on record, the alleged contravention seems to be technical in nature and due to some procedural lapses on the part of its directors for not enclosing board's report along with the company's balance-sheet as on March 31, 2011. However, the applicants have now attached the board's report for the financial year 2010-11 along with this compounding application, thus, they have made good of alleged lapses. The applicants have further explained that non-attaching of board's report of the company with the balance-sheet was erroneous, but without having any wrongful intention to its directors. Thus, it may be seen that the applicants have admitted their default, but has sought compounding of offence.

We carefully examined the aforesaid peculiar facts and circumstances of **10**
the present case and we are of the view that the present application deserves to be allowed as the alleged offence is made compoundable and can be compounded well by this court, because it is made punishable with imprisonment up to six months or with fine alone or with both.

For the aforesaid reasons, the present Company Petition No. 32 of 2018 **11**
is conditionally allowed by permitting petitioners Nos. 1 and 2 to compound the offence for alleged violation of section 217(1) of the Companies Act, 1956, subject to depositing compounding fees by each of the applicants with the Registrar of Companies :

Sl. No.	*Name of applicant*	*Amount (Rs.)*
1.	Sandeep Vinodchandra Dave	20,000
2.	Hitesh Chinubhai Shah	20,000

The above stated amount shall be paid within four weeks from the date of receipt of an authentic copy of this order. This can be paid by way of demand draft in favour of the Central Government, Ministry of Corporate Affairs or any other mode, as directed by the office of the Registrar of Companies, Ahmedabad, Gujarat.

In case the petitioners fail to pay the above ordered amount within the **12**
stipulated period or further extended period, then the Registrar of Companies, Gujarat, Dadra and Nagar Haveli, shall proceed to take appropriate action, including prosecution against the petitioners, as per applicable law under intimation to this Tribunal.

With the aforesaid observation and direction, the present company peti- **13**
tion is conditionally allowed and stands disposed of.

The registry is directed to communicate a copy of this order to the peti- **14**
tioners for necessary compliance, and also to the Registrar of Companies, Gujarat, Dadra and Nagar Haveli, for ensuring such compliance.

[2020] 220 Comp Cas 76 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH]

VIDEOCON INDUSTRIES LTD.

v.

STATE BANK OF INDIA AND OTHERS

M. K. SHRAWAT *(Judicial Member)*

March 13, 2019.

HF ▶ Applicant

INSOLVENCY RESOLUTION—APPLICATION BY FINANCIAL CREDITOR ADMITTED AND MORATORIUM DECLARED—NOTICE BY MINISTRY OF PETROLEUM DEMANDING PROFIT SHARE—PROHIBITION ON RECOVERY OF ANY AMOUNT DURING MORATORIUM—CLAIM TO BE MADE TO RESOLUTION PROFESSIONAL UNDER CODE—NOTICE NOT TO BE IMPLEMENTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 7, 14.

The application filed under section 7 of the Insolvency and Bankruptcy Code, 2016, was admitted by declaring moratorium under section 14 and appointing an interim resolution professional to commence the insolvency process. A notice dated October 22, 2018 was thereafter issued by the Ministry of Petroleum and Natural Gas (Exploration Division) demanding allocation of 100 per cent. of the sale proceeds in favour of the Government with immediate effect for recovering the provisional sum of US $314 million together with applicable interest towards the unpaid Government share of profit petroleum. On an application filed by the resolution professional for a declaration that the recovery notice dated October 22, 2018 was bad in law and illegal, the Ministry of Petroleum contended that the profit petroleum was its own asset and outside the ambit of section 14 of the Code :

Held, *that the scope of the application was not towards a request for enforcement of a foreign award. The Code was introduced to reorganize a corporate person in a time bound manner for maximization of the value of its assets as well as to promote entrepreneurship and also to balance the interests of all the stakeholders, notwithstanding alteration in the order of priority of payment of Government dues. The effect of declaration of a moratorium was that a prohibition was enforced for recovery against the corporate debtor. The prohibition was also towards institution of any suit or execution of any judgment, decree or order of any court of law, Tribunal, arbitration panel, etc. Once the moratorium was declared such an action on the part of the Ministry of Petroleum was not legal. The Code was fully applicable on the corporate debtor. The concerned Government authority was not to press or implement*

the notice dated October 22, 2018 during the commencement of the insolvency proceedings and as long as the moratorium was applicable on the corporate debtor. The Ministry of Petroleum could lodge its claim to any legally enforceable right of recovery to the appointed resolution professional. Status quo had to be maintained.

Cases referred to :

Hindustan Petroleum Corp. Ltd. *v.* Videocon Industries Ltd. [2012] SCC Online Del 3610 (para 3)

Noy Vallesina Engineering Spa *v.* Jindal Drugs Ltd. [2006] SCC On-Line Bom 545 ; [2006] 5 Bom CR 155 ; [2006] 3 Arb. LR 510 (para 3)

State Bank of India *v.* Videocon Industries Ltd. [2018] 3 Comp Cas-OL 144 (NCLT) (paras 1, 5)

M. A. No. 1300 of 2018 in C. P. (IB)-02/(MB)/2018.

Zal Andhyarujina, along with *Sundeep Ladda* along with *Ms. Sheetal Shah* instructed by *Mehta & Girdharlal*, (for Insolvency Resolution Professional, Anuj Jain), for the applicant.

Ms. Manidar Acharya, Senior Counsel (ASG) along with *Ms. Sheeja John*, *Anurag Ahluwalia* for respondents Nos. 2 and 7.

Tushad Kakalia, along with *Parikshit Barpujari* along with *Jehan Lalkaka*, instructed by *Mulla & Mulla* and CBC for respondent No. 4.

ORDER

M. K. SHRAWAT ***(Judicial Member)***.—This miscellaneous application is 1
submitted on October 29, 2018 by the resolution professional. (hereinafter RP) Mr. Anuj Jain having appointed vide an order dated June 6, 2018 titled as *State Bank of India* v. *Videocon Industries Ltd.* [2018] 3 Comp Cas-OL 144 (NCLT) (C. P. (IB)-02/(MB)/2018) passed under section 7 of the Insolvency and Bankruptcy Code, 2016.

