Kotak Mahindra Bank Ltd. vs A. Balakrishnan on 30 May, 2022

Author: B.R. Gavai

Bench: A.S. Bopanna, B.R. Gavai, L. Nageswara Rao

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.689 OF 2021

KOTAK MAHINDRA BANK LIMITED ...APPELLANT(S)

VERSUS

A. BALAKRISHNAN & ANR. ...RESPONDENT(S)

JUDGMENT

B.R. GAVAI, J.

1. The present appeal challenges the judgment and order dated 24th November, 2020 passed by the learned National Company Law Appellate Tribunal, New Delhi (hereinafter referred to as "NCLAT") in Company Appeal (AT) (Insolvency) No. 1406 of 2019, thereby allowing the appeal filed by the respondent no. 1 – Director and reversing the order dated 20 th September, 2019 passed by the learned National Company Law Tribunal, Chennai (hereinafter referred to as "NCLT"), whereby the application filed by the appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" for short) was admitted. The learned NCLAT while allowing the appeal held that the application filed by the appellant was time-barred and that issuance of Recovery Certificate would not trigger the right to sue.

2. A brief factual background giving rise to the present appeal is as under:

3. During the period between the years 1993 – 1994, Ind Bank Housing Limited (hereinafter referred to as "IBHL") sanctioned separate credit facilities to these companies (hereinafter referred to as the "borrower entities"):

(i) M/s Green Gardens (P) Ltd,

(ii) M/s Gemini Arts (P) Ltd. and

(iii) M/s Mahalakshmi Properties & Investments (P) Ltd. The respondent no. 2 M/s Prasad Properties and Investments Pvt. Ltd. (hereinafter referred to as "the Corporate Debtor") stood as the

Corporate Guarantor/mortgagor and mortgaged its immovable property, situated in Guttala Begampet Village in Ranga Reddy District of Andhra Pradesh, by deposit of title deeds to secure the aforesaid credit facilities sanctioned to the borrower entities.

4. These borrower entities defaulted in repayment of the dues and subsequently IBHL classified all the facilities availed by them as Non – Performing Asset ("NPA" for short) in November 1997. Pursuant thereto, IBHL filed three civil suits before the High Court of Madras, against the borrower entities and the Corporate Debtor, for recovery of the amounts due. During the pendency of the suits, the appellant – Kotak Mahindra Bank Ltd. (hereinafter referred to as "KMBL") and IBHL entered into a Deed of Assignment dated 13 th October, 2006, wherein IBHL assigned all its rights, title, interest, estate, claim and demand to the debts due from borrower entities, to KMBL.

5. Pursuant to the said deed, KMBL and the borrower entities entered into a compromise on 7 th August, 2006 (hereinafter referred to as "the said compromise"). The High Court vide a common judgment dated 26 th March, 2007, recorded the said compromise between the parties to the effect that the Corporate Debtor was jointly and severally liable to pay the amount of Rs. 29,00,96,918/☐ due from the borrower entities to KMBL. It was claimed by KMBL that the borrower entities failed to make payments as per the said compromise and thus, KMBL issued a Demand Notice dated 26th September 2007 to them and the Corporate Debtor under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act"). The said notice was followed by a Possession Notice dated 10th January, 2008 issued under Section 13(4) of the SARFAESI Act, by the KMBL due to default in payment by the Corporate Debtor of the amount demanded. The KMBL further issued a Winding Up Notice dated 6 th May, 2008 under sections 433 and 434 of the Companies Act, 1956 to the Corporate Debtor.

6. Aggrieved by the continuous default of payment by the Corporate Debtor and the borrower entities, KMBL filed three applications under Section 31(A) of the erstwhile Recovery of Debts Due to Banks and Financial Institutions Act, 1993, now known as the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as "the Debt Recovery Act") before the Debt Recovery Tribunal ("DRT" for short) for issuance of Debt Recovery Certificates in terms of the said compromise entered into between the parties. The said applications came to be allowed by the DRT vide orders dated 31st March, 2017 and 30th June, 2017, and separate Recovery Certificates dated 7 th June, 2017 and 20th October, 2017 came to be issued against each of the borrower entities and the Corporate Debtor. In the meanwhile, from the year 2008 to 2017, certain proceedings between the parties, with regard to a contempt petition filed by the KMBL as well as the dismissal of applications filed for issuance of Recovery Certificate and the subsequent grant of relief in a review application filed by the KMBL, were underway.

7. On the basis of the aforementioned Recovery Certificates, on 5th October, 2018 KMBL, claiming to be a financial creditor, filed an application under Section 7 of IBC, being CP/1352/IB/2018 before the learned NCLT and sought initiation of Corporate Insolvency Resolution Process ("CIRP" for short) against the Corporate Debtor, claiming an amount of Rs. 835,93,52,369/☐ The said application came to be admitted by the learned NCLT on 20th September, 2019. The respondent no.

1, Director of the Corporate Debtor filed an appeal being Company Appeal (AT) (Insolvency) No. 1406 of 2019, against the said order of the learned NCLT before the learned NCLAT. The grounds raised by the respondent no. 1 in the said appeal were with regard to the application for initiating CIRP against the Corporate Debtor being filed after the expiry of limitation period. The said appeal filed by the respondent no. 1 came to be allowed vide impugned judgment and order dated 24 th November, 2020 in the aforementioned terms.

8. We have heard Shri Guru Krishna Kumar, learned Senior Counsel appearing on behalf of KMBL, Shri S. Prabhakaran and Shri V. Prakash, learned Senior Counsel appearing on behalf of the respondent No.1 and Shri K.V. Viswanathan, learned Senior Counsel appearing on behalf of the respondent No.2.

