Arcelormittal India Private Limited vs Satish Kumar Gupta on 4 October, 2018

Equivalent citations: AIR 2018 SUPREME COURT 5646, AIRONLINE 2018 SC 393, (2018) 13 SCALE 381, (2018) 4 BANKCAS 380, (2018) 4 CURCC 587, 2019 (1) KCCR SN 8 (SC), 2019 (2) SCC 1, AIR 2020 SC (CIV) 387

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Bench: Indu Malhotra, R.F. Nariman

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs.9402-9405 OF 2018

ARCELORMITTAL INDIA PRIVATE LIMITED …APPELLANT

VERSUS

SATISH KUMAR GUPTA & ORS. ...RESPONDENTS

WITH

CIVIL APPEAL NO.9582 OF 2018

CIVIL APPEAL NO._____ OF 2018
DIARY NO.35253 OF 2018

CIVIL APPEAL NO._____ OF 2018
DIARY NO.33971 OF 2018

JUDGMENT

R.F. Nariman, J.

1. The facts of the present case revolve around the ineligibility of resolution applicants to submit resolution plans after the introduction of Section 29A into the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”), with effect from 23.11.2017.

2. On 2.8.2017, the Adjudicating Authority, being the NCLT, Ahmedabad Bench, passed an order under Section 7 of the Code at the behest of financial creditors, being the State Bank of India and the Standard Chartered Bank, admitting a petition filed under the Code for financial debts owed to them by the corporate debtor Essar Steel India Limited (hereinafter referred to as "ESIL"), in the sum of roughly Rs.45,000,00,00,000 (Rupees Forty Five Thousand Crores). Shri Satish Kumar Gupta was appointed as the Interim Resolution Professional and confirmed as such on 4.9.2017. Consequently, the Resolution Professional published an advertisement dated 6.10.2017, seeking expression of interest from potential resolution applicants who wished to submit resolution plans for the revival of ESIL. In terms of the advertisement, the last date for submission of an expression of interest was 23.10.2017. Pursuant to this advertisement, one 'ArcelorMittal India Private Limited' (hereinafter referred to as "AMIPL") submitted an expression of interest on 11.10.2017. An entity called Numetal Limited (hereinafter referred to as "Numetal"), also submitted an expression of interest on 20.10.2017. On 24.12.2017, the Resolution Professional published a 'request for proposal', in which it was stated that the last date for submission of resolution plans would be 29.1.2018. On a request made by the Committee of Creditors, the NCLT extended the duration of the corporate insolvency resolution process by 90 days beyond the initial period of 180 days, i.e., upto 29.4.2018. The Resolution Professional therefore issued the first addendum to the request for proposal, extending the date for submission of resolution plans to 12.2.2018. Given this, both AMIPL and Numetal submitted their resolution plans on this date. On 20.3.2018, apprehending that the Resolution Professional would recommend that it be declared ineligible, Numetal filed I.A. No. 98 of 2018 before the NCLT inter alia seeking that it be declared eligible as a resolution applicant. On 23.3.2018, however, the Resolution Professional found both AMIPL and Numetal to be ineligible under Section 29A. Insofar as AMIPL is concerned, the Resolution Professional found thus:

> "2. Please note that during the course of the evaluation of the Resolution Plan, I became aware of the fact that ArcelorMittal Netherlands B.V. (AM Netherlands) (which is mentioned as a 'connected person' of AM India in the Resolution Plan) has been disclosed as the 'promoter' of Uttam Galva Steels Limited (Uttam Galva) pursuant to which my Advisor had requested certain clarifications from AM India on 26 February 2018 (Request for Clarification 1) and on 14 March 2018 (Request for Clarification 2). Further to the responses received from AM India on 28 February 2018 and 17 March 2018 (collectively the AM India Responses) on the aforementioned requests for clarifications, I understand that:
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> 2.1. AM Netherlands had acquired 29.05% of the shareholding in Uttam Galva in 2009 and has since been classified as a promoter of Uttam Galva; 2.2. AM Netherlands had entered into a 'co-promoter' agreement dated 4 September 2009 with the other promoters of Uttam Galva (Co-Promoter Agreement) under which AM Netherlands had various rights (including certain rights which can be considered as participative in nature and not merely protective); 2.3. Uttam Galva's account was classified as a 'non-

performing asset' (NPA) on 31 March 2016 by Canara Bank and Punjab National Bank (which classification has continued for more 1 year till 02 August 2017); 2.4. AM Netherlands has sold its

shareholding in Uttam Galva to the other promoters of Uttam Galva on 7 February 2018; and 2.5. AM Netherlands has applied to the National Stock Exchange Limited and the BSE Limited, each on 8 February 2018 for declassification as a 'promoter' of Uttam Galva under Regulation 31A(2) of the Securities and Exchange Board of India

3. Further, as on the Plan Submission Date, AM Netherlands (had not obtained the Stock Exchange Approvals relating to declassification as a promoter of Uttam Galva and) continued to be classified as a promoter of Uttam Galva.

4. In light of the above, AM India is ineligible under the provisions of Section 29A(c) of the IBC and pursuant to paragraph 4.11.2(a) of the RPP, the Resolution Plan is hereby rejected and will not be placed before the Committee of Creditors."

3. Similarly, holding Numetal to be ineligible, the Resolution Professional, on the same date, found:

> "2.1. as on the date of submission of its expression of interest (EOI) on 20 October 2017 by Numetal, it relied on Essar Communications Limited (ECL), one of its shareholders to comply with the eligibility requirement relating to its 'tangible net worth' (TNW) (as stipulated in the section titled 'Eligibility Criteria' in the EOI); 2.2. as on the Plan Submission Date, Numetal relied on Crinium Bay, its shareholder to comply with the eligibility requirement relating to its TNW (as stipulated in Section 6.7 of the Resolution Plan); 2.3. Numetal was incorporated 7 days before submission of the EOI; and 2.4. Numetal is a newly incorporated joint venture between Aurora Enterprises Limited, Crinium Bay, Indo International Limited and Tyazhpromexport.
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> 3. Since Numetal has at all stages relied on its shareholders to comply with the eligibility requirements relating to submission of a resolution plan in respect of ESIL, for the purposes of ensuring compliance with Section 29A of the Insolvency and Bankruptcy Code, 2016 (IBC), I have considered each of the shareholders of Numetal as joint venture partners to be acting jointly for the purposes of submission of the Resolution Plan. Whilst considering the eligibility of the shareholders of Numetal, since Aurora Enterprises Limited (AEL) is held completely by Rewant Ruia (through various companies and a trust), I have considered Rewant Ruia, Crinium Bay, Indo International Limited and Tyazhpromexport for scrutiny under Section 29A of the IBC.
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> 4. Further, pursuant to Regulation 2(q) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST Regulations), a person is deemed to acting in concert with amongst others, his (or her) 'immediate relatives', which term (as defined under Regulation 2(1) of the SAST Regulations) includes the father of such person.

Therefore, in relation to the Resolution Plan in respect of ESIL (which contemplates the acquisition of ESIL by Numetal by way of a merger of ESIL with a wholly owned subsidiary of Numetal),

Rewant Ruia is deemed to be acting in concert with his father Ravi Ruia.

5. Further, as on the Plan Submission Date:

> (a)* Ravi Ruia (who Rewant Ruia is deemed to be acting in concert with) was the promoter of ESIL whose account was classified as an NPA for more than 1 year, prior to the commencement of corporate-insolvency resolution process (CIRP) of ESIL on 2 August 2017; and
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> (b) Ravi Ruia (who Rewant Ruia is deemed to be acting in concert with) has executed a guarantee in favour of SBI (for itself and a consortium of lenders) and the CIRP application filed by SBI has been admitted by the National Company Law Tribunal on 2 August 2017.

6. In light of the above, Rewant Ruia (who is acting jointly with the other shareholders of Numetal for the purposes of submission of the Resolution Plan) is ineligible under Section 29A of the IBC, specifically paragraphs (c) and (h) and accordingly, as on the Plan Submission Date, Numetal (which is nothing but an incorporated joint venture investment vehicle through which its shareholders are submitting the Resolution Plan) was not eligible under Section 29A of the IBC.

7. Accordingly and for the reasons set out in paragraphs 5 and 6 above, please note that pursuant to paragraph 4.11.2(a) of the RFP, the Resolution Plan is hereby rejected and will not be placed before the Committee of Creditors."

4. On 26.3.2018, AMIPL filed I.A. No. 110 of 2018 before the Adjudicating Authority, challenging "the order" of the Resolution Professional dated 23.03.2018. Numetal did likewise vide I.A. No. 111 of 2018.

5. On 2.4.2018, pursuant to the Resolution Professional's invitation, fresh resolution plans were submitted (as both the resolution plans before this were found to be ineligible) by AMIPL, Numetal, and one other entity, namely 'Vedanta Resources Ltd.'. On this very date, the NCLT directed that the bids of the resolution applicants, submitted pursuant to the revised request for proposal, should not be opened pending adjudication of I.A. No. 98 of 2018 filed by Numetal.

6. On 19.4.2018, the Adjudicating Authority, being the NCLT, passed its order in all the I.A.s, in which it first held:

> "21. As per the matter available on the record, a third party contestant, Arcelor Mittal India Pvt. Ltd., by filing Additional Application No. P-7 of 2018 has also sought for impleading itself in Intervention Application No. IA 98/2018 the Numetal has filed a Reply opposing such relief as being sought for by the present Applicant, Numetal Ltd., and in the present IA and also sought a declaration in its favour to be declared as eligible for filing a valid resolution plan as on 12.2.2018 thus, it has opposed the application alleging disability/ineligibility on the part of M/s. Numetal Ltd., to file a

> valid and proper resolution plan as on date of 12.2.2018. Since we have not decided the Impleadment Application in favour of ArcelorMittal by formally impleading it as party in the present I.A. No. 98 of 2018 and only audience were given to its learned counsel in support of its resolution plan, therefore, we find it appropriate to confine the issue of determination of eligibility mainly on the reason which formed a basis for the RP and CoC for not founding eligible for submission of resolution plan by the resolution applicant, M/s. Numetal Ltd., and not on additional ground as put forth by the ArcelorMittal. However, the oral submissions advanced by learned counsel for parties including the ArcelorMittal duly supported by their Written Submissions are being taken into consideration for deciding the issue involved in the present application.

For arriving at such findings/conclusion of the RP has obtained legal opinion and its such findings is based on such opinion which were explained to the CoC for reaching to appropriate conclusion/decision. Equally, the applicant in I.A. No. 98/2018 also obtain legal opinion from renowned jurists, e.g. (former judge of the hon'ble Supreme Court) and from former learned Law Officer of the GOI which are placed on record along with the present IA also in support of their case in this opinion it is expressed the Numetal Ltd. (Resolution Applicant) is a single and independent corporate entity and it cannot be termed as a consortium of its shareholders not it intend to implement the resolution plan jointly with another person hence, in view of this the amended clause 4.11.2(1) to the RFP would neither be applicable nor binding upon the resolution applicant and thus, it is not required at all to seek an approval from the RP or the CoC. In respect of proposed change its shareholding of ESIL in terms of RET and also are required under the other provisions of the Law. It has been also emphasised that the Numetal Ltd., is not a SPV brought into existence merely for the purpose of submitting the resolution plan in respect of the corporate debtor ESIL as it has recently entered into an agreement to acquire majority stock in Odisha Slurry Pipeline Infrastructure Ltd., by an independent contract from the Resolution Plan. Thus, it cannot be presumed that the applicant is such a corporate entity which is brought into the existence only for the purpose of putting forth resolution plan for the ESIL.

Since, there is difference in the legal opinions among the Learned Luminaries and law firms and more than one views are possible in the present case to be acted upon then, it cannot be said that there is patently illegality in the conclusion of the RP or it acted arbitrarily or mala fidely in rejecting the resolution plan by relying on the legal opinion received and believed to be true by him and which were placed before the CoC. Moreover, the RP under the provision of the Code it is expected to make scrutiny of a resolution plan in conformity with the law of the land and to take such a prudent decision which a common man in normal course may arrive and think just and proper. This court being the Adjudicating Authority under the Code is not expected to substitute its view upon the discretion and wisdom of the RP and CoC to opt for only which a particular view until and unless it is the case of patent illegality or arbitrariness.

Therefore, for the aforesaid reason in our prima facie view we do not find any patent illegality in the decision of the RP for declaring ineligible to applicants which is a prudent decision where there is possibility of more than one legal view then this court at this stage is not expected to substitute its

view and to interfere with the conclusion of the RP."

7. It then went on to hold:

> "19. Thus, the date on which a person stands disqualified would be the date of commencement of the Corporate Insolvency Resolution Process of the Corporate Debtor, i.e., ESIL. This date is 02.08.2017 on which date, ArcelorMittal India Pvt. Ltd., is disqualified in view of the fact that its connected persons of AM Netherland and L.N. Mittal are disqualified as they have an account or an account of the corporate debtor under their management and control or of whom they are a promoter classified as NPA under the guidelines of the Reserve Bank of India and at least a period of one year has lapsed from the date of such classification till the date of commencement of corporate insolvency resolution process of the corporate debtor. The said disqualification starts from 02.08.2017 can only be remedied in the manner provided in the proviso to clause (c) of section 29A read with section 30(4) proviso and in no other manner. The disqualification commenced on 02.08.2017 continues till 12.02.2018 and the same disqualification cannot be relieved by merely ceasing to be the promoter or by selling shares in the companies whose accounts are NPA such as Uttam Galva or KSS Petron.
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> 20. On perusal of annexure R/4, i.e., shareholding pattern annexed with the reply of Numetal Ltd., it is found that ArcelorMittal is a publicly known promoter of Uttam Galva and its shareholding is classified under "promoter and promoter group" in the filings made in the Stock Exchange of India. As per shareholding pattern of Uttam Galva disclosed in the stock exchange as on December, 2017 ArcelorMittal was a single largest shareholder having significant shareholding of 29.05 % in Uttam Galva.
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> 21. On perusal of the record it is found that connected person of the applicant are the promoter of KSS Petron Pvt. Ltd., a company incorporated under the Companies Act, 1956, having registered office at Swastik Chamber, 6th Floor, Sion Trombay Road, Chembur, Mumbai has been NPA for more than a year and CIRP has been initiated against the KSS Petron vide order dated 01.08.2017 by Mumbai Bench of the National Company Law Tribunal.
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> 22. It is also pertinent to mention herein that, in the minutes of the meeting of the committee of creditors which reproduces the decision of the RP pursuant to the opinions received by the RP from Cyril Amarchand Mangaldas and Mr. Khambatta.

Cyril Amarchand Mangaldas had opined that AM Netherlands exercised positive control over Uttam Galva and merely divesting the shareholding prior to the submission of the resolution plan could not remove the disqualification under section 29A(c) of the Code, unless cured by payment.

23. It is an admitted position that AM Netherlands is an indirect 100% subsidiary of ArcelorMittal Societe Anonyme (AMSA) which is a listed company incorporated in Luxemburg. On the other

hand, AM India is also an indirect subsidiary (99.99%) of AMSA. Accordingly, AMSA is promoter, in management and in control of AM India, the resolution applicant and AM Netherlands is a subsidiary company/associate company of AMSA in view of which AM Netherlands becomes a connected person and such connected person has an account of corporate debtor Uttam Galva under its management, control or of whom such connected person, namely, AM Netherlands is a promoter is classified as NPA for more than one year before 02.082017. Consequently, AM India shall not be eligible to submit a resolution plan as on 12.02.2018.

24. It is an admitted position that Laxminarayan Mittal is controlling AM India being an indirect subsidiary of AMSA. Accordingly, LN Mittal/AMSA is promoter in management and in control of AM India, the resolution applicant, and LN Mittal is also in management and control of KSS Global BV in view of what is stated above and KSS Petron which is a 100% subsidiary of KSS Global BV is also under management and control of LN Mittal. KSS Petron has a NPA for more than one year and consequently, LN Mittal being a promoter/in control of KSS Global BV/KSS Petron Pvt. Ltd., is a connected person whose account is classified non- performing. Consequently, AM India shall not be eligible to submit a resolution plan.

25. From a bare reading of section 29A(c) it is very clear that a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person; has an account, or an account of a corporate debtor under the management or control of such person or whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor, PROVIDED that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.

Section 29A does not distinguish between positive and negative control. Any person who is either promoter or in the management or in the control of the business of the corporate debtor and in default is ineligible. Person connected to ArcelorMittal India Pvt. Ltd., who are either promoter or in the management with KSS Petron and Uttam Galva Steels Ltd., are ineligible. Mere sale of shares and declassification as promoter after the companies have gone into default cannot be absolved them responsibility. In order to become eligible, overdue amounts to lenders in both the cases of KSS Petron and Uttam Galva Steels Ltd., should be paid by ArcelorMittal before being eligible to bid, as provided in Section 29A itself."

8. Having said this, it then remanded the matter to the Committee of Creditors as follows:-

> "27. Further, we are of the view that RP ought to have produced both the resolution plan before the CoC, along with his comments of eligibility of both the resolution applicants for consideration of the CoC and to follow the provision of section 29A(c) read with section 30(4) for the purpose of affording the opportunity to the resolution applicants before declaring them ineligible. In our view, such procedure has not been

followed hence, it vitiate the proceeding of the CoC and hence the present matter can be remanded back to the RP and CoC on this ground alone for their reconsideration."

9. Appeals were filed by both Numetal and AMIPL, on 26.4.2018 and 27.4.2018 respectively, before the Appellate Authority, being the NCLAT. Before these appeals could be decided, in compliance with the order passed by the Adjudicating Authority, the Committee of Creditors, after hearing both AMIPL and Numetal, disqualified AMIPL by an order dated 8.5.2018 as follows:

"48. In wrapping up this post-decisional hearing, we reiterate that AMIL is an ineligible resolution applicant under Section 29A(c) of the IBC, who acting in concert with AMBV (the promoter of Uttam Galva on insolvency commencement date and connected person of AMIL) and Arcelor Mittal Group in attempting to avoid their obligations to make payment as provided under Section 29A(c) of mc (sic) with reference to Uttam Galva and KSS Petron. Their unwillingness to make payment in the Uttam Galva matter or the KSS Petron matter by their actions of 7th of February, 2018 and 9th of February, 2018 as stated above is an avoidance device.

49. In case of Uttam Galva, AMBV arranged the sale of its shareholding at a nominal value just days prior to the date of submission of the Resolution Plan is evidence of the fact that AMIL is in concert with AMBV such action is a manifestation of the passage of Section 29A under IBC. As promoter of Uttam Galva and as member of the Arcelor Mittal Group referred above, they should have made payment of the Overdue Amounts to the lenders of Uttam Galva.

50. The same conduct of Arcelor Mittal Group acting through Fraselli and KSS Global in terminating the shareholders agreement in KSS Global, the holding company of KSS Petron, a device has been to avoid payment of the Overdue Amounts of KSS Petron before filing the Resolution Plan for ESIL. The close proximity of this action on 9th February, 2018, one day before the plan submission date is a telling act of avoidance.

51. Since the CoC have not by themselves filed an appeal over the Ld. Adjudicating Authority's order dated 19th April, 2018, the concession granted by the Ld. Adjudicating Authority to give an opportunity to cure the ineligibility, we are indicating to AMIL, its connected persona and persons in concert to cure their disability under Section 29A(c) of IBC by making a payment to the lenders of Uttam Galva for Overdue Amounts of Uttam Galva, another payment to the lenders of KSS Petron constituting Overdue Amounts in KSS Petron and Overdue Amounts of such other companies which are classified as NPAs and where Arcelor Mittal Group is a promoter. Such payments will have to be made by AMIL or its constituents / connected persons no later than 15th May, 2018, especially since the law actually requires that this curative payment of overdue amounts, interests and charges should be made by the corporate resolution intending applicant / resolution applicant before the Resolution Plan is filed. This concession by the CoC is without prejudice to the

CoC's right to strictly enforce the law and provisions of Section 29A(c) of the IBC. The proof of such payment in form of a No Overdue Amounts letter (indicative format set out in Annex) shall be submitted to the RP (with notification to the CoC) by 6:00 P.M. IST on 15th May 2018. As we have limited time available under the CIR process of ESIL, AMIL is requested to adhere to these timelines."