1.1. The reason for filing this miscellaneous application, as explained, is that a notice dated October 22, 2018 was issued by Union of India, Ministry of Petroleum and Natural Gas (Exploration Division) Shastri Bhawan, New Delhi-110 001 (respondent No. 2), demanding quote, "3. You are, therefore, advised to assign and allocate 100 per cent. of the sale proceeds/oil and gas invoices in favour of the Government, with immediate effect for recovering the provisional sum of US $314 million together with applicable interest towards the unpaid Government share of profit petroleum. You are also advised to remit the above assigned amount to Pay and Accounts Officer (PAO), Ministry of Petroleum and Natural Gas (MoPNG) under

intimation to this office". unquote. This demand notice/letter is issued to the followings :

(1) Chairman, CPCL, 536, Anna Salai, Teynampet, Chennai ;

(2) Chairman, MRPL, GF, Mercantile House, 15KG MARG, New Delhi ;

(3) The Chairman and Managing Director, GAIL, GAIL Bhawan, Bhikaji Cama Place, R. K. Puram, New Delhi ;

(4) Chairman, BPCL, E. C. E. House, 28-a, KG Marg, Connaught Place, New Delhi.

1.2. There was a "Production Sharing Contract" which was executed on October 28, 1994 (known as Ravva PSC) between the Government and the following four parties having percentage of participating interest as follows :

"Sl. No.	*Name of Party*	*% Participating interest*
1.	ONGC Ltd. ("ONGC")	40%
2.	Videocon Industries Ltd.	25%
3.	Vedanta Ltd. ("VIL") (company in which Cairn India Ltd. Stands merged)	22.5%
4.	Ravva Oil (Singapore) Pte. Ltd. ("ROS")	12.5%"

1.3. A dispute arose between Government of India (GoI) and Videocon Industries (VIL), (corporate debtor), regarding deductibility of ONGC participating interest. There was a litigation for the purpose of computation of "post-tax rate of return" (PTRR) and "cost petroleum" (ONGC Carry Issue). The impugned dispute was referred by the VIL (corporate debtor) on August 19, 2002 to "International Arbitration Tribunal". The Tribunal passed its verdict granting "Partial Award" on March 31, 2005, stated to be upholding VIL's contention and simultaneously dismissing Government of India's contention with respect to the ONGC carry issue.

1.4. One of the major claim and contention of the applicant is that the GoI is required to re-compute PTRR, "Cost Petroleum" and "Profit Petroleum" in accordance with the said award giving direction for such reallocation. The parties were unable to agree for "quantification of profit", hence further litigation started. The GoI had filed an appeal on May 10, 2005 before the High Court of Kuala Lumpur, Malaysia. The High Court has given verdict agreeing with the contention/claim of VIL and held that it had no jurisdiction to hear the appeal of the GoI by pronouncing dismissal of appeal order dated August 5, 2009. Even further an appeal filed by the GoI, again the Federal Court of Malaysia dismissed vide order dated May 16, 2016.

1.5. As per the contention of the applicant, the award of the Tribunal had become final, therefore, binding upon the GoI.

1.6. When the matter was under dispute, the Ministry of Petroleum and Natural Gas had issued a notice dated July 10, 2014 stated therein that the following parties were liable to make the payment, as demanded herein-below :

> "6. Whereas, DGH vide letter dated May 15, 2014 has intimated this Ministry that M/s. Cairn India Ltd. (CIL), Ravva Singapore Pte. Ltd. (ROS), Videocon Industries Ltd. (VIL) and ONGC have made short payment of Government's share of profit petroleum (PP) in the Ravva field. The break-up of the profit petroleum of USD 314 million that is liable to be paid is as under :

"Items	*ONGC 40% PI*	*CIL 22.50% PI*	*ROS 12.50% PI*	*VIL 25% PI*	*Total*
ONGC Carry		64	35	71	170
Base Development Cost	52	29	16	32	129
VIL short payment				15	15
Total	52	93	51	118	314"

1.7. The vehement objection of the applicant is that in a situation when the arbitration tribunal had passed an award on March 31, 2005, then the GoI should not have unilaterally issued the impugned notice of July 10, 2014, which was in breach of "Ravva PSC". The Tribunal award dated March 31, 2005 was binding upon the parties. An interesting point has also been mentioned by this applicant that the said award of March 31, 2005 was a "partial award", meaning thereby partly in favour of the VIL and partly in favour of GoI. The GoI had acted upon that part of the award which was favouring the GoI, however ignored the verdict and the award which was declared in favour of the VIL. So the argument is that if a portion of an order/award is acceptable to one of the parties and acted upon that part of the order/award, then the entire order is binding upon the said party. It is pleaded that the portion of the award which had gone in favour of the VIL should also be acceptable to GoI since the litigation stood set at rest.

1.8. The applicant has vehemently contested the issuance of notice dated July 10, 2014 specially when the Appellate Courts have given their verdicts in favour of the applicant and all the contentions or claims of the GoI have been rejected. The Government of India through the said notice asked the VIL to show cause within 30 days as to why the Government of India nominee be not directed to recover an amount to the tune of USD 118

Million from the sale proceeds payable by the nominee of Government of India to VIL.

Attention has also been drawn on an order of the arbitral tribunal constituted by Mr. Soli J Sorabjee, Chairman, Justice G. T. Nanavati, Member and Justice J. K. Mehra, Member (Arbitration Case Nos. 1 and 3 of 2003) which was pending for adjudication, therefore, the respected chairman/ presiding arbitrator vide order dated May 18, 2015 has directed, quote "The Tribunal directs the respondents in the meantime to restrain from taking any coercive action in furthermore of or in pursuance to the show-cause notice dated July 10, 2014 issued to the claimant till the final hearing of the interim application at a neutral venue in Colombo." unquote.

1.9. The applicant has pointed out that even after losing the case, the GoI had recovered (i) a sum of USD 16.70 million and (ii) a sum of Rs. 372.21 million in excess of actual recoverable amount. Therefore, VIL is seeking refund of excessive recoveries made by GoI. Before the said Tribunal an application of this nature had already been submitted.