9. Shri Guru Krishna Kumar, learned Senior Counsel submitted that the issue involved in the present proceedings is no more res integra. It is submitted that this Court in the case of Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy and another1 has held that once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount specified in the Recovery Certificate. It is submitted that in view of the law laid down by this Court in the case of Dena Bank (supra), the present appeal deserves to be 1 (2021) 10 SCC 330 allowed inasmuch as, the application under Section 7 of the IBC, filed by KMBL on 5th October, 2018 is within the period of three years from the dates of issuance of the Recovery Certificates being 7th June, 2017 and 20th October, 2017.

10. Shri Guru Krishna Kumar further submitted that the conduct of the respondents is that of a dishonest borrower. Having entered into the consent terms, which are decreed by the High Court of Madras vide order dated 26 th March, 2007 and having not complied with the terms contained in the compromise decree, it is now not open to the respondents to oppose the admission of application under Section 7 of the IBC.

11. Shri K.V. Viswanathan, learned Senior Counsel, on the contrary, submitted that the cause of action has merged into the order of issuance of the Recovery Certificate by the DRT and therefore, by application of the doctrine of merger, the debt no more survives. Shri Viswanathan further submitted that the initiation of CIRP by KMBL would amount to filing of second proceedings for the very same cause of action and thus would be hit by the doctrine of res judicata and particularly, per rem judicatam. In this respect, he relied on the judgments of this Court in the cases of State of U.P. vs. Nawab Hussain2 and Gulabchand Chhotalal Parikh vs. State of Bombay (now Gujarat)3.

12. Shri Viswanathan further submitted that in view of the limited legal fiction under Section 19(22A) of the Debt Recovery Act, the Recovery Certificates cannot be treated as “decree” for all purposes. It is submitted that assuming that a decree□holder may initiate CIRP as a financial creditor, but the holder of a Recovery Certificate granted under Section 19(22) of the Debt Recovery Act is not entitled to initiate CIRP under the IBC as a financial creditor or a decree holder. He submitted that sub□sections (22) and (22A) of Section 19 of the Debt Recovery Act were brought on the statute book by The Enforcement of Security Interest and Recovery of Debts Laws and

Miscellaneous Provisions (Amendment) Act, 2016 (Act No. 44 of 2 (1977) 2 SCC 806 3 (1965) 2 SCR 547 2016), which was enacted on 16th August, 2016 and brought into force from 4th November, 2016. He submits that the deeming fiction contained therein applies only for the purposes of initiation of winding up proceedings. The deeming fiction cannot be extended for any other purpose. In this respect, he relies on the judgment of this Court in the case of Paramjeet Singh Patheja vs. ICDS Ltd.4.

13. Shri Viswanathan further submitted that after 15 th November, 2016, i.e., the date on which Section 255 of the IBC was brought into force, the Recovery Certificate holders lost their right to use their certificate as a "decree" for initiating winding-up proceedings under the Companies Act. Shri Viswanathan relied on the judgment of the Tripura High Court in the case of Subhankar Bhowmik vs. Union of India and another5 in support of his submission that a decree-holder cannot initiate CIRP. He submitted that the Special Leave Petition (Civil) No.6104 of 2022 challenging the judgment of the 4 (2006) 13 SCC 322 5 2022 SCC OnLine Tri 208 Tripura High Court in the case of Subhankar Bhowmik (supra) has been dismissed by this Court on 11 th April, 2022.

14. Shri Viswanathan submitted that the judgment of this Court in the case of Dena Bank (supra) is per incuriam. He submitted that the said judgment is rendered without considering the provisions of sub-Sections (22) and (22A) of Section 19 of the Debt Recovery Act as well as clauses (6), (10), (11) and (12) of Section 3, clauses (7) and (8) of Section 5, Section 6 and Section 14(1)(a) of the IBC. He further submitted that the judgment of this Court in the case of Dena Bank (supra) has applied the judgments of this Court in the cases of Jignesh Shah and another vs. Union of India and another6 and Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Limited and another7 incorrectly and as such, the judgment of this Court in the case of Dena Bank (supra) is rendered per incuriam. In this respect, he relied on 6 (2019) 10 SCC 750 7 (2019) 10 SCC 572 the judgment of this Court in the case of Nirmal Jeet Kaur vs. State of M.P. and another8 so also the judgment of this Court in the case of Secretary to Govt. of Kerala, Irrigation Department and others vs. James Varghese and others9.

15. Shri Viswanathan further submitted that if the aforesaid provisions of the IBC and the Debt Recovery Act are considered in correct perspective, the conclusion that would be inevitable is that a decree-holder is not a "financial creditor" and as such, is disentitled to invoke the provisions of Section 7 of the IBC. He submitted that the provisions of Section 14 of the IBC would also amplify this position, inasmuch as, under clause (a) of sub-section (1) thereof, the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority is specifically prohibited. He therefore submits that the learned NCLAT has correctly held that the application filed by KMBL 8 (2004) 7 SCC 558 9 2022 SCC OnLine SC 545 under Section 7 of the IBC was beyond the period of limitation since issuance of Recovery Certificate does not give rise to a fresh cause of action and the timeline for the purpose of limitation would start in the year 1997 when the accounts of the borrower entities were declared NPA, and that no interference is warranted with the same.

16. Shri S. Prabhakaran and Shri V. Prakash, learned Senior Counsel appearing on behalf of the respondent No.1 have advanced their arguments on similar lines as were advanced by Shri K.V. Viswanathan.

