

Ghanashyam Mishra And Sons Private ... vs Edelweiss Asset Reconstruction ... on 13 April, 2021

Equivalent citations: AIRONLINE 2021 SC 196

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Bench: Hrishikesh Roy, B.R. Gavai, R.F. Nariman

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO.8129 OF 2019

GHANASHYAM MISHRA AND SONS
PRIVATE LIMITED THROUGH
THE AUTHORIZED SIGNATORY ...APPELLANT(S)

VERSUS

EDELWEISS ASSET RECONSTRUCTION
COMPANY LIMITED THROUGH THE
DIRECTOR & ORS. RESPONDENT(S)

WITH

CIVIL APPEAL NO.____1554_____ OF 2021
[Arising out of Special Leave Petition No.11232 of 2020]

WRIT PETITION (CIVIL) NO.1177 OF 2020

CIVIL APPEAL NOS.____1550-1553_____ OF 2021
[Arising out of Special Leave Petition Nos.7147-7150 of
2020]

JUDGMENT

B.R. GAVAI, J.

1. Leave granted in Special Leave Petition (Civil) Nos. 11232 of 2020 and 7147-7150 of 2020.

2. The short but important questions, that arise for consideration in this batch of matters, are as under:□

(i) As to whether any creditor including the Central Government, State Government or any local authority is bound by the Resolution Plan once it is approved by an adjudicating authority under sub□section (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code')?

(ii) As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?

(iii) As to whether after approval of resolution plan by the Adjudicating Authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the Corporate Debtor, which are not a part of the Resolution Plan approved by the adjudicating authority?

3. We will first refer to the facts in each of these matters.

CIVIL APPEAL NO.8129 OF 2019 [GHANASHYAM MISHRA AND SONS PRIVATE LIMITED Vs. EDELWEISS ASSET RECONSTRUCTION COMPANY LIMITED & OTHERS]

4. Orissa Manganese & Minerals Limited (hereinafter referred to as “Corporate Debtor” or “OMML”) was engaged in the business of mining iron ore, graphite, manganese ore and agglomerating iron fines into pellets through its facilities in Orissa and Jharkhand. The Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) was initiated in respect of the Corporate Debtor by an application under Section 7 of I&B Code filed by the State Bank of India (hereinafter referred to as “SBI”) before the National Company Law Tribunal, Kolkata Bench, Kolkata (hereinafter referred to as “NCLT”).

5. Vide order dated 3.8.2017, Company Petition (I.B.) No. 371/KB/2017 filed by SBI was admitted. Shri Sumit Binani was appointed as Interim Resolution Professional (hereinafter referred to as “IRP”). Upon admission of the said Company Petition, CIRP was initiated with effect from 3.8.2017. The appointment of IRP was confirmed by the Committee of Creditors (hereinafter referred to as “CoC”) in their meeting held on 4.9.2017. The Resolution Professional (hereinafter referred to as “RP”) continued with the resolution process by inviting Expression of Interest (hereinafter referred to as “EOI”) and applications for resolution plan in accordance with the provisions of the I&B Code and the Regulations framed thereunder. The initial period of CIRP of 180 days expired on 29.1.2018. At the request of CoC, RP moved an application for extension of CIRP period, which came to be extended by 90 days i.e. till 29.4.2018.

6. In response to the invitation, three Resolution Plans were received by RP each from, Edelweiss Asset Reconstruction Company Limited (hereinafter referred to as “EARC”), respondent No.1 herein, Orissa Mining Private Limited (hereinafter referred to as “OMPL”) and Ghanashyam Mishra & Sons Private Limited (hereinafter referred to as “GMSPL”), the appellant herein, respectively. In

the 8th meeting of the CoC held on 14.3.2018, EARC was declared as H1 Bidder. However, EARC failed to satisfy CoC in the negotiations and as such, the resolution plan submitted by EARC came to be rejected in the 9th meeting of CoC held on 31.3.2018.

7. CoC thereafter proceeded for negotiations with the H2 Bidder i.e. GMSPL. However, the resolution plan of GMSPL was also found to be unacceptable to CoC and therefore, in its 10th meeting held on 3.4.2018, it decided to annul the existing process and initiate a fresh process for invitation of Resolution Plan only from the applicants, which had earlier submitted their EOI. Accordingly, a communication was sent to the applicants, which had submitted their EOI. In response to the said invitation, three Resolution Plans were received each from GMSPL, EARC and Srei Infrastructure Finance Limited (hereinafter referred to as "SIFL") respectively. These Resolution Plans were considered by CoC in its 11th meeting held on 13.4.2018. After evaluation of the Resolution Plans, CoC ranked GMSPL as the H1 bidder.

8. Further negotiations were held by CoC with GMSPL. After several rounds of negotiations, the Resolution Plan of GMSPL was considered by CoC for its approval. In its 12th meeting held on 21.4.2018, CoC unanimously took a decision to convene a meeting of CoC on 25.4.2018 at 6 PM, for voting on the Resolution Plan proposed by GMSPL. After being satisfied, that the Resolution Plan submitted by GMSPL meets all the requirements under sub-section (2) of Section 30 of the I&B Code, the same was placed before the Members of CoC for voting, and the Resolution Plan came to be approved by more than 89.23% of the voting share of financial creditors of the Corporate Debtor.

9. Accordingly, a Company Application being C.A (IB) No. 402/KB/2018 came to be filed by RP for approval of the Resolution Plan submitted by GMSPL. One application being C.A. (IB) No. 398/KB/2018 came to be filed by EARC—respondent No.1 herein, challenging the approval of the Resolution Plan of GMSPL. One more application came to be filed by EARC being C.A. (IB) No. 470/KB/2018 challenging the decision of RP in not admitting its claim. The said application was filed, contending, that its claim stood on the strength of corporate guarantee provided by the Corporate Debtor against the take-out facility provided to Adhunik Power and Natural Resources Limited (hereinafter referred to as "APNRL"), being sister concern of the Corporate Debtor. It was contended, that in not admitting the claim on the strength of corporate guarantee, RP violated Regulations 13 and 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as "the Regulations"). It was prayed in the application for a direction to the successful resolution applicant i.e. GMSPL, to undertake to pay the full amount due and payable under the said corporate guarantee and further to issue directions for protecting the rights of the lenders of APNRL as pledgee. One more Application being C.A. (IB) No.509/KB/2018 was filed by the District Mining Officer, Department of Mining and Geology, Jharkhand challenging non-admission of its claim to the tune of Rs.93,51,91,724/- and Rs.760.51 crore.

10. NCLT by an elaborate order dated 22.6.2018 approved the Resolution Plan of GMSPL, which was duly approved by CoC by voting share of more than 89.23%. Rest of the applications including the two filed by EARC, the respondent No.1 herein, came to be rejected.

11. Being aggrieved by the order passed by NCLT, EARC preferred Company Appeal being Company Appeal (AT) (Insolvency) Nos. 437/2018 and 444/2018 before the National Company Law Appellate Tribunal, New Delhi (hereinafter referred to as "NCLAT"). Company Appeal (AT) (Insolvency) No. 437/2018 was against the rejection of claims of EARC as Financial Creditor and thereby its non-inclusion in CoC. Company Appeal (AT) (Insolvency) No. 444/2018 came to be filed with the grievance, that RP and CoC had erroneously held, that the plan of GMSPL was better than that of EARC. One more Company Appeal being Company Appeal (AT) (Insolvency) No. 500/2018 came to be filed by Sundargarh Mines & Transport Workers Union (hereinafter referred to as "SMTWU") on behalf of the workmen of the Corporate Debtor. One another Company Appeal being Company Appeal (AT) (Insolvency) No.438/2018 came to be filed by one Deepak Singh, an employee of APNRL, claiming dues of his salary.

12. By the impugned judgment and order dated 23.4.2019, NCLAT while holding, that RP was justified in not accepting the claim of EARC and that NCLT had rightly rejected the application filed by EARC, however, observed that the rejection of the claim for the purpose of collating and making it part of the Resolution Plan will not affect the right of EARC to invoke the Bank Guarantee against the Corporate Debtor, in case the principal borrower failed to pay the debt amount, since the moratorium period had come to an end. NCLAT on comparison of the plans submitted by EARC and GMSPL further held, that the resolution plan submitted by GMSPL was a better one than the one submitted by other applicants and there was no illegality in accepting the resolution plan of GMSPL.

13. Insofar as the Company Appeal (AT) (Insolvency) No. 500/2018 is concerned, the grievance was, that though there were around 1,476 workmen, RP ignored their rightful wages, statutory dues and other benefits. NCLAT, in the said order, observed, that after the period of moratorium, it was open for the persons to move before a civil court or to move an application before the court of competent jurisdiction against the Corporate Debtor. NCLAT therefore observed, that the appellant therein may move before the civil court or a court of competent jurisdiction and may file an application before the Labour Court for appropriate reliefs in favour of the concerned workmen or against the Corporate Debtor, if they have actually worked and had not been taken care of in the Resolution Plan.

14. Insofar as Company Appeal (AT) (Insolvency) No. 438/2018 is concerned, it was the claim of Deepak Singh, appellant therein, that he had joined APNRL, the holding Company of the Corporate Debtor, as the President-Group Head HR from 2.6.2014 to 9.3.2015. It was his claim, that he had an amount of Rs.17,03,000/-recoverable from the said APNRL and as such, was an Operational Creditor. It was submitted, that though the claim of the said appellant was valid, it was illegally rejected by RP. NCLAT held, that insofar as the said appeal is concerned, no ground as is permissible under sub-section (3) of Section 61 of I&B Code is made out and as such, relief could not be granted in the appeal. However, it was observed, that the said order passed in the appeal would not come in the way of appellant to move the appropriate forum for appropriate relief.

15. GMSPL, thus, aggrieved by the observations made by NCLAT to the effect, that the claims of the parties, which are not included in the Resolution Plan could be agitated by them before the other forums, has preferred the present appeal.

CIVIL APPEAL ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO.11232 OF 2020
[ULTRATECH NATHDWARA CEMENT LIMITED VS. STATE OF UTTAR PRADESH AND OTHERS

16. The appellant is a wholly owned subsidiary of UltraTech Cement Limited and is engaged in the business of manufacturing and marketing of cement and allied products.

17. On 19.12.2015, the Additional Commissioner, Commercial Tax, Ghaziabad passed an order in the appeal preferred by M/s Binani Cement Limited, thereby, allowing the appeal filed by Binani Cement and setting aside the order of imposition of fine of Rs.24,71,885/- Vide another order dated 22.12.2015, passed in the appeal filed by Binani Cement, the order of imposition of fine of Rs.59,61,445/- also came to be set aside. Vide order dated 2.8.2017, the Deputy Commissioner, Commercial Tax, Division No. 10, Ghaziabad held, that Binani Cement was liable to pay Entry Tax of Rs.40,47,344/- for the Assessment Year 2003-2004. By another order dated 2.8.2017, the Deputy Commissioner, Commercial Tax, Division No. 10, Ghaziabad further held, that Binani Cement was liable to pay Entry Tax of Rs.43,06,715/- for the Assessment Year 2004-2005.

18. Since the said Binani Cement was unable to pay the debt to Bank of Baroda, the Bank of Baroda filed an application being C.A. (IB) No. 359/KB/2017 before NCLT, Kolkata Bench under Section 7 of I&B Code. Vide order dated 25.7.2017, NCLT admitted the petition for initiating the CIRP process. Vide the said order, NCLT also declared moratorium for the purposes referred to in Section 14 of I&B Code.

19. Vide communication dated 10.11.2017, the authorities were informed about the initiation of the CIRP. However, the authority by an endorsement made on the application of the appellant herein stated, that there was no stay granted by NCLT on tax assessment process. It was observed, that if there was any clear order passed by NCLT, the same should be produced or the Binani Cement should appear on the next date i.e. 27.11.2017 for hearing of tax assessment process.

20. On 28.7.2017, RP made a public announcement inviting claims from all the creditors of the Corporate Debtor, as is required under Section 15 of I&B Code. The last date for submission of claims was 8.8.2017. RP upon receipt of the claims maintained a list of creditors alongside the amount claimed by them and the security interest. RP also invited EOI. In response, various entities including the present appellant submitted their EOI as well as resolution plans. CoC in its meeting dated 28.5.2018, unanimously approved the Resolution Plan submitted by the present appellant. Pursuant to the approval by CoC, NCLAT granted approval to the Resolution Plan of appellant vide order dated 14.11.2018. The said order came to be challenged before this Court in Civil Appeal No. 10998/2018, which was dismissed by this Court vide order dated 19.11.2018.