10. By another order of the same date, the Committee of Creditors disqualified Numetal as follows:

"44. Numetal and AEL are related as an associate company, on account of the fact that AEL (alias Rewant Ruia) has significant influence over Numetal pursuant to its control of at least 20% of the total voting power of Numetal. Since an associate company is considered as a related party to a resolution applicant where such resolution applicant and other persons are acting jointly or in concert, Numetal is clearly said to be acting jointly and in concert with AEL. This in turn means Numetal is acting in concert with Mr. Rewant Ruia and hence with Mr. Ravi Ruia, the promoter and guarantor of ESIL (a non-performing asset since 2016). This inflicts a disability and ineligibility upon Numetal / its consortium and constituent shareholders." xxx xxx xxx

57. Thus in wrapping up the post decisional hearing, we reiterate that Numetal is an ineligible resolution applicant acting in concert with Rewant Ruia and his connected person namely his relative / father Ravi Ruia, who is a promoter of a corporate debtor ESIL, which has a non-performing asset account.

58. Since the CoC have not by themselves filed an appeal over the Ld. Adjudicating Authority's Order dated 19th April, 2018, the concession granted by the Ld. Adjudicating Authority to give an opportunity to cure the ineligibility, we are indicating to the resolution applicant, i.e. Numetal and the consortium of Crinium Bay, Indo, TPE and AEL as persons acting in concert with Numetal, that they would be eligible only if they make payment of (i) the Overdue Amounts constituting NPA in ESIL as on 30th April, 2018 aggregating to Rs.

37,558.65 crores in principal and interest and Rs. 1,688.27 crores in penal interest and other charges and such other additional Overdue Amounts which have accrued till the date of payment; and (ii) the Overdue Amounts of such other companies which are classified as NPAs and where Mr. Ravi Ruia / Mr. Rewant Ruia are promoters. Such payments will have to be made by Numetal or its constituents / consortium no later than 15th May, 2018, especially since the law actually requires that this curative payment should be made before the resolution plan is filed. This concession is without prejudice to the CoC's right to strictly enforce the law and the provisions of Sections 29A(c) and 29A(h) of IBC. The proof of such payment in form of a no-Overdues Amounts letter (indicative format set out in Annex 3) shall be submitted to the RP (with notification to CoC) by 6:00 P.M. IST on 15th May 2018, As we have limited time available under the CIR process of ESIL, Numetal is requested to adhere to these timelines."

11. In the appeals that were filed before it, the Appellate Authority, insofar as Numetal's Resolution plan was concerned, vide an order dated 7.9.2018 held as follows:-

> "44. On behalf of 'AM India Ltd.', it was submitted that 'VTB Bank' one of the shareholders of 'Numetal Ltd.' is ineligible in view of Article 5(c) of the EU Regulations of 2014. Though such submission has been made, no order or evidence has been placed on record to suggest that any order of prohibition was imposed by the European Union against the 'VTB Bank'. Neither the date of order nor order passed by any competent authority or court of law has been placed on record.
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> 45. On the other hand, it will be evident that Council of European Union adopted Council Regulation (EU) No. 833/2014 concerning Restricting measures in view of Russia action. In fact, in view of situation in Ukraine, the European Union Regulation was adopted. Apart from the aforesaid fact, that 'AM India Ltd.' has not brought on record any penal order passed by any court of law relating to disability, if any, which is corresponding to any of the disability shown in clauses
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> (a) to (h) of Section 29A. Therefore, the stand taken by the 'AM India Ltd.' with regard to ineligibility of 'VTB Bank' is fit to be rejected.

xxx xxx xxx Resolution Plan submitted by the 'Numetal Ltd.' on 12th February, 2018

60. As on 12th February, 2018, when the 1st Resolution Plan was submitted by 'Numetal Ltd.', it had four shareholders.

(i) 'Crinium Bay'	:	40%
(ii) 'Indo'	:	25.1%
(iii) 'TPE'	:	9.9%
(iv) 'AEL'	:	25%

61. Admittedly, Mr. Rewant is 100% shareholder of 'AEL' and 'AEL' held 25% in 'Numetal Ltd.' even as on 12th February, 2018, Mr. Rewant being son of Mr. Ravi, who is the promoter of the 'Corporate Debtor', we hold that 'AEL' is a related party and comes within the meaning of 'person in concert' in terms of Regulation 2(1)(q).

62. In view of the aforesaid findings, we hold that at the time of submission of 1st Resolution Plan by 'Numetal Ltd.', one of the shareholders being 'AEL', 'Numetal Ltd.' was not eligible to submit 'Resolution Plan' in terms of Section 29A.

Position of 'Numetal Ltd.' as on 29 th March, 2018 when the subsequent 'Resolution Plan' was submitted by 'Numetal Ltd.'.

63. The 'Committee of Creditors' had extended the period for submitted a fresh 'Resolution Plan' by 2 nd April, 2018. 'Numetal Ltd.' filed fresh 'Resolution Plan' on 29th March, 2018. On the said date the 'Numetal Ltd.' consisted of the three shareholders: -

(a) 'Crinium Bay' ('VTB') : 40%
(b) 'Indo' : 34.1%
(c) 'TPE' : 25.9%

64. As on 29th March, 2018, as the 'AEL' was not the shareholder of 'Numetal Ltd.' and all the three shareholders aforesaid being eligible, we hold that 'Numetal Ltd.' in respect of the 'Resolution Plan' dated 29th March, 2018, is eligible and the provision of Section 29A, as on 29th March, 2018 is not attracted to the 'Numetal Ltd.'. For the reasons aforesaid, we are of the view that the 'Resolution Plan' submitted by 'Numetal Ltd.' on 29th March, 2018 is required to be considered by the 'Committee of Creditors' to find out its viability, feasibility and financial matrix."

12. In the same order, insofar as AMIPL's resolution plan was concerned, the Appellate Authority held as follows:

> "107. In the present case, the 'Expression of Interest' was submitted by 'AM India Ltd.' on 11th October, 2017 and by 'Numetal Ltd.' on 20 th October, 2017, both prior to 23rd November, 2017 i.e. the date Section 29A was inserted by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 but the 'Resolution Plans' were submitted by both 'AM India Ltd.' and 'Numetal Ltd.' on 12th February, 2018.
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> 108. The question arises for consideration is as to what will be the position if, on the basis of 'Information Memorandum' the 'Expression of Interest' is submitted by the 'Resolution Applicants' prior to 23 rd November, 2017 and whether they are eligible to take advantage of 2nd proviso to sub-section (4) of Section 30.?
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> 109. Section 29A came into force on 23rd November, 2017. Those who submitted 'Resolution Plan' prior to the said date and if covered by clause (c) of Section 29A are entitled to derive benefit of second proviso to sub-section (4) of Section 30. Under 'I&B Code' there is no provision to submit 'Expression of Interest' prior to 'Resolution Plan'. What we find from the invitation seeking 'Expression of Interest' to submit a 'Resolution Plan' for 'Essar Steel Limited' published on 6th October, 2017 is the first stage of 'Resolution Plan'.

Therefore, we hold that 'Expression of Interest' is part of the 'Resolution Plan', which follows the 'Resolution Plan'. In such case, the date of submission of the 'Expression of Interest' should be treated to be the date of submission of the 'Resolution Plan'. In this background, we hold that the date of submissions of the 1st 'Resolution Plan(s)' of 'AM India Ltd.' and 'Numetal Ltd.' will be deemed to be 11th October, 2017/12th February, 2018 and 20th October, 2017/12th February, 2018 respectively.

110. If the aforesaid proposition is not accepted, it will deprive the 'Resolution Applicants' from deriving advantage of second proviso to sub-section (4) of Section 30 inserted on 23rd November, 2017, even though they acted to submit the 'Resolution Plan' by submitting the 'Expression of

Interest' of 'Resolution Plan'.

111. In view of the aforesaid finding, we hold that the Adjudicating Authority rightly held that the Appellant- 'AM India Ltd.' should have been given the opportunity by the 'Committee of Creditors' in terms of second proviso to sub-section (4) of Section 30.

112. The question arises for consideration is whether the 'AM Netherlands' is eligible, having transferred its entire shareholding of 'Uttam Galva' on 7th February, 2018 and by transferring of its entire shareholding of 'Fraseli' in 'KSS Global' on 9th February, 2018 i.e. two to four days prior to the submission of 'Expression of Interest' (first phase of 'Resolution Plan').

113. Proviso to clause (c) of Section 29A reads as follows:

> "Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan"

114. The aforesaid proviso to clause (c) makes it clear that the person shall be eligible to submit a 'Resolution Plan' if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of 'Resolution Plan'. It does not stipulate any other mode to become eligible and thereby does not prescribe any other mode to become ineligible, including by selling the shares thereby existing as a member of the Company whose account has been classified as non- performing asset accounts in accordance with the guidelines of the Reserve Bank of India.

115. Second proviso to sub-section (4) of Section 30 also stipulates, as follows:

> "30. Submission of resolution plan.□(4) xxx xxx xxx Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause
>
> (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A"

116. From both the aforesaid provisions, it is clear that except in the manner the 'Resolution Applicants' can make it eligible and get rid of ineligibility under clause

(c) of Section 29A that is by making payment of all overdue amounts in accordance with the proviso to clause (c) of Section 29A, no other manner a person, who is otherwise ineligible under clause (c) of Section 29A, can become eligible. There is no provision in the 'I&B Code' which permits an ineligible person to become eligible by selling or transferring its shares of the Company whose accounts have been declared as NPA in accordance with the guidelines of Reserve Bank of India.

117. Admittedly, 'AM Netherlands' is related party of 'AM India Ltd.'. 'AM Netherlands' was the promoter of 'Uttam Galva' on the date when the 'Uttam Galva' classified as NPA in accordance with the guidelines of Reserve Bank of India and a period of one year has elapsed from the date of such classification, at the time of commencement of 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor'.

118. Once the stigma of "classification of the account as NPA" has been labelled on the promoter of the 'Uttam Galva', even after sale of shares by 'AM Netherlands' it may ceased to be a member or promoter of the 'Uttam Galva', but stigma as was attached with it will continue for the purpose of ineligibility under clause (c) of Section 29A, till payment of all overdue amount with interest and charges relating to NPA account of the 'Uttam Galva' is paid.

119. 'AM Netherlands' is 100% subsidiary of 'AMSA' which is a listed company incorporated in Luxemburg. 'AM India Ltd.' is also a subsidiary of 'AMSA' having 99.99% shareholding in it. Accordingly, 'AMSA' is also a promoter, in the management and in control of 'AM India Ltd.'. 'Fraseli' is a company owned and controlled by a company called by 'Mittal Investments' acquired about one third of the share capital of 'KSS Global BV'. Pursuant to such acquisition, 'Fraseli' acquired control over 'KSS Global BV' which in turn controls 'KSS Petron' and 'Petron Engineering'. 'Mittal Investments' is owned and controlled by LN Mittal Group, the promoters of the 'AM India Pvt. Ltd'.

120. 'AM India Ltd.' divested its shareholding in 'KSS Global BV' which is 100% owner of 'KSS Petron' (a Company whose account has been declared as NPA). 'AM India Ltd.' has its control over it will be evident from the fact that it has nominee Directors, who also resigned on 9th February, 2018 i.e. 3 days before submission of the 'Expression of Interest' of 'Resolution Plan' by 'AM India Ltd.' This will be also clear from the fact that the 'AM India Ltd.' was nothing that an entity controlling and managing in 'KSS Global BV' (which is 100% owner of 'KSS Petron' an NPA Company) divested its shareholding in 'KSS Global BV' on 9th February, 2018 i.e. 3 days before submission of the 'Expression of Interest' of 'Resolution Plan'.

121. We have also noticed that consequent to such acquisition of control by 'Fraseli', on 23rd May, 2011 a public announcement was made under 'SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997' for the acquisition of shares of 'Petron Engineering' inter alia by 'KSS Global BV' and 'Fraseli'. Therefore, we hold that Mr. L.N. Mittal Group, a connected person of 'AM India Ltd.' being the promoter and in the control and management of 'KSS Petron' since 2011 and 'KSS Petron' having classified as 'NPA' by multiple banks, the stigma attached to it cannot be cleared by 'KSS Global' by divesting its shares in 'KSS Petron' on 9th February, 2018 and the stigma will continue for the purpose of ineligibility under clause (c) Section 29A, till the payment of all overdue amount with interest thereon and charges relating to NPA account of 'KSS Petron'.

122. Admittedly, there are three nominee Directors of 'AM India Ltd.' in 'KSS Petron', one of the NPA Company. The nominee Directors of the Appellant- 'AM India Ltd.' had also resigned on 9th February, 2018 i.e. three days' before the submission of the 'Resolution Plan'. Therefore, it is clear that the 'AM India Ltd.' had complete control over the 'KSS Petron'.

123. It is informed that after impugned order passed by the Adjudicating Authority, the 'AM India Ltd.' had made conditional deposit of Rs. 7,000 Crores in its own current account (Escrow Account). Such depositation of the amount in its own Escrow Account does not qualify as a payment of overdue amounts in terms of proviso to clause (c) of Section 29A. A conditional offer to pay the over dues amount cannot be accepted till it is complied in the light of proviso to clause (c) of Section 29A unconditionally.

124. Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of 'AM India Ltd.' when asked, on instruction, submitted that if this Appellate Tribunal accept the 'Resolution Plan' submitted by the 'AM India Ltd.', it may deposit the non-performing assets amount with interest in the respective accounts which were declared as NPA in accordance with the guidelines of the Reserve Bank of India.

125. As we hold that 'AM India Ltd.' is also entitled to the benefit of second proviso to sub-section (4) of Section 30, we give one opportunity to the 'Resolution Applicant'- 'AM India Ltd.' to make payment of all overdue amount with interest thereon and charges relating to Non Performing Accounts of both the 'Uttam Galva' and the 'KSS Petron' in their respective accounts within three days i.e. by 11th September, 2018. If such amount is deposited in the accounts of both Non-Performing Accounts of 'Uttam Galva' and 'KSS Petron' within time aforesaid and is informed, the 'Committee of Creditors' will consider the 'Resolution Plan' submitted by 'AM India Ltd.' along with other 'Resolution Plans', including the 'Resolution Plan' submitted by the 'Numetal Ltd.' on 29th March, 2018, and if so necessary, may negotiate with the 'Resolution Applicant(s)'. An early decision should be taken by the 'Committee of Creditors' and on approval of the 'Resolution Plan', the 'Resolution Professional' will place the same immediately before the Adjudicating Authority who in its turn will pass order under Section 31 in accordance with law. The 'Successful Resolution Applicant' will take steps for execution of its 'Resolution Plan' and deposit the upfront money if proposed, in terms of the 'Resolution Plan'.

126. Taking into consideration the fact that a long period has taken due to pendency of the case before the Adjudicating Authority and thereafter, before this Appellate Tribunal, we direct the Adjudicating Authority to exclude the period the appeal was pending before this Appellate Tribunal i.e. from 26th April, 2018 till today (7th September, 2018) for the purpose of counting the total period of 270 days. The impugned order dated 19th April, 2018 passed by the Adjudicating Authority so far as it relates to eligibility of 'Numetal Ltd.' as on the date of the submission of the 'Resolution Plan' dated 29th March, 2018 is set aside. The impugned judgment/order in respect to 'AM India Ltd.' is affirmed with conditions as mentioned in the preceding paragraphs. All the appeals are disposed of with aforesaid observations and directions. The parties will bear their respective cost."

13. This is how both AMIPL and Numetal are before us in appeals from the Appellate Authority's order dated 7.9.2018.

14. Shri Harish N. Salve, learned Senior Advocate appearing on behalf of AMIPL, argued that Section 29A, as originally enacted, disqualified a person who has an account of a corporate debtor

under the management or control of such person, or of whom such person is a promoter, which account was declared as a non- performing asset. The further condition is that one year should have elapsed from the date of such declaration till the date of commencement of the corporate insolvency resolution process of the corporate debtor. Thus, a plain reading of the same establishes that the ineligibility under Section 29A is in relation to the submission of a resolution plan, which must consist of the elements set out in Section 30. Responding to preliminary enquiries, i.e., an expression of interest, is not the subject matter of a resolution plan, and therefore, the relevant time is the time of submission of a resolution plan. He further argued that the amendment made to Section 29A in June, 2018, expressly stating that the relevant time was the time of submission of a resolution plan, is clarificatory in nature. Once this becomes clear, everything on facts falls into place. According to the learned Senior Advocate, AMIPL is an indirect subsidiary of one 'ArcelorMittal Societe Anonyme' (hereinafter referred to as "AMSA"), which is a listed company in Luxemburg. AMSA holds 100% shares in one 'ArcelorMittal Belvel & Differdange Societe Anonyme' (hereinafter referred to as "AMBD"), a company incorporated in Luxemburg, which in turn holds 100% in one 'Oakey Holding BV', a company incorporated in the Netherlands, which in turn holds 99.99% shares in AMIPL. ArcelorMittal Netherlands BV (hereinafter referred to as "AMNLBV"), which is a member of the L.N. Mittal Group incorporated in the Netherlands, is 100% held by AMSA (the Chairman and CEO of AMSA being Shri L.N. Mittal). AMNLBV held 29.05% in one 'Uttam Galva Steels Limited' (hereinafter referred to as "Uttam Galva") which is an Indian company, listed in India. Uttam Galva was declared as a non-performing asset on 31.3.2016, with a debt of around Rs. 6000 crores. According to Shri Salve, Uttam Galva, though it entered into a Co-Promotion Agreement with AMNLBV on 4.9.2009, was really promoted by the Miglani Group of businessmen who are Indian citizens residing in Mumbai. The Co- Promotion Agreement conferred on AMNLBV the right to appoint 50% of the non-independent directors on the board, as well as certain affirmative voting rights. This required that the Articles of Association be amended, which was never in fact done. In 2015 itself, AMNLBV had written off the investment in Uttam Galva from its books, seeking an exit from Uttam Galva at this time. AMNLBV never appointed any director or exercised any voting rights in Uttam Galva. What is important to note is that it had transferred its entire shareholding in Uttam Galva on 7.2.2018 to one 'Sainath Trading Company Private Limited', which was a Miglani Group Company, for Re.1 per share (having purchased the shares at Rs.120 per share). The depository participant account of AMNLBV ceased to show the said shares with effect from 7.2.2018. The Co-Promotion Agreement dated 4.9.2009, pursuant to which the status of "promoter" had been conferred on AMNLBV, stood automatically terminated vide clause 21.6 thereof on 7.2.2018. In order to put the matter beyond any doubt, the parties also executed a Co-Promotion Termination Agreement on 7.2.2018. On 8.2.2018, Uttam Galva filed the necessary forms with the Registrar of Companies and made the necessary disclosures with the National Stock Exchange and Bombay Stock Exchange to declassify AMNLBV as a promoter of Uttam Galva. This was accordingly done on 21.3.2018 and 23.3.2018 before the NSE and BSE respectively. Such declassification, being a ministerial act, is relatable to the date of sale of shares, i.e., 7.2.2009, and considered effective from the said date. Inasmuch as AMNLBV therefore ceased to be a promoter in Uttam Galva prior to 12.2.2018, the resolution plan is not hit by Section 29A(c). Similarly, according to the learned Senior Advocate, insofar as KSS Petron Private Limited (hereinafter referred to as "KSS Petron") is concerned, it is an admitted case that 'Fraseli Investments Sarl' (hereinafter referred to as "Fraseli") is a company owned and controlled by one 'Mittal Investments Sarl,' which

in turn is owned and controlled by the L.N. Mittal Group, the promoters of AMIPL. Fraseli held 32.22% in one 'KazStroy Service Global BV' (hereinafter referred to as "KSS Global"), a company incorporated in the Netherlands which in turn held 100% of KSS Petron, an Indian company. The shareholders agreement entered into between Fraseli and KSS Global permitted Fraseli to appoint two out of six nominee directors in KSS Global, and provided for an affirmative vote of shareholders with respect to certain matters. According to the learned Senior Advocate, if the definition of "control" in Section 2(27) of the Companies Act, 2013 is applied, the relationship of KSS Global with KSS Petron would not constitute "control" over the wholly owned subsidiary in India. In any case, the entire shareholding of Fraseli in KSS Global was transferred back to the promoters of KSS Global on 9.2.2018, i.e., 3 days before submission of the resolution plan. KSS Petron has been classified as a non-performing asset by multiple banks, and the corporate insolvency resolution process was initiated against it on 1.8.2017 before the NCLT. It may be added that KSS Petron was declared a non-performing asset on 30.9.2015 with a debt of around Rs. 1000 crores. The learned Senior Advocate therefore attacked the finding of the Appellate Authority on this score, and stated that, as Section 29A was not attracted, the question of paying off the debts of Uttam Galva and KSS Petron would not arise.