1.10. In respect of "base development cost" ("BDC") it is informed that the arbitration final award at Kuala Lumpur dated January 18, 2011 had gone in favour of VIL.

1.11. In respect of "exchange rate issue" it is informed that the arbitration partial award dated March 31, 2005 had concluded that the sales made by VIL to nominee of GoI were in fact sales made to GoI. The said award provided for the payment by converting USD to Indian rupees at SBI, middle rate (i. e., average of SBI TT buy rate and SBI TT sell rate). As per this applicant, and it is important to place on record that, pursuant to the said award, VIL has been making payment of the GoI share of "Profit Petroleum" by converting USD into Indian rupees at SBI middle rate. It is also placed on record that after dismissal of final appeal of GoI by the Federal Court of Malaysia in May 2016, there was no recourse left for the GoI but to settle the exchange rate as per the claim of VIL.

1.12. A legal argument has also been raised that vide an order dated June 6, 2018 in the case of Videocon, an order is pronounced and Insolvency was declared. Upon admission, the "moratorium" under section 14 of the Insolvency Code was pronounced. On pronouncement of "moratorium" no recovery proceeding be initiated against the debtor-company. Because of the declaration of "moratorium" the applicant is seeking an injunction against the impugned notice dated October 22, 2018 issued by Ministry of Petroleum. It is informed that the sale proceeds are receivable from Chennai Petroleum Corporation, Mangalore Refinery, GAIL (India) Ltd., and Bharat Petroleum (hereinabove made respondent Nos. 3 to 6.).

1.13. The method of allocation and the details of claim as well as counter claims have been narrated from the side of the applicant and finally made Prayers as under :

"(a) Pass an order declaring the enforcement and/or acting upon in any manner pursuant to impugned recovery notice dated October 22, 2018 issued by respondent No. 2, Union of India pending moratorium/CIRP of applicant is bad in law and illegal ;

(b) Pass an order that the impugned recovery notice dated October 22, 2018 issued by Union of India be stayed and direction restraining the respondents, jointly or severally, not to acted upon or enforced in any manner in furtherance of the said impugned notice to the extent of the applicant, i. e., Videocon Industries Ltd. ;

(c) Pass an order and direction restraining respondents Nos. 3 to 6 from assigning and allocating any portion of the sale proceeds/Oil and Gas Invoices in favour of respondent No. 2 for recovering any sum due from the applicant, i. e., Videocon Industries Ltd. ;

(d) Pass an order and direction restraining respondents Nos. 3 to 6 from remitting any portion of the sale proceeds/Oil and Gas Invoices payable to the applicant, i. e., Videocon Industries Ltd. to Pay and Accounts Office (PAO), Ministry of Petroleum and Natural Gas (MoPNG) ;

(e) Pass an order and direction to respondents Nos. 3 to 6 to continue to pay VIL in accordance with the practice adopted hitherto without deducting any amounts as set out in GoI's letter dated October 22, 2018 ;

(f) Pass an ad interim ex parte stay order in favour of the applicant, i. e., Videocon Industries Ltd. in terms of the abovementioned prayers ;

(g) Pass an order awarding the entire costs of this application to the applicant, i. e., Videocon Industries Ltd. ;"

Reply from respondent No. 2

From the side of respondent No. 2 (Union of India) through its Ministry of Petroleum and Natural Gas and respondent No. 7 Directorate General of Hydro Carbons, a reply has been submitted. In this reply it is contested that respondent No. 2 is rightly entitled to recover its share of "Profit Petroleum". According to the respondents, the applicant had failed to demonstrate as to how the "Profit Petroleum" of Rs. 118 million to be paid by respondents Nos. 2 to 6. **2**

2.1. Narrating the brief facts as it is stated in the reply to the impugned application that Union of India is the sovereign owner of the petroleum and natural resources underlying below the seabed of India territorial waters and the continental shelf, which is recognized and declared vide article 297 of the Constitution of India. This fact has been interpreted by the hon'ble Supreme Court to mean that the people of India are the real owners of these resources and that State is only a Trustee to hold them for the benefit of the people. The answering respondents took steps to explore and exploit expeditiously the petroleum resources available within a specified area for the overall interest of India. In accordance with the rights conferred to it under the Oilfields (Regulation and Development) Act, 1948, the answering respondents entered into a production sharing contract dated October 28, 1994 ("PSC") with the applicant, Cairn India Ltd. (now Vedanta Ltd.). ("Cairn Energy") and Ravva Oil (Singapore) Pte. Ltd. ("Ravva Singapore") (together "the Contractor") for the development of a specified offshore area in the Bay of Bengal. Under the production sharing contract, the applicant and other entities (not parties to the present proceedings) undertook the task of development of the offshore fields to enable crude oil production. As per the scheme of the PSC, the applicant and other entities (not parties to the present proceedings) were entitled to recoup all the costs incurred in connection with the exploration and development of the oilfield from the portion of the petroleum produced ("cost petroleum"). All the remaining petroleum produced inter alia by the applicant after deducting the cost petroleum" would be shared by the applicant and the answering respondents in a particular proportion so as to have their shares of the profits ("profit petroleum"). The computations and manner in which the "profit petroleum" would be distributed amongst the parties was governed under article 16 of this PSC. One of the claim of respondent No. 2 is that it was a settled position among the parties, as also held by the arbitral tribunal in its partial award dated March 31, 2005 that the revenue is the property of the Ministry of Petroleum. As a consequence, the Ministry is only responsible to pay the contractor the cost incurred. However, in practice adopted for the sake of convenience, the operator is physically involved in production and transportation of crude oil and gas produced. The operator is to supply the hydrocarbons and collect the revenue out of sale. The operator is required to allocate the revenue towards the "cost petroleum" and "profit petroleum" share of the Government and other constituents including VIL. The operator is, therefore, only administering the operation. Accounts so maintained are to be approved by the management committee. Allegation is that the operator had not

obtained any such approval from the management committee. One more fact has been stressed upon that it was agreed in PSC that costs incurred by ONGC prior to PSC was to be reimbursed by the operators including the respondents to ONGC. There was a dispute about the "base development cost" ("BDC"). The contractor had recovered cost about USD 500 million towards BDC as against their entitlement of only USD 188.98 million. Therefore, the contractor through operator had appropriated excessive amount of cost without approval of management committee. The outcome was that the share from "profit petroleum" entitlement got adversely affected.