21. On 13.12.2018, the name of the Corporate Debtor was changed to UltraTech Nathdwara Cement Limited from Binani Cement Limited and the management of the Corporate Debtor was taken over by Ultratech Cement Limited w.e.f. 20.11.2018. Thereafter, the appellant addressed various communications to the tax authorities, who are respondents herein informing them, that after the Resolution Plan was approved by NCLT, all proceedings instituted against the Corporate Debtor,

arising and pending before the transfer date shall stand withdrawn. It was also informed, that all the liabilities towards operational creditors shall be deemed to have been settled by discharge and payment of the resolution amount by the Corporate Debtor. However, it was insisted by the tax authorities, that since there was no specific stay, proceedings could not be dropped. After various communications addressed by the appellant to the Joint Commissioner, Commercial Tax (Corporate Circle), Ghaziabad dated 26.4.2019, the following endorsements came to be made by the authority on 29.4.2019: □“After consideration on application presented by you, it is found that, by Hon’ble NCLT/NCLAT after transfer, neither stay is imposed on tax assessment nor on creation of demand. So the created demand is payable by you. If you are not agree with it, preferring appeal before higher authority, present its copy to us. Disposal is done of application presented by you.” _____

22. The Commercial Tax Department of the State of Rajasthan filed Civil Appeal No. 5889/2019 challenging the Resolution Plan. However, the said appeal came to be dismissed vide order of this Court dated 26.7.2019. The appeals being Civil Appeal Nos. 630□634/2020 were also preferred by the Commissioner of Central Excise, Goods and Services Tax, Jodhpur challenging the Resolution Plan. The same also came to be dismissed by this Court vide order dated 24.1.2020.

23. The appellant therefore filed a Civil Miscellaneous Writ Petition No. 354/2020 before the High Court of Allahabad challenging the order passed by the Additional Commissioner Grade 2 (Appeal) dated 30.1.2020, to the effect, that the proceedings in the State of U.P. would remain unaffected irrespective of the approval of the Resolution Plan of the appellant by NCLT. The appellant also prayed for a declaration, that all the proceedings pending before different authorities stand abated in terms of the approval of the Resolution Plan by NCLT. A prayer was also made for refund of Rs.248.92 lakhs deposited by the appellant under protest and for return of the Bank Guarantee.

24. The Division Bench of the Allahabad High Court vide order dated 6.7.2020 observed, that the contention of the appellant with regard to the approval of the Resolution Plan by NCLT has been dealt with by the Assessing Authority as well as by the Appellate Authority and therefore, it was in the fitness of things that the appellant should avail of the alternative remedy of filing a second appeal available under the VAT Act. Being aggrieved by the same, the appellant has filed the present appeal. WRIT PETITION (CIVIL) NO. 1177 OF 2020 M/S MONNET ISPAT & ENERGY LIMITED AND ANOTHER VS. STATE OF ODISHA AND ANOTHER

25. The petitioner Company is a Corporate Debtor in respect of which CIRP proceedings commenced in July 2017 and ended in July 2018, when NCLT approved the Resolution Plan submitted by a Consortium of Aion Investment Private Limited and JSW Steel Limited (“Aion□JSW” for short). Prior to approval by NCLT, CoC had granted approval to the said Resolution Plan by a voting majority of 98.97%. It is the contention of the petitioner, that in accordance with the provisions of I&B Code, RP had made a public announcement thereby, inviting claims from Creditors. Contending, that the demand notices issued by the respondents for recovery of Service Tax towards Royalty, District Mineral Foundation (“DMF” for short) and National Mineral Exploration Trust (“NMET” for short) against the iron ore purchased by the petitioner Company are contrary to the law laid down by this Court in the case of Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Others¹, the petitioner has

directly approached this Court by filing a writ petition under Article 32 of the Constitution of India.

CIVIL APPEALS ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NOS.7147-7150 OF 2020 [ELECTROSTEEL STEELS LIMITED, BOKARO, JHARKHAND VS. STATE OF JHARKHAND AND OTHERS]

26. The appellant is a Corporate Debtor in respect of which the proceedings under Section 7 were initiated by the SBI. Vide order dated 21.7.2017 of NCLT, the application filed by SBI was admitted and Mr. Dhaivat Anjaria was 1 (2020) 8 SCC 531 appointed as Interim Resolution Professional (IRP). In its meeting dated 21.8.2017, CoC approved the appointment of IRP as RP. In response to the invitation for submission of resolution plans, four applicants had submitted their Resolution Plans. CoC had approved the Resolution Plan of Vedanta Limited by 100% voting share. NCLT vide order dated 17.4.2018 approved the Resolution Plan of Vedanta Limited. The appeal being Company Appeal (AT) (Insolvency) No. 175/2018 filed by one Renaissance Steel India Private Limited challenging the order of NCLT came to be dismissed by NCLAT vide order dated 10.8.2018. Challenging the notices issued by the respondent State Authorities and the order of SBI asking it to pay an amount of Rs.37,41,41,602/- on account of tax penalty due under the Jharkhand VAT Act for the period 2011-12 and 2012-13, the appellant approached the High Court of Jharkhand. The appellant had also challenged the letter dated 22.11.2019 issued by State Tax Officer, Bokaro to deposit the amount of Rs.75,57,000/- As in the other matters, it is contended by the appellant, that in view of Section 31 of I&B Code, since the claim made by the respondent was not a part of the Resolution Plan, it would get extinguished on the Resolution Plan being approved by NCLT. The said writ petition came to be rejected by the High Court on the ground, that the petitioner had no locus and that the Resolution Plan was not binding on the State Government since it had not participated in the CIRP proceedings. SUBMISSIONS IN CIVIL APPEAL NO.8129 OF 2019 [Ghanashyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited & Others]

27. Dr. A.M. Singhvi, learned Senior Counsel appearing for GMSPL submitted, that as held by this Court in a catena of decisions, the commercial wisdom of CoC in accepting or rejecting the Resolution Plan is paramount. He submitted, that the interference would be warranted within the limited parameters of judicial review that are available under the Statute. The learned Senior Counsel further submitted, that once the adjudicating authority approves the Resolution Plan, it shall be binding on everyone including Corporate Debtor and its employees, Members, Creditors including the Central Government, any State Government or any local authority, to whom a debt is owed in respect of the payment of dues arising under any law for the time being in force, guarantors and other stakeholders, involved in the Resolution Plan. He submitted, that once a Resolution Plan is accepted, if any additional liability is thrust upon the Resolution Plan, the entire plan would become unworkable, resulting into the frustration of the very purpose of the enactment i.e. revival of the Corporate Debtor.

28. Dr. Singhvi further submitted, that perusal of the Resolution Plan submitted by EARC and particularly Clause 2.1.3 thereof would reveal, that the said Plan also provides, that all the debts and all dues, liability or obligations other than the one, which are included in Resolution Plan, shall be

deemed to have been irrevocably waived and permanently extinguished and written off in full with effect from the effective date. He submitted that a similar provision is also made in the Resolution Plan submitted by GMSPL.

29. The learned Senior Counsel further submitted, that the Resolution Plan submitted by GMSPL is for an amount of Rs.321.19 crore. If additional liability of Rs.648.89 crore is saddled upon the resolution applicant, the total resolution plan itself would be unworkable.

30. Dr. Singhvi further submitted that NCLT has found the conduct of EARC not to be bona fide. He submitted, that NCLT has categorically found, that the application filed by EARC was a deliberate attempt to stage manage an objection against the approval of Resolution Plan submitted by an entity, other than it. He submitted, that as a matter of fact, NCLT has imposed costs of Rs. 1 lakh on EARC taking into consideration its conduct.

31. Dr. Singhvi relied upon the judgments of this Court in the cases of K. Shashidhar vs. Indian Overseas Bank and Others², Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. 2 (2019) 12 SCC 150 Satish Kumar Gupta & Ors. (supra) Maharashtra Seamless Limited vs. Padmanabhan Venkatesh and others³, Karad Urban Cooperative Bank Ltd. vs. Swwapnil Bhingardevay & Ors.⁴ and Kalpraj Dharamshi and Another vs. Kotak Investment Advisors Limited and Another⁵.

32. Mr. Prashant Bhushan, learned Counsel appearing on behalf of the EARC Respondent No.1 submitted, that by the impugned order, NCLAT has only reserved the right of EARC to invoke the Corporate Guarantee in its favour. He submitted, that on account of the erroneous conduct of the proceedings by RP and CoC, EARC has been put in a precarious condition. He submitted, that on one hand RP has not recognized EARC as a financial creditor thereby, depriving its nomination to CoC and participation in finalization of the proceedings. On the other hand, denying EARC to encash its bank guarantee would leave EARC high and dry. A substantial claim of 3 (2020) 11 SCC 467 4 (2020) 9 SCC 729 5 2021 SCC OnLine SC 204 EARC would be rendered futile, in the event the order passed by NCLT is to be maintained. He therefore submitted, that no interference is warranted in the appeal.

33. In reply to the submissions of the appellant that EARC has not preferred an appeal against the order of NCLAT though its appeal was disposed of is concerned, the learned Counsel relying on the judgment of this Court in the case of Banarasi and Another v. Ram Phal⁶ submitted, that since the findings recorded by NCLAT are in its favour, there was no occasion for it to prefer an appeal. He submitted, that in any event, it can raise the grounds insofar as the findings in the impugned order, which are adverse to EARC in addition to supporting the final judgment in its favour.

34. Shri Neeraj Kishan Kaul, learned Senior Counsel appearing on behalf of the appellant submitted, that assuming without admitting that EARC could be considered as the financial creditor, it could have had voting right only to the extent of 9% and even in that eventuality, resolution 6 (2003) 9 SCC 606 plan of GMSPL would have been approved by CoC with the majority of more than 80%.

SUBMISSIONS IN CIVIL APPEAL ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL)
NO.11232 OF 2020 [UltraTech Nathdwara Cement Limited v. State of Uttar Pradesh and Others]

35. Dr. Singhvi, learned Senior Counsel appearing on behalf of the appellant□UltraTech Nathdwara Cement Limited submitted, that a conjoint reading of sub□section (10) of Section 3 and sub□sections (20) and (21) of Section 5 would show, that even if there was no amendment to Section 31 of I&B Code by the 2019 Amendment, still the Central Government and any State Government or the local authorities were bound by the same and any statutory dues owed to them by the Corporate Debtor, which were not included in the resolution plan, shall stand extinguished. He submitted, that the 2019 Amendment, which amends Section 31 is clarificatory in nature and only declares and clarifies the position of law, which has already been in existence i.e. the Central Government, any State Government and local authorities are bound by the CIRP. He submitted, that this Court in the cases of State Bank of India vs. V. Ramakrishnan and Another⁷ and B.K. Educational Services Private Limited v. Parag Gupta and Associates⁸ has held the amendment to certain provisions of the I&B Code to be clarificatory in nature. The learned Senior Counsel submitted, that upon perusal of the provisions of the I&B Code, it is clear, that once NCLT grants approval to the Resolution Plan, all proceedings pending insofar as the Corporate Debtor is concerned, which are not included in the Resolution Plan shall stand automatically stayed. He submitted, that perusal of the chart pertaining to the dues of the respondents, clearly reveal that all of the said dues are prior to the admission of the Company Petition filed under Section 7 of I&B Code and therefore, the respondents are not entitled to continue the proceedings in respect thereof since the same do not form part of the approved resolution plan.

7 (2018) 17 SCC 394 8 (2019) 11 SCC 633

36. He submitted, that the orders passed by NCLAT were challenged before this Court by the Revenue Authorities of the Rajasthan State as well as the Commissioner of Central Excise (GST), Jodhpur and this Court had refused to interfere with the order passed by NCLAT. It is submitted, that in this background, the authorities are totally unjustified in continuing the proceedings, which are undisputedly with respect to the dues prior to admission of the application under Section 7 of I&B Code, only on the ground, that there is no specific stay order passed by NCLT.

37. He submitted, that the High Court has erred in refusing to entertain the writ petition of the appellant solely on the ground, that an alternative remedy by way of a second appeal was available to the appellant. He submitted, that in catena of judgments, this Court has held, that non□exercise of jurisdiction under Article 226, despite availability of alternative remedy is a rule of self□restraint and in the appropriate areas carved out by this Court, entertaining a petition under Article 226, despite availability of alternative remedy, would be permissible. He submitted, that applying the said principle, the proceedings before the authority since stand prohibited in view of the provisions of the I&B Code, the High Court erred in refusing to entertain the petition.

