

# Ms Vijaylaxmi Alias Vijayalaxmi ... vs River Residency Developers on 14 August, 2024

IAL-10152-2024 0

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION (L) NO. 10152 OF 2024

IN

COMMERCIAL SUIT (L) NO. 33787 OF 2023

M/s. Vijaylaxmi alias Vijayalaxmi Developers & Anr

IN THE MATTER BETWEEN

M/s. Vijaylaxmi alias Vijayalaxmi Developers & Anr

Versus

River Residency Developers & Ors

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Mr Sharan Jagtiani, Senior Advocate, with Ankit Lohia, Krushi N

Barfiwala, Rima Desai, Shraddha Achliya, Shlok Bodas & Jyoti Raichandani, i/b Parinam Law Associates, for the Applicants Plaintiffs.

Mr Mayur Khandeparkar, Mr Aman Kacheria, with Neel Kothari, Rishabh Dhanuka, Sakshi Dube & Mahima Shah, i/b Agarwal & Dhanuka Legal, for Respondents/ Defendants Nos. 2 and 3.

Mr Shyam Kapadia, with Aayush Dhrupad Vaghani & Gaurav Jain, for Respondent/Defendant No. 4.

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CORAM: ARIF S. DOCTOR, J  
DATED: 14th August 2024

PC:-

1. This order will dispose of an application for ad-interim relief.

2. At the outset, I must note that the present Application was argued in part over a few days and the Respondents though granted an opportunity to file their Affidavits in Reply specifically chose not to do so and instead have chosen to oppose the application for ad interim reliefs on the basis of a demurer, thus at this stage, accepting the case of the Applicant as pleaded. The Respondents have chosen to at this stage oppose the application for ad interim reliefs solely on the basis of submissions on law. It is therefore in this context that I have to consider the present application for ad interim reliefs.

3. Mr Jagtiani, Learned Senior Counsel appearing on behalf of the Applicants submits that the Applicants had been constrained to file the present Suit on account of various fraudulent and collusive acts on the part of the Respondents, particularly Respondent Nos. 2 to 4. He submits that Applicant No. 1 is admittedly the owner of a plot of land

admeasuring 23 Hectares 10 Acres situated in Village Chikhli, Taluka

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Haveli, Pune ("the said land"). He submits that the Applicants had entered into a Joint Venture Agreement ("JVA") dated 11th May 2010 with Respondents Nos. 2 and 3 ("JV Partners") for development of a portion of the said land admeasuring 14 Hectares 40 Acres (project land) in a phase-wise manner ("the said Project") in the name of 'River Residency' ("JV Entity"). He submitted that Phase I to III of the said project was completed between the years 2010 to 2016 and it was only Phase IV of the development which was being carried out on a portion of project land.

4. Simply put, it is the case of the Applicants that the JV partners have fraudulently and in collusion with Respondent No. 4 (LIC) raised finance in the name of Respondent No. 1, i.e., River Residency Developers which is an Association of Persons ("AOP") comprising of the JV Partners and its directors with a deceptively similar name to that of the JV Entity. Further and crucially, the JV Partners had taken a loan from LIC in the name of the AOP by inter alia mortgaging a portion of the project land i.e. land admeasuring 14,960.51 sq. mt. as also by creating security in favour of LIC of 75% of the receivables from Phase IV

of the said project and the FSI availed from Phase I to IV of the said Project. All of this, he submitted, was done without the knowledge and consent of the Applicants and contrary to the terms of the JV

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Agreement. He submitted that LIC had now initiated proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") against the JV Partners in view of the defaults committed by them in repayment of the said loan. It was thus he submitted that the project land which is owned by the Applicants has been dealt with by the JV Partners without the knowledge and consent of the Applicants and could now potentially be sold along with other assets of the Applicants in respect of which the Applicants had unfettered rights, to repay the collusive and fraudulent loan taken by the JV Partners from LIC.

5. Mr Jagtiani then in support of his contention that the conduct of the JV Partners, in mortgaging a portion of the Phase IV Land along with the other assets, was fraudulent and collusive invited my attention to the JVA from which he placed reliance upon the following clauses, viz.:

i. Clause 4(b)(u)1 which he pointed out enabled the JV

1        4(B)(u) The Developer shall be entitled to raise bridge finance for the present project by mortgaging the phase of the property under their possession for construction. However, the entire responsibility of the repayment of the said project loan shall be of the Developer alone. The tenement/unit purchasers shall also be entitled to mortgage their rights and their respective tenements/units/plots/flats/shops/showroom/ offices/row-houses/bungalow etc. However the finance so raised by the developer shall not exceed the balance refundable security deposit with the owners as on that date and if it does then owners shall have a lien on the constructed

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Partners to raise bridge finance by mortgaging the project land only to the extent of the refundable security deposit placed with the Applicants which was Rs. 11 Crores.

- ii.        Clauses 2(f)2 and 3(e)3 which inter alia provided that the JV Partners were to develop the project land at their cost and that both parties could use the credits and assets of the JV Entity solely for the benefit of the JV Entity i.e. River Residency and no asset was to be transferred or encumbered for payment of any individual obligation.
- iii.        Clause 28 which provided that the Applicant had executed a General Power of Attorney ("GPA") in favour of JV Partners to represent them before all authorities to do all the acts and deeds for the purpose of development of

portion of the developers share."

2            2(f)        PAYMENTS OF INDIVIDUAL OBLIGATIONS:

The parties shall use the Joint Venture's credit and assets solely for the benefit of the Joint Venture. No asset of the Joint Venture shall be transferred or encumbered for or in payment of any individual obligation of a party.

3            3(e)        The Developer shall develop the said phases at its own costs including arranging for security of the entire said property and payment of property taxes and outgoings of hereof.

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project land.

6.           Mr Jagtiani then pointed out that the GPA executed by the Applicants in favour of the JV Partners made clear that (i) the Project land was to be developed in the name of JV Entity, i.e., 'River Residency' (ii) the JV Partners could raise finance only upto the extent of the refundable security deposit i.e. 11 crores and (iii) the responsibility to repay these funds was that of the JV Partners.

7.           Mr Jagtiani then submitted that the Applicants had on 3rd August 2017 executed a Special Power of Attorney ("SPA") in favour of the JV Partners by which the Applicants inter alia authorized the JV Partners to raise finance for the said project and to sign and register the documents with the concerned bank or financial institution. He pointed

out that the SPA specifically provided that (i) the JV Partners could avail the finance in the name of only the Promoter i.e. JV Entity (ii) such finance would be repaid by the JV Partners and (iii) the SPA dated 3rd August 2017 was to be read with the JVA and GPA dated 11th May 2010. He additionally pointed out that the Directors of the JV Partners had on 4th August 2017 also executed a declaration cum indemnity in favour of the Applicants by which they had expressly undertaken as follows, viz.:

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"We hereby declare and confirm that the Joint Venture shall be availing construction finance from time to time for development of the said property which may be secured against the said property and mortgage our collateral property and premises constructed to be constructed thereon. We agree and undertakes that the construction finance so availed by the joint venture shall be solely deployed for development of he said property and shall not to deployed for any other purpose, without the express written consent of M/s. Vijayalaxmi Developers. we hereby agree and undertake to repay the construction finance so availed by the Joint Venture along with interest and charges thereon, 1 solely out of the project cash flows allocable to the Joint Venture (excluding the revenue share of M/s. Vijayalaxmi Developers). In the event, the project cash flows allocable to the joint Venture are insufficient for repayment and servicing of the construction finance availed by the Joint Venture, 1 for any reason whatsoever, then we further agree and undertake that the deficit shall be solely met by us and that neither the Joint venture nor M/s. Vijayalaxmi Developers shall be personally liable for the same."

