M/S. Innoventive Industries Ltd vs Icici Bank & Anr on 15 May, 2017

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IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017

(arising out of Order dated 17th January, 2017 and Order dated 23rdJanuary, 2017 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in C.P. No. 1/I&BP/NCLT/MB/MAH/2016)

IN THE MATTER OF:

M/s. Innoventive Industries Ltd. ...Appellant

Vs

ICICI Bank & Anr. . . .Respondents

Present: For the Appellants:- Mr. Amarendra Saran, Senior Advocate, Mr. Makarand D. Adkar, Mr. Braj K. Mishra, Mr. Vijay Kumar, Mr. Amit Tamhankar, Ms Resham Sayyad, Advocates.

For Respondent No.1:- Mr. Ramji Srinivasan, Sr. Advocate, Mr. L. Vishwanathan, Mr. Indranil Deshmukh, Mr. Animesh Bsht, Mr. Karan Khanna, Ms Aditi Tambi, and Mr. Vivek O'riel, Advocates.

For Respondent No.2:- Mr. Jaswinder Singh and Ms Shipra Shukia, Advocates.

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JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA,J.

These appeals have been preferred by the Appellant! Corporate Debtor - M/s. Innoventive Industries Limited against order(s) dated 23rd 17th January, 2017 and January, 2017 passed by the 'adjudicating authority' (National Company Law Tribunal), Mumbai Bench, Mumbai (hereinafter referred to as 'Adjudicating Authority') under Section 7 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as I&B Code 2016) in C.P. No. 1/I&BP/NCLT/MB/MAH/20 16.

2. By the impugned order dated 17th January 2017, the 'adjudicating authority' rejected all the contentions raised by the Appellant/ Corporate Debtor and held that the application preferred by the financial creditor - M/s. ICICI Bank - (respondent herein) is complete under sub-section (2) of Section 7 of the Insolvency & Bankruptcy Code, 2016 and admitted the application declaring 'moratorium' in regard to the affairs of the company; appointed 'Interim Resolution Professional' and passed interim order (s) in terms of Section 7 of the Insolvency & Bankruptcy Code, 2016.

3. In the other impugned order dated 23rd January, 2017 the 'adjudicating authority' while admitted that there was a rush of work, in deciding the IA No. 6/2017 which inadvertently based on the argument of the Ld. Counsel for the Corporate Debtor, observed that delay in passing the order owing to the application filed by the Corporate Debtor in raising plea of no default, having raised in earlier C.A, the matter stands adjudicated.

4. The impugned judgment has been challenged by Appellant on the following grounds.

First contention raised on behalf of the appellant is that the impugned order has been passed by the Tribunal without notice to the Appellant against the principle of rules of natural justice, as stipulated under Section 424 of the Companies Act, 2013.

5. Mr Amarendra Saran, Ld. Senior Counsel for the Appellant submitted that Serious civil consequences ensue due to public announcement of the initiation of corporate insolvency resolution process and appointment of an Interim Resolution Professional to manage the affairs of the corporate debtor removing the Board of Directors. In such a case, notice prior to admission of a petition under Section 7 of I&B Code, 2016 is required to be given. If notice is given prior to admission of a petition, it will be open to the corporate debtor to bring to the notice of the Tribunal that there is no default or that the application filed by the 'financial creditor' is incomplete and deserves to be dismissed.

Reliance was placed on Hon'ble Supreme Court's decision in S.L. Kapoor vs Jagmohan 1980 (4) SCC 379 and Sahara India (Firm), Lucknow vs CIT 2008 (14) SCC 151.

6. It was also contended that the Tribunal being a creation of the Companies Act, 2013 (hereinafter referred to as Act, 2013) is bound by Section 420 of the Act 2013 which stipulates 'reasonable opportunity of being heard' to be given to the 'parties' before passing an order. Further, Section 424 of the Act 2013, which grants liberty to the Tribunal to regulate its own procedure mandate to follow the principles of natural justice. Therefore, the aforesaid sections cast duty upon the Tribunal to issue notice to and hear a party before passing any order affecting the rights of the party.

7. The next contention was that (Maharashtra Relief Undertaking (Special Provisions Act (Bombay Act XCVI of 1958) (hereinafter referred to as MRU Act, 1958), being a piece of legislation intended to give relief to industrial undertakings will prevail over I&B Code, 2016.

8. Ld. Senior Counsel submitted that MRU Act, 1958 being a legislation referable to Entry 24 of List II of Schedule 7 of the Constitution of India operates in different fields overriding the provisions of I&B Code, 2016.

9. It was also submitted that MRU Act being a beneficial piece of legislation and the State legislature having competent to enact it and the field being exclusively reserved for State legislature, will prevail over the I&B Code 2016, even if it may incidentally encroach upon field occupied by some other enactment.

He placed reliance on Hon'ble Supreme Court decision in Vishal N. Kalsaria vs Bank of India 2016 (3) SCC 762; Gram Panchayat vs Maiwinder Singh 1985 (3) SCC 661; Ishwari Khetan Sugar Mills (P) Ltd. vs State of UP 1980 (4) SCC 136.

10. It was further contended that there was complete non- application of mind by the Ld. Tribunal. According to him, Sub- section (4) and (5) of Section 7 of Code, 2016 casts duty on the Tribunal to first ascertain default and satisfy itself of default. The ascertaining of the fact that whether there is default or not can be satisfactorily reached only on perusal of documents produced by both the parties. A bare perusal of the impugned orders shows no such exercise has been undertaken by the Ld. Tribunal based on documents, materials, etc.