15. When it came to Numetal's resolution plan, the learned Senior Advocate argued that it is important to remember that Numetal was incorporated on 13.10.2017 by Shri Rewant Ruia, son of Shri Ravi Ruia (who was a promoter of the corporate debtor of ESIL), with the specific objective of trying to acquire ESIL. At the time of its incorporation, one 'Aurora Enterprises Limited' (hereinafter referred to as "AEL"), a Ruia Group Company, held 100% shareholding of Numetal. In turn AEL's 100% shareholding was held by one 'Aurora Holdings Limited' (hereinafter referred to as "AHL"), 100% of whose shareholding was held by Shri Rewant Ruia, who was a former director of the corporate debtor, i.e. ESIL. On 18.10.2017, a few weeks before Section 29A was introduced, AEL transferred 26.1% of its shares in Numetal to one 'Essar Communications Limited' (hereinafter referred to as "ECL"), a group company of the corporate debtor. On 19.10.2017 Shri Rewant Ruia settled an irrevocable discretionary trust, called the 'Crescent Trust', which purchased the shares of AHL at par value. On 20.10.2017, when Numetal submitted its expression of interest, it had two share holders, i.e., AEL (holding 73.9%) and ECL (holding 26.1%). On 22.11.2017, when the Finance Minister made a statement that the Code would be amended in order to prevent unscrupulous persons from submitting resolution plans, AEL transferred 13.9% of its shareholding in Numetal, and ECL its entire 26.1% shareholding, to one 'Crinium Bay Holdings Limited' (hereinafter referred to as "Crinium Bay"), a 100% indirectly held subsidiary of one 'VTB Bank', which in turn was a Russian company, the majority of whose shares were held by the Russian Government. Crinium Bay thus became the owner of 40% of the shareholding of Numetal. AEL subsequently transferred 25.1% of the shareholding in Numetal to one 'Indo International Trading FZCO' (hereinafter referred to as "Indo"), a Dubai company, and 9.9% of the shareholding to one 'JSC VO Tyazhpromexport' (hereinafter referred to as "TPE"), a Russian company. AEL was left with only a 25% shareholding in Numetal. Even this holding in Numetal was ultimately divested on 29.3.2018, so that Crinium Bay held 40%, TPE held 25.9% and Indo held 34.1% in Numetal, with AEL's holding becoming 'Nil'. Shri Salve has argued that Numetal is hit by Section 29A(i) of the Code, as VTB Bank, the parent of Crinium Bay, stands prohibited from accessing the securities markets in the European Union pursuant to an order dated 31.7.2004, and in the United States by two orders. This being the case,

Numetal is directly hit by sub-section (f) read with sub-section (i) of Section 29A. It is also hit by Section 29A(j) as Crinium Bay, being a subsidiary of VTB Bank, becomes a "connected person" as defined under sub-clauses (i) and (iii) of Explanation 1 to Section 29A(j). One very important fact that was stressed by him was that an amount of Rs. 500 crores was given by AEL to Numetal so that it could deposit the requisite earnest money that had to be made along with the resolution plan furnished by Numetal. This amount, that was admittedly furnished by AEL, continues to remain with the Resolution Professional, and has till date not been withdrawn by AEL, showing that Shri Rewant Ruia continues to be vitally interested and linked with the resolution plan of Numetal, even after the complete exit of AEL as its shareholder. He therefore submitted that, given these facts, whereas AMIPL should have been held eligible, it was wrongly held to be ineligible by the Appellate Authority; and that Numetal, being clearly hit by several provisions of Section 29A, was wrongly held to be eligible. He stressed the fact that one of the core objectives of Section 29A was to ensure that the promoter of the corporate debtor should not through or by circular means come back in order to regain the company that he himself had run to the ground. For this purpose, he relied upon the Finance Minister's statement on 29.12.2017, while introducing the Bill to amend the Code by introducing Section 29A, together with the Statements of Objects and Reasons appended to the said Bill.

16. Dr. A.M. Singhvi, learned Senior Advocate, supported the arguments of Shri Salve. According to him, Section 29A(c) always had the application of the resolution plan date as the relevant date, given the in praesenti "has" which is also there in clauses (h) and

(j), and is similar to the expression "is" which is to be found in clauses (a), (b), (e) and (f), as contrasted with the expression "has been" used in clauses (d) and (g), of Section 29A. According to him, the amendment made in 2018 is in any case clarificatory in nature. He supported the attack of Shri Salve on the Appellate Authority's judgment, stating that so far as Uttam Galva is concerned, it is well established that the sale of shares is complete once they move out of the demat account of the seller, which in this case took place five days before 12.2.2008. For this he cited certain judgments. He also supported Shri Salve's argument by stating that Numetal is clearly disqualified under several clauses of Section 29A.

17. On the other hand, Shri Mukul Rohatgi, learned Senior Advocate, appearing on behalf of Numetal, stated that Numetal was a company which was therefore a separate person in law from its shareholders. He contended that on the date of submission of the resolution plan (i.e., 12.2.2018), AEL held only 25%, which would be below the figure of 26% mentioned in the request for proposal dated 24.12.2017, wherein "control" has been defined as a person holding more than 26% of the voting share capital in the company. According to him, in any case by 2.4.2018, when it submitted a fresh resolution plan, AEL had walked out completely, leaving behind two Russian companies holding 40% and 25.9% respectively of Numetal, and Indo, a Dubai Company, holding 34.1%. According to the learned Senior Advocate, Numetal cannot possibly be described as a joint venture of its shareholders, and for this purpose he cited some of our judgments. According to him, a joint venture is a contractual arrangement whereby two or more parties undertake an economic activity which is subject to joint control, which is missing in the present case as a shareholder in a company is distinct from the company itself. He added that Section 29A(c) requires that Numetal as a person,

together with any other person acting jointly or in concert, has to have an account of a corporate debtor under its management or control, or of whom such person is a promoter (which is classified as a non- performing asset for a period of at least one year before the date of commencement of the corporate insolvency resolution process of the corporate debtor). According to the learned Senior Advocate, Shri Rewant Ruia would not fall within any of these categories, on a reading of Section 2(27) of the Companies Act, 2013, which defines "control"; Section 2(69) of the Companies Act, 2013, which defines "promoter"; and Sections 2(53) and 2(54) of the Companies Act, 2013, which define "manager" and "managing director" respectively. He emphatically argued that though Shri Rewant Ruia is the son of Shri Ravi Ruia, who is a promoter of the corporate debtor, and though he may be deemed to be a "person acting in concert" within the definition contained in Regulation 2(1)

(q) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as the "2011 Takeover Regulations"), yet, he cannot be considered to be a "connected person" under Section 29A(j) of the Code. This is for the reason that under Explanation 1 to Section 29A(j), the expression "connected person" can only mean a related party or a person who is referred to in sub-clauses (i) and (ii) of Explanation 1, and since Shri Rewant Ruia is neither a promoter of nor in the management or control of the resolution applicant Numetal, he would fall outside of sub-clause (iii) of Explanation 1. According to Shri Rohatgi, the Appellate Authority was absolutely correct in saying that Numetal would not be ineligible under Section 29A. He strongly attacked Shri Salve's argument that VTB Bank, the holding company of Crinium Bay, was barred from accessing the securities market by either the European Union or the United States. He took us to the original orders and argued that the document of the European Union, being Council Regulation 833 of 2014 dated 31.7.2014, pursuant to Article 215 of the Treaty on the Functioning of the European Union, was owing to restrictive measures taken in view of Russia's actions destabilizing the situation in Ukraine. Because Russia had illegally annexed Crimea, political sanctions were imposed by this document, which cannot possibly be said to be sanctions imposed by an authority equivalent to SEBI in India. The sanctions also did not relate in any manner to the securities market. Equally, insofar as the two orders of the United States are concerned, they were also political sanctions imposed against Russian companies for the same reason by the Office of Foreign Assets Control by a Presidential Order. He even argued that insofar as the European Union is concerned, the corresponding "authority" to SEBI is the 'European Securities and Market Authority', whereas in the United States it would be the 'Securities Exchange Commission,' neither of whom has issued any sanctions which would interdict VTB Bank from accessing or trading in the securities market. He also countered Shri Salve's submission that the Rs. 500 crores that was advanced by AEL and given as earnest money for the resolution plan was not yet withdrawn, contending that this was so because the validity of the first bid by Numetal continues to be sub judice.

18. Shri Rohatgi then attacked AMIPL by stating that even a literal reading of Section 29A(c) would make it clear that in the case of Uttam Galva, AMNLBV, which is admittedly an L.N. Mittal Group Company, was directly covered by sub-clause (c) as it had been shown as a "promoter" in the annual reports of Uttam Galva, and would therefore fit the definition of "promoter" contained in Section 2(69) of the Companies Act, 2013. What is of great importance, and what is in fact not disclosed, is that a Non- Disposal Undertaking was issued to the State Bank of India, the secured creditor of Uttam Galva, on 12.7.2011 by AMNLBV, agreeing that it would not sell, transfer or dispose of any

shares held by it without the consent of the lenders of Uttam Galva. According to Shri Rohatgi, therefore, the transfer of these shares, the recognition of such transfer by Uttam Galva, and the consequent application to the Stock Exchanges for declassification as promoter, without obtaining the consent of the State Bank of India, is invalid in law and a fraud played by AMNLBV. Further, in the disclosures that were made under the 2011 Takeover Regulations, the column relatable to the existence of any non- disposal undertakings was left blank. In addition, since a sale of shares between co-promoters inter se is exempted from the requirement of making a public offer under Regulation 3(1) read with Regulation 10(1)(a)(2) of the 2011 Takeover Regulations, it is clear that on the one hand promoter status is claimed in order to avail of the regulation, whereas, in the present case, it is argued that, in substance, AMNLBV is not in fact a promoter. Equally, leaving a blank in the form against the column which required disclosure of non-disposal undertakings, is a fraud played on SEBI, and on the shareholders of Uttam Galva; as otherwise, in the public offer that would have had to be made, the shares of Uttam Galva would have had to be purchased at the higher price that is mentioned in the said Regulations. Incidentally, according to Shri Rohatgi, in any case, getting out of Uttam Galva by paying a price of Re.1 per share when the market value on that date was Rs.19.50 per share is again a fraudulent transaction, which cannot possibly pass muster under Section 29A. Further, insofar as KSS Petron is concerned, it is clear that Fraseli's holding of 32.22% in KSS Global would certainly amount to de facto control, if not de jure control, of KSS Petron, its wholly owned subsidiary, as defined under Section 2(27) of the Companies Act, 2013. The transfer of Fraseli's shareholding on 9.2.2018, before submission of the resolution plan on 12.2.2018, is again a dubious and fraudulent act squarely hit by Section 29A. Shri Rohatgi further argued that Shri Pramod Mittal, brother of Shri L.N. Mittal, is a connected person, which would trigger Section 29A(j). Shri Pramod Mittal is a promoter and director of one 'Gontermann Piepers (India) Limited', which has also been declared an NPA, rendering Shri L.N. Mittal ineligible under Section 29A(j). Equally, Shri L.N. Mittal, Shri Pramod Mittal and other members of the Mittal family are promoters of one 'Ispat Profiles India Limited'. This company was ordered to be wound up by the BIFR, appeals from which have been dismissed by the AAIFR. Consequently, Shri L.N. Mittal, as a related party of Shri Pramod Mittal, would render AMIPL ineligible under sub-clause (c) read with sub-clause (j) of Section 29A of the Code.

19. Shri Gopal Subramanium, learned Senior Advocate appearing on behalf of the Committee of Creditors, has placed before us the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, introducing Section 29A, and commented on the difference between the opening lines of the said Ordinance as compared with those of the Amendment Act of 2017. The Amendment Act of 2017 brings in "persons acting in concert". According to the learned senior counsel, "persons acting in concert" has been dealt with by the Justice P.N. Bhagwati Committee Report on Takeovers, 1997, which he read out to us in copious detail. He also referred to some of our judgments on tearing the corporate veil, and on persons acting in concert. According to him, there should be no interference by the appropriate authority at the behest of a resolution applicant at the stage of a Resolution Professional processing resolution applications, and the subsequent stage of a Committee of Creditors disapproving a resolution plan. According to him, the period of 270 days is a watertight compartment, within which either a resolution plan will be approved, or the corporate debtor be wound up. According to him, the practice of interlocutory applications being filed at anterior stages of the proceedings before the Adjudicating Authority, and orders of remand to the Committee of

Creditors, should be stopped. However, the time taken by the Adjudicating Authority and the Appellate Authority in deciding disputes that may arise before them should be excluded from the computation of 270 days as aforesaid. According to the learned Senior Advocate, the expressions "persons acting in concert" and "control" are broad enough to bring all associated persons within the dragnet of Section 29A. He cited a number of judgments on how this provision should be construed in accordance with the object sought to be achieved by the said provision, which should never be stultified or defeated, so as to get to the real state of affairs of the facts of every given case. Therefore, it is very important to remember that phrases such as "persons acting in concert" and "control" are meant not only to pierce the corporate veil, but also to get to the real persons who present resolution plans. On the facts of each case, according to Shri Subramanium, both resolution plans were correctly rejected by the Resolution Professional and the Committee of Creditors, as they were both hit by the provisions of Section 29A. Any circular method, by which payment of debts of an NPA of a person acting jointly or in concert under the proviso to Section 29A(c) is sought to be avoided, should be interdicted. According to the learned Senior Advocate, both resolution plans are hit by Section 29A(c), and the only way out is for both resolution applicants to pay up the debts of the respective NPAs of the corporate debtors who are associated with them.

20. Shri K.V. Viswanathan, learned Senior Advocate, appearing on behalf of the Resolution Professional, drew our attention to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the "CIRP Regulations"), and stated that the role of the Resolution Professional is essentially to do a due diligence on each resolution plan submitted before it. It is only after such due diligence is done that this plan is to be forwarded to the Committee of Creditors. According to him, even if it is found that the resolution plan in question contravenes any law, such finding would only be a tentative opinion formed by the Resolution Professional, who has to submit the plan to the Committee of Creditors once it is complete in all respects. According to him, a conjoint reading of Section 25(2)(i) of the Code, read with Section 30(3) and the second proviso to Section 30(4), would necessarily lead to this conclusion. Also, according to the learned Senior Advocate, the expression "control" contained in Section 29A(c) should be construed noscitur a sociis with the word "management", and so construed, would only mean positive, de facto, control of such person.

21. At this point, it is necessary to first set out Section 29A in its various forms: as first introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 and the Insolvency and Bankruptcy Code (Amendment) Act, 2017, together with the amendment made by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. Section 29A, as introduced by the Insolvency & Bankruptcy Code (Amendment) Ordinance, 2017, on 23.11.2017, reads as follows:

> "29A.A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly with such person, or any person who is a promoter or in the management or control of such person,-
>
> (a) is an undischarged insolvent;

(b) has been identified as a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(c) Whose account is classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) and period of one year or more has lapsed from the date of such classification and who has failed to make the payment of all overdue amounts with interest thereon and charges relating to non-

performing asset before submission of the resolution plan;

(d) Has been convicted for any offence punishable with imprisonment for two years or more; or

(e) Has been disqualified to act as a director under the Companies Act, 2013 (18 of 2013);

(f) Has been prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) Has indulged in preferential transaction or undervalued transaction or fraudulent transaction in respect of which an order has been made by the Adjudicating Authority under this Code;

(h) Has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor under insolvency resolution process or liquidation under this Code;

(i) Where any connected person in respect of such person meets any of the criteria specified in clauses

(a) to (h).

Explanation – For the purposes of this clause, the expression "connected person" means-

(i) any person who is promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii)

(j) Has been subject to any disability, corresponding to clauses (a) to (i), under any law in a jurisdiction outside India."

22. The Insolvency and Bankruptcy Code (Amendment) Act, 2017, received the assent of the President on 28.1.2018, but came into force with retrospective effect from 23.11.2017. Section 29A,

as contained therein, reads as follows:

> "29A. Persons not eligible to be resolution applicant. - A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—
>
> (a) is an undischarged insolvent;
>
> (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);
>
> (c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-

performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

> Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;
>
> (d) has been convicted for any offence punishable with imprisonment for two years or more;
>
> (e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013);
>
> (f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
>
> (g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;
>
> (h) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;
>
> (i) has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or
>
> (j) has a connected person not eligible under clauses

(a) to (i).

Explanation.— For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

> Provided that nothing in clause (iii) of this Explanation shall apply to— (A) a scheduled bank; or (B) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); or (C) an Alternate Investment Fund registered with the Securities and Exchange Board of India."

23. Finally, the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, received the assent of the President on 17.8.2018, but came into force with retrospective effect from 6.6.2018. The said amendment inter alia amended Section 29A, which now reads as follows:

> "29A. Persons not eligible to be resolution applicant.—A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—
>
> (a) is an undischarged insolvent;
>
> (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);
>
> (c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-

performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

> Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to

non-performing asset accounts before submission of resolution plan:

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.—For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.—For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(d) has been convicted for any offence punishable with imprisonment—

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an

order has been made by the Adjudicating Authority under this Code:

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(i) is subject to any disability, corresponding to clauses

(a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses

(a) to (i).

Explanation I.—For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;

Explanation II.—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely—

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(d) an asset reconstruction company registered with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government."

