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[2020] 220 Comp Cas 449 (NCLAT)

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

SUO MOTU, *In re*

BANSI LAL BHAT J. ***(Chairperson),***
ANANT BIJAY SINGH J. ***(Judicial Member)*** and
DR. ASHOK KUMAR MISHRA ***(Technical Member)***

March 30, 2020.

HF ▸ Directions

INSOLVENCY RESOLUTION—TIME-LIMIT FOR COMPLETION—UNPRECEDENTED SITUATION ARISING OUT OF SPREAD OF COVID-19 VIRUS—PERIOD OF LOCK-DOWN DECLARED BY GOVERNMENT TO BE EXCLUDED FOR PURPOSE OF COUNTING OF PERIOD FOR "RESOLUTION PROCESS"—NATIONAL COMPANY LAW APPELLATE TRIBUNAL RULES, 2016, r. 11—INSOLVENCY AND BANKRUPTCY CODE, 2016, ss. 12, 61.

APPEAL TO APPELLATE TRIBUNAL—INTERIM ORDER FOR STAY—UNPRECEDENTED SITUATION ARISING OUT OF SPREAD OF COVID-19 VIRUS—PARTIES UNABLE TO ATTEND HEARING DUE TO LOCK-DOWN DECLARED BY GOVERNMENT—INTERIM DIRECTION OR STAY ORDER PASSED IN APPEALS TO CONTINUE UNTIL NEXT DATE OF HEARING TO BE NOTIFIED LATER—NATIONAL COMPANY LAW APPELLATE TRIBUNAL RULES, 2016, r. 11—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 61.

Taking suo motu cognisance of the unprecedented situation arising out of spread of Covid-19 virus and resultant lock-down declared, the Appellate Tribunal passed certain orders. It held that the period of lock-down ordered by the Central Government and the State Governments including the period as may be extended either in whole or part of the country, where the registered office of the corporate debtor was located, should be excluded for the purpose of counting of the period for resolution process under section 12 of the Insolvency and Bankruptcy Code, 2016, in all cases where "corporate insolvency resolution process" had been initiated and pending before any Bench of the National Company Law Tribunal or in appeal before the Appellate Tribunal. It was further ordered that any interim order or stay order passed by this Appellate Tribunal in any one or the other appeal under the Code was to continue till next date of hearing to be notified later.

QUINN LOGISTICS INDIA P. LTD. *v.* MACK SOFT TECH P. LTD. [2018] 208 Comp Cas 432 (NCLAT) *relied on*.

QUINN LOGISTICS INDIA P. LTD. *v.* MACK SOFT TECH P. LTD. [2018] 208 Comp Cas 432 (NCLAT) (para 1) *and* COGNIZANCE FOR EXTENSION OF LIMITATION, *In re* [2020] 220 Comp Cas 447 (SC) (para 1) *referred to.*

Company Appeal (AT) (Insolvency) No. 1 of 2020.

ORDER

1 Upon requests for urgent listing of cases having been made telephonically to the Registrar of this Appellate Tribunal from various persons, who were unable to physically file the same on account of complete lock-down declared by the Government with effect from March 25, 2020 we take suo motu cognizance of the unprecedented situation arising out of spread of Covid-19 virus declared a pandemic. Having regard to the hardships being faced by various stakeholders as also the legal fraternity, which go beyond filing of appeals/cases, which has already been taken care of by the hon'ble apex court by extending the period of limitation with effect from March 15, 2020 till further order/s in terms of order dated March 23, 2020 in *Cognizance for Extension of Limitation, In re* [2020] 220 Comp Cas 447 (SC) Suo Motu Writ Petition (Civil) No(s). 3 of 2020 inasmuch as certain steps required to be taken by various authorities under the Insolvency and Bankruptcy Code, 2016 or to comply with various provisions and to adhere to the prescribed timelines for taking the "resolution process" to its logical conclusion in order to obviate and mitigate such hardships, this Appellate Tribunal in exercise of the powers conferred by rule 11 of the National Company Law Appellate Tribunal Rules, 2016 read with the decision of this Appellate Tribunal rendered in *Quinn Logistics India P. Ltd.* v. *Mack Soft Tech P. Ltd* [2018] 208 Comp Cas 432 (NCLAT), in Company Appeal (AT) (Insolvency) No. 185 of 2018, decided on May 8, 2018 do hereby order as follows :

(1) That the period of lock-down ordered by the Central Government and the State Governments including the period as may be extended either in whole or part of the country, where the registered office of the corporate debtor may be located, shall be excluded for the purpose of counting of the period for "resolution process" under section 12 of the Insolvency and Bankruptcy Code, 2016, in all cases where "corporate insolvency resolution process" has been initiated and pending before any Bench of the National Company Law Tribunal or in appeal before this Appellate Tribunal.

(2) It is further ordered that any interim order/stay order passed by this Appellate Tribunal in anyone or the other appeal under the Insolvency and Bankruptcy Code, 2016 shall continue till next date of hearing, which may be notified later.

A copy of this order be communicated to the Registrar of the National Company Law Tribunal, New Delhi with a request to circulate the same to all Benches of the National Company Law Tribunal across the country including the Principal Bench based at Delhi. 2

A copy of this order be also communicated to the Secretary, Ministry of Corporate Affairs, New Delhi for information and compliance by various authorities under its control. 3

[2020] 220 Comp Cas 451 (NCLAT)

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

SUO MOTU, *In re*

BANSI LAL BHAT J. ***(Chairperson),***
ANANT BIJAY SINGH J. ***(Judicial Member)*** and
DR. ASHOK KUMAR MISHRA ***(Technical Member)***

March 30, 2020.

HF ▸ Directions

APPEAL TO APPELLATE TRIBUNAL—INTERIM ORDER FOR STAY—UNPRECEDENTED SITUATION ARISING OUT OF SPREAD OF COVID-19 VIRUS—PARTIES UNABLE TO ATTEND HEARING DUE TO LOCK-DOWN DECLARED BY GOVERNMENT—INTERIM DIRECTION OR STAY ORDER PASSED IN APPEALS TO CONTINUE UNTIL NEXT DATE OF HEARING TO BE NOTIFIED LATER—NATIONAL COMPANY LAW APPELLATE TRIBUNAL RULES, 2016, r.11—COMPANIES ACT, 2013.

Taking note suo motu of the unprecedented situation arising out of spread of Covid-19 virus and resultant lock-down declared, the Appellate Tribunal continued the interim direction or stay order passed in the appeals under the Companies Act, 2013 till the next date of hearing, which was to be notified later.

COGNIZANCE FOR EXTENSION OF LIMITATION, *In re* [2020] 220 Comp Cas 447 (SC) (para 1) *referred to.*

Company Appeal (AT) No. 1 of 2020.

ORDER

Upon requests for urgent listing of cases having been made telephonically to the Registrar of this Appellate Tribunal from various persons, who were unable to physically file the same on account of complete lock-down declared by the Government with effect from March 25, 2020 we take suo 1

motu cognizance of the unprecedented situation arising out of spread of Covid-19 virus declared a pandemic. Having regard to the hardships being faced by various stakeholders as also the legal fraternity, which go beyond filing of appeals/cases, which has already been taken care of by the hon'ble apex court by extending the period of limitation with effect from March 15, 2020 till further order/s in terms of order dated March 23, 2020 in *Suo Motu, In re* [2020] 220 Comp Cas 447 (SC) Writ Petition (Civil) No(s). 3 of 2020, inasmuch as certain steps required to be taken by various authorities or to comply with various provisions under the Companies Act, 2013, this Appellate Tribunal in exercise of the powers conferred by rule 11 of the National Company Law Appellate Tribunal Rules, 2016 do hereby order as follows :

(1) It is ordered that any interim order/stay order passed by this Appellate Tribunal in anyone or the other appeal under the Companies Act, 2013 shall continue till next date of hearing, which may be notified later.

2 A copy of this order be communicated to the Registrar of the National Company Law Tribunal, New Delhi with a request to circulate the same to all Benches of the National Company Law Tribunal across the country including the Principal Bench based at Delhi.

3 A copy of this order be also communicated to the Secretary, Ministry of Corporate Affairs, New Delhi for information and compliance by various authorities under its control.

[2020] 220 Comp Cas 452 (NCLAT)

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

SUO MOTU, *In re*

BANSI LAL BHAT J. ***(Chairperson),***
ANANT BIJAY SINGH J. ***(Judicial Member)*** and
DR. ASHOK KUMAR MISHRA ***(Technical Member)***

March 30, 2020.

HF ▸ Directions

APPEAL TO APPELLATE TRIBUNAL—INTERIM ORDER FOR STAY—UNPRECEDENTED SITUATION ARISING OUT OF SPREAD OF COVID-19 VIRUS—PARTIES UNABLE TO ATTEND HEARING DUE TO LOCK-DOWN DECLARED BY GOVERNMENT—INTERIM DIRECTIONS OR STAY ORDERS

PASSED IN ALL APPEALS TO CONTINUE UNTIL FURTHER ORDERS—COMPETITION ACT, 2002.

Taking note of the unprecedented situation arising out of the spread of the Covid-19 virus and resultant lock-down declared by the Government, the Appellate Tribunal continued the interim directions or stay orders passed in all appeals under the Competition Act, 2002, until further orders. It clarified that in the event of expiry of the period of fixed deposits, the concerned bank should renew them for a further period of six months.

COGNIZANCE FOR EXTENSION OF LIMITATION, *In re* [2020] 220 Comp Cas 447 (SC) (para 1) *referred to.*

Competition Appeal (AT) No. 1 of 2020.

ORDER

Upon requests for urgent listing of cases having been made telephonically to the Registrar of this Appellate Tribunal from various persons, who were unable to physically file the same on account of complete lock-down declared by the Government with effect from March 25, 2020 we take suo motu cognizance of the unprecedented situation arising out of spread of Covid-19 virus declared a pandemic. Having regard to the hardships being faced by various stakeholders as also the legal fraternity, which go beyond filing of appeals/cases, which has already been taken care of by the hon'ble apex court by extending the period of limitation with effect from March 15, 2020 till further order/s in terms of order dated March 23, 2020 in *Cognizance for Extension of Limitation, In re* [2020] 220 Comp Cas 447 (SC) Suo Motu Writ Petition (Civil) No(s). 3 of 2020 inasmuch as certain steps required to be taken by various authorities or to comply with the various provisions under the Competition Act, 2002, this Appellate Tribunal do hereby order as follows : **1**

(1) That interim direction/stay order passed in all competition appeals shall continue until further order.

(2) In the event of expiry of period of fixed deposits, the concerned bank shall renew the same for further period of six months.

A copy of this order be also communicated to the Secretary, Ministry of Corporate Affairs, New Delhi for information. **2**

A copy of this order be communicated to the Secretary, Competition Commission of India, New Delhi for information. **3**

[2020] 220 Comp Cas 454 (SC)

[IN THE SUPREME COURT OF INDIA]

COGNIZANCE FOR EXTENSION OF LIMITATION, *In re*

S. A. BOBDE C. J. I., **DEEPAK GUPTA** and **HRISHIKESH ROY** JJ.

May 6, 2020.

LIMITATION—ARBITRATION—DISHONOUR OF CHEQUES—CORONA VIRUS—EFFECT—SUPREME COURT—ORDER THAT ALL PERIODS OF LIMITATION PRESCRIBED UNDER ARBITRATION AND CONCILIATION ACT, 1996 AND UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881 EXTENDED WITH EFFECT FROM MARCH 15, 2020 TILL FURTHER ORDERS—WHERE LIMITATION EXPIRED AFTER MARCH 15, 2020 PERIOD FROM MARCH 15, 2020 TILL DATE ON WHICH LOCK-DOWN LIFTED IN JURISDICTIONAL AREA SHALL BE EXTENDED FOR 15 DAYS AFTER LIFTING OF LOCK-DOWN—ARBITRATION AND CONCILIATION ACT, 1996—NEGOTIABLE INSTRUMENTS ACT, 1881, s. 138.

Taking into consideration the effect of the corona virus and resultant difficulties being faced by the lawyers and litigants and with a view to obviate such difficulties and to ensure that lawyers and litigants do not have to come physically to file such proceedings in respective courts and Tribunals across the country, the Supreme Court ordered that all periods of limitation prescribed under the Arbitration and Conciliation Act, 1996 and under section 138 of the Negotiable Instruments Act, 1881 shall be extended with effect from March 15, 2020 till further orders to be passed by the court in the present proceedings. It directed that in cases where the limitation has expired after March 15, 2020 then the period from March 15, 2020 till the date on which the lock-down was lifted in the jurisdictional area where the dispute lay or where the cause of action arose shall be extended for a period of 15 days after the lifting of the lock-down.

COGNIZANCE FOR EXTENSION OF LIMITATION, *In re* [2020] 220 Comp Cas 447 (SC) (para 1) *referred to.*

Suo Moto Writ (Civil) No. 3 of 2020.

Counsel for appearing parties :

K. K. Venugopal, Attorney General, *Tushar Mehta*, Solicitor General, *Dushyant Dave* and *Ms. Meenakshi Arora*, Senior Advocates.

Other Advocates : *B. V. Balram Das*, *Sameer Pandit*, *Nikhil Ranjan*, *Utkarsh Kulvi*, *Pranaya Goyal*, *Ankur Mahindro*, *Ms. Anannya Ghosh*, *Arjun Garg*, *Divyakant Lahoti*, *Parikshit Ahuja*, *Ms. Praveena Bisht*,

Kartik Lahoti, *Ms. Madhur Jhavar*, *Ms. Vindya Mehra*, *Mayank Kshirsagar*, *Sahil Mongia* and *Aniruddha P. Mayee*.

Narayan Marathe, applicant-in-person.

JUDGMENT

I. A. No. 48411 of 2020—For directions

By way of filing this application for directions, the applicant has made the following prayer : 1

> "To issue appropriate directions qua (i) arbitration proceedings in relation to section 29A of the Arbitration and Conciliation Act, 1996 ; and (ii) initiation of proceedings under section 138 of the Negotiable Instruments Act, 1881 ;"

In view of this court's earlier order dated March 23, 2020[1] passed in Suo Motu Writ Petition (Civil) No. 3 of 2020 and taking into consideration the effect of the Corona Virus (Covid-19) and resultant difficulties being faced by the lawyers and litigants and with a view to obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective courts/Tribunal across the country including this court, it is hereby ordered that all periods of limitation prescribed under the Arbitration and Conciliation Act, 1996 and under section 138 of the Negotiable Instruments Act, 1881 shall be extended with effect from March 15, 2020 till further orders to be passed by this court in the present proceedings. 2

In case the limitation has expired after March 15, 2020 then the period from March 15, 2020 till the date on which the lock-down is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lock-down. 3

In view of the above, the instant interlocutory application is disposed of.

I. A. No. 48375 of 2020—Clarification/Direction and I. A. No. 48511 of 2020—Clarification/Direction and I. A. No. 48461 of 2020—Clarification/Direction and I. A. No. 48374 of 2020—Intervention application and I. A. No. 48416 of 2020—Intervention application and I. A. No. 48408 of 2020—Intervention application.

Issue notice. 4

Waive service on behalf of the respondent-Union of India since Mr. K.K. Venugopal, learned Attorney General for India and Mr. Tushar Mehta, learned Solicitor General, appear on its behalf. 5

Let notice be issued to other respondents. 6

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1. *Cognizance for Extension of Limitation, In re* [2020] 220 Comp Cas 447 (SC).

[2020] 220 Comp Cas 456 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — INDORE BENCH AT AHMEDABAD]

SUDIP BHATTACHARYA AND ANOTHER

v.

DHAR TEXTILE MILLS LTD.

HARIHAR PRAKASH CHATURVEDI *(Judicial Member)* and **PRASANTA KUMAR MOHANTY *(Technical Member)***

June 4, 2020.

HF ▸ Applicant/Directions

INSOLVENCY RESOLUTION—RESOLUTION PLAN—PLAN APPROVED BY COMMITTEE OF CREDITORS—PLAN COMPLYING WITH STATUTORY PROVISIONS—TO BE APPROVED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 30.

On an application filed under section 30(6) of the Insolvency and Bankruptcy Code, 2016, by the resolution professional for approval of the resolution plan duly approved by 100 per cent. voting of the committee of creditors :

Held, *that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 of the Code met the requirements under section 30 of the Code sub-sections (1), (2), (2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (2)(f), (3), (4), (5) and (6) and had provisions for its effective implementation. The resolution plan was to be approved. [Directions given].*

I. A. No. 730 of 2019 in C. P. (I. B.) No. 191/7/NCLT/AHM/2017.

Navin Pahwa, Senior Advocate, *Ravi Pahwa*, *Yuvraj Thakore*, *Vijay Assudani*, *Pratik Tripathi* and *Sawrin A. Mehta* for the RP/applicant.

Yogesh Hemnani, Advocate, for the Suspended Management.

ORDER

The order of the Bench was delivered by

1 PRASANTA KUMAR MOHANTY ***(Technical Member)***.—This I. A. No. 730 of 2019 has been filed under section 30(6) of the Insolvency and Bankruptcy Code, 2016 by the resolution professional/applicant, namely, Mr. Sudip Bhattacharya, before this Tribunal seeking approval of resolution plan (which has been duly approved by 100 per cent. voting of CoC) from this Adjudicating Authority under section 31(1) of the Insolvency and Bankruptcy Code, 2016.

2 As observed, this application has been filed by the resolution professional under section 30(6) enclosing—

(a) Copy of the order dated February 15, 2019, passed by this hon'ble Adjudicating Authority in C. P. (I. B.) No. 191 of 2017.

(b) Copy of public announcement dated February 23, 2019, made by the applicant as published in local newspaper Free Press Journal (English) in Mumbai and Indore Edition, Navshakti (regional language in Mumbai) and Indore Samachar.

(c) Copy of list of creditors as per regulation 13(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(d) Copy of the minutes of first meeting of the CoC (page Nos. 66 to 84 of the paper book).

(e) Copy of the minutes of second meeting of the CoC dated April 3, 2019 (page Nos. 87 to 103 of the paper book).

(f) Copy of the minutes of third meeting of the CoC dated April 24, 2019 (page Nos. 105 to 114 of the paper book).

(g) Copy of the minutes of fourth meeting of the CoC dated May 10, 2019 (page Nos. 115 to 125 of the paper book).

(h) Copy of the minutes of fifth meeting of the CoC dated June 12, 2019 along with amended Form G (page Nos. 126 to 135 of the paper book).

(i) Copy of the minutes of sixth meeting of the CoC dated June 18, 2019 (page Nos. 136 to 145 of the paper book).

(j) Copy of the minutes of seventh meeting of the CoC dated June 26, 2019 (page Nos. 146 to 153 of the paper book).

(k) Copy of the minutes of eighth meeting of the CoC dated July 26, 2019 (page Nos. 156 to 163 of the paper book).

(l) Copy of the minutes of ninth meeting of the CoC dated September 18, 2019 (page Nos. 164 to 179 of the paper book).

(m) Copy of the minutes of tenth meeting of the CoC dated October 15, 2019 (page Nos. 180 to 186 of the paper book).

(n) Copy of the minutes of eleventh meeting of the CoC dated November 1, 2019 (page Nos. 187 to 193 of the paper book).

(o) Copy of e-voting result along with resolution passed on November 8, 2019 and the approved resolution plan (page Nos. 194 to 197 of the paper book).

(p) Summary valuation sheet of the corporate debtor (page Nos. 198 to 199 of the paper book).

(q) Compliance certificate of the resolution professional as prescribed under regulation 39(4) of the CIRP Regulations (Page Nos. 200 to 206 of the paper book).

3 It is stated that the applicant, Mr. Sudip Bhattacharya, Resolution Professional (hereinafter referred as the "RP") was appointed as interim resolution professional vide order of this Bench in C. P. (I. B.) No. 191/7/NCLT/AHM/2017, dated February 15, 2019.

4 It is stated that the application is within the jurisdiction of this Bench. It is further stated that the application is within time as provided under section 12 of the Insolvency and Bankruptcy Code, 2016, as the last date of completion of the corporate insolvency resolution process is 180 days from February 15, 2019, as mentioned in Order No. C. P. (I. B.) No. 191/7/NCLT/AHM/2017 hence, August 20, 2019 was the last date.

5 It is stated that the corporate debtor was incorporated under the Companies Act, 1956 on June 15, 1984, having its identification No. L17121MP1984PLC002484. It is stated that the applicant/IRP issued a public announcement of the corporate insolvency resolution process (CIRP) on February 23, 2019, by inviting all stakeholders including financial creditors of the corporate debtor to submit their claims by March 12, 2019 and the public announcement was published in local newspaper made by the applicant as published in local newspaper.

6 It is stated that the applicant issued a public announcement on February 23, 2019 in daily newspaper, website and invited claims from the creditors of the corporate debtor. Accordingly, on receiving claims, the CoC was constituted on March 19, 2019 and first meeting was called on March 19, 2019, and the applicant was confirmed as the resolution professional of the corporate debtor thereon. Pursuant to the public announcement, the resolution professional received claims of Rs. 658,68,95,256.00 from two financial creditors. Further, the resolution professional received claims for Rs. 8,10,495.00 from two operational creditors.

7 During the second meeting of the CoC held on April 3, 2019, the applicant, namely, Mr. Sudip Bhattacharya was confirmed as the resolution professional for the corporate debtor, in accordance with section 22 of the Code by the committee of creditors of the corporate debtor. The applicant was authorized to take insurance cover for the two factory locations of corporate debtor under fire and other perils and burglary. The applicant also discussed the eligibility criteria for expression of interest and also was authorized to publish Form G in stipulated format according to regulation 36A(2), (3), (4), (5), (6) and (7) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations,

2016. Thereafter, the applicant issued a public announcement for inviting expression of interest (EoI) in Form-G.

8 It is further stated that the third meeting of the CoC was held on April 24, 2019, wherein the transaction auditor and a service provider for data space management were appointed and their fees were ratified. The applicant informed the CoC that until that date, no expression of interest was received.

9 The fourth meeting of the CoC was held on May 10, 2019, wherein the applicant informed the members of the CoC that the claims received up to April 30, 2019, were collated. The members of the CoC also discussed to finalize the engagement of process advisors to maximize the resolution value. The applicant also informed the members of the CoC that he had received two EoIs.

10 It is further stated that the fifth meeting of CoC was held on June 12, 2019, wherein one financial creditor, viz., ASREC (India) Ltd. filed revised Form C revising its claims with supportive documents. Hence, the applicant revised the voting share of CoC to the following extent :

Sl. No.	*Name of the financial creditor*	*Voting share (%)*
1.	M/s. Asset Reconstruction Co. (India) Ltd.	60.18
2.	ASREC (India) Ltd.	39.82
	Total	100.00

The applicant also informed the CoC that MPAKVN, one of the operational creditor has also filed revised Form-B with all supportive documents and accordingly, the applicant revised its voting share to the following extent :

Sl. No.	*Name of the operational creditors*	*Provisional admitted amount*
1.	MPAKVN	4,19,718.00
2.	ESIC-INDORE	3,90,780.00
	Total	8,10,498.00

The applicant also informed the CoC that he has published the amended Form-G on May 31, 2019. It was resolved in this meeting to extend the date for filing EoI from May 31, 2019 to June 5, 2019.

