

Jet Aircraft Maintenance Engineers ... vs Mr Ashish Chhawchharia Resolution ... on 14 February, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 628 of 2020
(Arising out of Order dated 11.06.2020 passed by the Adjudicating Authority
(National Company Law Tribunal), New Delhi, Principal Bench in CA-998/2020 in
CP(IB)-2205/MB/2019)

IN THE MATTER OF:

Jet Aircraft Maintenance
Engineers Welfare Association
JAMEWA, A-101, Laxmi Palace Society,
Shahaji Rane Road, Vile-Parle, East,
Mumbai - 400057, Maharashtra.

.... Appellant

Vs

1. Shri Ashish Chhawchharia
Resolution Professional for
Jet Airways (India) Ltd., Global One,
3rd Floor, 252, LBS Marg,
Kurla (West), Mumbai - 400070.

2. Committee of Creditors of
Jet Airways (India) Ltd.

3. HDFC Bank,
Mumbai Head Office,
Bank House, Dr. Annie Besant Road,
Shiv Sagar Street, Worli,
Mumbai-400018.

4. M/s. Vrihis Properties Private Limited,
401&402, 4th Floor, Delphi A,
Orchard Avenue, Powal,
Mumbai, Mumbai City, 400076.

.... Respondents

Present:

For Appellant:

Mr. Vikas Mehta, Mr. Kumud
Shekhar and Mr. Mayan Prasad,
Advocates.

For Respondents:

Mr. Arun Kathpalia, Sr. Advocate with
Mr. Rohan Rajadhyaksha, Ms. Amrita

Sinha, Mr. Dhiraj Kr. Totala, Mr. Parimal Kashyap, Ms. Tanya Chib and Mr. Nishant Upadhyay, Advocates for R-1 (RP).

Company Appeal (AT) (Insolvency) No. 628 of 2020

1

Mr. Raunak Dhillon and Ms. Isha Malik, Advocates for R-2.

Mr. Jank Dwarkadas, Sr. Advocate with Mr. Aman Gandhi, Ms. Aayushi Mehta, Mr. Denzil Arambhan, Mr. Chirag Kamdar and Ms. Riddhima Sharma, Advocates for R-3.

Mr. Krishnendu Datta, Sr. Advocate with Ms. Sneha Janakiraman, Mr. Prateek Kumar, Mr. Niranjana S. Rao, Advocates for R-4.

JUDGMENT

ASHOK BHUSHAN, J.

This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code') has been filed against the order dated 11th June, 2020 allowing IA No.998 of 2020 filed in Company Petition (IB) No.2205/MB/2019.

2. The brief facts of the case and sequence of the event, which are necessary to be noticed for deciding this Appeal are:

(i) The Appellant is a Registered Trade Union representing aircraft maintenance engineers of the Jet Airways (India) Limited (Corporate Debtor).

(ii) On an Application filed by State Bank of India under Section 7 against the Jet Airways (India) Limited, the Adjudicating Authority initiated Corporate Insolvency Resolution Process (CIRP) by order dated 20th June, 2019. By the same order, Moratorium under Section 14 of the Code was declared with Company Appeal (AT) (Insolvency) No. 628 of 2020 2 the consequential direction. Respondent No.1 was appointed as Interim Resolution Professional (IRP), which was confirmed as Resolution Professional (RP) in the first meeting of the Committee of Creditors (CoC) held on July 16, 2019. The Appellant's Union claim worth INR 1,525,859,239/- was admitted by Respondent No.1. Respondent No.2 was constituted as Committee of Creditors.

(iii) In the third Meeting of the Committee of Creditors held on 26th August, 2019, the RP brought into the notice of the CoC that with regard to aircrafts taken on

finance lease a finance upto USD 25 million is required for settlement with the Financial Lessors, to gain title position of the assets in favour of Company. The CoC resolved for raising additional interim finance for specific purpose and for having first charge on security over the aircrafts/ engines recovered in the process.

(iv) In the 8th Meeting of CoC, it deliberated over exclusion of certain immovable property (Non-core asset) of the Corporate Debtor. One of the non-core asset identified was BKC building covering three floors 2nd, 3rd and 4th floor encumbered to HDFC Limited. A Resolution was passed approving exclusion of immovable property of BKC building as non-core assets and such asset was not to form part of the estate of the Corporate Debtor to be transferred to a Resolution Applicant.

Company Appeal (AT) (Insolvency) No. 628 of 2020 3

(v) In 10th CoC Meeting, the RP informed the CoC that to obtain title of 6 B-777 aircrafts, sale of two floors of BKC property could generate the requisite cash flow, which may be utilized for the US Exim for settlement. The RP submitted that a minimum sale consideration for the sale of two floors being 3rd and 4th floors of the BKC property shall be INR 490 crores. The claim of HDFC was approximately INR 425 crores, which shall be settled at INR 360 crores and the balance fund will be available to the Corporate Debtor for settlement of US Exim and other CIRP related expenses. A Resolution was passed on 24th April, 2020 approving the arrangement of sale of 3rd and 4th floors of BKC property on minimum sale consideration of INR 490 crores. It is also noted in the Meeting that if the property sold at INR 490 crores, after payment of INR 360 crores to HDFC to release its charge there shall be INR 130 crores available to the CoC to settle with US Exim and meeting with the CIRP related expenses to obtain the ownership of six aircrafts, which shall be valuable addition to the assets of the Corporate Debtor. The CoC also resolved that approval of NCLT will be a pre-requisite for sale transaction and distribution of proceeds.

(vi) After approval of Resolution by 74.45% votes by the CoC on 24th April, 2020, the Resolution Professional filed an Application before the Adjudicating Authority seeking its Company Appeal (AT) (Insolvency) No. 628 of 2020 4 approval to the proposed sale of the BKC property. The RP filed an IA No.998 of 2020 before the Adjudicating Authority seeking permission to auction the premises. Respondent No.3 - HDFC Bank filed an affidavit dated 1st June, 2020 stating that it had no objection to the Application filed by Respondent No.1. The Adjudicating Authority vide its order dated 11th June, 2020 allowed the IA filed by the Resolution Professional. After order of the Adjudicating Authority dated 11th June, 2020, the RP issued notice dated 13th June, 2020 for sale/ transfer of 3rd and 4th floors by way of public auction of the premises.

