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(B) Mr. Murali Kumaran, learned counsel appearing on behalf of the respondent-company, apart from reiterating the objections that has been narrated supra also contended that the petitioner is guilty of suppression inasmuch as they have failed to divulge the following facts :

(i) The petitioner is not only the trustee but also the Registrar as well as principal agent of the bonds.

(ii) The bonds are tradeable in international market with restriction in trading in certain countries including India and that the bonds are listed in the Singapore Stock Exchange.

(iii) The petitioner had issued an invoice claiming "Zero" coupon interest for the period June 21, 2009 to December 21, 2009 and for the remaining two periods, viz., December 21, 2009 to June 21, 2009 and June 21, 2009 to December 21, 2009 no demand of interest was made by way of an invoice.

(iv) The petition is filed only on the written instruction of M/s. QVT Fund LP and Quintessence Fund LP and no other bond holders has given written instruction to the petitioner to file the winding up petition.

(v) That the petitioner who claims to be is not aware of the signing of the term sheet by M/s. QVT Fund LP and Quintessence Fund LP would contend that M/s. QVT Fund LP and Quintessence Fund LP has not signed the same.

(vi) That 50 per cent. of the bond amounting to USD 15 millions redeemed belongs to one particular bond holder and it is not M/s. QVT Fund LP and Quintessence Fund LP.

Learned counsel would further submit that the judgments reported, viz., *Zenith Infotech Ltd.* v. *Bank of New York Mellon* [2014] 187 Comp Cas 41 (Bom) and *Deutsche Trustee Co. Ltd.* v. *Mascon Global Ltd.* can be distinguished from the facts of the present case as the statutory notice in *Zenith Infotech Ltd.* v. *Bank of New York Mellon* [2014] 187 Comp Cas 41 (Bom) was issued after the bonds matured for repayment and redemption which is not the case on hand. Further in the above referred case their Lordships were dealing with the interpretation and definition of the word "creditor" under section 439(2) of the Act. The judgment in *Zenith Infotech Ltd.* v. *Bank of New York Mellon* [2014] 187 Comp Cas 41 (Bom) was also on these lines. Counsel would argue that the definition of creditor given in section 439(2) of the Act cannot be extended to section 434 of the Act. It is also his submission that the trigger point in a petition under section 433(e) for the purpose of limitation is the default under section 434 of the Act, as section 434 details the cause of action for filing the winding up petition

under section 433(e) of the Act. The further argument advanced is that the petitioner is not a "creditor" for the purpose of issuing the statutory notice under section 434(1)(a) of the Act as it is only the person to whom the company is indebted who is termed a "creditor". The statutory notice that has been issued would state that the amounts were due and payable to the petitioner who is only the trustee and not the creditor. Therefore, the statutory notice is not valid and the petition for winding up based on this notice is not maintainable. The respondent would also contend that the petitioner is unaware of the identity of the bond holders by relying upon an affidavit dated September 14, 2016 filed on behalf of the petitioner. Therefore, it is the contention of the respondent that the winding up petition filed without knowing the identity of the bond holders is not maintainable.

18 The respondent would further contend that M/s. QVT Fund LP and Quintessence Fund LP had authorised the petitioner only to issue the notice and not to file the winding up petition and once again the present petition being one without authority is therefore not maintainable. The winding up petition, according to the respondent is nothing but an arm twisting tactic by the petitioner. The respondent would contend that out of the 30 million bonds 15 million have been redeemed as per the restructured terms and the petitioner has been instructed to file the instant petition only by bond holders holding only approximately 8 million bonds. The bond holders holding 7 million bonds have not only accepted the restructured terms but has also contended that they have not instructed the petitioner to file the winding up petition on their behalf. The respondent would also plead collusion between M/s. QVT Fund LP and Quintessence Fund LP and the petitioner. The respondent would therefore contend that since there is a dispute with reference to the debt which is bona fide the winding up petition deserves to be dismissed.

19 *Discussion*

(a) The respondent has raised the preliminary issue of jurisdiction. This defence has been taken on account of clause 21 of the terms and conditions of the bonds which reads as follows :

> "The bonds, the trust deed and the agency agreement are governed by, and shall be construed in accordance with, English law. In relation to any legal action or proceedings arising out of or in connection with the trust deed and the bonds, the issuer has in the trust deed irrevocably submitted to the jurisdiction of the courts of England and in relation there to has appointed an agent for service of process in England. The courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with the bonds

and accordingly any legal action or proceedings arising out of or in connection with the two Bonds may be brought in such court."

(b) However the trust deed at clause 25.2 would clarify that the jurisdiction being vested with the Courts of England and Wales to settle any disputes arising out of or in connection with the trust deed, the conditions or the bonds was only for the benefit of the trustee and the bond holders and it will not limit the right of any of them to take proceedings in any other court of competent jurisdiction or even be a fetter to proceedings being initiated concurrently or otherwise is any one or more jurisdiction.

(c) Therefore the agreed terms of the trust deed gave the discretion to the trustee/the bond holders to approach any competent court having jurisdiction. Admittedly the petition that is now placed for the consideration of this court is a petition for winding up the respondent company under the provisions of the Companies Act, 1956. The Act confer jurisdiction to entertain a winding up petition only upon the High Court within whose jurisdiction the registered office of the company that is sought to be wound up is situate. There is no quarrel on the fact that the registered office of the respondent-company is only within the jurisdiction of this court. Therefore viewed both from the terms of the trust deed as well as the statutory provisions of the Act, this court vested with the jurisdiction to hear and decide the winding up petition. Therefore the preliminary objection raised by the respondent is rejected.

(d) As this court has the jurisdiction to consider the above petition let us proceed to discuss the case on hand. It is necessary to extract sections 433, 434 and 439 of the Act as these provisions which have a bearing on the facts of this case :

"433. *Circumstances in which company may be wound up by court*.—A company may be wound by the court,—

(a) if the company has, by special resolution, resolved that the company be wound up by the court ;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting ;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;

(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two ;

(e) if the company is unable to pay its debts ; (f) if the court is of opinion that it is just and equitable that the company should be wound up.

"434. *Company when deemed unable to pay its debts.*—(1) A company shall be deemed to be unable to pay its debts—

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor ;

(b) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part ; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm."

Section 439(1) and (2) of the Companies Act, 1956 states as follows :

"(1) An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section,—

(a) by the company ; or

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors ; or

(c) by any contributory or contributories ; or

(d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately ; or

(e) by the Registrar ; or

(f) in a case falling under section 243, by any person authorised by the Central Government in that behalf . . .

(2) A secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the

trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (b) of sub-section (1)."

Useful reference is also to be made to rules 24 and 96 of the Companies (Court) Rules, 1959 :

"24. *Advertisement of petition*.—(1) Where any petition is required to be advertised, it shall, unless the judge otherwise orders, or these rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the judge.

(2) Except in the case of a petition to wind up a company the judge may, if he thinks fit, dispense with any advertisement required by these rules.

96. *Admission of petition and directions as to advertisement*.—Upon the filing of the petition, it shall be posted before the judge in chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition."

(e) A reading of section 433(e) would clearly show that a company can be wound up if it is unable to pay its debts which presupposes the followings :

(a) That there is a debt which is validly due to the petitioner, and

(b) the respondent-company which is sought to be wound up is unable to pay its debts.

Section 434 elaborates the circumstances when a company is deemed to be unable to pay its debts :

(i) Where despite issuing a demand notice calling upon the respondent to pay the debt it owes to the petitioner, which is over and above a sum of Rs. 500 and the respondent after a period of three weeks from the receipt of the notice, has failed to pay up the due or given a reply putting forth a valid defence ; or

(ii) Where an execution or other process issued on a decree or order by any court in favour of the creditor is returned unsatisfied in whole or part ; and

(iii) That the company is unable to pay its debts and the contingent and prospective liabilities of the company are such that it would be unable to pay its debts.

(f) The only ground on which this petition can be dismissed is when the respondent-company disputes the debt and such dispute is bona fide and substantial. If the dispute is only a ruse to avoid the liability and a moonshine defence, the court can proceed to wind up the company following the procedure contemplated under the Act and the Rules.

In the case on hand, the respondent has raised a defence that they do not owe any debt to the petitioner. The defence in this regard is as follows :

(i) That the bond holders had agreed to the restructuring of the bonds by converting 50 per cent. of the bond value into equity shares for which purpose M/s. QVT Fund LP and Quintessence Fund LP, having a substantial holding, had signed a term sheet.

(ii) As a follow up of this restructuring the petitioner had raised a 0 per cent. invoice for the period June, 2009-December, 2009.

(iii) That the petitioner did not have the authority of all the bond holders to institute the winding up the proceedings and that 2 of them had questioned the petitioner's move. They had also called in question the petition on the ground that it was not instituted by a competent authority. The main thrust of the respondent's arguments is that they deny their liability as they are disputing the very existence of the debt.

(g) The march of the law regarding challenge to a winding up petition on the ground of dispute to the debt starting from the decision in *Amalgamated Commercial Traders P. Ltd.* v. *A. C. K. Krishnaswami* [1965] 35 Comp Cas 456 (SC) has been that if the debt is disputed, the respondent-company cannot be wound up. In the judgment in *Madhusudan Gordhandas and Co.* v. *Madhu Woollen Industries P. Ltd.* [1971] 3 SCC 632 ; [1972] 42 Comp Cas 125 (SC) the hon'ble Supreme Court following the judgment in *Amalgamated Commercial Traders P. Ltd. v. A. C. K. Krishnaswami* [1965] 35 Comp Cas 456 (SC) held as follows (page 131 of 42 Comp Cas) :

> "Two rules are well-settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the, creditor was unreasonable. (See *London and Paris Banking Corporation, In re* [1874] L. R. 19 Eq. 444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum

for work done for the company when the company contended that the work had not been done properly was not allowed (see *Brighton Club and Norfolk Hotel Co. Ltd., In re* [1865] 35 Beav. 204).

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (see *A Company, In re* [1894] 94 S. J. 369 ; [1894] 2 Ch D 349 (Ch D)). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantity the debt precisely (see *Tweeds Garages Ltd., In re* [1962] 32 Comp Cas 795 (Ch D)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding up order by the creditors the court will consider their wishes and may decline to make the winding up order. Under section 557 of the Company Act, 1956 in all matters relating to the winding up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in *Palmer's Company Law*, 21st edition, page 742 as follows :

'This right to a winding up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order.'

The wishes of the creditors will however be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable ; secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well-settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an. important bearing on the reasonableness of the case (see *P. and J. Macrae Ltd., In re* [1961] 31 Comp Cas 424 (CA))."

(h) This judgment laid down the following circumstances to be taken into consideration while considering a petition under section 433(e) of the Act.

(i) If the debt is disputed and the dispute is bona fide and the defence is a substantial one then this court will not wind up the company.

(ii) Where the debt is undisputed, the court will not accept the defence that the company has the ability to pay but would order winding up.

(iii) Where the dispute is only with reference to the quantum of debt even then the court can order winding up.

(iv) If there is a valid opposition to the winding up of the company by the creditors/shareholders, the court can refuse to wind up the company.

(i) The judgment in *Madhusudan Gordhandas and Co.* v. *Madhu Woollen Industries P. Ltd.* [1972] 42 Comp Cas 125 (SC) and *Amalgamated Commercial Traders P. Ltd.* v. *A. C. K. Krishnaswami* [1965] 35 Comp Cas 456 (SC) has been reiterated in the judgment reported in [2009] 147 Comp Cas 490 (SC) ; [2009] 3 SCC 527 (*Vijay Industries* v. *NATL Technologies Ltd.)*. The hon'ble Supreme Court also considered another judgment in the matter of *Mediqup Systems P Ltd.* v. *Proxmia Medical System GmbH* [2005] 124 Comp Cas 473 (SC) ; [2005] 7 SCC 42 and after taking into consideration the facts before them held that once a part of the debt is admitted then the winding up petition ought to be admitted and not dismissed on the ground that the debt is disputed.

(j) In the case before us the respondent's case is that only 50 per cent. of the bonds were restructured and the remaining 50 per cent. remained as bonds. The bonds were to be redeemed in December, 2012. Admittedly, to date even the admitted amounts due towards this 50 per cent. has not been paid.

(k) The cause of action for the present petition is the non-payment of the semi-annual interests by the respondent which according to the petitioner gave rise to an event of default. This gave a right to the petitioner under the terms of the bond and the trust deed to seek the early redemption amount. The petitioner as the trustee of the bond holders had issued the notice of default dated April 6, 2011 upon the instructions of their bond holders. From the reply dated April 19, 2011 of the respondent, it is seen that the bond holders consent for the amendment to the trust deed had not been received till the date of the reply notice. The respondent has further stated that M/s. QVT Fund LP and Quintessence Fund LP had not

proceeded as agreed by them in the term sheet. They have also contended that the restructuring had been initiated and had progressed with the full knowledge of the bond holders. In view of this, the respondent has contended that an event of default had not occurred. Interestingly, in their response dated June 1, 2011 to the statutory notice the respondent would at one place state as follows :

> "As a matter of fact, the so-called default in making payment of interest instalment from December, 2009 till date can hardly be said to constitute to a default that cannot be remedied. This reply is followed by a letter dated August 3, 2011 issued by the respondent to all the bond holders wherein they have informed the bond holders that in view of the global financial crises the respondent may not be able to redeem the entire amount on the bonds and therefore they were making additional offers to the bond holders. The letter has further detailed the procedure that would follow if the bond holders agreed to any one of these additional offers. The respondent in this letter would state as follows :
>
> (a) accept the change in coupon rate from 2.5 per cent. to zero coupon and 50 per cent. of the outstanding bonds to be immediately converted at a conversion premium which shall be as per the RBI pricing guidelines applicable on the date of conversion. The balance 50 per cent. of the outstanding bonds may be converted on similar terms or will be redeemed at a redemption premium of 111 per cent. on the maturity date ; or
>
> (b) extend the maturity of all the outstanding bonds by another ten (10) years and then receive 100 per cent. of the principal amount outstanding along with interest accrued thereon at the end of ten (10) years with a coupon rate of LIBOR (6 months) + 200 basis points ; or
>
> (c) extend the maturity of the outstanding bonds by another ten (10) years and then offer 10 per cent. of the principal amount of the bonds to the company for repurchase at each year beginning December, 2012 up to and ending December, 2022.
>
> This letter serves to inform the bond holders that the company wishes to extend the above offers to all bond holders. Pursuant to the trust deed, a resolution on a reserved matter requires quorum of two or more persons holding or representing not less than two-thirds in principal amount of the bonds for the time being outstanding. The trust deed also states that such extraordinary resolution duly passed shall be binding on bond holders whether or not they were present at the meeting at which such resolution was passed.

The company hereby requests that the bond holders consider and assent to one of the three offers and inform the trustee (at *wanlin.chong@bnymellon.com*) or the company (at *diraviam@indowind.com* with cc to : *rajadurai@indowind.com*) of their presence. The company will then consider the preference of the bond holders and communicate the decision to the bond holders. The bond holders are urged to take steps to contact the trustee or the company with their preference as soon as possible and, in any case, on or before 11.00 a.m. (London time) on August 17, 2011.

The company will then seek formal bond holders consent, if sufficient interest is shown for any of the proposals outlined above, to a restructuring through the passing of an extraordinary resolution by bondholders in accordance with the trust deed and assuming that is passed execute and request the trustee to execute a supplemental trust deed (the 'supplemental trust deed') amending the trust deed and the terms and conditions of the bonds set out in Schedule 1 to the trust deed."

M/s. QVT Fund LP and Quintessence Fund LP bond holders have responded to the offer as follows :

> "QVT Fund LP and Quintessence Fund LP (the 'QVT bond holders') hereby notify the Bank of New York Mellon, as trustee, (the 'Trustee') for the US$30,000,000 2.5 per cent. convertible bonds due 2012 issued by the company (the 'Bonds') that the QVT bond holders collectively currently own $13.5 million in aggregate principal amount of the bonds. The company has defaulted in payment of interest on the bonds since December, 2009. The QVT bond holders hereby also notify the trustee that having reviewed the company letter they reject all of the proposed offers set forth in the company letter and shall vote against the same if put to vote. Given that the QVT bond holders own 45 per cent. in aggregate principal amount of the bonds and that they are rejecting the proposed offers contained in the company letter, the proposals cannot pass under any circumstances. Please inform the company of the foregoing."

(l) All the terms and conditions of the terms sheet was to become operational subject to the completion of the satisfactory documentation and obtaining all the necessary regulatory approvals in connection with bonds. It appears from the documents filed, that by e-mail dated February 2, 2011 M/s. QVT Fund LP and Quintessence Fund LP has informed that they intend to vote against the proposed changes to the FCCB terms. This e-mail has not been disputed by the respondent. Thereafter, on April 4, 2011 M/s. QVT Fund LP and Quintessence Fund LP, in conformity with

condition No. 10 of the bond has instructed the petitioner to issue a notice as set out in Schedule 1 thereto, stating in "(a) and (b)" is as follows :

> "(a) an event of default has occurred and that acting at the request in writing by the holders of at least 25 per cent. in principal amount of the bonds then outstanding consequently the bonds are and have become immediately due and payable at their early redemption amount, plus accrued and unpaid interest ; and
>
> (b) If the insurer fails to make payment of the early redemption amount and the accrued and unpaid interest, in accordance with the provisions of the trust deed and the conditions, enforcement proceedings (including, but not limited to winding up proceedings) will be initiated against the issuer, entirely at the issuer's risk as to costs and consequences thereof."

The bond holder who holds more than 45 per cent. of the principal amount of the bonds had therefore given permission to the petitioner to institute proceeding for winding up the respondent-company.

(m) From a complete analysis of the above documents it is clear that the bond holder who had initially filed a term sheet agreeing to the restructuring of the FCCB in principle has thereafter on February 2, 2011 expressed in writing their intention not to go ahead with restructuring which was reiterated in August, 2011 and forwarded to the respondent as attachment to e-mail dated August 17, 2011. The notice for default has been issued after the bond holders had expressed their intention not to proceed further with the restructuring. The notice was issued on April 6, 2011 and the statutory notice under section 434(1)(a) of the Act has been issued on May 18, 2011 and the present petition filed on October, 2011. That apart it is after the issue of the statutory notice that the respondent send a letter dated August 3, 2011 to all the bond holders asking them to give their assent for any one of the terms of restructuring. It is therefore clearly evident that till the date of the filing of the winding up petition, the restructuring had not taken place and only the preliminary stage of signing the term sheet had taken place. This was also thereafter, revoked by QVT bond holder in February, 2011. Therefore, the defence that there is no debt and the liability is bona fide disputed rings hollow and is clearly a defence lacking in substance and a moonshine one.

(n) The next factor to be considered is whether the liability has been admitted. The petitioner has filed the balance-sheet and the profit and loss account of the respondent-company for the periods 2009-10 to 2012-13. The balance-sheet as on March 31, 2011 would show the FCCB as unsecured loans. The petitioner also produced the annual reports from the

period 2011-12 up to 2018-19. In the eighteenth annual report for the period 2012-13 in the notes forming part of the financial statement under Note : 9 Other Liabilities, Note (ii) the following has been added as a post-script :

> "The company has raised funds through 'foreign currency convertible bond' which has a option of 50 per cent. conversion to equity shares and it was due for redemption/conversion in December, 2012. Since there is a suit pending against the company filed by its bond holders, the same is not yet redeemed a converted."

However in the twentieth annual report for the period 2014-15 in the notes forming part of the financial statement the respondent-company has stated that a restructuring had been entered and in terms there of 50 per cent. of the bonds worth 15 million USD has been redeemed and the balance is to be converted into 1,91,53,012 equity shares. This statement has been appended when the petitioner has filed the winding up petition in the year 2011 itself denying any restructuring argument. The respondent had admitted the liability even in the balance-sheet for the year 2010-11 though they would state that the restructuring argument had been entered in June, 2009.

(o) From the typedset dated January 22, 2011 filed by the petitioner, it is seen that a new company called M/s. Indowind Power Private Limited has been incorporated on August 19, 2010. This company has been promoted by the respondent-company and its director. The respondent-company holds 3,97,500 shares in the newly incorporated company as on November 21, 2011. The objects of this newly incorporated company are similar to the respondent-company. In the course of the arguments, the learned senior counsel appearing on behalf of the petitioner had argued that the petitioner-company apprehends that the respondent-company would transfer its assets to this newly incorporated company to avoid the debts payable by them. Considering the financial position of the respondent-company which has declared a loss for the period ended March 31, 2019 the apprehension appears to be well founded.

(p) In view of the fact that the dispute put forward by the respondent lacks substance and is contrary to the documents produced and since the liability has been admitted in the balance-sheet for the year ending March 31, 2011 which is just a few months prior to the filing of the winding up petition and in the light of the judgments referred hereinabove, the winding up petition is admitted. The respondent-company is restrained from transferring, alienating encumbering or dealing with its immovable assets.

Citation is directed to publish in the *Times of India* and the *Daily Thanthi* for June 22, 2020.

Post the matter for further hearing on July 9, 2020.

[2020] 221 Comp Cas 541 (Mad)

[IN THE MADRAS HIGH COURT]

KAMALA SRINIVASAN

v.

UNION OF INDIA AND OTHERS

A. P. SAHI C. J. and **SUBRAMONIUM PRASAD** J.

February 14, 2020.

HF ▶ Respondent

SHARES—UNPAID DIVIDEND—TRANSFER OF SHARES TO INVESTOR EDUCATION AND PROTECTION FUND—VALIDITY OF PROVISIONS—RIGHTS OF SHAREHOLDER TO RECOVER SHARES FROM FUND PROTECTED IN PROVISO TO SECTION 124(6)—ARTICLE 300A NOT VIOLATED AS ACTUAL DEPRIVATION OF PROPERTY NOT TAKING PLACE—PROVISION MAKES SURE THAT COMPANY DOES NOT UNJUSTIFIABLY AND UNDULY ENRICH ITSELF—SUCH SHAREHOLDER CAN MAKE APPLICATION IN ACCORDANCE WITH RELEVANT RULES—THAT RULES CUMBERSOME AND DIFFICULT PROCEDURE PRESCRIBED NOT TO MAKE IT VIOLATIVE OF ARTICLE 14—CONSTITUTION OF INDIA, arts. 14, 300A—COMPANIES ACT, 2013, s. 124(6)—INVESTOR EDUCATION AND PROTECTION FUND AUTHORITY (ACCOUNTING, AUDIT, TRANSFER AND REFUND) RULES, 2016, rr. 6, 7.

Sections 124 and 125 of the Companies Act, 2013, replaced sections 205A, 205B and 205C of the Companies Act, 1956. The mechanism of the transfer of unpaid dividend to the Investor Education and Protection Fund, remains unchanged. However, under the 2013 Act, shares for which dividend had not been paid for over 7 years, will also now be transferred to the fund, by virtue of section 124(6) of the 2013 Act. The proviso to section 124(6) of the 2013 Act however, protects the right of a shareholder to recover the share from the fund. A shareholder, whose shares stood transferred to the fund, could make an application in accordance with the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

Article 300A of the Constitution of India is attracted to situations where the property of a person is acquired only by an executive fiat, and not on the basis of any law, validly made.

It is open for the courts to quash or strike down legislation on the grounds that it is manifestly arbitrary. In order to prove that a legislation is manifestly arbitrary, the burden is therefore to show that the Legislature has done something capriciously, irrationally or without adequate determining principle or if something is done which is excessive and disproportionate.

SHAYIRA BANU *v.* UNION OF INDIA [2017] 9 SCC 1 *relied on.*

Limitation is preventive and not curative and seeks to give quietus to claims which have not been enforced. It ensures that litigants are diligent in seeking remedies in court and prohibits stale claims. It ensures promptitude and assists vigilant persons who do not sleep over their rights. Laws prescribing reasonable period of limitation have been upheld, though whenever the period prescribed expires a claimant suffers, but this invariably happens as the litigant has been grossly negligent and has failed to take steps.

It is well-settled that just because the rules are cumbersome and it is difficult to carry out the procedure prescribed under the Rules this cannot make the rules violative of article 14 of the Constitution of India.