2.2. To resolve the controversy, the contractor had initiated arbitration proceedings against the respondent. The Arbitral Tribunal vide award dated January 18, 2011 decided the dispute with regard to base development cost in favour of the contractor, allegedly disregarding the express terms of the contract. Due to this the nation was deprived to the extent of USD 129 million of Government share of "profit petroleum".

2.3. With regard to the ONGC carry issue, since the contractor represented that they were entitled to deduct the ONGC carry charges in the computation of PTRR, the contractor deducted the same in PTRR as a consequence of which, the answering respondents suffered a loss of "profit petroleum" to the extent of USD 284 million because of illegal suppression of PTRR calculated under appendix D of PSC.

2.4. A legal point vehemently pleaded is that the awards dated March 31, 2005 and January 18, 2011 being foreign awards, therefore, the applicant (VIL) is under obligation to enforce the said award as per Part II of the Arbitration and Conciliation Act, 1996 (Arbitration Act). The award is declared but it is not enforceable being not a decree of any court. A fact has also been mentioned that the applicant (VIL), Cairn Energy and Ravva Singapore filed OMP (EFA) (Comm) No. 15 of 2016 in the hon'ble Delhi High Court seeking recognition and enforcement of the award dated January 18, 2011. The said petition was filed beyond the period of limitation and is still pending before the hon'ble High Court. In view of what is stated hereinabove and in the circumstances, the award dated January 18, 2011 is not yet recognized as a valid decree of a court under section 49 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). According to the respondent, the applicant had not yet filed any "execution petition" in respect of the Partial Award dated March 31, 2005. It is also informed that the PSC is expiring by October, 2019 but in terms of article 16 of the said Contract, the respondent had not yet received its share of "Profit Petroleum". Due to said reason a notice was issued on October 22, 2018 to

OMCs, viz., (i) ONGC, (ii) Vedanta Ltd. (Cairn Energy) (iii) Ravva Singapore and (iv) VIL. On receiving notice, Cairn Energy had approached the High Court of Delhi through an interim application and vide order dated October 29, 2018 the hon'ble court had refused to stay the operation of the said notice. The applicant (VIL) had filed this application and on this application an ad interim order was passed on October 31, 2018 directing to maintain the status quo. That interim order was challenged before the hon'ble National Company Law Appellate Tribunal and in Appeal No. (AT) (Insolvency) No. 717 of 2018 order dated November 20, 2018 it was held as under :

> "2. Since the Adjudicating Authority has passed the interim direction on the basis of a prima facie view which is directed to last only till November 26, 2018 and M. A. No. 1300 of 2018 has not been decided on merit, it would be appropriate to dispose of the instant appeal by requesting the Adjudicating Authority to expedite the disposal of aforesaid MA after taking reply from the appellant. The Adjudicating Authority will permit the appellant to submit its reply on November 26, 2018.
>
> 3. To safeguard the interests of both the parties, I am of the considered opinion that it would be appropriate to direct that the oil companies (respondents Nos. 2 to 5) shall not release amounts under profit petroleum which comprises subject matter of notice, till disposal of M. A. No. 1300 of 2018.
>
> 4. Learned Adjudicating Authority is requested to consider the aforesaid MA on its merit being uninfluenced with the observations made in the impugned order. It is clarified that this order shall not in any manner be interpreted as limiting the authority and powers of Adjudicating Authority to pass appropriate direction in regard to profit petroleum after hearing the matter on merit."

2.5. Further it is pleaded that the "Profit Petroleum" is an asset of the respondent, hence out of the ambits of section 14 of the IBC, therefore, the "moratorium" has no role to play to recover its own asset belonging to respondent. The answering respondent has a legal right over the Profit Petroleum, therefore, issued notice dated October 22, 2018. Such claim also does not constitute the essential Goods and Services. It is concluded that the applicant is not entitled to the relief(s) as prayed for in this application.

3 Learned counsel advocate Manidhar Acharya (ASG) along with learned Sheeja John along with advocate Anurag Ahluwalia and Mr. N. P. Puranik, Dy. G.M.-C.F. appeared. The case law relied upon are as under :

(1) [2012] SCC OnLine Del 3610 (*Hindustan Petroleum Cor. Ltd.* v. *Videocon Industries Ltd.*) and (*Union of India* v. *Videocon Industries Ltd.*) O. M. P. No. 223 of 2006, order dated July 13, 2012 ;

(2) [2006] SCC OnLine Bom 545 ; [2006] 5 Bom CR 155 ; [2006] 3 Arb LR 510 and *Noy Vallesina Engineering Spa* v. *Jindal Drugs Ltd.*, order dated June 5, 2006.

3.1. It is vehemently pleaded by learned counsel that the impugned foreign award is not enforceable under the Arbitration Act in terms of section 49 which says that, for enforcement of foreign award, a satisfaction of a court is to be recorded and only thereupon such award is enforceable. Further it is pleaded that the Profit Petroleum is a public property and the Government is the sole owner in respect of Petroleum produced within contract area. Merely demanding of one's own share of profit is not recovery of any tax or cess, therefore, clauses of the "moratorium" do not apply.

There is an "affidavit-in-reply" on behalf of respondent No. 4 : Man- **4**
galore Refinery and Petrochemicals Limited, however, through this affidavit the deponent remained non-committal and affirmed that the directions of the National Company Law Tribunal shall be complied within due course.

Findings

Heard both the sides at length. Perused the records of the case in the **5**
light of the evidences and precedents cited by the rival sides. (i) A fundamental question which is to be answered while deciding this miscellaneous application is that whether an action of any authority, which may cause financial loss to a debtor company which is under the insolvency proceedings having huge financial liability, be approved within the four corners of the Insolvency Code ? There is one more question that (ii) Whether a claimant, may be Government authority, can seek permission from the Adjudicating Authority functioning under the Insolvency and Bankruptcy Code, 2016, to settle its claim in the garb of right over its own asset while the debtor-company is under the insolvency proceedings, instead of lodging claim before the resolution professional already appointed ?