11 Thereafter, in the sixth meeting of the CoC held on June 18, 2019, wherein it was resolved to extend the CIRP timeline by another 90 days from August 14, 2019 to November 12, 2019, for various reasons recorded therein. Thereafter the applicant filed I. A. No. 378 of 2019 before this

Tribunal on June 25, 2019, inter alia, praying to extend the period of CIRP further 90 days till November 12, 2019.

12 It is submitted that seventh meeting of CoC held on June 26, 2019, wherein the applicant appraised the member of CoC about the filing of application before this hon'ble Tribunal for extension of CIRP period further of 90 days, i. e., till November 12, 2019. In this meeting, the CoC resolved to appoint WIN Corporate Advisors Private Limited as process advisors for the CIRP of corporate debtor. Thereafter, this hon'ble Tribunal extended the further period for CIRP for another 90 days, i. e., till November 12, 2019.

13 It is submitted that in the eighth meeting of the CoC held on July 26, 2019, the applicant apprised the member of the CoC about the further extension of CIRP period of 90 days. In this meeting the fees of process advisor was also discussed.

14 It is submitted that the ninth meeting of the CoC held on September 18, 2019, wherein the authorized representative of process advisors submitted before the CoC that 4 EoIs have been received from prospective resolution applicants.

15 It is submitted that in the tenth meeting of the CoC held on October 15, 2019, the CoC noted that Samayak International Limited presented features of its resolution plan and the discussion was preliminary. The CoC even deliberated on the plan and asked questions. However, as no written plan was submitted by the Samyak International Ltd., it was written plan. Thus Sradha Buildcon P. Ltd. was advised to submit a written plan by October 23, 2019.

16 It is further submitted that in the same meeting, the resolution plan of Shradha Buildcon P. Ltd. was discussed. However, even Sardha Buildcon P. Ltd. did not submit advise to submit a written plan by October 23, 2019.

17 It is submitted in the eleventh meeting of the CoC held on November 1, 2019, wherein the CoC took note of the fact only one complete resolution plan is received from the Sardha Buildcon P. Ltd. It was also noted that the resolution plan was discussed by the members of the CoC along with the resolution applicant and after discussion, the resolution applicant was advised to submit its final plan with all legal regulatory compliances latest by November 4, 2019, after which the plan would be placed for internal approval and e-voting. It was decided to keep the electronic voting platform during the defined dated.

18 It is submitted that e-voting held from November 5, 2019 from 17.00 hours to November 8, 2019 till 22.00 hours (i. e., for 77 hours), the resolution plan of the resolution applicant, viz., Shardha Buildcon P. Ltd. was

unanimously approved. The resolution with regard to CIRP cost also came to be unanimously approved.

19 It is submitted that the average liquidation value of the corporate debtor is INR 15.99 crores as evidenced from the summary valuation sheet a copy of which is annexed herewith and marked as annexure S, whereas the financial bid of the resolution applicant amounts to INR 23.27 crore. In the light of the same, it is submitted that the CoC is of the opinion that the final approved resolution plan is suitable and viable and deserves approval from this hon'ble Tribunal.

20 It is submitted that for the ready reference of this hon'ble Tribunal, the key features of approved resolution plan can be summarized hereunder :

(i) Background of the resolution applicant

(a) Shradha Buildcon P. Ltd. is an unlisted private company, with experience of more than a decade in construction. This is a closely held venture which invests in real estate of different kinds. Mr. Vinay Chhajlani, the promoter director, is a serial entrepreneur with interest in real estate, software, digital media and other business platforms. The resolution applicant is supported by group companies where there are annual cash flow generations as EBITDA is in excess of Rs. 12 crores in financial year 2018-19. The resolution applicant has diversified interest, apart from construction, in the following area :

- Digital media
- Printing industry
- Infrastructure industry
- Information technology
- Entertainment and media industry.

(b) The net worth of the resolution applicant as on March 31, 2019, is Rs. 1316.16 lakhs.

(c) After the implementation of the plan, the corporate debtor is expected to benefit from :

(i) The expertise of the resolution applicant in the relevant sector ;

(ii) The synergies from the brand presence and distribution network of the resolution applicant ;

(iii) The investment in the corporate debtor by the resolution applicant pursuant to this plan ; and

(iv) Any future investment that may made in the corporate debtor by the resolution applicant. The resolution applicant shall make appropriate modification to the constitutional documents of the company to achieve the successful implementation of this plan.

Thereby addressing the cause of insolvency.

(ii) Financial proposed

Sl. No.	*Particulars (outstanding amount of)*	*Admitted claim amount Rs.*	*Amount proposed to pay*	*Amount-NPV of proposed amount*	*Nos. of days when payment shall be made*
1.	CIRP expenses	81,36,130	81,36,130.00	80,68,880	30 days from approval from AA
2.	Operational creditor				
	MPAKVN	4,19,715	50% of amount admitted-Rs. 2,09,858	2,09,858	30 days from approval from AA
	ESIC Indore	3,90,780	50% of amount admitted-Rs. 1,95,390	1,95,390	30 days from approval from AA
	Total	8,10,495	4,05,248	4,05,248	
3.	Financial creditors				
	ARCIL-60.15%	396,38,05,715	13,99,73,039	12,66,01,320	As per below schedule
	ASREC-39.85%	262,30,89,541	9,27,33,593	8,38,74,690	As per below schedule
	Total-100%	658,68,95,256	23,27,06,632	21,53,38,179	
	Total outstanding proposed to be	24,11,00,000	21,81,09,609		

(iii) Implementation of the plan

Reconstitution of board of directors

It is been proposed in the resolution plan that from the date on which this hon'ble Tribunal approves the present resolution plan, all existing directors of the corporate debtor shall be deemed to have resigned and vacated their office and the board of directors of the corporate debtor shall be reconstituted in accordance with the applicable law. It has further been proposed that the management of the corporate debtor shall be reconstituted with professional managers, having relevant industrial experience, including the promoters of the resolution applicant, Mr. Vijay Chhajlani and Mr. Vimal Chand Surana.

(iv) Supervision of implementation

The supervision of implementation of the present resolution applicant plan shall be primarily done through a monitoring committee comprising of following :

I. Resolution professional as the chairman,

II. Managing director of the restructured company,

III. One nominee of Asset Reconstruction Company (India) Ltd., and

IV. One nominee of ASREC (India) Ltd.

(v) Resolution Professional praying for following reliefs

(A) That this hon'ble Adjudicating Authority may be pleased to allow this application and grant approval to the resolution plan as approved by the CoC, in the interest of justice ;

(B) That this hon'ble Adjudicating Authority may be pleased to grant any ancillary or consequential directions or such other and further reliefs as may be deemed fit and proper by this hon'ble Tribunal, in the interest of justice ;

It is submitted that resolutions decisions taken through e-voting with 100 per cent. and it was unanimously decided during the eleventh meeting of the CoC. **21**

The resolution professional has also submitted compliance certificate in Form "H" attached before the Adjudicating Authority on February 5, 2020. The highlights of the resolution plan, attached at annexure H at page No. 154 of the paper book as under : **22**

2. The details of the "CIRP" are as under :

Sl. No.	*Particulars*	*Description*
1.	Name of the CD	The Dhar Textile Mills Ltd.
	Date of initiation of CIRP	15-2-2019
	Date of appointment of IRP	22-2-2019
	Date of publication of public announcement	23-2-2019
	Date of constitution of CoC	18-3-2019
	Date of first meeting of CoC	22-3-2019
	Date of appointment of RP	3-4-2019
	Date of appointment of registered valuers	6-4-2019
	Date of issue of invitation for EoI	10-4-2019
	Date of final list of eligible prospective resolution applicants.	15-9-2019
	Date of invitation of resolution plan	10-9-2019
	Late date of submission of resolution plan	10-10-2019
	Date of approval of resolution plan by CoC	1-11-2019, passed by e-voting on 8-11-2019
	Date of filing of resolution plan with Adjudicating Authority	12-11-2019
	Date of expiry of 180 days of CIRP	14-8-2019
	Date of order extending the period of CIRP	7-7-2019
	Date of expiry of extended period of CIRP	12-11-2019
	Fair value	Average-L&B-13.56 crores, P&M-10.05 crores, FS-Zero, Total Average-23.61

	Liquidation value	Average-L&B-10.75 crores, P&M-5.23 crores, FS- Zero, Total average-15.99 crores
	Number of meetings of CoC held	Eleven

It is certified that—

(i) The said resolution plan complies with all the provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) and does not contravene any of the provisions of the law for the time being in force.

(ii) The resolution applicant (Shradha Buildcon Private Limited) has submitted an affidavit pursuant to section 30(1) of the Code confirming its eligibility under section 29A of the Code to submit resolution plan. The contents of the said affidavit are in order.

(iii) The said resolution plan has been approved by the CoC in accordance with the provisions of the Code and the CIRP Regulations made thereunder. The resolution plan has been approved by 100 per cent. of voting share of financial creditors after considering its feasibility and viability and other requirements specified by the CIRP Regulations.

(iv) The voting was held in the meeting of the CoC on November 1, 2019, where present members of the CoC were present.

5. The list of the financial creditors of the Dhar Textile Mills Ltd., being members of the CoC and distribution of voting share amount them is as under :

Sl. No.	*Name of creditor*	*Voting share*	*Voting for resolution plan (voted for/dissented/abstained)*
1.	Asset Reconstruction Company (India) Ltd. (ARCIL)	60.15%	Voted for - 60.15%
2.	ASREC India Ltd. (ASREC)	39.85%	Voted for - 39.85

6. The resolution plan includes a statement under regulations 38(1A) of the CIRP Regulations as to how it has dealt with the interests of all stakeholders in compliance with the Code and regulations made thereunder.

7. The amounts provided for the stakeholders under the resolution plan is as under :

Sl. No.	*Category of stakeholders*	*Amount claimed*	*Amount admitted*	*Amount provided under the plan#*	*Amount provided to the amount claimed (%)*
1.	Dissenting secured financial creditors	There are no dissenting secured financial creditor	N.A.	N.A.	N.A.
2.	Other secured financial creditors (assenting)	658,68,95,256	658,68,95,256	23,27,06,632	3.55 %
3.	Dissenting unsecured financial creditors	There are no dissenting unsecured creditor	N.A.	N.A.	N.A.
4.	Other unsecured financial creditor	No claims received	N.A.	N.A.	N.A.
5.	Operational creditor				
	Government	8,10,489	8,10,489	4,05,244	50%
	Workmen	No claims received	N.A.	N.A.	N.A.
	Employees	No claims received	N.A.	N.A.	N.A.
6.	Other debts and dues	N.A.	N.A.	N.A.	N.A.
7.	CIRP expenses	81,36,130	81,36,130	81,36,130	
	Total	659,58,41,875	659,58,41,875	24,11,00,000	

8. The interests of existing shareholders have been altered by the resolution plan as under :

Sl. No.	*Category of shareholder*	*No. of shares held before CIRP*	*No. of shares held after CIRP*	*Voting share (%) held before CIRP*	*Voting share (%) held after CIRP*
1.	Equity	6308753	Nil	Nil	Nil
2.	Preference	3500000	Nil	Nil	Nil

9. The compliance of the resolution plan is as under :

Section of the code/regulation No.	*Requirement with respect to resolution plan*	*Clause of resolution plan*	*Compliance*
Section 25(2)(h)	Whether the resolution applicant meets the criteria approved by the CoC having regard to the complexity and scale of operations of business of the CD ?	1.3	Yes
Section 29A	Whether the resolution applicant is eligible to submit resolution plan as per final list of resolution professional or order, if any, of the Adjudicating Authority ?	10.5	Yes
Section 30(1)	Whether the resolution applicant has submitted an affidavit stating that it is eligible	Form XII	Yes
Section 30(2)	Whether the resolution plan :		

	(a) provides for the payment of insolvency resolution process costs ?	6.1	Yes
	(b) provides for the payment of the debts of operational creditors ?	5.3	Yes
	(c) provides for the management of the affairs of the corporate debtor ?	4.2.1.1	Yes
	(d) provides for the implementation and supervision of the resolution plan ?	6.1 and 4.3	Yes
	(e) contravenes any of the provisions of the law for the time being in force.	10.3	Yes
Section 30(4)	Whether the resolution plan :		
	(a) is feasible and viable, according to the CoC ?	Yes	Yes
	(b) has been approved by the CoC with 66 per cent. voting share ?	Yes	Yes
Section 31(1)	Whether the resolution plan has provisions for its effective implementation plan, according to the CoC ?	Yes	Yes
Regulation 35A	Where the resolution professional made a determination if the corporate debtor has been subject to any transaction of the nature covered under section 43, 45, 50 or 66 before the one hundred and fifteen day of the insolvency commencement date, under intimation to the Board ?	Yes	Yes
Regulation 38(1)	Whether the resolution plan identifies specific sources of funds that will be used to pay the—		
	(a) insolvency resolution process costs ?	Yes	Yes
	(b) liquidation value due to operational creditors ?	N.A.	Yes
	(c) liquidation value due to dissenting financial creditors ?	N.A.	Yes
Regulation 38(1A)	Whether the resolution plan includes a statement as to how it has dealt with the interests of all stakeholders ?	5.3	Yes
Regulation 38(2)	Whether the resolution plan provides :		
	(a) the term of the plan and its implementation schedule ?	5.3	Yes
	(b) for the management and control of the business of the corporate debtor during its term ?	4.2	Yes
	(c) adequate means for supervision its implementation ?	4.3	Yes
Regulation 38(3)	Whether the resolution plan demonstrates that—	4.3	Yes
	(a) it addresses the cause of default ?		
	(b) it is feasible and viable ?		
	(c) it has provisions for its effective implementation ?		
	(d) it has provisions for approvals required and the time-line for the same ?		
	(e) the resolution applicant has the capability to implement the resolution plan ?		

Regulation 39(2)	Whether the RP has filed applications in respect of transactions observed, found or determined by him ?	CD ceased operation in past 2 financial years from the date of commencement of the CIRP, virtually no transaction	Yes

11. The time framed proposed for obtaining relevant approvals is as under :

Sl. No.	*Nature of approval*	*Name of applicable law*	*Name of authority who will grant approval*	*When to be obtained*
1.	Extension of lease of unit no. 2 of CD, situated at Pologround Industrial Area Indore	MP Industrial land allocation regulation and procedures	MPAKVN, Indore Industrial Authority	Expected by 3 months from the date of approval by AA
2.	Renewal of licenses under Factories Act and other labour laws	MP Industrial Development Authority (MPAKVN)	MPAKVN, Indore Industrial Authority	Expected by 4 months from the date of approval by AA
3.	Power and water connection		Indore Municipal Corporation	Expected by 3 months from the date of approval by AA

12. The resolution plan is not subject to any contingency. Excluding general force majeure.

13. The following are the deviations/non-compliances with the provisions of the Insolvency and Bankruptcy Code, 2016, regulations made or circulars issued hereunder (if any) deviation/non-compliances were observed, please state that the details and reasons for the same :

Sl. No.	*Deviation/non-compliance observed*	*Section of the code/ regulation No./circular No.*	*Reasons*	*Whether rectified or not*
1.	Non-compliance under Companies Act relating the RoC filing for annual returns, conducting AGM, employing a company secretary in the roll off CD.	Section 25 and regulations.	No employees are in employment of CD. Since the company is not generating any revenue CoC not will to fund to meet these expense. RP tried at his best and all humanly possible in view to meet these non-compliance.	
2.	Pending audit for the financial year 2018-19.	Do	The statutory auditor has resigned in August 2019. A statutory auditor has appointed to conduct the audit and comply.	A statutory auditor has to be appointed to conduct the audit and comply.

14. The resolution plan is being filed one day before the expiry of the period of CIRP provided in section 12 of the Code.

15. Provided details of section 66 or avoidance application filed/pending.

Sl. No.	*Type of transaction*	*Date of filing with Adjudicating Authority*	*Date of order of the Adjudicating Authority*	*Brief of the order*
1.	Preferential transaction under section 43	10-11-2019	N.A.	N.A.
2.	Undervalued transactions under section 45	10-11-2019	N.A.	N.A.
3.	Extortionate credit transactions under section 50	N.A.	N.A.	N.A.
4.	Fraudulent transactions under section 66	N.A.	N.A.	N.A.

Observation

23 The said application filed by the applicant on November 11, 2019, under section 30(6) of the Insolvency and Bankruptcy Code, 2016, seeking for approval of resolution plan.

24 It is observed that the CIRP has been initiated against the corporate debtor, namely, M/s. Dhar Textile Mills Limited in C. P. (I. B.) No. 191/7/NCLT/AHM/2017, vide an admission order passed by this Adjudicating Authority February 15, 2019, by appointing an IRP to initiate CIRP Process.

25 During the said period the applicant filed an application before this Adjudicating Authority for extension of CIRP period of 90 days and the same was allowed.

26 There was several meetings of CoC were held on different date and in 11th meeting of CoC dated November 1, 2019, one complete resolution plan was received from Sardha Buildcon Private Limited and it was unanimously passed by the members of CoC on November 8, 2019.

27 The loan was initially sanctioned by the financial creditor (State Bank of India, State Bank of Indore, and State Bank of Saurashtra) in the year 1995.

28 The account was declared NPA in March, 2004.

29 It is observed that the liquidation value of the corporate debtor is INR 15.99 crores evidenced from the summary valuation sheet.

ORDER

30 Having gone through the documents, papers, materials submitted and on record, this Adjudicating Authority is of the opinion that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 of the Insolvency and Bankruptcy Code, 2016 meets the requirement as referred in section 30 of the Insolvency and Bankruptcy Code, 2016

sub-sections (1), (2), (2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (2)(f), (3), (4), (5) and (6) and has provisions for its effective implementation.

Hence, this Adjudicating Authority is hereby approved the resolution plan submitted by the resolution professional as approved by the CoC. This resolution plan is now binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan from today.

The moratorium order passed by this Adjudicating Authority on February 15, 2019 shall cease to have effect from today. **31**

The resolution plan is approved with such observations that the resolution applicant shall follow the provisions of section 31(4) of the Insolvency and Bankruptcy Code, 2016, to obtain necessary approval required under any law for the time being in force within the period one year from the date of approval of the resolution plan by this Adjudicating Authority under sub-section (1) of section 31 of the Insolvency and Bankruptcy Code. **32**

Further, our approval of this resolution plan shall not be purported nor can be construed to have given any exemption under law or granted statutory concession, because in our view such issue lies within the domain of the appropriate Government Authority and the resolution applicant can seek appropriate relief and concession in accordance with law, from the appropriate Government/competent authority concerned. This will suffice the purpose of the resolution applicant for seeking necessary exemption from appropriate Government Authority and from other competent authority. **33**

The resolution professional shall handover the charge of the corporate debtor to Shradha Buildcon P. Ltd. resolution applicant of the corporate debtor immediately. All the records, books of account, assets, documents and agreements shall be handover to Shradha Buildcon P. Ltd., the resolution applicant for the corporate debtor. **34**

The resolution professional is directed to forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Insolvency and Bankruptcy Board of India for their record/database. **35**

The resolution professional is also directed to file a compliance report of the above directions with this registry at the earliest and thereafter the resolution professional is discharged from this corporate insolvency resolution process from the date of filing of the compliance report with this registry. **36**

37 The registry is hereby directed to communicate the authenticate copy of this order to the resolution professional, corporate debtor, resolution applicant, operational creditor, IBBI and Registrar of the company at the earliest through speed post/registered post.

38 Thus, the present I. A. No. 730 of 2019 in C. P. (I. B.) No. 191/7/NCLT/AHM/2017 filed under section 30(6) of the Insolvency and Bankruptcy Code, 2016 for the acceptance of the resolution plan stands disposed of with the above directions and observations.

[2020] 220 Comp Cas 470 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — KOLKATA BENCH]

SANGITA FISCAL SERVICES P. LTD. AND OTHERS

v.

DUNCANS INDUSTRIES LTD.

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

March 5, 2020.

HF ▸ Petitioner

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—FINANCIAL DEBT—AMOUNT BORROWED FOR SHORT-TERM FOR COMMERCIAL PURPOSE WITH INTEREST ELEMENT INVOLVED—LOAN ADVANCED AMOUNTED TO FINANCIAL DEBT—FAILURE TO REPAY DEBT—PETITION ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, ss. 5(8), 7.

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—JOINT PETITION BY THREE FINANCIAL CREDITORS—PETITIONER AUTHORISED BY BOARD RESOLUTIONS OF RESPECTIVE CREDITORS TO FILE PETITION ON THEIR BEHALF—PETITIONER PROPERLY AUTHORISED TO FILE PETITION—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 7—INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY) RULES, 2016, r. 4.

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—PETITION AGAINST TEA COMPANY—CONSENT OF CENTRAL GOVERNMENT NOT REQUIRED—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 7—TEA ACT, 1953, s. 16G(1)(c).

A joint petition by three financial creditors under section 7 of the Insolvency and Bankruptcy Code, 2016 was challenged by the corporate debtor

contending that no time value of money being involved, it was not a case of financial debt, that there being no fixed schedule for repayment of loans, the debt was not due and payable and that no proper authorisation was made by the financial creditor in favour of the petitioners :

Held, *allowing the petition, (i) that the application challenging the maintainability of the petition due to conflict between the provisions of the Code and the Tea Act, 1953 was infructuous in view of the decision of the Supreme Court*[1]*, wherein it was held that provisions of the Code prevailed over the Act and the petition under section 7 or 9 could be filed without permission of the Central Government.*

(ii) That written deeds of agreement had been executed wherein the creditors had been addressed as lender. In the preamble the term "finance" was defined as "temporary finance" to be granted by the lender to the corporate debtor against their present or future stock of tea in terms of the discharge schedule forwarded by the company. The term "finance account" was defined as the account relating to the temporary finance granted by the lender to the corporate debtor. It was also mentioned that a resolution under section 293(1)(d) of the Companies Act, 1956 had been passed by the shareholders of the corporate debtor to enable the company and its directors to borrow loans not exceeding Rs. 1,200 crores and avail of temporary finance within the limit of borrowing of the corporate debtor. It was also mentioned that the financial creditors were approached by the corporate debtor and that disbursement could be made in intervals or instalments. The broker was also nominated by the corporate debtor. Interest element also existed. Further, the financial creditors were not in the business of purchase and sale of tea. The contention that these were transactions of sale and purchase of tea and not of financing was without substance. The transactions of loan or advance were specifically covered under section 5(8)(a) of the Code as these had been borrowed against interest. The fact of repayment of loan to one of the financial creditors and other surrounding circumstances did not substantiate the claim of the corporate debtor particularly when no other material or documentary evidence had been brought on record to show that the tenure of the loan had been extended. It was not in dispute that the amount had been given as advance. The effect in the hands of the corporate debtor was that it amounted to a borrowing for commercial purpose. Therefore, in terms of section 5(8)(f) of the Code the transaction had the trappings and commercial effect of a borrowing. Hence, for this reason also this was a financial debt.