The petitioner's son had acquired the shares in 1993 and she was not aware of the shares till 2019. Upon demise of the shareholder the shares remained dormant for more than 7 years and the shares were transferred to the fund. A writ petition was filed by the petitioner challenging the validity of section 124(6) of the 2013 Act and rules 6 and 7 of the Rules as unconstitutional being violative of articles 14, 21 and 300A of the Constitution of India :

Held, *dismissing the petition, (i) that the contention of the petitioners that the provisions deprived them of their property, and were violative of article 300A of the Constitution was not tenable because there was no actual deprivation of property taking place. Under section 124(6) of the 2013 Act, there was no statutory vesting of the shares so transferred to the Fund. Section 124(6) of the 2013 Act only contemplated a transfer of shares to the Fund, and did not confer ownership of the shares on the Fund. The proviso to section 124(6), provided that a person shall always be permitted to re-claim his shares, from the Fund. The Rules prescribed under section 124(6) provided for a procedure for the refund of the shares so transferred to the Fund. Rule 7 of the Rules prescribed procedure for the refund of the shares by the Fund to the owner of the shares. By transfer of shares under section 124(6) of the 2013 Act, even if the petitioners were being deprived of their property, such deprivation would be in accordance with law, as a result of law made by Parliament, and not as a result of an executive fiat.*

INDIA AWAKE FOR TRANSPARENCY *v.* UNION OF INDIA [2018] 206 Comp Cas 13 (Delhi) *relied on.*

(ii) That the provisions were not "manifestly arbitrary". There was an avowed purpose for bringing this piece of legislation. It had been enacted to ensure that a company does not unjustifiably and unduly enrich itself, on the ground that the depositors had failed to stake claim and had not been paid for a period of seven years from the date the amount became due. There were no reasons to hold that the provisions were unconstitutional or violative of article 14 or any other provisions of the Constitution. The provisions did not violate the fundamental rights guaranteed in the Constitution. To strike down section 124(6) of the 2013 Act or the rules in the 2016 Rules would amount to negating and striking down a worthy and meritorious legislation which was on the whole beneficial and advantageous and in public interest. The law of limitation afforded a guarantee and ensured that a cause of action was not raised after a lapse of particular period. Section 124(6) had been brought to ensure that companies do not profit out of unclaimed dividends. The Rules have been brought to ensure that only claims of genuine persons can be entertained. The fact that the procedure to reclaim the shares and the dividend was more expensive and the conditions were more onerous would not make it fall foul of article 14 of the Constitution.

Cases referred to :

India Awake for Transparency *v.* Union of India [2018] 206 Comp Cas 13 (Delhi) (para 50)

Indian Express Newspapers (Bombay) P. Ltd. *v.* Union of India [1985] 1 SCC 641 ; [1985] SCC (Tax) 121 (para 52)

Jilubhai Nanbhai Khachar *v.* State of Gujarat [1995] (Supp) 1 SCC 596 (paras 46, 47)

K. T. Plantation P. Ltd. *v.* State of Karnataka [2011] 9 SCC 1 (paras 24, 47)

Nivedita Sharma *v.* Industrial Credit and Investment Corporation of India [2012] 171 Comp Cas 135 (Delhi) (para 35)

Nivedita Sharma *v.* Ministry of Corporate Affairs [2012] 172 Comp Cas 348 (Delhi) (para 37)

Shayira Banu *v.* Union of India [2017] 9 SCC 1 (paras 22, 52, 53)

State of Andhra Pradesh *v.* McDowell and Co. [1996] 3 SCC 709 (para 52)

State of West Bengal *v.* Vishnunarayan and Associates P. Ltd. [2002] 4 SCC 134 (para 47)

Writ Petition No. 1538 of 2020 and W. M. P. Nos. 1814 and 1816 of 2020.

M. Sricharan Rangarajan for the petitioner.

R. Durga Rani, Central Government Standing Counsel, for respondents Nos. 1 and 2.

JUDGMENT

The judgment of the court was delivered by

1 SUBRAMONIUM PRASAD J.—The instant writ petition challenges the vires of section 124(6) of the Companies Act, 2013 and rules 6 and 7 of the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 as unconstitutional being violative of articles 14, 21 and 300A of the Constitution of India.

2 The petitioner states that her son R. Murali Srinivasan passed away on August 30, 1993 intestate at Quriyat, Oman, leaving behind the petitioner and his wife. The petitioner's son was having shares in a company called I-Flex Solutions Ltd. (IFLEX). The said company was taken over by M/s. Oracle Financial Services Software Ltd., the fourth respondent herein. These shares were allotted to the petitioner in the year 1992.

3 Over the years, bonus shares were issued and the petitioner was holding 3,200 shares. The market value of the share as on date would be about 1.14 crores. It is also stated that after the petitioner's son passed away, the dividends which were not received and as on date, unclaimed dividends worth Rs. 29,92,000. It is stated by the petitioner that section 124(6) of the Companies Act, which deals with unclaimed dividends provides that all the shares in respect of which dividends have not been claimed for seven consecutive years or more than shall be transferred by the company in the name of the Investor Education and Protection Fund along with a statement containing such details as may be prescribed. Proviso to sub-section (6) of section 124 states that claimant of the shares shall be entitled to claim the transfer of shares from the Investor Education and Protection Fund in accordance with such procedure and on submission of such documents as may be prescribed.

4 Section 124 of the Companies Act, 2013, reads as under :

> "124. *Unpaid dividend account.*—(1) Where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the unpaid dividend account.

(2) The company shall, within a period of ninety days of making any transfer of an amount under sub-section (1) to the unpaid dividend account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the website of the company, if any, and also on any other website approved by the Central Government for this purpose, in such form, manner and other particulars as may be prescribed.

(3) If any default is made in transferring the total amount referred to in sub-section (1) or any part thereof to the unpaid dividend account of the company, it shall pay, from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of twelve per cent. per annum and the interest accruing on such amount shall ensure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.

(4) Any person claiming to be entitled to any money transferred under sub-section (1) to the unpaid dividend account of the company may apply to the company for payment of the money claimed.

(5) Any money transferred to the unpaid dividend account of a company in pursuance of this section which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the Fund established under sub-section (1) of section 125 and the company shall send a statement in the prescribed form of the details of such transfer to the authority which administers the said Fund and that authority shall issue a receipt to the company as evidence of such transfer.

(6) All shares in respect of which dividend has not been paid or claimed for seven consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing such details as may be prescribed :

Provided that any claimant of shares transferred above shall be entitled to claim the transfer of shares from Investor Education and Protection Fund in accordance with such procedure and on submission of such documents as may be prescribed.

Explanation.—For the removal of doubts, it is hereby clarified that in case any dividend is paid or claimed for any year during the said period of seven consecutive years, the share shall not be transferred to Investor Education and Protection Fund.

(7) If a company fails to comply with any of the requirements of this section, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees."

5 In exercise of powers conferred under sub-sections (1), (2), (3), (4), (8), (9), (10) and (11) of section 125 and sub-section (6) of section 124 read with section 469 of the Companies Act, the Central Government brought out the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016. Rules 6 and 7 of the said Act read as under :

"6. *Manner of transfer of shares under sub-section (6) of section 124 to the Fund.*—(1) The shares shall be credited to Demat Account of the Authority to be opened by the Authority for the said purpose, within a period of thirty days of such shares becoming due to be transferred to the Fund :

Provided that, in case the beneficial owner has encashed any dividend warrant or any dividend amount has been credited to bank account of the owner of such shares during the last seven years, such shares shall not be required to be transferred to the Fund even though some dividend warrants may not have been encashed :

Provided further that in cases where the period of seven years provided under sub-section (5) of section 124 has been completed or being completed during the period from 7th September, 2016 to 31st October, 2017, the due date of transfer of such shares shall be deemed to be 31st October, 2017 :

Provided further that transfer of shares by the companies to the Fund shall be deemed to be transmission of shares and the procedure to be followed for transmission of shares shall be followed by the companies while transferring the shares to the fund.

Explanation.—For removal of all doubts, it is hereby clarified that all shares in respect of which dividend has been transferred to Investor Education and Protection Fund on or before the 7th September 2016, shall also be transferred by the company in the name of Investor Education and Protection Fund.

(2) For the purposes of effecting transfer of such shares, the Board shall authorise the Company Secretary or any other person to sign the necessary documents.

(3) The company shall follow the following procedure while transferring the shares, namely :—

(a) The company shall inform, at the latest available address, the shareholder concerned regarding transfer of shares three months before the due date of transfer of shares and also simultaneously publish a notice in the leading newspaper in English and regional language having wide circulation informing the concerned that the names of such shareholders and their folio number or DP ID-Client ID are available on their website duly mentioning the website address.

(b) In case, where there is a specific order of court or Tribunal or statutory Authority restraining any transfer of such shares and payment of dividend or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996 or shares already been transferred under sub-rule (1) above, the company shall not transfer such shares to the Fund :

Provided that the company shall furnish details of such shares and unpaid dividend to the Authority in Form No. IEPF-3 within thirty days from the end of financial year.

(c) For the purposes of effecting the transfer, where the shares are dealt with in a depository—

(i) the company shall inform the depository by way of corporate action, where the shareholders have their accounts for transfer in favour of the Authority.

(ii) on receipt of such intimation, the depository shall effect the transfer of shares in favour of demat account of the Authority.

(d) For the purposes of effecting the transfer where the shares are held in physical form—

(i) the Company Secretary or the person authorised by the board shall make an application, on behalf of the concerned shareholders, to the company, for issue of a new share certificates ;

(ii) on receipt of the application under clause (a), a new share certificate for each such shareholder shall be issued and it shall be stated on the face of the certificate that 'Issued in lieu of share certificate No. . . for purpose of transfer to IEPF' and the same be recorded in the register maintained for the purpose ;

(iii) particulars of every share certificate shall be in Form No. SH-1 as specified in the Companies (Share Capital and Debentures) Rules, 2014 ;

(iv) after issue of a new share certificates, the company shall inform the depository by way of corporate action to convert the share certificates into demat form and transfer in favour of the Authority.

(4) The company shall make such transfers through corporate action and shall preserve copies for its records.

(5) While effecting such transfer, the company shall send a statement to the Authority in Form No. IEPF-4 within thirty days of the corporate action taken under clause (c) of sub-rule (3) of rule 6 containing details of such transfer and the company shall also attach a copy of the public notice published under clause (a) of sub-rule (3) of rule 6 in Form No. IEPF-4.

(6) The voting rights on shares transferred to the Fund shall remain frozen until the rightful owner claims the shares :

Provided that for the purpose of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the shares which have been transferred to the Authority shall not be excluded while calculating the total voting rights.

(7) The company shall maintain all such statements filed under sub-rule (5) in the same format along with all supporting documents and the Authority shall have the powers to inspect such records.

(8) All benefits accruing on such shares like bonus shares, split, consolidation, fraction shares and the like except right issue shall also be credited to such Demat account by the company which shall send a statement to the Authority in Form No. IEPF-4 within thirty days of the corporate action containing details of such transfer.

(9) The shares held in such Demat account shall not be transferred or dealt with in any manner whatsoever except for the purposes of transferring the shares back to the claimant as and when he approaches the Authority or in accordance with sub-rules (10) and (11).

(10) If the company is getting delisted, the Authority shall surrender shares on behalf of the shareholders in accordance with the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 and the proceeds realised shall be credited to the Fund and a separate ledger account shall be maintained for such proceeds.

(11) In case the company whose shares or securities are held by the Authority is being wound up, the Authority may surrender the securities to receive the amount entitled on behalf of the security holder

and credit the amount to the Fund and a separate ledger account shall be maintained for such proceeds.

(12) Any further dividend received on such shares shall be credited to the Fund and a separate ledger account shall be maintained for such proceeds.

(13) Any amount required to be credited by the companies to the Fund as provided under sub-rules (10), (11) and sub-rule (12) shall be remitted into the specified account of the IEPF Authority maintained in the Punjab National Bank and the details thereof shall be furnished to the Authority in Form No. IEPF-7 within thirty days from the date of remittance or within thirty days from the date of enforcement of these Rules, as the case may be.

(14) Authority shall furnish to its report to the Central Government as and when non-compliance of the rules by companies came to its knowledge.

7. *Refunds to claimants from Fund.*—(1) Any person whose shares, unclaimed dividend, matured deposits, matured debentures, application money due for refund, or interest thereon, sale proceeds of fractional shares, redemption proceeds of preference shares, etc., has been transferred to the Fund, may claim the shares under proviso to sub-section (6) of section 124 or apply for refund under clause (a) of sub-section (3) of section 125 or under proviso to sub-section (3) of section 125, as the case may be, to the Authority by submitting an online application in Form IEPF-5 available on the website *www.iepf.gov.in* along with fee specified by the Authority from time to time in consultation with the Central Government.

(2) Upon submission, Form No. IEPF-5 shall be transmitted online to the Nodal Officer of the company for verification of claim :

Provided that the claimant after making an application in Form No. IEPF-5 under sub-rule (1), shall send original physical share certificate, original bond, deposit certificate, debenture certificate, as the case may be, along with indemnity bond, advance receipts, any other document as enumerated in Form No. IEPF-5, duly signed by him, to the Nodal Officer of the concerned company at its registered office for verification of the claim.

(2A) Every company which is required to credit amounts or shares to the fund or has deposited the amount or transferred the shares to the Fund shall nominate a Nodal Officer, who shall either be a Director or Chief financial Officer or Company Secretary of the company,

for the purposes of verification of claims and co-ordination with Investor Education and Protection Fund Authority :

Provided that a company may appoint one or more officer as Deputy Nodal Officer to assist the Nodal Officer for the purposes of verification of claim and for co-ordination with Investor Education and Protection Fund Authority :

Provided further that the Nodal Officer shall be solely liable for all actions of any officer appointed as Deputy Nodal Officer :

Provided also that in case a company fails to appoint Nodal Officer, every director of the company shall be deemed to be nodal officer and be liable for any failure to comply with requirement of these rules.

(2B) The details of the Nodal Officer and Deputy Nodal Officer duly indicating his or her designation, postal address, telephone and mobile number and company authorized e-mail ID shall be communicated to the Investor Education and Protection Fund Authority in Form No. IEPF-2 within fifteen days from the date of publication of these rules and the company shall display the name of Nodal Officer and his e-mail ID on its website :

Provided that any change in the Nodal Officer or his details shall be communicated to the Authority through Form No. IEPF-2 within seven days of such change along with board resolution thereof.

(3) The company shall, within thirty days from the date of receipt of claim, send an online verification report to the Authority after verification of details in Form No. IEPF-5 in the format specified by the Authority along with all the documents submitted by the claimant and shall attach the scanned copy of all the original documents submitted by the claimant in physical form duly certified by its Nodal Officer along with the e-verification report along with a scanned copy of both sides of original physical share certificate or original bond or deposit or debenture certificate/s duly cancelled and certified :

Provided that if the online verification report is not sent by the company within thirty days of filing of claim, the company may do so by paying additional fee of fifty rupees for every day subject to maximum of two thousand and five hundred rupees :

Provided further that the company shall be liable to maintain the original documents submitted to it by the claimant and shall produce such documents whenever required :

Provided also that in case of non-receipt of verification report along with documents by the Authority after the expiry of sixty days from the date of filing of Form No. IEPF-5, the Authority may reject Form No. IEPF-5, after sending a communication to the claimant and the concerned company, on the e-mail address of the claimant and the company, to furnish response within a period of fifteen days :

Provided also that for failure to submit verification report of the claim in accordance with these rules, the company and its Nodal Officer shall be punishable as per the provisions of the Act.

Explanation.—In case (i) Loss of original physical share certificate or original bond or deposit or debenture certificate or proof of entitlement, the company and the claimant shall follow the procedure as laid down in the Companies (Share Capital and Debenture) Rules, 2014, the Securities and Exchange Board of India (Listing Obligation and Disclosure Requirements) Regulation, guidelines, procedures and circulars issued from time to time and Schedule III of these rules and attach certified copies of all documents as may be required under the said rules or guidelines with the e-verification report ; (ii) In addition, the company shall attach a scanned copy of both sides of share certificate generated under clause (d) of sub-rule (3) of rule 6 of these rules along with the e-verification report ; (iii) The company shall be solely responsible for collecting original physical share certificate or original bond or deposit or debenture certificate or proof of entitlement from the claimant and shall be liable for any misuse thereof.

(4) After verification of the entitlement of the claimant—

(a) to the amount claimed, the Authority and then Drawing and Disbursement Officer of the Authority shall present a bill to the Pay and Accounts Office for e-payment as per the guidelines,

(b) to the shares claimed, the Authority shall issue a refund sanction order with the approval of the Competent Authority and shall credit the shares to the Demat account of the claimant to the extent of the claimant's entitlement.

(5) The Authority shall, in its records, cause a note to be made of all the payments made under sub-rule (4).

(6) An application received for refund of any claim under this rule duly verified by the concerned company shall be disposed of by the Authority within sixty days from the date of receipt of the verification report from the company, complete in all respects and any delay beyond sixty days shall be recorded in writing specifying the reasons

for the delay and the same shall be communicated to the claimant in writing or by electronic means.

(7) Where the Authority, on examining any application for claim, finds it necessary to call for further information or finds such application or e-form or document to be defective or incomplete in any respect, the Authority shall give intimation of such information called for or defects or incompleteness, by e-mail on the e-mail address of the claimant and the company, which has filed such application or e-form or document, directing him or it to furnish such information or to rectify such defects or incompleteness or to re-submit such application or e-Form or document within fifteen days from the date of receipt of such communication, failing which the Authority may reject the claim or e-Form No. IEPF-5 :

Provided that if such information or incompleteness is called from the claimant, he shall file the e-Form and shall send such documents as called for within fifteen days, duly signed by him, to the Nodal Officer of the concerned company at its registered office for verification of the claim and company shall send a revised verification report :

Provided further that if any such information or incompleteness is called from the company, the company shall file the revised verification report and shall send such documents as called for within thirty days :

Provided also that the provisions of sub-rule (3) of rule 7 shall apply mutatis mutandis to this sub-rule.

(8) In case, claimant is a legal heir or successor or administrator or nominee of the registered shareholder, the claimant shall ensure to submission of self-attested scanned copy of all documents detailed in Schedule II of these rules online along with Form No. IEPF-5 :

Provided that in case of loss of securities held in physical form, he has to ensure to submission of self-attested scanned copy of additional documents detailed in Schedule III of these rules online along with Form No. IEPF-5 :

Provided further that the claimant shall submit in original all these documents duly signed by him, to the Nodal Officer of the concerned company at its registered office for verification of the claim.

(9) In case, claimant is a legal heir or successor or administrator or nominee of any other registered security or in cases where request of transfer or transmission of shares is received after the transfer of shares by company to the Authority, the company shall verify all

requisite documents required for registering transfer or transmission and shall issue letter to the claimant indicating his entitlement to the said security and furnish a copy of the same to the Authority while verifying the claim of such claimant through its e-verification report :

Provided that the authority shall dispose such request of transfer or transmission based on the e-verification report of the company subject to verification of such request . . .

(11)(a) The company shall be liable under all circumstances whatsoever to indemnify the Authority in case of any dispute or lawsuit that may be initiated due to any incongruity or inconsistency or disparity in the verification report or otherwise and the Authority shall not be liable to indemnify the security holder or company for any liability arising out of any discrepancy in verification report submitted, etc., leading to any litigation or complaint arising thereof.

(b) Any fraudulent claim by the claimant shall be deemed to be fraud within the meaning of section 447 of the Act and the claimant shall be liable accordingly.

(c) If any person deceitfully personates an owner of any security or of any share warrant or coupon issued in pursuance of this Act and thereby files any claim to obtain or attempts to obtain any such security or interest or any such warrant or coupon due to the lawful owner, he shall be punishable under sections 57, 447 and 448 of the Act."

6 It is the contention of the petitioner that section 124 of the Companies Act, 2013 corresponds to section 205A of the Companies Act, 1956. It is contended that under the 1956 Act where dividends have been declared by the company and where within 30 days from the date of declaration, the said amount have not been claimed even after a period of seven days, the company had to transfer the amount of dividend which remain unpaid to an account called unpaid dividend account from the date of expiry of 30 days period, and if the money transferred to the unpaid dividend account remains unclaimed for a period of seven years, it got transferred to the Investor Education and Protection Fund (IEPF).

7 It is the contention of the petitioner that under the erstwhile section, the title in the shares never got transferred and the shares continued to remain with the shareholder. It is therefore, submitted that by virtue of section 124(6) of the Companies Act, 2013, the shareholder looses his shares, which is property and is violative of article 300A of the Constitution of India. It is contended that a share is a bundle of rights and is movable

property cannot be taken away merely because the dividends which is a share in the profits given to the shareholder has not been claimed.

8 It is the contention of the petitioner that failure to claim dividends cannot amount to divesting the rights in the shares which is property. It is further contended that there is no public purpose for bringing out under section 124(6). It is contended that section 124(6) also applies where dividends are not paid by the company. It is therefore, stated that if the dividends are not paid by the company, then the shareholder cannot be divested of his property and such an action is completely unreasonable and unfair and is in violation of article 14 of the Constitution of India.

9 It is contended that divesting the rights of a shareholder by transfer of such shares to the Investor Education and Protection Fund, just because the dividends are not paid, or that the dividends are unclaimed is completely unjustifiable, arbitrary and violative of articles 14, 21 and 300A of the Constitution of India.

10 It is contended that it is well-settled that before a person is divested of his rights in any property and affected person ought to be heard. Taking away the right of a shareholder even without affording a hearing, cannot be sustained and such law which permits such a procedure of divesting property is unsustainable and deserves to be struck down.

11 It is also contended by learned counsel for the petitioner that rules 6 and 7 of the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016, is so cumbersome that it virtually makes it impossible to comply with the procedure. It is contended that rules 6 and 7 inasmuch as it relates to transfer of shares along with the unclaimed dividend is patently illegal and arbitrary inasmuch as the said rules render the transfer of shares to IEPF as transmission thereby divesting the shareholder and his legal heirs from their title to the said share.

12 It is further contended that rule 7 elaborates the procedure on claiming shares transferred to Investor Education and Protection Fund account. Sub-rule (8) read with sub-rule (1) initially held that the legal heirs of the claimants who are entitled for such shares need only send Form IEPF-5 online to IEPF regarding the claim and complete the entire transmission process with the company. However, vide a recent amendment with effect from September 20, 2019 the legal heirs are forced to send two sets of documents both the authority and to the company regarding the very same claim. The legal heirs now are compelled to complete the transmission process with the company and also the satisfaction of the authority. Therefore, the object of claiming unclaimed shares will only be rendered futile if the procedure to retrieve the same is onerous.

It is further contended that Schedule II appended to the amended Rules lists out the documents to be sent by the legal heirs to the IEPF. The list clearly stipulates that for shares held in physical form without any nomination and for value above Rs. 2,00,000 obtaining of succession certificate or probate or will or letter of administration is mandatory. Therefore, the legal heirs are constrained to take legal recourse and incur additional expenses instead of being entitled to the shares simply by transmission. 13

It is further contended that Schedule III renders an even more arduous case where the legal heirs are compelled to furnish surety affidavit of value equal to the market value of shares as on the date of execution in case of loss of original share certificates/documents. It is contended in the petition that in the instant case, the claims are around Rs. 22 lakhs and the petitioner being a senior citizen, who had just realised the existence of such shares is now compelled to file such a surety affidavit to claim the shares that she is legally entitled to otherwise under law as the sole surviving legal heir. 14

It is further contended that rule 7(3) initially held that even shares held in physical form could be transferred to the Authority by issuing a duplicate certificate and the Authority shall endeavour to dematerialize all such shares and retain some shares in physical form. However, vide amendment with effect from October 13, 2017 the rule was amended where the company is forced to convert all such shares in Demat form. Thus, the burden is now on the company to convert such shares and incur exorbitant costs. 15

It is further contended that neither the Companies Act, 1956 nor 2013 Act stipulate any condition/list of documents to be adduced for transmission of shares to the legal heirs. However, the Rules which are procedural in nature, have gone beyond the scope of the Act and had mandated the legal heirs to produce additional documents which are never prescribed in the Act. Inasmuch as section 124(6) and the corresponding rules 6 and 7 make it mandatory that the shares in relation to which the unclaimed dividend shall be transferred to IEPF, the same is arbitrary and illegal as the shareholder is divested of his title to the shares. 16

Heard Mr. M. Sricharan Rangarajan, learned counsel for the petitioner and Ms. R. Durga Rani, Central Government Standing Counsel for respondents Nos. 1 and 2. 17

Mr. Sricharan Rangarajan, learned counsel for the petitioner, would submit that there is no rationale behind section 124(6) of the Act which provides for transfer of shares along with dividend remaining unpaid or unclaimed for a period of 7 years from the unpaid dividend account of the company to the Investors Education and Protection Fund (IEPF). He would 18

submit that the erstwhile Companies Act, 1956 did not have any provision which provided for transfer of shares along with unpaid/unclaimed dividend. This was introduced only in the new Companies Act, 2013. He would state that the introduction of the section does not effectively remedy any mischief which was present under the erstwhile Act. He would state that no reasons have been given in order to bring out the intent behind its introduction. He would state that the reason for introducing the impugned sections for transfer of shares along with such unpaid/unclaimed dividend was not discussed in the Companies Bill, 2009 and in fact, the bill only provided for transfer of unpaid dividend.

19 He would submit that the reason given in the report submitted by the Parliamentary Standing Committee of Finance dated June 26, 2012 was that the underlying securities may be misused by vested parties, but no explanation had been given as to who are the vested parties and how it could be misused. No rationale has been accorded as to the introduction of transfer of shares along with unpaid/unclaimed dividend. He would state that the report submitted by the Parliamentary Standing Committee of Finance dated June 26, 2012 the Ministry had remarked that provisions are retained to achieve a broader objective of safety and security in capital market since unclaimed securities could be misused by unscrupulous persons for money-laundering activities, but there is no explanation as to who such unscrupulous persons and the manner of such misuse are. No rationale has been given for the introduction of transfer of shares along with unpaid/unclaimed dividend. He would therefore that the legislative intent behind the introduction of the section is non-existent and no reason has been cited by the Legislature as to its introduction and implementation.