17. Shri Guru Krishna Kumar, in rejoinder, submitted that the judgment of this Court in the case of Dena Bank (supra) correctly lays down the position of law. He submits that if the relevant provisions of the IBC are construed in correct perspective, the only conclusion that would be arrived at is that KMBL is a "financial creditor". He submits that the correct approach would be to consider the underlying transaction forming the basis of the proceedings initiated by the creditor culminating in a Decree/Recovery Certificate. He submitted that if the underlying transactions are such that they constitute a financial debt and the creditor is a financial creditor, then that would be the determining factor for deciding the maintainability of the CIRP application. Learned Senior Counsel further submitted that the judgment debt does not lose its legal essence or character solely because it has fructified into a Recovery Certificate. He relied on the judgment of the Division Bench of the Madras High Court in the case of P.S. Ramamoorthy Sastry vs. Selvar Paints and Varnish works (Pvt.) Ltd.10 in respect of this proposition. He also relied on the judgment of the learned NCLAT in the case of Mukul Agarwal vs. Royale Resinex Pvt. Ltd.11

18. Shri Kumar further submitted that the purpose of the IBC is to preserve the Corporate Debtor as an on□going concern, while ensuring maximum recovery for all the creditors. He submits that the provisions of the IBC have to be interpreted in 10 The Law Weekly, Vol. XCVII (97) dated 28th January, 1984 Part 1 11 Company Appeal (AT) (Insolvency) No.777 of 2020 dated 30.03.2022 such a manner as to advance the purpose of the IBC and not in a manner in which they defeat the object of the IBC.

19. Shri Kumar submitted that the contention that the judgment of this Court in the case of Dena Bank (supra) is per incuriam the provisions of the IBC and the Debt Recovery Act is totally without substance. He submits that the law laid down by this Court in the case of Dena Bank (supra) is correct and warrants no interference.

20. Before we proceed to consider the rival submissions, it will be apposite to consider the factual scenario, the issues that arose for consideration and the conclusion arrived at in the case of Dena Bank (supra).

21. In the case of Dena Bank (supra), the loan account of the Corporate Debtor was declared NPA on 31 st December, 2013. The Corporate Debtor had addressed a letter dated 24 th March, 2014 to the appellant Bank therein making a request for restructuring the term loan. The appellant Bank did not accede to the same. On 22nd December, 2014, the Bank issued legal notice to the Corporate Debtor as well as the respondent No.2 therein, calling upon them to make payment of Rs.52.12 crores. The Corporate Debtor did not make the payment. On or about 1st January, 2015, the Bank filed an application being OA No.16 of 2015 under Section 19 of the Debt Recovery Act. On 27th March, 2017, the DRT, Bengaluru passed a judgment and order against the Corporate Debtor for recovery of Rs.52,12,49,438.60 with future interest at the rate of 16.55% per annum from the date of filing of the application till the date of realisation. The Recovery Certificate came to be issued on 25th May, 2017

by the DRT. There were certain proceedings in the intervening period, reference to the same would not be necessary. On 12th October, 2018, the Bank filed a Company Petition before the Adjudicating Authority under Section 7 of the IBC. The Corporate Debtor filed its preliminary objection, inter alia, contending that the said petition was barred by limitation. By order dated 21st March, 2019, the Adjudicating Authority admitted the petition under Section 7 of the IBC and appointed an Interim Resolution Professional ("IRP" for short). The same came to be challenged by the respondent No.1 therein before the learned NCLAT by way of an Appeal under Section 61 of the IBC. The learned NCLAT vide order dated 18 th December, 2019 allowed the appeal and dismissed the petition filed by the appellant Bank holding that the same was barred by limitation.

22. The question therefore that arose for consideration before this Court in the case of Dena Bank (supra) was, as to whether the petition under Section 7 of the IBC was barred by limitation, on the sole ground that it had been filed beyond a period of 3 years from the date of declaration of the loan account of the Corporate Debtor as NPA.

23. While considering the said issue, this Court was also called upon to consider other issues. The first one was, as to whether the application under Section 7 of the IBC could be held to be barred by limitation, though the Corporate Debtor had subsequently acknowledged its liability within a period of 3 years prior to the date of filing of the petition under Section 7 of the IBC, by making a proposal for a one-time settlement, or by acknowledging the debt in its statutory balance sheets and books of accounts. The second issue that was considered in the case of Dena Bank (supra) was, as to whether a final judgment and decree of the DRT in favour of the financial creditor, or the issuance of a certificate of recovery in favour of the financial creditor, would give rise to a fresh cause of action to the financial creditor to initiate proceedings under Section 7 of the IBC within three years from the date of the final judgment and decree, and/or within three years from the date of issuance of the certificate of recovery. The third issue was, as to whether the Adjudicating Authority had the power to permit amendment of pleadings or to permit filing of additional documents in a petition filed under Section 7 of the IBC.

24. Though all these issues have been elaborately considered by this Court in the case of Dena Bank (supra), we would only be concerned with the issue, as to whether the issuance of the Recovery Certificate in favour of the "financial creditor" would give rise to a fresh cause of action to initiate proceedings under Section 7 of the IBC. This Court in the said case after considering various provisions of the IBC as well as the earlier judgments of this Court has observed thus:

> "99. There can be no dispute with the proposition that the period of limitation for making an application under Section 7 or 9 IBC is three years from the date of accrual of the right to sue, that is, the date of default. In GauravHargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd. [Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd., (2019) 10 SCC 572 : (2020) 1 SCC (Civ) 1] authored by Nariman, J. this Court held : (SCC p.

574, para 6) "6. ... The present case being "an application" which is filed under Section 7, would fall only within the residuary Article

137."

100. In B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates [B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates, (2019) 11 SCC 633 : (2018) 5 SCC (Civ) 528] , this Court speaking through Nariman, J. held : (SCC p. 664, para 42) "42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

101. In Jignesh Shah v. Union of India [Jignesh Shah v. Union of India, (2019) 10 SCC 750 : (2020) 1 SCC (Civ) 48] this Court speaking through Nariman, J.

reiterated the proposition that the period of limitation for making an application under Section 7 or 9 IBC was three years from the date of accrual of the right to sue, that is, the date of default.

102. In Vashdeo R. Bhojwani v. Abhyudaya Coop. Bank Ltd. [Vashdeo R. Bhojwani v. Abhyudaya Coop. Bank Ltd., (2019) 9 SCC 158 : (2019) 4 SCC (Civ) 308] this Court rejected the contention that the default was a continuing wrong and Section 23 of the Limitation Act, 1963 would apply, relying upon Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan [Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan, 1959 Supp (2) SCR 476 : AIR 1959 SC 798]."