24. The Hon'ble Minister of Finance and Minister of Corporate Affairs, Shri Arun Jaitley, while moving the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, stated on 29.12.2017:

"The core and soul of this new Ordinance is really Clause 5, which is Section 29A of the original Bill. I may just explain that once a company goes into the resolution process, then applications would be invited with regard to the potential resolution proposals as far as the company is concerned or the enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act and, therefore, Clause 29A introduces those who are not eligible to apply. For instance there is a clause with regard to an undischarged insolvent who is not eligible to apply; a person who has been disqualifies under the Companies Act as a director cannot apply and a person who is prohibited under the SEBI Act cannot apply. So these are statutory disqualifications. And there is also a disqualification in Clause (c) with regard to those who are corporate debtors and who as on the date of the application making a bid do not operationalise the account by paying the interest itself i.e. you cannot say

that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively this clause will mean that those who are in management and on account of whom this insolvent or non-performing asset has arisen will now try and say. I do not discharge any of the outstanding debts in terms of making the accounts operational and yet I would like to apply and set the enterprise back at a discount value, for this is not the object of this particular Act, So clause 5 has been brought in with that purpose in mind." (emphasis supplied)

25. The Statement of Objects and Reasons of the aforesaid Bill lays down:

"2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of the company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of the creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible." (emphasis supplied)

26. It is in this background that the section has to be construed.

In Ms. Eera Through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr., (2017) 15 SCC 133, this Court, after referring to the golden rule of literal construction, and its older counterpart the "object rule" in Heydon's case, referred to the theory of creative interpretation as follows:-

"122. Instances of creative interpretation are when the Court looks at both the literal language as well as the purpose or object of the statute in order to better determine what the words used by the draftsman of legislation mean. In D.R. Venkatachalam v. Transport Commr. [D.R. Venkatachalam v. Transport Commr., (1977) 2 SCC 273], an early instance of this is found in the concurring judgment of Beg, J. The learned Judge put it rather well when he said: (SCC p. 287, para 28) "28. It is, however, becoming increasingly fashionable to start with some theory of what is basic to a provision or a chapter or in a statute or even to our Constitution in order to interpret and determine the meaning of a particular provision or rule made to subserve an assumed "basic" requirement. I think that this novel method of construction puts, if I may say so, the cart before the horse. It is apt to seriously mislead us unless the tendency to use such a mode of construction is checked or corrected by this Court. What is basic for a section or a chapter in a statute is provided: firstly, by the words

used in the statute itself; secondly, by the context in which a provision occurs, or, in other words, by reading the statute as a whole; thirdly, by the Preamble which could supply the "key" to the meaning of the statute in cases of uncertainty or doubt; and, fourthly, where some further aid to construction may still be needed to resolve an uncertainty, by the legislative history which discloses the wider context or perspective in which a provision was made to meet a particular need or to satisfy a particular purpose. The last mentioned method consists of an application of the mischief rule laid down in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637] long ago."
xxx xxx xxx

127. It is thus clear on a reading of English, US, Australian and our own Supreme Court judgments that the "Lakshman Rekha" has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637], where the Court must have recourse to the purpose, object, text and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637], which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid-1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon case [Heydon case, (1584) 3 Co Rep 7a :

76 ER 637]."

27. A purposive interpretation of Section 29A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same. We are concerned in the present matter with sub-clauses (c), (f), (i) and (j) thereof.

28. It will be noticed that the opening lines of Section 29A contained in the Ordinance of 2017 are different from the opening lines of Section 29A as contained in the Amendment Act of 2017.

What is important to note is that the phrase "persons acting in concert" is conspicuous by its absence in the Ordinance of 2017. The concepts of "promoter", "management" and "control" which were contained in the opening lines of Section 29A under the Ordinance have now been transferred to sub-clause (c) in the Amendment Act of 2017. It is, therefore, important to note that the Amendment Act of 2017 opens with language which is of wider import than that contained in the Ordinance of 2017, evincing an intention to rope in all persons who may be acting in concert with the person submitting a resolution plan.

29. The opening lines of Section 29A of the Amendment Act refer to a de facto as opposed to a de jure position of the persons mentioned therein. This is a typical instance of a "see through provision", so that one is able to arrive at persons who are actually in "control", whether jointly, or

in concert, with other persons. A wooden, literal, interpretation would obviously not permit a tearing of the corporate veil when it comes to the "person" whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such a provision as Section 29A, alone governs. For example, it is well settled that a shareholder is a separate legal entity from the company in which he holds shares. This may be true generally speaking, but when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan, it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such cases, the principle laid down in Salomon v. A Salomon and Co. Ltd. [1897] AC 22 will not apply. For it is important to discover in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a resolution plan.

30. The doctrine of piercing the corporate veil is as well settled as the Salomon (supra.) principle itself. In Life Insurance Corporation of India v. Escorts Ltd. & Ors., (1986) 1 SCC 264, this Court held:

> "90. It was submitted that the thirteen Caparo companies were thirteen companies in name only; they were but one and that one was an individual, Mr Swraj Paul. One had only to pierce the corporate veil to discover Mr Swraj Paul lurking behind. It was submitted that thirteen applications were made on behalf of thirteen companies in order to circumvent the scheme which prescribed a ceiling of one per cent on behalf of each non-resident of Indian nationality or origin, or each company 60 per cent of whose shares were owned by non-residents of Indian nationality/origin. Our attention was drawn to the picturesque pronouncement of Lord Denning M.R. in Wallersteiner v. Moir [(1974) 3 All ER 217] and the decisions of this Court in Tata Engineering and Locomotive Co. Ltd. v. State of Bihar [(1964) 6 SCR 885], CIT v. Sri Meenakshi Mills Ltd. [(1967) 1 SCR 934] and Workmen v. Associated Rubber Industry Ltd. [(1985) 4 SCC 114]. While it is firmly established ever since Salomon v. A. Salomon & Co. Ltd. [1897 AC 22] was decided that a company has an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional circumstances Pennington in his Company Law (4th Edn.) states:
>
> "Four inroads have been made by the law on the principle of the separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes. Taxation of companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue the subject is

referred to the many standard text books on corporation tax, income tax, capital gains tax and capital transfer tax.

The other inroads on the principle of separate corporate personality have been made by two sections of the Companies Act, 1948, by judicial disregard of the principle where the protection of public interest is of paramount importance, or where the company has been formed to evade obligations imposed by the law, and by the courts implying in certain cases that a company is an agent or trustee for its members." In Palmer's Company Law (23rd Edn.), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories. Similarly in Gower's Company Law (4th Edn.), a chapter is devoted to 'lifting the veil' and the various occasions when that may be done are discussed. In Tata Engineering and Locomotive Co. Ltd. [(1964) 6 SCR 885] the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under Article 32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was not possible to treat the company as a citizen for the purposes of Article 19. In CIT v. Sri Meenakshi Mills Ltd. [(1967) 1 SCR 934] the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In Workmen v. Associated Rubber Industry Ltd. [(1985) 4 SCC 114] resort was had to the principle of lifting the veil to prevent devices to avoid welfare legislation. It was emphasised that regard must be had to substance and not the form of a transaction. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc." (Emphasis supplied.)

31. This statement of the law was followed in Union of India v. ABN Amro Bank and others, (2013) 16 SCC 490, at paragraphs 43 and 44 as follows:

"43. We are of the view that in a given situation the authorities functioning under FERA find that there are attempts to overreach the provision of Section 29(1)

(a), the authority can always lift the veil and examine whether the parties have entered into any fraudulent, sham, circuitous device so as to overcome statutory provisions like Section 29(1)(a). It is trite law that any approval/permission obtained by non-disclosure of all necessary information or making a false representation tantamount to approval/permission obtained by practising fraud and hence a nullity.

> Reference may be made to the judgment of this Court in Union of India v. Ramesh Gandhi [(2012) 1 SCC 476].

44. Even in Escorts case [(1986) 1 SCC 264], this Court has taken the view that it is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc. In Escorts case [(1986) 1 SCC 264], this Court held as follows: (SCC pp. 335-36, para 90) "90. ... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.""

32. Similarly in Balwant Rai Saluja & Anr. etc. etc. v. Air India Ltd. & Ors., (2014) 9 SCC 407, this Court in following Escorts Ltd. (supra.), held:

> "70. The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. Salomon & Co. Ltd. [1897 AC 22] Lord Halsbury LC, negating the applicability of this doctrine to the facts of the case, stated that: (AC pp.
>
> 30 & 31) "[a company] must be treated like any other independent person with its rights and liabilities [legally] appropriate to itself ... whatever may have been the ideas or schemes of those who brought it into existence." Most of the cases subsequent to Salomon case [1897 AC 22], attributed the doctrine of piercing the veil to the fact that the company was a "sham" or a "façade".

However, there was yet to be any clarity on applicability of the said doctrine.

71. In recent times, the law has been crystallised around the six principles formulated by Munby, J. in Ben Hashem v. Ali Shayif [Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam)]. The six principles, as found at paras 159-64 of the case are as follows:

> (i) Ownership and control of a company were not enough to justify piercing the corporate veil;
>
> (ii) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;

(iii) The corporate veil can be pierced only if there is some impropriety;

(iv) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;

(v) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and

(vi) The company may be a "façade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done

72. The principles laid down by Ben Hashem case [Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam)] have been reiterated by the UK Supreme Court by Lord Neuberger in Prest v. Petrodel Resources Ltd. [(2013) 2 AC 415], UKSC at para 64. Lord Sumption, in Prest case [(2013) 2 AC 415], finally observed as follows: (AC p. 488, para 35) "35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in LIC v. Escorts Ltd. [(1986) 1 SCC 264], while discussing the doctrine of corporate veil, held that: (SCC pp. 335-36, para 90) "90. ... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc.""

33. Similarly in Delhi Development Authority v. Skipper Construction Company (P) Ltd. & Another, (1996) 4 SCC 622, this Court held:

"24. In Salomon v. Salomon & Co. Ltd. [1897 AC 22] the House of Lords had observed, "the company is at law a different person altogether from the subscribers

> ...; and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by that Act." Since then, however, the courts have come to recognise several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is "when the corporate personality is being blatantly used as a cloak for fraud or improper conduct". [Gower: Modern Company Law — 4th Edn. (1979) at p. 137.] Pennington (Company Law — 5th Edn. 1985 at p. 53) also states that "where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law", the court will disregard the corporate veil. A Professor of Law, S. Ottolenghi in his article "From peeping behind the Corporate Veil, to ignoring it completely" says "the concept of 'piercing the veil' in the United States is much more developed than in the UK.

The motto, which was laid down by Sanborn, J.

and cited since then as the law, is that 'when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons'. The same can be seen in various European jurisdictions." [(1990) 53 Modern Law Review 338] Indeed, as far back as 1912, another American Professor L. Maurice Wormser examined the American decisions on the subject in a brilliantly written article "Piercing the veil of corporate entity" [published in (1912) XII Columbia Law Review 496] and summarised their central holding in the following words:

> "The various classes of cases where the concept of corporate entity should be ignored and the veil drawn aside have now been briefly reviewed. What general rule, if any, can be laid down? The nearest approximation to generalisation which the present state of the authorities would warrant is this: When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons."
>
> 25. In Palmer's Company Law, this topic is discussed in Part II of Vol. I. Several situations where the court will disregard the corporate veil are set out. It would be sufficient for our purposes to quote the eighth exception. It runs:
>
> "The courts have further shown themselves willing to 'lifting the veil' where the device of incorporation is used for some illegal or improper purpose.... Where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court

> treated the company as a mere 'sham' and made an order for specific performance against both the vendor and the company." Similar views have been expressed by all the commentators on the Company Law which we do not think necessary to refer to.
>
> 26. The law as stated by Palmer and Gower has been approved by this Court in TELCO v. State of Bihar [(1964) 6 SCR 885]. The following passage from the decision is apposite:
>
> "... Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But, it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation."
>
> 27. In DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [(1976) 3 All ER 462] the court of appeal dealt with a group of companies. Lord Denning quoted with approval the statement in Gower's Company Law that "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group".

The learned Master of Rolls observed that "this group is virtually the same as a partnership in which all the three companies are partners". He called it a case of "three in one" — and, alternatively, as "one in three".

28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people." (emphasis supplied)

34. It is thus clear that, where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the corporate veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole.

35. The expression "acting jointly" in the opening sentence of Section 29A cannot be confused with "joint venture agreements", as was sought to be argued by Shri Rohatgi. He cited various judgments

including Faqir Chand Gulati v. Uppal Agencies Pvt. Ltd. & Anr., (2008) 10 SCC 345, and Laurel Energetics Private Limited v. Securities and Exchange Board of India, (2017) 8 SCC 541, to buttress his submission that a joint venture is a contractually agreed sharing of control over an economic activity. We are afraid that these judgments are wholly inapplicable. All that is to be seen by the expression "acting jointly" is whether certain persons have got together and are acting "jointly" in the sense of acting together. If this is made out on the facts, no super added element of "joint venture" as is understood in law is to be seen. The other important phrase is "in concert". By Section 3(37) of the Code, words and expressions used but not defined in the Code but defined inter alia by the SEBI Act, 1992, and the Companies Act, 2013, shall have the meanings respectively assigned to them in those Acts. In exercise of powers conferred by Sections 11 and 30 of the SEBI Act, 1992, the 2011 Takeover Regulations have been promulgated by SEBI.

36. Originally, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994, defined "persons acting in concert" as follows:

> "(d) "person acting in concert" comprises persons who, pursuant to an agreement or understanding acquires or agrees to acquire shares in a company for a common objective o purpose of substantial acquisition of shares and includes:
>
> i. a company, its holding company, or subsidiaries of such companies or companies under the same management either individually or all with each other. ii. a company with any of its directors, or any person entrusted with the management of the funds of the company;
>
> iii. directors of companies, referred to in clause (i) and his associates; and iv. mutual fund, financial institution, merchant banker, portfolio manager and any investment company in which any person has an interest as director, fund manager, trustee, or as a shareholder having not less than 2% of the paid-up capital of that company. Explanation – For the purposes of this clause "associate" means:-
>
> A. Any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956);

B. the director or his relative whether individually or in aggregate holding more than 2% of the paid-up equity capital of such company." This was replaced in 1997 by the Regulations of 1997, and then further by the 2011 Takeover Regulations.

37. The Justice P.N. Bhagwati Committee Report on Takeovers, 1997, pursuant to which the Regulations of 1997 were framed, stated as follows:

> "2.22 Definition of 'Persons acting in concert' "Persons acting in concert" have particular relevance to public offers, for often an acquirer can acquire shares or voting rights in a company "in concert" with any other person in a manner that the acquisitions made by him remain below the threshold limit, though taken together

with the voting rights of persons in concert, the threshold may well be exceeded. It is therefore, important to define "persons acting in concert".

To be acting in concert with an acquirer, persons must fulfil certain "bright line" tests. They must have commonality of objectives and a community of interests which could be acquisition of shares or voting rights beyond the threshold limit, or gaining control over the company and their act of acquiring the shares or voting rights in a company must serve this common objective. Implicit in the concerted action of these persons must be an element of cooperation. And as has been observed, this cooperation could be extended in several ways, directly or indirectly, or through an agreement – formal or informal. The committee was of the view that the present definition of "persons acting in concert" in sub-clause (d) of regulation 2 needed to be strengthened by incorporating all the ingredients discussed in the foregoing paragraph to bring out clearly the import of acting in concert.

Any person fulfilling the "bright line" tests would be acting in concert. But there could also be certain persons who, by their position in relation to an acquirer or by the very nature of their business, could be generally presumed to be acting in concert, unless proved to the contrary. In other words, a rebuttable presumption of being persons in concert with burden of proof cast on them will be raised against these persons. The Committee was of the view that while the net of presumption should be cast to include all such persons, it should not be cast too widely so as to impinge on the freedom of any person to carry on his normal business activities. In other words, there should be well defined bounds of presumption. xxx xxx xxx 2.23 Burden of proof on 'persons acting in concert' The Committee further noted that in the existing Regulations, there is no burden of proof on the 'persons acting in concert'. Once the burden of proof is cast on the persons presumed to be acting in concert, it would be important to ensure that the persons are grouped in categories such that the persons may be presumed to be acting in concert only with another person belonging to the same category. A general reading of the existing provisions implies that a person belonging to any one of the categories mentioned in sub-clauses (i) to (iv) of clause (d) of regulation 2 could be presumed to be acting in concert with a person belonging to any other category. Thus, a company could be presumed to be acting in concert with a merchant banker, mutual fund, or any other body even though they may all be distinctly independent entities without any connection whatsoever. Such irrebuttable presumption of a common motive amongst unrelated parties would be illogical and not legally tenable. A distinction must be made between persons who could be presumed to be acting in concert unless proved to the contrary and others who may be acting in concert even though such a presumption cannot be raised against them. In this context, it may be noted that the UK City Code of Takeovers and Mergers, for this very reason, has divided the persons acting in concert into groups in such a manner that these persons would in the natural course of affairs be presumed to be acting in concert only with another person in the same group.

This served to set the pattern for raising rebuttable presumptions.

The Committee recommends that .In the definition of persons acting in concert, the persons be grouped in such a manner in the same group or category that they bear such relationship amongst themselves as could justify raising of a presumption in the normal course of affairs that they are acting in concert. For example, a sponsor of a mutual fund could be presumed to be acting in concert with the trustee company or asset management company of the same mutual fund;

similarly a merchant banker may be presumed to be acting in concert with his client as acquirer. But no presumption may be made that persons in one group are acting in concert with persons in another group. It has to be proved by evidence that they are acting in concert. (Reference: Part II of the Report – sub-clause (e) of sub-regulation (1) of regulation

2) .

The definition of the persons acting in concert as defined above would imply a rebuttable presumption. The question which arises is who would rule whether the presumption has been rebutted. The responsibility of ruling will lie with SEBI and over a period of time, jurisprudence on the subject will develop."

38. By Regulation 2(1)(q) of the 2011 Takeover Regulations, "persons acting in concert" is defined as follows:-

> "(q) "persons acting in concert" means,— (1) persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.
>
> (2) Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established,—
>
> (i) a company, its holding company, subsidiary company and any company under the same management or control;
>
> (ii) a company, its directors, and any person entrusted with the management of the company;
>
> (iii) directors of companies referred to in item (i) and (ii) of this sub-clause and associates of such directors;
>
> (iv) promoters and members of the promoter group;

(v) immediate relatives;

(vi) a mutual fund, its sponsor, trustees, trustee company, and asset management company;

(vii) a collective investment scheme and its collective investment management company, trustees and trustee company;

(viii) a venture capital fund and its sponsor, trustees, trustee company and asset management company;

(viiia) an alternative investment fund and its sponsor, trustees, trustee company and manager;

(ix) [***]

(x) a merchant banker and its client, who is an acquirer;

(xi) a portfolio manager and its client, who is an acquirer;

(xii) banks, financial advisors and stock brokers of the acquirer, or of any company which is a holding company or subsidiary of the acquirer, and where the acquirer is an individual, of the immediate relative of such individual:

Provided that this sub-clause shall not apply to a bank whose sole role is that of providing normal commercial banking services or activities in relation to an open offer under these regulations;

(xiii) an investment company or fund and any person who has an interest in such investment company or fund as a shareholder or unitholder having not less than 10 per cent of the paid-up capital of the investment company or unit capital of the fund, and any other investment company or fund in which such person or his associate holds not less than 10 per cent of the paid-up capital of that investment company or unit capital of that fund:

Provided that nothing contained in this sub- clause shall apply to holding of units of mutual funds registered with the Board;

Explanation.—For the purposes of this clause □"associate" of a person means,—

(a) any immediate relative of such person;

(b) trusts of which such person or his immediate relative is a trustee;

(c) partnership firm in which such person or his immediate relative is a partner; and

(d) members of Hindu undivided families of which such person is a coparcener;"

39. It will be seen from the wide language used, that any understanding, even if it is informal, and even if it is to indirectly cooperate to exercise control over a target company, is included. Under sub-clause (2) of clause (q), a deeming fiction is enacted, by which a presumption is raised in the categories mentioned, that a person falling within one category is deemed to be acting in concert with another person mentioned in the same category, unless the contrary is established. The corporate veil is not merely torn but is left in tatters by sub-clauses (i) to (iv) of Regulation 2(1)

(q)(2). What is also important to note is that "immediate relatives" are also covered by sub-clause (v) – i.e., father and son, brothers, etc. Also of importance is the definition of "associate" in the explanation to Regulation 2(1)(q)(2), which subsumes not merely immediate relatives but other forms in which a person can be associated with another - which includes the form of trust, partnership firm and HUF. What is of great importance is that wherever persons act jointly or in concert with the "person" who submits a resolution plan, all such persons are covered by Section 29A. It is interesting to note that the report of the Insolvency Law Committee of March, 2018, wanted to curtail the wide definition of persons acting jointly or in concert as follows:

> "14.3 The term 'person acting jointly or in concert' has not been defined in the Code and using the definition provided in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 results in inclusion of an extremely wide gamut of person within the scope of section 29A. In practice, it is unclear whether the term 'connected person' in clause (j) applies to only the resolution applicant or even 'persons acting jointly or in concert with such person'. If the latter interpretation is taken, this provision would be applicable to multiple layers of persons who are related to the resolution applicant even remotely. Further, ARCs, banks and alternate investment funds which are specifically excluded from the definition of 'connected person' provided in section 29A may be caught by the term 'person acting jointly or in concert with such person'. The Committee felt that section 29A was introduced to disqualify only those who had contributed in the downfall of the corporate debtor or were unsuitable to run the company because of their antecedents whether directly or indirectly. Therefore, extending the disqualification to a resolution application owing to infirmities in persons remotely related may have adverse consequences. Such interpretation of this provision may shrink the pool of resolution applicants. Accordingly, the Committee felt that the words, "..., if such person, or any other person acting jointly or in concert with such person" in the first line of section 29A must be deleted. This would clarify that section 29A is applicable to the resolution applicant and its connected person only. Further, in order to ensure that anyone who acts with a common objective along with the resolution applicant to acquire shares, voting rights or control of the corporate debtor is required to pass the test laid down in section 29A, the Committee felt that the following clause must be added as clause (iv) to the definition of connected person in the explanation to clause (j), "(iv) any

persons who along with the resolution applicant, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a corporate debtor, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the corporate debtor."" This part of the report has not been accepted by the legislature, as none of the suggested changes in the law have been made.