11. It was further contended that though so called default on the part of the Appellant has been dealt with by Tribunal holding that the Respondent No. 1 has placed the Information Utility, however, a perusal of the application filed by Respondent No. 1 would show that the Respondent has not produced any such material. In the column prescribed for details of Information Utility, only 'Not applicable' has been mentioned by Respondent No. 1. Without any further discussion the Tribunal has held that the default has occurred. Thus there is no ascertainment of default by the Ld. Tribunal as per sub- Section (3) (a) of Section 7 of the I&B Code, 2016 which requires consideration of the record of default recorded with Information Utility or only such other record or evidence 'as may be prescribed'. No such 'specified' evidence was produced by the Respondent No. 1 before the Ld. Tribunal.

12. Subsequently, upon mentioning, another order dated 23rd January 2017 was passed by the Ld. Tribunal purporting to clarify its earlier order. By this impugned order the Tribunal, quite contrary

to its earlier order, held that there was no requirement of hearing the opposite party under the I&B Code, 2016. Further, the impugned order refers to the record of Credit Information Bureau of India Limited (hereinafter referred to as CIBIL), not 'Information Utility' which was relied upon though earlier order clearly spoke about record of 'Information Utility'.

13. It was further contended that all the parties are bound by the Master Restructuring Agreement (hereinafter referred to as MRA) dated 8.9.2014. After MRA a fresh agreement came into existence and the previous debts came to an end. Under MRA both creditors and debtors had reciprocal obligations. Respondent No. 1 failed to fulfil its obligation under MRA. On the other hand Appellant has performed his obligations under MRA. This would be evident from the certificate issued by the auditor appointed by the bank consortium itself. The fact that Respondent No. 1 has not performed any of its obligation would also be evident from the reply of R2 (the lead consortium bank) at para 7 (g), (k), (1), (m) and (o) of the reply filed by Respondent No. 2 before the Tribunal.

14. According to appellant, Respondent No. 1 has attempted to manufacture a default by its own conduct/ default. A party which has defaulted its obligation cannot complaint about other's alleged default. Respondent No. 1 has not performed its obligation on the one hand and on the other had has wrongly adjusted the amounts due to the Appellant, in other accounts.

15. Ld. Senior Counsel for the Appellant further contended that Respondent No. 1 has not obtained permission/ consent from Joint Lender Forum (hereinafter referred to as 'JLF' for short) to initiate the present proceedings even though their application would adversely affect the loans of other members of JLF. In fact, Respondent No. 1 had applied for such permission but it was not granted. Against the total loan of Rs.90 crores given by other members to JLF, Respondent No. 1 has not given anything and the Appellant has already paid about thrice the amount. The other members of JLF have, therefore, no such grievance against the Appellant.

16. Mr Ramji Srinivasan, Ld. Senior Counsel for the 1St Respondent submitted that there was no provision for 'hearing' specified under the I&B Code, 2016. According to him the law prescribe that the 'adjudicating authority' is only required to ascertain the existence of default and pass necessary orders for admission only on the basis of these specified documents. The time bound process for ascertaining the existence of default is recognised as key object of the I&B Code, 2016 in order to ensure maximisation of value of assets of such persons.

17. However, it was accepted by the Ld. Senior Counsel for the Financial Creditor that in view of the application of Section 424 of the Companies Act, 2013 read with Section 60 (5) of the Code, 2016 and Rule 4(3) of the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, the 'adjudicating authority' is within its powers to issue the limited notice for a hearing, should the 'adjudicating authority' consider that a hearing is required to be given to the corporate debtor for ascertainment of existence of default based on the material submitted by the corporate debtor.

18. Ld. Senior Counsel for the Financial Creditor further submitted that there was no adverse civil consequences for the corporate debtor at the stage of admission which may attract the principles of

natural justice. According to him, the application of Section 424 of the Companies Act to proceedings under the Code does not necessarily require or call for a hearing at the admission stage or for that matter at any subsequent stage. It was submitted that the consequences of the admission of the Resolution process are in no manner prejudicial or against the interest of the corporate debtor. On the contrary, the aforementioned provisions only seek to

(i) preserve and protect the value of the corporate debtor; (ii) ensure the corporate debtor's smooth functioning as a going concern under professional management; and (iii) facilitate insolvency resolution. Thus, upon the admission of the application, the corporate debtor and its assets are in fact protected by the operation of the Code against inter alia any action for recovery or claims by any third party, including the financial creditors themselves. He referred to Section 13, 14, 15, 16 and 17 of the Code, 2016 to highlight the scheme of resolution process.

19. It was further contended that only notice of filing of application is required to be provided as specified under sub-Rule (3) of Rule 4 of the Rules. No other notice is required to be provided by the 'adjudicating authority'. Further, according to Ld. Sr. Counsel for the Financial creditor, Section 424 of the Companies Act, 2013 does not extend to create an absolute right of hearing under the scheme of the Code. Reliance was placed on different Supreme Court Decisions, which will be discussed at appropriate stage.

20. According to Ld. Sr. Counsel for the Respondent, the protection granted under the Notification issued under Section 4 of the MRU Act is limited to the enactments as specified in the Schedule to the MRU Act. The MRU Act specifies only certain acts to which the restriction applies and the same cannot be extended to any other legislation. Further, according to him, the I&B Code, 2016 has a clear non-obstante clause (Section 238) which overrides operation of MRU Act. He placed reliance on certain other Supreme Court decisions.

21. He further submitted that the order of the 'adjudicating authority' considers the submissions made by the appellant and provide reasoned grounds for rejection of the First Interim Application as well as the Second Interim Application. He further submitted that the admission of the Respondent No. I's application was done with due application of mind by the 'adjudicating authority' after ascertaining the clear and unambiguous existence of default from the records placed by the Respondent No. 1, including the records of the credit information company.

