

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT)(INS) No.277 of 2019

(Arising out of Order dated (13.02.2019) passed by the (National Company Law Tribunal) Kolkata Bench in C.P(IB) No 508/KB/2018 along with CA(IB) Nos. 972/KB/2018, 974/KB/2018, 1013/KB/2018, 08/KB/2019, 24/KB/2019 and 83/KB/2019)

IN THE MATTER OF:

K.L.Jute Products Private Limited.

Through Director Shri Kanhaiya Lal Agarwal
S/o Shri Ram Kishan Agarwal,
C/o 205, Rabindra Sarani,
3rd Floor, Kolkata – 700007
R/o 31/2G, Ram Krishan Samadhi Road,
Kolkata- 700 054

...Appellant

Versus

1.Tirupti Jute Industries Ltd.

(Through Mr. Chhedi Rajbhar – Liquidator appointed by NCLT)
No. 10, Dr. Rajendra Prasad Sarani,
2nd Floor, Kolkata – 700 001

2.Daaksh Jute LLP

No. 545, G.T.Road (South)
Howrah, West Bengal – 711 101

3.Pinaki Sircar

31/7, N.C.Chowdhury Road,
Kolkata – 700042

4. Small Industries Development Bank of India

11 Dr. U.N.Brahmachari Street,
Constantia Building,
8th Floor Kolkata – 700 017

5.Federal Bank Ltd

Kolkata Asset Recovery
Branch, Olisa House,
4 Government Place (North),
Kolkata – 700 001

6.Abinandan Holdings Pvt. Ltd.

3B, Darpanaryan Tagore Street,
Kolkata – 700 006

7.Everbright Vinimay Pvt. Ltd

64, Bentinck street,
3rd Floor, Kolkata – 700 069

8.Madan Mohan Mall

DL – 41, Salt Lake,
Sector II, Kolkata – 700 091

9.Prashant Damani

32, Ballygunge Place,
Kolkata – 700 019

10.National Fedration of Jute Workers

(Tirupati Jute Mill Committee)
A/18F/1, Sahanagar Road,
Kolkata – 700 026

11.Bangal Chatkal Mazdur Union, Unit:

Tiruptai Jute Industries Limited.
91, Naskarpara Road,
Ghusuri, Howrah – 711 107

...Respondents

Present:

For the Appellant:

**Mr. Saurabh Kalia, Mr. Rajiv Malik and
Ms. Saloni Purohit, Advocates.**

For the Respondents

**: Mr. Ramji Srinivasan, Sr. Advocate with
Mr. Abjijeet Sinha, Mr. Anup Kumar, Mr. Magan
Seth, Mr. Varun Narang, Mr. Rishab Kapoor,
Advocates for Respondent No.2
Mr. Brijesh Kumar, Mr. Vinay Singh Bist and Ms.
Khyati Bhardwaj, Advocates for R-3.
Mr. Piyush Singh and Mr. D.N.Sharma, Advocates
For R-8.
Mr. Abhinav Gupta, Advocate for R-6.
Mr. Abhishek Anand, Advocate for R-4, 5.
Ms. Shreya Singh, Advocate for R-7.
Notice served for R-9 (No Appearance)
Mr. Amritesh Raj, Advocate for R10 & 11.**

J U D G M E N T

VENUGOPAL M.J.

1. The Appellant being dissatisfied with the impugned order dated 13.02.2019 passed by the Adjudicating Authority ('National Company Law Tribunal') Kolkata Bench has preferred the instant appeal before this Tribunal.
2. The Adjudicating Authority ('National Company Law Tribunal') Kolkata Bench while passing the impugned order dated 13.02.2019 at para 24 to 28 had observed the following:

“ 24 By inviting public advertisement on 06.05.2018, RP called upon the prospective application to submit EoI/Resolution Plan by 23.05.2018. It was made clear that such applicants to submit EoI/Plans AS IS WHERE IS AND AS IS WHAT IS basis as regards to the status of the Corporate Debtor. It is not in dispute that on 01.08.2016 i.e. almost one year prior to filing of application under section 7 of I&B Code by the financial creditor, the corporate debtor executed lease deed in favour of one M/s. Daakh Jute LLP and handed over the jute mill for running. It is also not in dispute that lease agreement in between the Corporate debtor and Daakh Jute LLP is still subsisting. It is submitted by the Ld. Counsel for the RP that lease deed is void as it was executed by the corporate debtor after the receipt of notice under section 13(2) of SARFAESI At. He pointed out that Resolution Professional has filed application under Section 45 of the I&B Code bearing No. CA (IB) No. 36/KB/2019 for cancellation of that lease deed. I fail to

understand how that application is maintainable which is filed beyond CIRP period of 270 days and more particularly when lease agreement was executed one year prior to the date of commencement of admission of the application of the finance creditor against the corporate debtor. In my considered opinion such application may not be maintainable under section 46 of I&B Code. Apart from that, real question is having published the notice calling for the EoI/ Plan AS IS WHERE IS AND AS IS WHAT IS basis, whether the RP/CoC were in position to waive that condition while accepting the plan of M/s. K.L.Jute, I found that RP/CoC exactly did the same thing when they approved the plan submitted by M/s. K.L.Jute. I examined the plan of K.L.Jute products private Limited. M/s. K.L.Jute has made it clear in the resolution plan that the plan is subject to extinguishment of all claims (except criminal proceeding) against the corporate debtor upon approval of their plan by this authority. They gave list of such conditions precedent in the plan itself and stated that the plan is submitted subject to compliance of those conditions. Those conditions, were relating to exemption of all taxes/dues by the government/local authorities, disposal of all proceedings pending against the corporate debtor relating to such dues. How having submitted the plan after

considering the invitation of plan on the basis of AS IS WHERE IS AND AS IS WHAT IS basis, it was not proper on the part of K.L.Jute to put all above conditions in the plan. In my considered opinion, such plan ought not to have been approved by the CoC.

25. One can understand that the resolution application seeks some exemption from paying some past dues, taxes payable by the Corporate Debtor. Unless such exemptions are granted, none will be in a position to submit the plan. But in this case, it is seen that the Successful Resolution Applicant submitted the plan ignoring basic conditions about the status of corporate debtor, i.e. AS IS WHERE IS AND AS IS WHAT IS basis". It is brought to the notice that M/s. Daaksh Jute LLP is the lease holder in possession of the jute mill of corporate debtor. Resolution Professional requested K.L.Jute to modify their plan accordingly. Upon this, M/s.K.L.Jute sent email dated 03.10.2018 to the Resolution professional making it very clear that, "if the resolution plan (as submitted by them) being approved subject to modifications, which is not acceptable to the resolution applicant, in that case the resolution applicant will have absolute right to make withdrawal of bid without any notice to CoC as well as Resolution Professional". This mail was sent by them almost on the

last date when the CoC was to hold its meeting to approve the plan. Despite this CoC approved K.L.Jute's plan. In my considered opinion, such plan which was subject to so many conditions and the conditions which cannot be complied within reasonable period of time, ought not to have approved by the CoC.