20 Mr. Sricharan Rangarajan, learned counsel for the petitioner, in his challenge to rule 6 and rule 7 of the Investor Education and Protection Authority Fund (Accounting, Audit, Transfer and Refund) Rules, 2016, would state that the procedure as prescribed in the said Rules are extremely cumbersome. Heavy expenditure has to be incurred by the claimants for retrieving their shares. He would state that initially the 2016 rules provided for return of physical certificates of shares transferred to IEPF. However, after the 2017 amendment, such shares are to be mandatorily converted to Demat form while transferring to IEPF. Therefore, the claimants/legal heirs are forced to incur additional expenditure to open Demat accounts in order to claim back their own shares. He would state that even though some companies are not mandated to keep their shares in Demat form, due to the transfer of shares to IEPF, the companies are forced to incur high

expenditure for the conversion of physical shares to Demat and to subsequently transfer the same to IEPF's Demat Account.

He would submit that rule 7 originally provided that in case of claimants **21** being legal heirs or representatives of the deceased claimant, they ought to complete the transmission process alone in order to obtain refund of shares and the unpaid/unclaimed dividend. However, after the amendment in 2019, the process of completion of transmission has been completely done away with and the legal heirs/representatives are forced to undergo an arduous procedure where they are mandated to provide a succession certificate/probate/letter of administration in addition to other documents as per Schedule II in case the value of securities are above Rs. 2,00,000. He would state that in addition to the above, if the securities held in physical mode are lost, as per Schedule III, the claimant also ought to provide a surety affidavit of value equal to the market value of shares in addition to notarised copy of FIR/Police complaint, indemnity bond and copy of advertisement for the same. He would state that in the instant case, the market value of the shares are Rs. 1,14,00,000 therefore, the legal heirs are forced to incur heavy litigation expenses and are forced to wait for a longer period to claim back the shares.

Mr. Sricharan Rangarajan, learned counsel for the petitioner, also sub- **22** mits that section 124(6) and rules 6 and 7 of the Investor Education and Protection Authority Fund (Accounting, Audit, Transfer and Refund) Rules, 2016, are violative of article 300A of the Constitution of India. He would state that share is a movable property, with all the tributes of such property. A person whose name is entered in the register as a member of the company holding such shares is entitled to exercise all or any rights that emanate from such shares. Mr. Sricharan Rangarajan, learned counsel for the petitioner, would argue that shares constitute a bundle of rights and sharing of profits in the company is only one of the many rights that a shareholder is entitled to. Merely because a shareholder does not exercise one right in the share does not entitle the Government to divest the shares from the shareholder. The deprivation of right without any purpose is manifestly arbitrary (as held in *Shayira Banu* v. *Union of India* [2017] 9 SCC 1. There is no intelligible differentia as to how the right to claim dividend is given primacy over other rights. He would state that there might be a case where a shareholder who actively participates in the management and exercises his voting right does not claim dividends for a period of 7 years. In such a case, merely because he fails to claim dividend, his shares are transferred and he is restrained from exercising his voting rights as the same are frozen as per rule 6(6). He would argue that transfer of shares/

securities along with the unpaid dividend to IEPF is illegal as the property which vests with a person cannot be transferred without the permission/ authority of the owner. It is the owner's prerogative to exercise all/some of his rights on the property and merely because a right is not exercised does not automatically vest with the Government to take up the property to itself.

23 In the instant case, the petitioner is an 81 year old woman who was not aware even about the existence of the shares until recently on 2019. Since the shares were acquired by her son who died on 1993 in Oman, the petitioner had no way of knowing the shares on her own. Therefore, the shares were dormant for more than 7 years and in such a case, the shares are also unreasonably transferred to IEPF where the shareholder had actually died and the claimants were unaware of their existence.

24 Mr. Sricharan Rangarajan, learned counsel for the petitioner, places reliance on the judgment of the hon'ble Supreme Court in *K. T. Plantation P. Ltd.* v. *State of Karnataka* [2011] 9 SCC 1, paragraphs 190, 191 and 2019, for the proposition that the transfer of shares/securities along with the unpaid dividend to the IEPF is violative of article 300A of the Constitution of India, not having followed the twin tests of compensation and public purpose. No public purpose is served in transferring the shares of a person to IEPF merely because dividends had not been claimed with respect to such shares, more particularly when the rationale behind the introduction of this concept has not been elaborated by the Legislature and no reason till date has been adduced by the Legislature.

25 He would state that article 300A provides that no person shall be deprived of his property save by the authority of law. On a conjoint reading of the section and the Rules, shares being property of a person are arbitrarily transferred to the IEPF, a statutory authority without the consent of the owner therein. Article 300A strikes down at the very first instance, any law where any person is divested of their property without the proper sanction of law. Article 300A does not provide that mere provision of a recovery mechanism saves the illegality in the acquisition of such property. No exceptions are made in article 300A merely because a person is given a right to claim back the property.

26 The procedure for transfer of shares is onerous as the claimant/legal heir of the claimant is forced to undergo an ordeal of procedure to get back their own property. The procedure given under the Rules after the amendment is not in conformity with the substantial due process and fairness, as mentioned above, the section and the Rules are manifestly arbitrary.

Neither the section nor the rules provide for any checks and balances **27**
and effective adjudicative mechanism through which its civil right in shares can be divested. It is an essential facet of law and matter of fundamental policy in India that a person, whose rights are affected, ought to be heard. Therefore, the lack of such opportunity and effective mechanism by itself renders the section and the rules arbitrary and unconstitutional.

Lastly he would submit that simplified procedure of transmission done **28**
away with :

Parliament noted a large and growing trend of companies, in improperly declaring and distributing dividend. It is for this reason that the Companies (Amendment) Act, 1974 was enacted. Sections 205A and 205B were introduced, and the Statement of Objects and Reasons for the introduction of the sections is extracted below :

> "Clause 16. It has been observed that large established companies have been in the practice of declaring dividends even in a year in which profits are not adequate for payment of large dividends out of reserves accumulated in previous years. Such accumulated reserves which should have been normally available as a plough-back for the furtherance of the company's business are thus used in a manner prejudicial to public interest. It is, therefore, proposed to incorporate in the statute provisions to the effect that declaration of dividend out of reserves could be made only in accordance with the rules to be prescribed by the Central Government or in special cases with the previous approval of the Government. It is also proposed to make it obligatory for companies to transfer the total amount which is to be distributed to shareholders as dividend in any year to a special account to be opened by the company in any scheduled bank, within seven days from the date of the declaration. This is intended to prevent companies from declaring dividends when no profits in the shape of liquid funds are readily available. It has also been observed that very large amounts declared as dividends to shareholders by companies lie unclaimed or undistributed for several years. Hence it is proposed that such amounts lying unpaid for a period of three years should be transferred by the company to the general revenue account of the Central Government. In this way the possibility of the misuse of the money due to shareholders by management is avoided while the Central Government empowered to pay individual claimants as and when the claims are preferred. It is also proposed to make it obligatory to deposit in the general revenue account unclaimed dividends outstanding at the commencement of the amending Act."

29 Section 205A of the erstwhile Companies Act, 1956 was introduced by Parliament in the year 1974. It provided for instructions/directions to the companies to create a separate account for the dividend declared, which was unpaid. In other words, in the event dividend declared by a company was not collected by a shareholder, the dividend payable to such absentee shareholder, was to be maintained by the company in a separate account. Under section 205A(5), before its amendment in 1999, unclaimed dividend would within three years from date of the payment vest in the Central Government. Section 205A(5) as it was enacted is extracted below :

> "(5) Any money transferred to the unpaid dividend account of a company in pursuance of this section which remains unpaid or unclaimed for a period of three years from the date of such transfer, shall be transferred by the company to the general revenue account of the Central Government but a claim to any money so transferred to the general revenue account may be preferred to the Central Government by the person to whom the money is due and shall be dealt with as if such transfer to the general revenue account had not been made, the order, if any, for payment of the claim being treated as an order for refund of revenue."

30 Section 205B, on the other hand provided a remedy for such shareholder, who would have been entitled to the dividend, if he had claimed the dividend. It provided the shareholder the right to approach the Central Government to recover the money he was entitled to.

31 In the year 1999, these provisions underwent a drastic change. Section 205C was introduced, and amendments were made to sections 205A and 205B. Under section 205A(5), the unclaimed dividend would after a period of 7 years, be transferred to the Investor Education and Protection Fund (hereinafter "IEPF"), established under section 205C. Section 205A(5) as after the 1999 amendment, as well as section 205C are extracted below :

> "205A. (5) Any money transferred to the unpaid dividend account of a company in pursuance of this section which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company to the Fund established under sub-section (1) of section 205C.
>
> 205C. *Establishment of Investor Education and Protection Fund.*—(1) The Central Government shall establish a fund to be called the Investor Education and Protection Fund (hereafter in this section referred to as the 'Fund').
>
> (2) There shall be credited to the Fund the following amounts, namely :—

(a) amounts in the unpaid dividend accounts of companies ;

(b) the application moneys received by companies for allotment of any securities and due for refund ;

(c) matured deposits with companies ;

(d) matured debentures with companies ;

(e) the interest accrued on the amounts referred to in clauses (a) to (d) ;

(f) grants and donations given to the Fund by the Central Government, State Governments, companies or any other institutions for the purposes of the Fund ; and

(g) the interest or other income received out of the investments made from the Fund :

Provided that no such amounts referred to in clauses (a) to (d) shall form part of the Fund unless such amounts have remained unclaimed and unpaid for a period of seven years from the date they became due for payment.

Explanation.—For the removal of doubts, it is hereby declared that no claims shall lie against the Fund or the company in respect of individual amounts which were unclaimed and unpaid for a period of seven years from the dates that they first became due for payment and no payment shall be made in respect of any such claims.

(3) The Fund shall be utilised for promotion of investors' awareness and protection of the interests of investors in accordance with such rules as may be prescribed.

(4) The Central Government shall, by notification in the Official Gazette, specify an authority or committee, with such members as the Central Government may appoint, to administer the Fund, and maintain separate accounts and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

(5) It shall be competent for the authority or committee appointed under sub-section (4) to spend moneys out of the Fund for carrying out the objects for which the Fund has been established."

Before 1999, in the event that dividend was unclaimed or unpaid for a **32**
period of 3 years from the date of its declaration, the money would be transferred by the company to the Central Government. Any shareholder retained the right to obtain such unclaimed dividend either from the company itself, within 3 years from the date of declaration of the dividend. In the event that the shareholder was unable to avail of this opportunity, the

shareholder could recover such dividend by making an application under section 205B, to the Central Government.

33 After the amendments introduced in 1999, any company declaring dividend was required to maintain a dividend account for a period of 7 years. After the expiry of 7 years, the amount would then be transferred to the IEPF. This amount however would not be recoverable once the transfer was made by the company to the IEPF. The *Explanation* appended to sub-section (2) of section 205C, read with section 205A(5) makes this position abundantly clear.

34 Thus, a time limit of 7 years was imposed for claiming any dividend due to a shareholder, after which the money would instead be used by the IEPF, for fulfilling its various objectives. Parliament in its infinite wisdom felt that money owed to the careless shareholders ought to be put to good use, i. e., used for the purposes of the IEPF. In this manner, the right of the shareholder, to recover dividend in respect of his forgotten investments was curtailed. A shareholder could only recover dividend for up to 7 years, from the date on which he made an application to the company.

35 The vires of section 205C were challenged before the Delhi High Court in case titled *Nivedita Sharma* v. *Industrial Credit and Investment Corporation of India* [2012] 171 Comp Cas 135 (Delhi), W. P. (C) No. 10157 of 2009. The Delhi High Court vide judgment dated July 7, 2011 dismissed the challenge to section 205C, and held as under (page 145) :

> "Section 205C is a salutary and virtuous provision. It has been enacted to ensure that a company does not unjustifiably and unduly enrich themselves, as the depositors have failed to stake claim and have not been paid for a period of seven years from the date the amount became due. The word 'unclaimed' used in the proviso to section 205C(2) clarifies that in case a claim is made within a period of seven years from the date amount became due and payable ; the money shall not be transferred to the said fund. Thus, if a person makes a claim within a period of seven years, section 205C will not apply. Period of seven years is substantially long. A depositor or a person dealing with a company, therefore, should make a claim within a period of seven years. In case he makes a claim, provisions of section 205C of the Act are not applicable and money cannot be transferred to the fund. We do not see any reason to hold that the said provisions are unconstitutional or they violate article 14 or any other provisions of the Constitution. It cannot be said that the aforesaid provisions are faulty and violate the fundamental rights guaranteed in the Constitution.

To strike down section 205C will amount to negating and striking down a worthy and meritorious legislation which is on the whole beneficial and advantageous and in public interest. The petitioner is aggrieved because she did not stake her claim for refund within seven years. She did not inform change of address and, therefore, could not be communicated and informed about the premature redemption. The petitioner also did not bother to read the terms and conditions of allotment including the early redemption clause. These are serious lapses on the part of the petitioner. It is because of these lapses that the petitioner is in the present infelicitous situation. However, these cannot be a ground to strike down section 205C, which has been enacted in public interest and has a public purpose. Another contention during the course of arguments raised was that forfeiture clause should be struck down as unreasonable. It is not possible to agree with the said contention. The investors or public when they deposit the amount must make a claim within seven years otherwise, they will lose their right to make the claim. Rules of limitation are founded on consideration of public policy. The law of limitation affords a guarantee and ensures that cause of action is not raised after a lapse of particular period. Limitation is preventive and not curative and seeks to give quietus to claims which have not been enforced. It ensures that litigants are diligent in seeking remedies in court and prohibits stale claims. It ensures promptitude and assist vigilant persons who do not sleep over their rights. Laws prescribing reasonable period of limitation have been upheld, though whenever the period prescribed expires a claimant suffers, but this invariably happens as the said litigant has been grossly negligent and has failed to take steps. This has happened in the present case."

36 A special leave petition, bearing S. L. P. (CC) No. 19616 of 2011 was preferred against this judgment before the hon'ble Supreme Court of India. On January 2, 2012 the petition was dismissed as withdrawn with the liberty to approach the appropriate forum, once again.

37 Consequently, W. P. (C) No. 1098 of 2012, titled *Nivedita Sharma* v. *Ministry of Corporate Affairs* [2012] 172 Comp Cas 348 (Delhi), was preferred before the Delhi High Court. This petition too was dismissed vide judgment and order dated April 20, 2012.

38 Thus, the vires of section 205C, was upheld and the creation of a period of limitation, in respect of the right of a shareholder to claim dividend was deemed to be constitutionally valid.

39 Subsequently, the Companies Act, 1956 was repealed by the Companies Act, 2013. Consequently, sections 205A, 205B and 205C all were replaced by sections 124 and 125 of the New Act. Section 124 has been quoted in an earlier portion of the judgment and section 125 reads as under :

"125. *Investor Education and Protection Fund.*—(1) The Central Government shall establish a Fund to be called the Investor Education and Protection Fund (herein referred to as the Fund).

(2) There shall be credited to the Fund—

(a) the amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund ;

(b) donations given to the Fund by the Central Government, State Governments, companies or any other institution for the purposes of the Fund ;

(c) the amount in the unpaid dividend account of companies transferred to the Fund under sub-section (5) of section 124 ;

(d) the amount in the general revenue account of the Central Government which had been transferred to that account under sub-section (5) of section 205A of the Companies Act, 1956 (1 of 1956), as it stood immediately before the commencement of the Companies (Amendment) Act, 1999 (21 of 1999), and remaining unpaid or unclaimed on the commencement of this Act ;

(e) the amount lying in the Investor Education and Protection Fund under section 205C of the Companies Act, 1956 (1 of 1956) ;

(f) the interest or other income received out of investments made from the Fund ;

(g) the amount received under sub-section (4) of section 38 ;

(h) the application money received by companies for allotment of any securities and due for refund ;

(i) matured deposits with companies other than banking companies ;

(j) matured debentures with companies ;

(k) interest accrued on the amounts referred to in clauses (h) to (j) ;

(l) sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years ;

(m) redemption amount of preference shares remaining unpaid or unclaimed for seven or more years ; and

(n) such other amount as may be prescribed :

Provided that no such amount referred to in clauses (h) to (j) shall form part of the Fund unless such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment.

(3) The Fund shall be utilised for—

(a) the refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon ;

(b) promotion of investors' education, awareness and protection ;

(c) distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the court which had ordered disgorgement ;

(d) reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 by members, debentureholders or depositors as may be sanctioned by the Tribunal ; and

(e) any other purpose incidental thereto, in accordance with such rules as may be prescribed :

Provided that the person whose amounts referred to in clauses (a) to (d) of sub-section (2) of section 205C transferred to Investor Education and Protection Fund, after the expiry of the period of seven years as per provisions of the Companies Act, 1956 (1 of 1956), shall be entitled to get refund out of the Fund in respect of such claims in accordance with rules made under this section.

Explanation.—The disgorged amount refers to the amount received through disgorgement or disposal of securities.

(4) Any person claiming to be entitled to the amount referred in sub-section (2) may apply to the authority constituted under sub-section (5) for the payment of the money claimed.

(5) The Central Government shall constitute, by notification, an authority for administration of the Fund consisting of a chairperson and such other members, not exceeding seven and a chief executive officer, as the Central Government may appoint.

(6) The manner of administration of the Fund, appointment of chairperson, members and chief executive officer, holding of meetings of the authority shall be in accordance with such rules as may be prescribed.

(7) The Central Government may provide to the authority such offices, officers, employees and other resources in accordance with such rules as may be prescribed.

(8) The authority shall administer the Fund and maintain separate accounts and other relevant records in relation to the Fund in such form as may be prescribed after consultation with the Comptroller and Auditor-General of India.

(9) It shall be competent for the authority constituted under sub-section (5) to spend money out of the Fund for carrying out the objects specified in sub-section (3).

(10) The accounts of the Fund shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and such audited accounts together with the audit report thereon shall be forwarded annually by the authority to the Central Government.

(11) The authority shall prepare in such form and at such time for each financial year as may be prescribed its annual report giving a full account of its activities during the financial year and forward a copy thereof to the Central Government and the Central Government shall cause the annual report and the audit report given by the Comptroller and Auditor-General of India to be laid before each House of Parliament."

40 Sections 124 and 125 of the new Companies Act, 2013, replaced sections 205A, 205B and 205C. The mechanism of the transfer of unpaid dividend to the IEPF, remain unchanged. However, under the new Act, shares for which dividend had not been paid for over 7 years, would also now be transferred to the IEPF, by virtue of section 124(6). The proviso to section 124(6) however protected the right of a shareholder to recover the share from the IEPF. A shareholder, whose shares stood transferred to the IEPF, could make an application in accordance with the Rules laid down.

41 For the purposes of section 124(6), the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 were brought into force by the Central Government in exercise of its powers under sections 124, 125 and 469 of the Companies Act, 2013.

42 Under rule 3(2)(b), all shares in accordance with section 124(6) were to be transferred to the IEPF.

43 The present petition seeks to challenge, section 124(6) of the 2013 Act, and the rules made thereunder. It is the case of the petitioner, that the provisions related to the transfer of shares to the IEPF, i. e., section 124(6), and

the rules made thereunder, deprive a person of their right to property and are violative of article 300A of the Constitution of India. It is further the case of the petitioner that the provision and the rules made thereunder, are onerous and are manifestly arbitrary.

Article 300A, is extracted below : **44**

> "300A. *Persons not to be deprived of property save by authority of law.*—No person shall be deprived of his property save by authority of law."

It is settled law that article 300A ensures that no person shall be **45** deprived of their property, except in accordance with law. The protection offered under this article ensures that an executive fiat cannot result in the deprivation of property, and that law must be made by the appropriate Legislature, to deprive a person of their property.

In the case of *Jilubhai Nanbhai Khachar* v. *State of Gujarat* [1995] **46** (Supp) 1 SCC 596, the hon'ble Supreme Court explained the meaning of the expression, "deprivation of the property of a person," as under (page 627) :

> "48. The word 'property' used in article 300A must be understood in the context in which the sovereign power of eminent domain is exercised by the State and property expropriated. No abstract principles could be laid. Each case must be considered in the light of its own facts and setting. The phrase 'deprivation of the property of a person' must equally be considered in the fact situation of a case. Deprivation connotes different concepts. Article 300A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law made by Parliament or a State Legislature, a rule or a statutory order having force of law. It is inherent in every sovereign State by exercising its power of eminent domain to expropriate private property without owner's consent."

Additionally, it must be remembered that article 300A protects the pri- **47** vate property of a person from executive action. In addition to affirming the judgment in *Jilubhai Nanbhai Khachar* v. *State of Gujarat* [1995] (Supp) 1 SCC 596 the Constitution Bench in the case of *K. T. Plantation P. Ltd.* v. *State of Karnataka* [2011] 9 SCC 1 has held as under (page 51) :

> "168. Article 300A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a

competent Legislature. The expression 'property' in article 300A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law.

169. This court in *State of West Bengal* v. *Vishnunarayan and Associates P. Ltd.* [2002] 4 SCC 134, while examining the provisions of the West Bengal Great Eastern Hotel (Acquisition of Undertaking) Act, 1980, held in the context of article 300A that the State or executive officers cannot interfere with the right of others unless they can point out the specific provisions of law which authorises their rights.

170. Article 300A, therefore, protects private property against executive action. But the question that looms large is as to what extent their rights will be protected when they are sought to be illegally deprived of their properties on the strength of a legislation. Further, it was also argued that the twin requirements of 'public purpose' and 'compensation' in case of deprivation of property are inherent and essential elements or ingredients, or 'inseparable concomitants' of the power of eminent domain and, therefore, of List III Entry 42, as well and, hence, would apply when the validity of a statute is in question."

48 Thus, article 300A, is attracted to those situations where the property of a person is acquired only by an executive fiat, and not on the basis of any law, validly made. It is the case of the petitioners that the impugned provisions deprive them of their property, and are violative of article 300A of the Constitution of India. This argument is liable to be rejected because there is no actual deprivation of property taking place.

49 There is no doubt that as a result of the impugned provisions, the shares on which dividend is unclaimed for more than 7 years are to be transferred to the IEPF, but that does not amount to deprivation of property. This is for two reasons. Firstly, under section 124(6), there is no statutory vesting of the shares so transferred to the IEPF. Section 124(6), only contemplates a transfer of shares to the IEPF, and does not confer ownership of the shares on IEPF. This position is reflected in the proviso to section 124(6), which provides that a person shall always be permitted to re-claim his shares, from the IEPF. Secondly, the Rules prescribed under section 124(6), provide for a procedure for the refund of the shares so transferred to the IEPF. Rule 7, of the IEPF Rules, 2016 a procedure is prescribed for the refund of the shares by the IEPF to the owner of the shares. Rule 7(1) is extracted below :

"7. *Refund to claimants from Fund.*—(1) Any person whose shares, unclaimed dividend, matured deposits, matured debentures, application money due for refund, or interest thereon, sale proceeds of fractional shares, redemption proceeds of preference shares, etc., has been transferred to the Fund, may claim the shares under proviso to sub-section (6) of section 124 or apply for refund under clause (a) of sub-section (3) of section 125 or under proviso to sub-section (3) of section 125, as the case may be, to the Authority by submitting an online application in Form IEPF-5 available on the website *www.iepf.gov.in* along with fee specified by the Authority from time to time in consultation with the Central Government."

Thus, we are of the view that no deprivation of property is taking place, **50** under the impugned provisions, and as such article 300A is not attracted in this case. The Delhi High Court in *India Awake for Transparency* v. *Union of India* [2018] 206 Comp Cas 13 (Delhi) W. P. (C) No. 10589 of 2017, which was a public interest litigation seeking directions for the strict enforcement of the Rules, remarked about the nature of the transfer contemplated under section 124(6), and held as under (page 30) :

"To summarize, the court holds that section 124(6) does not result in a statutory vesting of any property ; it merely transfers through transmission of shares in companies which have yielded dividends for seven years that have not been claimed. Such shares are then transferred to the Fund which then holds them as a custodian—in whichever manner one would wish to say it. The Central Government further is mandated to devise appropriate procedures to enable shareholders to reclaim their property in the shares, by an appropriate procedure. For the duration of transfer of the shares, the companies cannot issue bonus shares or add anything prohibited under section 126. As far as the operationalisation of this provision goes, the Rules, especially the first and second amendments had the effect of giving companies adequate time to notify and comply with the three month public notice period to their shareholders about the event of transfer. The court also notices that the transfer of such shares or classes of shares is not a one-time measure but an ongoing event given the obligation of each company to identity such shares after the holding of every annual general meeting." (emphasis[1] supplied)

Even if we are to accept the argument of the petitioner that by the trans- **51** fer of shares under section 124(6), they are being deprived of their

1. Here printed in italics.

property, such deprivation would be in accordance with law, as a result of law made by Parliament, and not as a result of an executive fiat.