(vii) In pursuance of e-public auction held on 26th June, 2020, Respondent No.4 emerged as a Successful Bidder, whose offer was accepted by the RP at a price of INR

490 crores. Deed of assignment dated 10th July, 2020 and 13th July, 2020 was entered between Corporate Debtor through Respondent No.1 on the one hand and Respondent No.4 on the other, which were registered in the office of Sub-Registrar of Assurances at Bombay. Prior to above assignment Respondent No.3 has executed registered Deed in favour of Company releasing its charge of immovable property after receiving payment of INR 360 crores.

(viii) This Appeal has been filed by the Appellant on 17th July, 2020 challenging the order dated 11th June, 2020 passed by the Adjudicating Authority. Notices were issued in this Appeal on Company Appeal (AT) (Insolvency) No. 628 of 2020 5 4th August, 2020 in response to which Respondent Nos.1 to 4 have filed their reply to which a common rejoinder has also been filed by the Appellant.

3. We have heard Shri Vikas Mehta, learned Counsel for the Appellant, Shri Arun Kathpalia, learned Senior Counsel for Respondent No.1, Shri Raunak Dhillon, learned Counsel for Respondent No.2, Shri Janak Dwarkadas, learned Senior Counsel for Respondent No.3 and Shri Krishnendu Datta, learned Counsel for Respondent No.4.

4. Shri Vikas Mehta learned Counsel for the Appellant submits that in view of the declaration of Moratorium by order dated 20th June, 2019 of the Adjudicating Authority, the sale of BKC property, which was the asset of the Corporate Debtor was not permissible under the Code, which is specifically prohibited by Section 14, sub-section (1), sub-clause (b). Neither the RP nor the Committee of Creditors had any jurisdiction to transfer the assets of the Corporate Debtor during the CIRP proceedings. The Adjudicating Authority had also no jurisdiction to grant any approval of such proposal for transfer of BKC property of the Corporate Debtor. Under Section 14(1)(c), the Respondent No.3 could not have enforced its security interest and recovered its dues. The injunction in Section 14 is mandatory and there is no discretion vested with NCLT. Section 14 in its operation, does not distinguish between core and non-core assets. The Regulation 29 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the 'CIRP Regulations') only permits sale of unencumbered Company Appeal (AT) (Insolvency) No. 628 of 2020 6 assets. The premises in question were encumbered with Respondent No.3 and remained encumbered during the sale. The amount of INR 360 crores was paid to Respondent No.3 from the sale consideration of the property. The power under Section 28(1)(a) to raise interim finance, does not cover sale of property. Respondent No.4 is not a bonafide purchaser without notice and RP has mislead NCLT as well as the CoC. The assets of Corporate Debtor have been depleted by selling premises. The Adjudicating Authority has not even referred to Section 14 while passing the impugned order. The Adjudicating Authority has limited jurisdiction under Section 60 and it cannot exercise its jurisdiction, which is not vested in the Code. The six aircrafts, which were on finance lease, could have been secured at a lesser amount. Only INR 90 crores was to be paid to US Exim against its claims. The value of aircrafts was not USD 881 million. Five out of six aircrafts were already in India and in custody of RP. Three months later, CoC has approved Resolution Plan, which envisaged sale of CD's all 11 aircrafts, which indicate that the distinction between core and non-core assets drawn by RP was artificial.

5. Shri Arun Kathpalia, learned Senior Counsel appearing for Respondent No.1 refuting the submission of learned Counsel for the Appellant contends that the Corporate Debtor had taken six Boeing 777 long range aircraft on a financial lease from Fleet Ireland entities (Lessor), which thereafter were charged in favour of Export Import Bank of the United States (US Exim). The Corporate Debtor had already paid an amount of approximately 881 million USD and the balance amount of Company Appeal (AT) (Insolvency) No. 628 of 2020 7 approximately 18.65 million USD was required. Pursuant to concurrence of CoC, negotiations were made with US Exim, who was ready to settle for 13 million USD and in exchange US Exim agreed to transfer title in the aircraft to Corporate Debtor. After all conceivable avenues for raising funds had failed, as a last resort RP identified certain non-core assets. The BKC property was identified as non-core asset. The CoC passed Resolution approving the proposal of sale of BKC property on agreement of HDFC Bank that it will withdraw their charge on payment of INR 360 crores against their dues of INR 425 crores. The object of IBC proceeding is preservation and protection of the assets of the Corporate Debtor and maximization of its value. All steps were taken by RP with the approval of CoC for preservation and protection of the assets of Corporate Debtor, which is its paramount duty under Section 25(1) and Section 20, sub-section (1) of the Code. Section 14 of the Code should not be interpreted in a rigid manner or pedantic manner as sought to be done by the Appellant and must be interpreted in a rational and purposive manner with reference to its object as well as other provisions of the Code. The NCLT had power/ jurisdiction under Section 60, sub-section (5) of the Code to allow sale of 3rd and 4th floors of the premises. The Moratorium under Section 14, sub-section (1) only shields the Corporate Debtor from pecuniary attacks during the Moratorium period, so that the Corporate Debtor may rehabilitate itself. In the present case CoC and RP worked together acquiring title of the aircraft and thereby increased the value of the Corporate Debtor. Section 14 of the Code does not prohibit the CoC from selling assets of the Corporate Debtor. Company Appeal (AT) (Insolvency) No. 628 of 2020 8 Section 14(1)(b) prohibits the Corporate Debtor from alienating its assets. The provisions of statute must be interpreted purposively in its context. The Corporate Debtor is a live entity. The object of the IBC is not Moratorium, the key object is maximization of assets of the Corporate Debtor. In the event maximization is to be achieved by sale, the sale should be done. The CoC has taken decision to procure six aircrafts and has also declared the BKC property as non-core asset. Section 14 is not absolute, it is subject to other provisions of the Code like Sections 20 and 28, Regulation 29 of CIRP Regulations recognizes sale by RP.