(emphasis supplied)

8. Mr Jagtiani then pointed out that the Applicants became aware that the JV Partners had availed of finance to the tune of Rs. 80 crores from L&T Housing Finance Limited ("L&T"). He submitted that it was thus that the Applicants made several inquiries with the JV Partners pursuant to which the JV Partners on 16th August 2017 sent the Applicants an email attached with an Indenture of Mortgage dated 26th April 2017 executed with L&T which named the JV Partners and

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Respondent Nos. 5, 7 and 8 as the Borrowers. He submitted that though the Indenture of Mortgage dated 26th April 2017 stated that the same was signed by the Applicants the Applicants had denied this on Affidavit dated 3rd September 2018.

9. Mr Jagtiani also pointed out that the Indenture of Mortgage dated 26th April 2017 executed between L&T and the JV Partners and Respondents Nos. 5, 7 and 8 showed that the disbursement of money was to be in the name of the AOP, i.e., 'M/s River Residency Developers', and not the JV Entity, i.e., River Residency. It was thus, he submitted that the JV Partners had acted fraudulently in availing of this loan since the same was (i) without the knowledge and consent of the Applicants; (ii)



in violation of the terms of the JVA; (iii) not in the name of JV Entity; and (iv) was advanced to an AOP of which the Applicants were not members.

10. Mr Jagtiani further pointed out that the Applicants had, when conducting an online search in respect of the project land, came across a registered deed of re-conveyance dated 12th October 2018, executed between L&T and the AOP, i.e., M/s River Residency Developers and the JV Partners. He pointed out that the sanction letter revealed that out of the total loan of Rs. 80 Crores availed from L&T, Rs. 31 Crores were

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utilized to pay off earlier debts of JV Partners, 15 Crores for capital requirements of JV Partners and remaining 34 Crores though stated to be utilized towards the project of JV Entity, i.e., River Residency, but no supporting documents were provided by the JV Partners to the Applicants. He submitted that the JV Partners had then entered into a Deed of Re-conveyance on 12th November 2018 in which L&T provided a No Dues Certificate to the AOP i.e. M/s River Residency Developers and not the JV Partners and their directors in whose name the loan was sanctioned. He submitted that though the L&T loan was obtained in the name of JV Partners and their directors, the No Due

Certificate was granted in the name of the AOP.

11. Mr Jagtiani then pointed out that the Applicants had thereafter became aware that JV Partners had availed a loan from LIC in the name of the AOP by making use of the No Due Certificate issued by L&T. He submitted that LIC had vide a sanction letter dated 18th September 2018 sanctioned a loan for an amount of Rs. 95 Crores in favour of the AOP which was inter alia secured by the mortgage of a portion of the project land, the FSI availed from Phase I to IV of the said Project as also 75% receivables from Phase IV of the said project. He took pains to point out that none of this was done with the Applicants' consent or knowledge.

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12. He then invited my attention to Loan Agreement dated 5th October 2018 to submit that out of loan amount of Rs. 95 Crores, an amount of Rs. 46.64 Crores was to be utilized for taking over the earlier loan from L&T and the balance was to be used for construction and completion of the Phase IV of said project. He submitted that in the said Loan Agreement Respondents Nos. 5, 7 and 8 were shown as the Promoters of the AOP and the same made no mention of the Applicants. He then pointed out that in the Article 3.2 of the Loan Agreement dated

5th October 2018 Respondent No.1 and the JV Partners had stated that they had an absolute, clear and marketable title inter alia to the Phase IV land as also to the FSI of 15,00,000 sq. ft. which he took pains to point out was not only false but also pertained to all four phases of the said project and not just the Phase IV.

13. Mr Jagtiani then invited my attention to the Indenture of Mortgage dated 25th October 2018, which was executed between the AOP, the JV Partners, Respondent Nos. 5 and 6 as mortgagors and Respondent No.9 as Security Trustee. He pointed out that Article 2.1 of the Indenture of Mortgage provided that the AOP was to have the first and exclusive charge over the said Assets. He then invited my attention to Article 7.1.3 of Indenture of Mortgage to submit that same granted Respondent No.9 the liberty to sell the mortgaged property without the

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consent of the AOP, the JV Partners, Respondents Nos. 5 and 6 and most importantly, without the consent of the Applicants.

14. Basis the above he submitted that it was ex facie evident that the JV Partners had fraudulently created the mortgage in respect of a portion of the Phase IV land and other Assets in favour of LIC since,

- (a) The JVA and SPA only permitted the JV Partners to raise finance for the project in the name of JV Entity i.e. 'River Residency' neither the JVA nor SPA permitted the JV Partners to raise finance in the name of the JV Partners or any AOP of which the Applicants were not part of.
- (b) Admittedly the loan sanctioned by LIC was not in the name of the JV Entity and only the AOP, JV Partners, and Respondents Nos. 5, 7 and 8 were shown as the Borrowers in the Indenture of Mortgage dated 25th April 2017.
- (c) The JVA did not permit the JV Partners to transfer or encumber any of the assets for the payment of any individual object of the parties.

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- (d) The JV Partners had utilized the finance raised for objects which had nothing to do with construction of Phase IV of the said project;

15. He then pointed out that the fact that LIC had either colluded with the JV Partners or then had acted in a completely negligent

manner in creating the said mortgage was also evident and beyond the pale of doubt since, viz.

- (a) Admittedly, the Applicants was the owner of the project land and had never consented to the creation of any mortgage of any portion thereof in favour of LIC.
- (b) LIC had made an incorrect reporting to Central Registry of Securitization Asset and Reconstruction and Security Interest of India (CERSAI) by stating that the AOP and JV Partners were the owners of the mortgaged land.
- (c) Even the most basic due diligence would have reflected that the Applicants were the owner of the project land.
- (d) Though the Sanction Letter specifically required

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inspection of the original documents, no inspection was ever done since the original documents of title to the project land were in the Applicants' custody and possession.