38. The learned Senior Counsel further submitted, that despite the pendency of the present appeal, the Joint Commissioner, Commercial Tax, Ghaziabad has passed an Assessment Order dated 2.2.2021 for the period prior to admission of Section 7 petition, as such the appellant has filed IA

No.26255/2021 challenging the said assessment order.

39. Dr. Singhvi further submitted, that though the respondent authorities were aware of the Resolution Proceedings, they had failed to submit any claim, in response to the public notices issued by RP.

40. Shri V. Shekhar, learned Senior Counsel appearing on behalf of the State Authorities justified the impugned order and prayed for dismissal of the appeal. He submitted, that the order passed by NCLT would not come in the way of adjudicatory proceedings, which were continued by the authorities under the provisions of the relevant Statutes. He submitted, that the assessment orders which were passed in accordance with law were duly approved in appeal by the higher authority and therefore, the High Court was justified in observing that the petition was not maintainable, in view of the availability of alternative remedy of filing a second appeal.

41. The learned Senior Counsel submitted, that the adjudicatory authorities acting under the relevant statutes being not a part of CoC are not bound by the decision of CoC, which is approved by NCLT. He further submitted, that merely continuation of the adjudicatory proceedings cannot be a part of coercive action.

42. Shri V. Shekhar submitted, that 2019 Amendment cannot be said to be clarificatory in nature and as such, the proceedings, which were pending prior to the date of the amendment to Section 31, would not be affected by the 2019 Amendment to Section 31. He therefore prayed for dismissal of the appeal.

SUBMISSIONS IN WRIT PETITION (CIVIL) NO. 1177 OF 2020 [M/s Monnet Ispat & Energy Limited and Another v. State of Odisha and Another]

43. Shri Kaul, learned Senior Counsel appearing on behalf of the writ petitioner submitted, that in spite of clear legal position as enunciated in various judgments of this Court, various authorities in different parts of the country are continuing with the proceedings in respect of statutory dues existing prior to the date of approval of resolution plan by NCLT. He submitted, that various High Courts have held, relying on the judgments of this Court, that statutory dues prior to the date of admission of Section 7 application and which are not part of the Resolution Plan shall stand extinguished and the proceedings in respect thereof would no more survive. However, in some States, the authorities of the State are flouting the law and as such, the petitioner has approached this Court in its extraordinary jurisdiction under Article 32 of the Constitution so that there is an authoritative pronouncement by this Court. He submitted, that the respondent authorities in the present case had failed to file the claims in response to the statutory public notice issued by RP. The first demand by the authorities raised is only after the plan was approved by CoC on 9.4.2018. He also relied on the speech delivered by the Hon'ble Finance Minister in Rajya Sabha on 29.7.2019, to buttress his submissions that the 2019 Amendment of Section 31 of I&B Code is clarificatory in nature. **SUBMISSIONS IN APPEALS ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NOS.7147-7150 OF 2020 [Electrosteel Steels Limited, Bokaro, Jharkhand vs. State of Jharkhand and Others]**

44. Dr. Singhvi submitted, that in the present matter though NCLT had approved the Resolution Plan on 17.4.2018 and NCLAT had dismissed the appeal on 10.8.2018, only thereafter on 17.8.2018, the reassessment order came to be passed for the period 2012-13. He submitted, that immediately after the appellant discovered about the said order, the same was challenged in a writ petition. However, the High Court has dismissed the petition on erroneous grounds. It is submitted, that one of the grounds on which the petition is dismissed is, that it is the Vedanta Limited, which was an aggrieved party since it was a Resolution Applicant and as such, the petition at the behest of the present appellant, which was a Corporate Debtor was not tenable. He submitted, that the second ground on which the writ petition is dismissed is that the State Authorities had not participated in CIRP and the order passed by NCLT was binding only on the parties, which have participated in the Resolution process. He submitted, that both the grounds are erroneous inasmuch as, Vedanta Limited is a successful Resolution Applicant. The Resolution process is in respect of the present appellant-writ petitioner, which is the Corporate Debtor and as such, the petition at the behest of the present appellant was very much tenable in law. Insofar as the second ground of the High Court is concerned, he submitted, that if such a view is accepted, it will frustrate the entire object of I&B Code and the revival of the Debtor Companies would be impossible if the successful resolution applicants are sprung with the surprise debts, which are not part of the Resolution Plan.

45. Shri Gurukrishna Kumar, learned Senior Counsel appearing on behalf of the respondent submitted, that the entire process conducted by RP and CoC is fraudulent. He submitted, that in accordance with Section 29 and specifically, clause H of Regulation 36, RP was required to furnish the details of the material litigation and an ongoing investigation or proceedings initiated by Government and Statutory Authorities in the information memorandum. However, the Resolution Applicant had fraudulently used I&B Code by suppressing the vital information with regard to the same and thereby, denying the legitimate dues of public exchequer.

46. Dr. Singhvi in rejoinder submitted, that it is respondent's own admission that they have not participated in the proceedings conducted by RP, CoC, NCLT, NCLAT and even this Court. He submitted, that when the other Departments/Ministries had participated in the proceedings and raised their claims, it does not lie in the mouth of respondents to say, that they were not aware about CIRP proceedings.

47. In the said appeal, an intervention application has also been filed on behalf of Tata Steel BSL Limited. It is contended in the intervention application, that though the resolution process in respect of intervener/applicant was complete, still the Revenue Authorities were continuing with the proceedings with respect to the dues owed prior to the date of approval of resolution plan by NCLT. It is the submission of the intervener/applicant, that as such, legal position needs to be settled by this Court and therefore the intervener/applicant has filed the present intervention application. Shri Jaideep Gupta, learned Senior Counsel appearing on behalf of the said intervener-applicant has made submissions on similar lines as are advanced by Dr. Singhvi and Shri Kaul, learned Senior Counsel appearing in the other matters.

CONSIDERATION

48. We have extensively heard the learned counsel appearing for the parties in all the matters, perused the written submissions and materials on record.

49. The provisions of I&B Code have undergone scrutiny in various judgments of this Court. We would not like to burden the present judgment with the provisions of the statute, which have been duly reproduced and considered in the earlier judgments of this Court.

50. In the case of *Innoventive Industries Ltd. vs. ICICI Bank & Anr.*⁹ after reproducing the ‘Statement of Objects and Reasons’ of I&B Code in paragraph 12, this Court observed thus:

“13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia.” [emphasis supplied]

51. This Court thereafter in paragraph 16 reproduced the relevant paragraphs contained in the report of the Bankruptcy Law Reforms Committee Report of 2015. Thereafter, this Court reproduced all the relevant provisions of I&B Code in paragraphs 18 to 26.

52. This Court in the case of *Innoventive Industries Ltd. (supra)* thereafter elaborately discussed the scheme of the various provisions of the I&B Code in paragraphs 27 to 32, which read thus:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.

Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only

when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

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.

32. As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors.” [emphasis supplied]

53. After discussing the relevant provisions of I&B Code, this Court observed thus:

“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.” [emphasis supplied]

54. It could thus be seen, that one of the dominant objects of I&B Code is to see to it, that an attempt has to be made to revive the Corporate Debtor and make it a running concern. For that, a resolution applicant has to prepare a resolution plan on the basis of the Information Memorandum. The Information Memorandum, which is required to be prepared in accordance with Section 29 of I&B Code along with Regulation 36 of the Regulations, is required to contain various details, which have been gathered by RP after receipt of various claims in response to the statutorily mandated public notice. The resolution plan is required to provide for the payment of insolvency resolution process costs, management of the affairs of the Corporate Debtor after approval of the resolution plan; the implementation and supervision of the resolution plan. It is only after the Adjudicating Authority satisfies itself, that the plan as approved by CoC with the requisite voting share of financial creditors meets the requirement as referred to in sub-section (2) of Section 30, grants its approval to it. It is only thereafter, that the said plan is binding on the Corporate Debtor as well as its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The moratorium order passed by the Adjudicating Authority under Section 14 shall cease to operate, once the Adjudicating Authority approves the resolution plan. The scheme of I&B 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 Debtor as a going concern until a resolution plan is drawn up. Once the resolution plan is approved, the management is handed over under the plan to the successful applicant so that the Corporate Debtor is able to pay back its debts and get back on its feet.

55. This Court recently in the case of Kalpraj Dharamshi and another vs. Kotak Investment Advisors Ltd. and another (supra) has, in detail, considered the provisions of Sections 30 and 31 of I&B Code, the Bankruptcy Law Reforms Committee (BLRC) Report of 2015 and the judgments of this Court in the case K. Sashidhar (supra), Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. Satish Kumar Gupta & Ors. (supra) and Maharashtra Seamless Limited vs. Padmanabhan Venkatesh and others (supra) and observed thus:

“139. It is thus clear, that the Committee was of the view, that for deciding key economic question in the bankruptcy process, the only one correct forum for evaluating such possibilities, and making a decision was, a creditors committee, wherein all financial creditors have votes in proportion to the magnitude of debt that they hold. The BLRC has observed, that laws in India in the past have brought arms of the Government (legislature, executive or judiciary) into the question of bankruptcy process. This has been strictly avoided by the Committee and it has been provided, that the decision with regard to appropriate disposition of a defaulting firm, which is a business decision, should only be made by the creditors. It has been observed, that the evaluation of proposals to keep the entity as a going concern, including decisions about the sale of business or units, restructuring of debt, etc., are required to be taken by the Committee of the Financial Creditors. It has been

provided, that the choice of the solution to keep the entity as a going concern will be voted upon by CoC and there are no constraints on the proposals that the resolution professional can present to CoC. The requirements, that the resolution professional needs to confirm to the Adjudicator, are:

- (i) that the solution must explicitly require the repayment of any interim finance and costs of the insolvency resolution process will be paid in priority to other payments;
- (ii) that the plan must explicitly include payment to all creditors not on the creditors committee, within a reasonable period after the solution is implemented; and lastly
- (iii) the plan should comply with existing laws governing the actions of the entity while implementing the solutions.

140. The Committee also expressed the opinion, that there should be freedom permitted to the overall market, to propose solutions on keeping the entity as a going concern. The Committee opined, that the details as to how the insolvency is to be resolved or as to how the entity is to be revived, or the debt is to be restructured will not be provided in the I&B Code but such a decision will come from the deliberations of CoC in response to the solutions proposed by the market.

141. This Court in the case of K. Sashidhar (supra) observed thus:

“32. Having heard the learned counsel for the parties, the moot question is about the sequel of the approval of the resolution plan by CoC of the respective corporate debtor, namely, KS&PIPL and IIL, by a vote of less than seventy-five per cent of voting share of the financial creditors; and about the correctness of the view taken by NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. Further, is it open to the adjudicating authority/appellate authority to reckon any other factor other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be which, according to the resolution applicant and the stakeholders supporting the resolution plan, may be relevant?” (emphasis supplied)

142. After considering the judgment of this Court in the case of Arcelormittal India Private Limited v. Satish Kumar Gupta⁴⁶ and the relevant provisions of the I&B Code, this court further observed in K. Sashidhar (supra) thus:

“52. As aforesaid, upon receipt of a “rejected” resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been

enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject□matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made non□justiciable.” (emphasis supplied)

143. This Court has held, that it is not open to the Adjudicating Authority or Appellate Authority to reckon any other factor other than specified in Sections 30(2) or 61(3) of the I&B Code. It has further been held, that the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. This Court thus, in unequivocal terms, held, that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. It has been held, that the opinion expressed by CoC after due deliberations in the meetings through voting, as per voting shares, is a collective business decision. It has been held, that the legislature has consciously not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the Adjudicating Authority and that the decision of CoC's ‘commercial wisdom’ is made non□justiciable.

144. This Court in Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) after referring to the judgment of this Court in the case of K. Sashidhar (supra) observed thus:

“64. Thus, what is left to the majority decision of the Committee of Creditors is the “feasibility and viability” of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the

effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.” (emphasis supplied)

145. This Court held, that what is left to the majority decision of CoC is the “feasibility and viability” of a resolution plan, which is required to take into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. It has further been held, that CoC is entitled to suggest a modification to the prospective resolution applicant, so that carrying on the business of the Corporate Debtor does not become impossible, which suggestion may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, etc. It has been held, that what is important is, the commercial wisdom of the majority of creditors, which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.