6. The learned Counsel for Respondent No.2 submitted that CoC in its commercial wisdom for maximization of value of assets of the Corporate Debtor and for revival of the Corporate Debtor had approved disposal of BKC premises. The dues payable to US Exim were approximately USD 13 million and these aircrafts were cumulatively valued at over USD 200 million. Accordingly, CoC felt that making residual payment and securing title and ownership to the six aircrafts would add significant value to the estate of the Corporate Debtor. Despite making several efforts, RP could not successfully raise interim finance. Thus, in the absence of any other commercially viable option a decision to sell non-core assets was taken. Transfer/ disposal of the premises was not in violation of Moratorium under Section 14 of the Code. In any event, the Appellant has no right or claim over the proceeds from the sale transaction. Water fall mechanism as laid down in Section 53 of the Code is not applicable in the present case. Company Appeal (AT) (Insolvency) No. 628 of 2020 9

7. Shri Janak Dwarkadas, learned Senior Counsel appearing for Respondent No.3 submits that the prohibition under Section 14, sub-section (1)(c) is qua Corporate Debtor. The expression used in Section 14(1)(b) is "transferring, encumbering, alienating or disposing off by the Corporate Debtor any of its assets...." Section 14(1)(b) does not contain any prohibition to RP or CoC to take any decision for sale of any of its assets during the CIRP. It is submitted that when Regulation 29 of CIRP Regulations specifically permits the sale of assets by RP other than in the ordinary course of business and if interpretation as put by the Appellant is accepted then Regulation 29 will be rendered redundant and nugatory. Section 20 read with Section 25 imposes a duty on the IRP/RP to preserve and protect the assets of the Corporate Debtor and to continue the business operations of Corporate Debtor as a going concern and to maximize the value of the assets of the Corporate Debtor. To exercise the powers and duties under the Code, the RP and the CoC undertake such acts as may be required to fulfill the duties cast on RP. Section 28 specifies the actions, which may be taken by the RP only after obtaining the approval of CoC with at least sixty-six percent of voting. The sale by the RP of non-core assets of the Corporate Debtor was in furtherance of the duties conferred by the Board. Section 14 does not prescribe any embargo on RP/CoC from selling the assets of the Corporate Debtor in furtherance of their duties under the Code. A fully encumbered non-core asset was sold to prevent losing a core asset that is six long-haul aircrafts in which Corporate Debtor has already expended USD 881 million and only 18.65 million remained unpaid. HDFC Company Appeal (AT) (Insolvency) No. 628 of 2020 10 under Section 52 of the Code, would have been able to stand outside the liquidation process and would have been fully able to recover the amounts owed to it. HDFC has also gave up its security over the 2nd floor of the BKC property, which is available to the Corporate Debtor free of HDFC's encumbrance. The Appellant has no right to complaint. The injunction under Section 14 applies to Corporate Debtor and it does not apply to CoC or RP.

8. Shri Dwarkadas further submits that Appeal has become infructuous since before the Appeal was filed the auction sale took place and the entire transaction was completed. There was delay and laches in approach and in filing the Appeal. Delay and laches defeated the right of the Appellant to challenge the impugned order. The impugned order had been acted upon and third party rights have now intervened. The sale of subject premises was concluded more than eighteen months ago and proceeds thereof have been utilized for acquiring six aircrafts. The Resolution Plan for the Corporate Debtor has also been approved by the CoC. The parties have taken irreversible steps and have altered their position, which could not be reversed in the facts of the present case.

9. Shri Krishnendu Datta, learned Senior Counsel appearing for Respondent No.4 submits that Respondent No.4 is a bonafide third-party purchaser without notice. The Respondent No.4 being bonafide purchaser, who has purchased the subject property of a value, which is more than market value. The bid of Respondent No.4 of INR 490 crores was accepted. On 10th July, 2020, entire consideration was paid and Registered Deed of Company Appeal (AT) (Insolvency) No. 628 of 2020 11 Assignment was executed on 10th to 13th July, 2020. The present Appeal has been filed after entire process was completed. The Resolution Plan having already been approved, the title of Respondent No.4 need not be affected. The Respondent No.4 was not party to the litigation. Reliance on Clause 33 of auction notice does not help the Appellant since Respondent No.4 has no notice of litigation. There is no depletion of the value of the assets of the Corporate Debtor, but more value has been added consequent to the transaction in question.

10. Shri Vikas Mehta, learned Counsel for the Appellant in rejoinder submits that Section 14 imposes a statutory freeze and there is no discretion with anyone including the RP and CoC to transfer any assets of the Corporate Debtor. The object of Section 14 is to keep the assets of the Corporate Debtor together. Section 14(1)(c) prohibits recovery of dues and in the present case the conduct of the RP and CoC is contrary to the Code. Section 14 has to be read in a very wide manner. It is not to be confined only to pecuniary attack on Corporate Debtor as contended by learned Senior Counsel of Respondent No.1. Clause 33 of Disclosure of Terms and Conditions of Auction Sale itself says that sale is subject to any present or future litigation. There is no discretion with Adjudicating Authority to allow sale. Under Section 28(1)(a) by raising any interim finance, the RP cannot sell any assets of the Corporate Debtor. Section 28 has to be read subject to Section 14. Section 28 in no manner override Section 14. What has been sold is secured assets of the Corporate Debtor, which is not Company Appeal (AT) (Insolvency) No. 628 of 2020 12 permissible under Regulation 29. Sale in favour of Respondent No.4 is not bonafide sale. US Exim itself was a creditor and was bound by Section 14.

11. We have considered the submissions of learned Counsel for the parties and have perused the record.

12. From the submission of learned Counsel for the parties and perusal of the records, following are the questions, which arise for consideration in this Appeal:

(1) Whether the Appellant has right to challenge the decision of the NCLT dated 11th June, 2020?

(2) Whether the prohibition contained under Section 14, sub-

section (1), sub-clause (b) is only on the Corporate Debtor or the prohibition also operate on the RP and CoC in exercise of their duties and jurisdiction under the Code?

(3) Whether RP in exercise of power under Regulation 29 of CIRP Regulation, 2016 can sell the assets of Corporate Debtor during the currency of Moratorium declared under Section 14 of the Code?

(4) Whether decision of RP to proceed with the sale of BKC property and approval of CoC of the said proposal by its Resolution in the meeting dated 24th April, 2020 is impermissible by virtue of declaration and Moratorium under Section 14(1).