- (e) LIC had sanctioned the amount in favour of the AOP solely on the basis of the undertakings given by JV Partners.
- (f) LIC had ignored the fact that the SPA specifically mentioned that same was to be read with JVA and GPA and hence JV Partners could only avail of the loan (i) in the name of the JV Entity and (ii) not in excess an amount of Rs. 11 Crores.
- (g) LIC ignored the fact that the No Due Certificate issued by L&T was infact for the loan taken in the name the JV Partners and not the Respondent No.1.
- (h) LIC had created a first and exclusive charge over not only on the portion of the project land but also FSI 15,00,000 Sq. ft., i.e., FSI of all 4 Phases and 75% receivables from

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Phase IV of said project.

16. Mr Jagtiani then submitted that given the above conduct of the JV Partners and LIC, the Applicants had vide its letters dated 5th July 2019 and 19th July 2019 informed the LIC that Indenture of Mortgage dated 25th October 2018 was executed fraudulently and without the consent of the Applicants. It was thus that the Applicants called upon LIC to execute a Cancellation Deed in respect of the said mortgage. He submitted that LIC vide letter dated 5th August 2019 responded to the Applicants stating that the loan was sanctioned after considering the information provided by JV Partners and SPA hence denied the request of the Applicants.

17. Mr Jagtiani then submitted that the Applicants had thereafter terminated inter alia the JVA on 6th January 2023 after which LIC had filed proceedings against JV Partners under Section 7 Insolvency and Bankruptcy Code, 2016 (IBC) on 23rd January 2023 and 13th March 2023 before National Company Law Tribunal, Mumbai (NCLT). He submitted that it was thus that the Applicants was constrained to file the present Suit for a declaration that the said mortgage was void ab initio and non-binding on the Applicants. He pointed out that absent the grant of any interim relief the effect of the admission of the Petitions

filed by LIC in the NCLT would potentially cause the said land to be sold. It was thus that he submitted that the Applicants were entitled to ad interim reliefs inter alia from taking any coercive steps in furtherance of the said mortgage as also certain disclosures seeking details of the disbursements made by LIC.

18. Mr Jagtiani then placed reliance upon a judgement of this Court in the case of Paresh Gokuldas Suru and Ors vs. M/s Metalica Industries Ltd. and Ors.<sup>4</sup> to submit that where a mortgage was fraudulently and collusively created, it would only be the Civil Court which would have jurisdiction to grant the necessary relief and not the NCLT. He pointed out that the facts in the case of Paresh Gokuldas Suru (supra) were very similar to the facts of the present case as the same was also a case where the flats of the Plaintiffs in that case had also been fraudulently and collusively mortgaged by the developer and the Bank, the effect of which to deprive the Plaintiffs in that case of their respective flats. From the said judgement, Mr Jagtinai, pointed out that this Court had granted the Plaintiffs in that case interim relief after recording as follows:

"22. Thus, in a case such as in the present case, a collusive mortgage would put a party such as the SBI not only in a

4 Order of this court dated 11th April 2018 in Notice of Motion (L) 861 of 2018 in Commercial Suit (L) No. 453 of 2018.



position superior to all other creditors / stake holders but would also enable it to take advantage of its own wrong.

23. In the circumstances, as submitted by the Plaintiffs the Mortgage created by Defendant No. 1 and SBI cannot prima facie be construed as a mortgage in the eyes of law and that the said Mortgage is null, void ab initio so as to prevail over the rights of the Plaintiffs. Consequently, prima facie, no rights of any nature could be conferred upon SBI by Defendant No. 1. I am also in agreement with the Plaintiffs that given the facts and circumstances of the present case and the nature of the relief sought this Court being a Civil Court, alone would have the jurisdiction in dealing with the lis as set up in the plaint. The National Company Law Tribunal exercising powers as conferred under the I. & B. Code would not be the appropriate Tribunal due to the lack of power as conferred under the I. & B. Code. The bar of jurisdiction as contemplated under section 231 of the I. & B. Code on a plain reading also postulates that the bar would not apply in cases wherein the relief sought is beyond the scope of the said I. & B. Code. The I and B. Code has been promulgated with a view to cater to and adjudicate disputes with regard to non-payment of dues of creditors i.e. operational and/or financial creditors and the inability of the Debtor to pay the amounts as claimed. The jurisdiction of the NCLT does not empower or permit it to adjudicate upon issues regarding fraud such as in the present case wherein the fundamental challenge is to the validity of the creation of the mortgage or disbursement itself forming the underlining issue of the collusion as between the Debtor and the financial creditor. This is more so when the issues are being raised by affecting third parties who are neither the Debtor nor the Creditor.

24. In the case of Padma Ashok Bhatt vs. M/s Orbit Corporation Ltd. & Ors. (2018)1 Bom CR 275: 2017 SCC Online Bom 7740. ) in a similar situation, which arose under the SARFESI Act, a Single Judge of this Court upheld the

jurisdiction of this Court to entertain civil suits that allege fraud in the transaction between the Developer and the Bank. This is despite the provision of section 34 and 35 of the SARFESI Act, which oust the jurisdiction of the Civil Court. I am told that Appeal has been preferred from that Judgment but the Judgment has not been set aside as the Appeal is pending.

25. The latter part of Section 231 deals with the restrictive interference of civil courts in passing injunctions against the NCLT only with respect to any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority. Admittedly no order (of admission) has been passed by the NCLT as of date.

26. Therefore, in my view the entire application filed by SBI before the NCLT, is on the footing that they are financial creditors of the Defendant No.1 and have created a valid mortgage as a security in their favour. If SBI is allowed to proceed in the manner as they attempt, and exercise their right against the suit property in order to recover their loan the same would leave the Plaintiffs remediless despite having made very substantial payments towards their individual units (to the tune of Rs.65 Crore).

27. Under the above circumstances, the Plaintiffs have made out a prime facie case and as such Defendant No. 6 - SBI is restrained by an order of injunction from in any manner seeking to exercise any right in their favour with respect to the alleged mortgage created by Defendant No. 1 in favour of Defendant No. 6 - SBI. preferred from that Judgment but the Judgment has not been set aside as the Appeal is pending. 25. The latter part of Section 231 deals with the restrictive interference of civil courts in passing injunctions against the NCLT only with respect to any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority. Admittedly no order (of admission) has been

passed by the NCLT as of date. 26. Therefore, in my view the entire application filed by SBI before the NCLT, is on the footing that they are financial creditors of the Defendant No.1 and have created a valid mortgage as a security in their favour. If SBI is allowed to proceed in the manner as they attempt, and exercise their right against the suit property in order to recover their loan the same would leave the Plaintiffs remediless despite having made very substantial payments towards their individual units (to the tune of Rs.65 Crore). 27. Under the above circumstances, the Plaintiffs have made out a prime facie case and as such Defendant No. 6 - SBI is restrained by an order of injunction from in any manner seeking to exercise any right in their favour with respect to the alleged mortgage created by Defendant No. 1 in favour of Defendant No. 6 - SBI."