26. This takes me to consider one more crucial aspect due to which I feel that the resolution plan submitted for my approval, cannot be approved. Section 30(2)(e) of I&B Code states that the resolution plan should not contravene any provisions of law by the time being in force. Successful Resolution Applicant, M/s. K.L.Jute clearly stated in their plan that this authority while approving their plan has to pass the order cancelling the lease deed dated 01.08.2016 executed in between the Corporate Debtor and Daaksh Jute LLP. To my mind, this condition in the plan is contrary to the established procedure of law. Hon'ble NCLAT in case of Raj Builders vs. Raj oil Mills ltd. (Company Appeal No. 304 of 2018) clearly stated the position of law in this aspect. It was appeal against the order of NCLT, Mumbai bench, in that case, the Corporate Debtor was tenant holding over in the premises which was to go in possession of Successful Resolution Applicant. NCLT, Mumbai bench noted this fact while approving the plan but did not pass order of eviction of the

corporate debtor/tenant. Successful Resolution Application filed appeal against the order refusing to evict the tenant. The Hon'ble NCLAT considering that facts held that, "Adjudicating Authority is not competent to pass any order for eviction". In this case M/s. Daaksh Jute LLP is lessee in possession of Jute Mill owned by the Corporate Debtor. The Lease period is yet to over. It may be true that lease deed was executed by the corporate debtor after receipt of notice under Section 13(2) of SARFAESI Act. Real question is whether this authority has jurisdiction to hold that the lease is bad in law a pass order of eviction of the Daaksh Jute LLP from possession of the premises of the corporate debtor, as per the condition laid down in the resolution plan of Successful Resolution Applicant?

27. My answer to this question is that this Authority does not have such jurisdiction. M/s. K.L.Jute has submitted plan to the CoC stating the above conditions i.e. eviction of Daaksh Jute LLP. The CoC having issued public notice of invitation of EoI/Plan as AS IS WHERE IIS AND AS IS WHAT IS basis, the CoC made exception to the above condition and approved the plan. The plan as approved by them cannot be effectively implemented because resolution applicant made it very clear that his plan is subject to fulfilment of conditions i.e. eviction of Daaksh Jute LLP. To evict Daaksh Jute LLP, one has to approach

proper forum. One does not know as to what time will require to get such eviction order. In such a situation, CoC ought not have approved the plan. I do not question commercial wisdom of CoC herein but it appears to me that the CoC did not consider the legal implications while approving the plan. They approved the plan ignoring the provisions of Section 30(2)(e) of I&B Code. I hold that resolution plan submitted for my approval is in a contravention of above provision of law. It cannot be approved by this authority. I reject the resolution plan of M/s.K.L. Jute Products Private Limited for the above reasons.

28.CIRP period of 270 days already expired two months ago. Hence, it is of no use of refer other two plans – one by Mr. Madan Mohan Mal and the other by Mr.Prashant Damani back to CoC's consideration. It cannot be done now. I am not entering into controversy whether both of them are related party of the corporate debtor or not whether the provisions of section 29A are not applicable to the corporate debtor, in view of section 240A of I&B Code. Such questions are irrelevant. CoC has approved the only one plan i.e. M/s.K.L.Jute Private Limited. However, in my considered opinion that plan does not comply all provisions stated in section 30(2) of I&B Code. I have to reject that plan. Now alternative left for me to

pass the order of liquidation of the Corporate Debtor. Lr. Sr. counsel while arguing for the workmen submitted that if such occasion arises, the corporate debtor may be liquidated as a going concern. I accept the request. It is seen from the record that RP did not give correct advise when he submitted K.L.Jute's Plan for approval of CoC. In my considered opinion, in such a situation it would not be proper to appoint the present RP as the Liquidator. Hence, I replace the liquidator, in view of provision of Section 33(6) of I&B Code.”

and finally passed an order of liquidating the 1st Respondent/Corporate Debtor- Tirupati Jute Industries Limited as a going concern under Regulation 32(c) of the IBBI(Liquidation Process), Regulation 2016. Further, the Adjudicating Authority appointed Mr. Chhedi Rajbhar as a Liquidator etc.

3. Assailing the correctness, validity and legality of the impugned order dated 13.02.2019 passed by the 'Adjudicating Authority' ('National Company Law Tribunal, Kolkata Bench'), the Learned counsel for the Appellant/Resolution Applicant submits that the 4th Respondent/Small Industries Development Bank of India, ('an unsecured Financial Creditor having 22.40% voting share in the Committee of Creditor formed later') projected an Application under Section 7 of the 'Insolvency and Bankruptcy Code, 2016' against the 1st Respondent – ('Tirupati Jute Industries Ltd – a closely held public limited Company') to initiate 'Corporate Insolvency Resolution Process' against the

Corporate Debtor, in respect of a default of Rs. 7,18,21,128/- ('Rupees Seven Crore Eighteen Lakh Twenty-One Thousand One Hundred and Twenty-Eight Only'), which was admitted by the 'Adjudicating Authority' on 12.01.2018.

4. The Learned Counsel for the Appellant contends that the 5th Respondent/Federal Bank Ltd had earlier declared the 1st Respondent/Corporate Debtor's 'Non-performing Asset' on 31.10.2015, and in fact a notice under Section 13(2) of the 'Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002' ('SARFAESI ACT') was issued by the 5th Respondent addressed to the 1st Respondent/Corporate Debtor on 01.04.2016 and that the 1st Respondent/Corporate Debtor was directed not to deal with secured assets without prior permission of 5th Respondent/ Federal Bank.
5. It is represented on behalf of the Appellant that the 5th Respondent/Corporate Debtor had executed an unregistered lease deed dated 01.08.2016 in respect of the 'Immovable Fixed Assets' (including plant and machinery embedded to the earth) with the 2nd Respondent – 'Daaksh Jute LLP ('incorporated only on 28.07.2016) by the relatives of the 'Directors' of the 1st Respondent only after the issuance of notice U/s 13(2) of 'SARFAESI' Act for a period of 9(nine) years.
6. On the behalf of the Appellant, it is brought to the notice of the Tribunal that on 12.01.2018, one Mr. Pinaki Sircar was appointed as 'Interim Resolution Professional' and claims were called for from the 'Creditors' of the 1st Respondent/Corporate Debtor by making public announcement of the 'Corporate Insolvency Resolution Process' to which numerous creditors (Financial Creditors, Operational Creditors and Workmen & Employees) filed their claims. Further, the 'Interim Resolution Professional' formed the

‘Committee of Creditors’ which comprise of the following (along with voting share):