(5) Whether in view of Section 14, sub-section (1), sub-clause (c) of the Code, no Financial Creditor can foreclose, recover any debt or enforce any security interest created by the Corporate Debtor in respect of its property?

(6) The relief to which the Appellant is entitled in this Appeal, if any?

Company Appeal (AT) (Insolvency) No. 628 of 2020 13 Question No.1

13. The Respondents have challenged the locus of the Appellant to file this Appeal questioning the order dated 11th June, 2020 passed by the Adjudicating Authority. The Appellant is a registered Trade Union representing 95% of the aircraft maintenance engineers of the Corporate Debtor. The Appellant's Union had submitted a claim and Respondent No.1 has admitted claim worth INR 1,525,859,239/-. The Appellant is a stakeholder in the CIRP, its claim having been admitted. The Appellant has come up in this Appeal questioning the order of the NCLT dated 11th June, 2020 by which it has granted approval to the proposal of CoC and RP to sell the subject assets of the Corporate Debtor. The Appellant being stakeholder in the CIRP has interest in the assets of the Corporate Debtor, since it is the value of assets, which will be relevant for determination of its claim either in the Resolution Plan or in the liquidation proceedings. The Appellant has come up with a case that the sale of the subject property was impermissible in view of the Moratorium imposed under Section 14. We do not find any lack of locus in the Appellant to challenge the order dated 11th June, 2020 by which approval for proposal of sale of Corporate Debtor's property was granted by the NCLT. Whether the sale is in accordance with the provisions of the Code or not is a question on merit, which we shall proceed to consider while considering the other issues as noted above. However, insofar as the submission of the Respondent that Appellant is not an aggrieved person, we do not find ourselves in agreement with the submission of learned Counsel for the Respondents. We, thus, find that Company Appeal (AT) (Insolvency) No. 628 of 2020 14 the Appellant has sufficient locus to file this Appeal. The Appellant is a person aggrieved within the meaning of Section 61 of the Code and the Appeal on behalf of the Appellant is fully maintainable.

14. The sheet anchor of argument of the learned Counsel for the Appellant is Section 14 of the Code. The submission is that the Adjudicating Authority by order dated 20th June, 2019 in Company Petition No.2205 of 2019 and other two connected Company Petitions, Moratorium was declared in accordance with Section 14 of the Code. Section 14 of the Code is as follows:

"14. Moratorium. - (1) Subject to provisions of sub- sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

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

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Company Appeal (AT) (Insolvency) No. 628 of 2020 15 Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate Company Appeal (AT) (Insolvency) No. 628 of 2020 16 debtor has not paid dues arising from such supply during the moratorium period or in such circumstances.

(3) The provisions of sub-section (1) shall not apply to --

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

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

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

15. The object and purpose of Section 14 has been deliberated by different Report of the Insolvency Law Committee. In the Report of the Insolvency Law Committee 2018, following observations were made:

"..."the purposes of the moratorium include keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion

of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default" and "the moratorium on initiation Company Appeal (AT) (Insolvency) No. 628 of 2020 17 and continuation of legal proceedings, including debt enforcement action ensures as stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the object of the corporate insolvency resolution process."

16. The Report of the Insolvency Law Committee dated 20th February, 2020 again dealt with Moratorium under Section 14. Paragraphs 8.2 and 8.4 of the Report stated:

"8.2. The moratorium under Section 14 is intended to keep "the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default." Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings. The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it "facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate."

Company Appeal (AT) (Insolvency) No. 628 of 2020 18 8.4. The Committee discussed that by and large, the grants that the corporate debtor enjoys form the substratum of its business. Without these, the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern. Consequently, their termination during the CIRP by relying on ipso facto clauses or on non-payment of dues would be contrary to the purpose of introducing the provision for moratorium itself. Thus, the Committee concluded that the legislative intent behind introducing the provision for moratorium was to bar such termination."

17. The object and purpose of Section 14 had also been explained by Hon'ble Supreme Court in (2021) 6 SCC 258 - P. Mohanraj and Others vs. Shah Brothers ISPAT Private Limited. After noticing the Report of the Insolvency Law Committee of February 2020, the Hon'ble Supreme Court laid down following in paragraph 30 and 32:

"30. It can be seen that Para 8.11 refers to the very judgment under appeal before us, and cannot therefore be said to throw any light on the correct position in law which has only to be finally settled by this Court. However, Para 8.2 is important in that the object of a moratorium provision such as Section 14 is to see that there is no

depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all stakeholders. The idea is that it Company Appeal (AT) (Insolvency) No. 628 of 2020 19 facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor. Also, the judgment of this Court in *Swiss Ribbons (P) Ltd. v. Union of India* [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] states the *raison d'être* for Section 14 in para 28 as follows : (SCC p. 55) "28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protect the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another Company Appeal (AT) (Insolvency) No. 628 of 2020 20 management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

32. Viewed from another point of view, clause (b) of Section 14(1) also makes it clear that during the moratorium period, any transfer, encumbrance, alienation, or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein being also interdicted, yet a liability in the form of compensation payable under Section 138 would somehow escape the dragnet of Section 14(1). While Section 14(1)(a) refers to monetary liabilities of the corporate debtor, Section 14(1)(b) refers to the corporate debtor's assets, and together, these two clauses form a scheme which shields the corporate debtor from pecuniary attacks against it in the moratorium period so that the corporate debtor gets breathing space to continue as a going concern in order to ultimately rehabilitate itself. Any crack in this shield is bound to have adverse consequences, given the object of Section 14, and cannot, by any process of interpretation, be allowed to occur."

18. Hon'ble Supreme Court in an earlier judgment in (2020) 13 SCC 208

- *Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority and Another* had again dealing with Section 14 of the Code laid down following in paragraph 25:

"25. There is no doubt whatsoever that important functions relating to repairs and reconstruction of dilapidated buildings are given to Mhada. Equally, there is no doubt

that in a given set of circumstances, the Company Appeal (AT) (Insolvency) No. 628 of 2020 21 Board may, on such terms and conditions as may be agreed upon, and with the previous approval of the Authority, hand over execution of any housing scheme under its own supervision. However, when it comes to any clash between Mhada Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has thus been made is, unlike its predecessor in the SICA, 1985 only a limited one, which is expressly limited by Section 31(3) of the Code, to the date of admission of an insolvency petition up to the date that the adjudicating authority either allows a resolution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to under Section 14 must be strictly observed so that the corporate debtor may finally be put back on its feet albeit with a new management."