Mr Jagtiani then submitted that the aforesaid would squarely apply on all fours to the facts of the present case. He also in support of the same proposition placed reliance upon a judgement of this Court in the case of Padma Ashok Bhatt vs. Orbit Corporation Ltd. and others<sup>5</sup> and a judgment of the Delhi High Court in the case of Tajunissa and another Vs. Vishal Sharma and others<sup>6</sup> from which he pointed out that in case which involved fraud, the jurisdiction of the Civil Court could not be ousted.

5        2017 (6) Mh.L.J. 102.  
6        2022 SCC OnLine Del 18.

19. Mr Jagtiani then placed reliance upon a judgement of this Court in the case of Bharat Kishormal Shah vs. Yes Bank Ltd. and others <sup>7</sup> to submit that the jurisdiction of the Civil Court could never be barred since the jurisdiction of the NCLT was restricted and did not encompass the grant of the declaratory reliefs which the Applicants had sought for in the present Suit. It was thus he submitted that this Court would have jurisdiction to entertain the present Suit and the same would not be excluded under the provisions of the IBC etc.

20. It was basis the above that Mr Jagtiani submitted that the Applicants had made out a case for the grant of interim relief and absent such grant, grave prejudice and irreparable loss and injury would be caused to the Applicants.

21. Curiously the application for grant of ad interim relief was opposed by Respondent No. 2 and 3 i.e., the JV Partners against whom proceedings had been filed by LIC under Section 7 of the IBC. Mr Khandeparkar Learned Counsel appearing on behalf of the JV Partners submitted that he would be confining his submissions only to law, accepting the case as pleaded by the Applicants as being true.

<sup>7</sup> 2021 SCC OnLine Bom 12078

22. Mr Khandeparkar submitted that the SPA executed between the Applicants and JV Partners specifically permitted the JV Partner to mortgage the project lands and structures standing thereon. He submitted that there was no fictitious parallel JV Entity. He submitted that there was mere a misdescription of the JV Partners as 'Mortgagor' instead of 'Donee' in the Indenture of Mortgage dated 26th April 2017. He however submitted that such misdescription would not render the said Indenture of Mortgage invalid as the power conferred by SPA was subsisting while JV Partners executed said Indenture of Mortgage.

23. Mr Khandeparkar then submitted that as per Section 226 8 of Indian Contract Act, 1872 that the JV Partners being the agents of the Applicants were therefore bound by the contracts entered into by it as an agent of the Applicants since the same were done under the SPA. Mr Khandeparkar then submitted that Section 41 9 of Transfer of Property

8        226. Enforcement and consequences of agent's contracts. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

9        41. Transfer by ostensible owner.-- Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be violable on the ground that the transferor was not authorised to make it:

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Act provided that mortgages created by an ostensible owner or donee, i.e., JV Partners in this case, having authority to mortgage are binding on the real owners i.e. the Applicants. Basis this he submitted that none of the acts of JV Partners as claimed by the Applicants were in breach of JVA and SPA.

24. Mr Khandeparkar then invited my attention to paragraph 38 of the Complaint to submit that the JV Partners were aware of the mortgages since, December 2018. He submitted that the Applicants were aware of the fact that loan facilities were availed by Respondent No.1 and that the said fact was acknowledged by the Applicants in various documents executed by it with allottees. Basis this he submitted that the Applicants having knowledge and notice of mortgages from December 2018 had acquiesced to the acts of JV Partners and was thus estopped from raising objections regarding the same at this stage.

25. Mr Khandeparkar submitted that the Applicants' contention that there was no valid mortgage, could not be a ground to seek an injunction against proceedings filed before NCLT for the initiation of Corporate Insolvency Resolution Process (CIRP) under Section 7 of the

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

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IBC. In support of his contention that a Civil Court cannot grant an injunction in context of IBC proceedings he placed reliance upon a judgment of this Court in the case of PSL Limited vs Jotun India Private Limited.<sup>10</sup>

26. Mr Khandeparkar then submitted that the Applicants had an alternate and efficacious remedy under Section 60(5) <sup>11</sup> of the IBC. He pointed out that the Applicants could raise all the contentions that had been raised in the present Suit in an appropriate Application filed under Section 60(5) of the IBC which would then be decided by the NCLT. He also invited my attention to Section 18(f) <sup>12</sup> of the IBC and pointed out

<sup>10</sup> 2018 SCC OnLine Bom 36.

<sup>11</sup> Section 60: Adjudicating Authority for corporate persons

....

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of--

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

12 Section 18 Duties of interim resolution professional.

(1) The Interim Resolution Professional shall perform the following duties namely IAL-10152-2024 08-25-F.DOC that the same expressly contemplated that the Insolvency Resolution Professional (IRP) could only take control and custody of any asset over which the Corporate Debtor has ownership rights. He then pointed out that the explanation to the said Section made it clear that the definition of "assets" for the purpose of Section 18 of the IBC expressly clarified that the same would not include assets owned by a third party in possession of the corporate debtor. He thus submitted that the Applicants' contention that JV Partners' financial creditors did not have any rights in relation to mortgaged land and other mortgaged assets and, consequently, could not have executed a valid mortgage, could always be adjudicated before the NCLT in the proceedings which had been initiated by LIC. He submitted that the IRP would also have to make a determination of this factual aspect before proceeding to take .....

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including--(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;(ii) assets that may or may not be in possession of the corporate debtor;(iii) tangible assets, whether movable or immovable;(iv) intangible assets including intellectual property;(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;(vi) assets subject to the determination of ownership by a court or authority;

IAL-10152-2024 08-25-F.DOC into custody and control of the mortgaged land and other mortgaged assets.

27. Mr Khandeparkar then pointed out that the proceedings initiated by LIC were not to enforce a mortgage but were on account of the defaults stated to have been committed by the JV Partners in making payment of a financial debt. He pointed out that the nature of the proceedings under Section 7 of the IBC were such that the NCLT would have exclusive jurisdiction in respect thereof. He thus submitted that the Applicants having a remedy under the IBC could therefore not arrest or pre-empt the hearing of the proceedings filed by LIC under Section 7 of the IBC by filing of the present Suit.

28. Mr Khandeparkar also pointed out that granting of an injunction at the instance of a joint venture partner to arrest a proceeding which was in rem, initiated by a Financial Creditor, would indeed set a wrong precedent. He pointed out that it was not the case of the Applicants that LIC had not granted the said facilities to the JV Partners. He therefore submitted that the issue as to whether there in fact was a debt and a consequential default was best left to the wisdom of the NCLT.

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29. Mr Khandeparkar submitted that JV Partners were contesting the proceedings filed by LIC before the NCLT and were confident that the same would be dismissed. He however clarified that the reason the present application was being opposed by the JV Partners was because



(a) the pendency of proceedings in the NCLT was prejudicial to the interest of the JV Partners as the same was creating an impediment for procuring further finance; (b) the prayer sought for by the Applicants would necessarily entail a definitive finding of fraud against the JV Partners, which finding would impact both the pending civil and criminal proceedings; and (c) that the Applicants had despite attempts to amicably resolve the matter, initiated various applications against JV Partners before Economic Offences Wing which had led to arrest of the directors of the JV Partners.