5.1. An order was pronounced under section 7 of the Insolvency and Bankruptcy Code, 2016 on June 6, 2018 titled as *State Bank of India* v. *Videocon Industries Ltd.* [2018] 3 Comp Cas-OL 144 (NCLT) (C. P. (IB)-2(MB)/2018) admitting the petition of the financial creditor by declaring "moratorium" under section 14 and appointing interim resolution professional to commence insolvency process. It is worth to place on record that the debtor company is under heavy financial debt pertaining to various

types of loan facilities availed from consortium of banks approximately to the tune of Rs. 3,961 crores. The process of consolidation of group matter under the direction of the Principal Bench, New Delhi and preparation of information memorandum for inviting expression of interest is in progress on the date when this interim application was submitted.

5.2. The reason for submission of this miscellaneous application is a letter-cum-notice dated October 22, 2018 (No. O-22013/38/2010-ONG-D-V (E-4731) issued by respected under secretary to the Government of India, Ministry of Petroleum and Natural Gas (Exploration Division) with the subject quote, "Non-payment of Profit Petroleum by M/s. Videocon Industries Ltd., M/s. Oil and Natural Gas Limited, M/s. Vedanta Limited and Ravva Singapore Pte. Ltd. (ROS) under Ravva PSC." unquote. Being an urgent and directly affecting the source of revenue generation of the debtor-company, the resolution professional has preferred this miscellaneous application and the main prayer is that the operation of the impugned letter-cum-notice dated October 22, 2018 issued by Union of India be stayed.

5.3. It is worth to reiterate, although already referred in foregoing paragraphs, that previously a notice was issued on July 10, 2014 by the Ministry of Petroleum, wherein with reference to Production Sharing Contract dated October 28, 1994 signed with Cairne India Ltd., Ravva Singapore, ONGC and VIL in respect of Ravva Oil and Gas demanding therein a recovery of short payment of the Government's share of Profit Petroleum in the said Ravva filed from ONGC, CIL, ROS, VIL in respect of the items, i. e., ONGC Carry, Base Development Cost and VIL short payment. The demand in respect of VIL 25 per cent. PI was 118 million US dollar. It was specified that the said three companies were given notice to show cause as to why within 30 days all Oil Marketing Companies be not directed to recover the amount mentioned against the companies and ONGC together with interest from sale proceeds. It is now worth to mention at this juncture that the same amount, i. e., USD 118 million from VIL is now again claimed through the impugned notice dated October 22, 2018.

5.4. The issuance of notice dated July 10, 2014 as raised by the Government of India, Ministry of Petroleum was challenged before the respected Arbitral Tribunal and an interim order was passed on August 4, 2014 by the hon'ble Bench constituted by Soli J. Sorabjee, Justice (Retd.) G. T. Nanavati and Justice (Retd.) J. K. Mehra wherein opined as under :

> "The Tribunal is of the view that the present dispute is squarely covered within the ambit of the expression 'sums payable to either parties'. The contention of learned ASG Nagesh Rao that the Tribunal

is functus officio except to the extent of the 'computation of the sums payable' ignores the fact in addition to the same, the Tribunal also retained jurisdiction to determine the sums payable to either parties. The present dispute concerns itself with the very same question, namely the sums which are payable by or to either party. It is the considered opinion of the Tribunal that it has not become functus officio and has jurisdiction to determine the sums payable to other parties."

5.5. Not only the above observation, the Tribunal held as under :

"To sum up, the Tribunal holds :

(a) The Tribunal is not functus officio to consider and entertain the interim application dated July 24, 2014 filed by the claimant ;

(b) The Tribunal is not denuded of the power to grant interim relief as prayed for or after modifying the same, if a case is made out after hearing the parties ;

(c) The issue of juridical seat of arbitration is pending adjudication before the Federal Court at Malaysia. Accordingly, the present order will be deemed to have been made at the juridical seat as finally determined by the Federal Court at Malaysia."

5.6. Finally on May 18, 2015 in the said Arbitration case an interim order was passed by the Presiding Arbitrator Mr. Soli J. Sorabjee, already reproduced supra in para 1.8 that the respondents (Ministry of Petroleum and Natural Gas) be restrained from taking any coercive action in pursuance of show-cause notice of July 10, 2014 (referred supra).

5.7. The above discussion revolving around an attempt of GoI, Ministry of Petroleum for recovery of the very amount of 118 Million US Dollar was thwarted by granting interim restrain order in the year 2014 by the Arbitral Tribunal of India.

Now again vide a notice of October 22, 2018, almost on identical lines, **6**
GoI, Ministry of Petroleum has issued notice for recovery/collection of USD 118 million from VIL. On the face of it, the impugned notice of October 22, 2018 is nothing but a repetition of an earlier attempt. If the fresh attempt is similar then naturally the outcome shall also be identical. Before giving a final verdict it is quite appropriate to deal with the contentions of both the sides.

6.1. From the side of the Government of India a legal question has been raised that the impugned USD as claimed by the Government was the outcome of Arbitral Tribunal Award of Malaysia of January 18, 2011 and interim partial award respectively dated February 12, 2004 and December 23, 2004. Because the arbitral awards were pronounced by an Arbitration

authority outside India, therefore, Part II of the Arbitration and Conciliation Act, 1996 shall be operative. The basic contention is that any foreign award which would be enforceable shall be treated as binding where the court is satisfied that the foreign award is enforceable and that the Award thereafter shall be deemed to be a decree of that court. In this regard a moot question is to be answered that whether the applicant is trying to enforce its right on the Petroleum Profit by enforcing the said Foreign Award, or that the GoI is issuing notice for recovery of its profit sharing ratio. The present contention undisputedly raked up due to the issuance of the impugned notice dated October 22, 2018. It is not the applicant, i. e., VIL who has made an attempt for its claim over petroleum profit. On the contrary, the GoI is attempting to recover petroleum profit, undisputedly not yet crystalized. The legal question of applicability of Chapter II of the Arbitration and Conciliation Act, 1996 is therefore misplaced having no role to pay under the present facts and circumstances.