- i. Federal Bank/5th Respondent – 74.8% (recorded in the impugned order as 75.18%)
 - ii. SIDBI/1st Respondent -22.4% (recorded in the impugned order as 22.51%)
 - iii. Abinandan Holding Pvt. Ltd/ 6th Respondent – 2.30% (recorded in the impugned order as 2.31%)
 - iv. Everbright Vinimay Pvt. Ltd/7th Respondent – 0.50%
7. That apart, it is stand of the Appellant that the 1st meeting of ‘Committee of Creditor’ on 02.03.2018 confirmed the ‘Interim Resolution Professional’ Mr. Pinaki Sircar as ‘Resolution Professional’ (3rd Respondent) and that the said ‘Resolution Professional’ filed an application u/S 45 and 46 of the ‘Insolvency and Bankruptcy Code, 2016’ for cancellation of the ‘Lease Agreement dated 01.08.2016 (after the expiry of the 270 days period), which was dismissed by the ‘Adjudicating Authority’. Moreover, based on the instructions of the ‘Committee of Creditor’ a public notice was published in the ‘Indian Express’ Newspaper on 06.05.2018 calling for ‘Expression of Interest’ and ‘Resolution Plans’ on the basis of the status of the 1st Respondent/Corporate Debtor on “AS IS WHERE IS AND AS IS WHAT IS BASIS” in regard to the status of assets and documents thereof, pursuant to which the ‘Resolution Professional/3rd Respondent’ received three Resolution Plans on different dates prior 15.06.2018 and the same were discussed in the meeting of ‘Committee of Creditors’ that took place on 09.08.2018. The three resolution plans related to:

- i. K.L.Jute Products Pvt. Ltd/Appellant,
 - ii. Madan Mohan Mal (“Objector No.1/8th Respondent”) (a related party to the Corporate Debtor/1st Respondent).
 - iii. Prashant Damani (“Objector No.2/9th Respondent”) (Director of Abinandan Holdings Pvt. Ltd/6th Respondent).
8. The learned counsel for the Appellant proceeds to point out that the ‘Resolution Plan’ submitted by the ‘Resolution Applicant/Appellant – K.L.Jute Products Pvt. Ltd sought waivers with respect to past direct and indirect tax dues and extinguishment of pending litigations, etc., also that the Appellant prayed for the termination of the Lease Deed dated 01.08.2016 which granted management and operational rights to the 2nd Respondent(Daaksh Jute LLP) with a view to gain complete management and operating rights of the 1st Respondent/Corporate Debtor.
9. As a matter of fact, the Appellant (with total bid value highest among all plans) was approved by the ‘Committee of Creditors’ with 97.20% voting in its favour (recorded as 97.25% in the impugned order) on 03.10.2018. After approval of the ‘Resolution Plan’ by the ‘Committee of Creditor’, the Resolution Professional / 3rd Respondent filed an Application u/S 31 of the ‘I&B Code’ for approval of ‘Resolution Plan’ before the ‘Adjudicating Authority’, within a period of 270 days and objections were submitted by the 8th Respondent to 10th Respondent.
10. The Learned counsel for the Appellant comes out with the plea that the ‘Committee of Creditor’ had approved the ‘Resolution Plan’ submitted by the Appellant/Resolution Applicant (which required cancellation of unregistered Lease Agreement dated 01.08.2016 as part of its plan) with 97.20% vote share

and in January, 2019 an Application C.A No. 36/KB/2019 filed by the 'Resolution Professional' before the 'Adjudicating Authority' seeking cancellation of unregistered Lease Agreement dated 01.08.2016, executed between the 1st Respondent/Corporate Debtor and the 2nd Respondent.

11. The Learned counsel for the Appellant contends that the Lease Agreement dated 01.08.2016 executed by the 1st Respondent/Corporate Debtor after the issuance of notice under Section 13(2) of the 'SARFAESI Act' against the 1st Respondent/Corporate Debtor is not void ab initio. Further, the 'Adjudicating Authority' had failed to consider the relevant period for a preferential transaction as 'one year' as opposed to 'two years' prescribed under Section 46 of the I&B Code.
12. The Learned counsel for the Appellant submits that an 'Adjudicating Authority' cannot reconsider the decision of the CoC in its commercial wisdom as per decision K.Sasidharan V. Indian overseas Bank & ors., C.A No. 10673/18 and Committee of Creditors of Essar Steel India Ltd. V. Satish Kumar Gupta & ors. C.A No. 8766-67/2019. In this regard, the learned counsel for the Appellant submits that 'Unregistered Lease' confers no rights on a 'Lessee' as per Section 17 & 49 of the Indian Registration Act 1908 and Section 107 of the Transfer of Property Act, 1882. Moreover, on the side of the Appellant, it is projected that a 'Lease' for a period exceeding one year can only be made by way of a registered instrument and cites the decisions of Hon'ble Supreme Court (a) Anthony V. KC Itoop and Sons 7 ors. (2000) 6 SCC 394 (b) Park Street Properties (Pvt.) Ltd. V. Dipak Kumar Singh & Ors. AIR 2016 SC 4038.

13. The Learned counsel for the Appellant contends that the 'Adjudicating Authority had failed to take into account that C.A 36/KB/19 praying for cancellation of the 'Unregistered Lease Agreement' dated 01.08.2016 was already pending prior to the date of passing of the impugned order. It is version of the Appellant that the 'Adjudicating Authority had passed an impugned order in rejecting the 'Resolution Plan' of the Appellant without considering the Application C.A 36/KB/219 filed by the 'Resolution Professional' to declare the undervalued / preferential transaction (lease agreement dated 01.08.2016) entered into between the 2nd Respondent / Corporate Debtor (who is a related party of the Corporate Debtor) void (as only Rupees Eleven Lakhs p.m lease rent paid/ payable to the 1st Respondent/ Corporate Debtor in lieu of land & building, plant & machinery, office, etc., and the turnover of 2nd Respondent is more than Rupees Fifty Crores from this plant).
14. The Learned counsel for the Appellant submits that based on the facts and circumstances of the present case, the judgment of this Tribunal Raj Builders V. Raj Oil Mills Ltd. Company Appeal (NCLAT) No. 304/2018 is inapplicable because of the reason that in the aforesaid Appeal, the Corporate Debtor was the Lessee and the 'Moratorium' under Section 14(1)(4) of 'I&B Code' was declared. However, in the instant case, the Corporate Debtor is a 'Lessee' and hence, the judgment in Raj Builders case will not apply.
15. The Learned counsel for the Appellant contends that the 'Adjudicating Authority' had overlooked the time period for a 'Related party' transaction is two years without even deciding CA 36/2018. Besides this it is the contention of the Appellant that the 2nd Respondent was incorporated with five partners

(three of which were sons of shareholders of the 1st Respondent/Corporate Debtor and two were related to the Directors of the 1st Respondent/ Corporate Debtor.