30. Mr Khandeparkar submitted that the Complaint was bereft of the necessary details of fraud, without prejudice, to this contention he pointed out that after the Applicants' discovery of this alleged fraud, the Applicants had acquiesced to the creation of the mortgage and JV Partners authority to execute such mortgage and hence there was no question of the Applicants now alleging fraud and/or collusion on the part of the JV Partners and LIC IAL-10152-2024 08-25-F.DOC

31. Mr Khandeparkar then submitted that proceedings filed under the provisions of Section 7 of the IBC were materially different from proceedings under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 ("SARFAESI Act"). He pointed out that under the provisions of the SARFAESI Act a Secured Creditor is in fact enforcing its mortgage unlike in a Petition filed under Section 7 of the IBC where the only issue was whether there had been a default of a financial debt. He therefore submitted that the judgments in the context of the SARFAESI Act would have no application to the facts of the present case. He reiterated that the Applicants in this case had alternate efficacious remedy under Section 60(5) of the IBC for adjudication of the grievances. It was thus he submitted that no ad-interim relief ought to be granted to the Applicants.

32. Mr Kapadia, Learned Counsel appearing on behalf of LIC supplementing the submission made by Mr Khandeparkar first submitted that the jurisdiction of this Court was barred under Section 63 of the IBC. He submitted that Section 63 of the IBC expressly bars Civil Court Not to have Jurisdiction: No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction.

IAL-10152-2024 08-25-F.DOC barred all Civil Courts from entertaining any Suit or Proceeding in respect of any matter on which the NCLT has jurisdiction under the IBC. He submitted that what was sought for by prayer clause (a) of the Interim Application was in fact a bar on the Petitions filed under Section 7 of the IBC filed by LIC. He then submitted that any orders passed in the present Interim Application would, therefore, impinge upon the jurisdiction of the NCLT and would therefore be in the teeth of Section 63 of the IBC. Mr Kapadia also placed reliance upon the judgement of this Court in the case of PSL limited (supra) which he pointed out was upheld by the Division Bench of this Court in Jotun India Vs. PSL Limited<sup>14</sup> and was approved by the Hon'ble Supreme Court in the case of Forech India Limited vs Edelweiss ARC Limited & Anr. <sup>15</sup> It was thus he submitted that the jurisdiction of the Civil Court being expressly barred, no injunction or order of any kind which would affect the NCLT in proceedings with the Petitions filed by LIC under Section 7 of the IBC could be passed.

33. Mr Kapadia then in furtherance of the submissions made by Mr Khandeparkar that the Applicants remedy lay under the provisions of Section 60(5) of the IBC, placed reliance upon the case of Alliance 14 2018 SCC OnLine Bom 1952.

15 (2019) 18 SCC 549.

IAL-10152-2024 08-25-F.DOC Broaddband Service Pvt Ltd vs Manthan Broadband Services Pvt Ltd 16 from which he pointed out that the Petitioner in that case who was a pledgee of certain shares had approached the Calcutta High Court on the apprehension that the Liquidator would wrest control and take possession of the pledged shares thereby making them a part of the liquidation assets of the Company in liquidation. He pointed out that in this context, the Calcutta High Court had held as follows:

"28. ... as per the provisions of 60(5) of IBC, 2016 the petitioner can approach the NCLT instead of filing the instant application before this Court.

29. As per Section 238 of the IBC, 2016 is having override effect in any other law for the time being in force. In view of my prima facie findings that this Court cannot pass any interim order at this stage. This Court is of the view that the matter in issue in the suit can be more appropriately and effectively decided and adjudicated by the NCLT."

It was thus he submitted that the Applicants ought to have filed an Application under Section 60(5) of the IBC, since the NCLT had the necessary jurisdiction to decide issues of law and fact as had arisen in the present case.

34. He then pointed out that the Petitions under Section 7 of the IBC had been filed on 23rd January 2023 and 13th March 2023 16 2022 SCC OnLine Cal 4114.

IAL-10152-2024 08-25-F.DOC respectively which was well prior to the filing of the present Suit which was filed only on 4th December 2023. He submitted that the moot question which fell for consideration was whether the mortgage property was the property of the Applicants and thus could not have been mortgaged by the JV Partners and was one which in fact could be agitated before and decided by the NCLT. In support of his contention, that the NCLT was competent to decide this issue he placed reliance upon a judgement of the NCLAT in the case of Ramesh Singh Rawat vs. SPG Global Distribution Pvt Ltd.<sup>17</sup> He pointed out that the said decision had also been followed by the NCLT, Mumbai in the case of Shaikh Mahboob Subani & Ors vs Liquidator of K.K. Welding Limited<sup>18</sup> wherein the NCLT, Mumbai had after considering two conflicting submissions on ownership of certain immovable properties of the Corporate Debtor had directed the Liquidator to keep the subject property outside the liquidation estate of the Corporate Debtor. It was thus he submitted that the proper course of action was for the Applicants to approach the NCLT under Section 60(5) and seek protective orders. <sup>17</sup> MANU/NL/0143/2024.

<sup>18</sup> MANU/NC/0871/2024.

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35. Mr Kapadia, then pointed out that Section 231 19 of the IBC also created a bar against all Civil Courts from having jurisdiction in respect of any matter, which the Adjudicating Authority was empowered under the IBC to pass any order. He pointed out that under section 7(5) of the IBC, the NCLT was specifically empowered to pass orders, admitting, or rejecting an application under Section 7(1) of the IBC as well as any application filed under Section 60(5) of the IBC. He also pointed out that Section 231 of the IBC also barred all Courts from granting any injunction in respect of any action taken or to be taken in pursuance of any order passed by the NCLT under the IBC. It was thus his submission that this Court by virtue of Section 231 of the IBC was specifically barred from granting any injunction over the actions to be taken by the NCLT in the proceedings filed by LIC.

36. Mr Kapadia then additionally submitted that the jurisdiction of this Court would also be barred under Section 64(2) 20 of the IBC from 19 231. Bar of jurisdiction. No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority or Board is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority or Board under this Code. 20 Section 64 - Expeditious disposal of applications. (2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal IAL-10152-2024 08-25-F.DOC granting any injunction in respect of any action taken or to be taken in pursuance of any power conferred on the NCLT under the IBC. He pointed out that Section 430<sup>21</sup> of the Companies Act 2013 similarly barred the jurisdiction of the Civil Court from granting an injunction in respect of any action taken or to be taken in pursuance of any power conferred under the Companies Act on the NCLT.