146. The view taken in the case of K. Sashidhar (supra) and Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) has been reiterated by another three Judges Bench of this Court in the case of Maharashtra Seamless Limited (supra).

147. In all the aforesaid three judgments of this Court, the scope of jurisdiction of the Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT) has also been elaborately considered. It will be relevant to refer to paragraph 55 of the judgment in the case of K. Sashidhar (supra), which reads thus:

“55. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan “as approved” by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides : (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is

established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.”

148. It has been held, that in an enquiry under Section 31, the limited enquiry that the Adjudicating Authority is permitted is, as to whether the resolution plan provides:

- (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor,
- (ii) the repayment of the debts of operational creditors in prescribed manner,
- (iii) the management of the affairs of the corporate debtor,
- (iv) the implementation and supervision of the resolution plan,
- (v) the plan does not contravene any of the provisions of the law for the time being in force,
- (vi) conforms to such other requirements as may be specified by the Board.

149. It will be further relevant to refer to the following observations of this Court in K. Sashidhar (supra):

57. ...Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order “approving a resolution plan” under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers “by the resolution professional” during the

corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board.

Significantly, the matters or grounds— be it under Section 30(2) or under Section 61(3) of the I&B Code —are regarding testing the validity of the “approved” resolution plan by CoC;

and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision.” [emphasis supplied]

150. It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.

151. The position is clarified by the following observations in paragraph 59 of the judgment in the case of K. Sashidhar (supra), which reads thus:

“59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors.....”

152. This Court in Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) after reproducing certain paragraphs in K. Sashidhar (supra) observed thus:

“Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar”

153. It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.

154. In the case of Maharashtra Seamless Limited (supra), NCLT had approved the plan of appellant therein with regard to CIRP of United Seamless Tubular (P) Ltd. In appeal, NCLAT directed, that the appellant therein should increase upfront payment to Rs. 597.54 crore to the “financial creditors”, “operational creditors” and other creditors by paying an additional amount of Rs. 120.54 crore. NCLAT further directed, that in the event the “resolution applicant” failed to undertake the

payment of additional amount of Rs.

120.54 crore in addition to Rs. 477 crore and deposit the said amount in escrow account within 30 days, the order of approval of the 'resolution plan' was to be treated to be set aside. While allowing the appeal and setting aside the directions of NCLAT, this Court observed thus:

“30. The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in *Essar Steel [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531]*, the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the successful resolution applicant to enhance their fund inflow upfront.”

155. This Court observed, that the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. This Court clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront.

156. It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.”

56. Another three Judges Bench of this Court in the case of *Karad Urban Cooperative Bank Ltd. vs. Swwapnil Bhingardevay & Ors. (supra)*, taking a similar view, has observed thus:

“14. The principles laid down in the aforesaid decisions, make one thing very clear. If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and CoC has taken a conscious decision to approve the

resolution plan, then the adjudicating authority will have to switch over to the hands off mode. It is not the case of the corporate debtor or its promoter/Director or any one else that some of the factors which are crucial for taking a decision regarding the viability and feasibility, were not placed before CoC or the resolution professional....”

57. It could thus be seen, that the legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by Adjudicating Authority is limited to the extent provided under Section 31 of I&B Code and of the Appellate Authority is limited to the extent provided under sub-section (3) of Section 61 of the I&B Code, is no more res integra.

58. Bare reading of Section 31 of the I&B Code would also make it abundantly clear, that once the resolution plan is approved by the Adjudicating Authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is, revival of the Corporate Debtor and to make it a running concern.

59. The resolution plan submitted by successful resolution applicant is required to contain various provisions, viz., provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the Corporate Debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the Corporate Debtor. Explanation 1 to clause (b) of sub-section (2) of Section 30 of the I&B Code clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the Corporate Debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan.

Clause (e) of sub-section (2) of Section 30 of I&B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force.

60. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the Corporate Debtor so that the resolution applicant submitting a plan is aware of the assets and

liabilities of the Corporate Debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the Corporate Debtor towards them are required to be contained in the information memorandum.

61. All these details are required to be contained in the information memorandum so that the resolution applicant is aware, as to what are the liabilities, that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the Corporate Debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the Adjudicating Authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in sub-section (2) of Section 30 is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that he should start with fresh slate on the basis of the resolution plan approved.

62. This aspect has been aptly explained by this Court in the case of Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra).

“107. For the same reason, the impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count.”

63. In view of this legal position, we could have very well stopped here and held, that, the observation made by NCLAT in the appeal filed by EARC to the effect, that EARC was entitled to take recourse to such remedies as are available to it in law, is impermissible in law.

64. As held by this Court in the case of Pr. Commissioner of Income Tax vs. Monnet Ispat and Energy Ltd.¹⁰, in view of provisions of Section 238 of I&B Code, the provisions thereof will have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force or any instrument having 10 SLP(C) No.6483/2018 (order dated 10.8.2018) effect by virtue of any such law. As such, the observations made by NCLAT to the aforesaid effect, if permitted to

remain, would frustrate the very purpose for which the I&B Code is enacted.

65. However, in Civil Appeal arising out of Special Leave Petition (Civil) No.11232 of 2020, Writ Petition (Civil) No.1177 of 2020 and Civil Appeals arising out of Special Leave Petition (Civil) Nos. 7147-7150 of 2020, the issue with regard to the statutory claims of the State Government and the Central Government in respect of the period prior to the approval of resolution plan by NCLT, will have to be considered.

66. Vide Section 7 of Act No.26 of 2019 (vide S.O. 2953(E), dated 16.8.2019 w.e.f. 16.8.2019), the following words have been inserted in Section 31 of the I&B Code.

“including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed”

67. As such, with respect to the proceedings, which arise after 16.8.2019, there will be no difficulty. After the amendment, any debt in respect of the payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished.

68. The only question, which remains is, what happens to such dues if they pertain to a period wherein Section 7 petitions have been admitted prior to 16.8.2019.

69. To answer the said question, we will have to consider, as to whether the said amendment is clarificatory/declaratory in nature or a substantive one. If it is held, that it is declaratory or clarificatory in nature, it will have to be held, that such an amendment is retrospective in nature and exists on the statute book since inception. However, if the answer is otherwise, the amendment will have to be held to be prospective in nature, having force from the date on which the amendment is effected in the statute.

70. It will be relevant to refer to the “Statement of Objects and Reasons” (hereafter referred to as “SOR”) of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019, which read thus:

“The Insolvency and Bankruptcy Code, 2016 (the Code) was enacted with a view to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order or priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.

2. The Preamble to the Code lays down the objects of the Code to include “the insolvency resolution” in a time bound manner for maximisation of value of assets in

order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximisation.

There is a need to ensure that all creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code. Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre-insolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorised representative.

3. In view of the aforesaid difficulties and in order to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code. The Insolvency and Bankruptcy Code (Amendment) Bill, 2019, inter alia, provides for the following, namely:—

(a)

(b)

(c)

(d)

(e)

(f) to amend sub-section (1) of section 31 of the Code to clarify that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities;

(g)” [emphasis supplied]

71. Perusal of the SOR would reveal, that one of the prime objects of I&B Code was to provide for implementation of insolvency resolution process in a time bound manner for maximisation of value of assets in order to balance the interests of all stakeholders. However, it was noticed, that in some cases there was extensive litigation causing undue delays resultantly hampering the value maximisation. It was also found necessary to ensure, that all creditors are treated fairly. It was therefore in view of the various difficulties faced and in order to fill the critical gaps in the corporate insolvency framework, it was necessary to amend certain provisions of the I&B Code. Clause (f) of para 3 of the SOR of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019 would amply make it clear, that the legislative intent in amending sub-section (1) of Section 31 of I&B Code was to clarify, that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt is owed in

respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities.

72. In the Rajya Sabha debates, on 29.7.2019, when the Bill for amending I&B Code came up for discussion, there were certain issues raised by certain Members. While replying to the issues raised by certain Members, the Hon'ble Finance Minister stated thus:

“IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but largely, yes, it is IBC. [...] There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan. Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant. There will be no criminal proceedings against successful resolution applicant for fraud by previous promoters. So, I hope that is absolutely clear. I would want all the hon. Members to recognize this message and communicate further that this Code, therefore, gives that comfort to all new bidders. So now, they need not be scared that the taxman will come after them for the faults of the earlier promoters. No. Once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. So, that is very clear

(emphasis supplied)”

73. It could thus be seen, that in the speech the Hon'ble Finance Minister has categorically stated, that Section 238 provides that I&B Code will prevail in case of inconsistency between two laws. She also stated, that there was question about indemnity for successful resolution applicant and that the amendment was clearly making it binding on the Government. She stated, that the Government will not make any further claim after resolution plan is approved. So, that is going to be a major sense of assurance for the people who are using the resolution plan. She has categorically stated, that she would want all the Hon'ble Members to recognize this message and communicate further that I&B Code gives that comfort to all new bidders. They need not be scared that the taxman will come after them for the faults of the earlier promoters. She further states, that once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company.

74. This Court in the case of K.P. Varghese v. Income Tax Officer, Ernakulam and Another 11 had an occasion to consider the question, as to whether the speech made by the Hon'ble Finance Minister, explaining the reason for the introduction of the Bill could be referred for the purpose of

ascertaining the mischief sought to be remedied by the legislation. This Court observed thus:

“Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief 11 (1981) 4 SCC 173 sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in *Loka Shikshana Trust v. CIT* [(1976) 1 SCC 254 : 1976 SCC (Tax) 14 : 101 ITR 234 : 1976 LR 1], the other in *Indian Chamber of Commerce v. Commissioner of Income Tax* [(1976) 1 SCC 324 : 1976 SCC (Tax) 41 : 101 ITR 796 : 1976 Tax LR 210] and the third in *Additional Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers' Association* [(1980) 2 SCC 31 :

1980 SCC (Tax) 170 : 121 ITR 1] where the speech made by the Finance Minister while introducing the exclusionary clause in Section 2, clause (15) of the Act was relied upon by the Court for the purpose of ascertaining what was the reason for introducing that clause. The speech made by the Finance Minister while moving the amendment introducing sub-section (2) clearly states what were the circumstances in which sub-section (2) came to be passed, what was the mischief for which Section 52 as it then stood did not provide and which was sought to be remedied by the enactment of sub-section (2) and why the enactment of sub-section (2) was found necessary.....”

75. This Court in the case of *Union of India and others vs. Martin Lottery Agencies Ltd.*¹², in paragraph 38 has relied on the aforesaid observations made in the judgment of K.P. Varghese (*supra*).

76. It could thus be seen, that the speech made by Hon’ble Finance Minister while explaining the amendment could be referred to for ascertaining what was the reason for moving the Bill. The speech can be used for finding out:

- (1) what were the circumstances in which the amendment was carried out;
- (2) what was the mischief for which the unamended section did not provide; and (3) what was sought to be remedied by amended enactment.

77. It is clear, that the mischief, which was noticed prior to amendment of Section 31 of I&B Code was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an

approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, 12 (2009) 12 SCC 209 the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.

78. In Justice G.P. Singh treatise on “The principles of Statutory Interpretation”, 14th Edition, Revised by Justice A.K. Patnaik, former Judge of this Court, it is observed thus:

“

(i) Declaratory Statutes The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court:

“For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word ‘declared’ as well as the word ‘enacted’. ”¹³ But the use of the words ‘it is declared’ is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective ¹⁴. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form¹⁵. If a new Act is ‘to explain’ an earlier Act, it would be without object unless construed retrospective¹⁶. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act ¹⁷. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended¹⁸. The language ‘shall be deemed always to have meant’¹⁹ or ‘shall be deemed never to have included’ ²⁰ is declaratory, and is in plain terms retrospective. In 13 CRAIES : Statute Law, 7th Edition, p. 58, approved in Central Bank of India v.