16. The Learned counsel for the Appellant takes a plea that the 'Resolution Plan' of the Appellant had made provisions of payments under the Resolution Plan to all shareholders as per the Information Memorandum provided by the 'Resolution Professional' and in reality, the Appellant had made provisions by the Resolution Plan in respect of the following:

- i. 100% dues of Workmen & Employees of the Corporate Debtor –amount to Rs. 76, 39, 184/- (rupees Seventy-Six Lac Thirty-nine Thousand One Hundred Eighty-Four Only).
- ii. 100% Statutory dues of provident Fund to the Workmen & Employees of the Corporate Debtor – amounting to Rs. 1, 34, 84,014/- (Rupees One Crore Thirty-Four lac Eighty Four thousand Fourteen Only).
- iii. 100% Statutory dues of provident Fund to the Workmen & Employees of the Corporate Debtor up till 31.07.2016 - amounting to Rs. 7,65,30,745/- (Rupees Seven Crore Sixty Five lac thirty Thousand Seven Hundred Forty Five Only). Thereafter, i.e., from 01.08.2016, the unit is being run by M/s. Daaksh Jute L.L.P. (Respondent No.2) as and when payable.
- iv. Claim of Respondent No.2 – M/s. Daaksh Jute L.L.P's claim to the extent of Rs. 19,45,855/- (Rupees Nineteen Lac Forty-Five Thousand Eight Hundred Fifty-Five Only), as provided to the Operational Creditors of the Corporate Debtor. Therefore, even the claim of Respondent No.2 was accepted in the Resolution Plan which shows

that the plan is a complete plan and considered all the aspects as per approval of Resolution Plan as provided under the Code.

17. The Learned counsel for the Appellant submits that as per Regulation 35A of the IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016 a 'Resolution Professional' is perforced to investigate the affairs of 1st Respondent/Corporate Debtor as per Sections 43, 45, 50 and 66 of the 'I&B Code'. Added further, the 'Resolution Professional' had failed in its dues, and he has filed an Application for cancellation of the 'Lease Deed' dated 01.08.2016 only after the expiry of 270 days' period.
18. The Learned counsel for the Appellant seeks in aid of the decision of Hon'ble Supreme Court of the judgment dated 03.12.2019 in C.A No. 9170-92 of 2019 M/s. Embassy Property Developments Pvt. Ltd V. State of Karnataka 7 ors. Wherein at para 39 to 41 it is observed as under:

“ 39 – if NCLT has been conferred with jurisdiction to decide all types of claims of property, of the Corporate Debtor, section 18(f) (vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the Corporate Debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the Corporate Debtor under contractual arrangements, is specifically kept out of the definition of the term “assets” under the Explanation of Section 18. This assumes significance in view of the

language used in Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the dues of the Interim Resolution professional and Section 25 speaks about the duties of Resolution professional. These two provisions use the word “Assets”, while section 20(1) uses the word “property” together with the word “value”. Section 18 and 25 do not use the expression “property”. Another important aspect is that under Section 25(2) (b) of IBC, 2016, the Resolution professional is obliged to represent and act on behalf of the Corporate Debtor with third parties and exercise rights for the benefit of the corporate Debtor in judicial, quasi-judicial and arbitration proceedings. Section 25(1) and 25(2) (b) reads as follows:

“25. Duties of Resolution professional-

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purpose of sub-section (1), the resolution professional shall undertake the following actions:-

(a).....

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi judicial and arbitration proceedings.”

This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).

40 – Therefore, in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.

41- In fact the Resolution Professional in this case appears to have understood this legal position correctly, in the initial stages. This is why when the Government of Karnataka did not grant the benefit of deemed extension, even after the expiry of the lease on 25.05.2018, the Resolution Professional moved the High Court by way of a writ Petition in WP No. 23075 of 2018. The prayer made in WP No. 23075 of 2018 was for a declaration that the mining lease should be deemed to be valid upto 31.03.2020. if the NCLT was omnipotent, the Resolution Professional would have moved the NCLT itself for such a declaration. But he did not, as he understood the legal position correctly.

19. Also in the aforesaid judgment at para 45 to 48, it is observed as follows:

“45- Therefore, in fine, our answer to the first question would be that NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ Petition, on the basis that NCLT was coram non iudice.

46- The second question that arises for our consideration is as to whether NCLT is competent to enquire into allegations of fraud, especially in the matter of the very initiation of CIRP.

47- This question has arisen, in view of the stand taken by the Government of Karnataka before the High Court that they chose to challenge the order of the NCLT before the High Court, instead of before NCLAT, due to the fraudulent and collusive manner in which the CIRP was initiated by one of the related parties of the Corporate Debtor themselves. In the writ petition filed by the Government of Karnataka before the High Court,

it was specifically pleaded (i) that the Managing Director of the Corporate Debtor entered into an agreement on 06.02.2011 with one M/s.D.P.Exports, for carrying out mining operations on behalf of the Corporate Debtor and also for managing its affairs and selling 100% of the extracted iron ore; (ii) that the said M/s. D.P. Exports was a partnership firm of which one Mr.M.Poobalan and his wife were partners; (iii) that another agreement dated 11.12.2012 was entered into between the Corporate Debtor and a proprietary concern by name M/s. P. & D. Enterprises, of which the very same person namely, Mr. M.Poobalan was the sole proprietor; (iv) that the said agreement was for hiring of machinery and equipment; (v) that a finance agreement was also entered into on 12.12.2012 between the Corporate Debtor and a Company by name M/s.Udhyaman Investments Pvt. Ltd., represented by its authorized signatory Mr. M.Poobalan; (vi) that there were a few communications sent by the said Mr. Poobalan to various authorities, claiming himself to be the authorized signatory of the Corporate Debtor; (vii) that an MOU was entered into on 16.04.2016 between the Corporate Debtor and M/s. Udhyaman Investments

Pvt. Ltd., represented by the said Mr. Poobalan, whereby the Corporate Debtor agreed to pay Rs. 11.5 crores; (viii) that the said agreement was purportedly executed at Florida, but witnessed at Chennai; (ix) that Mr. Poobalan even communicated to the Director; Department of Mines & Geology as well as the Monitoring Committee, taking up the cause of the Corporate Debtor as its authorized signatory; (x) that the CIRP was initiated by M/s. Udhyaman Investments Pvt. Ltd. Represented by its authorized signatory, Mr. Poobalan; (xi) that the Resolution Applicant namely, M/s. Embassy Property Development Pvt. Ltd. As well as the Financial Creditor who initiated CIRP namely, M/s. Udhyaman investments Pvt. Ltd are all related parties and (xii) that Mr. Poobalan had not only acted on behalf of the Corporate Debtor before the statutory authorities, but also happened to be the authorized signatory of the Financial Creditor who initiated the CIRP, eventually for the benefit of the Resolution Applicant which is a related party of the Financial Creditors.

48- In the light of the above averments, the Government of Karnataka thought fit to invoke the jurisdiction of the

High Court under Article 226 without taking recourse to the statutory alternative remedy of appeal before the NCLAT. But the contention of the Appellants herein that allegations of fraud and collusion can also be inquired into by NCLT and NCLAT and that therefore the Government could not have bypassed the statutory remedy.”