22. The question (s) involved in this appeal are: -

> (i) Whether a notice is required to be given to the Corporate Debtor for initiation of Corporate Insolvency Resolution Process under I&B Code, 2016 and if so, at what stage and for what purpose?
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> (ii) Whether 'Maharashtra Relief Undertaking (Special Provisions) Act (Bombay Act XCVI of 1958)' (hereinafter referred to as MRU Act 1958) shall prevail over I&B Code 2016. In other words, whether a Corporate Debtor who is enjoying the benefit of MRV Act, can be subjected to I&B Code 2016? and

(iii) Whether in a case where Joint Lender Forum (JLF) have reached agreement and granted permission to the Corporate Debtor prior consent of JLF is required by financial creditor, before filing of an application under Section 7 of the I&B Code 2016?

23. For determination of first issue, it is desirable to notice different decisions of Hon'ble Apex Court on the question as to how far rules of natural justice is an essential element.

24. In Maneka Gandhi v UoI & Anr (1c78) 1 SCC 248, the Apex Court while posing the question as to how far natural justice is an essential element of "procedure established by law" held as follows:

> ..... There are certain well recognised exceptions to the audi alteram partem rule established by judicial decisions and they are summarised by S.A. de Smith in Judicial Review of Administrative Action, 2nd ed., at page 168 to 179. If we analyse tlese exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases the audi alteram partem rule is held inapplicable not by way of an exception to 'fair play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends ofjustice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrati'e process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands.
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> It is a wholesome rule designed to- secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True rue it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J.,

> emphasised in Russel v. Duke of Norfolk(1 949) 1 All Eng. Reports 109 that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case".

25. In the said case, Kailasam, J, while dealing with the concept of applicability of natural justice referred to the decision of Hon'ble Supreme Court in Union of India v J N Sinha (1970) 2 SCC 458 and held as follows:

> "Rules of natural justice cannot be equated with the fundamental rights". As held by the Supreme Court in Union of India v J.N. Sinha (19 70) 1 SCR 791, that "Rules of natural justice are not embodied rules nor can they be elevated to the position of Fundamental Rights. Their aim is to secure justice and to prevent miscarriage of justice. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice the court should do so but if a statutory provision that specifically or by necessary implication excludes the application of any rules of natural justice this Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice." So also the right to be heard cannot be presumed when in the circumstances of the case, there is paramount need for secrecy or when a decision will have to be taken in emergency or when promptness of action is called for where delay would defeat the very purpose or where it is expected that the person affected would take an obstructive attitude. To a limited extent it may be necessary to revoke or to impound a passport without notice if there is real apprehension that the holder of the passport may leave the country if he becomes aware of any intention on the part of the Passport Authority or the Government to revoke or impound the passport. But that itself would not justify denial of an opportunity to the holder of the passport to state his case before the final order is passed. It cannot be disputed that the legislature has not by express provision excluded the right to be heard...."

26. In Swadeshi Cotton Mills v. Union of India, (198 1) 1 SCC 664, Sarkaria, J. speaking for the majority noticed the concept of basic facets of natural justice, the twin principles, namely, audi alteram partem and nemojudex in re sua, the decisions rendered in Maneka Gandha, State of Orissa v. Dr. Bina Pani Dei, AIR 1967 SC 1269 and A. K. Kraipak v. UoI, (19 69) 2 SCC 262 and held "31. The rules of natural justice can operate only in areas not covered by any law validly made. They can supplement the law but cannot supplant it (Per Hegde, J. in A. K. Kraipak, 2 SCC 262). If a statutory provision either specifically or by inevitable implication excludes the application of the rules of natural justice, then the Court cannot ignore the mandate of the Legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of the exercise of that power. (See Union of India v. Col. J. N. Sinha, (1970)2 SCC 458.)

33. The next general aspect to be considered is: Are there any exceptions to the application of the principles of natural justice, particularly the audi alteram partem rule ? We have already noticed

that the statute conferring the power, can by express language exclude its application. Such cases do not present any difficulty. However, difficulties arise when the statute conferring the power does not expressly exclude this rule but its exclusion is sought by implication due to the presence of certain factors:

> such as, urgency, where the obligation to give notice and opportunity to be heard would obstruct the taking ofprompt action of a preventive or remedial nature...."
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> 27. In Liberty Oil Mills & Ors. v. UoI & Ors., (1984) 3 SCC 465, a Larger Bench of the Apex Court has held ..... We do not think that it is permissible to interpret any statutory instruments so as to exclude natural justice, unless the language of the instrument leaves no option to the court
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> 28. In UoI & Anr. Vs. Tulsiram Patel, (1985) 3 SCC 398 = AIR 1985 SC 1416 the Apex Court has expressed thus:
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> "100. In Swadeshi Cotton Mills v. UoI, (1981) 1 SCC 664 Chinnappa Reddy, J., in his dissenting judgment summarised the position in law on this point as follows (at page 591): (SCC p. 712, para 106).
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> The principles of natural justice have taken deep root in the judicial conscience of our people, nurtured by Binapani, Kraipak, Mohinder Singh Gill, Maneka Gandhi etc., etc. They are now considered as fundamental to the 'implicit in the concept of ordered liberty' and, therefore, implicit in every decision- making function, call it judicial, quasi-judicial or administrative. Where authority functions under a statute and the statute providesfor the observance of the principles of natural justice in a particular manner, natural justice will have to be observed in that manner and in no other. No wider right than that provided by statute can be claimed nor can the right be narrowed. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice. The implication of natural justice being presumptive it may be excluded by express words of statute or by necessary intendment. Where the conflict is between the public interest and the private interest, the presumption must necessarily be weak and may, therefore, be readily displaced."