40. In Technip SA v. SMS Holding (Pvt.) Ltd. & Ors., (2005) 5 SCC 465, this Court after referring to the Bhagwati Committee Report of 1997, stated as follows:-

"54. The standard of proof required to establish such concert is one of probability and may be established "if having regard to their relation etc., their conduct, and their common interest, that it may be inferred that they must be acting together:

evidence of actual concerted acting is normally difficult to obtain, and is not insisted upon" [CIT v. East Coast Commercial Co. Ltd., (1967) 1 SCR 821]. (SCR p. 829 H)

55. While deciding whether a company was one in which the public were substantially interested within the meaning of Section 23-A of the Income Tax Act, 1922 this Court said:

"The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted actings. Each case must necessarily be decided on its own facts." [CIT v. Jubilee Mills Ltd., (1963) 48 ITR 9 (SC), p. 20]

56. In Guinness PLC and Distillers Co. PLC [Guinness PLC and Distillers Company PLC (Panel hearing on 25-8-1987 and 2-9-1987 at p. 10052 — Reasons for decisions of the Panel.)] the question before the Takeover Panel was whether Guinness had acted in concert with Pipetec when Pipetec purchased shares in Distillers Company PLC. Various factors were taken into consideration to conclude that Guinness had acted in concert with Pipetec to get control over Distillers Company. The Panel said:

"The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to cooperation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a 'nod or a wink'.... Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and common sense to determine whether those involved in any dealings have some form of understanding and are acting in cooperation with each other." [Guinness PLC and

> Distillers Company PLC (Panel hearing on 25-8-1987 and 2-9-1987 at p. 10052 — Reasons for decisions of the Panel.)]" (emphasis supplied)

41. In M/s. Daiichi Sankyo Company Ltd. v. Jayaram Chigurupati & Ors., (2010) 7 SCC 449, this Court referred to the concept of "persons acting in concert" and held that there must be a shared common objective for substantial acquisition of shares of a target company under the SEBI regulations. A fortuitous relationship coming into existence by accident or chance obviously cannot amount to "persons acting in concert". This Court held:-

> "49. The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares, etc. of a certain target company. There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares, etc. of the target company. For, dehors the element of the shared common objective or purpose the idea of "person acting in concert" is as meaningless as a criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition or substantial acquisition of shares, etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares, etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares, etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of "persons acting in concert" to come into being." (emphasis supplied) When coming to the presumption created by the provision, this Court held that the deeming provision is left open to rebuttal as indicated by the words "unless the contrary is established" (see paragraph 54 of Daiichi (supra.)). Finally, this Court held that whether a person is or is not acting in concert would depend upon the facts of each case. (see paragraph 57 of Daiichi (supra.)).

42. When we come to sub-clause (c) of Section 29A, the first thing that was argued, at which the parties were at loggerheads, was the time at which sub-clause (c) can be said to operate. According to Shri Rohatgi, in the original sub-clause (c), pre- amendment, the time must necessarily be the date of commencement of the corporate insolvency resolution process, as is mentioned by the Section itself. According to Messrs Salve and Singhvi, it is clear that since submission of a resolution plan is spoken of, it is the time of submission of such plan and not any anterior stage.

43. According to us, it is clear that the opening words of Section 29A furnish a clue as to the time at which sub-clause (c) is to operate. The opening words of Section 29A state: "a person shall not be eligible to submit a resolution plan...". It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. The contrary view expressed by Shri

Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a non- performing asset. Further, the expression used is "has", which as Dr. Singhvi has correctly argued, is in praesenti. This is to be contrasted with the expression "has been", which is used in sub- clauses (d) and (g), which refers to an anterior point of time. Consequently, the amendment of 2018 introducing the words "at the time of submission of the resolution plan" is clarificatory, as this was always the correct interpretation as to the point of time at which the disqualification in sub-clause (c) of Section 29A will attach. In fact, the amendment was made pursuant to the Insolvency Law Committee Report of March, 2018. That report clearly stated:

> "In relation to applicability of section 29A(c), the Committee also discussed that it must be clarified that the disqualification pursuant to section 29A(c) shall be applicable if such NPA accounts are held by the resolution applicant or its connected persons at the time of submission of the resolution plan to the RP."

44. The ingredients of sub-clause (c) are that, the ineligibility to submit a resolution plan attaches if any person, as is referred to in the opening lines of Section 29A, either itself has an account, or is a promoter of, or in the management or control of, a corporate debtor which has an account, which account has been classified as a non-performing asset, for a period of at least one year from the date of such classification till the date of commencement of the corporate insolvency resolution process. For the purpose of applying this sub-section, any one of three things, which are disjunctive, needs to be established. The corporate debtor may be under the management of the person referred to in Section 29A, the corporate debtor may be a person under the control of such person, or the corporate debtor may be a person of whom such person is a promoter.

45. The expression "management" would refer to the de jure management of a corporate debtor. The de jure management of a corporate debtor would ordinarily vest in a Board of Directors, and would include, in accord with the definitions of "manager", "managing director" and "officer" in Sections 2(53), 2(54) and 2(59) respectively of the Companies Act, 2013, the persons mentioned therein.

46. The expression "control" is defined in Section 2(27) of the Companies Act, 2013 as follows:-

> "(27) "control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;"

47. The expression "control" is therefore defined in two parts. The first part refers to de jure control, which includes the right to appoint a majority of the directors of a company. The second part refers to de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be "in control". A management decision is a decision to be taken as to how the corporate body is to be run in its day to day affairs. A policy decision would be a decision that would be beyond running day to

day affairs, i.e., long term decisions. So long as management or policy decisions can be, or are in fact, taken by virtue of shareholding, management rights, shareholders agreements, voting agreements or otherwise, control can be said to exist.

48. Thus, the expression "control", in Section 29A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with "management", means de facto control of actual management or policy decisions that can be or are in fact taken. A judgment of the Securities Appellate Tribunal in M/s Subhkam Ventures (I) Private Limited v. The Securities and Exchange Board of India (Appeal No. 8 of 2009 decided on 15.1.2010), made the following observations qua "control" under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, wherein "control" is defined in Regulation 2(1)

(e) in similar terms as in Section 2(27) of the Companies Act, 2013. The Securities Appellate Tribunal held:

> "6. ...The term control has been defined in Regulation 2(1)(c) of the takeover code to "include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner." This definition is an inclusive one and not exhaustive and it has two distinct and separate features: i) the right to appoint majority of directors or,
>
> ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary (Eighth Edition) at page 353 where this term has been defined as under:
>
> "Control - The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee." Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the board of directors that is in control. If an acquirer were to have power to appoint majority of directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control the management or policy decisions of a company, he would be in control. This could

> happen by virtue of his shareholding or management rights or by reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."
>
> 49. We think that these observations are apposite, and apply to the expression "control" in Section 29A(c).
>
> 50. Section 29A(c) speaks of a corporate debtor "under the management or control of such person". The expression "under" would seem to suggest positive or proactive control, as opposed to mere negative or reactive control. This becomes even clearer when sub-clause (g) of Section 29A is read, wherein the expression used is "in the management or control of a corporate debtor". Under sub-clause (g), only a person who is in proactive or positive control of a corporate debtor can take the proactive decisions mentioned in sub-clause (g), such as, entering into preferential, undervalued, extortionate credit, or fraudulent transactions. It is thus clear that in the expression "management or control", the two words take colour from each other, in which case the principle of noscitur a sociis must also be held to apply.

Thus viewed, what is referred to in sub-clauses (c) and (g) is de jure or de facto proactive or positive control, and not mere negative control which may flow from an expansive reading of the definition of the word "control" contained in Section 2(27) of the Companies Act, 2013, which is inclusive and not exhaustive in nature.

51. In a recent judgment delivered by one of us (Nariman, J.) in Chintalapati Srinivasa Raju v. Securities and Exchange Board of India, (2018) 7 SCC 443, this Court after referring to the definition of "control" in the SEBI regulations, held on facts that an executive director, on a fixed monthly salary, post resignation, cannot be held to be a person exercising "control" within the meaning of the SEBI regulations. This Court referred to with approval the following test laid down in Securities and Exchange Board of India v. Kishore R. Ajmera, (2016) 6 SCC 368:-

> "26. It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the

> Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion." (emphasis supplied)

52. The third concept is that of a promoter. "Promoter" is defined by Section 2(69) of the Companies Act, 2013 as follows:

> "(69) "promoter" means a person—
>
> (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in Section 92; or
>
> (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
>
> (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:
>
> Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;"

53. Here again, sub-clause (a) refers to a de jure position, namely, where a person is expressly named in a prospectus or identified by the company in an annual return as a promoter. Sub- clauses (b) and (c) speak of a de facto position. Under sub-clause

(b), so long as a person has "control" over the affairs of a company, directly or indirectly, in any manner, he could be said to be a promoter of such company. Under sub-clause (c), such person need not be a member of the Board of Directors of a company, but can be a person who in fact advises, directs or instructs the Board to act. Under the proviso, only a person who acts in a professional capacity is excluded from the talons of sub- clause (c).

54. The interpretation of Section 29A(c) now becomes clear. Any person who wishes to submit a resolution plan, if he or it does so acting jointly, or in concert with other persons, which person or other persons happen to either manage or control or be promoters of a corporate debtor, who is classified as a non-performing asset and whose debts have not been paid off for a period of at least one year before commencement of the corporate insolvency resolution process, becomes ineligible to submit a resolution plan. This provision therefore ensures that if a person wishes to submit a resolution plan, and if such person or any person acting jointly or any person in concert with such person, happens to either manage, control, or be promoter of a corporate debtor declared as a non-performing asset one year before the corporate insolvency resolution process begins, is ineligible to submit a resolution plan. The first proviso to sub-clause (c) makes it clear that the ineligibility can only be removed if the person submitting a resolution plan makes payment of all overdue amounts with interest thereon and charges relating to the non-performing asset in question before submission of a resolution plan. The position in law is thus clear. Any person who wishes to

submit a resolution plan acting jointly or in concert with other persons, any of whom may either manage, control or be a promoter of a corporate debtor classified as a non-performing asset in the period abovementioned, must first pay off the debt of the said corporate debtor classified as a non-performing asset in order to become eligible under Section 29A(c).

55. However, Messrs Salve and Singhvi have argued that the expression "before submission of resolution plan" contained in the proviso must be read in a commercially sensible manner. The provision must, therefore, be interpreted to make it workable, and create a situation so that banks can recover the maximum possible amounts from the NPAs generally, and not merely from the NPAs of the corporate debtor in respect of which it is receiving resolution plans. In this context, therefore, if there is a system by which a person who presents a resolution plan can pay off the entire amount of the NPAs as a part of its resolution plan, to be appropriated before the resolution plan is accepted and implemented, it would fully subserve the object of both the proviso and the statute generally. According to them, the words of a statute can be altered suitably to avoid hardship or absurdity. We are afraid that we cannot accept the aforesaid submission. The plain language of the proviso makes it clear, that ineligibility can only be removed if the necessary payment is made before submission of a resolution plan. It is not possible to accede to the argument that, commercially speaking, no person would ever make a speculative bid, where he would pay off the debt of another related corporate debtor, classified as an NPA, without being certain that his resolution plan would be accepted, as this would narrow the pool of resolution applicants to nil, and therefore stultify the object sought to be achieved by the proviso to Section 29A(c). First, it is clear that there may be persons who may submit resolution plans, either by themselves, or in concert, or jointly with other persons who do not have debts which are declared as NPAs. Also, it is very difficult to say that in no circumstance whatsoever would a person submitting a resolution plan pay off the NPA dues of another person, with whom it is acting in concert or jointly. The dues may be such that it may be worth the while of the person, together with the persons with whom he is acting in concert or jointly, to first pay off the dues of the concerned corporate debtor whose account has been declared to be an NPA, as such dues may be negligible when compared with the gaining of control of the corporate debtor that is sought to be run as a going concern as per a resolution plan submitted. It is, therefore, impossible to say that the plain, literal, meaning of the language used by the proviso leads to absurdity or hardship. This interpretation is also in line with the object sought to be achieved, namely, that other corporate debtors who are declared as NPAs, whose debts may never be cleared in full, are required to be cleared as a condition precedent to submission of a resolution plan under the Code. In order, therefore, to make the statute "workable", as is suggested by Messrs Salve and Singhvi, we cannot disregard the plain language of the proviso and substitute words which would have the opposite effect.

56. Since Section 29A(c) is a see-through provision, great care must be taken to ensure that persons who are in charge of the corporate debtor for whom such resolution plan is made, do not come back in some other form to regain control of the company without first paying off its debts. The Code has bifurcated such persons into two groups, as a perusal of sub-clauses (c) and (g) of Section 29A shows. If a person has been a promoter, or in the management, or control, of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place, and in respect of which an order has been made by the

Adjudicating Authority under the Code, such person is ineligible to present a resolution plan under Section 29A(g). This ineligibility cannot be cured by paying off the debts of the corporate debtor. Therefore, it is only such persons who do not fall foul of sub-clause (g), who are eligible to submit resolution plans under sub-clause (c) of Section 29A, if they happen to be persons who were in the erstwhile management or control of the corporate debtor.

57. It is important for the competent authority to see that persons, who are otherwise ineligible and hit by sub-clause (c), do not wriggle out of the proviso to sub-clause (c) by other means, so as to avoid the consequences of the proviso. For this purpose, despite the fact that the relevant time for the ineligibility under sub- clause (c) to attach is the time of submission of the resolution plan, antecedent facts reasonably proximate to this point of time can always be seen, to determine whether the persons referred to in Section 29A are, in substance, seeking to avoid the consequences of the proviso to sub-clause (c) before submitting a resolution plan. If it is shown, on facts, that, at a reasonably proximate point of time before the submission of the resolution plan, the affairs of the persons referred to in Section 29A are so arranged, as to avoid paying off the debts of the non-performing asset concerned, such persons must be held to be ineligible to submit a resolution plan, or otherwise both the purpose of the first proviso to sub-section (c) of Section 29A, as well as the larger objective sought to be achieved by the said sub-clause in public interest, will be defeated.

58. When we come to sub-clause (f), it is clear that, if any of the persons mentioned in Section 29A is prohibited by SEBI from either trading in securities or accessing the securities market – again, ineligibility of the person submitting the resolution plan attaches. Under sub-clause (i), if a person situate abroad is subject to any disability which corresponds to sub-clause (f), such person also gets interdicted. In E.V. Mathai v. Subordinate Judge, Kottayam & Ors., (1969) 2 SCC 194, the expression "corresponding to" was explained as follows:-

> "It was argued by Mr Daphtary that Section 4 was not applicable because a different intention appeared from Section 34(1) of the Act of 1965. We find ourselves unable to accept this contention. The proviso to Section 34(1) lays down that a legal proceeding which could have been instituted, continued or enforced under the repealed Act of 1959 may be instituted under the corresponding provisions of the new Act. Mr Daphtary tried to meet this by urging that Section 11(4) of the Act of 1959 did not contain any corresponding provision. Sub-section (1) of Section 11 of the 1959 Act laid down that:
>
> "Notwithstanding anything to the contrary contained in any other law or contract a tenant shall not be evicted, whether in execution of a decree or otherwise except in accordance with the provisions of this Act:
>
> Provided…." Sub-section (4)(i) of Section 11 however gave the landlord a right to apply for eviction and for an order directing him to be put in possession of the building:

> "if the tenant has without the consent of the landlord transferred his right under the lease or sub-let the entire building or any portion thereof, if the lease does not confer on him any right to do so, or the landlord has not consented to such sub-letting;" We find ourselves unable to accept Mr Daphtary's argument that the above quoted provision of Section 11 of the Act of 1959 was not "a corresponding provision" within the meaning of the proviso to sub-

section (1) of Section 34 of the Act of 1965. To correspond means to "be in harmony with or be similar, analogous to". It does not mean to "be identical with" and therefore the relevant provisions of Section 34 (1) of the Act of 1965 must be held to be a provision corresponding to Section 11(4) of the Act of 1959."

59. In the light thereof, it is clear that if a person is prohibited by a regulator of the securities market in a foreign country from trading in securities or accessing the securities market, the disability under sub-clause (i) would then attach.

60. When we come to sub-clause (j), a "connected person" is defined as meaning the three categories of persons mentioned in the three sub-clauses therein. The first sub-clause of Explanation 1 again takes us back to the same three definitions of "promoter", "management" and "control" of the resolution applicant. Under sub-clause (ii), again, a "connected person" is a person who is either the promoter, or in management or control, of the business of the corporate debtor during implementation of the resolution plan. And under sub-clause (iii), holding companies, subsidiary companies and associate companies as defined under the Companies Act, 2013, or related parties of persons referred to in clauses (1) and (2) also become connected persons 1.

61. We now come to the equally important question as to the timelines within which the insolvency process is to be completed.

62. Previous legislation, namely, the Sick Industrial Companies By the Insolvency and Bankruptcy Code (Second Amendment) Act of 2018 a new definition of "related party" has been inserted with effect from 6.6.2018, as section 5(24-A) of the Code, as follows:-

> "(24-A) "related party", in relation to an individual, means—
>
> (a) a person who is a relative of the individual or a relative of the spouse of the individual;
>
> (b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;
>
> (c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;

(g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(h) a person on whose advice, directions or instructions, the individual is accustomed to act;

(i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation.—For the purposes of this clause,—

(a) “relative”, with reference to any person, means anyone who is related to another, in the following manner, namely:—

(i) members of a Hindu Undivided Family,

(ii) husband,

(iii) wife,

(iv) father,

(v) mother,

(vi) son,

(vii) daughter,

(viii) son's daughter and son,

(ix) daughter's daughter and son,

(x) grandson's daughter and son,

(xi) granddaughter's daughter and son, (Special Provisions) Act, 1985, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which made provision for rehabilitation of sick companies and repayment of loans availed by them, were found to have completely failed. This was taken note of by our judgment in Madras Petrochem Ltd. and Anr. v.