37. Mr Kapadia placed reliance upon a judgement of the Hon'ble Supreme Court in the case of Ghanshyam Sarda vs Shiv Shankar Trading Company<sup>22</sup> in which the Hon'ble Supreme Court had when considering the bar of jurisdiction under the provisions of the Sick Industrial Companies Act 1985 (SICA) had held that so long as the jurisdiction of the BIFR (the relevant Tribunal under the provisions of SICA) had correctly been exercised, the jurisdiction of the Civil Court to grant even temporary injunctive relief was completely excluded. He under this Code 21 Section 430 - Civil court not to have jurisdiction. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal. 22 (2015) 1 SCC 298.

IAL-10152-2024 08-25-F.DOC also placed reliance upon the judgement of the Hon'ble Supreme Court in the case of Mardia Chemicals Ltd vs Union of India<sup>23</sup> to point out that the Hon'ble Supreme Court had in that case considered the provisions of Section 34 of the SICA, which not only barred the Civil Court's jurisdiction with respect to matters over which cognizance had already been

taken by the DRT (the relevant Tribunal under the provisions of SARFAESI) but also over matters of which cognizance could be taken by the DRT in the future. He thus submitted that whether or not an application under Section 7 of the IBC of the IBC was to be admitted or not was purely a question which was within the power and jurisdiction of the NCLT. He therefore submitted that any order injuncting the NCLT from acting in pursuance of these powers would fall foul under Section 64(2) of the IBC as also Section 430 of the Companies Act as held in the judgement of this Court in the case of PSL Limited (supra) as also a judgement of the Calcutta High Court in the case of Alliance Broadband Service Pvt Ltd (supra).

38. Mr Kapadia then pointed out that Section 238 of the IBC which provided for a non-obstante clause by which the provisions of IBC would override any law which was contrary thereto. He pointed out that the facts of the present case, the Applicants had not sufficiently 23 (2004) 4 SCC 311.

IAL-10152-2024 08-25-F.DOC explained as to why this Court and not the NCLT had jurisdiction to entertain the present proceeding and/or under which legal provisions the relief was sought for. He submitted that in any view of the matter even assuming the Applicants had placed reliance upon such provision, the same would be superseded/overridden by Section 238 of the IBC.

39. Mr Kapadia then placed reliance upon the judgement of the Hon'ble Supreme Court in the case of Nahar Industrial Enterprises vs Hong Kong and Shanghai Banking Corporation 24 and the judgement of this Court in the case of Rentworks India Pvt. Ltd. Small Industries Development Bank of India<sup>25</sup> and PSL Limited (supra) to submit that it was now well settled that the NCLT was not a Court subordinate to the High Court. He then placed reliance upon the provisions of Section 41(b)<sup>26</sup> of the Specific Relief act 1963 to submit that this Court could not therefore grant an injunction on the institution or prosecution of any proceedings before the NCLT. In support of his contention, he 24 (2009) 8 SCC 646.

25 2014 SCC OnLine Bom 258 26 Section 41. Injunction when refused.

An injunction cannot be granted--

...

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

IAL-10152-2024 08-25-F.DOC placed reliance upon the decision of the Hon'ble Supreme Court in the case of Cotton Corporation of India Limited vs United Industrial Bank Limited.<sup>27</sup> Mr Kapadia also clarified that this Hon'ble Court while entertaining a Suit under its Ordinary Original Civil Jurisdiction did not unlike in proceedings under Article 226 and 227 of the Constitution of India have supervisory jurisdiction over the NCLT. It was thus he submitted that this Court could not pass any order of injunction or restraint in LIC prosecuting the Petitions filed under Section 7 of the IBC before the NCLT, Mumbai as the same would fall foul of the provisions of Section 41(b) of the

Specific Relief Act.

40. Mr Kapadia then placed reliance upon a judgement of the NCLAT in the case of Ashmeet Singh Bhatia vs Pragati Impex India Pvt Ltd<sup>28</sup> to submit that the NCLAT had therein observed that the adjudicating authority was fully entitled to while exercising jurisdiction under Section 65 of the IBC to close the CIRP process and pass consequential orders and the fact that an application under Section 7 of the IBC had been admitted, did not denude the jurisdiction of the adjudicating authority to examine the application under Section 65 of the IBC. He submitted that even the approval of a resolution plan would 27 (1983) 4 SCC 625.

28 2024 SCC OnLine NCLAT 462.

IAL-10152-2024 08-25-F.DOC not ipso facto extinguish any legitimate right of a party with regards to title of a property, particularly one that was disputed and subject to civil proceedings.

41. He then placed reliance upon a Judgement of the NCLT in Shubham Mercantile Pvt Ltd vs Bank of Baroda, 29 from which he pointed out that NCLT, Mumbai had held as follows:

"...since this Authority does not have the requisite jurisdiction to decide title ownership of the property in question which consists of land and building erected thereupon, the same should not be considered as an asset of the Corporate Debtor merely on account of the approval of the resolution plan under the Code. However, the parties shall be at liberty to approach appropriate Civil Court/ Authority/ Forum having jurisdiction over the matter for getting ascertained the ownership rights in the properties in question and the approval of the resolution plan in this case would not affect the rights of the respective parties in the aforementioned properties, if any, so far as the question of title is concerned."

Basis the above, he submitted that the question material to the captioned Suit and consequently to the Interim Application including whether the Indenture of Mortgage dated 25 th October 2018 was valid and binding insofar as it concerned, the subject assets were all questions which could be decided by the Civil Court, Tribunal or 29 Order dated 8th September 2023 of National Company Law Tribunal, Mumbai in IA (I.B.C.) 3124 of 2022 IAL-10152-2024 08-25-F.DOC Authority independent of the CIRP and therefore mere admission of the Application filed by LIC and the initiation of the CIRP in respect of JV Partners or even the approval of the resolution plan would not ipso-facto extinguish any legitimate rights of the Applicants.

42. He then submitted that the grant of injunction would be in the teeth of settled law regarding IBC proceedings. He pointed out that it was well settled that Application under Section 7 of the IBC was required to be admitted when there was a default of a financial debt. He placed reliance upon the Judgment of the Hon'ble Supreme Court in the case of Innovative Industries Ltd vs ICICI Bank Ltd, 30 In support of his contention that the moment the adjudicating authority is satisfied that a default has occurred, the Application must be admitted. He also placed reliance upon a Judgement of the Hon'ble Supreme Court in the case of M. Suresh Kumar Reddy vs Canara Bank & Ors 31 in which

the Hon'ble Supreme Court reiterated what was laid down in the case of Innovative Industries Ltd (Supra) held as follows:

"11. Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7, ... If NCLT finds that there is a debt, but it has not become due and payable, 30 (2018) 1 SCC 407.

31 (2023) 8 SCC 387.

IAL-10152-2024 08-25-F.DOC the application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application.

12. ....

13. ....

14. ...the view taken in Innovative Industries still holds good."

Basis the above, he submitted that there is no question of granting of any relief.