6.2. The issue before me is not the enforcement of an award pronounced by a Foreign Tribunal. All the case law cited from the side of the GoI revolve around a legal question that under what circumstances a procedure is to be followed as enshrined under section 47 read with section 48 of the Arbitration and Conciliation Act, 1996. I am of the view that the scope of this miscellaneous application is very limited that whether the GoI can recover Petroleum due at this stage when the corporate debtor is already under the insolvency. The scope of this miscellaneous application is not towards a request of enforcement of foreign award. Because of this reason, since this Bench is not adjudicating upon enforcement of foreign award, therefore, not inclined to answer the legal question raised about the applicability of sections 47, 48 and 49 of the Arbitration and Conciliation Act, 1996.

7 This Bench is only concerned about the enforcement of the provisions of the Insolvency Code. This Code is introduced with the objective as per its preamble, to reorganize a corporate person in a time bound manner for maximization of value of assets as well as to promote entrepreneurship along with the motive to balance the interest of all the stakeholders, notwithstanding alteration in the order of priority of payment of Government dues. All attempts are to be made to procure the value of the debtor company as also to procure the assets of the debtor company. Already an order has been pronounced on June 6, 2018 by this Bench under section 7 of the Insolvency Code, thereupon, implementation of section 14 of the IBC by declaring commencement of "moratorium". The effect of declaration of "moratorium" is that prohibition is enforced for recovery against the said

corporate debtor. Prohibition is also towards institution of any suit or execution of any judgment, decree or order of any court of law, Tribunal, arbitration panel, etc. Once the "moratorium" is declared such an action on the part of the GoI, Ministry of Petroleum, is not legal as far as the Insolvency Code is concerned now fully applicable on this corporate debtor.

In the light of the foregoing detailed discussion it is judicious to direct 8
the concerned Government authority not to press or implement the impugned notice dated October 22, 2018 during the commencement of the insolvency proceeding and as long as the "moratorium" is applicable on this corporate debtor. At the most, the Ministry of Petroleum can lodge its claim of any legally enforceable right of recovery to the appointed resolution professional, being not rendered remediless, as prescribed under the Code. Further directed that respondents Nos. 3 to 6, i. e., Chennai Petroleum Corporation Ltd. ; Mangalore Refinery and Petrochemicals Limited ; GAIL (India) Ltd. ; and Bharat Petroleum Corporation Ltd. are restrained and not to remit sale proceeds which are due to this corporate debtor, i. e., Videocon Industries Ltd. Status quo shall be maintained, i. e., respondents Nos. 3 to 6 shall continue to pay the share to VIL as adopted hitherto.

This miscellaneous application is disposed of accordingly. 9

[2020] 220 Comp Cas 89 (NCLAT)

[Before the National Company Law Appellate Tribunal — New delhi]

M. SRINIVAS

v.

SMT. RAMANATHAN BHUVANESHWARI AND OTHERS

Sudhansu Jyoti Mukhopadhaya J. ***(Chairperson)***,
A. I. S. Cheema J. ***(Judicial Member)*** and
Kanthi Narahari ***(Technical Member)***

July 24, 2019.

HF ▸ Respondent

Adjudicating Authority—Powers—Has power to refer matter to Central Government for investigation into affairs of company—Companies Act, 2013, s. 213—Insolvency and Bankruptcy Code, 2016—National Company Law Tribunal Rules, 2016, r. 11.

Under clause (b) of section 213 of the Companies Act, 2013, on an application made "by any other person" or "otherwise", if the Tribunal or Adjudicating Authority is satisfied that there are circumstances suggesting that

the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any of its members, or that the company was formed for any fraudulent or unlawful purpose and that the person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members or the members of the company have not given all the information with respect to its affairs which they might reasonably expect, and that the affairs of the company ought to be investigated, after giving a reasonable opportunity of being heard to the parties concerned, the Tribunal or Adjudicating Authority has power to refer the matter to the Central Government for investigation into the affairs of the company.

Apart from the power conferred by section 213 of the Companies Act, 2013, the Tribunal has inherent powers under rule 11 of the National Company Law Tribunal Rules, 2016. Therefore, in public interest, it is always open to the Tribunal after giving a reasonable opportunity of being heard to the parties concerned refer the matter to the Central Government for investigation, if the Tribunal or Adjudicating Authority forms a prima facie opinion that acts of fraud have been committed by company or group of companies or its director(s) or officers.

The Adjudicating Authority based on the forensic audit report directed the Central Government to refer the matter to the Serious Fraud Investigation Office for further investigation into the affairs of the corporate debtor, bank and other group of companies including the directors of the corporate debtor and group companies and officials of the bank. On appeal by the shareholder of the corporate debtor challenging the power of the Adjudicating Authority in exercising of power conferred under section 213 of the Companies Act, 2013 :

Held, accordingly, *dismissing the appeal, that the forensic audit report alleged that the members of the corporate debtor and its group companies along with officers of the bank had committed certain fraud, which, inter alia, suggested that a sum of Rs. 3,172.25 lakhs were receivable by the corporate debtor. The appellant and others were given reasonable opportunity of hearing by the Adjudicating Authority. There was no need for interference against the order.*

SWISS RIBBONS P. LTD. *v.* UNION OF INDIA [2019] 213 Comp Cas 198 (SC) *relied on.*

Order of the National Company Law Tribunal affirmed.

Shivram Prasad (Y.) *v.* S. Dhanapal [2019] 214 Comp Cas 83 (NCLAT) (para 11) *and* Swiss Ribbons P. Ltd. *v.* Union of India [2019] 213 Comp Cas 198 (SC) (para 12) *referred to.*

Company Appeal (AT) (Insolvency) No. 498 of 2019.