25. This Court further went on to observe thus:

> "136. A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and

order/decree, upon adjudication, and a certificate of recovery is also issued authorising the creditor to realise its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the recovery certificate.

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141. Moreover, a judgment and/or decree for money in favour of the financial creditor, passed by the DRT, or any other tribunal or court, or the issuance of a certificate of recovery in favour of the financial creditor, would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under Section 7 IBC for initiation of the corporate insolvency resolution process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the certificate of recovery, if the dues of the corporate debtor to the financial debtor, under the judgment and/or decree and/or in terms of the certificate of recovery, or any part thereof

remained unpaid." [emphasis supplied]

26. It could thus be seen that this Court in the case of Dena Bank (supra) in paragraphs 136 and 141, has in unequivocal terms held that once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the Recovery Certificate. It has further been held that issuance of a certificate of recovery in favour of the financial creditor would give rise to a fresh cause of action to the financial creditor, to initiate proceedings under Section 7 of the IBC for initiation of the CIRP, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the certificate of recovery, if the dues of the corporate debtor to the financial debtor, under the judgment and/or decree and/or in terms of the certificate of recovery, or any part thereof remained unpaid.

27. With these findings, we could have very well allowed the present appeal and set aside the judgment and order of the learned NCLAT. Undisputedly, the application for initiation of CIRP under Section 7 of the IBC has been filed by KMBL within a period of three years from the date of issuance of the Recovery Certificate. However, since it has been argued by Shri K.V. Viswanathan, learned Senior Counsel that the judgment rendered by the two-Judge Bench of this Court in the case of Dena Bank (supra) is per incuriam the provisions of the relevant statutes and the judgments of the three-Judge Bench of this Court in the cases of Jignesh Shah (supra) and Gaurav Hargovindbhai Dave (supra) and since the issue is of seminal importance, we would proceed to consider the rival submissions.

28. It will be relevant to refer to clauses (6), (10), (11) and (12) of Section 3, clauses (7) and (8) of Section 5, Section 6 and clause (a) of sub-section (1) of Section 14 of the IBC, which are as under:

> "3. Definitions.—In this Code, unless the context otherwise requires,—(1) .....
>
> .....
>
> (6) "claim" means—
>
> (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
>
> (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

*** *** *** (10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

(12) “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 5[paid] by the debtor or the corporate debtor, as the case may be;

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5. Definitions.-In this Part, unless the context otherwise requires,-(1) .....

.....

(7) “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to; (8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation.—For the purposes of this sub-clause,—

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

*** *** ***

6. Persons who may initiate corporate insolvency resolution process.—Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.

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14. Moratorium.—(1) Subject to

provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely—

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

29. Clause (6) of Section 3 of the IBC defines the term "claim" in two parts. Sub-clause (a) of clause (6) of Section 3 of the IBC defines the term to mean, a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. Sub-clause (b) of clause (6) of Section 3 of the IBC would show that a claim would also mean a right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

30. Clause (10) of Section 3 of the IBC defines the term "creditor", to mean any person to whom a debt is owed and incudes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder.

31. Clause (11) of Section 3 of the IBC defines the term "debt" to mean, a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

32. Clause (12) of Section 3 of the IBC defines the term "default" to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not

paid by the debtor or the corporate debtor, as the case may be.

33. Clause (7) of Section 5 of the IBC defines the term “financial creditor” to mean any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

34. Clause (8) of Section 5 of the IBC defines the term “financial debt”, to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money and specifies various categories of debts in sub-clauses (a) to (h), which would be included in the definition of term “financial debt”. Sub-clause (i) of clause (8) of Section 5 of the IBC provides that the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause would also be included in the definition of the term “financial debt”.

35. It could thus be seen that whereas sub-clauses (a) to (h) of clause (8) of Section 5 of the IBC deal with specific categories, which would come in the definition of the term “financial debt”, sub-clause (i) of clause (8) of Section 5 of the IBC would include the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to

(h) of the said clause within the meaning of the term “financial debt”.

36. Section 6 of the IBC provides as to who may initiate CIRP. It provides that where any Corporate Debtor commits a default, a financial creditor, an operational creditor or the Corporate Debtor itself may initiate CIRP in respect of such Corporate Debtor in the manner as provided under the said Chapter.

37. Section 14 of the IBC provides “Moratorium”, consequent upon the admission of the application under Section 7 or Section 9 or Section 10 of the IBC, on an order passed by the Adjudicating Authority. Clause (a) of sub-section (1) of Section 14 of the IBC prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.

38. From the scheme of the IBC, it could be seen that where any Corporate Debtor commits a default, a financial creditor, an operational creditor or the Corporate Debtor itself is entitled to initiate CIRP in respect of such Corporate Debtor in the manner as provided under the said Chapter. The default has been defined to mean non-payment of debt. The debt has been defined to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. A claim means a right to payment, whether or not such right is reduced to judgment, fixed, disputed, etc. It is more than settled that the trigger point to initiate CIRP is when a default takes place. A default would take place when a debt in respect of a claim is due and not paid. A claim would include a right to payment whether or not such a right is reduced to judgment.

39. It is a settled principle of law that the provisions of a statue ought to be interpreted in such a manner which would advance the object and purpose of the enactment.

40. This Court in the case of Swiss Ribbons Private Limited and another vs. Union of India and others 12 has held that preserving the Corporate Debtor as an on□going concern, while ensuring maximum recovery for all creditors is the objective of the IBC.

12 (2019) 4 SCC 17

41. It is an equally well settled principle of law that all the provisions in the Statute have to be construed in context with each other and no provision can be read in isolation.

42. In this background, we will have to consider, as to whether a person, who holds a Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC.