19. The Moratorium which comes into operation by order of the Adjudicating Authority on the insolvency commencement date is limited to the date when Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order of liquidation under Section

33. The Moratorium is to cease to have an effect from either of the above Company Appeal (AT) (Insolvency) No. 628 of 2020 22 dates. Thus, the life of Moratorium is not indefinite and is limited. Normally, period of completion of CIRP is 180 days and an ultimate time limit taking into consideration including all extension is 330 days as required by Section 12, sub-section (3). The object of the Code is clearly that there should be no depletion of Corporate Debtor's assets during the CIRP. The assets of the Corporate Debtor have to be preserved, protected and guarded for a successful insolvency resolution, which is the object of engrafting Section 14 in the statute. The submission of learned Counsel for the Appellant relying on the above judgment of Hon'ble Supreme Court is correct that there is statutory freeze when Moratorium is done under Section 14. The question to be answered is as to whether the statutory freeze, which comes into operation has any exception to it, or the prohibition contained in Section 14 is absolute. Section 14 uses various expressions including Corporate Debtor, Resolution Professional, which are defined in Section 3 and Section 5. Section 3, sub-section (8) defines 'Corporate Debtor' in following words:

"3(8) "corporate debtor" means a corporate person who owes a debt to any person;"

20. Section 5, sub-section (27) define 'Resolution Professional' in following words:

"5(27) "resolution professional", for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process or the pre-packaged insolvency resolution process, as the case may be,] and includes an

interim-resolution professional"

Company Appeal (AT) (Insolvency) No. 628 of 2020 23

21. The prohibition contained in Section 14, sub-section (1), sub-clause

(b) in transferring, encumbering, alienating and disposing of is by the Corporate Debtor any of its assets. The Corporate Debtor is incapacitated to deal with the assets in view of the statutory prohibition as above. We need to consider further statutory scheme to find out as to whether the provisions of the Code and the Regulations give jurisdiction to RP to transfer, encumber, alienate or dispose of any of the assets of the Corporate Debtor. Section 23 empowers the RP to conduct CIRP. Section 25 deals with duties of RP. Sections 23 and 25 of the Code are as follows:

"23. Resolution professional to conduct corporate insolvency resolution process. -

(1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:

Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.

(2) The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.

(3) In case of any appointment of a resolution professional under sub-sections (4) of section 22, the Company Appeal (AT) (Insolvency) No. 628 of 2020 24 interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional.

25. Duties of resolution professional. -

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

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

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

- (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
- (c) raise interim finances subject to the approval of the committee of creditors under section 28;
- (d) appoint accountants, legal or other professionals in the manner as specified by Board;
- (e) maintain an updated list of claims;
- (f) convene and attend all meetings of the committee of creditors;
- (g) prepare the information memorandum in accordance with section 29;
- (h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having Company Appeal (AT) (Insolvency) No. 628 of 2020 25 regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.
- (i) present all resolution plans at the meetings of the committee of creditors;
- (j) file application for avoidance of transactions in accordance with Chapter III, if any; and
- (k) such other actions as may be specified by the Board."

22. The Code being complete Code, all provisions of the Code have to be looked into to decipher the object and purpose of any provision contained in the Code. The provision has further to be given harmonious construction to ensure all provisions are given due effect to achieve the object. The prohibition as contained in Section 14(1)(b), which automatically come into force, has to be taken to its logical end that is unless there is any other indication in the Code, the provision is to continue till currency of the Moratorium. Section 23 and 25 contain provisions empowering the RP to protect and preserve the assets of the Corporate Debtor, although as noted above, the injunction under Section 14(1)(b) is against the Corporate Debtor. When we see Section 28, sub-section (1), sub-clause (b), which provides that RP shall not take any actions without the prior approval of the CoC. The provisions concede a decision of RP to create any security interest over the assets of the Corporate Debtor. Section 28, sub-section (1), which is relevant is as follows:

Company Appeal (AT) (Insolvency) No. 628 of 2020 26 "28(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: -

- (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

- (b) create any security interest over the assets of the corporate debtor;
 - (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
 - (d) record any change in the ownership interest of the corporate debtor;
 - (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
 - (f) undertake any related party transaction;
 - (g) amend any constitutional documents of the corporate debtor;
 - (h) delegate its authority to any other person;
 - (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
- Company Appeal (AT) (Insolvency) No. 628 of 2020 27
- (j) make any change in the management of the corporate debtor or its subsidiary;
 - (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
 - (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
 - (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor."

23. The prohibition under Section 14(1)(b) as noted above is also regarding encumbering the assets of Corporate Debtor. When Section 28(1) expressly provides for approval of Committee of Creditors for creating any security interest over the assets of the Corporate Debtor, this is a clear exception engrafted under the Code itself to Section 14(1)(b). The above scheme of the Code leads us to come to the conclusion that injunction under Section 14(1)(b) is against the Corporate Debtor, which provision does not restrain any other entity authorised under the Code to transfer, encumber or alienate the assets of the Corporate Debtor. Thus, prohibition under Section 14(1)(b) has to be read along with exceptions created in the Code itself.

24. Now we come to Regulation 29 of CIRP Regulations, on which much emphasis has been laid by the learned Counsel for the Respondent. CIRP Regulations are the Regulations, which have been framed in exercise of power conferred by different sections including Sections 14 and 25. Section 14 as noted above, deals with 'Moratorium' and Section 25 deals Company Appeal (AT) (Insolvency) No. 628 of 2020 28 with 'duties of Resolution Professional'. Regulation 29 contains a heading "Sale of assets outside the ordinary course of business", which is to the following effect:

"29. Sale of assets outside the ordinary course of business.

(1) The resolution professional may sell unencumbered asset(s) of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realisation of value under the facts and circumstances of the case:

Provided that the book value of all assets sold during corporate insolvency resolution process period in aggregate under this sub-regulation shall not exceed ten percent of the total claims admitted by the interim resolution professional.