1. See *Duncans Industries Ltd.* v. *A. J. Agrochem* [2019] 217 Comp Cas 320 (SC).

SHAILESH SANGANI *v.* JOEL CARDOSO [2019] 7 Comp Cas-OL 207 (NCLAT) *and* PIONEER URBAN LAND AND INFRASTRUCTURE LTD. *v.* UNION OF INDIA [2019] 217 Comp Cas 1 (SC) *relied on.*

(iii) That it was not in dispute that it was a case of a temporary finance. The corporate debtor had given post-dated cheques for short tenures. It was also mentioned that it was for a particular tea season. Hence, it would not lose its character as a short-term loan. Further, both the parties had to agree and a decision could not be taken by the corporate debtor on its own as it was based on mutual understanding as evident from the letter of the corporate debtor. Once it was so, the financial creditors had shown their intent by initiating proceedings under section 138 of the Negotiable Instruments Act, 1881 due to non-encashment of cheques.

(iv) That by board resolutions of each company authorisation had been given to the petitioner to sign the petition on its behalf and on their behalf. This can be done as in terms of section 7 of the Code as well as rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Moreover, such technicalities could not be allowed to come in the way of efficacy and implementation of an economic legislation which has as its object to promote credit culture and entrepreneurship particularly when no specific format had been prescribed and documents brought on record appeared to be genuine.

(v) That the petition was complete and defect-free. It was to be admitted.

Cases referred to :

Duncans Industries Ltd. *v.* A. J. Agrochem Ltd. [2019] 217 Comp Cas 320 (SC) (para 2)

Pioneer Urban Land and Infrastructure Ltd. *v.* Union of India [2019] 217 Comp Cas 1 (SC) (para 21)

Sanjay Kewalramani *v.* Sunil Parmanand Kewalramani [2018] 209 Comp Cas 331 (NCLAT) (para 14)

Shailesh Sangani *v.* Joel Cardoso [2019] 7 Comp Cas-OL 207 (NCLAT) (para 20)

C. P. (I. B.) No. 184/KB/2018 and C. A. (I. B.) Nos. 3 and 121/KB/2019.

Rishav Banerjee and *Adheesh Agarwal*, for the corporate debtor.

Utpal Bose, *P. K. Jhunjhunwala* and *S. Samit Rudra*, for the financial creditors.

ORDER

The order of the Bench was delivered by

Virendra Kumar Gupta ***(Technical Member)***.—This application has been filed on behalf of four financial creditors jointly under section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC, 2016") read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. 1

C. A. No. 3/KB/2019 pertains to the maintainability of this application due to conflict between the provisions of the IBC, 2016 and the Tea Act, 1953 which, in our opinion, is infructuous in view of the decision of the hon'ble Supreme Court[1], wherein it has been held that provisions of the IBC, 2016 prevailed over the Tea Act and the application under section 7/9 could be filed without permission of the Central Government. 2

C. A. No. 121/KB/2019 raises an issue regarding the recording of the utilisation of compensation which could be received on acquisition of a part of land in its tea estate owned by the corporate debtor which, in our opinion, is premature, hence, dismissed as such. 3

C. P. (I. B.) No. 184/KB/2018 :

The facts, in brief, are that there are four financial creditors in the present case who are detailed as under : 4

(i) Sangita Fiscal Services P. Ltd.

(ii) Navnita Tradefin P. Ltd.

(iii) Sudhir Credit P. Ltd.

(iv) Ruchi Trades and Holdings P. Ltd.

The particulars of all the financial creditors have been given in Form I. First financial creditor, i. e., Sangita Fiscal Services P. Ltd., gave a loan of Rs. 4,70,00,000 in the following manner : 5

	Rs.
16-8-2014	20,00,000
23-12-2014	2,90,00,000
23-12-2014	75,00,000
24-12-2014	85,00,000

Second financial creditor, i. e., Navnita Tradefin P. Ltd., gave a loan of Rs. 2,10,00,000 in the following manner :

1. See *Duncans Industries Ltd.* v. *A. J. Agrochem* [2019] 217 Comp Cas 320 (SC).

	Rs.
20-2-2015	1,00,00,000
24-2-2015	50,00,000
25-2-2015	50,00,000
17-4-2015	10,00,000

Third financial creditor, i. e., Sudhir Credit P. Ltd., gave a loan of Rs.3,00,00,000 in the following manner :

	Rs.
27-1-2014	50,00,000
28-1-2014	1,00,00,000
29-1-2014	50,00,000
30-1-2014	20,00,000
5-2-2014	40,00,000
7-2-2014	40,00,000

Fourth financial creditor, i. e., Ruchi Trades and Holdings P. Ltd., gave a loan of Rs. 60,00,000 on September 25, 2014 ; however, out of that, the corporate debtor repaid the principal amount of Rs. 45,00,000 and the balance remained outstanding.

6 The date of default, in case of first financial creditor, has been stated as December 31, 2015 ; in the case of second financial creditor, it has been stated as March 31, 2016 ; in the case of third financial creditor, it has been stated as December 31, 2014 ; which is also the same in the case of fourth financial creditor.

7 The application has been signed by one Mr. Jitendra Sirohia, being a director of Sangita Fiscal Services P. Ltd. It has also been stated that the original letters of authorisation were attached along with the board resolution and vakalatnama of all the applicants.

8 Learned counsel appeared on behalf of the financial creditors and submitted that the first applicant, i. e., Sangita Fiscal Services P. Ltd. agreed to give temporary finance for tea season 2015-16 to the corporate debtor up to a maximum of Rs. 4,50,00,000 on interest at 21 per cent. per annum, payable at monthly rest. Deed of agreement, in this regard, was executed on December 22, 2014 between the first applicant, corporate debtor and one M/s. Contemporary Brokers P. Ltd., being the tea broker of the corporate debtor. It was contended that under the said agreement, the corporate debtor was required to repay the entire amount with interest by December 31, 2015. A post-dated cheque dated March 31, 2016 was also issued by the corporate debtor for a sum of Rs. 4,50,00,000 in favour of the

financial creditor. However, the corporate debtor failed to pay the interest as well as repay the loan. It was pointed out that on August 11, 2017, the corporate debtor confirmed its liability for a sum of Rs. 4,70,00,000 ; however, it did not confirm the interest liability. It was also pointed out that the corporate debtor had also given a fresh post-dated cheque dated September 30, 2017 for Rs. 4,50,00,000 along with letter dated June 27, 2016. It was also submitted that proceedings under section 138 of the Negotiable Instruments Act, 1881 were also taken which were pending. Our attention was also drawn to the relevant clauses of the agreement as well as copies of the aforesaid letters and post-dated cheques.

9 As regards the second financial creditor, it was contended that a similar agreement dated February 18, 2015 had been executed whereby the corporate debtor was responsible to repay the entire loan by March 31, 2016. A post-dated cheque for Rs. 50,00,000 was sent vide letter dated February 20, 2015 ; another post-dated cheque for Rs. 2,50,00,000 was also sent along with letter dated February 26, 2015. Two post-dated cheques of Rs.50,00,000 each were also given vide letter dated February 18, 2015. However, on failure to honour its commitment by the corporate debtor, the operational creditor on August 4, 2017 and August 11, 2017 sought confirmation of balance outstanding from the corporate debtor which was done, but interest liability was not confirmed. Fresh post-dated cheques were also given. Proceedings under section 138 of the Negotiable Instruments Act, 1881 vide notice dated October 21, 2017 were initiated which were pending. Our attention was also drawn to the various clauses of the deed of agreement dated February 18, 2015 and promissory note given by the corporate debtor. Our attention was also drawn to the copies of the confirmation letters and post-dated cheques issued by the corporate debtor on all occasions.

10 As regards the third financial creditor, the basic terms and conditions and other facts are same except the dates and the amounts, hence, not repeated again for the sake of brevity. Deed of agreement in the case has been executed on January 21, 2014.

11 As far as the fourth financial creditor is concerned, the amount has been given on the basis of oral arrangement on the similar conditions. In this case, payment of Rs. 52,16,042 against the disbursement of Rs. 60,00,000 have also been made. As on December 31, 2017, the outstanding amount had been claimed at Rs. 24,60,048. The last payment had been made on August 18, 2015.

12 Learned counsel finally contended that there was a debt which was due and payable in law and in fact and a default had occurred, hence, this application was liable to be admitted.

13 Learned counsel for the corporate debtor appeared and made three fold arguments. First line of argument was that no time value of money was involved, hence, it was not a case of financial debt. Second line of argument was that there was no fixed schedule for repayment of loans, hence, debt was not due and payable. Third line of argument was that no proper authorisation was made by the financial creditor in favour of the applicant.

14 As regards the first argument, he referred to the deed of agreement and contended that it was a case of an advance for purchase of tea and, therefore, the application filed under section 7 of the IBC, 2016 on the face of it was liable to be dismissed. In support of his claim, he drew our attention to various clauses of the agreement. He also drew support from the decision of the hon'ble National Company Law Appellate Tribunal in the case of *Sanjay Kewalramani* v. *Sunil Parmanand Kewalramani* [2018] 209 Comp Cas 331 (NCLAT) in Company Appeal (AT) (Insolvency) No. 57 of 2018, order dated July 12, 2018 to contend that if no time value of money has involved, then, the transaction could not be held as of the nature of financial debt within the meaning of the provisions of section 5(8) of the IBC, 2016.

15 He, thereafter, referred to page No. 30 of the paper book which contained a letter written by the corporate debtor on June 27, 2016 to the first financial creditor wherein it was specifically stated that "as agreed, the repayment and other terms will be as mutually decided upon". Thus, on the basis of this understanding, learned counsel vehemently argued that the loan had not become due and payable and, therefore, the first ingredient itself was not complied with to file this application.

16 As regards the third objection, he drew our attention to page No. 87 and contended that no board resolution/power of attorney/authorisation was given to file the application jointly. It was also contended that no seal of the company was affixed and, therefore, in the background of these facts, according to learned counsel, the application was defective and did not meet the filing requirements and consequently, the same was liable to be dismissed. In this regard, he placed reliance on the decision of the hon'ble National Company Law Appellate Tribunal in the case of *Poloygit*.

17 In the rejoinder, learned counsel for the financial creditor again emphasised on the basis of agreement and other documentary evidences submitted that it was a case of temporary finance and it carried interest, hence, it was a case of financial debt. It was also contended that the lenders were

not in the business of buying and selling of tea and the broker of the corporate debtor was made a party for the purpose of securing the repayment, which could not alter the true nature of the arrangement. It was also pleaded that the board resolutions authorising the applicant to file application on behalf of all the financial creditors were also attached.

We have considered the submissions made by both sides and also **18** perused the material on record. It is not in dispute that in case of three financial creditors, a written deed of agreement has been executed. In the said agreement, the financial creditors have been addressed as lender. In the preamble the term "finance" has been defined as "temporary finance" to be granted by the lender to the corporate debtor against their present/future stock of tea as per discharge schedule forwarded by the company. The term "finance account" has been defined as the account relating to the temporary finance granted by the lender to the corporate debtor. It has also been mentioned that a resolution under section 293(1)(d) of the Companies Act, 1956 had been passed by the shareholders of the corporate debtor to enable the company and its directors to borrow loans not exceeding Rs. 1,200 crores and avail of temporary finance within the limit of borrowing of the corporate debtor-company. It is also mentioned that the financial creditors were approached by the corporate debtor. It is also mentioned that disbursement could be made in intervals/instalments. The broker is also nominated by the corporate debtor. Interest element also exists. Further, the financial creditors are not in the business of purchase and sale of tea. When we see these terms and conditions, we are totally amused as to on what basis the corporate debtor could claim that this is a transaction of sale and purchase of tea and not of financing. We further find no substance in the plea of the corporate debtor that it is not a financial debt within the meaning of section 5(8) of the IBC, 2016 for the simple reason that it also carries interest, whereas, in our considered opinion, if the money is given even without interest, still it has time value of money as it results into an economic advantage to the borrower at free of cost over a period of time when the value of money decreases due to inflation. The transactions of loan/advance are specifically covered under section 5(8)(a) as these have been borrowed against interest. Even, considering the fact of repayment of loan to one of the financial creditors and other surrounding circumstances as well, such claim made by the corporate debtor appears to be of no help particularly when no other material/documentary evidence has been brought on record to show that the tenure of the loan has been extended. Thus, in the background of the facts and circumstances and applicable legal position, as discussed herein above, we are of the considered view that the

transaction is of the nature of financial debt within the meaning of provisions of section 5(8) and 5(8)(a) of the IBC, 2016.

19 Although the nature of the transaction as of a financial debt based upon the interest element and other aspects has already been identified, yet we consider it pertinent to answer the contention raised by the corporate debtor that such transaction is in regard to the sale and purchase of tea. It is not in dispute that the amount has been given as advance, then, the effect in the hands of the corporate debtor is that it amounts to borrowing for commercial purpose. Therefore, as per section 5(8)(f) of the IBC, 2016, this transaction has got the trappings of commercial effect of borrowing, hence, for this reason also this is a financial debt.

20 As far as reliance placed by the corporate debtor on the decision of the hon'ble National Company Law Appellate Tribunal is concerned, we find that in a subsequent case of *Shailesh Sangani* vide order dated January 30, 2019, the decision relied on by the corporate debtor stands overruled by the order of the hon'ble National Company Law Appellate Tribunal itself in the case of *Shailesh Sangani* v. *Joel Cardoso* [2019] 7 Comp Cas-OL 207 (NCLAT), order dated January 30, 2019. The relevant findings are reproduced as under :

> ". . . the debt along with interest, if any, should have been disbursed against the consideration for the time value of money. However, the use of the expression 'if any' as suffix to 'interest' is clearly indicative of the fact that the component of interest is not a sine qua non from bringing the debt within the fold of financial debt. Hence, the amount that has been disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of section 5(8) embody the nature of transactions which are included in the definition of financial debt. It includes money borrowed against the payment of interest. Clause (f) of section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a promoter, director or a shareholder of the corporate debtor as a stakeholder to improve financial health of the company and boost its economic prospects, would have the commercial effect of borrowing on the part of corporate debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a company may at times feel the heat of resource

crunch and the stakeholders like promoter, director or a shareholder may, in order to protect their legitimate interest be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long-term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the company. Enhancement of assets, increase in production and the growth in profits, share value or equity ensures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the company is in the nature of a financial debt."

21 We further hold that in view of the subsequent decision of the hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* reported in [2019] 217 Comp Cas 1 (SC) ; [2019] 8 SCC 416, the decision placed reliance on by the corporate debtor is not binding. In the said decision, the hon'ble Supreme Court, while interpreting the concept of time value of money, has held that a transaction does not necessarily need to culminate into money being returned to the lender or interest being paid over the money borrowed as there may be a situation where something in kind equivalent to the money may be returned.

22 As far as the question of liability to pay in presentio is concerned, it is not in dispute that it is a case of a temporary finance. Even, the corporate debtor has given post-dated cheques for short tenures. It is also mentioned that it is for a particular tea season, hence, it may not, in our considered view, loose its character of short-term loan. Further, both the parties have to agree and a decision cannot be taken by the corporate debtor on its own as it is based on mutual understanding as evident from the subject letter of corporate debtor relied on by the corporate debtor. Once it is so, the financial creditors have shown their intent by initiating proceedings under section 138 of the Negotiable Instruments Act, 1881 due to non-encashment of cheques. Thus, this contention of the corporate debtor is also rejected.

23 As far as pleas regarding authorisation are concerned, we find that board resolutions of each company are enclosed whereby authorisation has been given to the applicant to sign the application on its behalf and on their behalf. It is not in dispute that this can be done as section 7 as well as rule

4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 permits so. We also find that such technicalities cannot be allowed to come into the way of efficacy and implementation of an economic legislation which has got its object to promote credit culture and entrepreneurship particularly when no specific format has been prescribed and documents brought on record appear to be genuine. Accordingly, we reject this contention of the corporate debtor as well.

24 The name of IRP has been proposed who has given his consent as well and as per records no disciplinary proceedings are pending against such IRP, hence, we approve his name to act as IRP.

25 The petition is complete and defect-free. Hence, we admit the same and order as under :

ORDER

(i) The application filed by the financial creditors under section 7 of the Insolvency and Bankruptcy Code, 2016 for initiating the corporate insolvency resolution process against the corporate debtor, Duncans Industries Limited, is hereby admitted.

(ii) We declare a moratorium and cause public announcement in accordance with sections 13 and 15 of the IBC, 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 IBC, 2016 may be made.

(x) Mr. Ram Ratan Modi, IP Registration No. IBBI/IPA-001/IP-P00051/2017-18/10125, e-mail : *rrmodi@gmail.com*, of "Narayani Building", 27, Brabourne Road, 5th Floor, Room No. 503, Kolkata-700 001 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 a sum of Rs. 3,00,000 (rupees three lakhs only) to IRP as advance fees as per regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which shall be adjusted from final bill.

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

(xiii) List the matter on April 20, 2020 for the filing of the progress report.

(xiv) C. A. (I. B.) No. 3/KB/2019 and C. A. (I. B.) No. 121/KB/2019 connected with C. P. (I. B.) No. 184/KB/2018 stand disposed of.

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

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

[2020] 220 Comp Cas 482 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — KOCHI BENCH]

CAPEDGE CONSULTING P. LTD.[1]

v.

INDIA TECHS LTD.

ASHOK KUMAR BORAH *(Judicial Member)* and
VEERA BRAHMA RAO AREKAPUDI *(Technical Member)*

October 25, 2019.

HF ▶ Petitioner

INSOLVENCY RESOLUTION—PETITION BY OPERATIONAL CREDITOR—DISPUTE AS TO DEBT—COMMUNICATION SEEKING DETAILS OF SERVICES RENDERED BY OPERATIONAL CREDITOR—CANNOT BE TERMED AS PRE-EXISTING DEBT—LITIGATION BETWEEN THIRD PARTIES ARISING OUT OF DISHONOUR OF CHEQUE NOT RELEVANT—DEBT AND DEFAULT ESTABLISHED—PETITION ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 9.

The existence of a dispute or the record of the pendency of a suit or arbitration proceedings should be pre-existing, i. e., prior to demand notice or invoice received by the corporate debtor. The moment there is existence of dispute, the corporate debtor goes out of the ambit of the Insolvency and Bankruptcy Code, 2016.

INNOVENTIVE INDUSTRIES LTD. *v.* ICICI BANK [2017] 205 Comp Cas 57 (SC) *relied on.*

The operational creditor filed a petition under section 9 of the Code on the ground that the corporate debtor had failed to pay its dues in respect of the services rendered by it. The debtor contended that a dispute existed between the parties prior to the filing of the petition and that the petition had been filed pressurise the corporate debtor to withdraw the complaints regarding cheque bouncing case :

Held, *admitting the petition, that the corporate debtor had placed reliance on the letter dated January 21, 2018 written by it to hold that there was an existence of dispute. However, in the e-mail communication the corporate debtor was merely asking for further information on the services rendered by the operational creditor for each of the invoices raised. There were no record to show a dispute that was pre-existing apart from the hypothetical or illusory dispute which had been raised by the corporate debtor. The corporate debtor*

1. This order has been affirmed by the National Company Law Appellate Tribunal : See [2020] 220 Comp Cas 490 (NCLAT) *infra*.—Ed.

had not raised any dispute relating to the debt or relating to quality of service or goods. It merely sought information regarding the services provided, which could not be termed as a pre-existing dispute or plausible dispute. The cheque dishonour case was not between the operational creditor and the corporate debtor but between some other parties which could not be taken into consideration. The petition was complete in all respects and the creditor was entitled to claim its dues. The creditor succeeded in establishing the default in payment of the operational debt beyond doubt. The petition was to be admitted with a moratorium.

MOBILOX INNOVATIONS P. LTD. *v.* KIRUSA SOFTWARE P. LTD. [2017] 205 Comp Cas 324 (SC) *relied on*.

[The debtor did not press the contention regarding non-issuance of demand notice upon production of the original acknowledgment due card indicating receipt of the demand notice at the office of the corporate debtor.]

Cases referred to :

Innoventive Industries Ltd. *v.* ICICI Bank [2017] 205 Comp Cas 57 (SC) (para 17)

Kishan (K.) *v.* Vijay Nirman Co. P. Ltd. [2018] 4 Comp Cas-OL 112 (SC) (para 11)

Mobilox Innovations P. Ltd. *v.* Kirusa Software P. Ltd. [2017] 205 Comp Cas 324 (SC) (paras 11, 19)

T. I. B. A. No. 14/KOB/2019.

Abraham George Jacob, for the operational creditor/applicant.

Paulose C. Abraham, for the corporate debtor/respondent.

ORDER

This application has been filed by, M/s. Capedge P. Ltd., represented by its director, Mr. Karukaparambil (for short to be referred hereinafter as the "operational creditor") under section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred hereinafter as the "Code") for initiating insolvency resolution process against M/s. India Techs Ltd. (for short to be referred hereinafter as the "corporate debtor"), a company registered under the Companies Act, 1956. The corporate debtor was incorporated on August 18, 1983 under the Companies Act, 1956 and continues now its existence with CIN No. U51103KL1983PLC003770 and has its registered office at 60/2177 B, Pattathil House, K. P. Vallon Road, Kadavanthara, Kochi-682 020, in the State of Kerala and therefore, the matter falls within the territorial jurisdiction of this Tribunal. 1

2 The operational creditor is engaged in the business of providing consultancy services to establishments for improving their productivity by restructuring and reorganising their financial, administrative and operational systems. The corporate debtor is in the business of dealing in services of construction equipment. The corporate debtor is dealing mainly in respect of sales and service of JCB machines, equipment, spare parts and lubricants for the entire Kerala region.

3 The contents of the application are supported by affidavit of Mr. Jacob Thomas Karukaparambil, the authorised representative of the operational creditor which is attached at annexure-IV of the paper book. It is stated in the affidavit that the company incurred huge losses and they engaged the operational creditor in November, 2015 to render assistance in resolving the issues. The operational creditor had entered into four consultancy agreements with the corporate debtor. The debt arose on account of supply of services rendered are due since March 1, 2016 to February 3, 2019.