43. A person to be entitled to be a "financial creditor" has to be owed a financial debt and would also include a person to whom such debt has been legally assigned or transferred to. Therefore, the only question that would be required to be considered is, as to whether a liability in respect of a claim arising out of a Recovery Certificate would be included within the meaning of the term "financial debt" as defined under clause (8) of Section 5 of the IBC.

44. It will be pertinent to note that in clause (8) of Section 5 of the IBC, i.e, the definition clause of the term "financial debt", the words used are "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes".

45. At this juncture, we may rely on the following observations in the case of Dilworth vs. Commissioner of Stamps13, which have been consistently followed by this Court:

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions." 13 (1899) AC 99

46. This Court in the case of Associated Indem Mechanical (P) Ltd. vs. W.B. Small Industries Development Corpn. Ltd. and others14 while construing the definition of the term "premises" as provided under Section 2(c) of the W.B. Government Premises (Tenancy Regulation) Act, 1976, observed thus:

> "13. .....The definition of premises in Section 2(c) uses the word "includes" at two places. It is well settled that the word "include" is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. (See Dadaji v. Sukhdeobabu [(1980) 1 SCC 621: AIR 1980 SC 150]; Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. [(1987) 1 SCC 424 :
>
> AIR 1987 SC 1023] and Mahalakshmi Oil Mills v. State of A.P. [(1989) 1 SCC 164 :
>
> 14 (2007) 3 SCC 607 1989 SCC (Tax) 56 : AIR 1989 SC 335]) The inclusive definition of "District Judge" in Article 236(a) of the Constitution has been very widely construed to include hierarchy of specialised civil courts viz.

Labour Courts and Industrial Courts which are not expressly included in the definition. (See State of Maharashtra v. Labour Law Practitioners' Assn. [(1998) 2 SCC 688 : 1998 SCC (L&S) 657 : AIR 1998 SC 1233]) Therefore, there is no warrant or justification for restricting the applicability of the Act to residential buildings alone merely on the ground that in the opening part of the definition of the word "premises", the words "building or hut" have been used." [emphasis supplied]

47. It is thus clear that it is a settled position of law that when the word "include" is used in interpretation clauses, the effect would be to enlarge the meaning of the words or phrases occurring in the body of the statute. Such interpretation clause is to be so used that those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In such a situation, there would be no warrant or justification in giving the restricted meaning to the provision.

48. In the case of Karnataka Power Transmission Corporation and another vs. Ashok Iron Works Private Limited15, this Court, while construing the definition of the word "person" as could be found in Section 2(1)(d) read with Section 2(1)(m) of the Consumer Protection Act, 1986, observed thus:

"17. It goes without saying that interpretation of a word or expression must depend on the text and the context. The resort to the word "includes" by the legislature often shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression. Sometimes, however, the context may suggest that word "includes" may have been designed to mean "means". The setting, context and object of an enactment may provide sufficient guidance for interpretation of the word "includes" for the purposes of such enactment." 15 (2009) 3 SCC 240

18. Section 2(1)(m) which enumerates four categories, namely,

(i) a firm whether registered or not;

(ii) a Hindu Undivided Family;

(iii) a cooperative society; and

(iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not while defining "person" cannot be held to be restrictive and confined to these four categories as it is not said in terms that "person" shall mean one or other of the things which are enumerated, but that it shall "include" them.

19. The General Clauses Act, 1897 in Section 3(42) defines "person":

> "3. (42) 'person' shall include any company or association or body of individuals, whether incorporated or not;"

20. Section 3 of the 1986 Act upon which reliance is placed by learned counsel for KPTC provides that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force. This provision instead of helping the contention of KPTC would rather suggest that the access to the remedy provided to (sic under) the Act of 1986 is an addition to the provisions of any other law for the time being in force. It does not in any way give any clue to restrict the definition of "person".

21. Section 2(1)(m), is beyond all questions an interpretation clause, and must have been intended by the legislature to be taken into account in construing the expression "person" as it occurs in Section 2(1)(d). While defining "person" in Section 2(1)(m), the legislature never intended to exclude a juristic person like company. As a matter of fact, the four categories by way of enumeration mentioned therein is indicative, Categories (i), (ii) and (iv) being unincorporate and Category (iii) corporate, of its intention to include body corporate as well as body unincorporate. The definition of "person" in Section 2(1)(m) is inclusive and not exhaustive. It does not appear to us to admit of any doubt that company is a person within the meaning of Section 2(1)(d) read with Section 2(1)(m) and we hold accordingly."

49. It could thus be seen that though the word "company" was not specifically included in Section 2(1)(m) of the Consumer Protection Act, 1986, this Court in the case of Karnataka Power Transmission Corporation (supra) found that the legislature never intended to exclude a juristic person like company from the definition of the word "person". It was found that the categories (i), (ii) and (iv) mentioned therein were unincorporate and category (iii) was corporate. As such, the legislative intention was to include body corporate as well as body unincorporate. It was held that the definition of "person" in Section 2(1)(m) was inclusive and not exhaustive.

50. The three-Judge Bench of this Court in the case of Pioneer Urban Land and Infrastructure Limited and another vs. Union of India and others16 was considering a challenge to the amendments made to the IBC vide which Explanation to sub-clause (f) of clause (8) of Section 5 of the IBC was inserted, which provides that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing. This Court

held that "the expression "and includes" speaks of 16 (2019) 8 SCC 416 subject-matters which may not necessarily be reflected in the main part of the definition".