43. Mr Jagtiani, in Rejoinder firstly reiterated that the Respondents had not disputed any part of the case pleaded by the Applicants on merits and had thus inter alia accepted that the mortgage was a fraudulent one. He then took pains to point out that though the Respondents had sought to draw a distinction between the judgements cited in the context of the SARFAESI Act, there was no answer forthcoming to in any manner distinguishing the judgment of this Court in the case of Paresh Gokuldas (Supra) in which this Court had specifically stated that in cases where a mortgage was fraudulently and collusively created, it would only be the Civil Court which would have jurisdiction to grant the necessary relief and not the NCLT. He also pointed out from the judgment of this Court in the case of Bank of Baroda through its Branch Manager vs Gopal Shriram Panda and IAL-10152-2024 08-25-F.DOC Another<sup>32</sup> that this court had noticed that special tribunals were created to enforce specific rights arising in the context of insolvency etc. of the corporate debtor and the same therefore were not meant to seize the jurisdiction of civil courts or redress any common law rights of citizens which have been infringed.

44. Mr Jagtiani then in dealing with the judgements relied upon by Mr Kapadia in the case of Alliance Broadband Services (supra) and Ramesh Singh Rawat (supra) submitted that the same in fact do not further the case of LIC at all since the same clarify/distinguish that in proceedings that arise de hors the insolvency resolution process, the Civil Courts would have jurisdiction. He pointed out from the judgement of the NCLT in the case of Ramesh Singh Rawat (supra) that the NCLT, Mumbai had specifically held as follows, viz.:

"18. In so far as the decision rendered in the case of Embassy Property Developments Pvt. Ltd. (Supra) is concerned, it was a case where the corporate debtor was holding a

mining lease granted by the Government of Karnataka which was to expire on 25.05.2018. A notice for premature termination of the lease was issued on 09.08.2017, on the allegation of violation of statutory rules and the terms and conditions of the lease deed, no order of termination had been passed till the date of initiation of the CIRP. The IRP therein addressed a letter dated 14.03.2018 to 32 2021 SCC OnLine Bom 466.

IAL-10152-2024 08-25-F.DOC the Chairman of the monitoring committee as well as the director of mines and geology informing them of the commencement of CIRP. He also wrote a letter dated 21.04.2018 to the director for seeking the benefit of deemed extension of the Company Appeal (AT) (Insolvency) No. 872 of 2023 lease beyond 25.05.2018 upto 31.03.2020 in terms of Section 8-A (6) of the mines and minerals (development and regulation) Act, 1957. Since, no response was found, therefore, RP filed a writ petition seeking a declaration that the mining lease should be deemed to be valid upto 31.03.2020 but during the pendency of the writ petition, Government of Karnataka passed an order dated 26.09.2018, rejecting the proposal for deemed extension. The RP moved an application before the NCLT for setting aside the order of the Government of Karnataka and seeking a declaration that the lease should be deemed to be valid upto 31.03.2020 which was allowed by the NCLT and ultimately the Adjudicating Authority directed the Government of Karnataka to execute the supplement lease deed. In the background of these facts, the Hon'ble Supreme Court has held that "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 RP, take a bypass and go before NCLT for the enforcement of such a right" However, facts of the present case are altogether different from the aforesaid case. In so far as the decision in the case of Tata Consultancy Service Limited (Supra) is concerned, the Hon'ble Supreme Court has reiterated that the RP can approach the NCLT for adjudication of disputes which relate to the insolvency resolution process, but when the dispute arises dehors the insolvency of the corporate debtor, the RP must approach the relevant competent authority. Similar view has been expressed by this Court in the case of Sicom Ltd. (Supra)."

IAL-10152-2024 08-25-F.DOC He also placed reliance upon the judgement of this Court in the case of Rajendra Bansal vs Reliance Communication 33 which in turn refers to judgments of the Hon'ble Supreme Court in the case of Embassy Property Developments Pvt. Ltd. Vs. State of Karantaka 34 and Gujrat urja Vikas Nigam Ltd. Vs. Amit Gupta,35, and has held as follows, "(e) In Embassy Property (Supra) after underscoring that the NCLT does not have general jurisdiction like that of a Civil Court, the Hobn'ble Supreme Court held that under Section 60(5)(c) of the IBC, the NCLT cannot exercise jurisdiction over any and every issue con cerning the corporate debtor. The Court held as follows:

"37. ...The only provision which can probably throw light on this question would be sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of sub- section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the Government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in clause (c) of sub-section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of the IBC is interpreted to include all questions of law or facts under the sky, an Interim 33 Order dated 4th January 2023 of this court in Interim Application No. 1161 of 2020 in First Appeal No. 1539 of 2012.

34 (2020) 13 SCC 308.

35 (2021) 7 SCC 209.

IAL-10152-2024 08-25-F.DOC Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260-A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results. [It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression "operational debt" under Section 5(21), making the Government an "operational creditor" in terms of Section 5(20). The moment the dues to the Government are crystallised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the adjudicating authority, namely, the NCLT.] .....

40. If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(1)(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 to 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 duties 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". Sections 18 and 25 do



not use the IAL-10152-2024 08-25-F.DOC expression "property". Another important aspect is that under Section 25(2)(b) of the 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. Sections 25(1) and 25(2)(b) reads as follows...

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).

41. 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."

(emphasis supplied)

(f) In Gujarat Urja (Supra) the Hon'ble Supreme Court laid down the test to ascertain the matters which can be adjudicated upon by the NCLT under Section 60(5)(c) and held that only those disputes which arise solely from the insolvency of the corporate debtor can be entertained by the NCLT under this provision. The Court observed as follows:

"69. ... Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor. However, in doing so, we issue a note of caution to NCLT and Nclat to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or IAL-10152-2024 08-25-F.DOC relate to the insolvency of the corporate debtor. The nexus with the insolvency of the corporate debtor must exist."

(emphasis supplied) Basis this, Mr Jagtiani submitted that if the case of fraud is mae out, then the NCLT will not have jurisdiction to adjudicate upon such matters.

45. On the aspect of delay, Mr Jagtiani denied that there was in fact any delay by pointing out the steps taken by the Applicants as set out in the Plaint. He then submitted that even assuming there was delay on the part of the Applicants the same would not by itself be a ground to deny the Applicants reliefs if a case for the grant of such relief was otherwise made out. In support of his contention, he placed reliance upon a judgement of this Court in the case of Rajiv Sanghvi Vs Pradip Kamdar.<sup>36</sup>

46. After having heard Learned Counsel of the Parties, considering their rival contentions as also the case law cited, I find that the Applicants had made out a case for the grant of limited ad interim

reliefs for the following reasons, viz.