(2) A sale of assets under this Regulation shall require the approval of the committee.

(3) A bona fide purchaser of assets sold under this Regulation shall have a free and marketable title to such assets notwithstanding the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature."

25. Regulation 29, sub-regulation (1) specifically empowers the RP to sell unencumbered asset(s) of the Corporate Debtor, if he is of the opinion that such sale is necessary for better realization of value. Thus, the power conferred on RP to sell unencumbered assets is on satisfaction that such a sale is necessary for better realization of the value. Regulation 29 Company Appeal (AT) (Insolvency) No. 628 of 2020 29 specifically empowers the RP and it being framed under exercise of powers conferred under Sections 14 and 25, it has to be treated that it is to give effect to the provisions of Sections 14 and 25. It is not in any manner in excess of Sections 14 and 25. We, thus, accept the submission of learned Counsel of Respondent that despite declaration of Moratorium under Section 14(1)(b), the RP is empowered to conduct sale of unencumbered assets, if he is of the opinion that it is necessary for better realization of the value.

26. The Board, which has framed the above Regulation is well aware of the contents and expanse of the provisions of the Code. We, thus, reject the submission of the learned Counsel of the Appellant that RP has no jurisdiction to conduct any sale during the pendency of Moratorium under Section 14.

27. There is another expression of limitation of sale of assets by RP under Regulation 29 and Section 28, sub-section (3) that sale of assets requires approval of CoC by vote of sixty-six percent. We need to notice whether in the facts of the present case the above two conditions have been adverted to and

complied with or not. The proceedings of the CoC in the 10th Meeting dated 24th April, 2020 are on the record, where RP has specifically stated that minimum sale price is higher than liquidation value given by registered valuers and following is noticed in the CoC meeting dated 24th April, 2020 "The representative from Bank of India enquired if an independent valuation had been obtained for the said price to which the RP informed the members that Liquidation value given by the registered valuers is lower Company Appeal (AT) (Insolvency) No. 628 of 2020 30 than above mentioned minimum sale price, however the exact value cannot be disclosed to the members as the confidentiality of the same has to be maintained as per the Code and the CIRP Regulations."

28. The above thus indicate that RP was of the opinion that sale of asset shall result in better realization of the value. In the same meeting dated 24th April, 2020, the CoC has passed Resolution, approving minimum sale consideration for the sale of two floors being 3rd and 4th floors of BKC property as INR 490 crores. The CoC although in its Resolution has contemplated for approval of NCLT for carrying out sale transaction. Thus, the condition as contained in Regulations 29, sub-regulation (2) by approval of the CoC and Section 28, sub-section (3) by minimum 66% of vote is satisfied, since the Resolution was passed by CoC with 74.45% of votes. We further notice that under Regulation 29, the jurisdiction has been given to the RP to sell unencumbered assets. Thus, the sale is permissible of only unencumbered assets. In the present case, subject property was under encumbrance, since the Corporate Debtor had taken a loan from HDFC on the security of 2nd, 3rd and 4th floors of the subject property. What has been submitted by the Respondent that HDFC had agreed to relinquish its charge and has filed its affidavit of no objection before the NCLT, which fact has been noticed by the NCLT in its impugned judgment. We, thus, conclude that prohibition in transferring the assets of the Corporate Debtor is on the Corporate Debtor and the said prohibition ipso-facto does not prohibit RP or CoC, who were empowered by specific provision of the Code to undertake any such sale. We need also to notice Company Appeal (AT) (Insolvency) No. 628 of 2020 31 that provision with regard to assets of the Corporate Debtor, object to which is to ensure that assets of CD are not depleted or alienated during pendency of the CIRP. The prohibition under Section 14(1)(b) thus in transferring the assets of the CD is throughout the currency of CIRP except where statute specifically empowers RP to carry the sale on fulfillment of conditions as laid down in the statute.

Question No.4

29. In view of the discussion on Question Nos.2 and 3, we are of the view that decision of RP to proceed with the sale of BKC property after approval of the CoC in the meeting dated 24th April, 2020 was permissible and was not interjected by virtue of declaration of Moratorium under Section 14(1)(b).

Question No.5

30. Section 14(1)(c) prohibits any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property. When Moratorium is declared any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property is prohibited. The object is that assets of Corporate Debtor do not deplete during the

currency of CIRP. Realization of recovery or enforcement of any security interest is also prohibited. The Financial Creditors of the Corporate Debtor are Members of CoC and various decisions as enumerated in the Code regarding CIRP have to be taken with the approval of CoC. Commercial wisdom of the Financial Creditors has Company Appeal (AT) (Insolvency) No. 628 of 2020 32 been given due credence in the scheme of the Code and are of paramount importance in CIRP. Most of the Financial Creditors are also Secured Creditors. The prohibition to foreclose or to recover any security interest is in the interest of Corporate Debtor, so that Secured Creditors do not enforce its security during continuance of CIRP. Law does not permit Secured Creditors to enforce their security, since, if permitted the Secured Creditors will be more than inclined to enforce their securities and realize their debt during the currency of the CIRP, which shall defeat the entire object of the insolvency resolution. We may in this context refer to judgment of Hon'ble Supreme Court in P. Mohanraj and Others (supra). The issue in the above case arose in the context of proceedings under Section 138 of Negotiable Instruments Act, which was filed against the Corporate Debtor due to dishonor of two cheques by Corporate Debtor. In paragraph 17 and 35.2, following has been laid down:

"17. Thus, the Central Government, in consultation with experts, may state that the moratorium provision will not apply to such transactions as may be notified. This is of some importance as Section 14(1)(a) does not indicate as to what the proceedings contained therein apply to. Sub-section (3)(a) provides the answer

-- that such "proceedings" relate to "transactions"

entered into by the corporate debtor pre-imposition of the moratorium. Section 3(33) defines "transaction" as follows:

"3. Definitions.--In this Code, unless the context otherwise requires--

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Company Appeal (AT) (Insolvency) No. 628 of 2020

33

(33) "transaction" includes an agreement or

arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;"

35.2. A legal action or proceeding in respect of any debt would, on its plain language, include a Section 138 proceeding. This is for the reason that a Section 138 proceeding would be a legal proceeding "in respect of" a debt. "In respect of" is a phrase which is wide and includes anything done directly or indirectly -- see Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd. [Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674 : (2018) 2 SCC (Civ) 288] (at p.