4 Counsel for the operational creditor further stated that the corporate debtor had availed of all the services of the operational creditor without any complaint or reservation as per its requirements but had failed to clear the amounts due to the operational creditor. Thereby the operational creditor issued several e-mail correspondences to the corporate debtor as reminders to clear the pending dues.

5 Thereafter, the operational creditor issued a demand notice on February 11, 2019 demanding the payment of the unpaid operational debt to the tune of Rs. 1,71,74,366 (rupees one crore seventy one lakhs seventy four thousand three hundred and sixty six only) including an amount of Rs. 46,90,657 (rupees forty six lakhs ninety thousand six hundred and fifty-seven only) as interest on the overdue amount.

6 It is stated that the corporate debtor has neither given a reply stating that there exists a dispute which is pre-existing and bona fide nor repaid the entire debt, therefore the operational creditor is filing this application to initiate the corporate insolvency resolution process under the IBC.

7 The corporate debtor had submitted that they have entered into certain consultancy agreements dated November 15, 2015, December 23, 2015 and December 23, 2016 with the operational creditor by which they had agreed to certain points which are clearly specified in annexure R-1 appended with the counter statement.

8 The corporate debtor further submitted that the operational creditor went astray from the terms and conditions in the agreement and they had never rendered any services that were promised by them. Further through the e-mail communication dated February 15, 2018 it was informed to the

operational creditor to furnish the details of work done in the invoices raised for accounting purposes, even then the operational creditor do not divulge any of the services rendered on the basis of which the invoices were raised. Therefore, the corporate debtor claims that they do not owe any debt to the operational creditor.

9 The corporate debtor in the counter statement also stated that the operational creditor had entered into two separate loan agreements dated February 28, 2016 and February 29, 2016 with M/s. Telsa Marketing P. Ltd., which has Mrs. Elizabeth Thomas as the managing director and Mr. Thomas George Thayyil as the director and borrowed a sum of Rs. 1,38,00,000 each (annexure R3 to the counter). They further submitted that Mr. George Vinci Thomas, who is the husband of Mrs. Elizabeth Thomas is the managing director of the corporate debtor and Mrs. Elizabeth Thomas and Mr. Thomas George Thayyil are the only remaining directors of the corporate debtor. For repaying the above said amount the operational creditor issued two cheque bearing No. 1845504 and 184554, both dated February 28, 2018 for an amount of Rs. 1,38,00,000 each. However, both the cheques were dishonoured vide cheque return memo dated May 28, 2018. Aggrieved by this M/s. Telsa Marketing P. Ltd. had filed two separate complaints under section 138 of the Negotiable Instruments Act dated July 20, 2018 which was registered as C. M. P. No. 10713 of 2018 and C. C. No. 3132 of 2019.

10 The corporate debtor claimed that the operational creditor communicated them to settle the complaint case filed under the Negotiable Instruments Act, but the settlement terms were not amicable for the corporate debtor. They further claim that the object of this application is not to realise the operational debt due, but to pressurize the corporate debtor to withdraw the complaints filed against him by M/s. Telsa Marketing P. Ltd. The present application under the I and B Code, against the corporate debtor is filed as a counter blast of the complaint filed under the NI Act.

11 The corporate debtor further submitted that no report or documents have been produced by the operational creditor to corroborate the work done by them. It merely indicates that the said invoice has been raised as per the agreement. It was claimed that no sufficient evidence had been laid before this Bench in the prescribed manner under the Code. Thereby, pleaded to reject the application as non-maintainable and devoid of merits. In reliance to the averments of a plausible dispute, counsel quoted the hon'b1e Supreme Court's judgment in *Mobilox Innovations P. Ltd.* v. *Kirusa Software P. Ltd.* [2017] 205 Comp Cas 324 (SC) and *K. Kishan* v. *Vijay Nirman Co. P. Ltd*. [2018] 4 Comp Cas-OL 112 (SC).

12 In the rejoinder filed by the operational creditor, it is stated that there were four agreements entered into by the parties and not three. The copy of the agreement dated November 15, 2016 executed between both the parties, which was not produced by the corporate debtor was produced along with the rejoinder (annexure VII). It was further submitted that the corporate debtor had never raised a dispute regarding the services rendered at any time before, either during the tenure of the agreement or after completion of the same.

13 It was further submitted by counsel for the operational creditor that there are no terms in any of the agreements that cast an obligation on the operational creditor to submit formal reports to the corporate debtor. It was claimed that the operational creditor had not entered into any agreement with M/s. Telsa Marketing P. Ltd. The matter relating to the transaction between M/s. Telsa Marketing P. Ltd. and M/s. Capedge Energy P. Ltd. and M/s. Capedge Metals and Minerals P. Ltd. which are separate and distinct legal entities cannot be dragged into the present proceedings.

14 The operational creditor vehemently denied all the averments in relation to the non-receipt of the demand notice, sufficient evidence for filing this application and also the intention to pressurise the corporate debtor. It was further submitted that the corporate debtor never requested for any documentary proof for consultancy work but only sought time to pay the amount due.

15 During the hearings on October 16, 2019, the Adjudicating Authority had directed the corporate debtor to submit their audited financial statements pertaining to the financial years 2015-16, 2016-17 and 2017-18 uploaded with the Registrar of Companies. However, counsel for the corporate debtor has filed an affidavit informing us that the annual financial returns for the aforesaid financial years were not yet audited, hence not filed with the Registrar of Companies, owing to the deficiency in service by the financial consultant engaged by the respondent-company. Certificate issued by the statutory auditors is also produced.

16 The CIRP application was transferred from the National Company Law Tribunal, Chennai to this Bench and renumbered as T. I. B. A. No. 14/KOB/2019. We have gone through the pleadings on record and perused the submissions made by learned counsels. On a careful perusal of the documents it is noticed that the foremost objection of the corporate debtor regarding "maintainability" of this application citing non-receipt of demand notice under section 8 of the Code is found to be irrelevant because the operational creditor has produced the original acknowledgment due card indicating receipt of the demand notice at the office of the corporate debtor,

which indicates proof of service of the notice. The counsel for the corporate debtor has also not pressed on this point after going through the proof of service produced by the operational creditor.

17 We have examined the claim of the operational creditor in the light of the landmark judgment of the hon'ble Supreme Court in *Innoventive Industries Ltd.* v. *ICICI Bank* [2017] 205 Comp Cas 57 (SC) ; [2018] 1 SCC 407, to establish any pre-existing dispute in the instant matter. We quote (page 88 of 205 Comp Cas) :

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

From the aforesaid judgment, it will be evident that the existence of a dispute or the record of the pendency of a suit or arbitration proceedings should be pre-existing, i. e., prior to demand notice or invoice received by the "corporate debtor". The moment there is existence of dispute, the "corporate debtor" gets out of the clutches of the I and B Code.

18 The corporate debtor had placed reliance on the letter dated January 21, 2018 written by them to hold that there is an existence of dispute. However, on perusal of the e-mail communication, we found that the corporate debtor is merely asking for further information on the services rendered by the operational creditor for each of the invoices raised. Can this be considered as a pre-existing dispute is the moot question.

19 To answer this, we relied on the judgment of the hon'ble Supreme Court in *Mobilox Innovations P. Ltd.* v. *Kirusa Software P. Ltd.* [2017] 205 Comp Cas 324 (SC) ; [2017] SCC Online SC 1154 (page 374 of 205 Comp Cas) :

> "Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the 'dispute' is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the court does not need to be satisfied that the defence is likely to succeed. The court does not at this stage examine the merits of the dispute except to the extent

indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

In this case, we have not come across any record which shows a dispute that was pre-existing apart from that of a hypothetical or illusory dispute which has been raised by the "corporate debtor".

20 Thereby, on perusal of records, it is clear that the respondent-corporate debtor has not raised any dispute relating to debt nor raised any dispute relating to quality of service of goods. They merely sought information regarding the services provided, which cannot be termed as a pre-existing dispute or plausible dispute. Further, the cheque bounce case of Telsa Marketing P. Ltd. is not between the "operational creditor" and the "corporate debtor" but between some other parties which cannot be taken into consideration in the instant case.

21 In the given facts and circumstances, the present application is complete in all respects and the applicant is entitled to claim its dues. The applicant succeeded in establishing the default in payment of the operational debt beyond doubt. In view of the above, the instant petition deserves to be admitted. We further declare moratorium under section 14 of the I and B Code with consequential directions, as mentioned below :

I. That this Bench at this moment prohibits :

(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 ;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

II. It is further made clear that :

(a) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

(b) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(c) That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) section 31 of the IBC or passes an order for liquidation of the corporate debtor under section 33 of the IBC, as the case may be.

(d) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the IBC.

(e) As the applicant has not specified the name of the resolution professional, this Bench, appoints Mr. Sasitharan Ramaswamy having registration number IBBI/IPA-002/IP-N00519/2017-2018/11678 (e-mail address : *rsasidharan.in@gmail.com*) (Address : TC/55/33, Saryu, Chirakara Temple Road, Kaimanam, Pappanamcode PO, Thiruvananthapuram, Kerala-695 018) as the interim resolution professional to carry the functions as mentioned under the IBC.

We direct the operational creditor to deposit a sum of Rs. 2 lakhs with **22** the interim resolution professional namely Mr. Sasitharan Ramaswamy, to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The needful shall be done within three days for the date of receipt of this order by the operational creditor. The amount however be subject to adjustment by the committee of creditors as accounted for by the interim resolution professional and shall be paid back to the operational creditor.

The order of moratorium shall have effect from the date of this order till **23** the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33 of the IBC, as the case may be.

The registry is directed to immediately communicate this order to the **24** operational creditor, the corporate debtor and the interim resolution professional even by way of an e-mail.

This application is disposed of accordingly. No order as to costs. **25**

[2020] 220 Comp Cas 490 (NCLAT)

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

GEORGE VINCI THOMAS

v.

CAPEDGE CONSULTING P. LTD. AND OTHERS

A. I. S. CHEEMA J. ***(Judicial Member)*****, V. P. SINGH** and **ALOK SRIVATSAVA** ***(Technical Members)***

March 16, 2020.

HF ▸ Respondent

INSOLVENCY RESOLUTION—PETITION BY OPERATIONAL CREDITOR—DISPUTE AS TO DEBT—MUST BE IN RELATION TO QUALITY OF SERVICES RENDERED BY OPERATIONAL CREDITOR—CORPORATE DEBTOR NOT ABLE TO SHOW ANY DISPUTE REGARDING QUALITY OF SERVICES RENDERED BY CREDITOR—ADMISSION OF PETITION AFFIRMED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 9.

On an appeal against the order of the Adjudicating Authority admitting the petition under section 9 of the Insolvency and Bankruptcy Code, 2016, filed by the operational creditor rejecting the contention of the corporate debtor regarding a pre-existing dispute :

Held, *dismissing the appeal, that the e-mail relied on by the corporate debtor at the most indicated some disputes but did not disclose what it was. For the purpose of section 9 of the Code, the relevant issue would be whether there was dispute regarding the quality of services rendered. The corporate debtor was not able to show any dispute with regard to the quality of services rendered by the creditor. There was no reason to interfere with the order of admission.*

Order of the National Company Law Tribunal in CAPEDGE CONSULTING P. LTD. *v.* INDIA TECHS P. LTD. [2020] 220 Comp Cas 482 (NCLT) *affirmed.*

CAPEDGE CONSULTING P. LTD. *v.* INDIA TECHS P. LTD. [2020] 220 Comp Cas 482 (NCLT) (para 1) *referred to.*

Company Appeal (AT) (Insolvency) No. 1395 of 2019.

Harshad V. Hameed for the appellant.

Avrojyoti Chatterjee, Rajiv S. Roy, Udayan Agarwal and *Ms. Jayasree Saha* for the respondents.

ORDER

Heard learned counsel for the appellant and counsel for respondent No. 1 ("operational creditor"). Respondent No. 1 "M/s. Capedge Consulting P. Ltd." ("operational creditor") filed an application under section 9 of the Insolvency and Bankruptcy Code, 2016 (the "I and B" Code, for short) against respondent No. 2 "M/s. India Techs P. Ltd." ("corporate debtor") before the Adjudicating Authority ("National Company Law Tribunal" Kochi Bench) TIBA/14/KOB/19 (*Capedge Consulting P. Ltd.* v. *India Techs P. Ltd*. [2020] 220 Comp Cas 482 (NCLT)). The appellant claims to be the managing director of the "corporate debtor" and has filed this appeal as the application under section 9 came to be admitted vide impugned order dated October 25, 2019. 1

The "operational creditor" filed the application through its director Jacob K. Thomas. The application claimed that the "operational creditor" was in the business of providing consultancy services to establishments for improving their productivity by restructuring and re-organising their financial, administrative and operational systems. It was claimed that the "corporate debtor" is in the business of dealing in services of construction equipment. The "operational creditor" claimed that the "corporate debtor" had suffered huge losses and engaged the "corporate debtor" in November, 2015 to render assistance in resolving issues. The "operational creditor" entered into four consultancy agreements with the "corporate debtor". It was claimed that the "debt" arose on account of dues of supply of services rendered between March 1, 2013 and February 3, 2019. 2

It is the case of the "operational creditor" that the demand notice dated February 11, 2019 was sent for unpaid operational debt to the extent of Rs. 1,71,74,366. The "operational creditor" claimed that there was no reply to the notice. 3

The "corporate debtor" appeared before the Adjudicating Authority and the case put up by the "corporate debtor" is that the service of the "operational creditor" were indeed taken by the "corporate debtor" by way of the agreements which are claimed to be executed, but that there was an existing dispute. 4

It is the case that the Jacob K. Thomas of the "operational creditor" was the managing director in yet another company, "M/s. Capedge Metals and Minerals P. Ltd." and also one "M/s. Capedge Energy P. Ltd.". It is argued by learned counsel for the appellant making reference to the agreement at annexure A6 (P74) that one other company "M/s. Telsa Marketing P. Ltd." and "M/s. Capedge Metals and Minerals P. Ltd." had entered into an agreement whereby Jacob K. Thomas took loan from that sister concern. It 5

is stated that Mrs. Elizabeth Thomas shown in the document as the managing director of "M/s. Telsa Marketing P. Ltd." in annexure A6 is also the managing director in the "corporate debtor".

6 Learned counsel for the appellant submits that because of this transaction with the sister concern, a confusion has got created between the "operational creditor" and "corporate debtor" on one side and the other company "M/s. Telsa Marketing P. Ltd." and "M/s. Capedge Metals and Minerals P. Ltd." counsel states that "M/s. Telsa Marketing P. Ltd." had also filed one complaint under section 138 of the Negotiable Instrument Act against "M/s. Capedge Energy P. Ltd." copy of which is at annexure A13 and another complaint against "M/s. Capedge Metals and Minerals P. Ltd." which is at page 102 of the paper book. Learned counsel for the appellant fairly states that these criminal complaints are not directly connected with the present parties but it shows foundation on the basis of which the "corporate debtor" is claiming that there was existence of dispute.

7 Learned counsel referred to the e-mail dated June 4, 2018 (annexure A12) (p-97) to show that there was an existence of dispute. The e-mail was sent by the "operational creditor" to the "corporate debtor" and copy was sent to "M/s. Telsa Marketing P. Ltd." also. The e-mail reads as under :

> "Dear Vinci/Elizabeth
>
> Good Day
>
> Basis our discussions and meetings on various occasions including yesterday's meeting to conclude on an amicable settlement, we have decided to put across the settlement proposal together with the attached statement and settlement calculations for your review and confirmation.
>
> Further once the settlement amounts are agreed, a settlement agreement to recap all the requirements to be translated into a settlement agreement to effect the same and the modus operandi of the accounting requirements, right off and payment will need to be discussed and agreed between all parties.
>
> Since we have decided that all parties are not intending for any legal disputes, we request that the bounced cheques are returned to me tomorrow when we meet to agree on the settlement proposal.
>
> Regards,
>
> Jacob."

8 When the e-mail was read out to us, we expressed to learned counsel that the e-mail at the most indicates regarding some disputes but does not

disclose what is the dispute. For the purpose of section 9, the relevant would be whether there was dispute regarding the quality of services rendered as the present matter relates to services rendered.

Learned counsel then referred to us the e-mail dated January 21, 2018 **9**
(page 90) annexure A8 which was sent by the "corporate debtor" to the "operational creditor". Learned counsel referred to this e-mail stating that the "corporate debtor" had asked the "operational creditor" to submit report regarding the India Techs Assets and it is submitted by counsel that mere sending invoices is not enough in the given agreements and submitting of report would also be necessary and such dispute was raised.

Learned counsel for the respondent, however, has referred to the **10**
"memorandum of agreement" between parties as at annexure A-2 (page 36). Learned counsel referred to "memorandum of understanding" dated November 15, 2015 and took us to clause 9 which stated that the professional fees would take the form of a combination of retainer fees and success based fees. It is argued that there was fixed retainer fees of Rs. 2 lakhs per month while rest of the payments relied on success to be achieved.

Learned counsel for respondent No. 1 then took us back to the e-mail **11**
dated January 21, 2018 (annexure A8) to make further submissions. It would be appropriate to reproduce the concerned portions from the e-mail dated January 21, 2018 (pages 90, 91) :

> "Dear Jacob,
>
> At the outset I reiterate that I have always informed you (and that was the understanding) that whatever payments that Capedge was to receive from India Tech would have to be from the money left over with India Techs after Capedge arranged for the sale of India Techs assets and negotiated with India Techs creditors. India Techs has no money in its coffers—not then and not now and you were aware of that from the very start . . . (1) What are Capedge's achievements and results so far regarding the India Techs project ?
>
> From the first payment in 2015 on November 23 and December 23 of Rs. 78,375 and Rs. 350,000, and on June 28, 2016 of Rs. 6,18,300 and both in November 2016 when India Techs renewed the agreement and later in August 1 and 23 India Techs paid Capedge Rs. 14,65,000, I had requested you to submit reports about the progress of the project and results achieved. You have not, to date, submitted even one report on the India Techs Project in spite of having 2 junior consultants who were appointed to work full time on the India Techs project."

12 Referring to this paragraph of the e-mail, learned counsel submitted that the reference to sale of India Techs Assets is portion which relates to the success fee, and report in that context. According to the counsel if the 'operational creditor' succeeds in the effort, he gets the success fee. By reference to such portion, the appellant cannot state that there is existence of dispute. Alternatively, it is argued that the agreements entered into have similar clauses. It is argued that the retainer fee would still be applicable in all the agreements which are entered between the parties and the 'debt' due in major portion is relating to non-payment of the retainer fees regarding which there is no dispute and which itself is more than Rs. 1 lakh.

13 We have gone through the impugned order where it has dealt with this e-mail dated January 21, 2018. Paragraphs 18 and 20 of the impugned order read as under :

> "18. The corporate debtor had placed reliance on the letter dated January 21, 2018 written by them to hold that there is an existence of dispute. However, on perusal of the e-mail communication, we found that the corporate debtor is merely asking for further information on the services rendered by the operational creditor for each of the invoices raised. Can this be considered as pre-existing dispute is the moot questions.
>
> 20. Thereby, on perusal of records, it is clear that the respondent-corporate debtor has not raised any dispute relating to debt nor raised any dispute relating to quality of service of goods. They merely sought information regarding the services provided, which cannot be termed as a pre-existing dispute or plausible dispute. Further, the cheque bounce case of Telsa Marketing P. Ltd. is not between the "operational creditor" and the "corporate debtor" but between some other parties which cannot be taken into consideration in the instant case."

14 We find ourselves in the agreement with the Adjudicating Authority for these and other reasons recorded and we do not find that the "corporate debtor" is able to show "dispute" with regard to quality of services rendered and thus we do not find any reason to interfere in the impugned order. There is no substance in the appeal, the appeal is accordingly dismissed. No costs.

[2020] 220 Comp Cas 495 (Karn)

[IN THE KARNATAKA HIGH COURT — DHARWAD BENCH]

K. VIRUPAKSHA AND ANOTHER

v.

STATE OF KARNATAKA AND ANOTHER

H. P. SANDESH J.

January 21, 2019.

HF ▸ Respondent

OFFENCES AND PROSECUTION—BANK—RECOVERY OF DUES—SALE OF MORTGAGED PROPERTY—REDUCTION OF RESERVE PRICE—PROTECTION OF ACTION TAKEN IN GOOD FAITH—ALLEGATION THAT OFFICIALS OF BANK COLLUDED TO SELL VALUABLE PROPERTY FOR LOWER PRICE—WHETHER OFFICIAL ACTED IN GOOD FAITH IN CONDUCTING AUCTION TO BE CONSIDERED ONLY AFTER ASCERTAINING FACTS—DISPUTED QUESTION OF FACTS INVOLVED—PROTECTION NOT AVAILABLE—UNLESS SERIOUS ALLEGATIONS LOOKED INTO BY CONCERNED POLICE, COURT CANNOT EXERCISE POWERS TO QUASH PROCEEDINGS—PETITION DISMISSED—CODE OF CRIMINAL PROCEDURE, 1973, S. 482—SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002, S. 32.

Complaints were lodged against a bank and its official, inter alia, alleging that ignoring the offers for one-time settlement scheme, the accused in collusion with others had deliberately and with dishonest intention lowered the value of the mortgaged property for the purpose of conducting public auction. The deputy managers of the bank filed a petition under section 482 of the Code of Criminal Procedure, 1973 seeking to quash the complaint as against them and claiming protection in terms of section 32 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 :

Held, *(i) that the question whether these petitioners had acted in good faith in conducting the auction had to be considered only ascertaining the material and involved questions of fact. The contention urged by the petitioners involved disputed questions of fact. The protection under section 32 of the 2002 Act would be available only when any act was done in good faith. The allegation against these petitioners was that they had not done the act in good faith and that the amount was reduced to Rs. 110 lakhs even though the property was worth Rs. 405 lakhs. Hence, section 32 of the Act would not apply to the facts of the case.*

(ii) That the court had in the earlier petition filed by the bank raising similar contentions held that it was premature to consider the prayer of the petitioner for quashing of the proceedings when such serious accusations were made indicating that there was dishonest intention on the part of the bank and its officers in deliberately undervaluing the property and putting it to public auction which required investigation by the police. Therefore, even before the investigation into such serious allegations closure of the complaint on technicalities was not permissible.

(iii) That the contention of the petitioners that they had discharged their duties under the good faith could not be ascertained without conducting any investigation. Unless the serious allegations were looked into by the concerned police, the court could not exercise the powers under section 482 of the Code to quash the proceedings. If they had any grievance against the final report, it was open for the petitioners to approach the court or the concerned Magistrate.

(iv) That the contention that respondent No. 2 had initiated the criminal proceedings only to harass the petitioners could not be accepted at this stage and mere registration of the case against these petitioners could not be set aside by this court unless a detailed enquiry was conducted by the police. There was a specific allegation in the complaint against these petitioners also that they had colluded with the other accused persons in bringing the property to auction sale that too a reduced price. It was not a fit case to exercise the powers under section 482 of the Code to quash the very initiation of proceedings without the final report.