51. Applying these principles to clause (8) of Section 5 of the IBC, it could clearly be seen that the words "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money" are followed by the words "and includes". Thereafter various categories (a) to (i) have been mentioned. It is clear that by employing the words "and includes", the Legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive. The legislative intent could not have been to exclude a liability in respect of a "claim" arising out of a Recovery Certificate from the definition of the term "financial debt", when such a liability in respect of a "claim" simpliciter would be included in the definition of the term "financial debt"

52. In any case, we have already discussed hereinabove that the trigger point for initiation of CIRP is default of claim. "Default" is non-payment of debt by the debtor or the Corporate Debtor, which has become due and payable, as the case may be, a "debt" is a liability or obligation in respect of a claim which is due from any person, and a "claim" means a right to payment, whether such a right is reduced to judgment or not. It could thus be seen that unless there is a "claim", which may or may not be reduced to any judgment, there would be no "debt" and consequently no "default" on non-payment of such a "debt". When the "claim" itself means a right to payment, whether such a right is reduced to a judgment or not, we find that if the contention of the respondents, that merely on a "claim" being fructified in a decree, the same would be outside the ambit of clause (8) of Section 5 of the IBC, is accepted, then it would be inconsistent with the plain language used in the IBC. As already discussed hereinabove, the definition is inclusive and not exhaustive. Taking into consideration the object and purpose of the IBC, the legislature could never have intended to keep a debt, which is crystallized in the form of a decree, outside the ambit of clause (8) of Section 5 of the IBC.

53. Having held that a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the ambit of its definition under clause (8) of Section 5 of the IBC, as a natural corollary thereof, the holder of such Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC. As such, such a "person" would be a "person" as provided under Section 6 of the IBC who would be entitled to initiate the CIRP.

54. Insofar as the contention of the respondents with regard to clause (a) of sub-section (1) of Section 14 of the IBC is concerned, we do not find that the words used in clause (a) of sub-section (1) of Section 14 of the IBC could be read to mean that the decree-holder is not entitled to invoke the provisions of the IBC for initiation of CIRP. A plain reading of said Section would clearly provide that once CIRP is initiated, there shall be prohibition for institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority. The prohibition to institution of suit or continuation of pending suits or proceedings including execution of decree would not mean that a decree-holder is also prohibited from initiating CIRP, if he is otherwise entitled to in law. The effect would be that the applicant, who is a decree-holder, would himself be

prohibited from executing the decree in his favour.

55. That leaves us to consider the contention, as to whether the judgment of this Court in the case of Dena Bank (supra) is contrary to the judgments of three-Judge Bench of this Court in the cases of Jignesh Shah (supra) and Gaurav Hargovindbhai Dave (supra), as contended by the respondents, and therefore, per incuriam.

56. In the case of Jignesh Shah (supra), the cause of action arose in the month of August, 2012. The winding-up petition, which was transferred to the learned NCLT, was filed on 21 st October, 2016, i.e., after a period of three years from the date on which cause of action arose. This Court in the said case was considering a question that, if a winding up petition was barred by limitation on the date it was filed, whether Section 238A of the IBC will give a new lease of life to such a time-barred petition. This Court held that Section 238A of the IBC would not extend the period of limitation for filing winding-up petition. On the facts of the said case, it was found that on the date on which the winding-up petition was filed, it was barred by lapse of time and Section 238A of the IBC would not give a new lease of life to such a time-barred petition. The question that falls for consideration in the present case is, as to whether a claim which is fructified in a decree would give a fresh cause of action to file an application under Section 7 of the IBC within a period of three years from such decree or not. This issue did not fall for consideration before this Court in the case of Jignesh Shah (supra).

57. In the case of Gaurav Hargovindbhai Dave (supra), the respondent therein was declared NPA on 21 st July, 2011 and an application under Section 7 of the IBC was filed in the year 2017 while IBC was brought into force on 1 st December, 2016. The three-Judge Bench of this Court in the said case held that the time began to run from the date when the respondent was declared NPA and as such, the application under Section 7 of the IBC, which was filed beyond the period of three years, was barred by limitation. The question, as to whether a person would be entitled to file an application for initiation of CIRP within a period of three years from the date on which the decree was passed or a Recovery Certificate was granted did not fall for consideration in the said case also.

58. Shri Viswanathan next contended that this Court in the case of Jignesh Shah (supra) has approved the judgment of the Calcutta High Court in the case of Rameswar Prasad Kejriwal & Sons Ltd. vs. Garodia Hardware Stores 17. In 17 2001 SCC OnLine Cal 586 this respect, it will be relevant to note that this Court was considering various judgments which were relied upon by Dr. Singhvi. Insofar as the judgment of the Calcutta High Court in the case of Rameswar Prasad Kejriwal (supra) is concerned, in the said case, the cause of action arose in the year 1992. The suit was filed in 1994 and the decree was obtained in the year 1997. It is to be noted that the winding-up petition came to be filed in the year 2001, i.e., after a period of three years. It was sought to be argued that the limitation period would be 12 years. The same was rejected.

59. No doubt that Shri Viswanathan is justified in referring to paragraph 21 of the judgment in the case of Jignesh Shah (supra) to the extent that this Court observed that the suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding-up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow

keeping the debt alive for the purpose of the winding-up proceeding. However, the question, as to whether such a suit or an application which has been culminated into a decree or a Recovery Certificate would give a fresh cause of action to file an application under Section 7 of the IBC did not arise for consideration in the said judgment/case. The said judgment cannot be held to be a ratio decidendi for a proposition that even after the suit is decreed, or Recovery Certificate is issued, it could not give fresh cause of action to initiate CIRP within a period of three years.

60. As to what is ratio decidendi has been succinctly observed by this Court in the case of Union of India and others vs. Dhanwanti Devi and others18, which is as under:

> "9. ..... It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates—(i) findings of material facts, direct and inferential. An inferential 18 (1996) 6 SCC 44 finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment.

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi."