20. The Learned counsel for the Appellant contends that Section 238 of the I&B Code, has an overriding effect over other Laws and that the 2nd Respondent was incorporated only on 28.07.2016 (after issuance of notice under Section 13(2) SARFAESI Act, 2002) only with an intention to defraud the ‘Creditors’ of the 1st Respondent/Corporate Debtor.
21. The Learned counsel for the 2nd Respondent (Daaksh Jute LLP) contends that the ‘Jute Mill’ of the 1st Respondent/Corporate Debtor was closed from 2015 and to restart the closed jute mill of 1st Respondent/Corporate Debtor, steps were taken to incorporate the 2nd Respondent at least two months prior to the execution of the formal operating lease agreement dated 01.08.2016 and that the necessary application was filed before the ‘Registrar of Companies’, Kolkata much before the Lease Agreement was entered into between the parties.
22. In this connection, it is pointed out on the side of the 2nd Respondent that since the ‘Registrar of Companies’ had not formally issued a ‘certificate of incorporation’, the Lease Agreement was not to be

- executed. Furthermore, the need for entering into a 'Lease Agreement' was to commence the closed unit and to provide an employment and wages to one thousand two hundred workers who were jobless for nearly two years.
23. The Learned counsel for the 2nd Respondent takes a stand that the 'Lease Agreement' in question does not visualise any 'sale', transfer or encumbrance over the 'Fixed Asset', land and properties of the 1st Respondent/Corporate Debtor. At this stage, the Learned counsel for the 2nd Respondent brings to the notice of this Tribunal that the 2nd Respondent is regularly paying the Lease 'Rentals' of Rupees Eleven lakhs per month (subject to the adjustment as per the said agreement) and that the tenure of the said Agreement is for nine years period and that term of the 'Lease Agreement' enjoins that there are no permanent transfers of any 'Asset' or 'Land' or property of the 1st Respondent/Corporate Debtor to the 2nd Respondent.
24. The Learned counsel for the 2nd Respondent contends that the 'Resolution Plan' of the Appellant is a conditional one and for cancellation of the 'Lease Agreement' of 2nd Respondent, only a 'Civil Court' has jurisdiction and that the Adjudicating Authority has no jurisdiction to cancel the said 'Agreement'.
25. The other plea taken on behalf of the 2nd Respondent is that the 'Resolution Plan' of the Appellant was contrary to the 'Expression of Interest' and the 'Information Memorandum' as such the same was

- rightly rejected by the 'Adjudicating Authority', although, the said plan was approved by the 'Committee of Creditor'.
26. The Learned counsel for the 2nd Respondent submits that the provisions under Section 13(13) of the SARFAESI Act, 2002 is not applicable to the Lease Agreement dated 01.08.2016 and the said bar is only under those situations when the borrower after receiving of notice under Section 13(2) of the SARFAESI Act, 2002 transfers by means of 'Sale', 'Lease' any of its secured assets without prior written consent of the secured creditor and being not in the usual course of business.
 27. The Learned counsel for the 2nd Respondent strenuously contends that the 'Lease Agreement' in question was entered into between the parties in the usual and ordinary course of business and not with any intention to transfer any 'Right', 'Title' or interest upon the asset of Corporate Debtor, in terms of Section 43 r/w Section 45 of the 'I&B Code' only the Liquidator or the Resolution Professional has only the right to question any 'Agreement' entered into by the 1st Respondent/Corporate Debtor.
 28. It comes to be known that the CA(IB) No. 36/KB/2019 filed by the 'Resolution Professional' was disposed by the 'Adjudicating Authority' as 'Infructuous' on 14.03.2019. In this connection, the Learned counsel for the 2nd Respondent contends that prior to the passing of liquidation order as on 13.02.2019, the 'Adjudicating Authority' came to a conclusion that such an application by the 'Resolution Professional'

Under Section 46 of the Code was not maintainable on numerous grounds (including the ground that during the period of CIRP, the 'Resolution Professional' and the 'Committee of Creditors') had remained silent and had not taken steps to challenge the validity of the 'Lease Agreement'.

29. The Learned counsel for the 2nd Respondent points out that the 'Federal Bank' during the entire 'Corporate Insolvency Resolution Process' accepted the rent from the 2nd Respondent in a continuously fashion and the said Bank had waived its right, if any, after issuance of Section 13(2) notice under the SARFAESI Act, 2002 to the Corporate Debtor on 01.04.2016.
30. The Learned counsel for the 2nd Respondent submits that the ownership of the Jute Mill is not vested with the 2nd Respondent and in fact the 'Federal Bank' was informed of the execution of the 'Lease Agreement' by the 1st Respondent/Corporate Debtor through its letter dated 21.02.2017 after all negotiations with the Labour unions were undertaken and formally signed.
31. The Learned counsel for the 2nd Respondent brings to the force that the 'Federal Bank' which issued under Section 13(2) of the SARFAESI Act, 2002 on the Corporate Debtor on 01.04.2016 and 'Possession Notice' on 06.05.2017 and that actual physical possession of the property of the 1st Respondent/Corporate Debtor was not taken by the said Bank.

32. The Learned counsel for the 2nd Respondent contends that since 21.02.2017 the 'Federal Bank' had not taken any step to enforce or relied upon the notice under Section 13(2) of the SARFAESI Act and the said bank, as one of the 'Financial Creditors' had submitted Form 'C' before the Applicant, which was not disclosed and also that the bar under Section 13(13) of the SARFAESI Act, 2002 will not impede the validity of the 'Lease Agreement' read with 'Addendum' dated 20.01.2016 because of the fact that the 'Federal Bank' had waived its right under Section 13(2) of the SARFAESI Act, 2002 by not enforcing the same, because of the fact that no litigant can accept and reject the same transactions.
33. The Learned counsel for the 2nd Respondent contends that the 'Resolution Professional' had acknowledged the claim of the 2nd Respondent of a sum of Rs. 79,05,224/- on 20.06.2018 and in fact that the 'Resolution Professional' had knowledge of the purported 'Lease' between the 2nd Respondent and the Corporate Debtor much earlier to filing of the Application and, therefore, the 'Expression of Interest' in a clearly cut manner mentions the 2nd Respondent name as one operating the 'Lease' and viewed in that perspective the 'Resolution Professional' has not authority to refer to the SARFAESI Act, 2002 notices issue by the 'Federal Bank', when the said 'Bank' was aware of the agreement made with the Respondent had remained silent and had waived its right, if any.