GENERAL OFFICER COMMANDING, RASHTRIYA RIFLES *v.* CENTRAL BUREAU OF INVESTIGATION [2012] 6 SCC 228 (para 13) *and* UNITED BANK OF INDIA *v.* SATYAWATI TONDON [2010] 158 Comp Cas 251 (SC) (para 10) *referred to.*

Criminal Petition No. 100323 of 2018.

Mallikarjunswamy B. Hiremath for the petitioners.

Praveen K. Uppar, High Court Government Pleader, for respondent No. 1.

Smt. Sumangala A. Chakalabbi for respondent No. 2.

JUDGMENT

1 H. P. SANDESH J.—Heard the arguments of the petitioners' counsel, HCGP for respondent No. 1 and also counsel for respondent No. 2.

2 This petition is filed by the petitioners invoking section 482 of the Code of Criminal Procedure, 1973, for quashing of the order dated May 20, 2016

passed by the Principal Civil Judge and JMFC, Hubballi, in P. C. No. 389 of 2016, referring the matter for investigation and consequently registration of FIR in Crime No. 152 of 2016 by the Hubballi Sub-Urban Police station for the offence punishable under sections 511, 109, 34, 120B, 406, 409, 420, 405, 417 and 426 of the Indian Penal Code, 1860, in so far as to the present petitioners are concerned and to pass such other order as deemed fit in the circumstances of the case.

3 The factual matrix of the case is that, petitioners Nos. 1 and 2 were working at Canara Bank Circle Office, Hubballi, as deputy managers. It is contended that the second respondent herein had approached the Canara Bank in the year 2009 for cash credit facility up to Rs. 1,00,00,000 for its working capital requirement and term loans and for security of the said loan, the second respondent offered to create mortgage of its property situated at Anchatageri village. The Canara Bank considering the request of the second respondent had sanctioned cash credit loan of Rs. 1,00,00,000 term loan of Rs. 88,00,000 another term loan of Rs. 14,00,000 and another term loan of Rs. 66,00,000. The second respondent for availing of cash credit loan had executed a common hypothecation agreement on March 16, 2009 and agreed to repay the cash credit loan on demand being made by the petitioner with interest at 13.75 per cent. per annum with compound interest and subject to changes made by the bank from time-to-time. Further the cash credit loan has been revived from time-to-time by the second respondent and the second respondent failed to repay the outstanding dues in spite of the demand made on January 16, 2013.

4 The second respondent became a defaulter, as such bank had to initiate recovery proceedings under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. In spite of sufficient opportunities, the second respondent did not even bother to clear the outstanding dues and hence, the bank without any other alternate had to issue a public notice on October 13, 2013 of the property mortgaged as security. When the auction was not materialized, yet again the bank called for auction of mortgaged property by notice dated December 4, 2013 and none participated in the auction. Since the reserve price fixed could not materialize the auction, the bank was left with no other alternate than to fix the reserve price at Rs. 1,10,00,000 as against Rs. 228.51 lakhs as fixed earlier by issuing a notice of public auction on December 30, 2013. The said action was called in question by the second respondent by filing a writ petition on January 19, 2014 before this court in W. P. No. 100382 of 2014 (GM-TEN). The said writ petition after hearing both the sides came to be dismissed on January 22, 2014 by the order of

this court and even cost of Rs. 10,000 was imposed upon the petitioner. This court has observed in the order that the petitioner also could get the purchaser or a bidder to purchase the property for the value which he claims to be Rs. 405.21 lakhs and the auction proposed to be held was held to be in consonance with the judgment of the apex court.

5 The second respondent thereafter had challenged the said order in Writ Appeal No. 100349 of 2014 and the same came to be dismissed on August 19, 2014. After having suffered an order as referred above, the second respondent has filed an application before the Debts Recovery Tribunal, Bengaluru, in I. R. No. 3044 of 2014. Even the said application also came to be dismissed by the Tribunal on September 11, 2014 and the said order is challenged by filing an appeal before the Debts Recovery Appellate Tribunal, Chennai, which has also been dismissed. It is contended that after taking recourse to all the possible steps to stall the recovery proceedings, the second respondent has filed a private complaint on May 20, 2016 before the Principal Civil Judge and JMFC, Hubballi, alleging that the auction conducted by the bank is with dishonest intention.

6 The learned Magistrate by an order dated August 19, 2016 has ordered to register the case and referred the complaint for investigation to the Sub-Urban Police Station and consequently the FIR has been issued and initially the Canara Bank which is arraigned as the first accused had filed a criminal petition seeking quashing of the FIR and the petitioner has learnt that the said petition is rejected by this court, vide order dated November 25, 2016, in Crl. P. No. 101162 of 2016. The petitioners being aggrieved by the order dated May 20, 2016 passed by the Principal Civil Judge and JMFC, Hubballi, referring the matter for investigation and consequent upon registration of a case against the petitioners for the alleged offences, filed this petition seeking the relief of quashing of the registration of the case.

7 The main contention urged in this petition is that, FIR itself is bad in law without going through the relevant records, which manifests that there is no offence committed by present petitioners and the Canara Bank has taken steps for recovery of dues on default by the second respondent in repaying the borrowed amount as agreed under the provisions of the SARFAESI Act and has admitted in the complaint and the said auction has been challenged in writ petition which was upheld and auction has been conducted and therefore the entire exercise by the petitioner is within the parameters of the Act and in view of that the launching of the prosecution is hit by section 32 of the SARFAESI Act, 2002. The same is nothing but abuse of process of law and therefore, the very launching of prosecution is

liable to be quashed. The registration of the FIR is highly illegal, since the order at document No. 1 has made it clear that action of bank proceeding with auction by showing reserve price at Rs. 110 lakhs was justified and in terms of the one of the mode as per the judgment of the Supreme Court in *United India* case. These petitioners are arraigned as accused without any accusations are made against them in the entire complaint and merely they had assumed the office at Hubballi for some days, cannot be a ground to arraign them as accused more so when specific allegations are not made against these petitioners.

8 Counsel appearing for the petitioners in his arguments he reiterated the grounds urged in the petition and further contended that all efforts have been made by respondent No. 2 to stall the proceedings and when he failed to succeed in his efforts, in 2016, he came up with a private complaint making allegations against these petitioners contending that conducting of auction for recovery of the amount is not done in good faith and it is nothing but abuse of process. Counsel in his argument also vehemently contended that this court has dismissed the writ petition filed by the second respondent by imposing cost of Rs. 10,000 and also made an observation in the judgment itself that the respondent can secure the prospective purchasers for the amount which he has claimed the properties worth of Rs. 405.21 lakhs and in spite of the said observation, respondent No. 2 did not come forward to secure the prospective purchaser for the amount which he has claimed and all efforts made by him to stall the proceedings have been failed and ultimately he filed a false complaint against these petitioners.

9 In support of his contention, the petitioners' counsel contends that under section 32 of the SARFAESI Act, there is a bar and these petitioners have discharged their duties in good faith that too for recovery of the amount which was advanced by the bank when respondent No. 2 has committed default in payment of the dues and hence he contends that the very initiation of the proceedings against these petitioners amounts to miscarriage of justice.

10 Counsel also brought to the notice of this court the order passed by this court in Writ Petition No. 100382 of 2014 and also the observation made by this court in order to get the prospective purchasers by respondent No. 2 and further brought to the notice of this court that a cost of Rs. 10,000 is imposed by this court when an attempt is made to stall the proceedings. Counsel also brought to the notice of this court that in Writ Appeal No. 100349 of 2014, while dismissing the appeal the Division Bench referring to paragraph No. 52 in *United Bank of India* v. *Satyawati Tondon*

[2010] 158 Comp Cas 251 (SC), held that the learned single judge was justified in observing that exercising of jurisdiction under article 226 of the Constitution, when statutory remedies are available under the Debts Recovery Tribunal Act and SARFAESI Act is unavailable to dismiss W. P. No. 100382 of 2014 instituted by the appellant does not call for any interference.

11 Counsel vehemently contended that the complaint which has been produced before this court along with this petition does not speak anything about the specific act against these petitioners contending that these petitioners have been arraigned as accused Nos. 9 and 11 and in the absence of any specific allegation against these petitioners, the very registration of the case against these petitioners is illegal and hence prayed this court to quash the proceedings.

12 Per contra, counsel appearing for respondent No. 2, in her arguments she vehemently contended that the petitioners have not exercised their powers in conformity with the law and there was no any bona fides on the part of these petitioners to bring the property for lesser consideration in spite of properties worth more than Rs. 400 lakhs and further contended that respondent No. 2 has given offers for more value which has been fixed by these petitioners and the bank and the same has not been considered and when this court has dismissed the writ petition, an appeal is filed before the Division Bench and an interim order was granted to maintain status quo in respect of the machinery and ultimately the writ appeal was dismissed. The second respondent has also approached the Debts Recovery Tribunal and the Tribunal dismissed the application of the second respondent only on the ground that there was a delay of 157 days and being aggrieved by the said order an appeal was filed before the Debts Recovery Appellate Tribunal at Chennai and the same came to be dismissed only on the ground that respondent No. 2 could not arrange for the amount and these petitioners being the employees of the bank, in collusion with the auction purchaser, conducted the sale only with a mala fide intention to cause loss to the second respondent. The petitioners have challenged the very initiation of the proceedings against the petitioners that too only referring the matter for investigation and the same is in preliminary stage and the very petition is premature and hence this court cannot invoke section 482 of the Cr.P.C. and investigation has to be conducted in so far as the allegations made in the complaint and hence the petitioners are not entitled for any relief at the hands of this court.

13 In support of her contention, counsel for respondent No. 2 relied upon a judgment of the apex court, reported in [2012] 6 SCC 228, in a case

between *General Officer Commanding, Rashtriya Rifles* v. *Central Bureau of Investigation* and contends that the apex court in the judgment held that the question whether the act complained of was done in performance or purported performance of duty, has to be determined by competent authority and not by court and these petitioners have not discharged the duties in conformity with the law which they were having and having not discharged the duties in good faith and only with intent to make benefit in favour of the purchaser, they have acted upon. Counsel also brought to the notice of this court paragraphs Nos. 73 to 76 of the judgment contending that the performance of duty acting in good faith either done or purported to be done in the exercise of the powers conferred under the relevant provisions can be protected under the immunity clause or not, is the issue raised. The first point that has to be kept in mind is that such an issue raised would be dependant on the facts of each case and cannot be a subject-matter of any hypothesis, the reason being, such cases relate to initiation of criminal prosecution against a public official who has done or has purported to do something in exercise of the powers conferred under the statutory provision. The facts of each case are, therefore, necessary to constitute the ingredients of an official act and then comes the issue of such a duty being performed in good faith and the allegations which are generally made are, that the act was traceable to any lawful discharge of duty. That by itself would not be sufficient to conclude that the duty was performed in bad faith. It is for this reason that the immunity clause is contained in the statutory provisions conferring powers on the law enforcing authorities and contends that this judgment is aptly applicable to the case on hand that the very act of these petitioners is not done in good faith.

Counsel also relied upon the judgment of this court passed in Criminal **14**
Petition No. 336 of 2014 and brought to the notice of this court paragraph No. 8 and contended that this court in the judgment held that the contention urged by the petitioners are disputed question of fact and these contentions cannot be gone into in exercise of the powers of section 482 of the Cr.P.C. and further brought to the notice of this court paragraph No. 9 in respect of section 32 of the SARFAESI Act is concerned, and it is observed that the acts of petitioner No. 1 and his officials are protected under the Act only when they are done in good faith, whereas in the instant case the petitioners have not acted in good faith and therefore, section 32 of the Act does not apply to the facts of this case.

By relying upon this judgment also counsel contends that the act of **15**
these petitioners is not in good faith. Only with an intention to favour the auction purchaser, colluding with him, the property was brought for sale.

16 Counsel also filed a memo along with the documents of interim order dated April 25, 2014 passed in writ appeal and also the copy of I. R. No. 1298 of 2013 filed by respondent No. 2 before the Debts Recovery Tribunal, Bengaluru and also the copy of I. R. No. 3044 of 2014 filed before the Debts Recovery Tribunal, Bengaluru, along with interim order. Counsel also filed the copy of the appeal arising out of I. A. No. 4482 of 2014 and I. R. No. 3044 of 2014 filed before the Debts Recovery Appellate Tribunal, Chennai, and contends that all efforts have been made by respondent No. 2 to get the actual worth of the property which was brought for auction and the papers which are produced along with the complaint clearly manifests that these petitioners have also indulged in bringing the property for auction and selling the same for lower price by fixing the price as Rs. 110 lakhs, reducing the value of the properties and proceedings were initiated against these petitioners by filing a private complaint. A specific allegation is made in the complaint against these petitioners also and there is no any substance in the contention of the petitioners that there is no any specific allegation against these petitioners and these petitioners have not discharged their duties in their public duty with good faith and the property is brought for sale only with a mala fide intention to help the auction purchaser. Hence, this court cannot invoke section 482 of the Cr.P.C. to quash the same and the matter has to be considered, since question of certain issues are involved in bringing the property for sale for lesser consideration and the performance of duty of these petitioners is not acting in good faith. Whether they have acted in good faith or not has to be decided in trial and only powers under section 482 of the Cr.P.C. has to be exercised when there is an abuse of process and in the case on hand, there is no abuse of process.

17 Having heard the arguments of the petitioners' counsel and also counsel representing respondent No. 2, who is the complainant, the point that arises for consideration of this court is whether the petitioners have made out a ground to invoke section 482 of the Cr.P.C. to quash the proceedings initiated against these petitioners based on the private complaint.

18 The main contention of the petitioners before this court is that the criminal proceedings initiated against them is abuse of process and if the proceedings is continued it amounts to miscarriage of justice and the auction is conducted when the complainant fails to make the payment and under the provisions of the SARFAESI Act a protection is given. Further it is contended that in spite of sufficient opportunity, the second respondent did not even bother to clear the outstanding dues and in the writ proceedings also an opportunity is given to the second respondent to get the prospective

purchaser. The other contention is that the act is done in good faith and respondent No. 2 exhausted all his remedy before this court and also before the Debts Recovery Tribunal and Appellate Tribunal and when failed to get the relief has initiated this proceeding. It is also the contention that there is no any specific averments in the complaint which had been filed against these petitioners and others and in the absence of specific averments there cannot be a criminal proceeding against these petitioners.

19 Now, let me look into the contents of the complaint which attribute against these petitioners. On perusal of the contents of the complaint in paragraph No. 14, it is alleged that ignoring the offers for one-time settlement scheme, accused No. 5 in collusion with accused Nos. 8, 10, 11, 14 and 15 for the purpose of conducting public auction on December 14, 2013 had issued pamphlets/hand bills dated October 11, 2013 without following the procedure under the SARFAESI Act. Further allegation is made that at the behest of accused No. 11 made their best efforts to arrange for a make belief auction sale by issuing paper publication on December 30, 2013 in *Vijayavani*, Kannada daily newspaper, calling for the public auction of the said property and specific allegation is made in the complaint about the role of these petitioners. The question of whether these petitioners acted in good faith in conducting the auction has to be considered only ascertaining the material and the same involves question of fact and the contention urged by the petitioners are disputed question of facts and the same is held in Criminal Petition No. 336 of 2014. The contentions urged by the petitioners that when the same is disputed question of facts, these contentions cannot be gone into in exercise of the powers of section 482 of the Cr.P.C. in order to quash the proceedings. The other contentions in so far as the bar under section 32 of the SARFAESI Act is concerned and the said protection is given when any act is done in good faith. Whereas in the instant case, the very allegation made against these petitioners is that they have not done the act in good faith and main contention that the amount is reduced to Rs. 110 lakhs even if the property is worth of Rs. 405 lakhs. Hence, section 32 of the Act does not apply to the facts of the case.

20 This court also in the earlier petition filed by the Canara Bank raising the similar contentions while disposing of the petition in Criminal Petition No. 101162 of 2016 held that the grievance of petitioner that no motive can be attributed either to the bank or to its officers and after hearing learned counsel for the petitioner and respondent counsel, it is seen that in any event, it is premature to consider the prayer of the petitioner for quashing of the said proceedings when such serious accusations are made in indicating that there is dishonest intention on the part of the bank and its

officers to deliberately under valued the property and to put the same for public auction indicating "rock bottom price" as initiate beat which requires investigation by the police. Therefore, even before the investigation into such serious allegation closure of the said complaint on technicalities is not permissible. This court also in other petition in Criminal Petition No. 101258 of 2016, filed by another accused reiterated the same in mentioning that the similar yardstick has been adopted in Criminal Petition No. 101162 of 2016 to the case on record and directed the police to file a final report and while doing so they should give due consideration of the materials supplied by the petitioner herein in support of the valuation report issued by them. In any event, if the petitioner is aggrieved by the report is at liberty to approach the learned Magistrate or this court at an appropriate stage for further relief. With the said observation, the petition filed by the Canara Bank as well as other accused are disposed of.

21 For having taken note of the similar set of grounds urged in the earlier petition and also in the present petition and the very contention of the petitioners are also that they have done and discharged the duties under the good faith cannot be ascertained without conducting any investigation and these petitioners have approached this court for very initiation of the proceedings against them and when the serious allegations are made against these petitioners and unless the serious allegations are looked into by the concerned police, this court cannot exercise the powers under section 482 of the Cr.P.C. to quash the proceedings. Let there be a final report and if they have any grievance against the final report, it is open for the petitioners to approach this court or the concerned Magistrate. The other contention that respondent No. 2 exhausted all his remedy in respect of auction and only to harass the petitioners has initiated the criminal proceedings cannot be accepted at this stage and mere registration of the case against these petitioners cannot be set aside by this court unless a detailed enquiry is conducted by the police. There is a specific allegation in the complaint against these petitioners also that they have colluded with the other accused persons in bringing the property for auction sale that too a reduced price. Hence, I am of the opinion that it is not a fit case to exercise the powers under section 482 of the Cr.P.C. to quash the very initiation of proceedings without the final report.

22 In view of the discussions made above, I pass the following :

ORDER

The petition is dismissed with a liberty to approach the court of Magistrate or this court after submitting the final report.

[2020] 220 Comp Cas 505 (SC)

[IN THE SUPREME COURT OF INDIA]

K. VIRUPAKSHA AND ANOTHER

v.

STATE OF KARNATAKA AND ANOTHER

MRS. R. BANUMATHI, S. ABDUL NAZEER and **A. S. BOPANNA** JJ.

March 3, 2020.

HF ▸ Appellant

OFFENCES AND PROSECUTION—BANK—RECOVERY OF DUES—SALE OF MORTGAGED PROPERTY—REDUCTION OF RESERVE PRICE—PROTECTION OF ACTION TAKEN IN GOOD FAITH—ALLEGATION THAT OFFICIALS OF BANK COLLUDED TO SELL VALUABLE PROPERTY FOR LOWER PRICE—WHETHER OFFICIAL ACTED IN GOOD FAITH IN CONDUCTING AUCTION TO BE CONSIDERED ONLY AFTER ASCERTAINING FACTS—CRIMINAL COMPLAINT FILED AFTER DISMISSAL OF APPLICATION BY DEBTS RECOVERY TRIBUNAL AND APPEAL THEREFROM INTIMIDATORY TACTIC AND AFTERTHOUGHT—COMPLAINT AGAINST BANK OFFICIALS QUASHED WITH LIBERTY TO COMPLAINANT TO APPEAL AGAINST ORDER OF DISMISSALS—CODE OF CRIMINAL PROCEDURE, 1973, S. 482—SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002, S. 32.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is a complete code in itself which provides the procedure to be followed by the secured creditor and the remedy to the aggrieved parties including the borrower. If there is any discrepancy in the manner of classifying the account of the defaulter as a non-performing asset or in the manner in which the property was valued or was auctioned, the Debts Recovery Tribunal is vested with the power to set aside such auction at the stage after the secured creditor invokes the power under section 13 of the Act. The action taken by the banks under the Act is neither unquestionable nor treated as sacrosanct under all circumstances but if there is discrepancy in the manner the bank has proceeded it will always open to challenge in the forum provided.

AUTHORISED OFFICER, INDIAN OVERSEAS BANK *v.* ASHOK SAW MILL [2011] 162 Comp Cas 324 (SC) *relied on.*

Complaints were lodged against a bank and its official, inter alia, alleging that ignoring the offers for one-time settlement, the accused in collusion with

others had deliberately and with dishonest intention lowered the value of the mortgaged property for the purpose of conducting public auction. The deputy managers of the bank filed a petition under section 482 of the Code of Criminal Procedure, 1973 seeking to quash the complaint as against them and claiming protection in terms of section 32 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The High Court refused to quash the complaint. On appeal :

Held, *allowing the appeal, that the application filed by the complainant before the Debts Recovery Tribunal had been dismissed and the appeal before the Debts Recovery Appellate Tribunal was dismissed. The further remedy was to approach the High Court challenging the orders of the Tribunals. Instead the petitioner after dismissal of the application before the Debts Recovery Tribunal had filed the criminal complaint which appeared to be an intimidatory tactic and an afterthought which was an abuse of the process of law. If the grievance as put forth was allowed to be agitated through a complaint and if the investigation was allowed to continue it would amount to permitting the jurisdictional police to redo the process which would be in the nature of reviewing the order passed by the single judge and the Division Bench in the writ proceedings by the High Court and the orders passed by the competent court under the Act which was neither desirable nor permissible and the banking system could not be allowed to be held to ransom by such intimidation. Whether the appellants were entitled to protection in terms of section 32 of the Act were questions of fact and were required to be proved by adducing evidence. This was also an aspect which could be examined in the proceedings provided under the Act. A criminal proceeding would not be sustainable in a matter of the present nature, and exposing the appellants even on that count to proceedings before the Investigating Officer or the criminal court would not be justified. The complaint in so far as the appellants were concerned was to be quashed with liberty to the complainant to avail of his remedies in accordance with law against the orders passed by the Debts Recovery Tribunal.*

Decision of the Karnataka High Court in K. VIRUPAKSHA *v.* STATE OF KARNATAKA [2020] 220 Comp Cas 495 (Karn) *reversed.*

Cases referred to :

Authorised Officer, Indian Overseas Bank *v.* Ashok Saw Mill [2011] 162 Comp Cas 324 (SC) (para 16)

General Officer Commanding, Rashtriya Rifles *v.* Central Bureau of Investigation [2012] 6 SCC 228 (para 18)

State of Haryana *v.* Bhajan Lal [1992] Supp (1) SCC 335 (para 9)

United Bank of India *v.* Satyawati Tondon [2010] 158 Comp Cas 251 (SC) (para 12)

Virupaksha (K.) *v.* State of Karnataka [2020] 220 Comp Cas 495 (Karn) (para 1)

Civil Appeal No. 377 of 2020.