61. It will also be apposite to refer to the following observations of this Court in the case of The Regional Manager and another vs. Pawan Kumar Dubey19:

> "7. .... Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from

> the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts." 19 (1976) 3 SCC 334

62. It could thus be seen that one additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

63. It will further be relevant to note that the judgment of this Court in the case of Jignesh Shah (supra) was authored by R.F.Nariman, J. R.F.Nariman, J. in the case of Vashdeo R. Bhojwani vs. Abhyudaya Co□operative Bank Limited and another20, while relying on the judgment of three□ Judge Bench of this Court in the case of Balakrishna Savalram Pujari Waghmare and others vs. Shree Dhyaneshwar Maharaj Sansthan and others21 has observed thus:

> "Following this judgment, it is clear that when the recovery certificate dated 24□12□ 2001 was issued, this certificate injured effectively and completely the appellant's rights as a result of which limitation would have begun ticking." 20 (2019) 9 SCC 158
> 21 1959 Supp (2) SCR 476 : AIR 1959 SC 798

64. In the said case, the respondent No.2 was declared NPA on 23rd December, 1999; the Recovery Certificate was issued on 24th December, 2001; application under Section 7 of the IBC came to be filed on 21st July, 2017. In this factual background, this Court found that the application under Section 7 of the IBC, which was filed after a period of almost 16 years, i.e., much beyond the period of three years, was barred by limitation.

65. It was found that the limitation period for filing a winding□up petition would be three years and since the same was filed beyond the period of three years, it was liable to be dismissed. In the present case, undisputedly, the application under Section 7 of the IBC was filed within a period of three years from the date of issuance of the Recovery Certificate.

66. It can thus be seen that this Court observed that the issuance of Recovery Certificate injured effectively and completely the appellant's rights and therefore the limitation would begin from the said date. In effect, this Court observed that the issuance of Recovery Certificate could trigger the limitation. As such, in our view, this Court in the case of Dena Bank (supra) has rightly relied on Vashdeo R. Bhojwani (supra), which, in turn, relied on the earlier three□Judge Bench judgment of this Court in the case of Balakrishna Savalram Pujari Waghmare (supra).

67. Shri Viswanathan, learned Senior Counsel relied on various judgments of this Court to fortify his submission that the judgment of two□Judge Bench of this Court in the case of Dena Bank (supra) is per incuriam. Recently, a two□Judge Bench of this Court (consisting of L.N. Rao and B.R. Gavai, JJ.) had an occasion to consider this doctrine in the case of James Varghese (supra). It is a settled law that "Incuria" literally means "carelessness". A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. It can

also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench.

68. A perusal of the judgment of this Court in the case of Dena Bank (supra) would reveal that this Court considered all the relevant provisions of the IBC and the earlier judgments of this court. As already discussed hereinabove, we do not find any inconsistency in the judgment of this Court in the case of Dena Bank (supra) with the earlier judgments of this Court on which reliance is placed by Shri Viswanathan. We find that the contention that the judgment of this Court in the case of Dena Bank (supra) being per incuriam to the statutory provisions and earlier judgments of this Court, is wholly unsustainable.

69. We have already hereinabove, done the exercise of considering the relevant provisions of the IBC afresh and come to a conclusion that a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" within the meaning of clause (8) of Section 5 of the IBC and a holder of the Recovery Certificate would be a "financial creditor" within the meaning of clause (7) of Section 5 of the IBC. We have also held that a person would be entitled to initiate CIRP within a period of three years from the date on which the Recovery Certificate is issued. We are of the considered view that the view taken by the two-Judge Bench of this Court in the case of Dena Bank (supra) is correct in law and we affirm the same.

70. That leaves us with the contention of Shri Viswanathan with regard to sub-sections (22) and (22A) of Section 19 of the Debt Recovery Act, which read thus:

> "19. Application to the Tribunal.-(1) .....
>
> .....
>
> (22) The Presiding Officer shall issue a certificate of recovery along with the final order, under sub-section (20), for payment of debt with interest under his signature to the Recovery Officer for recovery of the amount of debt specified in the certificate.
>
> (22-A) Any recovery certificate issued by the Presiding Officer under sub-section (22) shall be deemed to be decree or order of the Court for the purposes of initiation of winding up proceedings against a company registered under the Companies Act, 2013 (18 of 2013) or Limited Liability Partnership registered under the Limited Liability Partnership Act, 2008 (9 of 2008) or insolvency proceedings against any individual or partnership firm under any law for the time being in force, as the case may be."

71. It could be seen that sub-section (22) of Section 19 of the Debt Recovery Act empowers the Presiding Officer to issue a certificate of recovery along with the final order, under sub-section (20), for payment of debt with interest. The certificate is given for the purposes of recovery of the amount of debt specified in the certificate. Sub-section (22A) of Section 19 of the Debt Recovery Act provides that any Recovery Certificate issued by the Presiding Officer under sub-section (22) shall be deemed to be decree or order of the Court for the purposes of initiation of winding up

proceedings against a company, etc.

72. It is sought to be argued by Shri Viswanathan that the Recovery Certificate is for the limited purpose of initiation of winding up proceedings. If we accept the contention of Shri Viswanathan, we would be required to insert the word "limited" between the words "shall be deemed to be decree or order of the Court" and "for the purposes of initiation of winding up proceedings". If the contention is to be accepted, sub-section (22A) of Section 19 of the Debt Recovery Act would have to be reframed as "Any recovery certificate issued by the Presiding Officer under sub-section (22) shall be deemed to be decree or order of the Court for the limited purposes of initiation of winding up proceedings...".

73. In our considered view, if we accept the said submission, it would result in doing violence to the provisions of sub-section (22A) of Section 19 of the Debt Recovery Act.

74. It will be apposite to refer to the following observations of this Court in the case of Mohd. Shahabuddin vs. State of Bihar and others22:

> "179. Even otherwise, it is a well-settled principle in law that the court 22 (2010) 4 SCC 653 cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is a determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. Reference in this regard may be made to a recent decision of this Court in Ansal Properties & Industries Ltd. v. State of Haryana [(2009) 3 SCC 553]." [emphasis supplied]

75. It is more than well settled that when the language of a statutory provision is plain and unambiguous, it is not permissible for the Court to add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. At the cost of repetition, we observe that if the argument as advanced by Shri Viswanathan is to be accepted, it will completely change the texture of the fabric of sub-section (22A) of Section 19 of the Debt Recovery Act.