29. In Union of India and another v W.N. Chadha 1993 Supp. (4) SCC 260 their Lordships, while adverting to the issue of applicability of the doctrine of natural justice, have ruled as follows:

> "79. The rule of audi alteram partem is a rule of justice and its application is excluded where the rule will itself lead to injustice. In A. S. de Smith's Judicial Review of Administrative Action, 4th Ed. at page 184, it is stated that in administrative law, a prima facie right to prior notice and opportunity to be heard may be held to be excluded by implication in the presence of some factors, singly or in combination with another. Those special factors are mentioned under items (1) to (10) under the

heading "Exclusion of the audi alteram partem rule'.

80. Thus, there is exclusion of the application of audi alteram partem rule to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case. This rule cannot be applied to defeat the ends ofjustice or to make the law 'lifeless, absurd, stultifying and self-defeating or plainly contrary to the common sense of the situation' and this rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands.

81. Bhagwati, J. (as the learned Chief Justice then was) in Maneka Gandhi speaking for himself, Untawalia and Murtaza Fazal Ali, JJ has stated thus:

..... Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from fair play in action', it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion...."

82. Thus, it is seen from the decision in Maneka Gandhi that there are certain exceptional circumstances and situations where under the application of the rule of audi alteram pattern is not attracted..."

After so stating, their Lordships referred to a passage from Paul Jackson in Natural Justice and various other decisions.

88. Applying the above principle, it may be held that when the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a prima facie case is made out or not and a full enquiry in case of filing a report underSection 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of audi alteram partem superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether audi alterant partem is implicit, but whether the occasion for its attraction exists at all.

30. In D.K. Yadav v. J.M.A. Industries Limited (1993) 3 SCC 259, the Hon'ble Supreme Court has held as follows:-

"7. ..... Particular statute or statutory rules or orders having statutory flavour may also exclude the application of the principles of natural justice expressly or by necessary implication. In other respects the principles of natural justice would apply unless the employer should justice its exclusion on given special and exceptional exigencies."

31. In Dr. Rash Lal Yadav v. State of Bihar & Ors., (1994) 5 SCC 267, the Apex Court, after referring to the decisions in A.K. Kraipak v. UoI, (1969) 2 SCC 262, Dr. Bina Pani Dei, AIR 1967 SC 1269, Union of India v J N Sinha (1970) 2 SCC 458, Swadeshi Cotton Mills v. UoI, (198 1) 1 SCC 664 and Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405, 439, held as follows:-

> "9. What emerges from the above discussion is that unless the law expressly or by necessary implication excludes the application of the rule of natural justice, courts will read the said requirement in enactments that are silent and insist on its application even in cases of administrative action having civil consequences. However, in this case, the High Court has, having regard to the legislative history, concluded that the deliberate omission of the proviso that existed in Sub-section (7) ofsection 10 of the Ordinance (1980) while re-enacting the said sub- section in the Act, unmistakably reveals the legislature's intendment to exclude the rule of giving an opportunity to be heard before the exercise of power of removal. The legislative history leaves nothing to doubt that the legislature did not expect the State Government to seek the incumbent's explanation before exercising the power of removal under the said provision. We are in complete agreement with the High Court's view in this behalf...."

32. In Mangilal v. State of M.P., (2004) 2 SCC 447, while dealing with the principle of applicability of natural justice in awarding compensation under Section 357 (4) of the Code of Criminal Procedure, 1973, their Lordships have observed thus:

> "10 ..... It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natu rat justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary ,, intendment

33. In Union of India v Tulsiram Patel AIR 1985 SC 1416, Hon'ble Supreme court observed:

> " The right of opportunity to be heard can be excluded where the nature of action taken, its objects and purpose and the scheme of the relevant statutory provision warrant its exclusion .."

34. In Dharampal Satyapal v Deputy commissioner central Excise (2015) 8SCC 519, Hon'ble Apex court was of the view:

> •.If it is felt that a hearing would not change the ultimate conclusion reached by the decision maker, then no legal duty to supply a hearing arises

35. In Union of India v W.N. Chaddha AIR 1993 Sc 1082, Hon'ble Apex Court observed that:

> The question is not whether audi alteram partem is implicit, but whether the occasion for its attraction exists at all .....

36. In State of Maharashtra v. Jalgaon Municipal Council, (2003) 9 SCC 731, the Hon'ble Supreme Court observed as:

> "Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right to hearing being excluded are: (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) need to take urge)nt action for safeguarding public health or safety or public interest, (ii) the absence of legitimate exceptions, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, (v) express legislation."

37. In A.K. Kraipak v. Union of India, (1969) 2 SCC, Hon'ble Supreme Court observed that:

> ..... The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it...."

38. In C.B. Gautam vs Union Of India 1993 (1) SCC 78, Hon'ble Apex Court was of the view:

> "It is true that if a statutory provision can be read consistently with the principles of natural justice, the courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But If, on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice then the court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice....

39. In M.P. Industries Ltd. v. Union of India, AIR 1966 SC 671, it was observed by Hon'ble Supreme Court that:

> "The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation would effectively meet the requirements of the principles of natural justice."

40. In S.L Kapoor v. Jagmohan, (1980) 4 SCC 379 the Hon'ble Supreme Court was of the view:

> "Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice."

41. The aforesaid observation has been highlighted by Hon'ble Supreme Court, in a different way, observing that "useless formality"

> is another exception to the ratio of natural justice. Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice because it would be futile to order its observance. Therefore, where the result would not be different, and it is demonstrable beyond doubt, order of compliance with the principles of natural justice will not be justified.