709) and Giriraj Garg v. Coal India Ltd. [Giriraj Garg v. Coal India Ltd., (2019) 5 SCC 192 : (2019) 2 SCC (Civ) 744] (at pp. 202-203). This, coupled with the fact that the section is not limited to "recovery" of any debt, would indicate that any legal proceeding even indirectly relatable to recovery of any debt would be covered."

31. When the proceeding under Section 138 of Negotiable Instruments Act, which are held to be in respect of debt and are covered by Moratorium under Section 14, any proceeding for realization of any security are clearly prohibited. There is no provision in a Code or in a Regulation, which permit Secured Creditors to enforce their security interest during currency of the CIRP. We may refer to judgment of the Hon'ble Supreme Court in AIR (2020) SC 222 - Anand Rao Korada, Resolution Professional vs. Varsha Fabrics Private Limited. In the above case, the High Court has directed for auction of the assets of the properties during the currency of Company Appeal (AT) (Insolvency) No. 628 of 2020 34 CIRP. Hon'ble Apex Court held that in event the assets of the company are alienated during the pendency of the proceedings, it shall jeopardize the interest of all the stakeholders. In paragraph 9 of the judgment, following has been stated:

"9. In view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the corporate debtor, Respondent 4 herein, once the proceedings under the IBC had commenced, and an order declaring moratorium was passed by NCLT. The High Court passed the impugned interim orders dated 14-8-2019 [Hirakud Industrial v. Varsha Fabrics (P) Ltd., WP (C) No. 7939 of 2011, order dated 14-8-2019 (Ori)] and 5-9-2019 [Hirakud Industrial v. Varsha Fabrics (P) Ltd., WP (C) No. 7939 of 2011, order dated 5-

9-2019 (Ori)] after the CIRP had commenced in this case. The moratorium having been declared by NCLT on 4-6- 2019, the High Court was not justified in passing the orders dated 14-8-2019 [Hirakud Industrial v. Varsha Fabrics (P) Ltd., WP (C) No. 7939 of 2011, order dated 14-

8-2019 (Ori)] and 5-9-2019 [Hirakud Industrial v. Varsha Fabrics (P) Ltd., WP (C) No. 7939 of 2011, order dated 5-9-2019 (Ori)] for carrying out auction of the assets of Respondent 4 Company i.e. the corporate debtor before NCLT. The subject-matter of the auction proceedings before the High Court is a vast chunk of land admeasuring about 330 acres, including railway lines and buildings.

If the assets of Respondent 4 Company are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholders.

Company Appeal (AT) (Insolvency) No. 628 of 2020 35 As a consequence, we set aside the impugned interim orders dated 14-8-2019 [Hirakud Industrial v. Varsha Fabrics (P) Ltd., WP (C) No. 7939 of 2011, order dated 14-

8-2019 (Ori)] and 5-9-2019 [Hirakud Industrial v. Varsha Fabrics (P) Ltd., WP (C) No. 7939 of 2011, order dated 5-9-2019 (Ori)] passed by the Odisha High Court, as parallel proceedings with respect to the main issue cannot take place in the High Court. The sale or liquidation of the assets of Respondent 4 will now be governed by the provisions of the IBC."

32. We may also refer to judgment of Hon'ble Supreme Court in (2021) 9 SCC 401 - Sandeep Khaitan, Resolution Professional for National Plywood Industries Limited vs. JSVM Plywood Industries Limited and Another. In the above case, the Corporate Debtor has made transaction of INR 32.50 lakhs to the Respondent after Moratorium was declared. The amount of INR 32.50, which was paid by the Management of the Corporate Debtor to Respondent No.1 was ultimately directed to be refunded. In paragraph 32.1, following has been directed:

"32.1. Respondent 1 is allowed to operate its account subject to it first remitting into the account of the corporate debtor, the amount of Rs 32.50 lakhs which stood paid to it by the management of the corporate debtor. The assets of the corporate debtor shall be managed strictly in terms of the provisions of the IBC. The appellant as RP will bear in mind the provision of Section 14(2-A) and the object of IBC. We however make it clear that our order shall not be taken as our Company Appeal (AT) (Insolvency) No. 628 of 2020 36 pronouncement on the issues arising from the FIR including the petition pending under Section 482 CrPC."

33. We may also refer to judgment of this Tribunal reported in 2021 SCC OnLine NCLAT 308 - SM Milkose Limited and Another vs. Parvinder Kumar Bhatt and Others, in which this Tribunal had considered the question as to whether CoC can take a decision regarding payment to a particular Financial Creditor during CIRP. The question under consideration was noticed in paragraph 16 and same was answered in paragraph 25. This Tribunal held that amounts received by the Corporate Debtor during the currency of the CIRP are assets of the Corporate Debtor, which cannot be transferred to chosen creditor without the process of Resolution Plan. To the similar effect, another judgment of this Tribunal reported in Company Appeal (AT) (Insolvency) No.267 of 2017 in Indian Overseas Bank vs. Mr. Dinkar T. Venkatsubramaniam Resolution Professional for Amtek Auto Ltd., where in paragraph 5 following has been laid down:

"5. Having heard learned counsel for the Appellant, we do not accept the submissions made on behalf of the Appellant in view of the fact that after admission of an application under Section 7 of the 'I&B Code', once moratorium has been declared it is not open to any person including 'Financial Creditors' and the appellant bank to recover any amount from the account of the 'Corporate Debtor, nor it can appropriate any amount towards its own dues."

Company Appeal (AT) (Insolvency) No. 628 of 2020 37

34. The above judgment clearly holds that in CIRP no Secured Creditor can realize its claim or its debt due to prohibition imposed under Section 14(1)(c). The provisions of the Code and the CIRP Regulations, do not contain any exception to the effect that a Secured Creditor can be paid during CIRP process. If it is permitted, then Secured Creditors can realize their security or recover their security interest during CIRP. The Financial Creditors who are mostly the Secured Creditors shall always lean in favour of realizing their dues, adversely affecting the rights of other stakeholders, which is not permissible in CIRP.