34. The Learned Counsel for the 2nd Respondent submits that the 'Resolution Professional' and 'Committee of Creditor' had included presence of 2nd Respondent in the 'Information of Memorandum' and the 'Expression of Interest' only on being satisfied with the validity of the Lease Agreement dated 01.08.2016 and the 'Resolution Professional' and the Committee of creditors had not found the issue of 2nd Respondent purported to be a 'related party' to the 1st Respondent and as such the Appellant has no '*Locus standi*' to raise this issue, during oral hearing, and after the 'Resolution Plan' was voted and placed for 'Approval'.
35. The Learned Counsel for the 2nd Respondent contends that the 2nd Respondent filed a Civil Suit in T.S. No. 467 of 2019 before the 3rd Civil Judge (Junior Division) at Howrah, wherein the Respondent Nos. 4, 5, 10 and 11 are party defendants. The 'Status Quo order' in respect of nature, character and possession of the suit property was passed on 18.04.2019 by directing the defendants, including 'Federal Bank' and SIDBI (4th Respondent) and the Interim order was lastly extended till 17.01.2020.
36. The plea taken on behalf of the 3rd Respondent in the present case, the 'Lease' created in favour of the 2nd Respondent is *void ab initio* and, therefore, the eviction of 2nd Respondent does not make a Resolution plan conditionally or in violation of any law for the time being in force and also that the 'CoC' in their commercial wisdom had accepted the

requirement of eviction of the 'Lessee' in unlawful possession of the Corporate Debtor. Besides, this, it is the contention of the 3rd Respondent that since the proceedings were pending before the 'Adjudicating Authority', the rejection of application on the ground that 270 days had already expired is an incorrect one and in fact the said period of litigation is to be excluded for the period of calculation of CIRP period.

37. It is represented on behalf of the 3rd Respondent that the relief of eviction sought for by the Appellant was not violation of any Law because of the fact that the possession of 2nd Respondent is '*void ab initio*'.
38. The Learned Counsel for the 8th Respondent submits that after the impugned order dated 13.02.2019 passed by the 'Adjudicating Authority' (NCLT, Kolkata bench), the 8th Respondent, as an Applicant before the 'Adjudicating Authority' filed in C.A(IB) No. 974/KB/2018. Further, it is represented on behalf of the 8th Respondent, the 8th Respondent one of the 'Resolution Applicant' took part in 'CIRP of the 1st Respondent/Corporate Debtor also that on 12.01.2018, the Application filed by the 4th Respondent/ Small Industries Development Bank of India (Applicant/Financial Creditor) under Section 7 of the I&B Code was admitted on 12.01.2018. The 3rd Respondent (Mr. Pinaki Sircar) was appointed as an 'Interim Resolution Professional' and later

- the said Professional was appointed as 'Resolution Professional' to conduct the CIRP of the 1st Respondent.
39. The stand of the 8th Respondent is that as one of the 'Resolution Applicants', he submitted a 'Resolution Plan' for revival of the Corporate Debtor after the 'Information Memorandum' which was published by the 3rd Respondent on 23.05.2018. Later, the plan was further revised and submitted on 15.06.2018, 21.08.2018 and 15.09.2018 respectively.
40. According to the Learned Counsel for the 8th Respondent after the 'Resolution Plan' submitted by the 8th Respondent (as a Resolution Applicant on 15.09.2018). The 3rd Respondent ('Resolution Professional') informed the 8th Respondent that no plan could be submitted by any Resolution Applicant which would contain a clause for cancellation of the 'Lease Deed' and hence the 8th Respondent was advised to submit an 'Addendum' to the 'Resolution Plan' dated 15.09.2018.
41. The 3rd Respondent communicated that 'EOI' was issued on 'as is whereas and as is what is basis' and only those plans which would be submitted as per invitation would be considered, which was prior notice to the 8th Respondent in the meeting of 'CoC' that took place on 27.09.2018. Hence, the 'Addendum' of the Resolution Plan dated 15.09.2018 was submitted by the 8th Respondent before the 3rd Respondent/RP in a 'sealed envelope' under a covering letter dated 30.09.2018, which was duly received.

42. The Learned Counsel for the 8th Respondent points out that the 'Addendum' to the Plan of the 8th Respondent dated 15.09.2018 was submitted in a sealed cover 01.10.2018 before the 'Resolution Professional'/ 3rd Respondent and the same was subject to the directives given by the Resolution Professional/3rd Respondent that the 'Successful Resolution Applicant' would deal with the 'Operational Lease' between the Corporate Debtor and the 2nd Respondent separately after being selected as the 'Successful Resolution Applicant' by virtue of the Lease Deed between the parties.
43. At this stage, the Learned Counsel for the 8th Respondent contends that the Resolution Professional/3rd Respondent confirmed that it was a separate contractual agreement and could not be cancelled as part of the plan under the pretext of a Resolution etc.
44. It is represented on behalf of the 8th Respondent that in the 'CoC' meeting that took place on 03.10.2018, the 8th Respondent had requested the Resolution Professional to confirm and state on record whether the last directive issued by him on 27.09.2018 to the effect that the resolution plans to be submitted by the Resolution Applicant would not contain any clause/condition for Termination and/or cancellation of the Lease deed etc;
45. The Learned Counsel for the 8th Respondent submits that the 3rd Respondent in the CoC meeting that took place on 03.10.2018 had informed the 8th Respondent that the Resolution Plan submitted by the

Resolution Applicant in a sealed cover on 01.10.2018 was rejected and the 8th Respondent was required to leave the meeting under this circumstances.

46. The Learned Counsel for the 8th Respondent refers to C.A(IB) No.974/KB/2018 filed by him seeking among other things to assail the rejection of its resolution plan by the Resolution Professional and the CoC of the 1st Respondent/Corporate Debtor and also the wrongful acceptance of the plan submitted by the Appellant as a successful Resolution Applicant. In fact, the Resolution Professional (3rd Respondent) and the 4th, 5th, Respondents (members of the CoC) 6th and 9th Respondents had filed the replies to the aforesaid applications and that the Adjudicating Authority had not referred to the two plans of the 8th and 9th Respondents to the consideration of the 'CoC' because of the reason that the CIRP period of 270 days had lapsed two months before and eschewed the same for rumination.
47. It appears that the 9th Respondent's plan (One of the 'Unsuccessful Resolution Applicants') (one of the Directors of the 6th Respondent) was rejected by the 'Committee of Creditors' and the Resolution Professional' of the 1st Respondent/Corporate Debtor.
48. As a matter of fact, the 7th Respondent(one of the Financial Creditor of the 1st Respondent/Corporate Debtor) had applied before the 'Adjudicating Authority' in highlighting the irregularities and illegalities noticed during the 'Corporate Insolvency Resolution Process' which was

- conducted at the instructions of the major stake holders in the CoC viz; 3rd Respondent and 4th Respondent and sought declaration that the 'Resolution Plan' submitted by the Appellant is an illegal and void one.
49. The Learned Counsel for the 8th Respondents contends that the Adjudicating Authority had rightly rejected the 'Resolution plan' of the Appellant, since the same is in 'breach of Law' and further that the I&B Code has no provision for eviction of a 'Lessee' or Tenant.
50. The Learned Counsel for the 8th Respondent submits that the Resolution Plan of the Appellant could not have been approved by placing reliance on the ingredient of Regulation 39(3) of the 'Corporate Persons Regulations' and further that Regulation 39(3) has no application in respect of any Resolution Process commenced before 03.07.2018. In the instant case the Resolution process commenced on 12.01.2018.
51. The Learned Counsel for the Respondents No. 10th & 11th submits that the 'Resolution Plan' of the Appellant was 'vague' in respect of the workers claim and in fact, the Appellant's 'Resolution Plan' provided for the payment of workers dues. However, the exact quantum of workers' claim/dues was not mentioned in the 'Resolution Plan' by the Appellant and also that the 'Resolution Plan' of the Appellant spoke of continuation of "Wiling Workers" in short 'Resolution Professional' had not admitted the workers of 'whole claim' and that he functioned in a manner to benefit the cause of the Appellant. It is the stand of the

Respondent No.10 & 11 that the 'Resolution Plan' of the Appellant was contrary to Law.