Board for Industrial and Financial Reconstruction and Ors., (2016) 4 SCC 1:

"40. An interesting pointer to the direction Parliament has taken after enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is also of some relevance in this context. The Eradi Committee Report relating to insolvency and winding up of companies dated 31-7-2000, observed that out of 3068 cases referred to BIFR from 1987 to 2000 all but 1062 cases have been disposed of. Out of the cases disposed of, 264 cases were revived, 375 cases were under negotiation for revival process, 741 cases were recommended for winding up, and 626 cases were dismissed as not maintainable. These facts and figures speak for themselves and place a big question mark on the utility of the Sick Industrial Companies (Special Provisions) Act, 1985. The Committee further pointed out that effectiveness of the Sick Industrial Companies (Special Provisions) Act, 1985 as has been pointed out earlier, has been severely undermined by reason of the enormous delays involved in the disposal of cases by BIFR. (See Paras 5.8, 5.9 and 5.15 of the Report.)

(xii) brother,

(xiii) sister,

(xiv) brother's son and daughter,

(xv) sister's son and daughter, (xvi) father's father and mother, (xvii) mother's father and mother, (xviii) father's brother and sister, (xix) mother's brother and sister, and

(b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;" Consequently, the Committee recommended that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed and the provisions thereunder for revival and rehabilitation should be telescoped into the structure of the Companies Act, 1956 itself.

41. Pursuant to the Eradi Committee Report, the Companies Act was amended in 2002 by providing for the constitution of a National Company Law Tribunal as a substitute for the Company Law Board, the High Court, BIFR and AAIFR. The Eradi Committee Report was further given effect to by inserting Sections 424-A to 424-H into the Companies Act, 1956 which, with a few changes,

mirrored the provisions of Sections 15 to 21 of the Sick Industrial Companies (Special Provisions) Act, 1985. Interestingly, the Companies Amendment Act, 2002 omitted a provision similar to Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. Consequently, creditors were given liberty to file suits or initiate other proceedings for recovery of dues despite pendency of proceedings for the revival or rehabilitation of sick companies before the National Company Law Tribunal.

42. This Amendment Act came under challenge, which challenge culminated in the Constitution Bench decision in Union of India v. R, Gandhi, President, Madras Bar Association, (2010) 11 SCC 10 by which the amendments were upheld, with certain changes recommended by the Constitution Bench of this Court.

43. Close on the heels of the amendment made to the Companies Act came the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. This particular Act was meant to repeal the Sick Industrial Companies (Special Provisions) Act, 1985 consequent to some of its provisions being telescoped into the Companies Act. Thus, the Companies Amendment Act, 2002 and the SICA Repeal Act formed part of one legislative scheme, and neither has yet been brought into force. In fact, even the Companies Act, 2013, which repeals the Companies Act, 1956, contains Chapter 19 consisting of Sections 253 to 269 dealing with revival and rehabilitation of sick companies along the lines of Sections 424-A to 424-H of the amended Companies Act, 1956. Conspicuous by its absence is a provision akin to Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 in the 2013 Act. However, this Chapter is also yet to be brought into force. These statutory provisions, though not yet brought into force, are also an important pointer to the fact that Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 has been statutorily sought to be excluded, Parliament veering around from wanting to protect sick industrial companies and rehabilitate them to giving credence to the public interest contained in the recovery of public monies owing to banks and financial institutions. These provisions also show that the aforesaid construction of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 vis-à-vis the Sick Industrial Companies (Special Provisions) Act, 1985, leans in favour of creditors being able to realise their debts outside the court process over sick industrial companies being revived or rehabilitated. In fact, another interesting document is the Report on Trend and Progress of Banking in India 2011-2012 for the year ended 30-6-2012 submitted by Reserve Bank of India to the Central Government in terms of Section 36(2) of the Banking Regulation Act, 1949. In Table IV.14 the Report provides statistics regarding trends in non-performing assets bank-wise, group-wise. As per the said Table, the opening balance of non-performing assets in public sector banks for the year 2011-2012 was Rs 746 billion but the closing balance for 2011- 2012 was Rs 1172 billion only. The total amount recovered through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 during 2011-2012 registered a decline compared to the previous year, but, even then, the amounts recovered under the said Act constituted 70% of the total amount recovered. The amounts recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 constituted only 28%. All this would go to show that the amounts that public sector banks and financial institutions have to recover are in staggering figures and at long last at least one statutory measure has proved to be of some efficacy. This Court would be loathe to give such an interpretation

as would thwart the recovery process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which Act alone seems to have worked to some extent at least." (emphasis supplied)

63. These two enactments were followed by the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. As has been noted hereinabove, amounts recovered under the said Act recorded improvement over the previous two enactments, but this was yet found to be inadequate.

64. The Code was passed after great deliberation and pursuant to various Committee Reports, as has been held in Innoventive Industries Ltd. v. ICICI Bank & Anr. (2018) 1 SCC 407 at paragraph 12. The Statement of Objects and Reasons, which is reproduced in the said paragraph, makes it clear that the existing framework for insolvency and bankruptcy was not only inadequate and ineffective, but resulted in undue delays in resolution. One of the primary objects of the Code, therefore, is to resolve such matters in a time bound manner. This would not only support the development of credit markets and encourage entrepreneurship, but would also improve ease of doing business and facilitate more investment, leading to higher economic growth and development.

65. Paragraph 16 of the said judgment refers to the report of November, 2015 of the Bankruptcy Law Reforms Committee and refers to speed being of essence as follows:

> "Speed is of essence Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the "calm period" can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.
>
> From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay."

66. The Committee then chose certain principles within which the new Insolvency and Bankruptcy Code would work. One of them is that the Code will ensure a time bound process, which will not be extended, to better preserve the economic value of the asset (see Principle No.8 set out at page 427 of Innoventive Industries (supra.)).

67. After setting out the Scheme of the Code, this Court further went on to hold:

> "31. The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of

> the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation."
> xxx xxx xxx
>
> 33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum.

This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins."

68. It is in this backdrop that we must consider the provisions of the Code, insofar as the Code requires either that the corporate debtor be taken over by another management and run as a going concern or, if that fails, go into liquidation. Some of the relevant provisions of the Code, insofar as this case is concerned, are set out hereinbelow:

> "5. (12) "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or Section 10, as the case may be:
>
> Provided that where the interim resolution professional is not appointed in the order admitting application under Section 7, 9 or Section 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority;
>
> xxx xxx xxx (14) "insolvency resolution process period" means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;

xxx xxx xxx (25) “resolution applicant” means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of Section 25;

(26) “resolution plan” means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;

(27) “resolution professional”, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; xxx xxx xxx

7. Initiation of corporate insolvency resolution process by financial creditor.—(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed. (3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub- section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

> Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub- section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority. (6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).
>
> (7) The Adjudicating Authority shall communicate—
>
> (a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;
>
> (b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

xxx xxx xxx

12. Time-limit for completion of insolvency resolution process.—(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject- matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

> Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.
>
> xxx xxx xxx
>
> 30. Submission of resolution plan.—(1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under Section 29-A to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53;

(c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

Explanation.—For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub- section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

> Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under Section 29-A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:
>
> Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause
>
> (c) of Section 29-A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of Section 29-A:
>
> Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of Section 12, and the corporate insolvency resolution process shall be completed within the period

specified in that sub- section.

Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

31. Approval of resolution plan.—(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation. (2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in Section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.

32. Appeal.—Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of Section 61. xxx xxx xxx

33. Initiation of liquidation.—(1) Where the Adjudicating Authority,—

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under Section 12 or the fast track corporate insolvency resolution process under Section 56, as the case may be, does not receive a resolution plan under sub-section (6) of Section 30; or

(b) rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause

(b) of sub-section (1).

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub- section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator. (7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

xxx xxx xxx

60. Adjudicating Authority for corporate persons.— (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located. (2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(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.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application

by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

61. Appeals and Appellate Authority. - (1) Notwithstanding anything to the contrary contained under the Companies Act, 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

> Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.
> (3) An appeal against an order approving a resolution plan under Section 31 may be filed on the following grounds, namely—
>
> (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;
>
> (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
>
> (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
>
> (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
>
> (v) the resolution plan does not comply with any other criteria specified by the Board.
>
> (4) An appeal against a liquidation order passed under Section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.

62. Appeal to Supreme Court.—(1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

(2) The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within forty-five days, allow the appeal to be filed within a further period not exceeding fifteen days. xxx xxx xxx

64. Expeditious disposal of applications.—(1) Where an application is not disposed of or an order is not passed within the period specified in this Code, the National Company Law Tribunal or the

National Company Law Appellate Tribunal, as the case may be, shall record the reasons for not doing so within the period so specified; and the President of the National Company Law Tribunal or the Chairperson of the National Company Law Appellate Tribunal, as the case may be, may, after taking into account the reasons so recorded, extend the period specified in the Act but not exceeding ten days.

(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 under this Code."

69. Since the present case deals, on facts, with financial creditors, we may set out how the corporate insolvency resolution process is to work from the inception. Before admission of an application under Section 7 by a financial creditor, the Adjudicating Authority is, under Section 7(4), to first ascertain the existence of a default within 14 days of receipt of the application, as specified in Section 7(4). Upon satisfaction that such default has occurred, it may then admit such application, subject to rectification of defects, which the proviso in Section 7(5) says must be done within 7 days of receipt of such notice from the Adjudicating Authority by the applicant. The time frame within which ascertainment of default is to take place, as well as the time within which the defect is to be rectified, have both been held by a judgment of this Court to be directory in nature, the reason being that the stage of these provisions is before admission of the application (see Surendra Trading Co. v. Juggilal Kamlapat Jute Mills Company Ltd. & Ors. (2017) 16 SCC 143). The corporate insolvency resolution process commences from the date of admission of the application vide Section 7(6). Section 7(7) makes it incumbent upon the Adjudicating Authority to communicate the order accepting or rejecting the application to the financial creditor and the corporate debtor within a period of 7 days of such admission or rejection.

70. The time limit for completion of the insolvency resolution process is laid down in Section 12. A period of 180 days from the date of admission of the application is given by Section 12(1). This is extendable by a maximum period of 90 days only if the Committee of Creditors, by a vote of 66% 2, votes to extend the It is pertinent to note that the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (26 of 2018), inter alia amended the Code, with retrospective effect from 6th June, 2018, in so far as the requirement in certain sections of approval of 75% of the Committee of Creditors for various decisions was reduced to 51% in said period, and only if the Adjudicating Authority is satisfied that such process cannot be completed within 180 days. The authority may then, by order, extend the duration of such process by a maximum period of 90 days (see Sections 12(2) and 12(3)). What is also of importance is the proviso to Section 12(3) which states that any extension of the period under Section 12 cannot be granted more than once. This has to be read with the third proviso to Section 30(4), which states that the maximum period of 30 days mentioned in the second proviso is allowable as the only exception to the extension of the aforesaid period not being granted more than once.

71. What is important to note is that a consequence is provided, in the event that the said period ends either without receipt of a resolution plan or after rejection of a resolution plan under Section

31. This consequence is provided by Section 33, which makes it clear that when either of these two contingencies occurs, the corporate debtor is required to be liquidated in the manner laid down in Chapter III. Section 12, construed in the light of the object sought to be achieved by the Code, and in the light of the consequence provided by Section 33, therefore, makes it clear Section 21(8) (i.e. the minimum percentage of votes required for any decision of the Committee, where not otherwise provided for in the Code), and to 66% in Sections 12(2) (i.e. extension of time for completion of the process by 90 days), 22(2) (i.e. appointment of resolution professional), 27(2) (i.e. replacement of resolution professional), 28(3) (i.e. approval for certain actions by the resolution professional), 30(4) (i.e. approval of resolution plan), and 33(2) (i.e. initiation of liquidation). that the periods previously mentioned are mandatory and cannot be extended.

72. In fact, even the literal language of Section 12(1) makes it clear that the provision must read as being mandatory. The expression “shall be completed” is used. Further, sub-section (3) makes it clear that the duration of 180 days may be extended further “but not exceeding 90 days”, making it clear that a maximum of 270 days is laid down statutorily. Also, the proviso to Section 12 makes it clear that the extension “shall not be granted more than once”.

73. After admission of the application under Section 7 by the Adjudicating Authority, the scheme of the Code is as follows:

> .(i) Under Sections 13 to 15, a moratorium is declared; a public announcement of the initiation of the corporate insolvency resolution process and call for submission of claims is made;
>
> and an Interim Resolution Professional is to be appointed under Section 16 of the Code. This action is to be completed by the Adjudicating Authority within a period of 14 days from the insolvency commencement date, i.e., the date of admission of the application under Section 7 by the Adjudicating Authority.
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> .
>
> .(ii) Under Section 17, the corporate debtor’s affairs are to be managed by the Interim Resolution Professional so appointed, and the Board of Directors of the corporate debtor shall stand superseded. The officers and managers of the corporate debtor are now to report to the Interim Resolution Professional, who has the authority to act on behalf of the corporate debtor.
>
> .
>
> .(iii) Under Section 18(1), some of the important duties of this Interim Resolution Professional are set out, which are to collect all information relating to the financial position of the corporate debtor and, most importantly, to constitute a Committee of Creditors. That this has to be done at the very earliest, is clear from the scheme of the corporate insolvency resolution process which, as has been stated earlier, cannot

exceed the maximum period of 270 days from the date of admission of the financial creditors' application. .

.(iv) Under Section 21, the Interim Resolution Professional is to constitute this Committee of Creditors after collating all claims received against the corporate debtor and after determination of the financial position of the corporate debtor, both of which need to be done at the very earliest.

This Committee of Creditors is to comprise of financial creditors of the corporate debtor. All decisions of this Committee of Creditors are to be taken by a majority vote of not less than 51% of the voting share of each financial creditor.

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.(v) Under Section 22, the first meeting of the Committee of Creditors is to be held within 7 days of its constitution in order to appoint a Resolution Professional. The Committee of Creditors either continues the Interim Resolution Professional or replaces the Interim Resolution Professional by a majority vote of 66%. The application to replace the Interim Resolution Professional is then to be sent to the Adjudicating Authority, who is to forward the same to the Insolvency and Bankruptcy Board of India (hereinafter referred to as the "IBBI") for confirmation. Upon such confirmation, the Adjudicating Authority then appoints the Resolution Professional. In case the IBBI does not confirm the name of the proposed Resolution Professional within 10 days of receipt of the same, the Adjudicating Authority is then to direct the Interim Resolution Professional to continue to function as the Resolution Professional until such time as the IBBI confirms the appointment of the Resolution Professional.

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.(vi) It is this Resolution Professional who is then to conduct the corporate insolvency resolution process, which really begins at this stage (see Section 23). Section 25 then lays down some of the duties of this Resolution Professional, which are to continue the business operations of the corporate debtor, subject to the prior approval of the Committee of Creditors over the matters stated in Section 28. One of the important duties of the Resolution Professional under Section 25 is to invite prospective resolution applicants to submit resolution plans.

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.(vii) Under Section 29, the Resolution Professional is to prepare an information memorandum giving relevant information, as may be specified by the IBBI, to persons interested in formulating a resolution plan.

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.(viii) Section 30 is an important provision in that a resolution applicant may submit a resolution plan to the Resolution Professional, who is then to examine the said plan to see that it conforms to the requirements of Section 30(2). Once this plan conforms to such requirements, the plan is then to be presented to the Committee of Creditors for its approval under Section 30(3). This can then be approved by the Committee of Creditors by a vote of not less than 66% under sub-section (4). What is important to note is that the Committee of Creditors shall not approve a resolution plan where the resolution applicant is ineligible under Section 29A, and may require the Resolution Professional to invite a fresh resolution plan where no other resolution plan is available. Once approved by the Committee of Creditors, the resolution plan is to be submitted to the Adjudicating Authority under Section 31 of the Code. It is at this stage that a judicial mind is applied by the Adjudicating Authority to the resolution plan so submitted, who then, after being satisfied that the plan meets (or does not meet) the requirements mentioned in Section 30, may either approve or reject such plan.

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.(ix) An appeal from an order approving such plan is only on the limited grounds laid down in Section 61(3). However, an appeal from an order rejecting a resolution plan would also lie under Section 61.

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.(x) As has been stated hereinbefore, the liquidation process gets initiated under Section 33 if, (1) either no resolution plan is submitted within the time specified under Section 12, or a resolution plan has been rejected by the Adjudicating Authority; (2) where the Resolution Professional, before confirmation of the resolution plan, intimates the Adjudicating Authority of the decision of the Committee of Creditors to liquidate the corporate debtor; or (3) where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor. Any person other than the corporate debtor whose interests are prejudicially affected by such contravention may apply to the Adjudicating Authority, who may then pass a liquidation order on such application.

74. Regulation 40A of the CIRP Regulations presents a model timeline of the corporate insolvency resolution process, on the basis that the time available is 180 days. It states as follows:-

“40A. Model time-line for corporate insolvency res- olution process.

The following Table presents a model timeline of corpo- rate insolvency resolution process on the assumption that the interim resolution professional is appointed on

the date of commencement of the process and the time available is hundred and eighty days:

Section/Regulation	Description of Activity	Norm	Latest Timeline
Section 16(1)	Commencement of CIRP and appointment of IRP	….	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(c)/Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
Regulation 13(2)	Verification of claims received under regulation 12(2)		T+97
Section 21(6A)(b)/Regulation 16A	Application for appointment of AR	Within 2 days from verification of claims received under regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23
Section 22(1)/Regulation 19(1)	1st meeting of the CoC	Within 7 days of the constitution of the CoC, but with seven days’	T+30

		notice	
	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	…..
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 40th day of commencement	T+47
Section 12A/Regulation 30A	Submission of application for withdrawal of application admitted.	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90 % majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
Regulation 35A	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file		

	applications to AA for appropriate relief	Within 135 days to commencement	T+135
Regulation 36(1)	Submission of IM to CoC	Within 2 weeks of appointment of RP, but not later than 54th day of commencement	T+54
Regulation 36A	Publish Form G Invitation of EoI	Within 75 days of commencement	T+75
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+100
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115
	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
Regulation 36B	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
	Submission of CoC approved	As soon as approved by the	
Regulation 39(4)			T+165

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                    Resolution Plan
                                        CoC
                    to AA
                    Approval of
Section 31(1)       resolution plan                          T=180
                    by AA
      AA:   Adjudicating   Authority;    AR:    Authorised
      Representative;    CIRP:     Corporate     Insolvency
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Resolution Process; CoC: Committee of Creditors; EoI:

Expression of Interest; IM: Information Memorandum; IRP: Interim Resolution Professional; RA: Resolution Applicant; RP: Resolution Professional; RFRP: Request for Resolution Plan." It is of utmost importance for all authorities concerned to follow this model timeline as closely as possible.

75. What has now to be determined is whether any challenge can be made at various stages of the corporate insolvency resolution process. Suppose a resolution plan is turned down at the threshold by a Resolution Professional under Section 30(2). At this stage is it open to the concerned resolution applicant to challenge the Resolution Professional's rejection? It is settled law that a statute is designed to be workable, and the interpretation thereof should be designed to make it so workable. In Commissioner of Income Tax, Delhi v. S. Teja Singh, [1959] Supp. 1 S.C.R. 394, this Court said, at page 403:

> "We must now refer to an aspect of the question, which strongly reinforces the conclusion stated above. On the construction contended for by the respondent, S.18-A(9)(b) would become wholly nugatory, as ss.22(1) and 22(2) can have no application to advance estimates to be furnished under s.18-A(3), and if we accede to this contention, we must hold that though the legislature enacted s.18-A(9)(b) with the very object of bringing the failure to send estimates under s.18-A(3) within the operation of s.28, it signally failed to achieve its object. A construction which leads to such a result must, if that is possible, be avoided, on the principle expressed in the maxim, "ut res magis valeat quam pereat". Vide Curtis v. Stovin [1889] 22 Q.B.D.513 and in particular the following observations of Fry, L. J., at page 519:
>
> "The only alternative construction offered to us would lead to this result, that the plain intention of the legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this construction, we should be construing the Act in order to defeat its object rather than with a view to carry its object into effect".

Vide also Craies on Statute Law, p. 90 and Maxwell on The Interpretation of Statutes, Tenth Edn., pp. 236-237.