52 The other argument advanced by the petitioner is that the impugned provisions being onerous are manifestly arbitrary, and are liable to be struck down under article 14 of the Constitution of India. It is a settled principle of law that a law made by Parliament or the Legislature, can be struck down, on the ground of being manifestly arbitrary in the event that the it is shown that the action of the Legislature was capricious, irrational, excessive or disproportional. The Constitution Bench of this court in the case of *Shayira Banu* v. *Union of India* [2017] 9 SCC 1, noted the principles to borne in mind while determining, whether the action of the Legislature can be struck down on the grounds of being manifestly arbitrary. The Constitution Bench in *Shayira Banu* v. *Union of India* [2017] 9 SCC 1, observed as under (pages 91 and 99) :

"87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* (*State of Andhra Pradesh* v. *McDowell and Co.* [1996] 3 SCC 709, when it is said that a constitutional challenge can succeed on the ground that a law is 'disproportionate, excessive or unreasonable', yet such challenge would fail on the very ground of the law being 'unreasonable, unnecessary or unwarranted'. The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution . . .

101. It will be noticed that a Constitution Bench of this court in *Indian Express Newspapers (Bombay) P. Ltd.* v. *Union of India* [1985] 1 SCC 641 ; [1985] SCC (Tax) 121, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under article 14. Manifest arbitrariness, there-

fore, must be something done by the Legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under article 14."

53 The decision in *Shayira Banu* v. *Union of India* [2017] 9 SCC 1 holds that legislation or state action which is manifestly arbitrary would have elements of caprice and irrationality and would be characterized by the lack of an adequately determining principle. An "adequately determining principle" is a principle which is in consonance with constitutional values. With respect to criminal legislation, the principle which determines the "act" that is criminalized as well as the persons who may be held criminally culpable, must be tested on the anvil of constitutionality. The judgment of the hon'ble Supreme Court in *Shayira Banu* v. *Union of India* [2017] 9 SCC 1 has been consistently quoted with approval in a number of judgments.

54 Thus, the position of law that, is that it is open for the courts to quash/strike down legislation on the grounds that it is manifestly arbitrary. In order to prove that a legislation is manifestly arbitrary, the burden is therefore to show that Legislature has done something capriciously, irrationally and/or without adequate determining principle or if something is done which is excessive and disproportionate. In the facts of the present case however we do not find that the impugned provisions are "manifestly arbitrary". There is an avowed purpose for bringing this piece of legislation. It has been enacted to ensure that a company does not unjustifiably and unduly enrich themselves, as the depositors have failed to stake claim and have not been paid for a period of seven years from the date the amount became due. We do not see any reason to hold that the said provisions are unconstitutional or they violate article 14 or any other provisions of the Constitution. It cannot be said that the aforesaid provisions are faulty and violate the fundamental rights guaranteed in the Constitution. To strike down section 124(6) of the Investor Education and Protection Authority Fund (Accounting, Audit, Transfer and Refund) Rules, 2016, Rules will amount to negating and striking down a worthy and meritorious legislation which is on the whole beneficial and advantageous and in public interest. As observed by the Delhi High Court while upholding section 205 of the Companies Act, 1956, the investors or public when they deposit the amount must make a claim within seven years otherwise, they will lose

their right to make the claim. The rules of limitation are founded on consideration of public policy. The law of limitation affords a guarantee and ensures that cause of action is not raised after a lapse of particular period. Limitation is preventive and not curative and seeks to give quietus to claims which have not been enforced. It ensures that litigants are diligent in seeking remedies in court and prohibits stale claims. It ensures promptitude and assist vigilant persons who do not sleep over their rights. Laws prescribing reasonable period of limitation have been upheld, though whenever the period prescribed expires a claimant suffers, but this invariably happens as the said litigant has been grossly negligent and has failed to take steps.

55 It is also equally well-settled that just because the Rules are cumbersome and it is difficult to carryout the procedure prescribed under the Rules cannot make the Rules violative of article 14. Section 124(6) has been brought out to ensure that the companies do not profit out of unclaimed dividends. The Rules have been brought out only to ensure that only claims of genuine persons can be entertained. The fact that the procedure to reclaim the shares and the dividend is more expensive and the conditions are more onerous does not make it fall foul of article 14 of the Constitution of India.

56 In view of the above, the writ petition is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

[2020] 221 Comp Cas 572 (NCLAT)

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

1. PRADEEP (M. R.)

(Company Appeal (AT) (Insolvency) No. 306 of 2019)

2. MERCHEM (INDIA) P. LTD. AND ANOTHER

(Company Appeal (AT) (Insolvency) No. 307 of 2019)

3. P. E. THOMAS

(Company Appeal (AT) (Insolvency) No. 315 of 2019)

v.

RAVINDRA BELEYUR AND OTHERS

INDUSTRIAL ENGINEERING CO.

v.

MERCHEM LTD. AND ANOTHER

(Company Appeal (AT) (Insolvency) No. 554 of 2019)

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

July 29, 2020.

HF ▸ Directions

INSOLVENCY RESOLUTION—RESOLUTION PLAN—SET OFF OF BROUGHT FORWARD LOSSES AND DEPRECIATION—SUBJECT TO SCRUTINY BY INCOME-TAX DEPARTMENT—LICENCE FEE PAID DURING INSOLVENCY RESOLUTION PROCESS PERIOD—AS LONG AS CORPORATE INSOLVENCY RESOLUTION PROCESS CONTINUES OR TILL HANDING OVER BUILDING TO BUILDING OWNER WHICHEVER IS EARLIER—TO BE INCLUDED IN INSOLVENCY RESOLUTION PROCESS COSTS—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 61.

The resolution plan in respect of the corporate debtor was approved by the Adjudicating Authority. On appeals filed under sections 32 and 61(3) of the Insolvency and Bankruptcy Code, 2016, contending that the resolution applicant had sought several concessions and exemptions such as set off of brought forwarded losses and unabsorbed depreciation for computation of taxable profits under the Income-tax Act, 1961 and that the licence fee for the corporate insolvency resolution process period formed part of the insolvency resolution process costs and should have been paid in full :

Held, *that set off losses under the Income-tax Act, 1961 was subject to scrutiny by the Income-tax Department and the Code. Hence, there was a need for getting an affidavit from the resolution applicant that he would be successfully completing the resolution plan whether he got this set off under the Income-tax Act or not. The business was running on a "going concern basis" for the period as long as the corporate insolvency resolution process continued or they had handed over the building to the building owner whichever was earlier and it was to be restricted to his income-tax returns so far filed. These costs needed to be included in the costs of the corporate insolvency resolution process.*

Order of the National Company Law Tribunal in RAVINDRA BELEYUR *v.* MERCHEM LTD. [2019] 214 Comp Cas 69 (NCLT) *partly modified*.

Cases referred to :

Committee of Creditors of Essar Steel India Ltd. *v.* Satish Kumar Gupta [2020] 219 Comp Cas 97 (SC) (para 3)

Ravindra Beleyur *v.* Merchem Ltd. [2019] 214 Comp Cas 69 (NCLT) (para 1)

Sashidhar (K.) *v.* Indian Overseas Bank [2019] 213 Comp Cas 356 (SC) (para 3)

Company Appeal (AT) (Insolvency) Nos. 306, 307, 315 and 554 of 2019.

Rohan Rajasekaran, *Jitendra Malkan* and *Kartik Malhotra*, for the appellant in Company Appeal (AT) (Insolvency) No. 306 of 2019.

S. Santanam Swaminadhan and *Ms. Abhilasha Shrawat*, for the appellant in Company Appeal (AT) (Insolvency) No. 307 of 2019.

Swapnil Jain for the appellant in Company Appeal (AT) (Insolvency) No. 315 of 2019.

Jitendra Malkan for the appellant in Company Appeal (AT) (Insolvency) No. 554 of 2019.

T. Ravichandran with *K. V. Balakrishnan*, for respondent No. 1. in all the appeals.

P. V. Dinesh for the SBI in Company Appeal (AT) (Insolvency) Nos. 306, 307 and 315 of 2019.

N. P. S. Chawla and *Suresh K. Baxy*, for respondent No. 3 in all the appeals.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 DR. ASHOK KUMAR MISHRA ***(Technical Member)***.—These appeals have been filed under sections 32 and 61(3) of the Insolvency and Bankruptcy Code, 2016 ("for short the I and B Code, 2016") to set aside the impugned order passed by the National Company Law Tribunal, Chennai Bench ("Adjudicating Authority") in M. A. No. 515 of 2018 in C. P. No. 689/IB of 2017, dated January 23, 2019—(*Ravindra Beleyur* v. *Merchem Ltd.* [2019] 214 Comp Cas 69 (NCLT)). The Adjudicating Authority vide above stated miscellaneous application has approved the resolution plan and has made it effective from the date of passing of order and has directed to the resolution professional to send a copy of that order to the participants and the resolution applicant. Hence, we have considered for disposal by way of a common order.

2 The resolution plan was approved by the Adjudicating Authority contains various terms and conditions as submitted by the resolution applicant as per details enumerated at page 74 of C. A. (AT) (Insolvency) No. 315 of 2019.

As far as, Company Appeal (AT) (Insolvency) No. 306 of 2019 is concerned. The appellant has submitted that the resolution plan of the resolution applicant is a sale of assets under the guise of resolution plan : 3

(a) He has also stated that the Adjudicating Authority has failed to appreciate that no provision for payment of statutory dues related to employees/workmen such as gratuity, provident fund, etc., has been made in the "resolution plan" and it is discriminatory as against the employees and workmen of the corporate debtor.

(b) He has also submitted that the Adjudicating Authority has failed to appreciate that the mass retrenchment/termination of the employees and workmen through resolution plan is without following the due procedure of law. He has also submitted that intent of the I and B Code, 2016 is insolvency resolution as a "going concern concept" and should not be slump sale of assets. The appellant in this appeal is an employee of the corporate debtor who has filed the application under the I and B Code, 2016 and initiated the corporate insolvency resolution process (for short CIRP).

(c) However, respondent No. 1 in this appeal, i. e., the resolution professional has submitted that the appellant had resigned much before the commencement of CIRP and has left the services of the corporate debtor on September 19, 2017 while CIRP has been initiated on January 15, 2018. The resolution professional has also stated that there is a collusion between the appellant and the promoter. He has also stated that he is the person being ex-employee of the corporate debtor has triggered the CIRP, the corporate debtor does not appear before the Adjudicating Authority and the petition proceeded ex parte and gets admitted on January 15, 2018.

(d) The resolution professional has also submitted that the resolution plan is inconsonance with the provisions of the I and B Code, 2016 and the principles laid down by the hon'ble Supreme Court in *K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC) ; [2019] 12 SCC 150 and *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* [2020] 219 Comp Cas 97 (SC).

(e) While respondent No. 3, i. e., the resolution applicant of the corporate debtor has stated that the resolution applicant has already implemented the resolution plan by March 18, 2019 and has largely made all the payment to all the stakeholders/creditors and has incurred additional costs of Rs. 22.40 crores towards refurbishment of plant. He has also confirmed that he is keeping the operation of the corporate debtor as a going concern and has re-employed 36 ex-employees of the corporate debtor out of total employees joining the unit being 93. He has also stated that the liquidation value of the corporate debtor is Rs. 86.27 crores while resolution plan value

Rs. 115.25 crores. He has also stated that dues of workmen and secured financial creditors are more than the resolution plan value therefore they were paid in equal proportion. However, employees dues comes in lower priority they should got zero per cent. whereas they got 1.2 per cent. The resolution applicant was even willing to redistribute out of the total proceeds to provide 100 per cent. payment of admitted dues of workmen and employees. However, the erstwhile CoC in its meeting on November 25, 2019 has unanimously voted against it.

4 The appellant in Company Appeal (AT) (Insolvency) No. 307 of 2019 is the absolute owner of the corporate debtor's factory, he has entered into a licence agreement with the corporate debtor on October 1, 2011 and the corporate debtor has agreed to pay a sum of rupees towards licence fee payable either a lump sum or such other instalments being Rs. 16,50,000 towards building and Rs. 38,58,000 towards plant and machinery. He is aggrieved that the licence fee for the CIRP period forms part of IRP costs and should have been paid in full while this has not been considered and similarly the financial debt has not been paid. The appellant is insisting that the resolution applicant has handed over the building and other apartments only on June 17, 2019 and his dues of Rs. 82,65,000 along with additional 5 months licence fee at the rate of Rs. 5 lakhs per month has yet to be paid :

(a) However, the resolution professional stated that the appellants are related party and hence are not prejudicially affected and he has determined over Rs. 6 crores recoverable from the related party. He has also stated that that figures of rent, etc., are invariance with income-tax return filed by the appellant and hence they are not entitled to the claim. This is a grey area and needs consideration in view of section 14(1) of the I and B Code, 2016 read with regulation 31 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Since the premises was used by the resolution professional during the CIRP licence fee payment should have been considered at least tallying to the income-tax return of the respective years. The resolution applicant has submitted that he has provided the copy of the resolution plan to the appellant and requested him to sign the non-disclosure agreement which he has failed to do and accordingly, he has not provided a copy of the resolution plan.

5 The appellant in Company Appeal (AT) (Insolvency) No. 315 of 2019 has stated that he is promoter and director of the corporate debtor and had extended personal guarantees to the loans of the corporate debtor and he has mortgaged several of his properties as stated in the application including of his wife's properties to raise loans for the corporate debtor. He was

restructuring the company but in the meantime CIRP was initiated. He has not been paid dues over Rs. 2.65 crores towards his salary and unsecured loan of over Rs. 16 crores. He was both financial creditor and operational creditor. He has also stated that he has the reservations over the viability and feasibility of resolution plan approved :

(a) He has also stated that the resolution applicant has sought several concession and exemption like allowing setting off of brought forwarded losses and unabsorbed depreciation for computation of taxable profits as per the Income-tax Act, 1961, directing to provide reasonable opportunity to the jurisdiction Principal Commissioner of Income-tax for allowing this set off and also claiming certain other benefits apart from exemption under Stamp Duty Act, waival by the Gujarat Government/Gujarat Industrial Corporate from compliance related to drawal of water, approval from Environment and Forest Department, Central Pollution Control Board and other Government Authorities for regularisation and waival of any non-compliances pertaining to other requirements, etc. A look at the balance-sheet as on March 31, 2018 vide annexure A2.2 page 9 filed by the appellant on October 17, 2019 it appears that accumulated losses as on March 31, 2018 itself is over Rs. 121 crores apart from unabsorbed depreciation. However, these figures are as per financial statement and will require adjustment under the Income-tax Act, 1961 to determine exact carry forward of losses for setting off. Hence, the impact is very high. In this context there is a need for referring to the provisions of section 61 of the I and B Code, 2016 which clearly lays down that the approved resolution plan should not be in contravention of the provision of any law for the time being in force apart from the other criteria as specified by the IBBI.

(b) In this context reference is invited to the order dated March 29, 2019 of this Appellate Tribunal, which reads as under :

> "*March 29, 2019*—Learned counsel appearing on behalf of the appellant submits that there is no delay if it is counted from the date of the impugned order received by the appellants. If it is counted from the date of the impugned order, then only there is a delay of two days.
>
> In the circumstances, we find that there is no delay in preferring this appeal I. A. No. 115 of 2019 stands disposed of.
>
> Issue notice Mr. K. V. Balakrishnan, advocate accepts notice on behalf of the first respondent-(resolution professional). Mr. R. S. Lakshman, advocate accepts on behalf of second respondent. No further notice need be issued to them. They may file reply along with

vakalatnama within two weeks. Rejoinder, if any, be filed by the appellants within two weeks thereof.

Let notice be issued on rest of the respondents by speed post. Requisite along with process fee, if not filed, be filed by April 1, 2019. If the appellant provides the e-mail address of the rest of the respondents, let notice be also issued through e-mail.

Post the case 'for admission' on May 3, 2019.

In the meantime, the resolution plan may be implemented at the risk of the 'resolution applicant', which shall be subject to the decision of these appeals. However, the 'successful resolution applicant' will not sell or transfer not alienate or create third party interest on any of the moveable or immovable property of the 'corporate debtor'."

Hence the above order clearly stated that the resolution plan can be implemented at the risk of the resolution applicant which shall be subject to the decisions of the Appellate Tribunal.

(c) However, the resolution professional has stated that the appellant has not signed the non-disclosure agreement and hence was not given the copy of resolution plan and has also stated that no prejudice will be caused due to non-submission of the resolution plan as he has attended the CoC meeting.

(d) The resolution applicant has submitted that he has implemented the resolution plan by March 18, 2019 and has spent Rs. 22.40 crores additionally to bring the corporate debtor as a "going concern". He is also agreeable that he was willing to redistribute the amount which is approved by the CoC but CoC has unanimously rejected the proposal on November 25, 2019. He has also stated he is incurring losses due to such frivolous appeal.

6 The appellant in Company Appeal (AT) (Insolvency) No. 554 of 2019, the appellant is an operational creditor and he is working in the field of mechanical fabrication work. He has carried out the work last being in 2016 and his amounts due were Rs. 84,30,487. He is talking about the discrimination between the operational creditors and financial creditors and has stated that out of dues of over Rs. 84,00,000 he is getting Rs. 34,862. He has also stated that he is a fabrication contractors and not getting at least a reasonable amounts, his business is also in a bad shape :

(a) While the resolution applicant has submitted that the appellant is sole proprietorship concern and is not being eligible under section 61 of the IBC, 2016 to appeal. He has also stated that the instant appeal has been filed on May 16, 2019 after implementation of the resolution plan by March

18, 2019. He has also raised an issue that whatever amount he has got at that time he has not protested. In any case section 61 of the IBC, 2016 provides for the terminology "person" which is defined in section 3(23) of the IBC, 2016 and accordingly, any entity established under a statute will also be covered under this ambit.

We have gone through the various submissions made by the appellants and the respondents. We also understand that the resolution plan have been implemented by March 18, 2019 and a lot of time has lapsed in getting final approval and landing into appeals before this Appellate Tribunal. The grey area in this case is that the setting off of losses under the Income-tax Act, 1961 is subject to scrutiny by the Income-tax Department and the IBC, 2016 lays down that the resolution plan should be in compliance with the law laid down. Hence, there is a need for getting an affidavit from the resolution applicant that he will be successfully completing the resolution plan whether he gets this set off under the Income-tax Act or not. Secondly the issue is payment of licence fee to the building owner where the CIRP has been carried out and business was running on a "going concern basis" for the period till CIRP was continued or they have handed over the building to the building owner whichever is earlier and the same is to be restricted to his income-tax returns so far filed. This costs needs to be included in CIRP costs. **7**

We are of the view that there is no substance in C. A. (AT) (Insolvency) Nos. 306 and 554 of 2019. Hence dismissed. However, C. A. (AT) (Insolvency) Nos. 307 and 315 of 2019 are partly allowed as indicated above. Any interim order issued, stands vacated and pending IA's, if any, stands disposed of. No order as to costs. **8**

The Adjudicating Authority shall ensure the compliance of above directions within a period of 4 (four) weeks. Registry is directed to send the copy of this judgment to the Adjudicating Authority (National Company Law Tribunal, Chennai Bench).

[2020] 221 Comp Cas 580 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — MUMBAI BENCH]

SREI INFRASTRUCTURE FINANCE LTD.

v.

STERLING INTERNATIONAL ENTERPRISES LTD.

(M. A. No. 1584 of 2018 in C. P. No. 402 of 2018)

J. M. FINANCIAL ASSET RECONSTRUCTION CO. LTD.

v.

CA VISHAL JAIN, RESOLUTION PROFESSIONAL OF STERLING INTERNATIONAL ENTERPRISES LTD.

(M. A. No. 1584 of 2018)

BHASKARA PANTULA MOHAN *(Judicial Member)* and
V. NALLASENAPATHY *(Technical Member)*

March 13, 2019.

HF ▸ Applicant

INSOLVENCY RESOLUTION—FINANCIAL CREDITOR—CREDITOR IN WHOSE FAVOUR PROPERTIES OF CORPORATE DEBTOR MORTGAGED TO SECURE DEBT GRANTED TO THIRD PARTY—TO BE CONSIDERED AS FINANCIAL CREDITOR OF CORPORATE DEBTOR—ENTITLED TO EXERCISE VOTING RIGHTS TO ENABLE SUCCESSFUL IMPLEMENTATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS—RESOLUTION PROFESSIONAL TO COLLATE ITS CLAIM AS FINANCIAL CREDITOR AND TO INCLUDE CREDITOR IN COMMITTEE OF CREDITORS—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 3(31), 5(8).

If the mortgagee, being a stakeholder in the mortgaged property, is left out of the corporate insolvency resolution process nobody knows how the mortgagee will deal with the properties since the mortgagee has an interest transferred in specific immovable properties in its favour. Hence, unless an opportunity is given to the mortgagee to be part of the committee of creditors and is made as a party to the process of approval or rejection of resolution plan, that will be a clear case of violation of natural justice. The main objective of the Insolvency and Bankruptcy Code, 2016 is resolution of the corporate debtor and selective exclusion of an important stakeholder may not auger well for the successful conduct of the corporate insolvency resolution process. A narrow, conventional and restricted interpretation of financial debt may lead to a situation which is diagonally opposite to the objective of the Code itself.

Further, when no representation is given to the mortgagee in the committee of creditors the binding effect of the resolution plan may be in jeopardy when the mortgagee enters into litigation at the stage of approval of the resolution plan or thereafter.

UPL had availed of a short-term loan of Rs. 50 crores from SL and the corporate debtor mortgaged its assets as security towards the loan granted to SL. The loan account of UPL turned into non-performing asset and SL initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, by issuing a notice demanding sum of Rs. 56,91,81,846 from the corporate debtor. SL took possession of the property of the corporate debtor under section 13(4) of the 2002 Act. On March 22, 2014 SL assigned the debts of UPL, along with all its rights and interest, to the applicant. Subsequently the corporate debtor along with its other sister concerns further created a charge over properties belonging to them by creation of equitable mortgage in favour of the applicant. The applicant issued a demand notice under the 2002 Act calling upon the principal debtor UPL, as well the corporate debtor to repay the amount due and in furtherance the applicant took possession of properties which were mortgaged as additional securities. After the initiation of the corporate insolvency resolution process against the corporate debtor, the applicant filed a claim against the corporate debtor before the resolution professional and requested to be included in the committee of the creditors of the corporate debtor. The resolution professional of the corporate debtor rejected the claim of the applicant. On an application seeking a direction to the resolution professional to incorporate the claim of the applicant as a financial creditor :

Held, *allowing the application, that the mortgage executed by the corporate debtor in favour of the applicant was a security interest as provided under section 3(31) of the Code and the applicant was a stakeholder whose rights would be affected vitally. The applicant being the mortgagee of properties of the corporate debtor, who had advanced loan to a third party, was a financial creditor of the corporate debtor. It was entitled to exercise voting rights under the Code for enabling the successful implementation of the corporate insolvency resolution process. The resolution professional was to collate the claim received from the applicant as a financial creditor and include the applicant in the committee of creditors.*

Vijay Kumar Jain *v.* Standard Chartered Bank [2019] 5 Comp Cas-OL 531 (SC) (para 10) *and* Export-Import Bank of India *v.* Resolution Professional, JEKPL P. Ltd. [2018] 3 Comp Cas-OL 594 (NCLAT) (para 10) *referred to.*

M. A. No. 1584 of 2018 in C. P. No. 402 of 2018.

Rohit Gupta with *Nikhul Rajani* instructed by *M/s. V. Deshpande and Co.* for the applicant.

Abdullah Qureshi instructed by *Indian Law LLP* for the respondent.

ORDER

The order of the Bench was delivered by

1 V. NALLASENAPATHY ***(Technical Member)***.—The applicant, an asset reconstruction company, filed this application praying for the following reliefs :

(a) That this hon'ble Tribunal be pleased to allow miscellaneous application filed by the applicant and accordingly quash and/or set aside the decision of the RP dated October 11, 2018 ;

(b) That this hon'ble Tribunal be pleased to direct the resolution professional to incorporate the claim of the applicant herein as a financial creditor, in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 ; or in the alternative,

(c) Pending the hearing and final disposal of the present miscellaneous application, this hon'ble Tribunal be pleased to stay the effect and operation of the decision dated October 11, 2018 and accordingly permit the applicant to participate in the resolution process as a member of committee of creditors ; or in the alternative,

(d) This hon'ble Tribunal be pleased to stay any further steps to be taken by resolution professional and by the committee of creditors in the absence of or without taking into consideration the vote of the present application ;

(e) Interim reliefs as prayed in prayer clause (b) to (d) ;

(f) Any other and further reliefs as this hon'ble Tribunal may deem fit in the facts and circumstances of the present case ;

(g) Costs of the application.

2 Sterling International Enterprises Ltd., the corporate debtor herein, was put in corporate insolvency resolution process (CIRP) by an order of this Adjudicating Authority dated July 16, 2018 and the respondent is the resolution professional (RP).