Appeal from the judgment and order dated January 21, 2019 of the Karnataka High Court in Crl. Petition No. 100323 of 2018. The judgment of the Karnataka High Court is reported as *K. Virupaksha* v. *State of Karnataka* [2020] 220 Comp Cas 495 (Karn).

Brijesh Kumar Tamber and *Ms. Mani Solanki*, Advocates, for the appellants.

Ms. Kiran Suri, Senior Advocate (*Chandrashekhar A. Chakalabbi*, *Shiv Pandey*, *Asanish*, *Anshul Rai*, *Amith (S. J.)*, *M/s. Aishwarya Kumar* (for *M/s. Dharamaprabhas Law Associates*), *Shubhanshu Padhi*, *Ashish Yadav*, *Rakshit Jain*, *Vishal Banshal* and *Joseph Aristotle (S.)*, Advocates, with her) for the respondents.

JUDGMENT

The judgment of the court was delivered by

A. S. BOPANNA J.—Leave granted. 1

The appellants herein were the petitioners in Criminal Petition No. 100323 of 2018 which was dismissed by the High Court of Karnataka, Dharwad Bench through the order dated January 21, 2019[1]. The said order was passed by the High Court while considering the petition filed by the appellants herein under section 482 of the Code of Criminal Procedure, 1973 seeking that the order dated May 20, 2016 passed by the Principal Civil Judge and JMFC in P. C. No. 389 of 2016 referring the matter for investigation and consequential registration of FIR in Crime No. 152 of 2016 by the Hubballi Sub-Urban Police Station for the alleged offences punishable under sections 511, 109, 34, 120B, 406, 409, 420, 405, 417 and 426 of the Indian Penal Code, 1860 be quashed. In the said proceedings the appellants herein are arrayed as accused Nos. 9 and 11 respectively. The appellants herein were at the relevant point in time working as the Deputy General Managers in the Canara Bank (accused No. 1), Circle Office at Hubballi, Karnataka. 2

The brief facts leading to the present situation is that respondent No. 2 herein (hereinafter referred to as the "complainant") had approached the Canara Bank at Hubballi pursuant to which credit facilities were sanctioned 3

1. See *K. Virupaksha* v. *State of Karnataka* [2020] 220 Comp Cas 495 (Karn).

on March 16, 2009. The total credit facility sanctioned amounted to Rs. 2.68 crores. The property bearing Survey No. 213 of 2002 situated at Anchatageri Village, Hubballi measuring 3 acres 2 guntas was offered as security for the said loan and a charge was created. The said property is hereinafter referred to as the "secured asset". As per the case of Canara Bank, the complainant had not repaid the loan amount and in that view having committed default, the account of the complainant was classified as "non-performing asset" ("NPA" for short) on January 15, 2013. The Canara Bank thus having invoked the power under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act" for short) had issued appropriate notices and ultimately the possession of the secured asset as contemplated under section 14 of the SARFAESI Act was taken on March 22, 2013. The secured asset was thereafter evaluated and was brought to auction through the public notice dated October 13, 2013 indicating the date of auction as November 15, 2013. The reserve price of the secured asset was fixed at Rs. 2,28,51,000. Though publication was made, no bids were received in the auction proposed on November 15, 2013 and since the same was a public holiday declared in the State of Karnataka the auction was postponed to December 4, 2013. Even on the said date no bids were received.

4 Accordingly, the Canara Bank had revised the valuation, indicating the reserve price as Rs. 1.10 crores since the earlier reserve price at a higher rate had not attracted purchasers and issued the fresh auction notice dated December 30, 2013. The complainant claiming to be aggrieved by such action, assailed the auction notice in a writ petition filed before the High Court of Karnataka, Dharwad Bench in Writ Petition No. 100382 of 2014. The learned single judge having considered the matter, apart from taking note of the contentions put forth by the complainant had also taken into consideration the alternate remedy available to the complainant under the SARFAESI Act and accordingly dismissed the writ petition with cost of Rs. 10,000 on January 22, 2014. The complainant assailed the said order by filing a writ appeal before the Division Bench in W. A. No. 100349 of 2014. The Division Bench through the order dated August 19, 2014 dismissed the writ appeal. The complainant thereafter availed of the remedy under section 17(1) of the SARFAESI Act by filing an application in I. R. No. 3044 of 2014 (SA) and also accompanying the same with an application under section 5 of the Limitation Act bearing I. A. No. 4482 of 2014. The application seeking condonation of delay and consequently the main application were dismissed by the Debts Recovery Tribunal ("DRT" for short) through its order dated June 12, 2015. Pursuant thereto the complainant is stated to

have filed an appeal before the Debts Recovery Appellate Tribunal, Chennai ("DRAT" for short) which is also stated to be dismissed.

5 It is in the said backdrop the complainant filed the complaint under section 200 of the Cr. P. C. in the Court of the Principal Civil Judge (Junior Division) and JMFC, Hubballi in P. C. No. 389 of 2016 alleging that the officers of the Canara Bank in connivance with the auction purchaser had caused wrongful loss to the complainant. To the said complaint, apart from the Canara Bank, the highly placed officials, the appellants herein, the valuers and the auction purchaser were shown as the accused. The said complaint being taken on record, the learned Magistrate has referred the same for investigation under section 156(3) of the Cr. P. C. and to submit a report. Based on such direction FIR No. 0152 of 2016 is registered. The appellants, therefore, claiming to be aggrieved had preferred the criminal petition under section 482 of the Cr. P. C in Criminal Petition No. 100323 of 2018, which was dismissed by the High Court through the order dated January 21, 2019 which is assailed herein.

6 Heard Mr. Brijesh Kumar Tamber, learned counsel appearing for the appellants, Ms. Kiran Suri, learned senior counsel for the complainant, Mr. Shubhanshu Padhi, learned counsel for the State of Karnataka and perused the appeal papers.

7 Learned counsel for the appellants would contend that apart from the appellants having no role in the transaction between the complainant and the Canara Bank, being the Deputy General Managers and working at the Circle Office, even otherwise cannot be held liable to face a criminal action of the present nature. It is contended that the loan transaction and the account being treated as NPA due to the non-repayment of loan cannot be disputed. In that circumstance the entire action taken, up to the stage of the sale of the property is as regulated under the provisions of the SARFAESI Act which provides not only for the procedure but also for redressal of the grievance of the parties concerned. In that circumstance even if the grievance as sought to be made out by the complainant are taken note, the same cannot form the basis for maintaining the criminal complaint and in such event the learned Magistrate without application of mind has directed investigation under section 156(3) of the Cr. P. C. which has led to the registration of the FIR. It is contended that in respect of the action taken by the Canara Bank, the complainant in fact has availed of the remedy of filing the writ petition, writ appeal and thereafter the proceedings before the DRT as also DRAT and having failed therein has set criminal law into motion which is not bona fide and not sustainable in law. It is contended that the learned judge of the High Court of Karnataka has not appreciated

the matter in its correct perspective. Instead, the learned judge has arrived at the conclusion that the investigation would not prejudice the appellants, which is not justified. It is contended that when action is taken against a defaulter, if the instant action is permitted, it would not be possible to discharge the official functions and as such the instant case is a fit case where interference was required but the High Court has failed to appreciate this aspect of the matter. Further, it is also pointed out that the learned judge was not justified in rejecting the petition filed by the appellants merely because the other petitions filed in Criminal Petition No. 101258 of 2016 and Criminal Petition No. 101162 of 2016 filed by certain other accused had been dismissed and a direction was issued to the police to file the final report.

8 Learned senior counsel for the complainant would on the other hand rely on the identical criminal petitions which had been dismissed by the High Court in so far as accused Nos. 1 and 12 are concerned. It is contended that though the loan of Rs. 2.68 crores was sanctioned, only a sum of Rs. 90 lakhs was disbursed and the remaining amount was adjusted as repayment. It is further contended that the secured asset which was worth more than Rs. 4 crores was undervalued and ultimately sold for Rs. 1.10 crores in connivance with the auction purchaser who is arrayed as accused No. 15. It is further contended that the under valuation of the mortgage property is not the only issue but the issue with regard to the non-disbursement of the entire loan and the non-consideration of the three offers made by the complainant for one-time settlement ("OTS" for short) are all aspects which are to be investigated upon. It is contended that in such circumstance the investigation as ordered by the learned Magistrate was justified and the High Court has appropriately refrained from interfering in the matter at this stage. It is, therefore, contended that the contention as urged in the instant appeal by the appellants does not merit consideration and the appeal is liable to be rejected. Learned counsel for the State of Karnataka would contend that pursuant to direction issued by the learned Magistrate the FIR had been registered and the investigation is in progress and therefore, the same be permitted to be taken to its logical conclusion.

9 Before adverting to the rival contentions urged on behalf of the parties we have kept in perspective the decision of this court in the case of *State of Haryana* v. *Bhajan Lal* [1992] Supp (1) SCC 335 placed for consideration by learned senior counsel for the complainant which lays down the parameters that are to be kept in view while exercising the extraordinary power/inherent power to quash the criminal proceeding. On stating the parameters, this court has cautioned that the power of quashing a criminal

proceeding should be exercised very sparingly and with circumspection and that too in rare cases. In that background, keeping in view the nature of transaction and the manner in which the earlier proceedings were resorted to on the same subject-matter, the present situation is required to be considered.

As noted, the undisputed fact is that the complainant had approached **10** the Canara Bank for financial assistance, wherein the appellants herein were the officers in the Circle Office. The complainant had availed of the loan facility to the tune of Rs. 2.68 crores on March 16, 2009. Though the complainant contends that the entire amount of Rs. 2.68 crores was not released, but only a sum of Rs. 90 lakhs was released and the remaining amount was adjusted as repayment, the question would be as to whether that aspect and the other aspects as raised with regard to the non-consideration of the OTS as also the value for which the property was sold and the manner in which it was sold could be investigated into by the police merely because allegations are made and certain sections of the Indian Penal Code are invoked when the action is resorted to and regulated under the SARFAESI Act. While taking note of the sequence of events it is noticed that the secured asset though sold in the auction conducted on January 31, 2014 and the grievances as sought to be put forth at this point in the criminal complaint was available at that juncture, it is not as if the complaint was immediately filed. On the other hand, when the auction notice dated October 13, 2013 was issued, no grievance was made out by the complainant before any judicial forum. However, the sale did not take place for want of purchasers and a fresh auction notice dated December 30, 2013 was issued indicating the reserve price at Rs. 1.10 crores.

At that stage the complainant approached the High Court of Karnataka, **11** Dharwad Bench in a writ petition filed under articles 226 and 227 of the Constitution of India in W. P. No. 100382 of 2014. The auction notice dated December 30, 2013 was impugned therein. The allegation which is now sought to be put forth in the complaint filed under section 200 of the Cr. P. C. wherein the appellants herein along with others have been accused of with regard to the under valuation of the secured assets was the very contention which was urged in the said writ petition. The learned single judge in the said writ petition had taken note of the contention that the reserve price in respect of the secured assets was fixed at Rs. 228.51 lakhs initially, thereafter in the subsequent auction conducted the same was fixed at Rs. 1.10 crores and has thereafter concluded as hereunder :

> "Undisputedly, the petitioner is the debtor and has suffered an order passed by the jurisdictional Debts Recovery Tribunal. The Debts

Recovery Tribunal, Bangalore has issued recovery certificate in favour of the respondent-bank to recover the said amount. Property mortgaged to the respondent-bank by the petitioner has been brought for sale by auction. In the event of bank not adhering to provisions of the SARFAESI Act in conducting the sale or there being any infraction in this regard, the petitioner has an alternate remedy available under the SARFAESI Act. Hence, at the stage of auction being conducted by the respondent-bank for recovery of its legitimate dues, this court would not interfere with said auction in the normal course.

In the instant case, reserve price earlier fixed at Rs. 228.51 lakhs has not fetched customers and as such, the respondent-bank has fixed the reserve price at Rs. 110 lakhs which would be the price with which the public auction starts and auction bidders are not permitted to give bids below the floor value or reserve price. *If the petitioner is able to secure a customer or a bidder who can offer his bid for the value as proposed by the petitioner itself, it would be needless to state that secured creditor would definitely accept the said bid since earlier attempts by it to auction the property has been in vain.*

In the instant case, as already noticed hereinabove, the petitioner is a borrower and it had defaulted in payment of monies due to the bank. In other words, public money due by the petitioner to the bank has not been repaid. The petitioner loan account having been classified as a 'non-performing asset', the respondent-bank has initiated proceedings under the SARFAESI Act to recover the dues. In the earlier auctions conducted, reserve price fixed was Rs. 228.51 lakhs, i. e., in the auction which was to be held on November 15, 2013 and December 4, 2013. However, in the paper publication that has been issued on December 30, 2013 annexure C in the auction proposed to be held on January 31, 2014 at 3.30 p.m. (e-auction), reserve price has been fixed at Rs. 110 lakhs. The grievance of the petitioner is that value of the property is more than Rs. 405.21 lakhs and as such, property in question cannot be sold for a pittance. *If value of the property as contended by the petitioner is Rs. 405.21 lakhs, nothing prevents the petitioner from getting a purchaser or a bidder to purchase the property for the said value and clear off the debts due by it to the respondent which even according to the petitioner is around Rs. 285.71 lakhs as on January 31, 2014 (which was Rs. 261 lakhs as on October 11, 2013). However, without taking said recourse, the petitioner is attempting to stall the auction proceedings which is not permissible inasmuch as the respondent-bank being a nationalised bank which is*

Number of individual first subscriber(s)-cum-directors		
Total number of directors (director(s) who is/are not subscriber(s) + subscriber(s)-cum-director(s) as mentioned in above Row No. 3)		

2. (b) Authorized person of non-individual first subscriber(s)

I. Income-tax Permanent Account Number (PAN)

Declaration

I being the subscriber to the memorandum, of the above named proposed company, hereby solemnly declare and affirm that :

- I have not been convicted of any offence in connection with the promotion, formation or management of any company during the preceding five years ; and
- I have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years ; and
- All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of my knowledge and belief.

DSC DSC Box

2. (c) Particulars of individual first subscriber(s) (other than subscriber-cum-director)

I. Director Identification Number (DIN)

Declaration

I being the subscriber to the memorandum, of the above named proposed company, hereby solemnly declare and affirm that :

- I have not been convicted of any offence in connection with the promotion, formation or management of any company during the preceding five years ; and
- I have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years ; and
- All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of my knowledge and belief.

DSC DSC Box

II. Income-tax permanent account number (PAN)

Declaration

I being the subscriber to the memorandum, of the above named proposed company, hereby solemnly declare and affirm that :

- I have not been convicted of any offence in connection with the promotion, formation or management of any company during the preceding five years ; and

☐ I have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years ; and

☐ All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of my knowledge and belief.

DSC DSC Box

2. (d) Particulars of individual first subscriber(s)-cum-directors

I. Director Identification Number (DIN) ☐

Declaration

I ☐ being the subscriber to the memorandum and named as first director in the articles, of the above named proposed company, hereby solemnly declare and affirm that :

☐ I have not been convicted of any offence in connection with the promotion, formation or management of any company during the preceding five years ; and

☐ I have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years ; and

☐ All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of my knowledge and belief.

DSC DSC Box

II. Income-tax permanent account number (PAN) ☐

Declaration

I ☐ being the subscriber to the memorandum and named as first director in the articles, of the above named proposed company, hereby solemnly declare and affirm that :

☐ I have not been convicted of any offence in connection with the promotion, formation or management of any company during the preceding five years ; and

☐ I have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years ; and

☐ All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of my knowledge and belief.

DSC DSC Box

2. (e) Particulars of directors (other than first subscribers)

I. Director Identification Number (DIN) ☐

Declaration

I ☐ being the subscriber to the memorandum and named as first director in

the articles, of the above named proposed company, hereby solemnly declare and affirm that :

☐ I have not been convicted of any offence in connection with the promotion, formation or management of any company during the preceding five years ; and

☐ I have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years ; and

☐ All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of my knowledge and belief.

DSC DSC Box

II. Income-tax permanent account number (PAN) ☐

Declaration

I ☐ being the subscriber to the memorandum and named as first director in the articles, of the above named proposed company, hereby solemnly declare and affirm that :

☐ I have not been convicted of any offence in connection with the promotion, formation or management of any company during the preceding five years ; and

☐ I have not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years ; and

☐ All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of my knowledge and belief.

DSC DSC Box"

(iii) in Form No. INC-33, the letters, words and brackets "MOA language 0 English 0 Hindi SRN of form (RUN)" shall be omitted ;

(iv) in Form No. INC-34, the letters, words and brackets "AOA language 0 English 0 Hindi SRN of form (RUN)" shall be omitted ;

(v) in Form No. URC-1, the words and letters "Form language 0 English 0 Hindi SRN of RUN" shall be omitted.

[F. No. 1/13/2013 CL-V, Vol. IV]

Companies (Auditor's Report) Order, 2020

Notification No. 849(E), dated 25th February, 2020[1].

In exercise of the powers conferred by sub-section (11) of section 143 of the Companies Act, 2013 (18 of 2013) and in supersession of the Companies (Auditor's Report) Order, 2016, published in the Gazette of India,

1. Gaz. of India, Extry. No. 776, dt. 25-2-2020, Pt. II, sec. 3(ii).

Extraordinary, Part II, Section 3, Sub-section (ii), vide number S. O. 1228(E), dated 29th March, 2016, except as respects things done or omitted to be done before such supersession, the Central Government, after consultation with the National Financial Reporting Authority constituted under section 132 of the Companies Act, 2013, hereby makes the following Order, namely :—

1. Short title, application and commencement.—(1) This Order may be called the **Companies (Auditor's Report) Order, 2020.**

(2) It shall apply to every company including a foreign company as defined in clause (42) of section 2 of the Companies Act, 2013 (18 of 2013) (hereinafter referred to as the Companies Act), except—

(i) a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949) ;

(ii) an insurance company as defined under the Insurance Act, 1938 (4 of 1938) ;

(iii) a company licensed to operate under section 8 of the Companies Act ;

(iv) a One Person Company as defined in clause (62) of section 2 of the Companies Act and a small company as defined in clause (85) of section 2 of the Companies Act ; and

(v) a private limited company, not being a subsidiary or holding company of a public company, having a paid-up capital and reserves and surplus not more than one crore rupees as on the balance-sheet date and which does not have total borrowings exceeding one crore rupees from any bank or financial institution at any point of time during the financial year and which does not have a total revenue as disclosed in Schedule III to the Companies Act (including revenue from discontinuing operations) exceeding ten crore rupees during the financial year as per the financial statements.

(3) It shall come into force on the date of its publication in the Official Gazette.

2. Auditor's report to contain matters specified in paragraphs 3 and 4.—Every report made by the auditor under section 143 of the Companies Act on the accounts of every company audited by him, to which this Order applies, for the financial years commencing on or after 1st April, 2020[1], shall in addition, contain the matters specified in paragraphs 3 and 4, as may be applicable :

1. Substituted by Gaz. of India, Extry. No. 1083, dt. 26-3-2020, Pt. II, sec. 3(ii).

Provided this Order shall not apply to the auditor's report on consolidated financial statements except clause (xxi) of paragraph 3.

3. Matters to be included in auditor's report.—The auditor's report on the accounts of a company to which this Order applies shall include a statement on the following matters, namely :—

(i)(a)(A) whether the company is maintaining proper records showing full particulars, including quantitative details and situation of property, plant and equipment ;

(B) whether the company is maintaining proper records showing full particulars of intangible assets ;

(b) whether these property, plant and equipment have been physically verified by the management at reasonable intervals ; whether any material discrepancies were noticed on such verification and if so, whether the same have been properly dealt with in the books of account ;

(c) whether the title deeds of all the immovable properties (other than properties where the company is the lessee and the lease agreements are duly executed in favour of the lessee) disclosed in the financial statements are held in the name of the company, if not, provide the details thereof in the format below :—

Description of property	*Gross carrying value*	*Held in name of*	*Whether promoter, director or their relative or employee*	*Period held—indicate range, where appropriate*	*Reason for not being held in name of company**
—	—	—	—	—	*also indicate if in dispute

(d) whether the company has revalued its property, plant and equipment (including right of use assets) or intangible assets or both during the year and, if so, whether the revaluation is based on the valuation by a registered valuer ; specify the amount of change, if change is 10 per cent. or more in the aggregate of the net carrying value of each class of property, plant and equipment or intangible assets ;

(e) whether any proceedings have been initiated or are pending against the company for holding any benami property under the Benami Transactions (Prohibition) Act, 1988 (45 of 1988) and rules made thereunder, if so, whether the company has appropriately disclosed the details in its financial statements ;

(ii)(a) whether physical verification of inventory has been conducted at reasonable intervals by the management and whether, in the opinion of

the auditor, the coverage and procedure of such verification by the management is appropriate ; whether any discrepancies of 10 per cent. or more in the aggregate for each class of inventory were noticed and if so, whether they have been properly dealt with in the books of account ;

(b) whether during any point of time of the year, the company has been sanctioned working capital limits in excess of five crore rupees, in aggregate, from banks or financial institutions on the basis of security of current assets ; whether the quarterly returns or statements filed by the company with such banks or financial institutions are in agreement with the books of account of the company, if not, give details ;

(iii) whether during the year the company has made investments in, provided any guarantee or security or granted any loans or advances in the nature of loans, secured or unsecured, to companies, firms, limited liability partnerships or any other parties, if so,—

(a) whether during the year the company has provided loans or provided advances in the nature of loans, or stood guarantee, or provided security to any other entity [not applicable to companies whose principal business is to give loans], if so, indicate—

(A) the aggregate amount during the year, and balance outstanding at the balance-sheet date with respect to such loans or advances and guarantees or security to subsidiaries, joint ventures and associates ;

(B) the aggregate amount during the year, and balance outstanding at the balance-sheet date with respect to such loans or advances and guarantees or security to parties other than subsidiaries, joint ventures and associates ;

(b) whether the investments made, guarantees provided, security given and the terms and conditions of the grant of all loans and advances in the nature of loans and guarantees provided are not prejudicial to the company's interest ;

(c) in respect of loans and advances in the nature of loans, whether the schedule of repayment of principal and payment of interest has been stipulated and whether the repayments or receipts are regular ;

(d) if the amount is overdue, state the total amount overdue for more than ninety days, and whether reasonable steps have been taken by the company for recovery of the principal and interest ;

(e) whether any loan or advance in the nature of loan granted which has fallen due during the year, has been renewed or extended or fresh loans granted to settle the overdues of existing loans given to the same parties, if so, specify the aggregate amount of such dues renewed or

extended or settled by fresh loans and the percentage of the aggregate to the total loans or advances in the nature of loans granted during the year (not applicable to companies whose principal business is to give loans) ;

(f) whether the company has granted any loans or advances in the nature of loans either repayable on demand or without specifying any terms or period of repayment, if so, specify the aggregate amount, percentage thereof to the total loans granted, aggregate amount of loans granted to promoters, related parties as defined in clause (76) of section 2 of the Companies Act, 2013 ;

(iv) in respect of loans, investments, guarantees, and security, whether provisions of sections 185 and 186 of the Companies Act have been complied with, if not, provide the details thereof ;

(v) in respect of deposits accepted by the company or amounts which are deemed to be deposits, whether the directives issued by the Reserve Bank of India and the provisions of sections 73 to 76 or any other relevant provisions of the Companies Act and the rules made thereunder, where applicable, have been complied with, if not, the nature of such contraventions be stated ; if an order has been passed by the Company Law Board or the National Company Law Tribunal or the Reserve Bank of India or any court or any other Tribunal, whether the same has been complied with or not ;

(vi) whether maintenance of cost records has been specified by the Central Government under sub-section (1) of section 148 of the Companies Act and whether such accounts and records have been so made and maintained ;

(vii)(a) whether the company is regular in depositing undisputed statutory dues including goods and services tax, provident fund, employees' state insurance, income-tax, sales-tax, service tax, duty of customs, duty of excise, value added tax, cess and any other statutory dues to the appropriate authorities and if not, the extent of the arrears of outstanding statutory dues as on the last day of the financial year concerned for a period of more than six months from the date they became payable, shall be indicated ;

(b) where statutory dues referred to in sub-clause (a) have not been deposited on account of any dispute, then the amounts involved and the forum where dispute is pending shall be mentioned (a mere representation to the concerned Department shall not be treated as a dispute) ;

(viii) whether any transactions not recorded in the books of account have been surrendered or disclosed as income during the year in the tax

assessments under the Income-tax Act, 1961 (43 of 1961), if so, whether the previously unrecorded income has been properly recorded in the books of account during the year ;

(ix)(a) whether the company has defaulted in repayment of loans or other borrowings or in the payment of interest thereon to any lender, if yes, the period and the amount of default to be reported as per the format below :—

Nature of borrowing, including debt securities	*Name of lender**	*Amount not paid on due date*	*Whether principal or interest*	*No. of days delay or unpaid*	*Remarks, if any*
	*lender wise details to be provided in case of defaults to banks, financial institutions and Government.				