52. It is to be pointed out that Section 5(24) of the I&B Code, 2016 defines "Related party" in relation to a Corporate Debtor. Section 5(24) (A) of the I&B Code, 2016 defines "Related party" in relation to means an individual as defined in the Code. Section 5(25) of the Code, defines "Resolution Applicant". Section 5(26) of the Code defines "Resolution Plan". Section 5(27) of the Code, defines "Resolution Professional".
53. Indeed Section 5(25) of the Code, relating to "Resolution Applicant" is to be read in consonance with the duties of Resolution Professional to invite certain categories of individuals to furnish the Resolution plan(s).
54. One of the pivotal functions of a Resolution Professional is to prepare a 'Information Memorandum' which will enable him to submit a Resolution plan. The Resolution Applicant is to submit a 'Resolution Plan' to the 'Resolution Professional', based on 'Information Memorandum' mentioning relevant information, as may be specified by the Board (including the Information relating to a Corporate Debtor's financial position). Further, information related to disputes by or against the Corporate Debtor and any other matter pertaining to the Corporate Debtor may also be furnished.
55. It must be borne in mind that a Resolution Plan submitted by the Resolution Professional must satisfy the ingredients mentioned under Section 30(2) of the Code. It is pertinent to point out that a 'Resolution

Plan' is not a 'Recovery/ Sale/Liquidation/ auction'. A 'Resolution Plan' is to be perused by a Resolution Professional with utmost care and caution and if the said plan when approved by the Committee of Creditors on being placed before an 'Adjudicating Authority' the said Authority is to apply its mind before giving a green signal or even rejecting the same.

56. Insofar as the 'Preferential transactions' and 'relevant time' that as per Section 43 of the Code, it is to be pointed out that this provision can be pressed into service by a 'Resolution Professional' or a Liquidator before an 'Adjudicating Authority' under section 44 of the Code and that the said Authority is to pass an appropriate order, as he deems fit and proper. The aim of Section 43 of the Code is to protect the 'body of interest' over whom an undue preference was given in favour of other 'creditors' and 'transactions' can be called as a preferential ones entered into by a Corporate Debtor, wherein a Corporate Debtor gave undue preference at a relevant time to any person. The 'transfer of property' or any interest of property ought to be of a 'Corporate Debtor' and such transfer was made with a view to give 'undue preference' to the 'Transferee'. In a case of 'Fraudulent Preference' the dominant motive of a 'Debtor' in effecting transfer to a certain creditor or other is to be seen by an 'Adjudicating Authority'.
57. In this connection, it may not be out of place for this Tribunal to make a significant mention that the definition of 'preferential transactions' as

per Section 43 of the Code refers to an opinion of a 'Liquidator' or a 'Resolution Professional', that was reached during the 'Resolution stage'. An action under Section 43 of the I&B Code can lie only when the 'Liquidator' or 'Resolution Professional' arrived an opinion that an 'undue preference' was given to a particular 'Creditor' or 'Guarantor' or 'Surety' with a view to place a beneficiary in a profitable pedestal in regard to other creditors position in regard to other 'Creditors' when the Corporate Debtor entered into transaction with any individual. Section 43 of the Code speaks of 'avoidance of preference' given by a Corporate Debtor in the run up to 'Insolvency'. Section 43 (2) of I&B Code mentions the circumstances when a Transactions entered into by a Corporate Debtor shall be treated as a deemed preference on a fiction of Law. The 'Term', 'Transfer' includes 'sale', 'Relinquishment', 'Exchange', and an Adjudicating Authority under Section 49 of the Code can restore a status quo ante in a given matter by protecting a person's interest. Section 49 of the I&B Code prescribes no time limit for securing an order in respect of a transaction entered into which were meant for defrauding the 'creditors'.

58. Section 53 of the Code will come into operative play, if the transfer of property by a Corporate Debtor affects the priority order of a 'Creditor' or a 'Surety' or 'Guarantor' and place him at a higher altitude, owing to the change in 'Priority order'

59. Coming to the aspect of 'Civil Court's Jurisdiction' being barred, it is to be pointed out that Section 63 of the I&B Code bars the jurisdiction of 'Civil Court' or an Authority to entertain any suit or proceedings in respect of any matter over which the 'NCLT' or 'NCLAT' has necessary jurisdiction under the Code. A cumulative reading of Section 63 of the Code and section 430 of the Companies Act, 2013 makes it clear that the 'NCLT' or 'NCLAT' have sole jurisdiction to determine all issues pertaining to the I&B C. Also, Section 64(2) Code speaks 'no order' injunction can be granted by any Court, Tribunal or Authorities in respect of any action taken or to be pursuant to the power of confer of NCLT as well as NCLAT under this Code. An injunction to stay the proceedings before the 'National Company Law Tribunal' cannot be issued by a 'Civil Court' as per decision Jotun India Pvt. Ltd Vs. PSL Limited (2018) Company cases OL page 224 and confirmed in the decision reported in 2018 95 Taxmann . com 311.
60. If an Adjudicating Authority is dissatisfied with a 'Resolution Professional', he may appoint another 'Resolution Professional' as a 'Liquidator'. Needless, to make an emphasis that it is the duty of Corporate Debtor to cooperate with a Liquidator. Section 35 of the Code, confers powers and duties of a Liquidator to ensure an orderly completion of the 'Liquidation Proceedings'. Even an Adjudicating Authority may assign certain duties, to be discharged by him. Undoubtedly a 'Liquidator' is to act under the supervision of an

‘Adjudicating Authority’. A Liquidator is to establish a ‘connivance’ between a ‘Company’ and the ‘Transferee’ as per decision Monark Enterprises V. Kishan Tulpule & Ors. reported in 1991 Company L.J. 288(Bom).