3 One M/s. Unique Proteins P. Ltd., had availed a short-term loan of Rs. 50 crores from M/s. SICOM Ltd., and the corporate debtor mortgaged its assets as security towards the said loan in favour of SICOM Ltd. The loan account of Unique Proteins P. Ltd., turned into non-performing asset and SICOM Ltd., initiated SARFAESI proceedings by issuing notice dated

January 18, 2013 demanding sum of Rs. 56,91,81,846 from the corporate debtor. SICOM Ltd., took possession of the property of the corporate debtor under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 on March 15, 2013. On March 22, 2014 SICOM Ltd., assigned the debts of Unique Proteins P. Ltd., along with all its rights and interest to the applicant. Subsequently on September 22, 2014 the corporate debtor along with its other sister concerns further created charge over properties belonging to them by creation of equitable mortgage in favour of the applicant. Further, on September 22, 2014 the corporate debtor along with their sister concerns made a declaration confirming the creation of mortgage by deposit of title deeds of the additional properties in favour of the applicant.

4 On February 28, 2018 the applicant issued a demand notice under the SARFAESI Act calling upon the principal debtor Unique Proteins P. Ltd., as well the corporate debtor to repay Rs. 57,21,13,945 and in furtherance the applicant took possession of properties which were mortgaged as additional securities.

5 After the initiation of CIRP against the corporate debtor, the applicant filed a claim against the corporate debtor before the RP and requested to include them in the committee of creditors of the corporate debtor. The resolution professional of the corporate debtor rejected the claim of the applicant on August 16, 2018 by an e-mail addressed to the applicant stating as below :

> "Dear Mr. Deo,
>
> Your claim has been rejected.
>
> Your contentions only prove your debt claim on the principal borrower and not on Sterling International.
>
> Sterling International has only mortgaged its properties but not given any corporate guarantee, so it is not a debtor and consequently your claim cannot be accepted."

6 The resolution professional subsequently on October 11, 2018 sent another e-mail to the applicant stating as below :

> "Dear sirs,
>
> I have reviewed your request and also consulted a few lawyers and even they are of the opinion that your claim is not admissible for the same reason I stated earlier. I am sorry to say but your claim is rejected."

7 Aggrieved by the decision of the resolution professional, the applicant filed this application under section 60(5) of the Code for the reliefs cited supra.

8 The followings are the contentions of the applicant :

(A) The resolution professional has arrived at an erroneous conclusion that though there is a mortgage created in favour of the applicant by the corporate debtor but since no corporate guarantee was executed, the claim of the applicant is not tenable in the CIRP of the corporate debtor and the decision of the RP in rejecting the claim is flawed.

(B) The decision of the resolution professional is without any justification or without any reasoning, contrary to the principal of natural justice and not based on the sound principle of law.

(C) The RP failed to appreciate the distinction between a mortgage or a guarantee and proceeded on the basis that there cannot be a mortgage without any guarantee. Any party can create a mortgage as a security without guaranteeing the repayment of debt. Creation of mortgage itself is sufficient to create a right in favour of the lender for enforcing the mortgage in case there is a default in repayment of the debt.

(D) There is a valid and subsisting claim for the applicant as against the corporate debtor which the RP failed to appreciate. On default in repayment of the debt by Unique Proteins Ltd., the applicant has claimed and is entitled to recover its dues by enforcing the mortgage, therefore, there is a valid and subsisting claim.

(E) Financial debt also includes a mortgage claim and this includes the rights and obligations of any party which, inter alia, will include the transaction of this nature.

(F) The CIRP will be a futile exercise and may create future complications, if the legitimate claim of the applicant as a financial creditor is not admitted by the RP.

(G) The RP failed to appreciate that the applicant is legally entitled to bring a suit for sale and foreclosure with regard to the mortgage property owned by the corporate debtor.

(H) The decision of RP is contrary to the provisions of the Transfer of Property Act as well as the Contract Act.

9 The contentions of the RP is below :

(A) The applicant is not a financial creditor and the debt is not a financial debt as defined under section 5(8) of the Code and hence the claim filed by the applicant is rejected.

(B) The conjoint reading of the following sections of the Code :

(i) Section 3(6) which defines claim as—

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

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

(ii) Section 3(8) which defines corporate debtor as a corporate who owes a debt to any person ;

(iii) Section 3(10) which defines creditor as any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder ;

(iv) Section 3(11) which defines debt as a liability or obligation in respect of a claim which is due from any person and includes a financial debt or an operational debt along with the Form C filed by the applicant ;

—it is clear that neither any financial debt nor any operational debt is owed by the corporate debtor to the applicant and as such the applicant is precluded to file a proof of claim during the CIRP.

(C) The RP further submits that a perusal of Form C submitted by the applicant and even the present application, it clearly appears that it is not the case where the money has been disbursed to the corporate debtor which is payable along with interest, therefore, the argument of the applicant that the definition of financial debt does not envisage the disbursement of the debt has to be necessarily to the corporate debtor, is completely untenable. It is further submitted that the arguments of the applicant, that the scope of debt in the Code is not limited to the liability or obligation owed directly by the principal borrower, but also includes liability or other liability of other parties in respect of the debt of the principal borrower is also untenable.

(D) The RP further submits that the question of exercising the rights under the mortgage deed by the applicant can only arise during the liquidation as the same has been specifically provided for a secured creditor under section 52 of the Code and therefore the rights of the applicant will remain intact and can be exercised after the CIRP period but not during the CIRP of the corporate debtor. Further regulation 36 of the CIRP Regulations requires the resolution professional to place the liabilities of the corporate debtor in different classes while preparing the information memorandum of the corporate debtor in terms of section 29 of the Code. Hence

no prejudice would be caused to the applicant in whatsoever nature as contended by the applicant as all its rights are protected by the Code.

(E) The RP further submits that even otherwise there is no modality to put a value to the assets mortgaged as the major mortgaged assets is under litigation for title and hence may have no substantial value.

(F) With the above submissions the RP submits that the present application is misconceived, frivolous, untenable, not maintainable and is liable to be dismissed with the exemplary cost.

10 *Discussion :*

(A) Even though the RP submits that, the mortgagee's claim against the corporate debtor cannot be admitted during the CIRP, by quoting section 52 of the Code, the RP fairly admits that the mortgagee is entitled to the remedies in liquidation, but rejected the claim saying that there is no remedy for the mortgagee under the CIRP. Further the RP admits that, applicant/mortgagee is a secured creditor for the loan given to a third party, for which the corporate debtor created equitable mortgage of its properties.

(B) It is an admitted fact that the mortgagee had provided loan to a third party by taking the property of the corporate debtor as security. During the CIRP, when an information memorandum is prepared by the RP, this fact has to be disclosed. Now, the CoC will decide on the resolution plan without the participation of the mortgagee of the corporate debtor as and when the resolution plan is submitted before it by the RP, since the claim of the mortgagee was rejected by the RP. This creates an anomalous situation where the CoC decides on a resolution plan completely ignoring a mortgagee who is also an important stakeholder. If the mortgagee, being a stakeholder in the mortgaged property, is left out of the process and nobody knows how the mortgagee will deal with the properties since the mortgagee has an interest transferred in specific immovable properties in its favour, which is also admitted by the RP. Hence, unless otherwise an opportunity is given to the mortgagee to have a seat in the committee of creditors and is made as a party to the process of approval or rejection of resolution plan, that will be a clear case of violation of natural justice. The main objective of the Code is resolution of the corporate debtor and this kind of selective exclusion of an important stakeholder may not auger well for the successful conduct of the CIRP. By providing a narrow, conventional and restricted interpretation of the financial debt may lead to a situation which is diagonally opposite to the objective of the Code itself. Further, when no representation is given to the mortgagee in the committee of creditors the binding effect of the resolution plan may also end up in jeopardy when the mortgagee enters into litigation at the stage of

approval of resolution plan or thereafter. Hence, the contention of the RP that the question of exercising the rights under the mortgage deed by the applicant can only arise during the liquidation and not in CIRP is not a sound proposition.

(C) Under the Transfer of Property Act, 1882, the mortgagor binds himself to repay the mortgage money. Admittedly an equitable mortgage is created by the corporate debtor in favour of the applicant. That means there is a debt, documents of title deeds are deposited as security and on payment of mortgage money only the title deeds are to be returned to the mortgager. It is clear that there is inherently an assurance to repay on the part of the corporate debtor to the applicant/mortgagee and hence the mortgagee deserves to be treated as a financial creditor. Apart from that the mortgagee has a vested interest in the property for the reason that the title in the property vest with the mortgagee until the loan is repaid to him. In this particular situation, the question whether the corporate debtor is bound to repay or not is not at all an issue to be discussed because the corporate debtor had already transferred the rights and the property in favour of the mortgagee, the day when he surrendered the title deeds with the applicant. So in our opinion, the mortgagee always has a vested right to approach the RP on par with any financial creditor and claim the amounts and it is for the RP who is acting on behalf of the corporate debtor to forthwith admit the claim as per the law.

(D) It is to be noted that the hon'ble Supreme Court in the case of *Vijay Kumar Jain* v. *Standard Chartered Bank* [2019] 5 Comp Cas-OL 531 (SC) at paragraph 12 stated as below (page 556) :

> "There is no doubt whatsoever that Notes on Clauses are an important aid to the construction of sections of the Code as they show what the Drafting Committee had in mind when such provisions were drafted. However, a closer look at the Notes on Clause 24 makes it clear that the third sentence of the Notes on Clause 24 is itself problematic. First and foremost, it speaks of the resolution professional seeking information. The resolution professional does not seek information at a meeting of the committee of creditors, which is what section 24 is all about. The resolution professional only seeks information from the erstwhile board of directors under section 29 before preparing an information memorandum, which then includes the financial position of the corporate debtor and information relating to disputes by or against the corporate debtor, etc. All this has nothing to do with section 24 of the Code which deals with meetings of the committee of creditors. Secondly, the resolution professional does

not prepare a resolution plan as is mentioned in the Notes on Clause 24 ; he only prepares an information memorandum which is to be given to the resolution applicants who then submit their resolution plans under section 30 of the Code. The committee of creditors, in turn, gets information so that they can assess the financial position of the corporate debtor from various sources before they meet. It is, therefore, difficult to understand the Notes on Clause 24. Even assuming that the Notes on Clause 24 may be read as being a one-way street by which erstwhile members of the board of directors are only to provide information, we find that section 31(1) of the Code would make it clear that such members of the erstwhile board of directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The Regulations also make it clear that these persons are vitally interested in resolution plans as they affect them. Thus, under regulation 36 of the CIRP Regulations, the information memorandum that is given to each member of the CoC and to any potential resolution applicant, will contain details of guarantees that have been given in relation to the debts of the corporate debtor (see regulation 36(2)(f) of the CIRP Regulations). Also, under regulation 37(1)(d) of the CIRP Regulations, a resolution plan may provide for satisfaction or modification of any security interest. Security interest is defined by section 3(31) of the Code as follows :

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

(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person :

Provided that security interest shall not include a performance guarantee.'

This would certainly include a guarantor who may be a member of the erstwhile board of directors. Further, under regulation 37(1)(f), a resolution plan may provide for reduction in the amount payable to

the creditors, which again vitally impacts the rights of a guarantor. Last but not least, a resolution plan which has been approved or rejected by an order of the Adjudicating Authority, has to be sent to 'participants' which would include members of the erstwhile board of directors—vide regulation 39(5) of the CIRP Regulations. Obviously, such copy can only be sent to participants because they are vitally interested in the outcome of such resolution plan, and may, as persons aggrieved, file an appeal from the Adjudicating Authority's order to the Appellate Tribunal under section 61 of the Code. Quite apart from this, section 60(5)(c) is also very wide, and a member of the erstwhile board of directors also has an independent right to approach the Adjudicating Authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under section 31 of the Code."

(E) The mortgage executed by the corporate debtor in favour of the applicant is also a security interest as provided under section 3(31) of the Code and the applicant/mortgagee is also a stakeholder whose rights will be affected vitally. In view of this situation, this Bench is of the considered view that the applicant/mortgagee shall be given the status of financial creditor.

(F) It is also worth mentioning the judgment of the hon'ble National Company Law Appellate Tribunal in the case of *Export-Import Bank of India* v. *Resolution Professional, JEKPL P. Ltd.* [2018] 3 Comp Cas-OL 594 (NCLAT), in C. A. (AT) (Insolvency) No. 304 of 2017, dated August 14, 2018 wherein it was held that guarantee given by a corporate debtor is a financial creditor of the corporate debtor as provided under section 5(8)(h) of the Code. It is to be noted that the corporate debtor has not received any loan/finance/facilities but the recipient of the loan is only the principal borrower, as in the case on hand.

(G) In view of the above discussion, it is held that the applicant/mortgagee of properties of the corporate debtor, who had advanced loan to a third party, is a financial creditor of the corporate debtor, who is also entitled to exercise voting rights under the Code for enabling the successful implementation of CIRP. Accordingly the resolution professional is directed to collate the claim received from the applicant as a financial creditor and include the applicant in the CoC.

(H) Accordingly this application is allowed. No costs.

[2020] 221 Comp Cas 590 (NCLAT)

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

AXIS BANK LTD.[1]

v.

ANUJ JAIN, RESOLUTION PROFESSIONAL FOR JAYPEE INFRATECH LTD.

(and connected appeals)

SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)*** and **BANSI LAL BHAT** J. ***(Judicial Member)***

August 1, 2019.

HF ▶ Appellant

INSOLVENCY RESOLUTION—FRAUDULENT OR WRONGFUL TRADING—PREFERENTIAL TRANSACTION—MORTGAGE OF CORPORATE DEBTOR'S PROPERTY FOR LOANS GRANTED TO ITS HOLDING COMPANY—MORTGAGES IN ORDINARY COURSE OF ITS BUSINESS—NO ALLEGATIONS THAT TRANSACTIONS MADE TO DEFRAUD CREDITORS OR SUCH TRANSACTIONS AMOUNTED TO "EXTORTIONATE CREDIT"—ADJUDICATING AUTHORITY NOT EMPOWERED TO HOLD THAT MORTGAGE DEEDS WERE TRANSACTIONS WITHIN MEANING OF "FRAUDULENT TRADING" OR "WRONGFUL TRADING"—TRANSACTIONS NOT PREFERENTIAL TRANSACTION OR UNDERVALUED TRANSACTIONS OR ENTERED INTO TO DEFRAUD CREDITORS OF CORPORATE DEBTOR—ADJUDICATING AUTHORITY'S ORDER SET ASIDE—BANKS AND FINANCIAL INSTITUTIONS ENTITLED TO EXERCISE THEIR RIGHTS UNDER CODE—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 43, 45, 49, 50, 51, 60(5)(a), 66.

The resolution professional filed an application under sections 43, 45, 60(5)(a) and 66 read with section 25(2)(j) of the Insolvency and Bankruptcy Code, 2016 before the Adjudicating Authority seeking directions that the transactions entered into by the promoters and directors of the corporate debtor creating mortgages on 858 acres of immovable property owned by it and in its possession, to secure the debt of a related party by way of the mortgage deeds were fraudulent and wrongful transactions within the meaning of section 66 of the Code. The Adjudicating Authority passed an order in favour of the resolution professional. On appeals by the banks and financial

1. This order has been reversed by the Supreme Court : see [2020] 221 Comp Cas 625 (SC) *infra*.—Ed.

institutions which had given loans to the holding company of the debtor and in whose favour the mortgages had been created :

Held, *allowing the appeals, that the mortgages were made in favour of the banks and financial institutions by the corporate debtor in the ordinary course of its business. The banks and financial institutions had given loans to the holding company of the debtor. The corporate debtor being a group company, as a guarantor, had executed mortgage deeds in favour of the banks and financial institutions. None of the transactions was a "preferential transaction" or "undervalued transaction". There were no allegations that these transactions were made to defraud the creditors in terms of section 49 or that such transactions amounted to "extortionate credit" as defined under section 50. Therefore, the Adjudicating Authority in the absence of any such finding was not empowered to pass order under section 51. In the absence of any evidence to show that they were made to defraud the creditors of the corporate debtor or for any fraudulent purpose, on a mere allegation made by the resolution professional, it was not open to the Adjudicating Authority to hold that the mortgage deeds were came within the meaning of "fraudulent trading" or "wrongful trading" under section 66. The allegation against the banks and financial institutions were not justified. The Adjudicating Authority had failed to notice the relevant facts and had misread the provisions of sections 43, 45 and 66 of the Code and on the basis of wrong presumption and error of fact held that transactions in question amount to "preferential transactions" ; "undervalued transactions" and for fraudulent purpose to defraud the creditors of the corporate debtor. The order could not be upheld. The banks and financial institutions were entitled to exercise their rights under the Code.*

Order of the National Company Law Tribunal reversed.

CHITRA SHARMA *v.* UNION OF INDIA [2018] 210 Comp Cas 609 (SC) (para 11) *referred to.*

Company Appeal (AT) (Insolvency) Nos. 243, 244, 245, 249, 276, 301, 331, 343, 348, 349, 353, 370, 374, 376, 411, 424, 436, 458, 492, 511, 524 of 2018.

Sudipto Sarkar, Senior Advocate assisted by ***Ms. Anindita Roy Chowdhury***, ***Abhishek Singh*** and ***Abhijnan Jha,*** for the appellant in Company Appeal (AT) (Insolvency) No. 243 of 2018.

Amit Sibal, Senior Advocate with ***Parag Maini*** and ***Abhimanyu Chopra***, for the appellant in Company Appeal (AT) (Insolvency) No. 244 of 2018.

Ramji Srinivasan, Senior Advocate assisted by *Ms. Misha*, *Shantanu Chaturvedi* and *Ms. Charu*, for the appellant in Company Appeal (AT) (Insolvency) Nos. 245 and 353 of 2018.

Sanjay Kapur, *Bharath Gangadhar* and *Ms. Megha Karnwal*, for the appellant in Company Appeal (AT) (Insolvency) No. 249 of 2018.

Alok Dhir, *Ms. Varsha Banerjee* and *Kunal Godhwani*, for the appellant in Company Appeal (AT) (Insolvency) No. 276 of 2018.

Krishnendu Datta, *Ms. Anindita Roy Chowdhary*, *Abhishek Singh* and *Abhijnan Jha*, for the appellant in Company Appeal (AT) (Insolvency) No. 301 of 2018.

Divyanshu Goyal and *Ms. Swati Jain*, for the appellant in Company Appeal (AT) (Insolvency) No. 331 of 2018.

Rajiv S. Roy, *Avrojyoti Chaterjee*, *Abhijit S. Roy* and *Ms. Jayasree Saha*, for the appellant in Company Appeal (AT) (Insolvency) Nos. 343, 370, 424 and 492 of 2018.

Jasvinder Singh and *Ms. Shipra Shukla*, for the appellant in Company Appeal (AT) (Insolvency) No. 348 of 2018.

Parag Maini and *Abhimanyu Chopra*, for the appellant in Company Appeal (AT) (Insolvency) No. 349 of 2018.

Vijay Kumar and *Shashant Prabhakar*, for the appellant in Company Appeal (AT) (Insolvency) No. 374 of 2018.

Ramji Srinivasan, Senior Advocate with *Varun Singh*, Advocate, for the appellant in Company Appeal (AT) (Insolvency) No. 376 of 2018.

Siddhant Surya and *Sanjay Bajaj*, for the appellant in Company Appeal (AT) (Insolvency) No. 436 of 2018.

Ms. Shweta Bharti, *Sukrit Kapoor* and *Ms. Shuchi Sejwar*, for the appellant in Company Appeal (AT) (Insolvency) No. 458 of 2018.

Syed A. Abid, *A. Gupta* and *Prateek Khaitan*, for the appellant in Company Appeal (AT) (Insolvency) No. 511 of 2018.

Abhimanyu Chopra and *Parag Maini*, for the appellant in Company Appeal (AT) (Insolvency) No. 524 of 2018.

Mahfooz Nazki, for the respondents in Company Appeal (AT) (Insolvency) No. 243 of 2018.

Sanjeev Sen, Senior Advocate with *Ms. Jannahvi Bhasin*, for the respondents in all the appeals.

Sanjay Bhatt and *Ms. Niharika Sharma*, for the respondents in all the appeals.

Jasvinder Singh and *Ms. Shipra Shukla*, for the respondents in Company Appeal (AT) (Insolvency) No. 343 of 2018 and for the appellant in Company Appeal (AT) (Insolvency) Nos. 348 and 411 of 2018.

Anshuman Gupta, *Syed Arsalan Abid* and *Prateek Khaitan* for the respondents in Company Appeal (AT) (Insolvency) No. 244 of 2018.

Divyanshu Goyal and *Ms. Swati Jain* for respondent No. 23 in Company Appeal (AT) (Insolvency) No. 370 of 2018.

Jasvinder Singh and *Ms. Shipra Shukla* for respondent No. 26 in Company Appeal (AT) (Insolvency) Nos. 370, 424, 492 and 511 of 2018.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

SUDHANSU JYOTI MUKHOPADHAYA J.—The "resolution professional" of "Jaypee Infratech Ltd."-("corporate debtor") filed application (C. A. No. 26 of 2018) under sections 43, 45, 60(5)(a) and 66 read with section 25(2)(J) of the Insolvency and Bankruptcy Code, 2016 ("I and B Code" for short) before the Adjudicating Authority ("National Company Law Tribunal"), Allahabad Bench, Allahabad seeking direction that the transactions entered into by the promoters and directors of the "corporate debtor" creating mortgage of 858 acres of immovable property owned by it and in possession of the "corporate debtor", to secure debt of a related party, i.e., "Jaiprakash Associates Limited" by way of the mortgage deeds dated December 29, 2016, May 12, 2014, March 7, 2017, May 24, 2016 and March 4, 2016, are fraudulent and wrongful transactions within the meaning of section 66 of the "Insolvency and Bankruptcy Code". 1

The direction was also sought against the directors and promoters of the "corporate debtor" to make such contributions to the assets of the "corporate debtor" as it may deem fit, including directions under section 67 of the "Insolvency and Bankruptcy Code". 2

The impugned order has been challenged by the appellants-banks/financial institutions (lenders of "Jaypee Infratech Limited"/"Jaiprakash Associates Limited") on the grounds as noticed below. 3

Learned counsel for the appellant submitted that the Adjudicating Authority ignored the nature and character of a mortgage. Referring to section 58 of the "Transfer of Property Act, 1882", it is submitted that a "mortgage" means transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. 4

5 According to the appellants, a mortgage debt is covered by the definition of "debt" under section 3(11) of the "Insolvency and Bankruptcy Code" and it being liability or obligation in respect of a claim which is due from the "corporate debtor" or a mortgagor and the appellants have a right to payment.

6 According to learned counsel for the appellants, a mortgage debt constitutes a "financial debt" within the meaning of section 5(8) of the "Insolvency and Bankruptcy Code" and the Adjudicating Authority misconstrued the definition of "financial debt". The Adjudicating Authority failed to notice that the "corporate debtor" stood in the position of a "guarantor" with respect to the security provided by it and also failed to notice the meaning of "financial debt" particularly clauses (a) to (i) of section 5(8) of the "Insolvency and Bankruptcy Code", which provides extended meaning to "financial debt".

7 Therefore, according to them, the transactions in question cannot be termed to be "preferential transactions" within the meaning of section 43 of the "Insolvency and Bankruptcy Code".

8 Further, according to them, the transactions, in question, nor come within the meaning of "undervalued transactions" for taking action under section 45, nor can be termed to be a "fraudulent trading or wrongful trading" within the meaning of section 66 of the "Insolvency and Bankruptcy Code".

9 To decide the aforesaid issue, it is relevant to notice the individual case of the appellants and transactions, as detailed below :

Company Appeal (AT) (Insolvency) No. 243 of 2018 :

10 Learned counsel for the appellant-"Axis Bank Limited" provided the table of assets mortgaged to it, as under :

Sl. No.	*Name of the Bank*	*Date of the Mortgage*	*Assets encumbered under the Mortgage*
1.	Axis Bank Ltd.-Appellant in Comp. App. (Ins.) AT No(s). 243, 301 of 2018	February 24, 2015 (to cover the NCD exposure of the corporate debtor) (pages 243, 314 of the appeal paperbook) This was modified on September 15, 2015 (wherein the Security would cover the rupee term loan exposure, in addition to the NCD Exposure).	(a) 167.229 acres of land at Village Chagan and Chhalesar Agra, Uttar Pradesh (page 348 of the appeal paperbook) ; and (b) 166.9615 acres of land at Village Tappal, Kansera, and Jeenagarh, Aligarh, Uttar Pradesh (page 275 of the appeal paperbook).

		This was further modified on December 29, 2016, as the number of lenders (in terms of the rupee term loan exposure) increased substantially. (pages 365, 455 of the appeal paperbook) However, the nature and identity of the Security remained the same. (pages 247, 318 of the Appeal Paperbook read with pages 377-378, 457-458 of the appeal paperbook)	The nature and identity of the assets encumbered have remained the same from February 24, 2015, till date. (pages 247, 318 of the appeal paperbook read with pages 377-378, 457-458 of the appeal paperbook).