Ashish Rana and *Surekh Baxy*, for the appellant.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

Sudhansu Jyoti Mukhopadhaya J. ***(Chairperson)***.—In the "corporate insolvency resolution process" against M/s. Bhuvana Infra Projects, the "resolution professional" brought to the notice of the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench that the promoters of the "corporate debtor" and its company defrauded a number of creditors of more than crores of rupees. The Adjudicating Authority by impugned judgment dated April 16, 2019 dispose of interlocutory application in exercising of power conferred under section 213 of the Companies Act, 2013, with following directions : **1**

> "19. In the result by exercising powers conferred on this Adjudicating Authority, which being the National Company Law Tribunal, under section 213 of the Companies Act, 2013, I. A. No. 446 of 2018 in C. P. (IB) No. 122/BB/2017 is disposed with the following directions :
>
> (1) Learned resolution professional is directed to forward all material documents, which is connected to the present case including the Forensic Audit Report dated December 14, 2018 the Central Government, within a period of three weeks from the receipt of the copy of the order.
>
> (2) Learned resolution professional is also directed to furnish all the documents forwarded to the Central Government, to all parties/ other side duly following principles of natural justice.
>
> (3) The Central Government is directed to refer the matter to the SFIO for further investigation into the affairs of the corporate debtor, Bank of Maharashtra and other related companies including director of companies of corporate debtor and related companies and officials of Bank of Maharashtra basing on the report of forensic audit report, as expeditiously as possible.
>
> (4) Bank of Maharashtra is also directed to extend full assistance to the SFIO to complete the investigation as expeditiously as possible.

(5) The parties are liberty to take appropriate legal course of action basing on the ultimate findings given by the SFIO in this case.

(6) The prayer as sought for the application stand disposed of in the light of above directions.

(7) No order as to costs."

2 The appellant-"M. Srinivas", majority shareholder of the "corporate debtor" (third respondent before the Adjudicating Authority) has challenged the order dated April 16, 2019 on the ground that the Adjudicating Authority has no jurisdiction to pass order under section 213 of the Companies Act, 2013.

3 The question arises for consideration in this appeal is whether the "Adjudicating Authority" which is the "National Company Law Tribunal" having dual jurisdiction under the "Companies Act, 2013" and the "Insolvency and Bankruptcy Code, 2016" can direct the Central Government to refer the matter to the "Serious Fraud Investigation Office" (SFIO) for further investigation into the affairs of the "corporate debtor", Bank of Maharashtra and other group of companies including the directors of the companies of corporate debtor and group companies and officials of Bank of Maharashtra basing it on the "Forensic Audit Report".

4 During the "corporate insolvency resolution process", the "resolution professional" of M/s. Bhuvana Infra Projects P. Ltd., earlier filed an application (I. A. No. 269 of 2018) under section 66 of the Insolvency and Bankruptcy Code, 2016 (for short, "the I and B Code") for recovery of Rs. 46 crores from the "groups of companies" and the directors of the "corporate debtor", the Adjudicating Authority by order dated October 24, 2018 observed that the "resolution professional" has not made out any prima facie case for alleged discrepancies under section 66 of the I and B Code and there cannot be a parallel proceedings before the Tribunal and the court.

5 Subsequently, the "committee of creditors" appointed "forensic auditor" to conduct a forensic audit report and on receipt of the report, "resolution professional" filed another I. A. No. 446 of 2018 under section 66 read with sections 25(2), 69, 70 and other applicable sections of the I and B Code, inter alia, seeking to attach the personal assets of one Mr. Pratap Kunda (who was the first respondent) and Mr. Sanjay Raj (who was the second respondent) and Mr. M. Srinivas (who was the third respondent and appellant herein) alleging that they are responsible for defrauding the creditors and in order to recover the total dues of Rs. 461,163,402 by exercising power conferred on the "Adjudicating Authority"/"National Company Law Tribunal" and on the said application, the order has been passed referring

the matter to the Central Government for investigation through SFIO. The appellant-Mr. M. Srinivas has challenge the aforesaid order.

Learned counsel appearing on behalf of the appellant submitted that the **6** Adjudicating Authority has not been conferred with power under section 213 of the Companies Act, 2013 in absence of any amendment made in Schedule XI of the I and B Code. It was also submitted that the Adjudicating Authority has powers under section 49,—"Transactions defrauding creditors"—which relates to undervalued transaction ; section 65, which provides action against any person who has done certain things fraudulently or with malicious intent during the "insolvency resolution process" or "liquidation" ; section 66 in case during the "corporate insolvency resolution process" or in "liquidation process", it is found that any business of the "corporate debtor" has carried out with the intent to defraud creditors and under section 35 for the "liquidator" to investigate the affairs of the "corporate debtor". This apart, action can be taken and punishment can be imposed by the Special Court only under section 68(b) of the I and B Code, section 69, section 71 and section 74 of the "I and B Code". According to the appellant all the allegations are baseless and not based on record.

From the record, we find that the Adjudicating Authority having gone **7** through the "forensic audit report" and observed :

> "7. Following are the irregularities pointed out in the forensic audit report :
>
> (a) Related parties' and individuals behind these companies :
>
> (i) The corporate debtor-M/s. Bhuvana Infra Projects (BIPPL), M/s. Golden Gate Properties Ltd. (GGPL), M/s. Prisha Properties India P. Ltd. (PPIL) and M/s. Commune Properties P. Ltd. (CPIL), New Age Properties LLP are part of the 56 group companies, which are related parties.
>
> (ii) Mr. Prattap Kunda and Mr. Sanjay Raj are the individuals related to all the above group/related entities.
>
> (iii) Loan from HDB Financial Services being serviced by GGPL and PPIPL, also showing group company relationship between the entities and the corporate debtor.
>
> (iv) Mr. Sanjay Raj is the 'Benami' individual in whose name the properties are being purchased by the group companies.
>
> (b) Loans availed from the Bank of Maharashtra (BoM) in a fraudulent manner and mis-utilisation of CC facility :
>
> (i) Few months directorship to impress the Bank with credentials of group entities : Mr. Sanjay Raj, the director-cum-KMP of the

group became director of corporate debtor (BIPPL) for a period of five months only during which period the first tranche of CC limit of INR 500 lakhs was availed from BoM by also providing personal guarantee and had hypothecated land in his name as collateral security.