61. In the instant case, on hand, the Appellant/Resolution Applicant initially had firstly submitted a ‘Resolution Plan’ containing necessary details etc, and later submitted an ‘Addendum’ to the Resolution Plan by it specifying certain details. Suffice it for this Tribunal to point out that the said ‘Addendum’ to the ‘Resolution Plan’ in unequivocal terms mentioned that acceptability of ‘Resolution plan’ by the ‘Resolution Applicant shall be subject to and directly related to termination of all erstwhile ‘agreement entered into by the old management of the Corporate Debtor, including but not limited to agreement with M/s. Daaksh Jute LLP, agreement with M/s. Stylish interlocking Pavers (P) Ltd., etc., peaceful and satisfactory handover of the entire unit of the Corporate Debtor with all its movable and immovable properties free from all encumbrances, complete management and operation rights of the entire unit of the Corporate Debtor and waivers/reliefs sought from Hon’ble NCLT.
62. A year before filing of an application under Section 7 of the I&B Code by the Financial Creditor, the 1st Respondent/Corporate Debtor had executed an unregistered Lease Deed dated 01.08.2016 to and in favour of the 2nd Respondent and handed over the jute mill for running

it. The tenure of lease was for Nine years beginning from 01.08.2016 and ending with 31.07.2025. The Appellant /'Resolution Applicant' laid down certain conditions in the plan and also addressed email dated 03.10.2018 had clearly mentioning that "if the Resolution Plan being approved subject to modification which is not acceptable to it", in that case the Resolution Applicant will have absolute right to make withdrawal of bid without any notice to CoC as well as RP and also stating that the fact the email was sent by the Appellant on the final day, when the CoC was to conduct its meeting to approve the plan, in spite of the same the CoC approved the Appellant's plan which cannot be countenanced in the eye of Law.

63. It is well settled that the Resolution Professional is required to examine and confirm the Resolution Plan subject to the same being in conformity with the ingredient of Section 30(2) of the Code. A Resolution Professional can submit his ex facie opinion to the 'Committee of Creditors' that the law was or was not violated. It is true that the Section 30(2)(e) of the Code does not authorise the Resolution Professional to determine whether the Resolution Plan does or does not violate the relevant provisions of Law.

64. In reality, ascribing conditions in the 'Resolution Plan' by the Appellant/Resolution Applicant is an unacceptable one, in the considered opinion of this Tribunal. Therefore, the Adjudicating

- Authority in the impugned order came to the right conclusion that the plan of the Resolution Applicant/Appellant was in negation of Law.
65. Insofar as, the eviction of 2nd Respondent is concerned, the Adjudicating Authority is not empowered to pass an order of eviction and it is for an 'Aggrieved party' to move the appropriate forum for redressal of its grievances in accordance with Law. In short, the Committee of Creditors had approved the Resolution Plan in utter disregard regard to the ingredient of Section 30(2)(e) of the I&B Code and as hence the same was rejected by the Adjudicating Authority. Moreover, the Adjudicating Authority had appointed a 'Liquidator' other than the 'Existing Resolution Professional'.
66. In regard to the issues framed by this Tribunal on 30.08.2019 (i) whether at the stage of Liquidation, the question of preferential transactions under Section 43 of I&B Code can be decided by an Adjudicating Authority? and (ii) Whether the Liquidator has jurisdiction to decide such issued?, this Tribunal is of the considered opinion that Section 43 of the Code can be invoked during the pendency of Resolution Process or Liquidation proceedings, if there are genuine, reasonable grievances relating to 'preferential transactions' at a relevant time and in fact a Liquidator by filing an 'Application' can seek one or other order from the Adjudicating Authority as per tenor and spirit of Section 44 of the I&B Code. Section 35 of the Code shows 'powers and duties' of a Liquidator' and that he must act under the

supervision of an Adjudicating Authority. Section 35 of the I&B Code is like Section 290 of the Companies Act, 2013 a Transfer must be made by a 'Debtor' in lieu of an operational 'Debt' or an antecedent financial 'Debt' or other liabilities saddled on him. As per Section 35(b) of the Code, a 'Liquidator' is to take into his custody or control all assets, property, effects and actionable claims of the Corporate Debtor. Section 35(L) of the Code enjoins upon the 'Liquidator' to investigate the Financial affairs of the 'Corporate Debtor' to determine undervalued or preferential transactions. One cannot remain oblivious that a 'Liquidator' keeps the 'Liquidation Assets' in fiduciary capacity for the benefit of the all creditors. Therefore, it can be safely and securely concluded that section 43 of the Code can be invoked during the pendency of 'Resolution Process' by a 'Resolution Professional' or 'Liquidator' for seeking necessary relief pertaining to a preferential transaction by filing an Application and that the Adjudicating Authority can pass orders under Section 44 of the Code. Further a Liquidator as per Section 35 of the I&B Code, a Liquidator has jurisdiction to investigate the financial affairs of the Corporate Debtor to determine undervalued or 'preferential transactions' subject to the supervisory jurisdiction of an Adjudicating Authority and these issues also answered As regards the ingredients of Section 240A of the Code it is to be pointed out that a Financial Creditor or an Operational Creditor of MSME may take it to Insolvency Proceedings before an

‘Adjudicating Authority’. But the fact of the matter is that the MSME may not be pushed into liquidation thereby affecting the employees and workers of MSME and therefore, Section 240A (2) of the Code specifies that the Central Government may, in public interest by notification direct that any of the provisions of the IBC shall not apply to Micro, Small and Medium Enterprises or apply to them with such modifications as may be mentioned. The learned Adjudicating Authority in the impugned order had not entered into the aspect of whether 8th and 9th Respondent are related to 1st Respondent/ corporate Debtor or otherwise or whether the ingredient of section 29A of the Code applies or not because of the fact the said authority thought it fit that these aspects are irrelevant and while rejecting the plan ordered the liquidation of the 1st Respondent. The Adjudicating Authority in the impugned order, had also disposed of the Applications filed by the respective parties to the proceedings.

67. In regard to I.A No. 2976 of 2019 filed by the Intervener/Applicant (City Union Bank, to intervene in the main appeal i.e. CA(AT)(INS) No. 277 of 2019, on the basis that the Liquidator on 15.03.2019 had admitted its claim under the category of Secured Financial Creditor and since the Resolution Plan had not provided anything to the Applicant’s claim was considered under the category of other creditor, it is to be pointed out that the plan of Resolution Applicant was rejected by the Adjudicating Authority and in the main case an order of liquidation was passed by

- the Adjudicating Authority on 13.02.2019, and as such it is open to the Applicant/Intervener Bank to stake its claim before the Liquidator for redressal of its grievance(s), in accordance with law if it so desires/advised. Accordingly, the said Interlocutory Application stands disposed of.
68. I.A No. 4285 of 2019 filed by the Applicant seeking Leave to place the judgment of Hon'ble Supreme Court dated 03.12.2019 in CA No. 9170-72 of 2019 M/s. Embassy Property Developments Pvt. Ltd V. State of Karnataka & ors., is taken on record.
69. For the foregoing detailed discussions, and also this Tribunal taking note of the attendant facts and circumstances of the present case, in a conspectus fashion, comes to an irresistible consequent conclusion that the impugned order dated 13.02.2019 passed by the Adjudicating Authority in rejecting the Resolution Plan and appointing a Liquidator in respect of the 1st Respondent is free from any legal flaws.
70. Looking at from any angle the present Appeal sans merits and the same is dismissed. There shall be no order as to costs. IA No. 11009 of 2019 stands closed.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

20th February, 2020
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