Their Workmen, AIR 1960 SC 12, p. 27 : (1960) 1 SCR 200. See Jones v. Bennet, (1890) 63 LT 705, p. 708 (LORD COLERIDGE, C.J.); Madras Marine & Co. v. State of Madras, (1986) 3 SCC 552, p. 563 : AIR 1986 SC 1760; Satnam Overseas (Export) v. State of Haryana, AIR 2003 SC 66, p. 84 : (2003) 1 SCC 561. ¹⁴ Harding v. Queensland Stamp Commissioners, (1898) AC 769, pp. 775, 776 (PC) ¹⁵ Ibid ¹⁶ R. V. Dursley (Inhabitants), (1832) 110 ER 168, p. 169 ¹⁷ Keshavlal Jethalal Shah v. Mohanlal, AIR 1968 SC 1336, p. 1339 : (1968) 3 SCR

623. The question whether an ‘explanation’ added by an amending Act is really explanatory or not would depend on its construction. In *S. K. Govindan and Sons v. Commr. Of Income Tax, Cochin*, AIR 2001 SC 254 p. 260 : (2001) 1 SCC 460 : (2001) 247 ITR 192, Explanation 2 inserted in section 139(8) of the Income Tax Act, 1961 was held to be clarificatory. But in *Birla Cement Works v. The Central Board of Direct Taxes*, JT 2001 (3) SC 256, p. 262 : (2001) 9 SCC 35 : AIR 2001 SC 1080, it was held that mere addition of an ‘explanation’ by an amending Act in a taxing Act cannot, without more, be held to be clarificatory and retrospective. In *Commissioner of Income Tax Bhopal v. Shelly Products*, (2003) 5 SCC 461, pp. 477, 478 : AIR 2003 SC 2532 provisos (a) and (b) added in section 240 of the Income Tax Act, 1961 by amending Act which came into force on 1-4-1989 were held to be clarificatory and retrospective.

18 *Channan Singh v. Jai Kuar (Smt.)*, AIR 1970 SC 349, p. 349, p. 351 : (1969) 2 SCC 19 *CIT v. Straw Products*, AIR 1966 SC 1113 : 1966 (2) SCR 881 20 *Union of India v. S. Muthyay Reddy*, JT 1999 (7) SC 596, p. 597 : 1999 (7) SCC 545 : AIR 1994 SC 3881 the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous²¹. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law²². The above statement of the law relating to the nature and effect of a declaratory statute has been quoted with approval by the Supreme Court from earlier editions of this book in a number of cases²³. “In *Mithilesh Kumari v. Prem Bihari Khare*²⁴, section 4 of the Benami Transactions (Prohibition) Act, 1988 was, it is submitted, wrongly held to be an Act declaratory in nature for it was not passed to clear any doubt existing as to the common law or the meaning or effect of any statute. The conclusion, however, that section 4 applied also to past benami transactions may be supportable on the language used in the section.” These observations and criticism of *Mithilesh Kumari*’s case also received the approval in *R. Rajgopal Reddy v. Padmini Chandrasekharan*²⁵, where the Supreme Court after quoting them (from 5th 21 *Sakuru v. Tanoji*, (1985) 3 SCC 590, p. 594 : AIR 1985 SC 1279 22 *Punjab Traders v. State of Punjab*, AIR 1990 SC 2300, p. 2304 : 1991 (1) SCC 86 23 *R. Rajgopal Reddy v. Padmini Chandrasekharan*, 1995 (1) Scale 692, p. 704 : AIR 1996 SC 238, p. 246 : (1995) 2 SCC 630; *Allied Motors (P.) Ltd. v. CIT*, AIR 1997 SC 1361, pp. 1366, 1367 : 1997 (3) SCC 472; *CIT v. Podar Cement Pvt. Ltd.*, AIR 1997 SC 2523, pp. 2537, 2538 : 1997 (5) SCC 482; *Shyam Sunder v. Ram Kumar*, AIR 2001 SC 2472, p. 2487 : (2001) 8 SCC 24; *Zile Singh v. State of Haryana*, (2004) 8 SCC 1, p. 9 : AIR 2004 SC 5100, pp. 5103, 5104; *Commissioner of Income Tax I, Ahmedabad v. Gold Coin Health Food Pvt. Ltd.*, (2008) 9 SCC 622 paras 19, 20 :

(2009) 9 JT 312. See further *S. B. Bhattacharjee v. S. D. Majumdar*, AIR 2007 SC 2102 (paras 26 to 29) : (2007) 7 JT 381.

24 AIR 1989 SC 1247, p. 1255 : 1989 (2) SCC 95 25 1995 (1) Scale 692 : 1995 AIR SCW 1422 : AIR 1996 SC 238 Edition pp. 315, 316) said : “No exception can be taken to the above observations”.²⁶ A proviso added from 1.4.1988 to section 43 B inserted in the Income Tax Act, 1961 from 1.4.1984 came up for consideration in *Allied Motors(P.) Ltd. v. Commissioner of Income-tax*²⁷ and it was given retrospective effect from the inception of the section on the reasoning that the proviso was

added to remedy unintended consequences and supply an obvious omission so that the section may be given a reasonable interpretation and that in fact the amendment to insert the proviso would not serve its object unless it is construed as retrospective. In Commissioner of Income-Tax, Bombay v. Podar Cement Pvt. Ltd., the Supreme Court held that amendments introduced by the Finance Act, 1987 in so far they related to section 27(iii), (iiia) and (iiib) which redefined the expression 'owner of house property', in respect of which there was a sharp divergence of opinion amongst the High Courts, was clarificatory and declaratory in nature and consequently retrospective. Similarly, in Brij Mohan Das Laxman Das v. Commissioner of Income – tax²⁹. Explanation 2 added to section 40 of the Income-tax Act, 1961 from 1.4.1985 on a question on which there was a divergence of opinion was held to be declaratory in nature and, therefore, retrospective. And in Zile Singh v. State²⁶ Ibid, p. 704 (Scale) : p. 246 (AIR) 27 AIR 1997 Sc 1361, pp. 1366, 1367 : 1997 (3) SCC 472; Similarly in Commissioner of Income Tax v. Suresh N. Gupta, (2008) 4 SCC 362 paras 38 and 39 : AIR 2008 SC 572, proviso inserted in section 113 of the Income Tax Act with effect from 1st 6th 2002 was held to be clarificatory and retrospective. Again in Commissioner of Income Tax v. Alom Extensions Ltd., (2010) 1 SCC 489 : (2009) 14 JT 441 deletion of a second proviso and consequent amendment in second proviso to section 43B of Income Tax Act, 1961 by the Finance Act, 2003 was held to be curative and retrospective. 28 AIR 1997 SC 2523, p. 2538 : (1997) 5 SCC 482. 29 AIR 1997 SC 1651, p. 1654 : 1997 (1) SCC 352; Affirmed in Suwalal Anandlal Jain v. Commr. Of Income Tax, AIR 1997 SC 1279 : (1997) 4 SCC 89 and Commissioner of Income Tax Bombay v. Kanji Shivji and co., AIR 2000 SC 774 : (2000) 2 SCC 253. See further cases in note 42, supra.

of Haryana, 30 substitution of the word 'upto' for the word 'after' in the proviso to section 13A (added in 1994) in Haryana Municipal Act, 1973 by the Haryana Municipal (Second Amendment) Act, 1994 was held to be correction of an obvious drafting error to bring about the text in conformity with the legislative intent and, therefore, retrospective. Even without the amendment of the proviso, the court in all probability would have read and interpreted the section as corrected by the amendment³¹.”

79. In the case of Zile Singh vs. State of Haryana and others³², this Court had an occasion to consider the provisions of Section 13A of the Haryana Municipal Act, 1973, which, prior to amendment, read thus:

“13A. Disqualification for membership.— (1) A person shall be disqualified for being chosen as and for being a member of a municipality— ***

(c) if he has more than two living children:

Provided that a person having more than two children on or after the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified.

***” [emphasis supplied] 30 (2004) 8 SCC 1 : AIR 2004 SC 5100 31 Ibid, p. 23 (SCC).

32 (2004) 8 SCC 1

80. The faulty drafting in the provision was capable of being interpreted, that the legislative embargo imposed on a person from procreating and giving birth to a third child in the context of holding the office of a member of a municipality remained in operation for a period of one year only and thereafter it was lifted. It could be interpreted, that on the date on which Section 13A was brought on the statute book i.e. dated 5.4.1994, even if a person became disqualified, the disqualification ceased to operate and he became qualified once again to contest the election and hold the office of member of a municipality on the expiry of one year from 5.4.1994. After realizing the error, Section 13A came to be amended as under:

“2. In the proviso to clause (c) of sub-section (1) of Section 13A of the Haryana Municipal Act, 1973 (hereinafter called the principal Act), for the word ‘after’, the word ‘upto’ shall be substituted.” [emphasis supplied]

81. This Court while observing, that the amendment was clarificatory in nature, held thus:

“14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is “to explain” an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to “explain” a former statute, the subsequent statute has relation back to the time when the prior Act was passed.

The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of *Attorney General v. Pougett* [(1816) 2 Price 381 : 146 ER 130] (Price at p. 392). By a Customs Act of 1873 (53 Geo. 3, c.

33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the Attorney General, said: (ER p. 134) “The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act;” (Price at p. 392)

17. Maxwell states in his work on *Interpretation of Statutes* (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it “may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it” (p. 225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the “inhibition of the rule” is a matter of degree which would “vary *secundum materiam*” (p. 226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).

18. In a recent decision of this Court in *National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India* [(2003) 5 SCC 23] it has been held that there is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to be subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as: (i) the words used must expressly provide or clearly imply retrospective operation;

(ii) the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional; (iii) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is only one of the methods to leave actions unsusustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.

19. The Constitution Bench in *Shyam Sunder v. Ram Kumar* [(2001) 8 SCC 24] has held: (SCC p. 49, para 39) “Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment

was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective." (p. 2487).

20. In *Bengal Immunity Co. Ltd. v. State of Bihar* [(1955) 2 SCR 603 : AIR 1955 SC 661] , Heydon case [(1584) 3 Co Rep 7a :

76 ER 637] was cited with approval. Their Lordships have said: (SCR pp. 632-633) "It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon case [(1584) 3 Co Rep 7a : 76 ER 637] was decided that— '... for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered— 1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth, and 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.' "

21. In *Allied Motors (P) Ltd. v. CIT* [(1997) 3 SCC 472] certain unintended consequences flowed from a provision enacted by Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rule of reasonable interpretation should apply.

"A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole." (SCC pp. 479-80, para 13)

22. The State Legislature of Haryana intended to impose a disqualification with effect from 5-4-1995 and that was done. Any person having more than two living children was disqualified on and from that day for being a member of a municipality. However, while enacting a proviso by way of an exception carving out a fact situation from the operation of the newly introduced disqualification the draftsman's folly caused the creation of trouble. A simplistic reading of the text of the proviso spelled out a consequence which the legislature had never intended and could not have intended. It is true that the Second Amendment does not expressly give the amendment a retro-

spective operation. The absence of a provision expressly giving a retrospective operation to the legislation is not determinative of its prospectivity or retrospectivity. Intrinsic evidence may be available to show that the amendment was necessarily intended to have retrospective effect and if the Court can unhesitatingly conclude in favour of retrospectivity, the Court would not hesitate in giving the Act that operation unless prevented from doing so by any mandate contained in law or an established principle of interpretation of statutes.” [emphasis supplied]

82. It could thus be seen, that what is material is, to ascertain the legislative intent. If legislature by an amendment supplies an obvious omission in a former statute or explains a former statute, the subsequent statute has a relation back to the time when the prior Act was passed.

83. The law laid down in *Zile Singh* (supra) has been subsequently followed in various judgments of this Court, including in the case of *Commissioner of Income Tax I, Ahmedabad vs. Gold Coin Health Food Private Limited*³³ (three Judges’ Bench).

84. This Court recently in the case of *State Bank of India vs. V. Ramakrishnan and another*³⁴, had an occasion to consider the question, as to whether the amendment to sub-section (3) of Section 14 of I&B Code by Amendment Act 26 of 2018 was clarificatory in nature or not. By the said amendment, sub-section (3) of Section 14 of I&B Code was substituted to provide, that the provisions of sub-section (1) of Section 14 shall not apply to a surety in a contract of guarantee for Corporate Debtor. Considering the said issue, this Court observed thus:

“30. We now come to the argument that the amendment of 2018, which makes it clear that Section 14(3), is now substituted to read that the provisions of sub-section (1) of Section 14 shall not apply to a surety in a contract of guarantee for corporate debtor. The amended section reads as follows:

“14. Moratorium.—(1)–(2) *
* *

(3) The provisions of sub-section (1) shall not apply to— 33(2008) 9 SCC 622 34
(2018) 17 SCC 394

(a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator;

(b) a surety in a contract of guarantee to a corporate debtor.”