42. From the aforesaid decisions of Hon'ble Supreme Court, the exception on the Principle of Rules of natural justice can be summarised as follows:-

(i) Exclusion in case of emergency,

(ii) Express statutory exclusion

(iii) Where discloser would be prejudicial to public interests

(iv) Where prompt action is needed,

(v) Where it is impracticable to hold hearing or appeal,

(vi) Exclusion in case of purely administrative matters.

(vii) Where no right of person is infringed,

(viii) The procedural defect would have made no difference to the outcome.

(ix) Exclusion on the ground of 'no fault' decision maker etc.

(x) Where on the admitted or undisputed fact only one conclusion is possible - it will be useless formality.

43. There is no specific provision under the I&B Code, 2016 to provide hearing to Corporate debtor in a petition under Section 7 or 9 of the I&B Code, 2016.

44. Sub-section (1) of Section 5 defines "adjudicating authority"

for the purpose of that part means "National Company Law Tribunal", (NCLT) constituted under Section 408 of the Companies Act, 2013 (18 of 2013).

45. Section 420 of the Companies Act, 2013 relate to 'orders of Tribunal'. Sub-Section (1) of Section 420 mandates the Tribunal to provide the parties before it, the reasonable opportunity of being heard before passing orders as it thinks fit, as quoted below:-

" 420. Orders of Tribunal.-- (1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit."

46. I&B Code, 2016 empowers 'adjudicating authority' to pass orders under Section 7, 9 and 10 of the Code, 2016 and not the National Company Law Tribunal. It is by virtue of the definition under sub-Section (1) of Section 5 read with section 60 of the I&B Code, 2016, the National Company Law Tribunal plays role of an "adjudicating authority".

47. Section 60 of the I&B Code, 2016 which relate to 'Adjudicating Authority' for corporate persons which empowers the National Company Law Tribunal to entertain and dispose of the petition as stipulated under sub-section (5) of Section 60 reads as follows: -

"ADJUDICATING AUTHORITY FOR CORPORATE PERSONS 60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

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

(a) any application or proceeding by or against the corporate debtor or corporate person; (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

48. By Section 255 of the I&B Code 2016 certain provisions of the Companies Act, 2013 has been amended in the manner as specified in the XIth Schedule. By virtue of Article 32 of XIth Schedule, the Section 424 of the Companies Act, 2013 stands amended as follows:

"32. In section 424, - Commencement of winding up by Tribunal. (i) in sub-section (1), after the words, "other provisions of this Act", the words "or of the Insolvency and Bankruptcy Code, 2016" shall be inserted; (ii) in sub-section (2), after the words,

"under this Act", the words "or under the Insolvency and Bankruptcy Code, 2016" shall be inserted."

On such amendment, Section 424 of the Companies Act, 2013 reads as follows: -

"424. Procedure before Tribunal and Appellate Tribunal -

(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act (or of Insolvency and Bankruptcy Code 2016) and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act (or under the Insolvency and Bankruptcy Code 2016,) the same powers as are vested in a civil court under th Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely: -

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(fi dismissing a representation for default or deciding it ex parte;

(g) setting aside any order of dismissal of any representation for default or any order passed by it exparte; and

(h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction, -

(a) in the case of an order against a company, the registered office of the company is situate; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973."

49. As amended Section 424 of the Companies Act, 2013 is applicable to the proceeding under the MB Code, 2016, it is mandatory for the adjudicating authority to follow the Principles of rules of natural justice while passing an order under I&B Code, 2016. Further, as Section 424 mandates the 'Tribunal' and Appellate Tribunal, to dispose of cases or/appeal before it subject to other provisions of the Companies Act, 2013 or MB Code 2016 such as, Section 420 of the Companies Act 2013 was applicable and to be followed by the Adjudicating Authority.

50. One "Sree Metaliks Limited & Ann" moved before the Hon'ble Calcutta High Court in Writ Petition 7144 (W) of 2017 assailing the vires of Section 7 of the Code, 2016 and the relevant rules under the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 (hereinafter referred to as I&B Rules, 2016). The challenge was premise upon the contention that the Code, 2016 does not afford any opportunity of hearing to a corporate debtor in a petition under Section 7 of I&B Code, 2016. The Hon'ble High Court noticed relevant provision of Section 7 of the I&B Code 2016, the definition of 'adjudicating authority' as defined under Section 5(1), Section 61 of the I&B Code, 2016 relating to appeal and amended Section 424 of the Companies Act, 2013 and by judgment dated 7th April, 2017 held as follows:-

> ..... However, it is to apply the principles of natural justice in the proceedings before it. It can regulate it own procedure, however, subject to the other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any Rules made thereunder. The Code of 2016 read with the Rules 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is silent whether a party respondent has a right of hearing before the adjudicating authority or not.
>
> Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fetters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a

statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing.

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from Section 7(4) of the Code of 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under Section 7 of the Code of 2016. Sub-rule (3) of Rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor. Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under Sub-section (1) of Section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 or Part-Ill of the National Company Law Tribunal Rules, 2016.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a reasonable opportunity of hearing to the respondent before passing its order.

In a given case, a situation may arise which may require NCLT to pass an ex-parte ad interim order against a respondent. Therefore, in such situation NCLT, it may proceed to pass an ex-parte ad interim order, however, after recording the reasons for grant of such an order and why it has chosen not to adhere to the principles of natural justice at that stage. It must, thereafter proceed to afford the party respondent an opportunity of hearing before confirming such ex-parte ad interim order.

> In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order. It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.
>
> In such circumstances, the challenge to the vires to Section 7 of the Code of 201 6 fails."

51. As per clause (3) of Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the financial creditor is required to despatch forthwith a copy of the application filed with the 'adjudicating authority' to the corporate debtor as quoted below:-

> "4(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor."