Company Appeal (AT) (Insolvency) No. 244 of 2018 (Standard Chartered Bank) :

Similar details have been given by counsel for the appellant-"Standard Chartered Bank", as under : **11**

Sl. No.	*Name of the bank*	*Date of mortgage*	*Details of assets forming part of the mortgage*	*Commencement of CIRP*	*Date of filing of application under sections 43, 45 and 66 of the Code*
1.	Standard Chartered Bank Facility 1	27-11-2012	An area admeasuring 25.0040 acres of parcel of land situated at Village : Sultanpur, Sector-128, Noida.	By order dated August 9, 2017, passed by the Adjudicating Authority at Allahabad revised to August 9, 2018, by way of Writ Petition (Civil) No. 744 of 2017 in the matter of *Chitra Sharma* v. *Union of India* [2018] 210 Comp Cas 609 (SC).	February 6, 2018
2.	Standard Chartered Bank Facility 2	29-12-2012			
3.	Standard Chartered Bank Facility 3	23-03-2013			
4.	Standard Chartered Bank Facility 4	23-06-2015			
5.	Standard Chartered Bank Facility 5	24-05-2016			

Company Appeal (AT) (Insolvency) No. 245 of 2018 (ICICI Bank Limited) :

12 Learned counsel for the appellant-"ICICI Bank Limited" provided a detailed chart relating to mortgaged properties, as follows :

Property	*Bank's Name*	*Date of first mortgage deed*	*Facilities secured by first mortgage*	*Date of reconveyance/release and rationale*	*Date of second mortgage deed*	*Facilities secured by second mortgage*
CONSORTIUM MORTGAGES						
167.229 acres land at Agra, Uttar Pradesh	26 Lenders of Jaiprakash Associates Limited ("JAL") including ICICI Bank	September 15, 2015	Term loans aggregating to Rs. 20,509 crores (comprising of ICICI facilities aggregating to Rs. 5,600 crores) and non-convertible debentures for maximum of Rs. 3,600 crore sanctioned by a consortium of the lenders of JAL ("Original Lenders")	On December 29, 2016 a release deed was executed in relation to momentary release of mortgage created vide deed dated 15 September 2015, Simultaneously, a Mortgage Deed dated December 29, 2016 creating mortgage over the same properties was executed in favour of JAL Lenders (Including ICICI Bank). Rationale : The aforesaid momentary release and recreation of mortgage have been done only to record entry of certain additional members into the consortium (as mentioned in 'Facilities Secured by Second Mortgage' column). It may be noted that ICICI exposure has remained unchanged since 2015.	December 29, 2016	Term loans aggregating to 21081.50 crore (comprising of ICICI facilities aggregating to Rs. 5600 crores) and redeemable non-convertible debentures of Rs. 2,409.25 crores (as reduced from Rs. 3,600 crore) with addition of certain lenders other than Original Lenders. *Note*.—As is evident, ICICI Bank's aggregate exposure of 5,600 crores has remained unchanged since 2015.

166.9615 acres land at Tappal, Aligarh, Uttar Pradesh	26 JAL Lenders including *ICICI Bank*	September 15, 2015	Term loans aggregating to Rs. 20,509 crores (comprising of ICICI facilities aggregating to Rs. 5,600 crores) and non-convertible debentures for maximum of Rs. 3,600 crores sanctioned by a consortium of the lenders of JAL ("original lenders")	On December 29, 2016, a release deed was executed in relation to momentary release of mortgage created vide deed dated September 15, 2015. *Simultaneously,* a mortgage deed dated December 29, 2016 creating mortgage over the same properties was executed in favour of the JAL Lenders (including ICICI Bank). Rationale : The aforesaid momentary release and recreation of mortgage have been done only to record entry of certain additional members into the consortium (as mentioned in 'facilities secured by second mortgage' column). It may be noted that ICICI exposure has remained unchanged since 2015.	29 December 2016	Term loans aggregating to 21081.50 crores (comprising of ICICI facilities aggregating to Rs. 5600 crores) and redeemable non-convertible debentures of Rs. 2,409.25 crores (as reduced from Rs. 3,600 crores) with addition of certain lenders other than Original lenders. *Note.*—As is evident, ICICI Bank's aggregate exposure of 5,600 crores has remained unchanged since 2015.
151.0063 acre at Tappal, Aligarh, Uttar Pradesh	ICICI Bank	May 12, 2014	Rupee term loan of Rs. 15 Billion under corporate rupee loan facility agreement and general conditions dated May 7, 2014 and overdraft facility of Rs. 1.75 billion.	On March 7, 2017, a release deed was executed for the release of property in relation to the 15 billion facility (of 2014) as the same got repaid in 2017.	March 7, 2017	Rupee Term Loan of Rs. 12 billion (under the CAP) under the corporate rupee loan facility agreement dated May 25, 2015.

	Background :	(Repaid IN 2017)		However, simultaneous execution of mortgage deed dated March 7, 2017 in relation to the same properties was done for creation of mortgage in favour of ICICI Bank for the 12 billion facility under the corporate rupee loan facility agreement dated May 25, 2015 which was pending since 2015	*Note.*—Though the mortgage deed was executed in 2017, the earmarking of this mortgage for the 12 billion facility under the corporate rupee loan facility agreement dated May 25, 2015, has been done by JIL since 2015 as is evident from the fact that the same has been recorded in the JIL's annual reports for the financial year 2015-16 at Note 29 at page 1691 of Volume VII and the year 2016-17 at note 34 at page 2085 of Volume IX of the appeal

	On May 12, 2014, a mortgage deed was executed by JIL qua this property for a 15 billion facility granted by ICICI Bank to JAL in 2014. On May 25, 2015, another facility worth Rs. 12 billion was provided by ICICI Bank to JAL with a stipulation on JIL to create mortgage on the same land, but security creation by JIL remained pending since 2015. However, JIL had admitted its liability in relation to creation of mortgage vis-a-vis the 12 billion facility through additional documents, such as annual reports for the financial year 2015-16 at Note 29 at page 1691 of Volume VII and the year 2016-17 at Note 34 at page 2085 of Volume IX of the appeal.					

	While in 2017, the 15 billion facility was repaid, the obligation on JIL to create security for the 12 billion facility (of 2015) still continued. Thus from the above, it is clear that, w.r.t. the 12 billion facility, the property was always agreed to be mortgaged as far back as 2015. Formally, the said mortgage was eventually done by JIL on March 7, 2017.						
158.1739 acre at Jaganpur and Aurangpur, Uttar Pradesh	ICICI Bank	May 12, 2016	Rupee term loan of Rs. 15 billion under corporate rupee loan facility agreement and general conditions dated May 7, 2014 and overdraft facility of Rs. 1.75 billion.	On March 7, 2017, a release deed was executed for the release of property in relation to the 15 billion facility (of 2014) as the same got repaid in 2017. However, simultaneous execution of mortgage deed dated March 7, 2017, in relation to the same properties was done for creation of mortgage in favour of ICICI Bank for the 12 billion facility under the corporate rupee loan facility agreement dated May 25, 2015, which was pending since 2015.	March 7, 2017,	Rupee term loan of Rs. 12 billion (under the CAP) under the Corporate rupee loan facility agreement dated May 25, 2015.

	Background :	(Repaid IN 2017		*Note.*—Though the mortgage deed was executed in 2017, the earmarking of this mortgage for the 12 billion facility under the Corporate rupee Loan Facility Agreement dated May 25, 2015 has been done by JIL since 2015 as is evident from the fact that the same has been recorded in the JIL's Annual Reports for the Financial year 2015-16 at Note 29 at page 1691 of Volume VII and the year 2016-17 at Note 34 at page 2085 of Volume IX of the appeal.

On May 12, 2014, a mortgage deed was executed by NIL qua this property for a 15 billion facility granted by ICICI Bank to JAL in 2014. On May 25, 2015, another facility worth Rs. 12 billion was provided by ICICI Bank to JAL with a stipulation on JIL to create mortgage on the same land, but security creation by JIL remained pending since 2015. However, JIL had admitted its liability in relation to creation of mortgage vis-a-vis the 12 billion facility through additional documents, such as annual reports for the financial year 2015-16 at note 29 at page 1691 of Volume VII and the year 2016-17 at note 34 at page 2085 of Volume IX of the appeal.					

	While in 2017, the 15 billion facility was repaid, the obligation n JIL to create security for the 12 billion facility (of 2015) still continued. Thus from the above, it is clear that, w.r.t. the 12 billion facility, the property was always agreed to be mortgaged as far back as 2015. Formally, the said mortgage was eventually done by JIL on March 7, 2017.				

Company Appeal (AT) (Insolvency) No. 249 of 2018 (State Bank of India) :

13 Learned counsel for the appellant-"State Bank of India" provided a chart relating to mortgaged properties, as follows :

Name of the Bank	*Date of mortgage*	*Details of assets forming part of the mortgage*
State Bank of India	Initially on 24-02-2015 Reconfirmed on 15-09-2015	Immovable property comprising 167.229 acres land at Agra, Uttar Pradesh at 140-180
	On 29-12-2016 with the entry of additional lenders into consortium of JAL lenders, charge over these 2 properties was remortgaged to cover other lenders as well	Immovable property comprising 166.9615 acres land at Tappal, District Aligarh, Uttar Pradesh at 181-222
	04-03-2016	First charge on Immovable Property admeasuring 90 acres at Village Chauga Tehsil Elmadpur, ICT Agra, Uttar Pradesh at 223-253 of Vol. II

Company Appeal (AT) (Insolvency) No. 301 of 2018 (Axis Bank Ltd.) :

14 The case of the appellant-"Axis Bank Ltd." is that the security, being 167.229 acres of land at Village Chagan and Chhalesar, Agra, Uttar Pradesh and 166.9615 acres of land at Village Tappal, Kansera and Jeenagarh, Aligarh, Uttar Pradesh, were mortgaged by the "corporate debtor" to a consortium of lenders, including the appellant. This security was granted by the "corporate debtor" on February 24, 2015, vide separate mortgage deeds to secure financial assistance given by the appellant to "Jaiprakash Associates Limited", which is holding company of the "corporate debtor".

Company Appeal (AT) (Insolvency) No. 331 of 2018 (Bank of Maharashtra) :

15 Learned counsel for the appellant-"Bank of Maharashtra" provided a chart relating to "mortgage, asset mortgaged", as follows :

Chart showing name of the bank, date of mortgage, asset mortgaged, date of admission of application under Insolvency and Bankruptcy Code, 2016, date of filing of application under section 43 of the Insolvency and Bankruptcy Code, 2016.

Sl. No.	*Name of the bank*	*Date of indenture of mortgage*	*Asset mortgaged*
1.	Bank of Maharashtra as a part of consortium of Banks.	15-09-2015-To secure credit facilities advanced to JAL ; 29-12-2016-superseded the aforesaid Indenture of Mortgage dated 15-09-2015 ; with no change in substantial terms of the Agreement w.r.t. the same purpose/transaction.	167.229 acres land situated at village Chagan and Chhalesar Agra ; Uttar Pradesh.
2.	Bank of Maharashtra as a part of consortium of Bank.	15-09-2015-To Secure credit facilities advanced to JAL ; 29-12-2016-superseded the aforesaid Indenture of Mortgage dated 15-09-2015 ; with no change in substantial terms of the Agreement w.r.t. the same purpose/transaction	166.9615 acres land situated at Tappal, Kansera and Jeenagarh district Aligarh, Uttar Pradesh.

Company Appeal (AT) (Insolvency) No. 343 of 2018 (United Bank of India) :

The case of the appellant-"United Bank of India" is that two different **16**
mortgage deeds each dated February 24, 2015, were executed by the "Corporate Debtor" mortgaging its properties (as third party security) (i) measuring 167.229 acres situated at Village Chaugan and Chhalesar, Tehsil Etmadpur District Agra, Uttar Pradesh ("Property 1") and (ii) measuring 166.9615 acres situated at Village Tappal, Kansera and Jeenagarh, Tehsil Khair District Aligarh, Uttar Pradesh ("Property 2") to secure the financial assistance of "Jaiprakash Associates Limited", for the first time in favour of "Axis Bank Limited" and "State Bank of India" (both lenders of "Jaiprakash Associates Limited") on February 24, 2015. Later, upon accession of other lenders and enhancement of secured limits further mortgage was effectuated on September 15, 2015 and again on December 29, 2016. The mortgages in favour of the appellant was created vide registered mortgage deed dated December 29, 2016.

Company Appeal (AT) (Insolvency) No. 348 of 2018 (Central Bank of India) :

17 Learned counsel for the appellant-"Central Bank of India" provided a chart relating to "mortgage of properties in question", as under :

Sl. No.	*Name of the Bank*	*Asset mortgaged*	*Date of mortgage by corporate debtor*	*Date of initiation of CIRP*	*Date of filing of claim/ Form C*
1.	Central Bank of India	Immovable property comprising 167.229 acres land at Agra, Uttar Pradesh ("Agra Property")	Originally created vide indenture of mortgage dated 15 September 2015 Momentarily lifted and recreated on 29 December 2016	09-08-2017	18-08-2017
2.	Central Bank of India	Immovable property comprising 166.9615 acres land at Tappal, District Aligarh, Uttar Pradesh ("Aligarh Property")	Originally created vide indenture of mortgage dated15 September 2015 Momentarily lifted and recreated on 29 December 2016	09-08-2017	18-08-2017

Company Appeal (AT) (Insolvency) No. 349 of 2018 (Standard Chartered Bank) :

18 According to the appellant-"Standard Chartered Bank'" on September 27, 2012, the appellant entered into an agreement vide which the credit facilities aggregating Rs. 400 crores ("Facility 1") had been granted in favour of "Jaiprakash Associates Limited" vide the term loan facility agreement ("facility 1 agreement"). In order to secure the amount granted under the facility 1 agreement, on November 27, 2012, the security by way of first pari passu charge over the subject property was in favour of the applicant by the "corporate debtor" vide the mortgage deed ("mortgage deed 1") executed by the "corporate debtor" in favour of "IDBI Trusteeship Services Limited" ("security trustee") acting for and on behalf of the appellant.

19 Further case of the appellant is that pursuant to the execution of facility 1 agreement and the mortgage 1, additional credit facilities aggregating Rs. 450 crores ("Facility 2") were sanctioned by the appellant in favour of "Jaiprakash Associates Limited" on December 29, 2012. Accordingly, for the purpose of availing the amount covered in facility 2, a term loan facility agreement ("facility agreement 2") was executed by and between "Jaiprakash Associates Limited" and the appellant.

20 Thereafter, on March 23, 2013, pursuant to the execution of the Facility agreement 2, charge created on the subject property was extended to secure facility 2. Accordingly, a first pari passu charge by way of a registered mortgage was created in favour of the security trustee acting for and on behalf of the applicant by way of a mortgage deed ("mortgage deed 2").

21 The appellant submits that facility 3 of INR 538,16,00,000 and facility 4 of INR 81,84,00,000 (total aggregating INR 620,00,00,000) were granted by the appellant to "Jaiprakash Associates Limited" vide term loan facility agreements, both of the date (facility agreement 3 and facility agreement 4) on May 1, 2015.

22 The case of the appellant is that on June 23, 2015, Facility 3 and Facility 4 were sanctioned to "Jaiprakash Associates Limited" pursuant to the corrective action plan of the "joint lenders" forum of "Jaiprakash Associates Limited" constituted under the guidelines framed by "Reserve Bank of India" ("RBI") which mandated all lenders of "Jaiprakash Associates Limited" to sanction new term loans as per their respective share for the purpose of meeting the liquidity gap required to meet immediate cash flow requirements of "Jaiprakash Associates Limited". Accordingly, one of the conditions for the sanction of facility 3 and 4 was that the mortgage created over the Subject Property for Facility 1 and Facility 2 shall also extend to secure Facility 3 and 4. Therefore, in order to achieve the said purpose, the "corporate debtor" executed "security trustee agreement" in favour of the security trustee (acting for and on behalf of the appellant).

23 On November 4, 2015, equitable mortgage was created vide the declaration ("declaration") executed by the authorised representative of the 'corporate debtor' evidencing deposit of title deeds inter alia pertaining to subject property in favour of security trustee (acting for and on behalf of the appellant) to secure facility 1, facility 2, facility 3 and facility 4 inter se on pari passu charge basis. On November 4, 2015, the security trustee prepared a memorandum of entry recording the deposit of title documents in relation to the subject property.

24 On May 24, 2016, the appellant received a request from "Jaiprakash Associates Limited" by way of its email dated December 12, 2015, stating that the title deeds deposited with the security trustee for creating equitable mortgage contains certain properties which were not intended to have been mortgaged for the benefit of the appellant and some of such title deeds were required by the "corporate debtor", and therefore "Jaiprakash Associates Limited" requested for release of title deeds deposited with the security trustee and simultaneously "corporate debtor" agreed to create charge by way of registered mortgage over the subject property to secure the facility of Rs. 297 crores (sanctioned in the year 2013) ("facility 5") in addition to facility 1 to facility 4. for the said purpose, the "corporate debtor" created charge by way of registered mortgage over the subject property vide execution of the deed of mortgage ("last deed of mortgage") dated may 24, 2016, in favour of the security trustee, thereby creating first

pari passu charge on the subject land to secure facility 1 to facility 5 (hereinafter referred to as "entire facilities") aggregating INR 1767 crores sanctioned by the appellant.

25 On June 17, 2016, pursuant to the execution of the last deed of mortgage, charge over the subject property was /registered by filing form CHG-1 and certificate of registration of charge (bearing charge Identification No. 10600969) was issued in this respect.

Company Appeal (AT) (Insolvency) No. 353 of 2018 (ICICI Bank Ltd.) :

26 26. The case of "ICICI Bank Ltd." in this appeal is that on December 28, 2009, the appellant sanctioned rupee term loan of Rs. 8.0 billion ("RTL-1") and rupee term loan of Rs. 4.0 billion ("RTL-2") under two separate common facility agreement to "Jaiprakash Associates Limited", the holding company of "Jaypee Infratech Limited", the corporate debtor herein. On March 31, 2011, the facility agreement executed between the appellant and "Jaiprakash Associates Limited" whereby the appellant sanctioned a rupee term loan of Rs. 5 billion ("RTL-3") to "Jaiprakash Associates Limited".

27 The facility agreement executed between the appellant and "Jaiprakash Associates Limited" whereby the appellant sanctioned a rupee term loan of Rs. 12 billion ("RTL-4") to "Jaiprakash Associates Limited" on September 30, 2011.

28 On December 13, 2013, the corporate rupee loan facility agreement and general conditions executed between the appellant and "Jaiprakash Associates Limited" whereby the appellant granted rupee term loan of Rs. 15.0 billion ("RTL-5") to "Jaiprakash Associates Limited".

29 On March 10, 2014, the "corporate debtor" executed a deed of mortgage for mortgaging its property admeasuring 100 acres at Tappal, District Aligarh, Uttar Pradesh for securing RTL-5.

30 Pursuant to the corporate rupee loan facility agreement and general conditions, the appellant, on May 7, 2014, sanctioned a rupee term loan of Rs. 15 Billion ("RTL-6") and overdraft facility of Rs. 1.75 Billion to "Jaiprakash Associates Limited". The corporate rupee loan facility agreement executed between the appellant and "Jaiprakash Associates Limited" whereby the appellant further advanced a rupee term loan of Rs. 12 billion ("RTL-7") to "Jaiprakash Associates Limited" on May 25, 2015.

31 On December 29, 2016, the "corporate debtor" created first pari passu charge on its property admeasuring 167.229 acres land at Agra, Uttar/ Pradesh in favour of "Axis Trustee Services Limited" (security trustee), acting for and on behalf of a consortium of lenders of "Jaiprakash Associates

"22. *Client level segregation of advisory and distribution activities.*—(1) An individual investment adviser shall not provide distribution services.

(2) The family of an individual investment adviser shall not provide distribution services to the client advised by the individual investment adviser and no individual investment adviser shall provide advice to a client who is receiving distribution services from other family members.

(3) A non-individual investment adviser shall have client level segregation at group level for investment advisory and distribution services.

Explanation.—(i) The same client cannot be offered both advisory and distribution services within the group of the non-individual entity.

(ii) A client can either be an advisory client where no distributor consideration is received at the group level or distribution services client where no advisory fee is collected from the client at the group level.

(iii) 'Group' for this purpose shall mean an entity which is a holding, subsidiary, associate, subsidiary of a holding company to which it is also a subsidiary or an investing company or the venturer of the company as per the provisions of the Companies Act, 2013 for non-individual investment adviser which is a company under the said Act and in any other case, an entity which has a controlling interest or is subject to the controlling interest of a non-individual investment adviser.

(4) Non-individual investment adviser shall maintain an arm's length relationship between its activities as investment adviser and distributor by providing advisory services through a separately identifiable department or division.

(5) Compliance and monitoring process for client segregation at group or family level shall be in accordance with the guidelines specified by the Board."

(XVI) after regulation 22 and before regulation 23, the following regulation shall be inserted, namely,—

"22A. *Implementation of advice or execution.*—(1) Investment adviser may provide implementation services to the advisory clients in securities market :

Provided that investment advisers shall ensure that no consideration including any commission or referral fees, whether embedded or indirect or otherwise, by whatever name called is received ; directly or indirectly, at investment adviser's group or family level for the said service, as the case may be.

(2) Investment adviser shall provide implementation services to its advisory clients only through direct schemes/products in the securities market.

(3) Investment adviser or group or family of investment adviser shall not charge any implementation fees from the client.

(4) The client shall not be under any obligation to avail implementation services offered by the investment adviser."

(XVII) In sub-regulation (1) of regulation 25, the word "representative of investment adviser" shall be substituted with the words and symbols, "partners, directors, principal officer and persons associated with investment advice".

(XVIII) In sub-regulation (3) of regulation 25, after the word "partners" and before the word "or", the words and symbol ", principal officer and persons associated with investment advice" shall be inserted.

(XIX) In clause (a) of regulation 27, after the words "investment adviser" and before the words "not to provide", the words and symbols ", partners, directors, principal officer and persons associated with investment advice" shall be inserted.

(XX) In clause (c) of regulation 27, after the words "investment adviser" and before the words "from operating", the words and symbols ", partners, directors, principal officer and persons associated with investment advice" shall be inserted.

(XXI) in the First Schedule, in Form A,—

(i) in item 1,

(a) in clause (c), after the word "person(s)", the words "and principal officer" shall be inserted.

(b) in clause (d), the words and symbol ", body corporate (including company), partnership firm or limited liability partnership" shall be substituted with the words "or non-individual".

(c) in clause (i), the following words shall be omitted.

"(For renewal application, provide details of existing investment advisory services including number and type of clients, assets under advice, revenue, profitability, products/securities on which investment advice was provided, etc.)".

(ii) in item 2,—

(a) clause 1 of sub-item (I), shall be substituted with the following, namely,—

"(1) Whether the applicant and persons associated with investment advice comply with qualification and certification requirements under regulation 7 and applicant has submitted a declaration with respect to the same.

(Provide self-certified copies of supporting documents)."

(b) in clause 2 of sub-item (I), the following shall be omitted.

"*(If the applicant is an existing investment adviser applying for fresh registration, then provide a declaration stating that it shall obtain such certification within two years from the date of commencement of these regulations and submit a copy of the certification to the Board within 15 days of receipt of such certification.)*".

(c) in sub-item (I), clause 3 shall be substituted by the following clause, namely,—

"3. Number of persons associated with investment advice, if any, who shall render investment advice under these regulations on behalf of the applicant. Provide documents as mentioned in points 1 to 2 above for such persons associated with investment advice."

(d) in clause 4 of sub-item (I), after the word "applicant", the words "and persons associated with investment advice" shall be inserted.

(e) in clause 2 of sub-item (II), the words "employees and agents of the applicant (hereinafter referred to as 'representatives')" shall be substituted with the words "persons associated with investment advice".

(f) in sub-item (II), clause 3 shall be substituted with the following clause, namely,—

"3. Declaration by the applicant that its principal officer and persons associated with investment advice currently comply with the certification, qualification and experience requirements under regulation 7."

(g) in clause 4 of sub-item (II), the word "representatives" shall be substituted with the words "principal officer and persons associated with investment advice".

(h) in sub-item (II), the following clause 8 shall be inserted, namely,—

"8. Enclose identity proof and address proof of the applicant, principal officer and persons associated with investment advice."

(i) in clause 1 of sub-item (III), after the word "partners", wherever it occurs, the words and symbol ", principal officer and persons associated with investment advice" shall be inserted.

(j) clause 2 of sub-item (III) shall be substituted with the following, namely,—

"2. Whether the aforesaid principal officer and persons associated with investment advice comply with certification and qualification requirements under regulation 7 and applicant has submitted a declaration with respect to the same.

(Provide self-certified copies of supporting documents)."

(k) in sub-item (III), clause 3 shall be substituted with the following clause, namely,—

"3. Copy of certification obtained by the aforesaid principal officer and persons associated with investment advice in accordance with regulation 7(2)."

(l) in clause 4 of sub-item (III), the word "partners" shall be substituted with the words "principal officer and persons associated with investment advice".

(m) in clause 5 of sub-item (III), the word "net tangible assets" shall be substituted by "networth".

(n) in clause 1 of sub-item (IV), after the word "directors", wherever it occurs, the words and symbol ", principal officer and persons associated with investment advice" shall be inserted.

(o) in clause 3 of sub-item (IV), the words "employees and agents of the applicant (hereinafter referred to as 'representatives')" shall be substituted with the words "principal officer and persons associated with investment advice".