> "A statute is designed", observed Lord Dunedin in Whitney v. Commissioners of Inland Revenue [1925] 10 Tax Cas.88, 110, "to be workable, and the interpretation

> thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable".

76. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.

77. However, it must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2). Under Section 25(2)(i), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30(3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in sub-section (2). This provision has to be read in conjunction with Section 25(2)(i), and with the second proviso to Section 30(4), which provides that where a resolution applicant is found to be ineligible under Section 29A(c), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29A(c). A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to "decide" whether the resolution plan does or does not contravene the provisions of law. Regulation 36A of the CIRP Regulations specifically provides as follows:-

> "(8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-
>
> (a) the provisions of clause (h) of sub-section (2) of section 25;
>
> (b) the applicable provisions of section 29A, and
>
> (c) other requirements, as specified in the invitation for expression of interest. (9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).

> (10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest. (11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.
>
> (12) On considering the objections received under sub-

regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee."

78. Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.

79. Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place.

80. It is the Committee of Creditors which will approve or disapprove a resolution plan, given the statutory parameters of Section 30. Under Regulation 39 of the CIRP Regulations, sub- clause (3) thereof provides:-

> "(3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit:
>
> Provided that the committee shall record the reasons for approving or rejecting a resolution plan." This regulation shows that the disapproval of the Committee of Creditors on the ground that the resolution plan violates the provisions of any law, including the ground that a resolution plan is ineligible under Section 29A, is not

final. The Adjudicating Authority, acting quasi-judicially, can determine whether the resolution plan is violative of the provisions of any law, including Section 29A of the Code, after hearing arguments from the resolution applicant as well as the Committee of Creditors, after which an appeal can be preferred from the decision of the Adjudicating Authority to the Appellate Authority under Section 61.

81. If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the Ad- judicating Authority, this determination can be challenged before the Appellate Authority under Section 61, and may further be chal- lenged before the Supreme Court under Section 62, if there is a question of law arising out of such order, within the time specified in Section 62. Section 64 also makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great im- portance, and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time limit spec- ified. Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Ad- judicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.

82. One thing that must be made clear at this stage is that when Section 33 speaks of the "Adjudicating Authority" in sub-section (1), it is referring to both the Adjudicating Authority as well as the Appellate Authority. An Adjudicating Authority may decide in favour of a resolution plan, which order may then be set aside by the Appellate Authority. This order of the Appellate Authority, setting aside the order of the Adjudicating Authority, would then be the order which rejects the resolution plan for the purposes of Section 33. The same would apply to an ultimate order of rejection by the Supreme Court under Section 62. This is on the principle that, as stated in Lachmeshwar Prasad Shukul & Ors. v. Keshwar Lal Chaudhuri & Ors. AIR 1941 FC 5 and followed in a number of our judgments, an appeal is a continuation of the original proceedings.

83. Given the fact that both the NCLT and NCLAT are to decide matters arising under the Code as soon as possible, we cannot shut our eyes to the fact that a large volume of litigation has now to be handled by both the aforesaid Tribunals. What happens in a case where the NCLT or the NCLAT decide a matter arising out of Section 31 of the Code beyond the time limit of 180 days or the extended time limit of 270 days? Actus curiae neminem gravabit

- the act of the Court shall harm no man - is a maxim firmly rooted in our jurisprudence (see Jang Singh v. Brijlal & Ors. [1964] 2 S.C.R. 146 at page 149, and A.S. Antulay v. R.S. Nayak & Ors. [1988] Supp. 1 S.C.R. 1 at page 71). It is also true that the time taken by a Tribunal should not set at naught the time limits within which the corporate insolvency resolution process must take place. However, we cannot forget that the consequence of the chopper falling is corporate death. The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. We

must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible.3 A reasonable and balanced construction of this statute would therefore lead to the result that, where a resolution plan is upheld by the Appellate Authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded. This is not to say that the NCLT and NCLAT will be tardy in decision making. This is only to say that in the event of the NCLT, or the NCLAT, or this Court taking time to decide an application beyond the period of 270 days, the time taken in legal proceedings to decide the matter cannot possibly be excluded, as otherwise a good resolution plan may have to be shelved, resulting in corporate death, and the consequent displacement of employees and workers.

84. Coming to the facts of the present case, let us first examine the resolution plan presented by Numetal. Numetal was incorporated in Mauritius on 13.10.2017, expressly for the purpose Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, states that the liquidator may also sell the corporate debtor as a going concern.

of submission of a resolution plan qua the corporate debtor, i.e., ESIL. Two other companies, viz., AHL and AEL, were also incorporated on the same day in Mauritius. Shri Rewant Ruia, son of Shri Ravi Ruia (who was the promoter of ESIL) held the entire share capital of AHL, which in turn held the entire shareholding of AEL, which in turn held the entire share capital of Numetal. At this stage there can be no doubt whatsoever that Shri Rewant Ruia, being the son of Shri Ravi Ruia, would be deemed to be a person acting in concert with the corporate debtor, being covered by Regulation 2(1)(q)(v) of the 2011 Takeover Regulations.

85. On 18.10.2017, AEL transferred its shareholding of 26.1% in Numetal to a group company, viz., ECL. This group company is ultimately owned by 'Virgo Trust' and 'Triton Trust', the beneficiaries of which are companies owned by Shri Ravi Ruia, his brother Shri Shashikant Ruia and their immediate family members. The object of including ECL, as stated in the relevant extract from Numetal's expression of interest is as follows:

> "The Company satisfies the minimum tangible net worth requirement of INR 30 Billion considering ECL, as a group company that holds 26.1% (Twenty Six point one Percent) shares in the Company, has net worth of USD 2,974 million (US Dollars Two Thousand Nine Hundred Seventy Four million) or INR 192.8 Billion (Rupees One Hundred Ninety Two Point Eight Billion) as on 31st March 201 (immediately preceding completed financial year). Please refer Annexure I for the certificate of Chartered Accountant of the Company certifying satisfaction of the minimum tangible net worth requirement in terms of the Eligibility Criteria which includes A, a certificate of Chartered Accountant certifying ECL's tangible net worth. It is pertinent to note that in case the company is considered as a consortium potential resolution applicant, it continues to satisfy the minimum tangible net worth requirement since the total tangible net worth of the Company, computed on the basis of the weighted

> average of AEI's and ECL's net worth proportionate to their respective shareholding in the Company, is INR 50.33 Billion, which is in excess of INR 30 Billion".

86. The very next day, Shri Rewant Ruia settled an irrevocable and discretionary trust, viz., the 'Crescent Trust', and settled the entire share capital of AHL into the Trust, at a par value of USD 10,000. The beneficiaries of this Trust were general charities, as well as entitles owned by Shri Shashikant Ruia (brother of Shri Ravi Ruia, promoter of the corporate debtor), and entities owned by Shri Rewant Ruia himself.

87. On 20.11.2017, Shri Rewant Ruia settled 'Prisma Trust', another irrevocable and discretionary trust, whose beneficiaries are "general charities" and one 'Solis Enterprises Limited', a company incorporated in Bermuda, whose share capital is held by Shri Rewant Ruia. Numetal, vide a response dated 30.3.2018, admitted that while the trust deed relating to Prisma Trust allowed the trustee to benefit any English or Bermuda charity, "no particular charity is named at this stage". The Trustee of AEL is one 'Rhone Trustee', Singapore. What is important to note is that Shri Rewant Ruia was the ultimate natural person who held the beneficial interest in AEL through Prisma Trust, through Solis Enterprises Limited. This emerges from Section 6.7 of the resolution plan submitted by Numetal to the Resolution Professional. Interestingly enough, in an affidavit dated 5.3.2018, the Trustee of Prisma Trust submitted:

> "that the Trustee (for itself and each person controlled by it), hereby confirm that AEL or Rewant Ruia neither are nor will, following the implementation of the Resolution Plan, be a promoter of or have control over or have any management rights in the RA or ESIL (or the resultant company upon completion of the Merger) (including without limitation, the rights to appoint directors on the board of the RA or ESIL, or any specific veto rights or the right to direct the policy or management of the RA or ESIL in any manner)."

88. The Resolution Professional, after looking at this affidavit, correctly noted that statements of such a nature would not have been made by a truly independent trustee of a discretionary trust, which demonstrates that the trustee was under the complete control of Shri Rewant Ruia. This in turn indicates that Prisma Trust is one more smokescreen in the chain of control, which would conceal the fact that the actual control over AEL is by none other than Shri Rewant Ruia himself.

89. "Curiouser and Curiouser" was the expression of Alice, in Lewis Carroll's Alice in Wonderland. In this wonderland of Shri Rewant Ruia, one day later on 22.11.2017, the trustees of the Prisma Trust now acquired 100% of the shareholding of AHL for a par value of approximately USD 10,000 from the trustees of the Crescent Trust. On this very date, merely one day before the Ordinance bringing into force Section 29A was promulgated, ECL transferred its shareholding of 26.1% of the share capital of Numetal to Crinium Bay, an indirect wholly owned subsidiary of VTB Bank, whose shares in turn are held by the Russian Government. AEL also transferred shares representing 13.9% of the share capital of Numetal to Crinium Bay, thus making Crinium Bay's total holding in Numetal 40%. On the same date, AEL also transferred shares representing 25.1% of the share capital of Numetal to Indo, and also transferred shares representing 9.9% of the share capital of Numetal to

TPE. These transfers are likely to have taken place between 10.2.2018 and 12.2.2018. At the time of submission of its first Resolution Plan dated 12.2.2018, the shareholding of Numetal was as follows:

Crinium Bay	:	40%
Indo	:	25.1%
TPE	:	9.9%
AEL	:	25%

90. It is important to note that, as of this date, Shri Rewant Ruia, who is the ultimate beneficiary in the chain of control of the trusts which in turn controlled AEL, was very much on the scene, holding through AEL 25% of the shareholding of Numetal.

91. One other extremely important fact needs to be noticed at this stage. The earnest money in the form of Rs. 500 crores, credited to the account of the corporate debtor, has been provided to Numetal by AEL as a shareholder of the resolution applicant, viz. Numetal. It is important to note that this earnest money deposit of Rs.500 crores made by AEL continues to remain with the Resolution Professional till date, despite the fact that, by the time the second resolution plan was submitted by Numetal on 2.4.2018, AEL had exited as a shareholder of Numetal. It is also important to note that under clause 4.4.4 of the request for proposal for submission of resolution plans for ESIL, the earnest money deposit stands to be forfeited if any condition thereof is breached or the qualifications of the potential resolution applicant are found to be untrue. At this stage, it is important to reproduce relevant extracts of the resolution plan first submitted by Numetal in response to the request for proposal. The same are as under:

> "4. ... the Resolution Applicant is a newly established company that has been incorporated to provide a platform to create and sustain a leading Indian steel business and is focused on the acquisition and turnaround of the Corporate Debtor.
>
> Accordingly, to implement the Plan, Numetal believes that it has access to the right mix and balance of the financial and technical market experience which can be provided to the Corporate Debtor.
>
> Numetal is held by four independent shareholders, who possess complementary skill-sets in financial, operational, trading and industrial sectors together with regional expertise that will support the business in the medium and longer term.
>
> xxx xxx xxx 5.2. ... (i) Numetal is backed by seasoned and experienced shareholders who bring deep expertise from different industries covering Finance, Steel, Oil and Gas, Metal Mining, Trading expertise across geographies. Crinium Bay Holdings Limited ("Crinium Bay") an indirect wholly owned subsidiary of VTB Bank PJSC ("VTB Bank"). VTB Bank is one of the largest emerging market groups listed on Moscow Exchange ("MOEX") and London Stock Exchange ("LSE") with current

> market capitalization of approximately US$ 12.3bn (approximately INR 79,000 Crores) and total assets in excess of approximately US$ 220bn (approximately INR 14,08,000).

xxx xxx xxx VTB Banks support to provide financing, credit assistance to the Resolution Applicant is set out in Annexure 2 and is subject to the terms of the letter provided therein.

The other shareholders in Numetal also have material businesses with international operations focused on the steel, materials and resources sector-

(a) Tyazhpromexport JSC ("TPE") a leading engineering agency in Russia in ferrous and non ferrous metallurgy project operations and construction with experience with over 60 years and wholly owned by Russian State corporation, Rostec;

(b) Indo International Trading FZCO ("Indo" or "IITF"), a leading commodity trading company; and

(c) Aurora Enterprise Trading (sic) Limited ("AEL" or "Aurora") a financial investor with regional expertise. Numetals (sic) shareholders bring together a wealth of experience in technical and operational capabilities, banking and finance, commodity trading and regional expertise for the benefit of creating long term steel business.

xxx xxx xxx 6.3. ...The shareholders of Numetal bring to the table, considerable experience from difference industries covering finance, steel, oil and gas, metals and mining chemicals and other sectors across geographies. They have extensive experience in the field of management of distressed assets/situations, restructuring of debt, turnaround of corporates and improvement of strategies for cash flows. In addition these shareholders have a good understanding of Asian markets having dealt with large corporates in these markets. The above factors coupled with the financial strength of its shareholders, put Numetal in a strong position to implement the turnaround successfully. xxx xxx xxx

(c) ... Aurora Enterprises Limited ("AEL") brings a careful focus on financial returns and expertise of the Indian business and commercial sector to Numetal. AEL is a pure financial investor.

The beneficiaries of such discretionary trust are general charities and Solis Enterprise Limited, a company incorporated in Bermuda, the share capital of which is held by Mr. Rewant Ruia.

Mr. Rewant Ruia is the son of Ravi Ruia, who is one of the existing promoters of the Corporate Debtor."

92. Clause 6.7 of Numetal's resolution plan stipulated that it satisfied the minimum tangible net worth requirement, as set out under the request for proposal, because Crinium Bay held 40% of the shareholding of Numetal, and that VTB Bank, Crinium Bay's holding company had sufficient net worth, as on 31.12.2016, to comply with the requirement under the request for proposal. The Resolution Professional, in its affidavit before the Adjudicating Authority, took note of this plan and,

therefore, stated:

> "Under Para 1 of the Eligibility Criteria for Potential Resolution Applicants published by this Respondent on the website of the Corporate Debtor, potential resolution applicants were given the option of satisfying the minimum tangible net worth net owned funds requirement at a "Group Level" by taking into consideration the financial of entities controlling or controlled by or under common control with the potential resolution applicant. It is evident from the foregoing that Numetal took advantage of this provision and relied upon the financial wherewithal of its constituents/ shareholders. Numetal has not submitted or relied upon its stand-alone financials to satisfy the eligibility criteria. It is submitted that having taken advantage of this provision it is not open to Numetal to contend that this Respondent cannot look at its constituents/ shareholders when determining the issue of eligibility under Section 29A of the Code. Further, it is submitted that even though the RFP document does not allow a resolution applicant to look at its constituents/ shareholders for the purposes of demonstrating its experience, it is clear from the foregoing that Numetal has extensively relied on the experience of its constituents/shareholders to demonstrate its experience. It is submitted that having relied on the experience of its constituents/shareholders it is not open to Numetal to contend that this Respondent cannot look at its constituents/shareholders when determining the issue of eligibility under Section 29A of the Code."

93. The excerpted portions of Numetal's resolution plan make it clear that, since Numetal itself was a newly incorporated entity, with no financial or experience credentials of its own, it therefore relied entirely on the credentials of each of its constituent shareholders. This shows that Numetal itself revealed in its resolution plan that its corporate veil should be lifted, for without lifting this veil, none of the parameters of the request for proposal could have been met by Numetal itself. It is thus clear that the four shareholders of Numetal were persons "acting jointly" within the meaning of Section 29A. This being the case, it is clear that Shri Salve's argument that VTB Bank is a "connected person", being ineligible under sub-clause (j), would have to be rejected, as VTB Bank is itself, through its wholly owned subsidiary of Crinium Bay, a person acting jointly with the three other shareholders of Numetal, and would, therefore, fall within the first part of Section 29A itself. This being so, it cannot be said that VTB Bank is a person "connected to" any one of the persons acting jointly, as it is itself a person acting jointly, and therefore covered by the first part of Section 29A.

94. It is important to note that on 29.3.2018, AEL transferred its 25% shareholding in Numetal to the other three constituent shareholders, thereby leaving its shareholding in Numetal as 'Nil'. In response to the Resolution Professional's invitation, the second Resolution Plan, therefore, submitted by Numetal on 2.4.2018, did not have AEL as a constituent of Numetal; instead, Crinium Bay continued with 40% of the shareholding of Numetal, with TPE's holding now augmented to 29.5% and Indo's to 34.1%.

95. Given the fact that Shri Rewant Ruia is a person deemed to be acting in concert with his father Shri Ravi Ruia (who was a promoter of the corporate debtor ESIL), there is no doubt whatsoever

that Section 29A(c) would be attracted as on the date of submission of the first resolution plan, viz. 12.2.2018, as AEL was held by Prisma Trust, whose ultimate beneficiary is Shri Rewant Ruia himself. This would show that the NPA declared over a year before the date of commencement of the corporate resolution process of ESIL (i.e. in 2015) would render Numetal ineligible to submit a resolution plan. The only manner in which Numetal could successfully present a resolution plan would be to first pay off the debts of ESIL, as well as those of such other corporate debtors of the Ruia group of companies, which were declared as NPAs prior to the aforesaid period of one year, before submitting its resolution plan. However, if the date of the second resolution plan is to be seen, Shri Rewant Ruia appears to have disappeared from the scene altogether, as the three entities left are stated to be independent entities in the form of two Russian entities and one UAE entity. Viewed on 2.4.2018, therefore, could it be said that Shri Rewant Ruia had disappeared from the scene altogether, so as to obviate the application of Section 29A(c)? The obvious answer is no. This is for two reasons. First, as has been stated earlier, the Rs.500 crores that has been deposited towards submission of earnest money continues to remain deposited by AEL even post 2.4.2018, showing thereby that Shri Rewant Ruia continues to be present, insofar as Numetal's second resolution plan is concerned. Further, having regard to the reasonably proximate state of affairs before submission of the resolution plan on 2.4.2018, beginning with Numetal's initial corporate structure, and continuing with the changes made till date, it is evident that, the object of all the transactions that have taken place after Section 29A came into force on 23.11.2017 is undoubtedly to avoid the application of Section 29A(c), including its proviso. We therefore hold that, whether the first or second resolution plan is taken into account, both would clearly be hit by Section 29A(c), as the looming presence of Shri Rewant Ruia has been found all along, from the date of incorporation of Numetal, till the date of submission of the second resolution plan.

96. Another argument raised by Shri Salve is that VTB Bank is ineligible to present a resolution plan, as the major constituent of Numetal, through its wholly owned subsidiary of Crinium Bay, as VTB Bank is ineligible as sub-clause (f) read with sub-clause (i) of Section 29A have been attracted.

97. In February/March 2014, the Russian Federation annexed the Ukrainian region of Crimea. Consequently, on 6.3.2014, the President of the United States issued Executive Order 13660, pursuant to the International Emergency Economic Powers Act and the National Emergencies Act. The said order sought to block the property of Russian entities contributing to the situation in Ukraine. Summarizing the executive order issued by the President, the Department of Treasury's Office of Foreign Assets Control commented:-

> "The Ukraine/Russia-related sanctions program implemented by the Office of Foreign Assets Control (OFAC) began on March 6, 2014, when the President, in Executive Order (E.O.) 13660, declared a national emergency to deal with the threat posed by the actions and policies of certain persons who had undermined democratic processes and institutions in Ukraine;

threatened the peace, security, stability, sovereignty, and territorial integrity of Ukraine; and contributed to the misappropriation of Ukraine's assets. In further response to the actions and polices of the Government of the Russian Federation, including the purported annexation of the

Crimea region of Ukraine, the President issued three subsequent Executive orders that expanded the scope of the national emergency declared in E.O. 13660. Together, these orders authorize, among other things, the imposition of sanctions against persons responsible for or complicit in certain activities with respect to Ukraine; against officials of the Government of the Russian Federation; against persons operating in the arms or related materiel sector of the Russian Federation; and against individuals and entities operating in the Crimea region of Ukraine. E.O. 13662 also authorizes the imposition of sanctions on certain entities operating in specified sectors of the Russian Federation economy. Finally, E.O. 13685 also prohibits the importation or exportation of goods, services, or technology to or from the Crimea region of Ukraine, as well as new investment in the Crimea region of Ukraine by a United States person, wherever located."