31. The Insolvency Law Committee, appointed by the Ministry of Corporate Affairs, by its Report dated 26³⁵ 2018, made certain key recommendations, one of which was:

“(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-à-vis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed

under the Code;” (emphasis supplied)

32. The Committee insofar as the moratorium under Section 14 is concerned, went on to find:

“5.5. Section 14 provides for a moratorium or a stay on institution or continuation of proceeding, suits, etc. against the corporate debtor and its assets. There have been contradicting views on the scope of moratorium regarding its application to third parties affected by the debt of the corporate debtor, like guarantors or sureties.

While some courts have taken the view that Section 14 may be interpreted literally to mean that it only restricts actions against the assets of the corporate debtor, a few others have taken an interpretation that the stay applies on enforcement of guarantee as well, if a CIRP is going on against the corporate debtor.” *** “5.7. The Allahabad High Court subsequently took a differing view in *Sanjeev Shriya v. SBI* [*Sanjeev Shriya v. SBI*, 2017 SCC OnLine All 2717 : (2018) 2 All LJ 769 : (2017) 9 ADJ 723] , by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CIRP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is crystallised, the guarantor's liability may not be triggered. The Committee deliberated and noted that this would mean that surety's liabilities are put on hold if a CIRP is going on against the corporate debtor, and such an interpretation may lead to the contracts of guarantee being infructuous, and not serving the purpose for which they have been entered into. 5.8. In *SBI v. V. Ramakrishnan* [*SBI v. V. Ramakrishnan*, 2018 SCC OnLine Nclat 384] , NCLAT took a broad interpretation of Section 14 and held that it would bar proceedings or actions against sureties. While doing so, it did not refer to any of the above judgments but instead held that proceedings against guarantors would affect the CIRP and may thus be barred by moratorium. The Committee felt that such a broad interpretation of the moratorium may curtail significant rights of the creditor which are intrinsic to a contract of guarantee.

5.9. A contract of guarantee is between the creditor, the principal debtor and the surety, whereunder the creditor has a remedy in relation to his debt against both the principal debtor and the surety (*National Project Construction Corpn. Ltd. v. Sadhu and Co.* [*National Project Construction Corpn. Ltd. v. Sadhu and Co.*, 1989 SCC OnLine P&H 1069 :

AIR 1990 P&H 300]). The surety here may be a corporate or a natural person and the liability of such person goes as far the liability of the principal debtor. As per Section 128 of the Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence (*Chokalinga Chettiar v. Dandayuthapani Chettiar* [*Chokalinga Chettiar v. Dandayuthapani Chettiar*, 1928

SCC OnLine Mad 236 : AIR 1928 Mad 1262]).

Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several (Bank of Bihar Ltd. v. Damodar Prasad [Bank of Bihar Ltd. v. Damodar Prasad, AIR 1969 SC 297]). The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost importance for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.

5.10. The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14.

5.11. Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under Section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only.”

33. The Report of the said Committee makes it clear that the object of the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14. That such clarificatory amendment is retrospective in nature, would be clear from the following judgments”

85. In the case of B.K. Educational Services Private Limited vs. Parag Gupta and Associates (supra), this Court considered the question, as to whether the 2018 amendment which inserted Section 238A to the I&B Code was clarificatory in nature or not. After considering various earlier judgments of

this Court, this Court observed thus:

“26. In the present case also, it is clear that the amendment of Section 238A would not serve its object unless it is construed as being retrospective, as otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation.

27. We may also refer to a recent decision of this Court in SBI v. V. Ramakrishnan [SBI v. V. Ramakrishnan, (2018) 17 SCC 394] , where this Court, after referring to the selfsame Insolvency Law Committee Report, held that the amendment made to Section 14 of the Code, in which the moratorium prescribed by Section 14 was held not to apply to guarantors, was held to be clarificatory, and therefore, retrospective in nature, the object being that an overbroad interpretation of Section 14 ought to be set at rest by clarifying that this was never the intention of Section 14 from the very inception.

86. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in subsection (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

87. We have no hesitation to say, that the word “other stakeholders” would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. We therefore hold, that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

88. There is another reason, which persuades us to take the said view. Subsection (10) of Section 3 of the I&B Code defines “creditor” thus:

“(10) “creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decreeholder;”

89. Subsections (20) and (21) of Section 5 of the I&B Code define “operational creditor” and “operational debt” respectively as such:

(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

90. “Creditor” therefore has been defined to mean ‘any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decreeholder’.

“Operational creditor” has been defined to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

“Operational debt” has been defined to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

91. It is a cardinal principle of law, that a statute has to be read as a whole. Harmonious construction of subsection (10) of Section 3 of the I&B Code read with subsections (20) and (21) of Section 5 thereof would reveal, that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of ‘operational debt’. The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of ‘operational creditor’ as defined under subsection (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of ‘creditor’ as defined under subsection (10) of Section 3 of the I&B Code. As such, even without the 2019 amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term ‘creditor’ and in any case, by the term ‘other stakeholders’ as provided in subsection (1) of Section 31 of the I&B Code.

92. The Division Bench of the Rajasthan High Court in D.B. Civil Writ Petition No.9480 of 2019 in the case of Ultra Tech Nathdwara Cement Ltd. vs. Union of India & Ors., by judgment and order dated 7.4.2020 has taken a view, that the demand notices, issued by the Central Goods and Service Tax Department, for a period prior to the date on which NCLT has granted its approval to the resolution plan, are not permissible in law. While doing so, the Rajasthan High Court has relied on the judgment of this Court in the case of Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra).

93. The Calcutta High Court in the case of Akshay Jhunjhunwala & Anr. vs. Union of India through the Ministry of Corporate Affairs & Ors. 35 has also taken a view, that the claim of operational creditor will also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute. We are in agreement with the views taken by these Courts.

94. Therefore, in our considered view, the aforesaid provisions leave no manner of doubt to hold, that the 2019 amendment is declaratory and clarificatory in nature. We also hold, that even if 2019 amendment was not effected, still in light of the view taken by us, the Central Government, any State Government or any local authority 35 2018 SCC OnLine Cal. 142 would be bound by the resolution plan, once it is approved by the Adjudicating Authority (i.e. NCLT). CONCLUSION

95. In the result, we answer the questions framed by us as under:

(i) That once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(ii) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

(iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.

96. In the light of what has been held by us hereinabove, we now proceed to decide individual matters. CIVIL APPEAL NO.8129 OF 2019

97. In the said appeal, admittedly, the Company Petition filed by the SBI under Section 7 of I&B Code in respect of OMML/Corporate Debtor came to be admitted on 3.8.2017. Correspondingly, order of moratorium and appointment of IRP also came to be passed on the said date. By a public notice, RP invited claims from the creditors. The last date for submission of such claims was 18.8.2017. RP also invited EOI as well as resolution plans. In response to the said invitation, both GMSPL and EARC had submitted their resolution plans. In the 8th meeting of CoC held on 14.3.2018, the resolution plan submitted by EARC was found to be most competitive and as such, it was declared as H1 bidder. However, during negotiation, the resolution plan of EARC was not found to be satisfactory by CoC and as such, in the 9th meeting of CoC held on 31.3.2018, resolution plan of EARC came to be rejected.

98. Thereafter, since GMSPL was H2 bidder, negotiations were held with it. However, the resolution plan submitted by GMSPL was also not found to be satisfactory and therefore in the 10th meeting of CoC held on 3.4.2018, it was decided to annul the existing proceedings and initiate a fresh process for invitation for submission of resolution plan. This was restricted only to such entities, which had submitted their EOI for submission of resolution plan. In response to the fresh invitation for submission of resolution plan, three bidders, namely, GMSPL, EARC and SIFL submitted their resolution plans. In the 11th meeting of CoC held on 13.4.2018, the resolution plan submitted by GMSPL was found to be most competitive and as such, CoC declared it as H1 bidder. After holding several rounds of negotiations, in the 12th meeting of CoC held on 21.4.2018, CoC unanimously decided to convene a meeting of the CoC on 25.4.2018 for voting on the resolution plan proposed by GMSPL. In the meeting of the CoC held on 25.4.2018, CoC being satisfied that the resolution plan submitted by GMSPL meets all the requirements under sub-Section (2) of Section 30 of I&B Code, placed the same for voting. The said resolution plan of GMSPL was approved by more than 89.23% of voting share of financial creditors of the Corporate Debtor. Accordingly, an application being CA (IB) No.402/KB/2018 came to be filed by RP for grant of approval to the resolution plan submitted by GMSPL before the NCLT. EARC filed application being CA (IB) No.398/KB/2018, challenging the approval granted by CoC to the resolution plan submitted by GMSPL. It also filed CA (IB) No. 470/KB/2018, challenging the decision of RP in not admitting its claim. One Application being CA(IB) No.509/KB/2018 came to be filed by the District Mining Officer, Department of Mining and Geology, Jharkhand challenging the non-admission of its claim to the tune of Rs.93,51,91,724/- and Rs.760.51 crores.

99. By common order dated 22.6.2018, application being CA(IB) No.402/KB/2018 filed by RP, came to be allowed thereby, granting approval under the provisions of Section 31(1) of the I&B Code and declaring that the same will be binding on the Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. Application being CA (IB) No.398/KB/2018 filed by EARC challenging the approval granted by CoC to the resolution plan submitted by GMSPL was dismissed. Vide same order dated 22.6.2018, application being CA (IB) No.470/KB/2018 filed by EARC challenging the decision of the RP in not admitting its claim and application being CA(IB) No.509/KB/2018 filed by the District Mining Officer, Department of Mining and Geology, Jharkhand challenging the non-admission of its claim were also dismissed with cost of Rs.1,00,000/- each.

100. While allowing the application filed by RP, granting approval to the resolution plan of GMSPL (i.e. CA No.402/KB/2018) and rejecting the application of EARC challenging the grant of approval to the resolution plan of GMSPL by CoC (i.e. CA No.398/KB/2018), NCLT found, that RP had followed the entire procedure as required under the I&B Code and the Regulations. It also found, that CoC after applying its mind found, that the resolution plan submitted by GMSPL was in conformity with the requirements under Section 30(2) of the I&B Code.

101. Insofar as the application filed by EARC with regard to non-admission of its claim submitted to RP is concerned, NCLT found, that the Corporate Debtor had executed guarantee securing loan received by APNRL, which had been given by India Infrastructure Finance Company Limited ("IIFCL" for short). The corporate guarantee executed by the Corporate Debtor was in favour of IIFCL. The Corporate Debtor also owned share in APNRL, which was pledged with IIFCL to secure the loan given by IIFCL to APNRL. IIFCL assigned its rights to EARC. EARC being the assignee of the aforesaid submitted its claims to the RP.

102. NCLT found, that by email dated 6.1.2018, EARC had submitted its claim in Form 'C' for an amount of Rs.648,89,62,395/- In response to the said email, RP sought a clarification, as to whether the corporate guarantee had been invoked by the applicant. RP had not received any response till 21.2.2018 from EARC. Despite repeated requests made by RP, EARC did not respond to the query made by RP. From the record placed before NCLT, it was clear, that EARC had not invoked the corporate guarantee. NCLT therefore posed a question to itself, as to whether an uninvoked corporate guarantee could be considered as matured claim of the applicant. NCLT found, that once the moratorium was applied under Section 14 of I&B Code, EARC was prevented from invoking the corporate guarantee. NCLT further found, that the OMML's guarantee had not been invoked by EARC till the date of completion of CIRP process and once the moratorium was imposed, it could not invoke the corporate guarantee. NCLT therefore found, that there is no illegality or irregularity in not admitting the claim of EARC.

103. NCLT found, that the entire information was uploaded in the virtual data room to which EARC had access since it was also one of the resolution applicants. NCLT found, that the information with regard to claim of all financial creditors inclusive of EARC's claim was available in the virtual data room. The record also revealed, that the claim of EARC was not admitted for the reason that the corporate guarantee in question was uninvoked as on date.

104. Insofar as the second objection of EARC with regard to the shares owned by the Corporate Debtor in APNRL, which were pledged with IIFCL to secure the loan given by IIFCL to APNRL and which were assigned to EARC being invoked on 30.4.2018 is concerned, NCLT found the same claim also to be without merit. NCLT found, that on 30.4.2018, the moratorium was in force and therefore invocation of pledge by EARC on 30.4.2018 was not permissible in law. It was further found, that RP had rightly not admitted the said claim.

105. It was sought to be argued on behalf of EARC, that CIRP process was complete on 29.4.2018 and therefore, invocation of pledge by EARC on 30.4.2018 was legal and valid. However, NCLT found, that unless the application filed by RP under Section 31(1) for approval of the plan was

decided and an order either approving or rejecting the resolution plan was passed, the moratorium declared under Section 14 would continue to have force. As such, invocation of pledge on 30.4.2018 was held to be not permissible in law. It would be relevant to refer to the observations made by NCLT with regard to conduct of EARC.