(p) in sub-item (IV), clause 4 shall be substituted with the following clause, namely,—

"4. Declaration by the applicant that its principal officer and persons associated with investment advice currently comply with the certification and qualification requirements under regulation 7."

(q) in clause 5 of sub-item (IV), the word "representatives" shall be substituted with the words "principal officer and persons associated with investment advice."

(iii) item 5 shall be substituted with the following, namely,—

"Implementation of advice or execution services.

'1. Provide a declaration that no consideration including any commission or referral fees whether embedded or indirect or otherwise by whatever name called shall be received directly or indirectly at Investment Adviser's group or family level for the said service, as the case may be.

2. If the applicant is a non-individual, whether the applicant proposes to offer distribution services."

(iv) in item 6,

(a) in clause (d), after the word "partners" and before the word "have", the words and symbol ", principal officer and persons associated with investment advice".

(b) in clause (f), the words "representatives" shall be substituted with the words "directors, principal officer, persons associated with investment advice".

(XXII) in the Third Schedule,—

(a) in clause 6, after the word "Board" and before the symbol ".", the words and symbols ", if any" shall be omitted.

(b) in clause (8), the words "representative(s)" shall be substituted with the words and symbol "partners, principal officer and persons associated with investment advice".

[ADVT.-III/4/Exty./111/2020-2021]

General Circulars

Circular No. 26/2020, dated 6th July, 2020.

To

All Regional Directors,
All Registrar of Companies,
The Stakeholders

Subject: **Extension of the last date of filing of Form NFRA-2—Regarding**

Sir,

In continuation of the Ministry's General Circular No. 19/2020, dated 30th April, 2020[1] and after due examination, it has been decided that the time limit for filing of Form NFRA-2, for the reporting period financial year 2018-19, will be 270 days from the date of deployment of this form on the website of National Financial Reporting Authority (NFRA).

2. This issues with the approval of Competent Authority.

Yours faithfully,
K. M. S. Narayanan,
Assistant Director (Policy).
[F. No. 7/39/2019-CL-I]

[*Source : Issued by the Ministry of Corporate Affairs, New Delhi, dated 6th July, 2020.*]

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1. See [2020] 220 Comp Cas (St.) 211.

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2020

Notification No. SEBI/LAD-NRO/GN/2020/21, dated 1st July, 2020[1].

In exercise of the powers conferred under section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following Regulations to further amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018[2], namely :—

1. These regulations may be called the **Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2020.**

2. They shall come into force on the date of their publication in the Official Gazette.

3. In the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018,—

(I) After regulation 164A, the following new regulation shall be inserted, namely,—

"164B. *Optional pricing in preferential issue.*—(1) In case of frequently traded shares, the price of the equity shares to be allotted pursuant to the preferential issue shall be determined by regulation 164 or regulation 164B, as opted for.

(2) The price of the equity shares to be allotted pursuant to the preferential issue shall not be less than the higher of the following :

(a) the average of the weekly high and low of the volume weighted average price of the related equity shares quoted on the recognised stock exchange during the twelve weeks preceding the relevant date ; or

(b) the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on a recognised stock exchange during the two weeks preceding the relevant date.

(3) Specified securities allotted on a preferential basis using the pricing method determined under sub-regulation (2) shall be locked-in for a period of three years.

(4) The pricing method determined at sub-regulation (2) shall be availed in case of allotment by preferential issue made between July 1, 2020

1. Gaz. of India, Extry. No. 245, dt. 1-7-2020, Pt. III, sec. 4.
2. See [2019] 213 Comp Cas (St.) 2.

or from the date of notification of this regulation, whichever is later and December 31, 2020.

(5) All allotments arising out of the same shareholders approval shall follow the same pricing method."

[ADVT-III/4/Exty./105/2020-21]

Companies (Indian Accounting Standards) Amendment Rules, 2020

Notification No. G. S. R. 463(E), dated 24th July, 2020[1].

In exercise of the powers conferred by section 133 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government, in consultation with the National Financial Reporting Authority, hereby makes the following rules further to amend the Companies (Indian Accounting Standards) Rules, 2015[2], namely :—

1. Short title and commencement.—(1) These rules may be called the **Companies (Indian Accounting Standards) Amendment Rules, 2020.**

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Companies (Indian Accounting Standards) Rules, 2015, in the "Annexure", under the heading "B. Indian Accounting Standards (Ind AS)",—

(A) in "Indian Accounting Standard (Ind AS) 103",—

(i) for paragraph 3, the following shall be substituted, namely :—

"3. **An entity shall determine whether a transaction or other event is a business combination by applying the definition in this Ind AS, which requires that the assets acquired and liabilities assumed constitute a business. If the assets acquired are not a business, the reporting entity shall account for the transaction or other event as an asset acquisition. Paragraphs B5-B12D provide guidance on identifying a business combination and the definition of a business.**" ;

(ii) after paragraph 64-O, the following shall be inserted, namely :—

"64P *Definition of a Business* (Amendments to Ind AS 103), added paragraphs B7A-B7C, B8A and B12A-B12D, amended the definition of the term 'business' in Appendix A, amended paragraphs 3, B7-B9, B11 and B12 and deleted paragraph B10. An entity shall apply these amendments to

1. Gaz. of India, Extry. No. 359, dt. 24-7-2020, Pt. II, sec. 3(i), p. 15.
2. See [2015] 191 Comp Cas (St.) 5.

business combinations for which the acquisition date is on or after the beginning of the first annual reporting period beginning on or after the 1st April, 2020 and to asset acquisitions that occur on or after the beginning of that period." ;

(iii) in Appendix A, for definition of the term "business", the following definition shall be substituted, namely :—

"**business** An integrated set of activities and assets that is capable of being conducted and managed for the purpose of providing goods or services to customers, generating investment income (such as dividends or interest) or generating other income from ordinary activities." ;

(iv) in Appendix B,—

(I) for paragraph B7, the following shall be substituted, namely :—

"B7 A business consists of inputs and processes applied to those inputs that have the ability to contribute to the creation of outputs. The three elements of a business are defined as follows (see paragraphs B8-B12D for guidance on the elements of a business) :

(a) **Input :** Any economic resource that creates outputs, or has the ability to contribute to the creations of outputs, when one or more processes are applied to it. Examples include non-current assets (including intangible assets or rights to use non-current assets), intellectual property, the ability to obtain access to necessary materials or rights and employees.

(b) **Process :** Any system, standard, protocol, convention or rule that, when applied to an input or inputs, creates outputs or has the ability to contribute to the creations of outputs. Examples include strategic management processes, operational processes and resource management processes. These processes typically are documented, but the intellectual capacity of an organised workforce having the necessary skills and experience following rules and conventions may provide the necessary processes that are capable of being applied to inputs to create outputs. (Accounting, billing, payroll and other administrative systems typically are not processes used to create outputs).

(c) **Output :** The result of inputs and processes applied to those inputs that provide goods or services to customers, generate investment income (such as dividends or interest) or generate other income from ordinary activities." ;

(II) after paragraph B7, the following shall be inserted, namely :—

"**Optional test to identify concentration of fair value**"

B7A Paragraph B7B sets out an optional test (the concentration test) to permit a simplified assessment of whether an acquired set of

activities and assets is not a business. An entity may elect to apply, or not apply, the test. An entity may make such an election separately for each transaction or other event. The concentration test has the following consequences :—

(a) if the concentration test is met, the set of activities and assets is determined not to be a business and no further assessment is needed ;

(b) if the concentration test is not met, or if the entity elects not to apply the test, the entity shall then perform the assessment set out in paragraphs B8-B12D.

B7B The concentration test is met if substantially all of the fair value of the gross assets acquired is concentrated in a single identifiable asset or group of similar identifiable assets. For the concentration test :

(a) gross assets acquired shall exclude cash and cash equivalents, deferred tax assets, and goodwill resulting from the effects of deferred tax liabilities ;

(b) the fair value of the gross assets acquired shall include any consideration transferred (plus the fair value of any non-controlling interest and the fair value of any previously held interest) in excess of the fair value of net identifiable assets acquired. The fair value of the gross assets acquired may normally be determined as the total obtained by adding the fair value of the consideration transferred (plus the fair value of any non-controlling interest and the fair value of any previously held interest) to the fair value of the liabilities assumed (other than deferred tax liabilities), and then excluding the items identified in sub-paragraph (a). However, if the fair value of the gross assets acquired is more than that total, a more precise calculation may sometimes be needed ;

(c) a single identifiable asset shall include any asset or group of assets that would be recognised and measured as a single identifiable asset in a business combination ;

(d) if a tangible asset is attached to, and cannot be physically removed and used separately from, another tangible asset (or from an underlying asset subject to a lease, as defined in Ind AS 116, Leases), without incurring significant cost, or significant diminution in utility or fair value to either asset (for example, land and buildings), those assets shall be considered a single identifiable asset ;

(e) when assessing whether assets are similar, an entity shall consider the nature of each single identifiable asset and the risks associated with managing and creating outputs from the assets (that is, the risk characteristics) ;

(f) the following shall not be considered similar assets :

(i) a tangible asset and an intangible asset ;

(ii) tangible assets in different classes (for example, inventory, manufacturing equipment and automobiles) unless they are considered a single identifiable asset in accordance with the criterion in sub-paragraph (d) ;

(iii) identifiable intangible assets in different classes (for example, brand names, licences and intangible assets under development) ;

(iv) a financial asset and a non-financial asset ;

(v) financial assets in different classes (for example, accounts receivable and investments in equity instruments) ; and

(vi) identifiable assets that are within the same class of asset but have significantly different risk characteristics.

B7C The requirements in paragraph B7B do not modify the guidance on similar assets in Ind AS 38, *Intangible Assets* ; nor do they modify the meaning of the term "class" in Ind AS 16, *Property, Plant and Equipment*, Ind AS 38 and Ind AS 107, Financial Instruments : Disclosures." ;

(III) for paragraph B8, the following shall be substituted, namely :—

"**Elements of a Business**

B8 Although businesses usually have outputs, outputs are not required for an integrated set of activities and assets to qualify as a business. To be capable of being conducted and managed for the purpose identified in the definition of a business, an integrated set of activities and assets requires two essential elements.inputs and processes applied to those inputs. A business need not include all of the inputs or processes that the seller used in operating that business. However, to be considered a business, an integrated set of activities and assets must include, at a minimum, an input and a substantive process that together significantly contribute to the ability to create output. Paragraphs B12-B12D specify how to assess whether a process is substantive." ;

(IV) after paragraph B8, the following shall be inserted, namely :—

"B8A If an acquired set of activities and assets has outputs, continuation of revenue does not on its own indicate that both an input and a substantive process have been acquired." ;

(V) for paragraph B9, the following shall be substituted, namely :—

"B9 The nature of the elements of a business varies by industry and by the structure of an entity's operations (activities), including the entity's stage of development. Established businesses often have many

different types of inputs, processes and outputs, whereas new businesses often have few inputs and processes and sometimes only a single output (product). Nearly all businesses also have liabilities, but a business need not have liabilities. Furthermore, an acquired set of activities and assets that is not a business might have liabilities." ;

(VI) for paragraph B10, the following shall be substituted, namely :—

"B10 [Refer Appendix 1]" ;

(VII) for paragraph B11, the following shall be substituted, namely :—

"B11 Determining whether a particular set of activities and assets is a business shall be based on whether the integrated set is capable of being conducted and managed as a business by a market participant. Thus, in evaluating whether a particular set is a business, it is not relevant whether a seller operated the set as a business or whether the acquirer intends to operate the set as a business." ;

(VIII) for paragraph B12, the following shall be substituted, namely :—

"**Assessing whether an acquired process is substantive**

B12 Paragraphs B12A-B12D explain how to assess whether an acquired process is substantive if the acquired set of activities and assets does not have outputs (paragraph B12B) and if it does have outputs (paragraph B12C)." ;

(IX) after paragraph B12, the following shall be inserted, namely :—

"B12A An example of an acquired set of activities and assets that does not have outputs at the acquisition date is an early-stage entity that has not started generating revenue. Moreover, if an acquired set of activities and assets was generating revenue at the acquisition date, it is considered to have outputs at that date, even if subsequently it will no longer generate revenue from external customers, for example because it will be integrated by the acquirer.

B12B If a set of activities and assets does not have outputs at the acquisition date, an acquired process (or group of processes) shall be considered substantive only if—

(a) it is critical to the ability to develop or convert an acquired input or inputs into outputs ; and

(b) the inputs acquired include both an organised workforce that has the necessary skills, knowledge, or experience to perform that process (or group of processes) and other inputs that the organised workforce could develop or convert into outputs. Those other inputs could include—

(i) intellectual property that could be used to develop a good or service ;

(ii) other economic resources that could be developed to create outputs ; or

(iii) rights to obtain access to necessary materials or rights that enable the creation of future outputs.

Examples of the inputs mentioned in sub-paragraphs (b)(i)-(iii) include technology, in-process research and development projects, real estate and mineral interests.

B12C If a set of activities and assets has outputs at the acquisition date, an acquired process (or group of processes) shall be considered substantive if, when applied to an acquired input or inputs, it—

(a) is critical to the ability to continue producing outputs, and the inputs acquired include an organised workforce with the necessary skills, knowledge, or experience to perform that process (or group of processes) ; or

(b) significantly contributes to the ability to continue producing outputs and—

(i) is considered unique or scarce ; or

(ii) cannot be replaced without significant cost, effort, or delay in the ability to continue producing outputs.

B12D The following additional discussion supports both paragraphs B12B and B12C :

(a) an acquired contract is an input and not a substantive process. Nevertheless, an acquired contract, for example, a contract for outsourced property management or outsourced asset management, may give access to an organised workforce. An entity shall assess whether an organised workforce accessed through such a contract performs a substantive process that the entity controls, and thus has acquired. Factors to be considered in making that assessment include the duration of the contract and its renewal terms ;

(b) difficulties in replacing an acquired organised workforce may indicate that the acquired organised workforce performs a process that is critical to the ability to create outputs ;

(c) a process (or group of processes) is not critical if, for example, it is ancillary or minor within the context of all the processes required to create outputs." ;

(v) in Appendix 1, for paragraph 6, the following shall be substituted, namely :—

"6. The following paragraph numbers appear as 'Deleted' in IFRS 3. In order to maintain consistency with paragraph numbers of IFRS 3, the paragraph numbers is retained in Ind AS 103 :

(a) Paragraph B10

(b) Paragraphs B28-B30

(c) Paragraph B32(a)" ;

(B) in "Indian Accounting Standard (Ind AS) 107",—

(i) after paragraph 24G, the following shall be inserted, namely :—

"*Uncertainty arising from interest rate benchmark reform*

24H. For hedging relationships to which an entity applies the exceptions set out in paragraphs 6.8.4-6.8.12 of Ind AS 109, an entity shall disclose—

(a) the significant interest rate benchmarks to which the entity's hedging relationships are exposed ;

(b) the extent of the risk exposure the entity manages that is directly affected by the interest rate benchmark reform ;

(c) how the entity is managing the process to transition to alternative benchmark rates ;

(d) a description of significant assumptions or judgments the entity made in applying these paragraphs (for example, assumptions or judgments about when the uncertainty arising from interest rate benchmark reform is no longer present with respect to the timing and the amount of the interest rate benchmark-based cash flows) ; and

(e) the nominal amount of the hedging instruments in those hedging relationships." ;

(ii) after paragraph 44CC, the following shall be inserted, namely :—

44DD. [Refer Appendix 1] ;

44DE. *Interest Rate Benchmark Reform* (amendments to Ind AS 109 and Ind AS 107) added paragraphs 24H and 44DF. An entity shall apply these amendments when it applies the amendments to Ind AS 109.

44DF. In the reporting period in which an entity first applies *Interest Rate Benchmark Reform*, an entity is not required to present the quantitative information required by paragraph 28(f) of Ind AS 8, *Accounting Policies, Changes in Accounting Estimates and Errors*."

(iii) in Appendix 1, for paragraph 5, the following shall be substituted, namely :—

"5. Paragraphs 42I-42S of IFRS 7 have not been included in Ind AS 107 as these paragraphs relate to initial application of IFRS 9 which are not relevant in Indian context. Paragraphs 43-44BB related to effective date and transition given in IFRS 7 have not been given in Ind AS 107 since it is not relevant in Indian context. However, in order to maintain consistency with paragraph numbers of IFRS 7, these paragraph numbers are retained in Ind AS 107. Paragraph 44DD relates to IFRS 17, *Insurance Contracts*, for which corresponding Ind AS is under formulation." ;

(C) in "Indian Accounting Standard (Ind AS) 109",—

(i) after paragraph 6.7.4, the following shall be inserted, namely :—

"**6.8 Temporary exceptions from applying specific hedge accounting requirements**

6.8.1 An entity shall apply paragraphs 6.8.4-6.8.12 and paragraphs 7.1.8 and 7.2.26(d) to all hedging relationships directly affected by interest rate benchmark reform. These paragraphs apply only to such hedging relationships. A hedging relationship is directly affected by interest rate benchmark reform only if the reform gives rise to uncertainties about—

(a) the interest rate benchmark (contractually or non-contractually specified) designated as a hedged risk ; and/or

(b) the timing or the amount of interest rate benchmark-based cash flows of the hedged item or of the hedging instrument.

6.8.2 For the purpose of applying paragraphs 6.8.4-6.8.12, the term 'interest rate benchmark reform' refers to the market-wide reform of an interest rate benchmark, including the replacement of an interest rate benchmark with an alternative benchmark rate such as that resulting from the recommendations set out in the Financial Stability Board's July 2014 report 'Reforming Major Interest Rate Benchmarks'.[1]

6.8.3 Paragraphs 6.8.4-6.8.12 provide exceptions only to the requirements specified in these paragraphs. An entity shall continue to apply all other hedge accounting requirements to hedging relationships directly affected by interest rate benchmark reform.

Highly probable requirement for cash flow hedges

6.8.4 For the purpose of determining whether a forecast transaction (or a component thereof) is highly probable as required by paragraph 6.3.3, an entity shall assume that the interest rate benchmark on which the

1. The report, "Reforming Major Interest Rate Benchmarks", is available at *http://www.fsb.org/wpcontent/uploads/r_140722.pdf*.

hedged cash flows (contractually or non-contractually specified) are based is not altered as a result of interest rate benchmark reform.

Reclassifying the amount accumulated in the cash flow hedge reserve

6.8.5 For the purpose of applying the requirement in paragraph 6.5.12 in order to determine whether the hedged future cash flows are expected to occur, an entity shall assume that the interest rate benchmark on which the hedged cash flows (contractually or non-contractually specified) are based is not altered as a result of interest rate benchmark reform.

Assessing the economic relationship between the hedged item and the hedging instrument

6.8.6 For the purpose of applying the requirements in paragraphs 6.4.1(c)(i) and B6.4.4-B6.4.6, an entity shall assume that the interest rate benchmark on which the hedged cash flows and/or the hedged risk (contractually or non-contractually specified) are based, or the interest rate benchmark on which the cash flows of the hedging instrument are based, is not altered as a result of interest rate benchmark reform.

Designating a component of an item as a hedged item

6.8.7 Unless paragraph 6.8.8 applies, for a hedge of a non-contractually specified benchmark component of interest rate risk, an entity shall apply the requirement in paragraphs 6.3.7(a) and B6.3.8—that the risk component shall be separately identifiable.only at the inception of the hedging relationship.

6.8.8 When an entity, consistent with its hedge documentation, frequently resets (i. e., discontinues and restarts) a hedging relationship because both the hedging instrument and the hedged item frequently change (i. e., the entity uses a dynamic process in which both the hedged items and the hedging instruments used to manage that exposure do not remain the same for long), the entity shall apply the requirement in paragraphs 6.3.7(a) and B6.3.8—that the risk component is separately identifiable.only when it initially designates a hedged item in that hedging relationship. A hedged item that has been assessed at the time of its initial designation in the hedging relationship, whether it was at the time of the hedge inception or subsequently, is not reassessed at any subsequent redesignation in the same hedging relationship.

End of application

6.8.9 An entity shall prospectively cease applying paragraph 6.8.4 to a hedged item at the earlier of—

(a) when the uncertainty arising from interest rate benchmark reform is no longer present with respect to the timing and the amount of the interest rate benchmark-based cash flows of the hedged item ; and

(b) when the hedging relationship that the hedged item is part of is discontinued.

6.8.10 An entity shall prospectively cease applying paragraph 6.8.5 at the earlier of—

(a) when the uncertainty arising from interest rate benchmark reform is no longer present with respect to the timing and the amount of the interest rate benchmark-based future cash flows of the hedged item ; and

(b) when the entire amount accumulated in the cash flow hedge reserve with respect to that discontinued hedging relationship has been reclassified to profit or loss.

6.8.11 An entity shall prospectively cease applying paragraph 6.8.6—

(a) to a hedged item, when the uncertainty arising from interest rate benchmark reform is no longer present with respect to the hedged risk or the timing and the amount of the interest rate benchmark-based cash flows of the hedged item ; and

(b) to a hedging instrument, when the uncertainty arising from interest rate benchmark reform is no longer present with respect to the timing and the amount of the interest rate benchmark-based cash flows of the hedging instrument.

If the hedging relationship that the hedged item and the hedging instrument are part of is discontinued earlier than the date specified in paragraph 6.8.11(a) or the date specified in paragraph 6.8.11(b), the entity shall prospectively cease applying paragraph 6.8.6 to that hedging relationship at the date of discontinuation.

6.8.12 When designating a group of items as the hedged item, or a combination of financial instruments as the hedging instrument, an entity shall prospectively cease applying paragraphs 6.8.4-6.8.6 to an individual item or financial instrument in accordance with paragraphs 6.8.9, 6.8.10, or 6.8.11, as relevant, when the uncertainty arising from interest rate benchmark reform is no longer present with respect to the hedged risk and/or the timing and the amount of the interest rate benchmark-based cash flows of that item or financial instrument." ;

(ii) after paragraph 7.1.7, the following shall be inserted, namely :—

"7.1.8 *Interest Rate Benchmark Reform* (amendments to Ind AS 109 and Ind AS 107), added Section 6.8 and amended paragraph 7.2.26. An entity shall apply these amendments for annual periods beginning on or after the 1st April, 2020." ;

(iii) after paragraph 7.2.20, the following heading shall be inserted, namely :—

"Transition for hedge accounting (Chapter 6)" ;

(iv) for paragraph 7.2.26, the following shall be substituted, namely :—

"7.2.26 As an exception to prospective application of the hedge accounting requirements of this Standard, an entity—

(a)–(c) [Refer Appendix 1]

(d) shall apply the requirements in section 6.8 retrospectively. This retrospective application applies only to those hedging relationships that existed at the beginning of the reporting period in which an entity first applies those requirements or were designated thereafter, and to the amount accumulated in the cash flow hedge reserve that existed at the beginning of the reporting period in which an entity first applies those requirements." ;

(v) in Appendix 1, for paragraph 4, the following shall be substituted, namely :—

"4. Following paragraphs related to transition have not been included as these paragraphs are not relevant in Indian context. However, in order to maintain consistency with paragraph numbers of IFRS 9, the paragraph numbers are retained in Ind AS 109 :

(i) Paragraph 7.2.2

(ii) Paragraphs 7.2.6-7.2.7

(iii) Paragraphs 7.2.12-7.2.13

(iv) Paragraphs 7.2.14A-7.2.25

(v) Paragraphs 7.2.26 (a)-(c)

(vi) Paragraphs 7.2.27-7.2.28" ;

(D) in "Indian Accounting Standard (Ind AS) 116",—

(i) after paragraph 46, the following shall be inserted, namely :—

"46A. As a practical expedient, a lessee may elect not to assess whether a rent concession that meets the conditions in paragraph 46B is a lease modification. A lessee that makes this election shall account for any change in lease payments resulting from the rent concession the same way

it would account for the change applying this Standard if the change were not a lease modification.

46B. The practical expedient in paragraph 46A applies only to rent concessions occurring as a direct consequence of the Covid-19 pandemic and only if all of the following conditions are met :—

(a) the change in lease payments results in revised consideration for the lease that is substantially the same as, or less than, the consideration for the lease immediately preceding the change ;

(b) any reduction in lease payments affects only payments originally due on or before the 30th June, 2021 (for example, a rent concession would meet this condition if it results in reduced lease payments on or before the 30th June, 2021 and increased lease payments that extend beyond the 30th June, 2021) ; and

(c) there is no substantive change to other terms and conditions of the lease." ;

(ii) after paragraph 60, the following shall be inserted, namely :—

"60A If a lessee applies the practical expedient in paragraph 46A, the lessee shall disclose—

(a) that it has applied the practical expedient to all rent concessions that meet the conditions in paragraph 46B or, if not applied to all such rent concessions, information about the nature of the contracts to which it has applied the practical expedient (see paragraph 2) ; and

(b) the amount recognised in profit or loss for the reporting period to reflect changes in lease payments that arise from rent concessions to which the lessee has applied the practical expedient in paragraph 46A." ;

(iii) in Appendix C,

(a) after paragraph C1, the following paragraph shall be inserted, namely :—

"C1A. *Covid-19-Related Rent Concessions*, added paragraphs 46A, 46B, 60A, C20A and C20B. A lessee shall apply that amendment for annual reporting periods beginning on or after the April 1st, 2020. In case a lessee has not yet approved the financial statements for issue before the issuance of this amendment, then the same may be applied for annual reporting periods beginning on or after the April 1st, 2019." ;

(b) after paragraph C20, the following shall be inserted, namely :—

"Covid-19-related rent concessions for lessees

C20A. A lessee shall apply *Covid-19-Related Rent Concessions* (see paragraph C1A) retrospectively, recognising the cumulative effect of

initially applying that amendment as an adjustment to the opening balance of retained earnings (or other component of equity, as appropriate) at the beginning of the annual reporting period in which the lessee first applies the amendment.