98. The Office of Foreign Assets Control thereafter issued Directive Number 1 under Executive Order 13662, stating:-

> "DIRECTIVE 1 (AS AMENDED ON SEPTEMBER 29, 2017) UNDER EXECUTIVE ORDER 13662 Pursuant to sections 1(a)(i), 1(b), and 8 of Executive Order 13662 of March 20, 2014, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine" (the Order) and 31 C.F.R. § 589.802, taking appropriate account of the Countering Russian Influence in Europe and Eurasia Act of 2017, and following the Secretary of the Treasury's determination under section 1(a)(i) of the Order with respect to the financial services sector of the Russian Federation economy, the Director of the Office of Foreign Assets Control has determined, in consultation with the Department of State, that the following activities by a U.S. person or within the United States are prohibited..." After this, the Office of Foreign Assets Control issued Directive Number 2, under Executive Order 13662, stating:-
>
> "DIRECTIVE 2 (AS AMENDED ON SEPTEMBER 29, 2017) UNDER EXECUTIVE ORDER 13662 Pursuant to sections 1(a)(i), 1(b), and 8 of Executive Order 13662 of March 20, 2014, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine" (the Order) and 31 C.F.R. § 589.802, taking appropriate account of the Countering Russian Influence in Europe and Eurasia Act of 2017, and following the Secretary of the Treasury's determination under section 1(a)(i) of the Order with respect to the energy sector of the Russian Federation economy, the Director of the Office of Foreign Assets Control has determined, in consultation with the Department of State, that the following activities by a U.S. person or within the United States are prohibited, except to the extent provided by law or unless licensed or otherwise authorized by the Office of Foreign Assets Control: (1) For new debt issued on or after July 16, 2014 and before November 28, 2017, all transactions in, provision of financing for, and other dealings in new debt of longer than 90 days maturity of persons determined to be subject to this Directive or any earlier version thereof, their property, or their interests in property.
>
> (2) For new debt issued on or after November 28, 2017, all transactions in, provision of financing for, and other dealings in new debt of longer than 60 days maturity of

> persons determined to be subject to this Directive or any earlier version thereof, their property, or their interests in property.

All other activities with these persons or involving their property or interests in property are permitted, provided such activities are not otherwise prohibited pursuant to Executive Orders 13660, 13661, 13662, or 13685 or any other sanctions program implemented by the Office of Foreign Assets Control."

99. The names of persons determined to be subject to the directives issued under Executive Order 13662 are published in the 'Sectoral Sanctions Identification List', published by the Office of Foreign Assets Control. A perusal of this list shows that VTB Bank is listed therein, along with various entities affiliated to it.

100. Similarly, under EU Council Regulation 833 of 2014 dated 31.7.2014, certain restrictive measures in view of Russian actions destabilizing the situation in Ukraine were taken against certain Russian entities, of which VTB Bank was one. These measures included:

> "(5) It is also appropriate to apply restrictions on access to the capital market for certain financial institutions, excluding Russia-based institutions with international status established by intergovernmental agreements with Russia as one of the shareholders. Other financial services such as deposit business, payment services and loans to or from the institutions covered by this Regulation, other than those referred to in Article 5, are not covered by this Regulation." Under Article I of this regulation, 'transferable securities' was defined as :
>
> "(f) 'transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:
>
> (i) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares,
>
> (ii) bonds or other forms of securitised debt, including depositary receipts in respect of such securities,
>
> (iii) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement;" Article V thereto provided:-
>
> "It shall be prohibited to directly or indirectly purchase, sell, provide brokering or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments with a maturity exceeding 90 days, issued after 1 August 2014 by..." Further, Annexure III thereto listed VTB Bank as one of the institutions subject to the 'restrictive measures'.

101. What has been argued on behalf of Shri Rohatgi is that, in order to be covered by sub-clause (f) read with sub-clause (i) of Section 29A, the person must be subject to a disability, which corresponds to a prohibition by SEBI in India from trading in securities or accessing the securities markets. Sub-clauses (f) and

(i) therefore refer to persons who, on account of their antecedents, may adversely impact the credibility of the processes under the Code. This is in fact stated in the Preamble of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, dated 23.11.2017, which introduced Section 29A into the Code, as follows:

"AND WHEREAS in order to strengthen further the insolvency resolution process, it has been considered necessary to provide for prohibition of certain persons from submitting a Resolution Plan who, on account of their antecedents, may adversely impact the credibility of the processes under the Code." (emphasis supplied)

102. What is stressed by Shri Rohatgi is that, in his speech while introducing the Amendment Bill in Parliament, the Finance Minister stated:-

"and a person who is prohibited under SEBI cannot apply. So these are statutory disqualifications." In the light of this object, Section 29A(i) will have to be read as a disability which corresponds to Section 29A(f) in view of the antecedent conduct on the part of the person applying as a resolution applicant in a jurisdiction outside India.

103. What will be noticed is that the sanctions that have been imposed by the authorities of both the United States and the Council of the European Union are not on account of any misconduct on the part of VTB Bank. Rather, they have been imposed politically, because of the conduct of a particular country, i.e. Russia, which has sought to undermine Ukraine's territorial integrity, sovereignty and independence, by illegally annexing Crimea and Sevastopol. We are of the view that Shri Rohatgi is right, inasmuch as VTB Bank cannot be said to have been prohibited by an authority outside India from trading in securities or accessing the securities markets, due to any fraudulent and/or unfair trade practices relating to the securities market generally. A prohibitory sanction by an authority situate outside India for political reasons would thus not be covered by sub-clause (i).

However, Shri Salve pointed to an order dated 19.9.2017 of the US Commodity Futures Trading Commission, which held:

"A. Respondents Violated Section 4c(a)(1) and (2) of the Act Respondents' RUB/USD block trades constituted unlawful fictitious sales and caused prices to be reported or recorded that were not true and bona fide prices. Section 4c(a)(1) and (2) of the Act makes it unlawful "for any person to offer to enter into, enter into, or confirm the execution of a transaction that is ... a fictitious sale" or that "is used to cause any price

to be reported, registered, or recorded that is not a true and bona fide price."

xxx xxx xxx Respondents' RUB/USD block trades were fictitious sales under the Act. Respondents designed the block trades to accomplish through the use of the futures market that which was not otherwise possible for VTB to accomplish in the swaps market. Through the block trades, VTB was able to transfer its cross-currency risk to VTB Capital which could then hedge the risk in the swaps market. VTB obtained pricing from VTB Capital for these transactions that was more favorable than it admittedly could have obtained from third-parties in the futures market. With this structure, Respondents, as intended, negated market risk and avoided price competition. Accordingly, Respondents' block trades were "fictitious from the standpoint of reality and substance" and in violation of Section 4c(a)(1) and (2) (A) of the Act. In re Goldwurm, 7 Agric. Dec. 265, 275 (providing that cotton futures trades entered for purpose of accomplishing income tax reporting goals were "fictitious from the standpoint of reality and substance"). Further, Respondents' trades caused prices to be reported to or recorded by the CME that were not true and bona fide prices in violation of Section 4c(a)(2)(B) of the Act. See In re Morgan Stanley & Co., [2012 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 32,218 (CFTC June 5, 2012) (settlement order) (finding violation of Section 4c(a) where unlawfully executed exchanges for related positions caused non-bona fide prices to be reported or recorded).

xxx xxx xxx V. FINDINGS OF VIOLATION Based on the foregoing, the Commission finds that, during the Relevant Period, VTB and VTB Capital violated Section 4c(a)(1) and (2) of the Act and Regulation 1.38(a).”

104. VTB Bank had submitted an offer before the US Commodity Futures Trading Commission, in which it, without admitting or denying the findings or conclusions, had offered to cease and desist from violating the regulations aforementioned, to pay a civil monetary penalty in the amount of USD five million, and had ordered its successors and assigns to comply with the conditions consented to. This offer was accepted by the Commission, and by way of settlement, apart from what was offered by the respondents, the respondents further agreed, in the said Order dated 19.9.2017 as follows:-

“3. Respondents further agree that they shall comply with the following additional undertakings:

a. Respondents shall not enter into privately negotiated futures, options or combination transactions with one another on or through any U.S.-based futures exchange for a period of two years from the date of this Order;”

105. A reading of this order makes it clear that, even assuming that the Commodity Futures Trading Commission is an authority which corresponds with SEBI (Shri Rohatgi has argued that in the United States the Securities Exchange Commission is the authority which corresponds with SEBI in India), it is clear that there is no prohibition by the Commodity Futures Trading Commission of the

United States interdicting VTB Bank from trading in securities or accessing the securities market. All that VTB Bank has done is consent to a cease and desist order; consent to pay a monetary penalty in the amount of USD five million; and further consent to not enter into privately negotiated futures options with a particular subsidiary, viz. VTB Capital, on or through any US-based futures exchange for a period of two years from the date of the order. Obviously, a prohibition regarding privately negotiated futures options, or combination transactions with one another, is not a prohibition from trading in securities or accessing the securities market. We thus agree with Shri Rohatgi that Crinium Bay, being a wholly owned subsidiary of VTB Bank, does not therefore incur any disqualification under sub-clause (f) read with sub-clause (i) of Section 29A.

106. This brings us to the Appellant, i.e., AMIPL. So far as Uttam Galva is concerned, the corporate structure is as follows:-

> AMSA is a listed company in Luxemburg. This company is the ultimate parent company of the resolution applicant, through its wholly owned subsidiary AMBD, a company incorporated in Luxemburg, which in turn holds 100% of the shares in Oakey Holding BV, a company incorporated in the Netherlands, which in turn holds 99.99% shares in AMIPL, a company incorporated in India. AMNLBV is a company incorporated in the Netherlands, and is a 100% subsidiary of AMSA. It is this group company of Shri L.N. Mittal that held 29.05% of the shareholding in Uttam Galva (as on 7.2.2018).

107. On 4.9.2009, a Co-Promotion Agreement was executed between AMNLBV and the Indian promoters of Uttam Galva, who are stated to be the Miglani family, who are residents of Mumbai. As per the Co-Promotion Agreement, the foreign promoter, viz., AMNLBV was entitled to nominate one half of the non-independent directors on the board of Uttam Galva, the other half being nominated by the Miglanis. Both of them were to jointly nominate all of the independent directors. Clause 16 of the said agreement, read with Schedule II thereof, provides a list of matters which require the affirmative vote of AMNLBV. It is important to notice that the original shareholding of AMNLBV in Uttam Galva was 32%. This shareholding was reduced to 29.05% in the hands of AMNLBV, the Miglani group holding 31.82% as of December 2017. The rest of the shares were held by the public. This Co- Promotion Agreement, therefore, not only names AMNLBV as the foreign promoter of Uttam Galva, but also makes it clear that Uttam Galva would be jointly managed and controlled by the foreign and Indian promoters. Pursuant to this Co-Promotion Agreement, on 7.9.2009 AMNLBV issued a letter of offer to acquire 35,226,233 fully paid shares of the face value of Rs.10, representing 25.76% of the share capital of Uttam Galva. In this letter, it was disclosed to the public at large that AMNLBV was becoming a promoter of this company, with significant affirmative voting rights. On 20.9.2011, a Non Disposal Undertaking was provided by AMNLBV, as promoter of Uttam Galva, to the lender banks of Uttam Galva, which included the State Bank of India. On 31.3.2016, Canara Bank and Punjab National Bank declared Uttam Galva's accounts as NPA. It is important to note that, in all the annual returns of Uttam Galva till date, AMNLBV's shareholding has been shown as 'promoter's shareholding.' All the annual reports, upto 2017, contained a list of promoters, which included AMNLBV as one such, holding 29.05%% of the share capital of the company, and having significant influence over the company. Shri Salve's argument that, in point of

fact, no control was actually exercised as AMNLBV never appointed any directors or exercised its voting rights, cannot be accepted as that makes no difference to the de jure position of AMNLBV being a "promoter" as defined in Section 2(69)(a) of the Companies Act, 2013.

108. On 7.2.2018, a few days before AMIPL submitted its first resolution plan, AMNLBV sold its entire shareholding in Uttam Galva by way of an off market sale, to a company of the Indian co-promoters, viz., 'Sainath Trading Company Private Limited'. Shares that were purchased for Rs.120 each, were sold for Re.1 each, when the market value of the shares on the said date was admittedly Rs.19.50 per share. The aforesaid sale of shares was done without making an open offer under the 2011 Takeover Regulations, on the basis that it was an inter se transfer of shares between promoters, and therefore exempt from such requirement under Regulation 10 of the said regulations. Also, as a matter of fact, the sale of the said shares was effected without taking the consent of the lenders of Uttam Galva, which consent was necessary as per the Non Disclosure Undertaking that was executed by AMNLBV. On 7.2.2018, consequent to the aforesaid inter se transfer, the Co-Promotion Agreement is said to have stood automatically terminated. By way of abundant caution, a formal deed of termination was entered into. AMNLBV addressed letters to the NSE and the BSE to record the aforesaid inter se transfer, who accordingly declassified AMNLBV as a promoter of Uttam Galva on 21.3.2018 and 23.3.2018 respectively.

109. It is absolutely clear that Shri L.N. Mittal, who is the ultimate shareholder of the resolution applicant, viz. AMIPL, is directly the ultimate shareholder of AMNLBV as well, which is an L.N. Mittal Group Company. When the corporate veil of the various companies aforementioned is pierced, both AMIPL and AMNLBV are found to be managed and controlled by Shri L.N. Mittal, and are therefore persons deemed to be acting in concert as per Regulation 2(1)(q)(2)(i) of the 2011 Takeover Regulations. That AMNLBV is a promoter of Uttam Galva is clear from the aforementioned facts, being expressly stated as such in Uttam Galva's annual returns. The reasonably proximate facts prior to the submission of both resolution plans by AMIPL would show that there is no doubt whatsoever that AMNLBV's shares in Uttam Galva were sold only in order to get out of the ineligibility mentioned by Section 29A(c), and consequently the proviso thereto. The fact that the lenders with whom AMNLBV had a Non Disposal Undertaking have not yet moved any forum for a declaration that the sale of the shares, being without their consent, is non est, does not absolve AMNLBV from having failed to first obtain their consent before selling off its shares in Uttam Galva. Such sale is directly contrary to the Non Disposal Undertaking given to the lenders. Quite apart from this, it is also clear that shares worth Rs.19.50 each were sold at a distress value of Re.1 each, so as to overcome the provisions of Section 29A(c) and the proviso thereto. It is clear therefore that the Uttam Galva transaction clearly renders AMIPL ineligible under Section 29A(c) of the Code.

110. Insofar as the transaction with regard to KSS Petron is concerned, the facts are as follows:- on 3.3.2011, Fraseli, an entity registered and incorporated in Luxemburg, which is managed and controlled by Shri L.N. Mittal, held 32.22% of the shareholding of KSS Global, a company domiciled in the Netherlands. On 19.5.2011, by a Shareholders Agreement entered into between KSS Holding, KSS Infra EALQ, Fraseli and KSS Global, the first three companies were each given a right to appoint an equal number of directors on the board of directors of KSS Global, which in turn held

100% of the share capital of KSS Petron, a company incorporated in India. Fraseli was also granted affirmative voting rights on decisions regarding certain specified matters, both at the board and the shareholder level, in respect of KSS Global and all companies controlled by it, which would include KSS Petron. As has been stated hereinabove, KSS Petron was declared as an NPA on 30.9.2015. As in the case of Uttam Galva, Fraseli divested its shareholding in KSS Petron on 9.2.2018, i.e., only three days before AMIPL submitted its first resolution plan. On the same day, the directors nominated by Shri L.N. Mittal, through Fraseli, resigned from the board of KSS Global.

111. From the aforementioned facts, there can be no doubt whatsoever that Fraseli, being a company managed and controlled by Shri L.N. Mittal, holding one third of the shares in KSS Global, which in turn held 100% of the share capital in KSS Petron, was in joint control of KSS Petron, if the corporate veil of all these companies is disregarded. Further, the Shareholders Agreement of 19.5.2011 makes it clear that the joint control of KSS Global would be between three entities, viz., KSS Holding, KSS Infra EALQ and Fraseli, each of whom had the right to appoint an equal number of directors on the board of directors of KSS Global. Not only this, but Fraseli was also granted affirmative voting rights as aforementioned, on certain important specified matters. There would be no doubt whatsoever that, just before presentation of the resolution plan of 12.2.2018, AMIPL would be hit by Section 29A(c), as a group company of Shri L.N. Mittal exercised positive control, by its shareholding, right to appoint directors and affirmative voting rights, over KSS Global, which in turn held 100% shareholding in KSS Petron. Again, as in the case of Uttam Galva, there can be no doubt whatsoever that the sale of Fraseli's shareholding in KSS Global, together with the resignation of the Mittal directors from the board of directors of KSS Global, is a transaction reasonably proximate to the date of submission of the resolution plan by AMIPL, undertaken with the sole object of avoiding the consequence mentioned in the proviso to Section 29A(c). Having regard to the law laid down by us in this judgment, it is, therefore, clear that AMIPL is ineligible under Section 29A(c) of the Code, on this account as well.

112. Shri Rohatgi also argued before us that Shri Pramod Mittal, brother of Shri Laxmi Mittal, also held shares in two other companies which were declared to be NPAs more than one year prior to the date of commencement of the corporate insolvency resolution process of ESIL. We have been informed by Shri Salve that Shri Pramod Mittal parted company with Shri L.N. Mittal as far back as 1994, and cannot therefore be regarded as a person acting in concert with Shri L.N. Mittal. Since this aspect of the case has not been argued before the authorities below, though raised in an I.A. by Numetal before the Appellate Authority, we will not countenance such an argument for the first time before this Court.

113. Since it is clear that both sets of resolution plans that were submitted to the Resolution Professional, even on 2.4.2018, are hit by Section 29A(c), and since the proviso to Section 29A(c) will not apply as the corporate debtors related to AMIPL and Numetal have not paid off their respective NPAs, ordinarily, these appeals would have been disposed of by merely declaring both resolution applicants to be ineligible under Section 29A(c). Shri Subramanium, on behalf of the Committee of Creditors, requested us to give one more opportunity to the parties before us to pay off their corporate debtors' respective debts in accordance with Section 29A, as the best resolution plan can then be selected by the requisite majority of the Committee of Creditors, so that all dues could

be cleared as soon as possible. Acceding to this request, in order to do complete justice under Article 142 of the Constitution of India, and also for the reason that the law on Section 29A has been laid down for the first time by this judgment, we give one more opportunity to both resolution applicants to pay off the NPAs of their related corporate debtors within a period of two weeks from the date of receipt of this judgment, in accordance with the proviso to Section 29A(c). If such payments are made within the aforesaid period, both resolution applicants can resubmit their resolution plans dated 2.4.2018 to the Committee of Creditors, who are then given a period of 8 weeks from this date, to accept, by the requisite majority, the best amongst the plans submitted, including the resolution plan submitted by Vedanta. We make it clear that in the event that no plan is found worthy of acceptance by the requisite majority of the Committee of Creditors, the corporate debtor, i.e. ESIL, shall go into liquidation. The appeals are disposed of, accordingly.

.....J. (R.F. Nariman) .....J. (Indu Malhotra) New Delhi;

October 4, 2018.