36 Order dated 30th June 2022 of this court in Interim Application No.571 of 2022 in Suit No. 44 of 2021.

IAL-10152-2024 08-25-F.DOC A. The Respondents by proceeding on the basis of a demurer, have inter alia accepted that the mortgage created by the JV Partners in favour of LIC is both fraudulent and collusive. The question therefore which immediately falls for consideration is that in such a fact scenario in whose favour would the balance of convenience lie, (i) the party affected/likely to be affected by such fraudulent and collusive acts or (ii) the parties who have collusively or otherwise committed such fraud. To my mind, there can only be one answer to this question i.e. the balance of convenience would be wholly in favour of the party affected/likely to be affected by the fraudulent and/or collusive act. To hold otherwise would be putting a premium on dishonesty. Thus, in such a fact scenario, the jurisdiction of the Civil Court cannot be said to have been ousted. Additionally, I find that the Applicants' reliance upon the finding of this Court in the case of Paresh Gokuldas (supra) to be entirely apposite to the facts of the present case. Since however, extensive arguments were advanced on the exclusion of jurisdiction of this Court, I must deal with the same.

B. The primary contention of the Respondents was that the Applicants ought to file an Application under Section 60 (5) of the IBC IAL-10152-2024 08-25-F.DOC wherein the Petitioner would have the liberty raise all the contentions which have been raised in the Suit. This contention to my mind on the face of it in the facts of the present case is untenable. A plain reading of Section 60 of the IBC makes clear that the jurisdiction of the Adjudicating Authority is, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors. Thus, any application made under Section 60(5) would necessarily have to be one which arises from or in relation to the insolvency resolution or liquidation process of a corporate debtor and would not include an independent claim against the corporate debtor or like in this case, even the financial creditor in which the relief which has been sought for could infact never be granted by the NCLT C. The aforesaid was made clear in a judgement of this Court in the case of Rajendra Prasad Bansal (supra) in which it was held that the NCLT would have jurisdiction only on those issues which arise solely out of the insolvency of the corporate debtor and that can be adjudicated upon by the NCLT under Section 60(5) of the IBC. Clearly, the issue which arises for determination in the present Suit neither arises solely out of the insolvency of the Corporate Debtor and is also not one which can be adjudicated upon IAL-10152-2024 08-25-F.DOC by the Corporate Debtor. Hence in my view the judgments of the NCLT in the case of Alliance Broadband Services Private Limited (supra) and Ramesh Singh Rawat (supra) upon which reliance was placed by Mr Kapadia would be of no assistance in the facts of the present case since the issue in the present Suit is de hors the Petition filed by LIC.

D. I cannot also, at this stage, accept the contention of Mr Khandeparkar that the mortgage was validly created by virtue of the SPA. Even assuming the SPA permitted the creation of such a mortgage, the same could only have been used for completion of the said project and not on any other objects as has been done by the JV Partners in the present case. The contention of Mr Khandeparkar that there has been a misdescription in the deed of mortgage to describe the JV

Partners as "Mortgagors" instead of "Donee" is far too simplistic a contention, especially absent any pleading to that effect. Also, the fact that LIC has in its filing before CERSAI described the JV Partners as owners of the mortgaged land which militates against the JV Partners' contention that this was a misdescription. Also, absent any pleading to this effect, I am unable to accept the contention that the Applicants had in any manner acquiesced to the said loan.

IAL-10152-2024 08-25-F.DOC E. Equally, the contention of delay in the facts of the present case would not in my view deny the Applicants the grant of ad interim reliefs. It is well settled that delay by itself would not deprive a party to the grant of interim relief but is a factor to be considered when balancing the equities. In my view, given the Respondents have today accepted that the said mortgage had been fraudulently entered into, the delay if any, would certainly not deprive the Applicants to the grant of limited ad interim relief that I propose to pass.

F. There is no dispute to the fact that the jurisdiction of the NCLT is not subordinate to that of the High Court and that under Section 7 of the IBC, it is only the NCLT which would have the jurisdiction to decide the issue of debt and default. Also, there is no dispute about the bar of jurisdiction of the Civil Court under Section 63 and also 231 of the IBC. However, such bar would only apply in cases where the NCLT would have exclusive jurisdiction over the subject matter of the dispute/issues. It is not as though the Civil Courts jurisdiction would be denuded in all cases, especially when it is ex facie clear that the dispute is one in respect of which the NCLT could never grant relief. Thus, the exclusion of jurisdiction has to be the qua subject matter and if the IAL-10152-2024 08-25-F.DOC subject matter/issue in dispute is one which falls outside the exclusive jurisdiction of the NCLT, the Civil Courts will have jurisdiction. Thus, provisions which exclude the Civil Courts' jurisdiction cannot be read so widely as to expand the scope of the jurisdiction of the NCLT over civil disputes which fall outside the four corners of the IBC in the manner suggested by the Respondents. I find that the judgement in the case of PSL Limited (supra) also have no application in the facts of the present case as the issue which arose for determination in that case pertained to jurisdiction of NCLT after an order of admission or appointment of provisional liquidator by company court and was not one of fraud as in the present case. In any view of the matter, I do not propose to stay the proceedings before the NCLT.

47. Hence, for the reasons mentioned hereinabove I deem it fit to grant ad interim relief in terms of prayer clauses (a), (b) and (c), which read as follows:

"(a) That pending the hearing and final disposal of the present Suit, the Respondents by themselves or through their servants, agents, employees and representatives be restrained by an order and injunction of this Hon'ble Court from directly or indirectly taking any coercive steps or other measures and/or acting in furtherance of the Loan Agreement dated 5th October 2018 and the Indenture of Mortgage dated 25th October 2018 in so far as they concern the Project and/or the Phase IV Property, including but not limited to coercive steps or other measures under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and/or in the Company Petition No. 336 of 2023 and Company Petition No. 468 of 2023 before the NCLT;

(b) That pending the hearing and final disposal of the present Suit, Respondent No. 4 be directed to disclose on oath the following in a time bound manner:

i. details of all disbursement of funds made by Respondent No. 4 pursuant to the LIC Sanction Letter, the Loan Agreement, the amended LIC Sanction Letter and the Modification to Loan Agreement;

ii. details of all repayments made jointly or severally by Respondent Nos. 1 to 3, 5 and 6 under the Loan Agreement and/or the Modification to Loan Agreement and the manner in which such repayments have been apportioned/ adjusted by Respondent No.4 in their books of accounts;

(c) That pending the hearing and final disposal of the Suit, the Respondents by themselves, their servants, agents, employees and representatives be restrained by an order and injunction of this Hon'ble Court from directly or indirectly selling, disposing, alienating, transferring, mortgaging, encumbering or parting with possession of, dealing with or creating any third-party rights whatsoever or holding themselves out to be owners/ charge holders/ mortgagors/ mortgagees of the Phase IV Property."

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48. It is clarified that the disclosure in terms of prayer clause (b) as reproduced above is to be made within a period of two weeks from the date on which this order is uploaded.

49. I make it clear that this order shall not in any manner act as an injunction against NCLT from proceeding with Company Petition No. 336 of 2023 and Company Petition No. 468 of 2023.

50. Affidavit in Reply, if any, to be filed and served on or before 9th September 2024. Affidavit in Rejoinder, if any, to be filed and served on or before 20th September 2024.

51. List the matter for hearing on 3rd October 2024.

(ARIF S. DOCTOR, J)