76. Though there are umpteen number of authorities to support this proposition, we do not wish to burden our judgment with them. Suffice it to refer to the judgment of three-Judge Bench of this Court in the case of Nasiruddin and others vs. Sita Ram Agarwal23 wherein this Court has held as under:

> "37. The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists

> a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression "shall or may" is not decisive for arriving at a finding as to whether the statute is directory or 23 (2003) 2 SCC 577 mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character." [emphasis supplied]

77. From the plain and simple interpretation of the words used in sub-section (22A) of Section 19 of the Debt Recovery Act, it would be amply clear that the Legislature provided that for the purposes of winding-up proceedings against a Company, etc., a Recovery Certificate issued by the Presiding Officer under sub-section (22) of Section 19 of the Debt Recovery Act shall be deemed to be a decree or order of the Court. It is thus clear that once a Recovery Certificate is issued by the Presiding Officer under sub-section (22) of Section 19 of the Debt Recovery Act, in view of sub-section (22A) of Section 19 of the Debt Recovery Act it will be deemed to be a decree or order of the Court for the purposes of initiation of winding-up proceedings of a Company, etc. However, there is nothing in sub-section (22A) of Section 19 of the Debt Recovery Act to imply that the Legislature intended to restrict the use of the Recovery Certificate limited for the purpose of winding-up proceedings. The contention of the respondents, if accepted, would be to provide something which is not there in sub-section (22A) of Section 19 of the Debt Recovery Act.

78. In any case, when the Legislature itself has provided that any Recovery Certificate issued under sub-section (22) of Section 19 of the Debt Recovery Act will be deemed to be a decree or order of the Court for initiation of winding-up proceedings, which proceedings are much severe in nature, it will be difficult to accept that the Legislature intended that such a Recovery Certificate could not be used for initiation of CIRP, which would enable the Corporate Debtor to continue as an on-going concern and, at the same time, pay the dues of the creditors to the maximum. We, therefore, find no substance in the said submission.

79. Insofar as the judgment of this Court in the case of Paramjeet Singh Patheja (supra) is concerned, we do not find it necessary to refer to the same, inasmuch as the view, which we have taken, has been taken after interpreting the provisions of the IBC, whereas the view in the case of Paramjeet Singh Patheja (supra) is with regard to legal fiction as provided in Section 36 of the Arbitration and Conciliation Act, 1996.

80. Insofar as the reliance on the case of Nawab Hussain (supra) is concerned, what has been observed by this Court is that the doctrine of per rem judicatam is based on two theories, viz., (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It has been held that the said doctrine serves not only a public but also a private purpose by obstructing the reopening of matters which have been adjudicated upon.

81. In the case of Nawab Hussain (supra), the respondent was a confirmed Sub-Inspector of Police in Uttar Pradesh. He challenged his dismissal in a writ petition before the Allahabad High Court on the ground that he was not afforded a reasonable opportunity. The said writ petition was dismissed. After the dismissal of the said writ petition, he filed a suit in the Court of Civil Judge, Etah, raising certain additional grounds. The same was also dismissed. The respondent preferred a second appeal, which was allowed by the High Court. The High Court had held that the suit was not barred by the principle of constructive res judicata. In this background, the aforesaid observations were made by this Court while reversing the judgment of the High Court and holding it to be barred by res judicata.

82. In the case of Gulabchand Chhotalal Parikh (supra), the appellant therein had prayed for the issuance of a writ of mandamus and a writ of prohibition against the respondent-State in a writ petition filed in the High Court. The High Court dismissed the petition on merits after full contest. The appellant thereafter filed a suit against the respondent and raised a similar plea. In this background, the Trial Court, the First Appellate Court and the High Court held that the suit was barred by res judicata in view of the judgment of the High Court in the writ petition. In appeal, this Court affirming the concurrent views held that on general principles of res judicata, the decision of the High Court in a writ petition under Article 226 of the Constitution of India, after full contest, will operate as res judicata in a subsequent regular suit between the same parties with respect to the same matter.

83. Insofar as the judgment in the case of Thoday vs. Thoday24 is concerned, the same has been considered by this Court in the case of Bhanu Kumar Jain vs. Archana Kumar and another25, wherein this Court held that a cause of action estoppel arises where, in two different proceedings, identical issues are raised, in which event, the latter proceedings 24 (1964) 2 WLR 371 25 (2005) 1 SCC 787 between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event, the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. We are of the view that the said judgment would not even remotely be applicable to the facts of the present case. In that view of the matter, we do not find that reliance on the said judgment would be of any assistance to the case of the respondents.

84. To conclude, we hold that a liability in respect of a claim arising out of a Recovery Certificate would be a “financial debt” within the meaning of clause (8) of Section 5 of the IBC. Consequently, the holder of the Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC. As such, the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.

85. We further find that the view taken by the two-Judge Bench of this Court in the case of Dena Bank (supra) is correct in law and we affirm the same. We further find that in the facts of the present case, the application under Section 7 of the IBC was filed within a period of three years from the date on which the Recovery Certificate was issued. As such, the application under Section 7 of the IBC was within limitation and the learned NCLAT has erred in holding that it is barred by limitation.

86. In the result, we pass the following judgment:

(i) The appeal is allowed.

(ii) The impugned judgment and order dated 24 th November, 2020 passed by the learned National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No.1406 of 2019 is quashed and set aside.

87. We further clarify that though elaborate arguments have been advanced by the rival parties upon the merits of the matter, we have not touched the same. We have only decided the legal issues. The parties would be at liberty to raise all the issues, considering the merits of the matter before the learned NCLT. The learned NCLT would decide the same in accordance with law.

88. Pending applications, including the application(s) for ex□parte stay and disposal of the matter shall stand disposed of in the above terms. There shall be no order as to costs.

…….……J. [L. NAGESWARA RAO] ……..……J. [B.R. GAVAI] .....J. [A.S. BOPANNA] NEW DELHI;

MAY 30, 2022.