(ii) Mis-use of CC facility from BoM against the terms of sanction : The cash credit facility, meant for working capital, was mis-utilised by transfer to other bank accounts of BIPPL and in turn used for purchase of fixed assets for INR 79.50 lakhs in contravention to the conditions of CC limit sanction. As per the loan sanction, the facility can be called back if there is violation in the utilization of funds.

(iii) Enhancing bank CC facility from Rs. 5 crores to Rs. 10 crores to accommodate fixed assets purchase in violation of loan sanction terms : BIPPL had applied for a term loan of INR 450 lakhs with BoM in relation to setting up of a per-cast plant for the commune 1 project under CPIPL in financial year 2015-16. However, the term loan was rejected due to issues with the property pledged as collateral and the bank requesting additional security which BIPPL was not willing to give. Thus, it appears that during financial year 2014-15 the CC facility from BoM was enhanced from INR 500 lakhs to INR 1,000 lakhs in order to potentially accommodate the setting up of Precast Plant which is in violation of the restrictive covenant of the loan.

(iv) Further issue of shares from ICD from the group : During financial year 2015-16, the inter corporate deposit ('ICD') from PPIPL was used to allot an additional 37,00,000 shares to M. Srinivas taking the subscribed share capital to 50,00,000 shares.

Therefore, RP is of the view that this done primarily to meet the capital adequacy ratio and the requirement of promoters' contribution for the enhanced CC facility.

(v) Inflating revenue to avail CC limit enhancement :

Revenue for financial year 2014-15 inflated by INR 2,300.49 lakhs through year-end adjustment entry. It may be noted that CC limit enhanced by BoM from 500 lakhs to 1,000 lakhs in financial year 2015-16, apparently based on the financial year for 2014-15.

(vi) Surge in financial year 2014-15 to facilitate enhancement : The auditors observed in financial year 2014-15, when then enhancement of the CC facility from INR 500 lakhs to INR 1,000 lakhs, a surge in revenue, profit, and inventory and a reduction in debtors.

(c) Financial irregularities in the conduct of business of CD :

(i) Identified cash deposits of INR 171.95 lakhs into and cash withdrawals of INR 165.81 lakhs from the bank accounts of BIPPL. The transactions pattern indicates that these could potentially be diversion of funds for generation of unaccounted cash.

(ii) Identified purchases of INR 1,881.55 lakhs from non-OEM, small time vendors and traders, which appears to be suspicious.

(iii) Parking of funds of INR 346.66 lakhs with contractors through potentially fictitious suspense account in financial year 2013-14 and subsequently written-off the books of account of BIPPL in financial year 2016-17.

(d) Round tripping transaction :

(i) Identified round tripping transactions form the bank accounts of BIPPL for INR 779.00 lakhs which could potentially be accommodation entries.

(e) Asset stripping :

(i) Inventory worth INR 941.23 lakhs written-off during financial year 2017-18 without any documentation and/or revenue being recognized.

(ii) Fixed assets sold to scrap dealers, resulting in INR 579.00 lakhs of fixed assets being written-off in the books of BIPPL during financial year 2016-17.

(f) Anomalies in accounting and audited financial statements :

(i) Revenue for financial year 2014-15 inflated by INR 2,300.49 lakhs through year-end adjustment entry. It may be noted that CC limit enhanced by BoM from 500 lakhs to 1,000 lakhs in financial year 2015-16, apparently passed on the financial for 2014-15.

(ii) Revenue for financial year 2015-16 written-off to the extent of INR 2,437.24 lakhs through year-end adjustment entry. However, BoM enhanced CC limit from 1,000 lakhs to 1,250 lakhs in financial year 2016-17.

(iii) Revenue for financial year 2016-17 written-off to the extent of INR 2,706.26 lakhs through year end adjustment entry.

(iv) Undue benefit to the statutory auditor : Outstanding balance of INR 8.82 lakhs of statutory auditor settled through transfer of plots worth Rs. 26 lakhs to Miracle Pools P. Ltd., an entity registered by the auditor.

(v) Variance in accounts receivable between financial statements of BIPPL and payables in the financial statements of customers of BIPPL.

(vi) Revenue, cost and advances recognized for Golden Serenity project with no work order.

(vii) Cost recognized and advances given in relation to Golden County project with no work order with no revenue recognized.

(viii) Cash and other receipts of INR 44.91 lakhs associated with ledger "GMD-Golden Days" in relation to work execution, with no work order and no revenue recognized ; and

(ix) Arm's length pricing not assessed while estimating costs and revenue for projects.

(x) Inflated value of work orders issued to BIPPL by customers of BIPPL in relation to projects commune and orchids.

8. Modus operandi adopted : From the above observations of the forensic audit report, RP submits the following fraudulent intensions and actions :

(a) The corporate debtor was set-up for fraudulent purpose and to defraud the creditors : This Golden Gate Group of Companies with a fraudulent intention set up the CD for various fraudulent transactions, namely, to somehow avail bank loans, to generate unaccounted cash, to manage round tripping of funds with respect to group companies businesses, for diversion of funds amounting to fraud, etc.

(b) Wrong purpose shown to ensure loan sanction : The CD and its directors applied for enhancement of CC facility for working capital with a fraudulent intention to use the same for purchase of fixed assets as the term loan applied for Capex was rejected by Bank.

(c) Manipulated financials to ensure loan sanction.

(d) Increased the losses in 2016-17 through fictitious transactions to reduce the statutory liability and also to justify default to banks.

(e) Liquidated assets/inventory in a planned manner in 2016-17 to make the company a shell.

(f) Facilitated to file under section 7 of the Code with the sole aim to liquidate the CD : Mr. Sanjay Raj, one of the common directors in all the group companies resigned from directorship of all the customers of BIPPL, i. e., GGPL, PPIPL. CPIPIL and from New Age Properties LLP in 2017, the year when New Age Properties LLP filed an application on BIPPL under section 7 of the IBC.

Planned resignation of original shareholder-cum-directors : To avoid responsibility on loans becoming non-performing asset all directors of CD resign around the same time in February/March 2017 and dummy directors were brought in to meet MCA requirement.