(b) whether the company is a declared wilful defaulter by any bank or financial institution or other lender ;

(c) whether term loans were applied for the purpose for which the loans were obtained ; if not, the amount of loan so diverted and the purpose for which it is used may be reported ;

(d) whether funds raised on short-term basis have been utilised for long-term purposes, if yes, the nature and amount to be indicated ;

(e) whether the company has taken any funds from any entity or person on account of or to meet the obligations of its subsidiaries, associates or joint ventures, if so, details thereof with nature of such transactions and the amount in each case ;

(f) whether the company has raised loans during the year on the pledge of securities held in its subsidiaries, joint ventures or associate companies, if so, give details thereof and also report if the company has defaulted in repayment of such loans raised ;

(x)(a) whether moneys raised by way of initial public offer or further public offer (including debt instruments) during the year were applied for the purposes for which those are raised, if not, the details together with delays or default and subsequent rectification, if any, as may be applicable, be reported ;

(b) whether the company has made any preferential allotment or private placement of shares or convertible debentures (fully, partially or optionally convertible) during the year and if so, whether the requirements of section 42 and section 62 of the Companies Act, 2013 have been

complied with and the funds raised have been used for the purposes for which the funds were raised, if not, provide details in respect of amount involved and nature of non-compliance ;

(xi)(a) whether any fraud by the company or any fraud on the company has been noticed or reported during the year, if yes, the nature and the amount involved is to be indicated ;

(b) whether any report under sub-section (12) of section 143 of the Companies Act has been filed by the auditors in Form ADT-4 as prescribed under rule 13 of the Companies (Audit and Auditors) Rules, 2014 with the Central Government ;

(c) whether the auditor has considered whistle-blower complaints, if any, received during the year by the company ;

(xii)(a) whether the Nidhi Company has complied with the Net owned funds to deposits in the ratio of 1 : 20 to meet out the liability ;

(b) whether the Nidhi Company is maintaining ten per cent. unencumbered term deposits as specified in the Nidhi Rules, 2014 to meet out the liability ;

(c) whether there has been any default in payment of interest on deposits or repayment thereof for any period and if so, the details thereof ;

(xiii) whether all transactions with the related parties are in compliance with sections 177 and 188 of the Companies Act where applicable and the details have been disclosed in the financial statements, etc., as required by the applicable accounting standards ;

(xiv)(a) whether the company has an internal audit system commensurate with the size and nature of its business ;

(b) whether the reports of the internal auditors for the period under audit were considered by the statutory auditor ;

(xv) whether the company has entered into any non-cash transactions with directors or persons connected with him and if so, whether the provisions of section 192 of the Companies Act have been complied with ;

(xvi)(a) whether the company is required to be registered under section 45-IA of the Reserve Bank of India Act, 1934 (2 of 1934) and if so, whether the registration has been obtained ;

(b) whether the company has conducted any non-banking financial or housing finance activities without a valid Certificate of Registration (CoR) from the Reserve Bank of India as per the Reserve Bank of India Act, 1934 ;

(c) whether the company is a Core Investment Company (CIC) as defined in the regulations made by the Reserve Bank of India, if so, whether it continues to fulfil the criteria of a CIC, and in case the company is an exempted or unregistered CIC, whether it continues to fulfil such criteria ;

(d) whether the group has more than one CIC as part of the group, if yes, indicate the number of CICs which are part of the group ;

(xvii) whether the company has incurred cash losses in the financial year and in the immediately preceding financial year, if so, state the amount of cash losses ;

(xviii) whether there has been any resignation of the statutory auditors during the year, if so, whether the auditor has taken into consideration the issues, objections or concerns raised by the outgoing auditors ;

(xix) on the basis of the financial ratios, ageing and expected dates of realisation of financial assets and payment of financial liabilities, other information accompanying the financial statements, the auditor's knowledge of the board of directors and management plans, whether the auditor is of the opinion that no material uncertainty exists as on the date of the audit report that company is capable of meeting its liabilities existing at the date of balance-sheet as and when they fall due within a period of one year from the balance-sheet date ;

(xx)(a) whether, in respect of other than ongoing projects, the company has transferred unspent amount to a fund specified in Schedule VII to the Companies Act within a period of six months of the expiry of the financial year in compliance with second proviso to sub-section (5) of section 135 of the said Act ;

(b) whether any amount remaining unspent under sub-section (5) of section 135 of the Companies Act, pursuant to any ongoing project, has been transferred to special account in compliance with the provision of sub-section (6) of section 135 of the said Act ;

(xxi) whether there have been any qualifications or adverse remarks by the respective auditors in the Companies (Auditor's Report) Order (CARO) reports of the companies included in the consolidated financial statements, if yes, indicate the details of the companies and the paragraph numbers of the CARO report containing the qualifications or adverse remarks.

4. Reasons to be stated for unfavourable or qualified answers.—(1) Where, in the auditor's report, the answer to any of the questions referred to in paragraph 3 is unfavourable or qualified, the auditor's report shall also

state the basis for such unfavourable or qualified answer, as the case may be.

(2) Where the auditor is unable to express any opinion on any specified matter, his report shall indicate such fact together with the reasons as to why it is not possible for him to give his opinion on the same.

[F. No. 17/45/2015-CL-V Part I]

General Circulars

I

Circular No. 12/2020, dated 30th March, 2020.

To

All Regional Directors
All Registrar of Companies
All Stakeholders

Subject: **Companies Fresh Start Scheme, 2020**

Sir(s),

In furtherance of the Ministry's Circular No. 11/2020, dated 24th March, 2020[1] and in order to facilitate the companies registered in India to make a fresh start on a clean slate, this Ministry has decided to take certain alleviative measures for the benefit of all companies.

2. The Companies Act, 2013 requires all companies to make annual statutory compliance by filing the annual return and financial statements. Apart from this, various other statements, documents, returns, etc., are required to be filed on the MCA-21 electronic registry within prescribed time limits. Filing fees for filing such statements, documents, returns, etc., is governed by section 403 of the Companies Act, 2013 read with Companies (Registration Offices and Fees) Rules, 2014.

3. The Ministry has received representations from various stakeholders requesting for grant of one-time opportunity, so as to enable them to complete their pending compliances by filing necessary documents in the MCA-21 registry including annual filings without being subject to a higher additional fees on account of any delay.

4. In order to give such an opportunity to the defaulting companies and to enable them to file the belated documents in the MCA-21 registry, the Central Government in exercise of the powers conferred under section 460 read with section 403 of the Companies Act, 2013 has decided to introduce a Scheme namely "Companies Fresh Start Scheme, 2020" (CFSS-2020)

1. See [2020] 219 Comp Cas (St.) 61.

condoning the delay in filing the abovementioned documents with the Registrar, in so far as it relates to charging of additional fees, and granting of immunity from launching of prosecution or proceedings for imposing penalty on account of delay associated with certain filings. Only normal fees for filing of documents in the MCA-21 registry will be payable in such ease during the currency of CFSS-2020 as per the provisions of section 403 read with the Companies (Registration Offices and Fees) Rules, 2014 and section 460 of the Act.

5. In addition, the scheme gives an opportunity to inactive companies to get their companies declared as "dormant company" under section 455 of the Act by filing a simple application at a normal fee. The said provision enables inactive companies to remain on the register of the companies with minimal compliance requirements.

6. The details of the Scheme are as under :

(i) The scheme shall come into force on 1st April, 2020 and shall remain in force till 30th September, 2020

(ii) *Definitions.*—In this Scheme, unless the context otherwise requires,

(a) "Act" means the Companies Act, 2013 and Companies Act, 1956 (wherever applicable) ;

(b) "Company" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 ;

(c) "defaulting company means a company defined under the Companies Act, 2013, and which has made a default in filing of any of the documents, statement, returns, etc., including annual statutory documents on the MCA-21 registry ;

(d) "Designated authority" means the Registrar of Companies having jurisdiction over the registered office of the company ;

(e) "Immunity certificate" means the certificate referred to in sub-paragraph (viii) of paragraph 6 of the Scheme ;

(f) "Inactive company" means a company as defined in *Explanation* (i) to sub-section (1) of section 455(1) of the Companies Act, 2013 ;

(iii) *Applicability.*—Any "defaulting company" is permitted to file belated documents which were due for filing on any given date in accordance with the provisions of this Scheme :

(iv) *Manner of payment of normal fees for filing of belated documents and seeking immunity under the Scheme.*—Every defaulting company shall be required to pay normal fees as prescribed under the Companies (Registration Offices and Fees) Rules, 2014 on the date of filing of each belated

document and no additional fee shall be payable. Immunity from the launch of prosecution or proceedings for imposing penalty shall be provided only to the extent such prosecution or the proceedings for imposing penalty under the Act pertain to any delay associated with the filings of belated documents. Any other consequential proceedings, including any proceedings involving interests of any shareholder or any other person qua the company or its directors or key managerial personnel would not be covered by such immunity. For example, under section 42(8), every company is required to file a return of allotment within the period provided therein. However, the proviso to section 42(4) also requires that the utilisation of money raised through private placement shall not be made unless the return of allotment has been filed in the registry. Now, the immunity under the Scheme shall only be available in respect of the proceedings for imposing penalty on account of delay in filing the return of allotment, but not on account of utilization of the money raised through private placement prior to the filing of the return with the registry.

(v) *Withdrawal of appeal against any prosecution launched or the proceedings for imposing penalties initiated*.—If the defaulting company, with respect to any statutory filing under the Act, or its officer in default, as the case may be, has filed any appeal against any notice issued or complaint filed or an order passed by a court or by an adjudicating authority under the Act, before a competent court or authority for violation of the provisions under the Companies Act, 1956 and/or Companies Act, 2013, in respect of which the application is made under this scheme, the applicant shall before filing an application for issue of immunity certificate, withdraw the appeal and furnish proof of such withdrawal along with the application.

(vi) *Special measures for cases where the order of the adjudicating authority was passed but the appeal could not be filed*.—In all cases where due to delay associated in filing of any document, statement or return, etc., at the MCA-21 registry, penalties were imposed by an adjudicating officer under the Act, and no appeal has been preferred by the concerned company or its officer before the Regional Director under section 454(6) as on the date of commencement of the Scheme, the following would apply :

(A) Where the last date for filing the appeal against the order of the adjudicating authority under section 454(6) falls between the 1st March, 2020 to 31st May, 2020 (both days included), a period of 120 additional days shall be allowed with effect from such last date to all companies and their officers for filing the appeal before the concerned Regional Directors ;
(B) During such additional period as stated in (A) above, prosecution under

section 454(8) for non-compliance of the order of the adjudicating authority, in so far as it relates to delay associated in filing of any document, statement or return, etc., in the MCA-21 registry shall not be initiated against such companies or their officers ;

(vii) *Application for issue of immunity in respect of document(s) filed under the Scheme.*—The application for seeking immunity in respect of belated documents filed under the Scheme may be made electronically in the Form CFSS-2020 annexed, after closure of the Scheme and after the document(s) are taken on file, or on record or approved by the designated authority as the case may be but not after the expiry of six months from the date of closure of the Scheme. There shall not be any fee payable on this Form :

Provided that this immunity shall not be applicable in the matter of any appeal pending before the court of law and in case or management disputes of the company pending before any court of law or Tribunal :

Provided also that no immunity shall be provided in case any court has ordered conviction in any matter, or an order imposing penalty has been passed by an adjudicating authority under the Act, and no appeal has been preferred against such orders of the court or of the adjudicating authority, as the case may be, before this Scheme has come into force.

(viii) *Order by designated authority granting immunity from penalty and prosecution.*—Based on the declaration made in the Form CFSS-2020 an immunity certificate in respect of documents filed under this Scheme shall be issued by the designated authority.

(ix) *Scheme not to apply in certain cases.*—This scheme shall not apply :—

(a) to companies against which action for final notice for striking off the name under section 248 of the Act (previously section 560 of the Companies Act, 1956) has already been initiated by the designated authority ;

(b) where any application has already been filed by the companies for action of striking off the name of the company from the register of companies ;

(c) to companies which have amalgamated under a scheme of arrangement or compromise under the Act ;

(d) where applications have already been filed for obtaining dormant status under section 455 of the Act before this Scheme ;

(e) to vanishing companies ;

(f) where any increase in authorized capital is involved (Form SH-7) and also charge related documents (CHG-1, CHG-4, CHG-8 and CHG-9) ;

(x) *Effect of immunity*.—After granting the immunity, the designated authority concerned shall withdraw the prosecution(s) pending, if any, before the concerned court(s) and the proceedings of adjudication of penalties under section 454 of the Act, other than those referred in the second proviso to sub-paragraph (vii) of paragraph 6 of this Scheme, in respect of defaults against which immunity has been so granted shall be deemed to have been completed without any further action on the part of the designated authority ;

(xi) *Scheme for inactive companies*.—The defaulting inactive companies, while filing due documents under CFSS-2020 can, simultaneously, either :

(a) apply to net themselves declared as dormant company under section 455 of the Companies Act, 2013 by filing e-form MSC-1 at a normal fee on said form ; or

(b) apply for striking off the name of the company by filing e-Form STK-2 by paying the fee payable on Form STK-2.

7. At the conclusion of the Scheme, the designated authority shall take necessary action under the Act against the companies who have not availed of this Scheme and are in default in filing these documents in a timely manner.

8. This issues with the approval of the competent authority.

Yours faithfully,
K. M. S. Narayanan,
Assistant Director (Policy).
[F. No. 02/01/2020-CL-V]

[*Source : Issued by the Ministry of Corporate Affairs, New Delhi, dated 30th March, 2020.*]

Annexure

Form

[Pursuant to Companies Fresh Start Scheme, 2020]

Application for issue of immunity certificate under the Companies Fresh Start Scheme (CFSS), 2020

To

The Registrar of Companies,

Sir/Madam,

I hereby make an application for issue of immunity certificate under the Companies Fresh Start Scheme, 2020 and give below the following particulars, namely :—

1. (a) Corporate identity number (CIN) Pre-fill

(b) Global location number (GLN) of company

2. (a) Name of the company

(b) Address of the registered office or principal place of business in India of the company

(c) e-mail ID of the company

3. Details of documents filed under the Companies Fresh Start Scheme, 2020

Total number of service request number (SRN)(s) Pre-fill

SRN	*Form number(s)*	*Date of filing (DD/MM/YYYY)*	*Date of event (DD/MM/YYYY)*	*Normal fees charged under CFSS, 2020 (in Rs.)*	*Total fees paid (in Rs.)*
Total					

4. Whether any appeal(s) was filed against any notice issued or complaint filed, or an order passed by a court or by an adjudicating authority under the Act, before a competent court or authority, before the commencement of the Scheme, for violation of the provisions under the Act in respect of the abovementioned document(s). If yes attach proof of withdrawal of such appeal.

Yes ☐ No ☐ Not applicable ☐

5. Whether any prosecution(s) is pending in court against the company and its officers in respect of belated documents filed under the scheme. If yes, provide the details thereof as an attachment.

Yes ☐ No ☐

Attachments *List of attachments*

(1) Proof of withdrawal of any appeal(s) against any notice issued or complaint filed or an order passed by a court by an adjudicating authority under the Act. Attach

(2) Details in respect of prosecution(s) pending against the company and its officers in respect of belated documents filed under the scheme which requires withdrawal by the Registrar. Attach

(3) Optional attachment(s)—if any Attach

Remove attachment

Verification

To the best of my knowledge and belief, the information given in this application and its attachments is correct and complete.

☐ I have been authorised by the board of director's resolution number ☐

dated ☐ (DD/MM/YYYY) to sign and submit this application.

☐ I am duly authorised by the board of director's to sign and submit this application.

☐ The company has failed to comply with the provisions of the Act as mentioned in respect of filing of abovementioned documents.

☐ The company has withdrawn the appeals pending before any court or NCLT/NCLAT or Regional Director or any other adjudicating authority.

**To be digitally signed by*

*Designation ☐ DSC Box

*Director identification number of the director ; or DIN or PAN of the manager or CEO or CFO ; or membership number of the secretary ☐

Modify | Check Form | Pre-scrutiny | Submit

FOR OFFICE USE ONLY : Affix filing details

e-Form service request number (SRN) ☐ e-Form filing date ☐ (DD/MM/YYYY)

Digital signature of the authorising officer

This e-Form hereby approved ☐

This e-Form is hereby rejected ☐ Confirm submission

Date of signing ☐ (DD/MM/YYYY)

Immunity Certificate under CFSS, 2020

GOVERNMENT OF INDIA

MINISTRY OF CORPORATE AFFAIRS

<Name of the RoC office>

<Address of the RoC office>

<Corporate Identify Number or Foreign Company Registration Number>, <CIN/FCRN>

Certificate for grant of immunity from prosecution or imposition of penalty under the Companies Fresh Start Scheme (CFSS), 2020.

Whereas <Company Name> (herein referred to as the company) has filed the documents mentioned below and has filed an application under

the CFSS, 2020 for grant of immunity from prosecution, under the Companies Act, 2013.

SRN	*Form number(s)*	*Date of filing (DD/MM/YYYY)*	*Date of event (DD/MM/YYYY)*	*Normal fees charged under CFSS, 2020 (in Rs.)*	*Total fees paid (in Rs.)*
Total					

And whereas the company has also declared that no petition or appeal was filed against any noticed issued or complaint filed before any court or NCLT or NCLAT or Regional Director or any other adjudicating authority for violation of the provisions under the Act in respect of the abovementioned document(s), or where filed, has withdrawn such appeal.

Now therefore, in exercise of the powers conferred under the CFSS, 2020 the undersigned herein issues this certificate to the said company granting immunity from prosecution or imposition of penalty under the Act subject to the provisions contained in the scheme in respect of aforesaid document(s) covered in the application.

<Full name of the authorizing approving the work-item>

<ARoC/DRoC/RoC>

<Registrar of Companies>

<Name of the RoC Office>

Mailing address as per record available in Registrar of Companies Office :

<Name of the company>

<Address of the registered office or of the principal place of business in India of the company>

Note : Immunity Certificate has been generated on the basis of the declaration made in the Form, which may be subject to verification at an appropriate stage. Immunity under the Companies Act, 2013 shall be available strictly in accordance with the terms and conditions mentioned in the Companies Fresh Start Scheme (CFSS), 2020 and will be limited to any default associated with the delay in filing of documents in the registry.

II

Circular No. 13/2020, dated 30th March, 2020.

To

All Regional Director

All Registrar of Companies

All Stakeholders

Subject: **LLP Settlement Scheme, 2020—Modification—Regarding**

Sir,

In continuation to Ministry's General Circular No. 6/2020, dated 4th March, 2020[1] and in order to support and enable Limited Liability Partnerships (LLPs) registered in India to focus on taking necessary measures to address the COVID-I9 threat and to reduce their compliance burden, certain modifications to the said Circular have been decided to be implemented by this Ministry, with effect from 1st April, 2020.

2. *Modification in paragraph No. 8 of the said Circular dated 4th March, 2020, with effect from 1st April, 2020*

(a) Title of the paragraph shall be read as "The details of the original scheme are as under :"

(b) In sub-paragraphs (i) and (vi), for the words, letters and figures, "13th June, 2020", the words, letters and figures, "31st March, 2020" shall be substituted.

3. *Insertion of paragraph 8A after paragraph 8 of the said Circular dated 4th March, 2020 with effect from 1st April, 2020*

The following paragraph shall be inserted after paragraph 8, namely :—

"8A. The details of the scheme as modified, are as under :

(i) The scheme shall come into force with effect from 1st April, 2020 and shall remain in force up to 30d, September, 2020.

(ii) *Definitions.*—In this scheme, unless the context otherwise requires,—

(a) "Act" means the Limited Liability Partnership Act, 2008 ;

(b) "LLP" means a LLP as defined in section 2 (n) of the Limited Liability Partnership Act, 2008 ;

(c) "defaulting LLP" means a LLP registered under the Limited Liability Partnership Act, 2008 which has made a default in filing of documents on the due date(s) specified under the LLP Act, 2008 and rules made thereunder ;

1. See [2020] 219 Comp Cas (St.) 49.

(d) "belated documents" means all documents or forms which arc required to be filed in MCA-21 registry under the provisions of LLP Act, 2008 and the rules made thereunder.

(iii) *Applicability.*—Any "defaulting LLP" is permitted to tile belated documents, which were due for filing till 31st August, 2020 in accordance with the provisions of this Scheme.