Thus it is clear that sub-Rule (3) of Rule 4 of I&B (Application to Adjudicating Authority) Rules, 2016, mandates the applicant to dispatch forthwith, a copy of the application "filed with the Adjudicating Authority". Thereby a post filing notice required to be issued and not as notice before filing of an of application. The purpose for the same being to put corporate debtor to adequate impound notice so that the Corporate Debtor may bring to the notice of Adjudicating Officer "mitigating factor/records before the application is accepted even before formal notice is received."

52. The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor - company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under section 7 and 9 of the 'I & B Code', 2016.

53. In view of the discussion above, we are of the view and hold that the Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the Corporate debtor before passing its order.

Purpose of Issuance of Notice:

54. Section 7 of the Code provides for process of initiation of corporate Insolvency Resolution process by a financial creditor, Section 8 and 9 provide for process of initiation of Insolvency Resolution process by an operational creditor and Section 10 of the Code provides for process of initiation of Insolvency Resolution process by the corporate debtor itself.

55. Process of initiation of Insolvency Resolution process by a financial creditor is provided in Section 7 of the I & B Code. As per sub-section (1) of Section 7 of the I & B Code, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of Section 7 provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including:

> i. "record of the default" recorded with the information utility or such other record or evidence of default as may be specified;
>
> ii. the name of the resolution professional proposed to act as an interim resolution professional; and iii. any other information as may be specified by the Board

56. The procedure once an application is filed by the financial creditor with the Adjudicating Authority is specified in sub-section (4) of Section 7 to sub-section (7) of Section 7 of the Code. As per sub-section (4) of Section 7 of the I & B Code:

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

57. Sub-section (5) of Section 7 of the I & B Code provides for admission or rejection of application of a financial creditor Where the Adjudicating Authority is satisfied that-...'. the documents are complete or incomplete.

58. The Adjudicating Authority post ascertaining and being satisfied that such a default has occurred may admit the application of the financial creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'.

59. Unlike Section 7 of the I & B Code, before making an application to the Adjudicating Authority under Section 9 of the I & B Code, the requirements under Section 8 of the I & B Code are required to be complied with.

60. Under sub-section (1) of Section 8 of the Code, an Operational Creditor, on occurrence of a default, is required to deliver a notice of demand of unpaid debt or get copy of the invoice

demanding payment of the defaulted amount served on the corporate debtor. This is the condition precedent under section 8 and 9 of the I & B Code, unlike in Section 7, before making an application to the Adjudicating Authority.

61. Under Section 9 of the Code, a right to file an application accrues after expiry of ten days from the date of delivery of the demand notice or copy of invoice as the case may be, demanding payment under sub-section (1) of Section 8 of the I & B Code. The operational creditor would receive either the payment or a notice of dispute in terms of sub-section (2) of Section 8 of the I & B Code.

62. Thus, it is evident from Section 9 of the I & B Code that the Adjudicating Authority has to, within fourteen days of the receipt of the application under sub-section (2), either admit or reject the application. Section 9 has two-fold situations insofar as notice of dispute is concerned. As per sub-section (5) (1) of Section 9, the Adjudicating Authority can admit the application in case no notice raising the dispute is received by the operational creditor (as verified by the operational creditor on affidavit) and there is no record of a dispute is with the information utility.

On the other hand, sub-section (5) of Section 9(5) mandates the Adjudicating Authority to reject the application if the operational creditor has received notice of dispute from the corporate debtor. Section 9 thus makes it distinct from Section 7. While in Section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under Section 9. The use of language in sub-section (2) of Section 8 of the I & B Code provides that the "corporate debtor shall, within a period of ten days of the 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 " Under Section 7 neither notice of demand nor a notice of dispute is relevant whereas under Sections 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for and rejection.

63. While ascertaining the 'Adjudicating Authority' to comes to a conclusion whether there is an existence of default for the purpose of section 7 or there is a dispute raised by the corporate debtor and all other purpose whether an application is complete or incomplete, it is not only necessary to hear the financial creditor! 'Operational Creditor but also the corporate debtor.

64. The different decisions of the Hon'ble Supreme Court, as referred to above and exception of principles of natural justice as noticed and summarised in the preceding paragraphs is not applicable to the insolvency resolution process as it is not a case of emergency declared or prejudicial to public interest or that there is a statutory exclusion of rules of natural justice or it is impracticable to hold hearing. It is not the case that no right of any person has been affected, as immediately on appointment of an Interim Resolution Professional, the Board of directors stand superseded. There are other persons who are also affected due to order of moratorium. Therefore, the 'adjudicating authority' is duty bound to give a notice to the corporate debtor before admission of a petition under Section 7 or Section 9.

65. In the present case though no notice was given to the Appellant before admission of the case but we find that the Appellant intervened before the admission of the case and all the objections raised

by appellant has been noticed, discussed and considered by the 'adjudicating authority' while passing the impugned order dated 17th January 2017. Thereby, merely on the ground that the Appellant was not given any notice before admission of the case cannot render the impugned order illegal as the Appellant has already been heard. If the impugned order is set aside and the case is remitted back to the adjudicating authority, it would be 'useless formality' and would be futile to order its observance as the result would not be different. Therefore, order to follow the principles of natural justice in the present case does not arise.

66. However, in some of the cases initiation of Insolvency Resolution Process may have adverse consequences on the welfare of the Company. Therefore, it will be imperative for the "adjudicating authority" to adopt a cautious approach in admitting Insolvency Application by ensuring adherence to the principle of natural justice.