Question No.6

35. The Appellant is a Trade Union of aircraft maintenance engineers of Jet Airways (India) Limited, which had filed its claim. The claim worth INR 1,525,859,239/- was admitted. The CIRP has already been completed and Resolution Plan has been approved by the Committee of Creditors, which Plan has also been approved by the Adjudicating Authority vide its order dated 22nd June, 2021. The order of Adjudicating Authority dated 22nd June, 2021 approving the Resolution Plan is also now under challenge before this Tribunal in Company Appeal (AT) (Insolvency) No.643 of 2021 - Association of Aggrieved Workmen of Jet Airways (India) Limited vs. Jet Airways (India) Ltd. represented by Shri Ashish Chhawchharia, Resolution Professional and others. The sale of subject property on 26th June, 2020 was effected by Resolution Professional after obtaining approval of CoC in its 10th Meeting dated 24th April, 2020, which was also approved by the Adjudicating Authority on 11th June, 2020. In our foregoing discussions, Company Appeal (AT) (Insolvency) No. 628 of 2020 38 we have held that Resolution Professional was competent to effect sale with due approval of the CoC of the subject assets. The consideration of sale of the said property has been utilized to secure title of six aircrafts as well as to make payment to Respondent No.3, who had charge over the subject properties. The charge was released by Respondent No.3 subject to receiving payment of INR 360 crores as noted above. Resolution of Corporate Debtor culminated in Successful Resolution of CIRP, resulting in approval of Plan. All the claims of various stakeholders including of the employees and workmen must have received their due consideration in the Plan. After the CIRP having been culminated in Successful Resolution, we are not inclined to off-set the entire process, which has culminated into Successful Resolution, by reverting the consideration received by Respondent No.3 towards its charge on the subject property. At this distance of time, it cannot be said that sale of subject assets on 26th June, 2020 did not increase the valuation of the assets of the Corporate Debtor. Due to sale of assets, title of six aircrafts were acquired by Corporate Debtor and it has been submitted by learned Counsel for the Appellant that in the Resolution Plan all the 11 aircrafts have been sold. The said acquisition and sale of the said property is now stand dealt with in the Resolution Plan. We are of the view that in this Appeal, no pecuniary benefit can be extended to the Appellant, nor any finding can be recorded that by sale of the assets of the Corporate Debtor, its assets have been depleted. We have although held that due to provision under Section 14(1)(c), Respondent No.3 - Secured Creditor could not have realized its due in CIRP, but when the Company Appeal (AT) (Insolvency) No. 628 of 2020 39 Resolution Plan has been finally approved, we are not inclined to reverse the transaction at this stage, which has been approved by NCLT vide order dated 11th June, 2020. The Successful Resolution is a factum, which has to be taken into consideration while taking the decision on relief to be granted in this Appeal.

36. In the above context we may refer to recent judgment of Hon'ble Supreme Court in Civil Appeal No.8411 of 2019 - Bank of Baroda and Anr. vs. MBL Infrastructure Limited & Ors. decided on 18th January, 2022. In the above case, Successful Resolution Applicant was held to be ineligible under Section 29A to submit a Resolution Plan. Hon'ble Supreme Court held that Plan submitted by Respondent No.3 ought to have been rejected, but noticing the fact that Plan has been approved and Successful Resolution Applicant has infused substantial money and all on-going projects were of the public importance, hence Hon'ble Supreme Court refused to disturb the Resolution Plan. Paragraph 61 to 64 of the judgment are to the following effect:

"61. Having held so, we would like to come to the last part of our order. Though the very resolution plan submitted by the Respondent No. 3, being ineligible is not maintainable, much water has flown under the bridge. The requisite percentage of voting share has been achieved. We may also note that the percentage has been brought down from 75% to 66% by way of an amendment to Section 30(4) of the Code.

62. Secondly, majority of the creditors have given their approval to the resolution plan. The adjudicating authority has rightly noted that it was accordingly Company Appeal (AT) (Insolvency) No. 628 of 2020 40 approved after taking into consideration, the techno- economic report pertaining to the viability and feasibility of the plan. The plan is also put into operation since 18.04.2018, and as of now the Respondent No. 1 is an on-going concern. Though, the Respondent No.11 has taken up the plea that its offer was conditional, it has got a very minor share which may not be sufficient to impact by adding it with that of the appellant and Respondent No.7. The Respondent No.7 and the Respondent No.11 did not choose to challenge the order of the appellate tribunal.

63. We need to take note of the interest of over 23,000 shareholders and thousands of employees of the Respondent No.1. Now, about Rs. 300 crores has also been approved by the shareholders to be raised by the Respondent No.1. It is stated that about Rs. 63 crores has been infused into the Respondent No.1 to make it functional. There are many on-going projects of public importance undertaken by the Respondent No.1 in the nature of construction activities which are at different stages.

64. We remind ourselves of the ultimate object of the Code, which is to put the corporate debtor back on the rails. Incidentally, we also note that no prejudice would be caused to the dissenting creditors as their interests would otherwise be secured by the resolution plan itself, which permits them to get back the liquidation value of their respective credit limits. Thus, on the peculiar facts of the present case, we do not wish to disturb the resolution plan leading to the on-going operation of the Respondent No.1."

Company Appeal (AT) (Insolvency) No. 628 of 2020 41

37. The Appellant, a stakeholder in the CIRP must have received due consideration in the final Resolution Plan approved on 22nd June, 2021, which Resolution Plan is also under challenge in separate Appeal and one of the Appeal has been filed by Association of Aggrieved Workmen of Jet Airways (India) Limited being Company Appeal (AT) (Insolvency) No.643 of 2021, we see no reason to set-aside the impugned order dated 11th June, 2021 at this stage.

38. We also make it clear that our reference to approval of Resolution Plan on 22nd June, 2021 may not be treated as any expression of our opinion with regard to Resolution Plan, which is not subject matter of this Appeal.

39. For the reasons indicated above, no relief can be granted in this Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan] Chairperson [Dr. Alok Srivastava] Member (Technical) NEW DELHI 14th February, 2022 Ash/NN Company Appeal (AT) (Insolvency) No. 628 of 2020 42