(iv) *Manner of payment of fee on filing of belated documents for seeking immunity under the Scheme.*—The defaulting LLPs may themselves avail of this scheme for filing documents which have not been filed or registered in time on the payment of fee as payable for filing of such document or return :

Provided that no additional fees shall be payable for filing any belated documents under this scheme.

(v) *Immunity from prosecution in respect of document(s) filed under the Scheme*.—The defaulting LLPs, which have filed their belated documents till 30th September, 2020 and made good the default, shall not be subjected to prosecution by the Registrar for such defaults.

(vi) *The Scheme not to apply* :—This Scheme shall not apply to LLPs which have made applications in Form 24 to the Registrar, for striking off their name from the register as per provisions of rule 37(1) of the LLP Rules, 2009."

4. *Modification in paragraph No. 9 of the said Circular dated 4th March, 2020 with effect from 1st April, 2020*

(a) After the words "conclusion of the Scheme", the words, letters and figures "after 30th September, 2020" shall be inserted.

5. The other terms and conditions of the said circular shall remain unchanged.

6. This issues with the approval of the competent authority.

Yours faithfully,
K. M. S. Narayanan,
Assistant Director (Policy).
[F. No. 17/61/2016-CL-V-Pt-I]

[*Source : Issued by the Ministry of Corporate Affairs, New Delhi, dated 30th June, 2020.*]

III

Circular No. 14/2020, dated 8th April, 2020.

To

All Regional Directors

All Registrar of Companies

All Stakeholders

Subject: **Clarification on passing of ordinary and special resolutions by companies under the Companies Act, 2013 and rules made thereunder on account of the threat posed by COVID-19**

Sir/Madam,

Several representations have been received in the Ministry for providing relaxations in the provisions of the Companies Act, 2013 (the Act) or rules made thereunder to allow companies to pass ordinary and special resolutions of urgent nature, in view of the difficulties faced by the stakeholders on account of the threat posed by COVID-19. The issues raised in the said representations have been examined considering the overall situation at present.

2. The Act does not contain any specific provision for allowing conduct of members' meetings through video conferencing (VC) or other audio visual means (OAVM). It has been noted that section 108 of the Act and rules made thereunder provide for relevant companies to allow e-voting (including remote e-voting) in case of general meetings convened by them. Section 110 of the Act, on the other hand, allows the companies to pass resolutions (except items of ordinary business and items where any person has a right to be heard) through postal ballot (which includes electronic ballot and electronic voting under section 108). In view of the current extraordinary circumstances due to the pandemic caused by COVID-19 prevailing in the country, requiring social distancing, companies are requested to take all decisions of urgent nature requiring the approval of members, other than items of ordinary business or business where any person has a right to be heard, through the mechanism of postal ballot/e-voting in accordance with the provisions of the Act and rules made thereunder, without holding a general meeting, which requires physical presence of members at a common venue.

3. However, in case holding of an extraordinary general meeting (EGM) by any company is considered unavoidable, the following procedure needs to be adopted for conducting such a meeting on or before 30th June, 2020,

in addition to any other requirement provided in the Act or the rules mode thereunder :

A. *For companies which are required to provide the facility of e-voting under the Act, or any other company which has opted for such facility—*

I. EGMs, wherever unavoidable, may be held through VC or OAVM and the recorded transcript of the same shall be maintained in safe custody by the company. In case of a public company, the recorded transcript of the meeting, shall as soon as possible, be also made available on the website (if any) of the company.

II. Convenience of different persons positioned in different time zones shall be kept in mind before scheduling the meeting.

III. All care must be taken to ensure that such meeting through VC or OAVM facility allows two way teleconferencing or webex for the ease of participation of the members and the participants are allowed to pose questions concurrently or given time to submit questions in advance on the e-mail address of the company. Such facility must have a capacity to allow at least 1,000 members to participate on a first-come-first-served basis. The large shareholders (i. e., shareholders holding 2 per cent. or more shareholding), promoters, institutional investors, directors, key managerial personnel, the chairpersons of the Audit Committee, Nomination and Remuneration Committee and Stakeholders Relationship Committee, auditors, etc., may be allowed to attend the meeting without restriction on account of first-come-first-served principle.

IV. The facility for joining the meeting shall be kept open at least 15 minutes before the time scheduled to start the meeting and shall not be closed till the expiry of 15 minutes after such scheduled time.

V. Before the actual date of the meeting, the facility of remote e-voting shall be provided in accordance with the Act and the rules.

VI. Attendance of members through VC or OAVM shall be counted for the purpose of reckoning the quorum under section 103 of the Act.

VII. Only those members, who are present in the meeting through VC or OAVM facility and have not cast their vote on resolutions through remote e-voting and are otherwise not barred from doing so, shall be allowed to vote through e-voting system or by a show of hands in the meeting.

VIII. Unless the articles of the company require any specific person to be appointed as a Chairman for the meeting, the Chairman for the meeting shall be appointed in the following manner :

(a) where there are less than 50 members present at the meeting, the Chairman shall be appointed in accordance with section 104 ;

(b) in all other cases, the Chairman shall be appointed by a poll conducted through the e-voting system during the meeting.

IX. The Chairman present at the meeting shall ensure that the facility of e-voting system is available for the purpose of conducting a poll during the meeting held through VC or OAVM. Depending on the number of members present in such meeting, the voting shall be conducted in the following manner :

(a) where there are less than 50 members present at the meeting, the voting may be conducted either through the e-voting system or by a show of hands, unless a demand for poll is made in accordance with section 109 of the Act, in which case, the voting shall be conducted through the e-voting system ;

(b) in all other cases, the voting shall be conducted through e-voting system.

X. A proxy is allowed to be appointed under section 105 of the Act to attend and vote at a general meeting on behalf of a member who is not able to attend personally. Since general meetings under this framework will be held through VC or OAVM, where physical attendance of members in any case has been dispensed with, there is no requirement of appointment of proxies. Accordingly, the facility of appointment of proxies by members will not be available for such meetings. However, in pursuance of section 112 and section 113 of the Act, representatives of the members may be appointed for the purpose of voting through remote e-voting or for participation and voting in the meeting held through VC or OAVM.

XI. At least one independent director (where the company is required to appoint one), and the auditor or his authorized representative, who is qualified to be the auditor shall attend such meeting through VC or OAVM.

XII. Where institutional investors are members of a company, they must be encouraged to attend and vote in the said meeting through VC or OAVM.

XIII. The notice for the general meeting shall make disclosures with regard to the manner in which framework provided in this Circular shall be available for use by the members and also contain clear instructions on how to access and participate in the meeting. The company shall also provide a helpline number through the Registrar and transfer agent, technology provider, or otherwise, for those shareholders who need assistance

with using the technology before or during the meeting. A copy of the meeting notice shall also be prominently displayed on the website of the company and due intimation may be made to the exchanges in case of a listed company.

XIV. In case a notice for meeting has been served prior to the date of this Circular, the framework proposed in this Circular may be adopted for the meeting, in case the consent from members has been obtained in accordance with section 101(1) of the Act, and a fresh notice of shorter duration with due disclosures in consonance with this Circular is issued consequently.

XV. All resolutions passed in accordance with this mechanism shall be filed with the Registrar of Companies within 60 days of the meeting, clearly indicating therein that the mechanism provided herein along with other provisions of the Act and rules were duly complied with during such meeting.

B. *For companies which are not required to provide the facility of e-voting under the Act—*

I. EGM, wherever unavoidable, may be held through VC or OAVM and the recorded transcript of the same shall be maintained in safe custody by the company. In case of a public company, the recorded transcript of the meeting, shall as soon as possible, be also made available on the website (if any) of the company.

II. Convenience of different persons positioned in different time zones shall be kept in mind before scheduling the meeting.

III. All care must be taken to ensure that such meeting through VC or OAVM facility allows two way teleconferencing or webex for the ease of participation of the members and the participants are allowed to pose questions concurrently or given time to submit questions in advance on the e-mail address of the company. Such facility must have a capacity to allow at least 500 members or members equal to the total number of members of the company (whichever is lower) to participate on a first-come-first-served basis. The large shareholders (i. e., shareholders holding 2 per cent. or more shareholding), promoters, institutional investors, directors, key managerial personnel, the chairpersons of the Audit Committee, Nomination and Remuneration Committee and Stakeholders Relationship Committee, auditors, etc., may be allowed to attend the meeting without restriction on account of first-come-first-served principle.

IV. The facility for joining the meeting shall be kept open at least 15 minutes before the time scheduled to start the meeting and shall not be closed till the expiry of 15 minutes after such scheduled time.

V. Attendance of members through VC or OAVM shall be counted for the purpose of reckoning the quorum under section 103 of the Act.

VI. Unless the articles of the company require any specific person to be appointed as a Chairman for the meeting, the Chairman for the meeting shall be appointed in the following manner :

(a) where there are less than 50 members present at the meeting, the Chairman shall be appointed in accordance with section 104 ;

(b) in all other cases, the Chairman shall be appointed by a poll conducted in a manner provided in succeeding sub-paragraphs.

VII. At least one independent director (where the company is required to appoint one), and the auditor or his authorized representative, who is qualified to be the auditor shall attend such meeting through VC or OAVM.

VIII. A proxy is allowed to be appointed under section 105 of the Act to attend and vote at a general meeting on behalf of a member who is not able to attend personally. Since general meetings under this framework will be held through VC or OAVM, where physical attendance of members in any case has been dispensed with, there is no requirement of appointment of proxies. Accordingly, the facility of appointment of proxies by members will not be available for such meetings. However, in pursuance of section 112 and section 113 of the Act, representatives of the members may be appointed for the purpose of voting through remote e-voting or for participation and voting in the meeting held through VC or OAVM.

IX. Where institutional investors are members of a company, they must be encouraged to attend and vote in the said meeting through VC or OAVM.

X. The company shall provide a designated e-mail address to all members at the time of sending the notice of meeting so that the members can convey their vote, when a poll is required to be taken during the meeting on any resolution, at such designated e-mail address.

XI. The confidentiality of the password and other privacy issues associated with the designated e-mail address shall be strictly maintained by the company at all times. Due safeguards with regard to authenticity of e-mail address(es) and other details of the members shall also be taken by the company.

XII. During the meeting held through VC or OAVM facility, where a poll on any item is required, the members shall cast their vote on the resolutions only by sending e-mails through their e-mail addresses which are registered with the company. The said e-mails shall only be sent to the designated e-mail address circulated by the company in advance.

XIII. Where less than 50 members are present in a meeting, the Chairman may decide to conduct a vote by show of hands, unless a demand for poll is made by any member in accordance with section 109 of the Act. Once such demand is made, the procedure provided in the preceding sub-paragraphs shall be followed.

XIV. In case the counting of votes requires time, the said meeting may be adjourned and called later to declare the result.

XV. The notice for the general meeting shall make disclosures with regard to the manner in which framework provided in this Circular shall be available for use by the members and also contain clear instructions on how to access and participate in the meeting. The company should also provide a helpline number through the Registrar and transfer agent, technology provider, or otherwise, for those shareholders who need assistance with using the technology before or during the meeting. A copy of the notice shall also be prominently displayed on the website of the company.

XVI. In case a notice for meeting has been served prior to the date of this Circular, the framework proposed in this Circular may be adopted for the meeting in case the consent from members has been obtained in accordance with section 101(1) of the Act, and a fresh notice of shorter duration with due disclosures in consonance with this Circular is issued consequently.

XVII. All resolutions passed in accordance with this mechanism shall be filed with the Registrar of Companies within 60 days of the meeting clearly indicating therein that the mechanism provided herein along with other provisions of the Act and rules were duly complied with.

4. The companies referred to in paragraphs 3(A) and 3(B) above, shall ensure that all other compliances associated with the provisions relating to general meetings, viz., making of disclosures, inspection of related documents by members, or authorizations for voting by bodies corporate, etc., as provided in the Act and the articles of association of the company are made through electronic mode.

5. This issues with the approval of the competent authority.

Yours faithfully,
K. M. S. Narayanan,
Assistant Director.
[F. No. 2/1/2020-CL-V]

[*Source : Issued by the Ministry of Corporate Affairs, New Delhi, dated 8th April, 2020.*]

IV

Circular No. 15/2020, dated 10th April, 2020.

Subject: **COVID-19 related Frequently Asked Questions (FAQs) on Corporate Social Responsibility (CSR)**

The Ministry has been receiving several references/representations from various stakeholders seeking clarifications on eligibility of CSR expenditure related to COVID-19 activities. In this regard, a set of FAQs along with clarifications are provided below for better understanding of the stakeholders :

Sl. No.	*Frequently Asked Questions (FAQs)*	*Reply*
1.	Whether contribution made to "PM CARES Fund" shall qualify as CSR expenditure ?	Contribution made to "PM CARES Fund" shall qualify as CSR expenditure under item No. (viii) of Schedule VII to the Companies Act, 2013 and it has been further clarified vide Office memorandum F. No. CSR-05/1/2020-CSR-MCA, dated 28th March, 2020.
2.	Whether contribution made to "Chief Minister's Relief Funds" or "State Relief Fund for COVID-19" shall qualify as CSR expenditure ?	"Chief Minister's Relief Fund" or "State Relief Fund for COVID-19" is not included in Schedule VII to the Companies Act, 2013 and therefore any contribution to such funds shall not qualify as admissible CSR expenditure.
3.	Whether contribution made to State Disaster Management Authority shall qualify as CSR expenditure ?	Contribution made to State Disaster Management Authority to combat COVID-19 shall qualify as CSR expenditure under item No. (xii) of Schedule VII to the 2013 Act and clarified vide General Circular No. 10/2020, dated 23rd March, 2020[1].
4.	Whether spending of CSR funds for COVID-19 related activities shall qualify as CSR expenditure ?	Ministry vide General Circular No. 10/2020, dated 23rd March, 2020 has clarified that spending CSR funds for COVID-19 related activities shall qualify as CSR expenditure. It is further clarified that funds may be spent for various activities related to COVID-19 under items Nos. (i) and (xii) of Schedule VII relating to promotion of health care including preventive health care and sanitation, and disaster management. Further, as per General Circular No. 21/2014, dated 18th June, 2014[2], items in Schedule VII are broad based and may be interpreted liberally for this purpose.

5.	Whether payment of salary/wages to employees and workers, including contract labour, during the lock-down period can be adjusted against the CSR expenditure of the companies ?	Payment of salary/wages in normal circumstances is a contractual and statutory obligation of the company. Similarly, payment of salary/wages to employees and workers even during the lock-down period is a moral obligation of the employers, as they have no alternative source of employment or livelihood during this period. Thus, payment of salary/ wages to employees and workers during the lock-down period (including imposition of other social distancing requirements) shall not qualify as admissible CSR expenditure.
6.	Whether payment of wages made to casual/daily wage workers during the lockdown period can be adjusted against the CSR expenditure of the companies ?	Payment of wages to temporary or casual or daily wage workers during the lock-down period is part of the moral/humanitarian/contractual obligations of the company and is applicable to all companies irrespective of whether they have any legal obligation for CSR contribution under section 135 of the Companies Act, 2013. Hence, payment of wages to temporary or casual or daily wage workers during the lock-down period shall not count towards CSR expenditure.
7.	Whether payment of ex-gratia to temporary/casual/daily wage workers shall qualify as CSR expenditure ?	If any ex-gratia payment is made to temporary/casual workers/daily wage workers over and above the disbursement of wages, specifically for the purpose of fighting COVID-19, the same shall be admissible towards CSR expenditure as a one-time exception provided there is an explicit declaration to that effect by the Board of the company, which is duly certified by the statutory auditor.

1. See [2020] 219 Comp Cas (St.) 60.
2. See [2014] 185 Comp Cas (St.) 29.

This issues with the approval of competent authority.

Yours faithfully,

Shobhit Srivastava,

Deputy Director, MCA.

[F. No. CSR-01/4/2020-CSR-MCA]

[*Source : Issued by the Ministry of Corporate Affairs, New Delhi, dated 10th April, 2020.*]

V

Circular No. 16/2020, dated 13th April, 2020.

To

All Stakeholders

Nodal Officers (IEPF) of Companies

All Regional Directors and Registrar of Companies

Subject: **Filings under section 124 and section 125 of the Companies Act, 2013 read with IEPFA (Accounting, Audit, Transfer and Refund) Rules, 2016 in view of emerging situation due to outbreak of COVID-19**

Sir,

In view of the situation emerging out of the outbreak of COVID-19, which requires adherence of social distancing norms, the stakeholders have pointed about various difficulties and sought relaxation especially in procedures related to transfer of money remaining unpaid or unclaimed for a period of seven years in terms of the provision of section 124(5) of the Companies Act, 2013 (the Act) and transfer of shares under section 124(6) of the Act read with the IEPFA (Accounting, Audit, Transfer and Refund) Rules, 2016.

2. In this regard, it may be noted that the Ministry of Corporate Affairs has already allowed filing in MCA-21 registry without additional fees till 30th September, 2020 through General Circular No. 11/2020, dated 24th March, 2020[1] and General Circular No. 12/2020, dated 30th March, 2020[2]. Therefore, the necessary relaxation, in so far as filing of various other IEFF e-Forms (IEPF-1, IEPF-1A, IEPF-2, IEPF-3, IEPF-4, IEPF -7) and e-verification of claims filed in e-Form IEPF-5, is concerned, the same has already been provided. Therefore, the stakeholders may plan other concomitant actions accordingly.

3. This issues with the approval of competent authority.

Yours faithfully,
Navneet Chouhan,
General Manager.
[File No. 16/01/2018-IEPFA (Vol. II)]

[*Source : Issued by the Ministry of Corporate Affairs, New Delhi, dated 13th April, 2020.*]

1. See [2020] 219 Comp Cas (St.) 61.
2. See [2020] 220 Comp Cas (St.) 187.

VI

Circular No. 17/2020, dated 13th April, 2020.

To

All Regional Directors

All Registrar of Companies

All Stakeholders

Subject: **Clarification on passing of ordinary and special resolutions by companies under the Companies Act, 2013 and rules made thereunder on account of the threat posed by COVID-19**

Sir/Madam,

Reference is drawn to this Ministry's General Circular No. 14/2020, dated 8th April, 2020[1] on the subject cited above. After the issue of the said circular, the Ministry has received representations from stakeholders for clarification on some of the elements in the framework laid down therein. The stakeholders have highlighted the difficulties in serving and receiving notices/responses by post in the current circumstances. In view of the same and with a view to bringing in greater clarity on the modalities to be followed by companies for conduct of extraordinary general meetings during the COVID-19 related social distancing norms and lock-down for the period as indicated in the said Circular, or till further orders, whichever is earlier, the following clarifications are hereby given :—

(i) *Manner and mode of issue of notices to the members before convening the general meeting :*

A. *For companies which are required to provide the facility of e-voting under the Act, or any other company which has opted for such facility—*

I. In view of the present circumstances, in accordance with the provisions of rule 18 of the Companies (Management and Administration) Rules, 2014 (the rules), the notices to members may be given only through e-mails registered with the company or with the depository participant/ depository.

II. While publishing the public notice as required under rule 20(4)(v) of the rules, the following matters shall also be stated, namely :—

(a) a statement that the EGM has been convened through VC or OAVM in compliance with applicable provisions of the Act read with General Circular No. 14/2020, dated 8th April, 2020[1] and this Circular ;

(b) the date and time of the EGM through VC or OAVM ;

1. See [2020] 220 Comp Cas (St.) 197.

(c) availability of notice of the meeting on the website of the company and the stock exchange ;

(d) the manner in which the members who are holding shares in physical form or who have not registered their e-mail addresses with the company can cast their vote through remote e-voting or through the e-voting system during the meeting ;

(e) the manner in which the members who have not registered their e-mail addresses with the company can get the same registered with the company ;

(f) any other detail considered necessary by the company.

III. The Chairman of the meeting shall satisfy himself and cause to record the same before considering the business in the meeting that all efforts feasible under the circumstances have indeed been made by the company to enable members to participate and vote on the items being considered in the meeting.

B. *For companies which are not required to provide the facility of e-voting under the Act—*

I. In view of the present circumstances, in accordance with the provisions of rule 18 of the Companies (Management and Administration) Rules, 2014 (the rules), the notices to members may be given only through e-mails registered with the company or with the depository/depository participant.

II. A copy of the notice shall also be prominently displayed on the website, if any of the company.

III. In order to ensure that all members are aware that a general meeting is proposed lo be conducted in compliance with applicable provisions of the Act read with General Circular No. 14/2020, dated 8th April, 2020[1], the company shall :

(a) contact all those members whose e-mail addresses are not registered with the company over telephone or any other mode of communication for registration of their e-mail addresses before sending the notice for meeting to all its members ; or

(b) where the contact details of any of members are not available with the company or could not be obtained as per (a) above, it shall cause a public notice by way of advertisement to be published immediately at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated and having a wide circulation in that district, and at least once in English

1. See [2020] 220 Comp Cas (St.) 197.

language in an English newspaper having a wide circulation in that district, preferably both newspapers having electronic editions, and specifying in the advertisement the following information :—

(i) that the company intends to convene a general meeting in compliance with applicable provisions of the Act read with the General Circular No. 14/2020, dated 8th April, 2020[1] and this Circular, and for the said purpose it proposes to send notices to all its members by e-mail after, at least, 3 days from the dale of publication of the public notice ;

(ii) the details of the e-mail address along with a telephone number on which the members may contact for getting their e-mail addresses registered for participation and voting in the general meeting.

IV. The Chairman of the meeting shall satisfy himself and cause to record the same before considering the business in the meeting that all efforts feasible under the circumstances have indeed been made by the company to enable members to participate and vote on the items being considered in the meeting.

(ii) *Requirement for voting by show of hands* :—In sub-paragraph A-IX of paragraph 3 of the General Circular No. 14/2020, dated 8th April, 2020 relevant companies were allowed to pass resolutions in certain cases through show of hands. Considering the dissimilarities involved in e-voting and voting by show of hands, the said sub-paragraph is substituted as under :—

"IX. The Chairman present at the meeting shall ensure that the facility of e-voting system is available for the purpose of voting during the meeting held through VC or OAVM."

(III) *Passing of certain items only through postal ballot without convening a general meeting* :—(a) In General Circular No. 14/2020, dated 8th April, 2020. it was stated that the companies may pass resolutions through postal ballot/e-voting without holding a general meeting unless it is so required as per section 110(1)(b) of the Act. Clarifications have been sought on the issue of dispatch of notices by companies by post and communication by the members of their assent or dissent on relevant resolutions by post under the current circumstances.

(b) The matter has been examined and the attention is invited to rule 22(15) of the rules which provides that the provisions of rule 20 regarding voting by electronic means shall apply, as far as applicable, mutatis mutandis to this rule in respect of the voting by electronic means. Therefore, for companies covered in paragraph 3A of General Circular No. 14/2020, dated

1. See [2020] 220 Comp Cas (St.) 197.