67. The next question is whether the Appellant can claim any protection having granted benefit under MRU Act, 1956.

The protection granted by notification issued under Section 4 of the MRU Act, 1956 is limited to the enactments as specified in the Schedule to the MRU Act, as apparent from Section 4(1)

(a) (1) of the MRU Act and provides as follows: -

> "4. (1) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, standing order or other provision whatsoever, the State Government may, by notification in the official Gazette, direct that--
>
> (a) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under sub-section (2) of section 3-
>
> (i) all or any of the laws in the Schedule to this Act or any provisions thereof shall not apply (and such relief undertaking shall be exempt therefrom), or shall, if so directed by the State Government, be applied with such modifications (which do not however affect the policy of the said laws) as may be specified in the notification;...
>
> (ii) all or any of the agreements, settlements, awards or standing orders made under any of the laws in the Schedule to this Act, which may be applicable to the undertaking immediately before it was acquired or taken over by the State Govemme;it 3[or before any loan, guarantee or other financial assistance was provided to it by, or with the approval of, the State Government,] for being run as a relief undertaking, shall be suspended in operation or shall, if so directed by the State Government, be applied with such modifications as may be specified in the notification;
>
> (iii) rights, privileges, obligations and liabilities shall be determined and be enforceable in accordance with clauses (i) and (ii) and the notification;

> (iv) any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement thereof shall be suspended and all proceedings relative thereto pending before any court, tribunal, officer or authority shall be stayed"

(emphasis supplied")

68. The Schedule to the MRU Act specifies only certain acts to which the restriction applies. Accordingly, the application of the MRU Act can only be extended to such acts as specified in the schedule and no other legislation. The legislations referred to in the 'schedule' to the MRU Act are employment welfare related which is in consonance with the objects and purposed of the MRU Act i.e. 'employment and unemployment'. The protection under the MRU Act, therefore, cannot be extended to other legislations especially to union legislation which is subsequent to the MRU Act and related to insolvency resolution i.e. I&B Code, 2016

69. Section 4 of the MRU Act, including Section 4 (iv), therefore, is limited in scope to the acts listed in the schedule thereto.

70. Section 238 of the I&B Code, 2016 is non-obstante clause which overrides the operation of the MRU Act. As per Section 238 of the I&B Code, 2016 the provisions of the Code are to are to be given effect to notwithstanding anything contrary contained any other law or any instrument having effect under such law. Section 238 states as follows:

> "238 - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in anti other law for the time being in force or anti instrument havina effect by virtue of any such law."

71. In light of the aforementioned non-obstante provision (which is a subsequent Union Law), the provisions of the I&B Code, 2016 shall prevail over the provisions of the MRU Act and any instrument issued under the MRU Act including the Notification.

72. It was submitted on behalf of the Appellant that by virtue of the provisions of Sections 3 and 4 of the MRU Act read with the notification issued thereunder, a creditor is restrained from exercising its statutory rights under the provisions of the Code. But such submission cannot be accepted as Section 238 of the I&B Code, 2016 clearly mandates that the provisions of the I&B Code, 2016 shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. This being the position and considering the mandate laid down in Section 238, which is a subsequent law enacted by Parliament, the provisions of the Section 238 would have effect notwithstanding the provisions of the MRU Act and any notification issued thereunder, insofar as it restrains the creditor from enforcing its security interest against the relief undertaking in whose favour a notification has been issued.

73. The MRU Act operates in a different field from the I&B Code, 2016. MRU Act is an Act to make temporary provisions for industrial relations and other matters to enable the State Government to conduct or to provide a loan, guarantee or financial assistance for the conduct of certain industrial undertakings 'as a measure of preventing unemployment or of unemployment relief.'

74. On the other hand the I&B Code, 2016 is an Act enacted to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the order of priority of payments of Government dues. The I&B Code, 2016, which is later act of greater specificity, seeks to balance the interests of all stake holders.

75. In view of the aforesaid objects of the two enactments it is apparent that the two enactments operate in entirely different fields. This is further made clear by the fact that the MRU Act is enacted under Entry 23 of List III while the Code has been enacted under Entry 9 of the List III. The stand taken by the learned counsel for the Appellant that the MRU Act has been enacted under Entry 24 of List II cannot be accepted as the MRU Act has received Presidential assent under Article 2 54(2) of the Constitution of India, which is only required for statutes enacted by the State Government in exercise of its legislative competence under the Concurrent List.

76. In Yogender Kumar Jaiswal Vs. State of Bihar, (2016) 3 SCC 183, the Hon'ble Supreme Court, while dealing with Article 254, noticed the decision in "Hoechst Pharmaceuticals Ltd. (1983) 4 SCC 45" and observed as follows:-

> 55. Thereafter, the Court proceeded to state that:
>
> (Hoechst Pharmaceuticals Ltd. case [Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45:1983 SCC (Tax) 248: AIR 1983 SC 1019], SCC pp. 89-90, para 69)
> "69. ... The question of repugnancy under Article 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy, become void. Article 254(1) has no application to cases of repugnancy due to overlapping found between List U on the one hand and List land List III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non obstante clause in Article 246(1) read with the opening words 'subject to' in Article 246(3). In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. It is no doubt true that the expression 'a law made by Parliament which Parliament is competent to enact' in Article 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List HI as well as 'List F. But if Article 254(1) is read as a whole,

it will be seen that it is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List--in other words, if clause (2) is to be the guide in the determination of scope of clause (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Article 254(1) speaks of a State law being repugnant to (a) a law made by Parliament or (b) an existing law."