“It appears to us that it is a deliberate attempt to stage manage an objection against the approval of a resolution plan other than the plan submitted by the resolution applicant. We also found that CA 398 of 2018 filed for rejection of the resolution plan is liable to be dismissed since the very same applicant not at all succeeds in proving its contention and that the applicant approaches the Bench without any clean hand. Instances of challenging resolution plan by unsuccessful resolution applicant is at the increase. Filing like petition is also one among the reason for the delay in approving the resolution plan passed by the CoC in compliance of the provisions of the Code. This is a unique case in which the applicant herein filed the application without any valid grounds. Dismissing like petition without cost may encourage the applicant like the applicant to file like petition. It would also amount to allowing the applicant to abuse the process of the Tribunal as well as deliberately delaying the completion of CIRP process. Accordingly, we hold that this application is liable to be dismissed with costs of Rs.1,00,000/□ Awarding cost of Rs.1,00,000/□in the peculiar nature and circumstances of the case in hand is found reasonable.”

106. Insofar as application being CA No.509/KB/2018 filed by the District Mining Officer is concerned, NCLT found, that RP had sought clarification from the said applicant with regard to its claim made in Form ‘B’ since the information supplied therein was found to be inadequate. It was found, that in spite of the said request, the District Mining Officer had failed to place on record any supportive document or affidavit as required under the Regulations. NCLT found no merit in the contentions raised on behalf of the District Mining Officer with regard to the claim on the basis of Section 25 of the Mines and Mineral (Development and Regulation) Amendment Act, 1972. It was found, that in view of the provisions of Section 238 of I&B Code, the provisions of I&B Code have an overriding effect over any other law.

107. It was therefore found, that no error was committed by RP in not admitting the claim of the District Mining Officer since it was not supported by any document or affidavit. NCLT therefore rejected the said application with cost of Rs.1,00,000/□

108. The order dated 22.6.2018 passed by NCLT was challenged by way of four appeals before NCLAT; two appeals being Company Appeal (AT) (Insolvency) Nos.437 and 444 of 2018 filed by EARC; one appeal being Company Appeal (AT) (Insolvency) No. 438 of 2018 filed by one Deepak Singh and one appeal being Company Appeal (AT) (Insolvency) No. 500 of 2018 filed by Sundargarh Mines & Transport Workers Union.

109. Vide the impugned judgment and order dated 23.4.2019, NCLAT found, that as no ground was made out in terms of Section 61(3) of I&B Code, no relief could be granted in the appeals. However, while doing so, NCLAT observed thus:

“28. However, we make it clear that the rejection of the claim for the purpose of collating the claim and making it part of the ‘Resolution Plan’ will not affect the right of the Appellant□‘Edelweiss Asset Reconstruction Limited’ to invoke the Bank Guarantee against the ‘Corporate Debtor’ in case the ‘Principal Borrower’ failed to pay the debt amount, the ‘Moratorium’ period having come to an end.

42. From the aforesaid provisions, it is clear that after period of Moratorium it is open to the person to move before a Civil Court or to move an application before the Court of Competent Jurisdiction against the ‘Corporate Debtor’.

43. In the present case, since it is not possible either for the Adjudicating Authority or for this Appellate Tribunal to give any specific finding, we are of the view that the Appellant may move before the Civil Court or Court of Competent Jurisdiction and may file an application before the Labour Court for appropriate relief in favour of the concerned workmen or against the ‘Corporate Debtor’ if they have actually worked and have not been taken care in the ‘Resolution Plan’ due to lack of knowledge and non□filing of the claim within time.

51. In the present case, as no ground has been made out in terms of sub□section (3) of Section 61 of the ‘I&B Code’ and the decision of the ‘Resolution Professional’ was not challenged by the Appellant, no relief can be granted. However, this order will not come in the way of the Appellant to move before appropriate forum for appropriate relief if the claim is not barred by limitation.

52. In so far dues of State of Jharkhand is concerned, we hold that the statutory dues shall be payable to the State of Jharkhand in terms of existing law which comes within the meaning of ‘operational debt’ as defined in Section 5(20) read with Section 5(21) and held in “Pr. Director Company Appeal (AT) (Insolvency) Nos.

437, 438, 444 & 500 of 2018 General of Income Tax (Admn. & TPS) Vs. M/s.

Spartek Ceramics India Ltd. & Anr.□Company Appeal (AT) (Insolvency) No. 160 of 2017”.

Except the aforesaid observations, in absence of any appeal filed by the State of Jharkhand, no order is passed.”

110. We find, that the aforesaid observations are beyond the scope of the powers available with NCLAT under sub□section (3) of Section 61 of I&B Code. We also find, that the said observations run totally contrary to the consistent view taken by this Court in the line of judgments starting from K. Sashidhar (supra) to Kalpraj Dharamshi (supra).

111. NCLAT has categorically found, that no ground as is available under sub□section (3) of Section 61 of I&B Code has been made out and has also categorically found, that the resolution plan submitted by GMSPL was a better offer than the other two resolution applicants, including EARC

and that the Adjudicating Authority has rightly approved the resolution plan of GMSPL. After coming to such finding, the only option available with NCLAT was to dismiss the appeals. In our view, the observations made in the aforesaid paragraphs, if permitted to remain, would totally frustrate the object of I&B Code of revival of a Corporate Debtor and to resurrect it as a going concern. As held by this Court, the successful resolution applicant cannot be flung with surprise claims which are not part of the resolution plan.

112. It will also be relevant to refer to the conduct of EARC. Clause 2.1.3 of the resolution plan submitted by EARC reads as under:

“2.1.3 Financial Creditors other than Identified Financial Creditors

(i) Liabilities We have been informed by the RP that other than the Identified Financial Creditors, there are no other Financial Creditors of the Company, whether secured or unsecured.

Other than the Assigned Debt, any and all dues to, liabilities or obligations payable to, claims, counter claims, demands, actions or penalties made or imposed by (including but not limited to all interests, damages, losses, expenses and third party claims), and any right, title, interest enjoyed by, any actual or potential Financial Creditor or in connection with any Financial Debt, whether, or not claimed, whether or not filed, whether or not crystallised, whether or not accrued, whether or not admitted, whether or not notional, whether or not known, whether due or contingent, whether or not disputed, present or future, whether or not being adjudicated in any proceeding, whether or not decreed, whether or not reflected in the financial statements of the Company, or whether or not reflected in any record, document, statement, statutory or otherwise, arising prior to or after the Effective Date, but pertaining to a period prior to the Effective Date, or arising in connection with the Assignment or acquisition of shares of the Company by the Investors or conversion of the Conversion Debt into equity or restructuring of the Assigned Debt or in any other manner as a result of or in connection with this Plan, shall be deemed to have been irrevocably waived and permanently extinguished and written off in full with effect from the Effective Date. To give effect to such waiver and extinguishment, any contract, agreement, deed or document;

whether oral or written, express or implied, statutory or otherwise, pursuant to which any such dues, liabilities, obligations, claims, counter claims, demands, actions, penalties, right, title or interest is claimed (other than as specifically mentioned herein) shall stand modified with effect from the Effective Date without any further act or deed, and approval of this Plan by NCLT shall be deemed to be sufficient notice which may be required to be given to any Person for such matter and no further notice shall be required to be given. ”

113. It will also be relevant to refer to similar provisions made in the resolution plan submitted by GMSPL, which read as under:

“7. Withdrawal of litigations initiated by the Financial Creditors against OMML, issue no dues certificate(s) in favour of OMML and release their respective charges on the

securities in full and complete satisfaction of all debts owed to the Financial Creditors by OMML / the respective SPVs as the case may be, including all guarantees which may have been provided to the Financial Creditors, for credit facilities availed by OMML.

8. Extinguishment and waiver of all dues to the Incumbent Promoter Group by OMML.

9. Directions to ensure that the Proposed Merger application shall stand withdrawn. Relinquishment of corporate guarantee issued by OMML in favour of or on behalf of any of its subsidiaries, associates, group companies or any third party.

Directions to the effect that the guarantees provided by any and all members of Incumbent Promoter Group or their respective promoters or any person associated with the Incumbent Promoter Group, may continue with the Financial Creditors. However, the same shall not result in any liability towards OMML or the Resolution Applicants.”

114. It is thus clear, that according to the resolution plan submitted by EARC itself, had it been a successful applicant, then in that event, the claims made by it would have been irrevocably waived and permanently extinguished and written off in full with effect from the Effective Date. Had the resolution plan of EARC been approved, then all such debts would have stood extinguished without any further act or deed and approval of the said plan by NCLT would have been a sufficient notice required to be given to any person for such matter. Undisputedly, the resolution plan submitted by EARC was on the basis of the information memorandum submitted by RP wherein, it was specifically clarified, that the claims of EARC were not admitted by RP. It is thus clear, that EARC is trying to blow hot and cold at the same time. According to it, had its resolution plan been approved by CoC and NCLT, then the claims, which are now insisted by EARC would have stood extinguished. However, on its failure to become a successful resolution applicant and approval of other applicant as a successful resolution applicant, its claim would survive. A party cannot be permitted to apply two different yardsticks.

115. Shri Bhushan, learned counsel appearing on behalf of EARC, strongly relying on the judgment of NCLAT dated 14.8.2018 passed in Export Import Bank of India vs. Resolution Professional JEKPL Private Limited³⁶, submits, that NCLAT itself in the said case had held, that invocation of corporate guarantee has no nexus with filing of the claim pursuant to public announcement made under Section 13(1)(b) read with Section 15(1)(c) of the I&B Code and also for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). He submits, that Civil Appeal challenging the said judgment and order has been dismissed by this Court vide order dated 23.1.2019. 36 Company Appeal (AT) (Insolvency) No.304 of 2017 and connected matters.

116. He submits, that NCLAT itself in the said case had directed EXIM Bank and Axis Bank to be treated as ‘financial creditors’ and had further directed them to be given representation on CoC. He submits, that, however, in the present case, NCLAT has taken a contrary view. He therefore submits, that in the alternative this Court should direct RP/CoC to treat EARC as a ‘financial creditor’ and

give it representation on CoC and take a decision in accordance with law.

117. We find, that the said case, on facts, would not be applicable to the case at hand. No doubt, that the appeal filed against the judgment and order of NCLAT dated 14.8.2018 has been dismissed by this Court on 23.1.2019. However, it is a settled law, that dismissal of a Special Leave Petition/Appeal does not amount to affirmation of the view taken in the judgment impugned in the Special Leave Petition/Appeal. It will also be relevant to refer to the order passed by this Court dated 23.1.2019 while dismissing the appeal, which reads thus:

We have heard learned counsel for the parties and perused the relevant material on record.

The Civil Appeal is dismissed.

It will be open for the appellant to urge all points as may be available to it in law before the appropriate forum, if so advised.”

118. It will thus be clearly seen, that this Court while dismissing the appeal has reserved the liberty to the appellant to urge all points as may be available to it in law before the appropriate forum.

119. It is to be noted, that in the appeal before NCLAT, the EXIM Bank as well as Axis Bank had taken steps immediately after the claim of said Banks on the basis of corporate guarantee came to be rejected by RP/CoC. After rejection of the claim, said Banks had filed an application under Section 60(5) before NCLT. On NCLT rejecting the said claim, those Banks had approached NCLAT in appeals, which were allowed and the order, as stated hereinabove, was passed.

120. In the present case, the claim of EARC was rejected on 22.1.2018. Instead of challenging the said rejection, EARC participated in the proceedings and was one of the resolution applicants. Not only that, in the first round, it was a successful bidder being ranked H1 bidder.

However, since in the negotiations it failed to satisfy CoC, fresh bids were invited from the resolution applicants, which had submitted their EOI. In the 12 th meeting of CoC held on 25.4.2018, the resolution plan of GMSPL was approved by 89.23% of the voting shares. Only thereafter, EARC filed two applications; one challenging the approval of resolution plan of GMSPL by CoC and another challenging rejection of its claims by RP/CoC.

121. It could thus be clearly seen, that EARC was taking chances. After rejection of its claim, it did not choose to challenge the same by an application under Section 60(5) but waited till the decision of CoC. During this period, it was actually pursuing its resolution plan. Only after its resolution plan was not approved and the resolution plan of GMSPL was approved, it filed the aforesaid two applications. Apart from that, as already observed hereinabove, in the resolution plan of EARC

itself, it has provided for extinguishment of all claims not forming part of resolution plan.