C20B. In the reporting period in which a lessee first applies *Covid-19-Related Rent Concessions*, a lessee is not required to disclose the information required by paragraph 28(f) of Ind AS 8." ;

(E) in "Indian Accounting Standard (Ind AS) 1",—

(i) in paragraph 7, for the definition of the term "Material", the following shall be substituted, namely :—

"***Material :***

Information is material if omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general purpose financial statements make on the basis of those financial statements, which provide financial information about a specific reporting entity.

Materiality depends on the nature or magnitude of information, or both. An entity assesses whether information, either individually or in combination with other information, is material in the context of its financial statements taken as a whole.

Information is obscured if it is communicated in a way that would have a similar effect for primary users of financial statements to omitting or misstating that information. The following are examples of circumstances that may result in material information being obscured :—

(a) information regarding a material item, transaction or other event is disclosed in the financial statements but the language used is vague or unclear ;

(b) information regarding a material item, transaction or other event is scattered throughout the financial statements ;

(c) dissimilar items, transactions or other events are inappropriately aggregated ;

(d) similar items, transactions or other events are inappropriately disaggregated ; and

(e) the understandability of the financial statements is reduced as a result of material information being hidden by immaterial information to the extent that a primary user is unable to determine what information is material.

Assessing whether information could reasonably be expected to influence decisions made by the primary users of a specific reporting entity's general purpose financial statements requires an entity to consider the characteristics of those users while also considering the entity's own circumstances.

Many existing and potential investors, lenders and other creditors cannot require reporting entities to provide information directly to them and must rely on general purpose financial statements for much of the financial information they need. Consequently, they are the primary users to whom general purpose financial statements are directed. Financial statements are prepared for users who have a reasonable knowledge of business and economic activities and who review and analyse the information diligently. At times, even well-informed and diligent users may need to seek the aid of an adviser to understand information about complex economic phenomena." ;

(ii) after paragraph 139Q, the following shall be inserted, namely :—

"139R-139S [Refer Appendix 1]

139T. *Definition of Material* (Amendments to Ind AS 1 and Ind AS 8) amended paragraph 7 of Ind AS 1 and paragraph 5 of Ind AS 8, and deleted paragraph 6 of Ind AS 8. An entity shall apply those amendments prospectively for annual periods beginning on or after the 1st April, 2020." ;

(iii) in Appendix 1, for paragraph 10, the following shall be substituted, namely :—

"10. Paragraphs 139 to 139M and 139O-139P related to Transition and Effective Date have not been included in Ind AS 1 as these are not relevant in Indian context. Paragraph 139R relates to IFRS 17, *Insurance Contracts*, for which corresponding Ind AS is under formulation. Paragraph 139S is not included since it relates to amendments due to *Conceptual Framework for Financial Reporting under IFRS Standards* for which corresponding *Conceptual Framework for Financial Reporting under Indian Accounting Standards* is under formulation. However, in order to maintain consistency with paragraph numbers of IAS 1, these paragraph numbers are retained in Ind AS 1." ;

(F) in "Indian Accounting Standard (Ind AS) 8",—

(i) in paragraph 5, for the definition of term "Material", the following shall be substituted, namely :—

"the term *"Material", used in this Standard shall have the same meaning as assigned to it* in paragraph 7 of Ind AS 1." ;

(ii) for paragraph 6, the following shall be substituted, namely :—

"6 [Refer Appendix 1]" ;

(iii) after paragraph 53, the following shall be inserted, namely :—

"**Effective date and transition**

54-54G [Refer Appendix 1]

54H. *Definition of Material* (Amendments to Ind AS 1 and Ind AS 8), amended paragraph 7 of Ind AS 1 and paragraph 5 of Ind AS 8, and deleted paragraph 6 of Ind AS 8. An entity shall apply those amendments prospectively for annual periods beginning on or after the 1st April, 2020." ;

(iv) in Appendix 1, after paragraph 3, the following shall be inserted, namely :—

"4 Paragraph 6 appears as 'deleted' in IAS 8. In order to maintain consistency with paragraph numbers of IAS 8, the paragraph number is retained in Ind AS 8.

5 Paragraphs 54-54E of IAS 8 related to Effective Date and transition have not been included in Ind AS 8 as these are not relevant in Indian context. Paragraphs 54F-54G are not included since these relate to amendments due to *Conceptual Framework for Financial Reporting under IFRS Standards* for which corresponding *Conceptual Framework for Financial Reporting under Indian Accounting Standards* is under formulation. However, in order to maintain consistency with paragraph numbers of IAS 8, these paragraph numbers are retained in Ind AS 8." ;

(G) in "Indian Accounting Standard (Ind AS) 10",—

(i) for paragraph 21, the following shall be substituted, namely :—

"21 If non-adjusting events after the reporting period are material, non-disclosure could reasonably be expected to influence decisions that the primary users of general purpose financial statements make on the basis of those financial statements, which provide financial information about a specific reporting entity. Accordingly, an entity shall disclose the following for each material category of non-adjusting event after the reporting period—

(a) the nature of the event ; and

(b) an estimate of its financial effect, or a statement that such an estimate cannot be made." ;

(ii) after paragraph 22, the following shall be inserted, namely :—

"**Effective date**

23-23B [Refer Appendix 1]

23C *Definition of Material* (Amendments to Ind AS 1 and Ind AS 8), amended paragraph 21. An entity shall apply those amendments when it applies the amendments to the definition of material in paragraph 7 of Ind AS 1 and paragraphs 5 and 6 of Ind AS 8."

(iii) in Appendix 1, after paragraph 2, the following shall be inserted, namely :—

"3 Paragraphs 23-23B of IAS 10 related to Effective Date have not been included in Ind AS 10 as these are not relevant in Indian context. However, in order to maintain consistency with paragraph numbers of IAS 10, these paragraph numbers are retained in Ind AS 10." ;

(H) in "Indian Accounting Standard (Ind AS) 34",—

(i) for paragraph 24, the following shall be substituted, namely :—

"24 Ind AS 1 defines material information and requires separate disclosure of material items, including (for example) discontinued operations, and Ind AS 8, *Accounting Policies, Changes in Accounting Estimates and Errors* requires disclosure of changes in accounting estimates, errors, and changes in accounting policies. The two Standards do not contain quantified guidance as to materiality." ;

(ii) after paragraph 55, the following shall be inserted, namely :—

"56-58. [Refer Appendix 1]

59. *Definition of Material* (Amendments to Ind AS 1 and Ind AS 8) amended paragraph 24. An entity shall apply those amendments when it applies the amendments to the definition of material in paragraph 7 of Ind AS 1 and paragraphs 5 and 6 of Ind AS 8." ;

(iii) in Appendix 1, for paragraph 7, the following shall be substituted, namely :—

"7 Paragraphs 46-54 and 56-57 related to effective date have not been included in Ind AS 34 as these are not relevant in Indian context. Paragraph 58 is not included since it relates to amendments due to *Conceptual Framework for Financial Reporting under IFRS Standards* for which corresponding *Conceptual Framework for Financial Reporting under Indian Accounting Standards* is under formulation. However, in order to maintain consistency with paragraph numbers of IAS 34, these paragraph numbers are retained in Ind AS 34." ;

(I) in "Indian Accounting Standard (Ind AS) 37",—

(i) for paragraph 75, the following shall be substituted, namely :—

"75. A management or board decision to restructure taken before the end of the reporting period does not give rise to a constructive

obligation at the end of the reporting period unless the entity has, before the end of the reporting period—

(a) started to implement the restructuring plan ; or

(b) announced the main features of the restructuring plan to those affected by it in a sufficiently specific manner to raise a valid expectation in them that the entity will carry out the restructuring.

If an entity starts to implement a restructuring plan, or announces its main features to those affected, only after the reporting period, disclosure is required under Ind AS 10 *Events after the Reporting Period*, if the restructuring is material and non-disclosure could reasonably be expected to influence decisions that the primary users of general purpose financial statements make on the basis of those financial statements, which provide financial information about a specific reporting entity." ;

(ii) after paragraph 102, the following shall be inserted, namely :—

"103 [Refer Appendix 1]

104 *Definition of Material* (Amendments to Ind AS 1 and Ind AS 8), amended paragraph 75. An entity shall apply those amendments when it applies the amendments to the definition of material in paragraph 7 of Ind AS 1 and paragraphs 5 and 6 of Ind AS 8." ;

(iii) in Appendix 1, for paragraph 4, the following shall be substituted, namely :—

"4. Paragraphs 93-99 and 101 related to Transitional Provisions and Effective date given in IAS 37 have not been given in Ind AS 37, since all transitional provisions related to Ind ASs, wherever considered appropriate have been included in Ind AS 101, First-time Adoption of Indian Accounting Standards corresponding to IFRS 1, First-time Adoption of International Financial Reporting Standards and paragraphs related to Effective date are not relevant in Indian context. However, in order to maintain consistency with paragraph numbers of IAS 37, these paragraph numbers are retained in Ind AS 37. Paragraph 103 relates to IFRS 17, *Insurance Contracts*, for which corresponding Ind AS is under formulation." ;

[F. No. 01/01/2009-CL-V (Pt.VIII)]

Prevention of Money-laundering (Maintenance of Records) Rules, 2005 : Notification under rule 9(5)(iiia) : Extension of time limit

Notification No. G. S. R. 465(E), *dated 24th July 2020*[1].

In exercise of the powers conferred by clause (iiia) of sub-rule (5) of rule 9 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005, the Central Government hereby extend the period for which small account shall remain operational till 30th September, 2020.

[F. No. P-12011/18/2019-E.S. Cell-DOR]

Foreign Exchange Management (Non-debt Instruments) (Third Amendment) Rules, 2020

Notification No. S. O. 2442(E), dated 27th July, 2020[2].

In exercise of the powers conferred by clauses (aa) and (ab) of sub-section (2) of section 46 of the Foreign Exchange Management Act, 1999 (42 of 1999), the Central Government hereby makes the following rules further to amend the Foreign Exchange Management (Non-debt Instruments) Rules, 2019[3], namely :—

1. (1) These rules may be called the **Foreign Exchange Management (Non-debt Instruments) (Third Amendment) Rules, 2020.**

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (hereinafter referred to as the principal rules), after rule 2, the following rule shall be inserted, namely :—

"2(A). *Reserve Bank to administer these rules.*—(1) These rules shall be administered by the Reserve Bank.

(2) While administrating these rules, the Reserve Bank may interpret and issue such directions, circulars, instructions, clarifications, as it may deem necessary, for effective implementation of the provisions of these rules."

3. In the principal rules, in rule 3, the words "and in consultation with the Central Government" shall be omitted.

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1. Gaz. of India, Extry. No. 361, dt. 24-7-2020, Pt. II, sec. 3(i).
2. Gaz. of India, Extry. No. 2155, dt. 27-7-2020, Pt. II, sec. 3(ii).
3. See [2019] 217 Comp Cas (St.) 71.

4. In the principal rules, in rule 4, the words "and in consultation with the Central Government" shall be omitted.

5. In the principal rules, in Schedule 1, in the Table,—

(i) for serial number 9.3 and the entries relating thereto, the following serial number and entries shall be substituted, namely :—

Sl. No. (1)	*Sector/Activity* (2)	*Sectoral cap* (3)	*Entry route* (4)
"9.3	Air Transport Services		
	(1)(a) Scheduled Air Transport Service/Domestic Scheduled Passenger Airline (b) Regional Air Transport Service	100%	Automatic up to 49% (Automatic up to 100% for NRIs) Government route beyond 49%
	(2) Non-Scheduled Air Transport Service	100%	Automatic
	(3) Helicopter services/seaplane services requiring Directorate General of Civil Aviation (DGCA) approval	100%	Automatic
Note : As per Schedule XI of the Aircraft Rules, 1937, Air Operator Certificate to operate Scheduled Air Transport Services (including Domestic Scheduled Passenger Airline or Regional Air Transport Service) is granted to such company or a body corporate,— (a) which is registered and has its principal place of business within India ; (b) whose Chairman and at least two-thirds of its directors are citizens of India ; and (c) whose substantial ownership and effective control is vested in Indian nationals." ;			

(ii) for serial number 9.5 and the entries relating thereto, the following serial number and entries shall be substituted, namely :—

(1)	*(2)*
"9.5	Other Conditions" (a) Air Transport Services shall include Domestic Scheduled Passenger Airlines, Non-Scheduled Air Transport Services, helicopter and seaplane services. (b) Foreign airlines are allowed to participate in the equity of companies operating Cargo airlines, helicopter and seaplane services, as per the limits and entry routes mentioned above. (c) Foreign airlines are allowed to invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49 per cent. of their paid-up capital, subject to the following conditions, namely :— (i) it is made under the Government approval route,

	(ii) the 49 per cent. limit will subsume FDI and FII/FPI investment, (iii) the investments so made would need to comply with the relevant regulations of the Securities and Exchange Board of India (SEBI), such as the Issue of Capital and Disclosure Requirements (ICDR) Regulations/ Substantial Acquisition of Shares and Takeovers (SAST) Regulations, as well as other applicable rules and regulations, (iv) all foreign nationals likely to be associated with Indian scheduled and non-scheduled air transport services, as a result of such investment shall be cleared from security view point before deployment, and (v) all technical equipment that might be imported into India as a result of such investment shall require clearance from the relevant authority in the Ministry of Civil Aviation. (d) In addition to the above conditions, foreign investment in M/s. Air India Ltd., shall be subject to the following conditions, namely :— (i) foreign investments in M/s. Air India Ltd., including that of foreign airlines shall not exceed 49 per cent. either directly or indirectly except in case of those NRIs, who are Indian Nationals, where foreign investments is permitted up to 100 per cent. under automatic route. (ii) substantial ownership and effective control of M/s. Air India Ltd., shall continue to be vested in Indian Nationals as stipulated in Aircraft Rules, 1937. (e) FDI in Civil Aviation shall be subject to provisions of the Aircraft Rules, 1937, as amended from time to time. *Note :* (i) The FDI limits or entry routes mentioned at serial numbers 9.2 and 9.3 above, are applicable in the situation where there is no investment by foreign airline. (ii) Any investment by foreign airlines in companies operating in Air Transport Services, including in M/s. Air India Ltd., shall be subject to entries (b) and (c) above. (iii) The dispensation for those NRIs, who are Indian Nationals, regarding FDI up to 100 per cent. will continue in respect of the investment regime specified at entries (c)(ii) and (d) above."

[F. No. 01/05/EM/2019]

Companies Act, 2013 : Notification under section 435 : Courts designated as Special Courts : Amendments

Notification No. S. O. 2445(E), dated 24th July, 2020[1].

In exercise of the powers conferred by section 435 of the Companies Act, 2013 (18 of 2013), the Central Government, with the concurrence of the Chief Justice of the High Court of Gauhati hereby designates the court mentioned in column (2) of the Table below as Special Court for the purposes of providing speedy trial of offences under clause (b) of sub-section (2) of section 435 of the said Act, namely :—

TABLE

Sl. No.	*Court*	*Jurisdiction as Special Court*
(1)	*(2)*	*(3)*
1.	Court of Chief Judicial Magistrate, Kamrup (M) at Guwahati	State of Assam

[F. No. 01/12/2009-CL-I (Vol.IV)]

National Company Law Tribunal and National Company Law Appellate Tribunal (Procedure for investigation of misbehaviour or incapacity of Chairperson, President and other Members) Rules, 2020

Notification No. G. S. R. 470(E), dated 28th July, 2020[2].

In exercise of the powers conferred by section 469, read with sub-section (4) of section 417 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules, namely :—

1. Short title and commencement.—(1) These rules may be called the **National Company Law Tribunal and National Company Law Appellate Tribunal (Procedure for investigation of misbehaviour or incapacity of Chairperson, President and other Members) Rules, 2020.**

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Extent of application.—These rules shall be applicable to the President, Judicial Member and Technical Members of the National Company Law Tribunal and Chairperson, Judicial Members and Technical Members (appointed before the commencement of Part XIV of Chapter VI of the

1. Gaz. of India, Extry. No. 2158, dt. 27-7-2020, Pt. II, sec. 3(ii).
2. Gaz. of India, Extry. No. 366, dt. 28-7-2020, Pt. II, sec. 3(i).

Finance Act, (7 of 2017)) of the National Company Law Appellate Tribunal established under the Act :

Provided that these rules shall not apply to sitting judge of the High Court appointed as Chairperson, President or Member of the Tribunal or Appellate Tribunal and such Chairperson, President or Member would continue to be governed by the provision of article 217 of the Constitution till he would have held the office of Judge of the High Court.

3. Definitions.—(1) In these rules, unless the context otherwise requires,—

(a) "Act" means the Companies Act, 2013 (18 of 2013) ;

(b) "Appellate Tribunal" means the National Company Law Appellate Tribunal established under the Act ;

(c) "Chairperson" means the Chairperson of the Appellate Tribunal and includes a Member authorised to act as the Chairperson in accordance with section 415 of the Act ;

(d) "Committee" means the Committee referred to in sub-rule (2) of rule 4 ;

(e) "Judge" means a sitting Judge of the Supreme Court appointed by the President of India under sub-rule (2) of rule 5 to conduct the inquiry ;

(f) "Judicial Member" means a Member of Tribunal or Appellate Tribunal appointed as such under the Act ;

(g) "Member" means a Member (whether Judicial or Technical) of the Tribunal and Appellate Tribunal and includes Chairperson and President of the Appellate Tribunal or Tribunal as the case may be ;

(h) "section" means a section of the Act ;

(i) "President" means the President of Tribunal and includes a Member authorised to act or the President in accordance with section 415 of the Act ;

(j) "Technical Member" means a member of the Tribunal or Appellate Tribunal appointed as such under the Act ;

(k) "Tribunal" means the National Company Law Tribunal established under the Act.

(2) Words and expressions used herein and not defined but defined in the Companies Act, 2013 (18 of 2013) shall have the meanings respectively assigned to them in the Act.

4. Committee for investigation of complaints.—(1) The Central Government shall, after receipt of written complaint, alleging any definite charges of misbehaviour or incapacity to perform the functions of the office

in respect of a Member, it shall make a preliminary scrutiny of such complaint.

(2) The Central Government after Preliminary scrutiny considers necessary to investigate into the allegation, it shall place the complaint together with supporting material as may be available, before a Committee consisting of the following officers, to investigate the charges of allegations made in the complaint, namely :—

(i)	Cabinet Secretary	—Chairman ; ex-officio
(ii)	Secretary, Ministry of Corporate Affairs	—Member ; ex-officio
(iii)	Secretary, Department of Legal Affairs, Ministry of Law and Justice	—Member, ex-officio

(3) The Committee shall devise its own procedure and method of investigation which may include recording of evidence of the complainant and collection of material relevant to the inquiry.

(4) The Committee shall submit its findings to the President of India as early as possible within a period that may be specified by the President of India in this behalf.

5. Judge to conduct inquiry.—(1) If the President of India is of the opinion that there are reasonable grounds for making an inquiry into the truth of any imputation of misbehaviour or incapacity of a Member, it shall make a reference to the Chief Justice of India requesting him to nominate a Judge of the Supreme Court to conduct such inquiry.

(2) The President of India shall, by order, appoint the Judge of the Supreme Court nominated by the Chief Justice of India for the purpose of conducting the inquiry.

(3) The notice of appointment of a Judge under sub-rule (2) shall be given to the Member concerned.

(4) The President of India shall forward to the Judge a copy of—

(a) the articles of charges against the Member concerned and the statement of imputations ;

(b) the statement of witnesses, if any ; and

(c) the material documents relevant to the inquiry.

(5) The Judge appointed under sub-rule (2) shall complete the inquiry within such time of further time as may be specified by the President of India.

(6) The Member concerned shall be given an opportunity of presenting a written statement of defence within such time as may be specified in this behalf by the Judge.

(7) Where it is alleged that the Member concerned is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Judge may arrange for the medical examination of the Member by such Medical Board as may be appointed for the purpose by the President of India and the Member concerned shall present himself to such medical examination within the time specified in this behalf by the Judge.

(8) The Medical Board shall undertake such medical examination of the Member as may be considered necessary and submit a report to the Judge stating therein whether the incapacity is such as to render the Member unfit to continue in office.

(9) If the Member refuses to undergo such medical examination as considered necessary by the Medical Board, the Board shall submit a report to the Judge stating therein the examination which the Member has refused to undergo, and the Judge may, on receipt of such report, presume that the Member suffers from such physical or mental incapacity as is alleged in the complaint.

(10) The Judge may, after considering the written statement of the Member and the Medical Report, if any, amend the charges referred to in clause (a) of sub-rule (5) and in such a case, the Member shall be given an opportunity of presenting a fresh written statement of defence.

(11) The Central Government shall appoint an officer or an advocate to present the case against the Member.

(12) Where the Central Government has appointed an advocate to present its case before the Judge, the Member concerned shall also be allowed to present his case by an advocate chosen by him.

6. Application of the Departmental Inquiries (Enforcement of Witness and Production of Documents) Act, 1972 to inquiries under these rules.—The provisions of the Departmental Inquiries (Enforcement of witness and Production of Documents) Act, 1972 (18 of 1972), shall apply to the inquires made under these rules as they apply to Departmental inquires.

7. Powers of judge.—The Judge shall not be bound by the procedure to be laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and shall have power to regulate his own procedure including the fixing of places and times of his inquiry.

8. Suspension of Member.—Notwithstanding anything contained in rule 4 and without prejudice to any action being taken in accordance with the said rule, the Central Government may, with the concurrence of Chief

Justice of India, keeping in view the gravity of charges, suspend the Member of the Tribunal against whom reference has been made to the Judge of the Supreme Court until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court.

9. Subsistence allowance.—The payment of subsistence allowance to a Member under suspension shall be regulated in accordance with the rules and orders for the time being applicable to a Government servant of the corresponding level.

10. Inquiry report.—After the conclusion of the investigation, the Judge shall submit his report to the President of India stating therein his findings and the reasons therefor on each of the articles of charges separately with such observations on the whole case as he thinks fit.

[F. No. A-45011/70/2018-Ad.IV]

Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2020

Notification No. SEBI/LAD-NRO/GN/2020/23, dated 17th July, 2020[1].

In exercise of the powers conferred under section 30 read with clause (g) of sub-section (2) of section 11 and clauses (d) and (e) of section 12A of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board hereby makes the following regulations to amend the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, namely :—

1. These regulations may be called the **Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2020.**

2. They shall come into force on the date of their publication in the Official Gazette.

3. In the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015,—

(I) in regulation 3,

(i) sub-regulation (5), shall be substituted with the following, namely—

"(5) The board of directors or head(s) of the organisation of every person required to handle unpublished price sensitive information shall

1. Gaz. of India, Extry. No. 261, dt. 17-7-2020, Pt. III, sec. 4.

ensure that a structured digital database is maintained containing the nature of unpublished price sensitive information and the names of such persons who have shared the information and also the names of such persons with whom information is shared under this regulation along with the Permanent Account Number or any other identifier authorized by law where Permanent Account Number is not available. Such database shall not be outsourced and shall be maintained internally with adequate internal controls and checks such as time stamping and audit trails to ensure non-tampering of the database."

(ii) after sub-regulation (5), the following shall be inserted, namely,—

"(6) The board of directors or head(s) of the organisation of every person required to handle unpublished price sensitive information shall ensure that the structured digital database is preserved for a period of not less than eight years after completion of the relevant transactions and in the event of receipt of any information from the Board regarding any investigation or enforcement proceedings, the relevant information in the structured digital database shall be preserved till the completion of such proceedings."

(II) in regulation 7, in sub-regulation (2), after clause (b), the following shall be inserted, namely,—

"(c) The above disclosures shall be made in such form and such manner as may be specified by the Board from time to time."

(III) in Schedule B,

(i) in clause 4, sub-clause 3 (b), after the words "delisting offer", the words "or transactions which are undertaken through such other mechanism as may be specified by the Board from time to time" shall be inserted.

(ii) clause 12 shall be substituted with the following, namely—

"Without prejudice to the power of the Board under the Act, the code of conduct shall stipulate the sanctions and disciplinary actions, including wage freeze, suspension, recovery, etc., that may be imposed, by the listed company required to formulate a code of conduct under sub-regulation (1) of regulation 9, for the contravention of the code of conduct. Any amount collected under this clause shall be remitted to the Board for credit to the Investor Protection and Education Fund administered by the Board under the Act."

(iii) in clause 13, the words "inform the Board promptly" shall be replaced by the words "promptly inform the stock exchange(s) where the concerned securities are traded, in such form and such manner as may be specified by the Board from time to time".