62. Having stated the proposition where and in which circumstances the principle of repugnancy would be attracted and the legislation can be saved or not saved, it is necessary to focus on clause (2) of Article 254 of the Constitution. In Hindustan Times v. State of U.P. [Hindustan Times v. State of U.P., (2003) 1 SCC 591], after referring to the earlier judgments, it has been held that Article 254(2) carves out an exception and, that is, if the Presidential assent to a State law which has been reserved for his consideration is obtained under Article 200, it will prevail notwithstanding the repugnancy to an earlier law of the Union. The relevant passage of the said authority is extracted below: (SCC pp. 599-600, para

19) "19. As noticed hereinbefore, the State of Uttar Pradesh intended to make a legislation covering the same field but even if the same was to be made, it would have been subject to the parliamentary legislation unless assent of the President of India was obtained in that behalf. The State executive was, thus, denuded of any power in respect of a matter with respect whereto Parliament has power to make laws, as its competence was limited only to the matters with respect to which the legislature of the State has the requisite legislative competence. Even assuming that the matter relating to the welfare of the working journalists is a field which falls within Entry 24 of the Concurrent List, unless and until a legislation is made and assent of the President is obtained, the provisions of the 1955 Act and the Working Journalists (Fixation of Rates and Wages) Act, 1958 would have prevailed over the State enactment."

77. In "Madras Pet rochem Limited and Another Vs Board for Industrial and Financial Reconstruction and Others," (2016)4, SCC 1, the Hon'ble Supreme Court was considering the question whether pendency of reference before BIFR bar enforcement of secured assets under SARFAESI Act, 2002. In the said case, the Hon'ble Supreme Court having noticed the earlier decisions observed:

"29. On the other hand, in Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. [Solidaire India Ltd. v. Fairgrowth Financial Services Ltd., (2001) 3 SCC 71], it was the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 which came up for consideration vis-ä-vis the Sick Industrial Companies (Special Provisions) Act, 1985. In paras 9 and 10 of this Court's judgment, this Court noted that both Acts were special Acts. In a significant ext ract from a Special Court judgment, which was approved by this Court, it was stated that the SpeciaZ Courts Act, 1992, being a later enactment and also containing a non obstante clause, would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985. Had the

legislature wanted to exclude the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, from the ambit of the said Act, the legislature would specifically have so provided (emphasis supplied). The fact that the legislature did not specifically so provide necessarily means that the legislature intended that the provisions of the said Act were to prevail over the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. In short, when property of notified persons under the Special Courts Act, 1992 stands attached, it is only the Special Court which can give directions to the custodian under the said Act as to disposal of such property of a notified party. The legislature expressly overrode Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 and permitted the custodian to give directions under Section 11 of the Special Courts Act, 1979, notwithstanding Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

36. A conspectus of the aforesaid decisions shows that the Sick Industrial Companies (Special Provisions) Act, 1985 prevails in all situations where there are earlier enactments with non obstante clauses similar to the Sick Industrial Companies (Special Provisions) Act, 1985. Where there are later enactments with similar non obstante clauses, the Sick Industrial Companies (Special Provisions) Act, 1985 has been held to prevail only in a situation where the reach of the non obstante clause in the later Act is limited--such as in the case of the Arbitration and Conciliation Act, 1996--or in the case of the later Act expressly yielding to the Sick Industrial Companies (Special Provisions) Act, 1985, as in the case of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Where such is not the case, as in the case of Special Courts Act, 1992, it is the Special Courts Act, 1992 which was held to prevail over the Sick Industrial Companies (Special Provisions) Act, 1985.

39. This is what then brings us to the doctrine of harmonious construction, which is one of the paramount doctrines that is applied in interpreting all statutes. Since neither Section 35 nor Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is subject to the other, we think it is necessary to interpret the expression "or any other law for the time being in force" in Section 37. If a literal meaning is given to the said expression, Section 35 will become completely otiose as all other laws will then be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Obviously this could not have been the parliamentary intendment, after providing in Section 35 that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 will prevail over all other laws that are inconsistent therewith. A middle ground has, therefore, necessarily to be taken. According to us, the two apparently conflicting sections can best be harmonised by giving meaning to both. This can only be done by limiting the scope of the expression "or any other law for the time being in force" contained in Section 37. This expression will, therefore, have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to

> Banks and Financial Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market."

78. Following the law laid down by Hon'ble Supreme Court in "Yogendra Krishnan Jaiswal" and "Madras Petrochem Limited" we hold that there is no repugnancy between I&B Code, 2016 and the MRU Act as they both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force. This stipulation does not mean that the provisions of MRU Act or for that matter any other law are repugnant to the provisions of the Code.

79. In view of the finding as recorded above, we hold that the Appellant is not entitled to derive any advantage from MRU Act, 1956 to stall the insolvency resolution process under Section 7 of the Insolvency & Bankruptcy Code, 2016.

80. Insofar as Master Restructuring Agreement dated 8th September 2014 is concerned; the appellant cannot take advantage of the same. Even if it is presumed that fresh agreement came into existence, it does not absolve the Appellant from paying the previous debts which are due to the financial creditor.

81. The Tribunal has noticed that there is a failure on the part of appellant to pay debts. The Financial Creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement, including the Master Restructuring Agreement. In that view of the matter, the Appellant cannot derive any advantage 8th of the Master Restructuring Agreement dated September, 2014.

82. As discussed in the previous paragraphs, for initiation of corporate resolution process by financial creditor under sub-section (4) of Section 7 of the Code, 2016, the 'adjudicating authority' on receipt of application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under Section 5 of Section 7, the 'adjudicating authority' is required to satisfy -

(a) Whether a default has occurred;

(b) Whether an application is complete; and

(c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.

83. Once it is satisfied it is required to admit the case but in case the application is incomplete application, the financial creditor is to be granted seven days' time to complete the application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected.

84. Beyond the aforesaid practice, the 'adjudicating authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petition that the Respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and fit to be rejected.

85. In the aforesaid circumstances the 'adjudicating authority' having satisfied on all counts, including default and that the application is complete and that there is no disciplinary proceeding pending against the Insolvency Resolution Professional, no interference is called for against the impugned judgment.

86. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
15 May, 2017

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