122. Even otherwise, if for the sake of argument, it is held, that EARC was entitled to be treated as a 'financial creditor' and entitled for a participation in CoC, still its share was about 9% and as such, the resolution plan of GMSPL would have been passed by a majority of 80%, which is much above the statutory requirement.

123. We are therefore of the considered view, that the observation made by NCLAT giving liberty to EARC to take recourse to such proceedings as available in law for raising its claims is totally unsustainable.

124. Insofar as, the observation made with regard to claim of the Jharkhand Government is concerned, it is to be noted, that the State of Jharkhand has not even appealed against the order passed by NCLT. Insofar as, the claims of Labour and Workmen are concerned, RP has specifically stated before NCLAT, that whatever claims were received from the workmen were duly considered in the resolution plan. Despite that, observing that a liberty is available to the workmen to raise their claims before a Civil Court or Labour Court, in our view, is totally in conflict with the provisions of I&B Code. The same would equally apply to the observation made in the appeal of Mr. Deepak Singh, claiming to be 'operational creditor'.

125. We are therefore of the considered view, that the appeal deserves to be allowed by expunging the paragraphs nos. 28, 42, 43, 51 and 52 from the judgment of NCLAT dated 23.4.2019. It is ordered accordingly. The judgment and order passed by NCLT dated 22.6.2018 is upheld. No costs.

CIVIL APPEAL ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO.11232 OF 2020

126. The present appeal arises out of the judgment and order passed by the Division Bench of the Allahabad High Court dated 6.7.2020 thereby, dismissing the petition filed by the appellant on the ground of availability of alternate remedy. The petition being Civil Misc. Writ Petition (Tax) No.354 of 2020 came to be filed seeking following reliefs:

“i. Issue a writ, order or direction in the nature of certiorari quashing the order dated 30.01.2020 passed by the Additional Commissioner Grade – 2 (Appeal) rejecting the appeal preferred by the petitioner in respect of Assessment Year 2015-16 (U.P. V A T) and affirming a demand of Rs. 232.60 Lacs raised on the petitioner;

ii. Issue a writ, order or direction in the nature of certiorari quashing the Communications/orders of the Joint Commissioner (Corporate), Ghaziabad holding that the proceedings in the State of U.P. would remain unaffected irrespective of the Resolution Plan of the petitioner being approved by the NCLT under the Insolvency and Bankruptcy Code as the NCLT order does not specifically prohibit these proceedings;

iii. Issue a writ, order or direction in the nature of mandamus directing refund of the amount which the petitioner is entitled to as a result of orders passed by the respondents;

iv. Issue a declaration that all proceedings pending before different authorities (assessing authority, first appellate authority or Commercial Tax Tribunal, Ghaziabad Bench) in respect of transactions entered into by the petitioner prior to the Transfer Date involving a consolidated amount of Rs. 769.73 Lacs stand abated in terms of the Resolution Plan approved by the NCLT under the Insolvency and Bankruptcy Code, 2016;

v. Issue a writ, order or direction in the nature of mandamus directing the Respondents to refund Rs. 248.92 Lacs/□ deposited by the petitioner under protest in these proceedings and also to return the bank guarantee submitted for Rs.

16.31 Lacs/□

vi. Issue a writ, order or direction in the nature of mandamus restraining the Respondents from passing any orders including penalty orders, raising any further demands, imposing any liability or taking any coercive steps including continuing with pending assessments / proceedings / litigation / appeals / revisions in respect of period prior to Transfer Date.”

127. The High Court found, that the appellant has an alternative efficacious remedy of filing the Second Appeal and as such, deemed it fit to not to entertain the said petition. The basic grievance of the appellant in the writ petition was, that after the resolution application was approved by the Adjudicating Authority and the management of the Corporate Debtor was transferred to the resolution applicant, all the claims stood extinguished and the proceedings in respect thereof could not continue.

128. The main ground raised on behalf of the respondent is, with regard to availability of alternate remedy. The second ground raised is, since the transfer date is prior to 2019 amendment to Section 31 of I&B Code, the said amendment would not be applicable to the debts owed to the State Government or Central Government.

129. As held by this Court in catena of cases including in the cases of Babu Ram Prakash Chandra Maheshwari vs. Antarim Zilla Parishad Muzaffar Nagar³⁷, Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors.³⁸, Nivedita Sharma vs. Cellular Operators Association of India & Ors.³⁹, Embassy Property Developments Pvt. Ltd. vs. State of Karnataka and Others⁴⁰ and recently in the case of Kalpraj Dharamshi (supra), that non□ exercise of jurisdiction under Article 226 is a rule of self□ restraint. It has been consistently held, that ³⁷ (1969) 1 SCR 518 ³⁸ (1998) 8 SCC 1 ³⁹ (2011) 14 SCC 337 ⁴⁰ (2020) 13 SCC 308 the alternate remedy would not operate as a bar in at least three contingencies, namely, (1) where the writ petition has been filed for the enforcement of any of the Fundamental Rights; (2) where there has been a violation of the principle of natural justice; and (3) where the order or proceedings are wholly without jurisdiction or the vires of an Act is

challenged.

130. In the foregoing paragraphs, we have held, that 2019 amendment to Section 31 of I&B Code is clarificatory and declaratory in nature and therefore will have a retrospective operation. As such, when the resolution plan is approved by NCLT, the claims, which are not part of the resolution plan, shall stand extinguished and the proceedings related thereto shall stand terminated. Since the subject matter of the petition are the proceedings, which relate to the claims of the respondents prior to the approval of the plan, in the light of the view taken by us, the same cannot be continued. Equally the claims, which are not part of the resolution plan, shall stand extinguished.

131. In this view of the matter, we find, that relegating the appellant to the alternative remedy would serve no purpose. A party cannot be made to run from one forum to another forum in respect of the proceedings and the claims, which are not permissible in law.

132. The appeal therefore is allowed. The impugned judgment and order dated 6.7.2020 passed by the Allahabad High Court is quashed and set aside. We hold and declare, that the respondents are not entitled to recover any claims or claim any debts owed to them from the Corporate Debtor accruing prior to the transfer date. Needless to state, that the consequences thereof shall follow.

WRIT PETITION (CIVIL) NO.1177 OF 2020

133. For the reasons stated, I.A. for change of name of the petitioner No.1. is allowed. Cause title be amended accordingly.

134. The present writ petition has been filed by the petitioners under Article 32 of the Constitution. In this case also, the resolution plan in respect of the Corporate Debtor (petitioner – Company) has been approved by the Adjudicating Authority on 24.7.2018. Pursuant thereto, the management of the Corporate Debtor (petitioner – Company) was transferred to the successful resolution applicant i.e. Aion JSW.

135. After the completion of CIRP on 5.1.2019, the respondent No.2 issued a reminder to the petitioner to pay an amount of Rs.4,49,34,917.00 towards the service tax deposited by it towards royalty, DMF and NMET for the period between 1.4.2016 and 30.6.2017. The petitioner replied to the said notice pointing out to the authorities the provisions of I&B Code and stating therein, that the demand made by the respondent were not permissible in view of I&B Code. The petitioners had also requested for refund of an amount of Rs.5,25,15,880/- deposited as advance against supply of iron ore.

136. In this background, the petitioners have approached this Court challenging the demand notice dated 20.7.2018 and 28.4.2020.

137. The present case would also be covered by the view taken by us hereinabove.

138. It is further to be noted, that the Income Tax Authorities had approached this Court with respect to income tax dues concerning the present petitioner by way of Special Leave Petition (Civil) No.6483 of 2018. This Court passed the following order in the said Special Leave Petition on 10.8.2018:

“Heard.

Delay, if any, is condoned.

Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income Tax Act.

We may also refer in this Connection to Dena Bank vs. Bhikhabhai Prabhudas Parekh and Co. & Ors. (2000) 5 SCC 694 and its progeny, making it clear that income tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.

We are of the view that the High Court of Delhi, is, therefore, correct in law.

Accordingly, the Special Leave Petitions are dismissed.

Pending applications, if any, stand disposed of.”

139. In ordinary course, we would not have entertained such a petition directly under Article 32 of the Constitution. However, a question of law, which arises for consideration in the present petition has been considered by us in this batch of matters. In that view of the matter, we find, that it would not be in the interest of justice to non-suit the present petitioner, when we have specifically decided question of law, which would govern the present case also. As such, the present petition is allowed.

140. We hold and declare, that the respondents are not entitled to recover any claims or claim any debts owed to them from the Corporate Debtor accruing prior to the transfer date. Needless to state, that the consequences thereof shall follow.

CIVIL APPEALS ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NOS.7147-7150 OF 2020

141. For the reasons stated, I.A. for intervention on behalf of the applicant – TATA Steel BSL Limited is allowed.

142. In the present case, the appellant challenges the judgment and order passed by the Division Bench of the Jharkhand High Court dated 1.5.2020 vide which the petitions filed by the appellant, challenging the action of the respondent – authorities thereby, seeking to recover the Jharkhand Value Added Tax (JVAT) for the period between 2011-2012 and 2012-2013, have been rejected. Both the learned Judges have written separate judgments.

143. In the judgment authored by H.C. Mishra, J, the petitions filed by the appellant were rejected on two grounds, viz., one, that since the management of the appellant was taken over by M/s Vedanta Limited on 4.6.2018, it was only M/s Vedanta Limited, which had locus to file writ petitions. Secondly, it was debatable whether the amount of JVAT shall be covered by the expressions “debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government” so as to bring it within the definition of “operational debt”.

144. Insofar as, the judgment authored by Deepak Roshan, J. is concerned, the learned Judge has observed, that since the resolution plan was approved by NCLT on 17.4.2018, 2019 amendment to Section 31(1) of I&B Code would not apply to the said plan. We find, that the finding of the High Court, that the dues owed to the State Government and Central Government would not come within the definition of ‘operational debt’, is incorrect in law in the light of the view that is taken by us. So also the finding, that since the order of NCLT is prior to the date on which Section 31(1) of I&B Code was amended, the provisions of Section 31 would not be applicable, also cannot stand in view of the foregoing observations made by us hereinabove.

145. We also find, that the High Court has erred in holding, that the Appellant – Company does not have locus to file the writ petitions inasmuch as, the management has been taken over by M/s Vedanta Limited. The resolution plan is in respect of the Corporate Debtor and the successful resolution applicant only takes over the management of the Corporate Debtor in accordance with the resolution plan. The resolution applicant steps into the shoes of the Corporate Debtor. As such, the finding in this respect would also not be sustainable in law.

146. Shri Gurukrishna Kumar, learned Senior Counsel, strenuously argued, that RP/CoC had acted in a fraudulent manner. It is submitted, that though a notice inviting claim was required to be published in local newspapers where the registered office of the Corporate Debtor was situated, the notice was published in the newspaper of Kolkata edition. As per Regulation 6(2)(b) of the 2016 Regulations, the said notice is required to be published in one English and one regional language newspaper with wide circulation at the location of the registered office and corporate office of the Corporate Debtor. Perusal of the record would reveal, that the notice was published in Business Standard and Ananda Bazar Patrika newspapers of the Kolkata edition, which have wide circulation in Ranchi. The corporate office of the Corporate Debtor is at Kolkata whereas its registered office is at Ranchi. In any case, it is to be noticed, that the Forest Department of the State Government had filed intervention application before NCLT as well as NCLAT. When one of the wings of the State Government has approached NCLT and NCLAT, it is difficult to believe, that other organ of the State was not aware about the said proceedings.

147. The contention of Shri Gurukrishna Kumar, learned Senior Counsel, that finding with regard to non-compliance of Section 13 is not challenged by the Electrosteel Steels Limited, is also incorrect, inasmuch as, Electrosteel Steels Limited has raised the specific ground in Grounds ‘U’ to ‘AA’ to that effect in the appeal memo.

148. In the result, the appeals deserve to be allowed. It is ordered accordingly. The impugned judgment and order of the Jharkhand High Court dated 1.5.2020 is quashed and set aside.

149. We hold and declare, that the respondents are not entitled to recover any claims or claim any debts owed to them from the Corporate Debtor accruing prior to the transfer date. Needless to state, that the consequences thereof shall follow.

....., J.

[R.F. NARIMAN], J.

[B.R. GAVAI], J.

[HRISHIKESH ROY] NEW DELHI;

APRIL 13, 2021