

# Kapil Wadhawan vs Piramal Capital & Housing Finance Ltd. & ... on 15 May, 2023

**Author: Ashok Bhushan**

**Bench: Ashok Bhushan**

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 437 of 2023  
(Arising out of Order dated 09.02.2023 passed by the Adjudicating Authority  
(National Company Law Tribunal), Mumbai Bench, Court II in IA No.3128/2022  
in IA No.338 of 2021 in CP(IB)4258/MB/C-II/2019)

IN THE MATTER OF:

Kapil Wadhawan

... Appellant

Vs

Piramal Capital & Housing Finance Ltd. & Ors.

... Respondents

Present:

For Appellant: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Shivam Shukla, Mr. Viresh Malviya, and Mr. Tejas Popat, Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Chitra Rentala, Ms. Shatakshi Tripathi and Mr. Aditya Dhupar, Advocates for R-1.

With

Company Appeal (AT) (Insolvency) No.439 of 2023  
(Arising out of Order dated 09.02.2023 passed by the Adjudicating Authority  
(National Company Law Tribunal), Mumbai Bench, Court II in IA No.2843/2021  
in IA No.257/2021 in CP(IB)4258/MB/C-II/2019)

IN THE MATTER OF:

Kapil Wadhawan

... Appellant

Vs

Piramal Capital & Housing Finance Ltd. & Ors.

... Respondents

Present:

For Appellant: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Shivam Shukla, Mr. Viresh Malviya, and Mr. Tejas Popat, Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Chitra

Rentala, Ms. Shatakshi Tripathi and Mr. Aditya  
Dhupar, Advocates for R-1.

Company Appeal (AT) (Insolvency) Nos. 437, 439,  
441, 442, 445, 451, 452 & 512 of 2023

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With

Company Appeal (AT) (Insolvency) No.441 of 2023  
(Arising out of Order dated 09.02.2023 passed by the Adjudicating Authority  
(National Company Law Tribunal), Mumbai Bench, Court II in IA No.3129/2022  
in IA No.2526/2020 in CP(IB)4258/MB/C-II/2019)

IN THE MATTER OF:

Kapil Wadhawan

... Appellant

Vs

Piramal Capital & Housing Finance Ltd. & Ors.

... Respondents

Present:

For Appellant: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Shivam  
Shukla, Mr. Viresh Malviya, and Mr. Tejas Popat,  
Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Chitra  
Rentala, Ms. Shatakshi Tripathi and Mr. Aditya  
Dhupar, Advocates for R-1.

With

Company Appeal (AT) (Insolvency) No.442 of 2023  
(Arising out of Order dated 09.02.2023 passed by the Adjudicating Authority  
(National Company Law Tribunal), Mumbai Bench, Court II in IA No.475/2022 in  
IA No.2523/2020 in CP(IB)4258/MB/C-II/2019)

IN THE MATTER OF:

Kapil Wadhawan

... Appellant

Vs

Piramal Capital & Housing Finance Ltd. & Ors.

... Respondents

Present:

For Appellant: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Shivam  
Shukla, Mr. Viresh Malviya, and Mr. Tejas Popat,  
Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Chitra  
Rentala, Ms. Shatakshi Tripathi and Mr. Aditya  
Dhupar, Advocates for R-1.

Company Appeal (AT) (Insolvency) Nos. 437, 439,  
441, 442, 445, 451, 452 & 512 of 2023

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With

Company Appeal (AT) (Insolvency) No.445 of 2023  
(Arising out of Order dated 09.02.2023 passed by the Adjudicating Authority  
(National Company Law Tribunal), Mumbai Bench, Court II in IA No.2982/2021  
in IA No.2524/2020 in CP(IB)4258/MB/C-II/2019)

IN THE MATTER OF:

Kapil Wadhawan

... Appellant

Vs

Piramal Capital & Housing Finance Ltd. & Ors.

... Respondents

Present:

For Appellant: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Shivam  
Shukla, Mr. Vihesh Malviya, and Mr. Tejas Popat,  
Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Chitra  
Rentala, Ms. Shatakshi Tripathi and Mr. Aditya  
Dhupar, Advocates for R-1.

With

Company Appeal (AT) (Insolvency) No.451 of 2023  
(Arising out of Order dated 09.02.2023 passed by the Adjudicating Authority  
(National Company Law Tribunal), Mumbai Bench, Court II in IA No.2849/2021  
in IA No.328/2021 in CP(IB)4258/MB/C-II/2019)

IN THE MATTER OF:

Kapil Wadhawan

... Appellant

Vs

Piramal Capital & Housing Finance Ltd. & Ors.

... Respondents

Present:

For Appellant: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Shivam  
Shukla, Mr. Vihesh Malviya, and Mr. Tejas Popat,  
Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Chitra  
Rentala, Ms. Shatakshi Tripathi and Mr. Aditya  
Dhupar, Advocates for R-1.

Company Appeal (AT) (Insolvency) Nos. 437, 439,  
441, 442, 445, 451, 452 & 512 of 2023

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With

Company Appeal (AT) (Insolvency) No.452 of 2023  
(Arising out of Order dated 09.02.2023 passed by the Adjudicating Authority  
(National Company Law Tribunal), Mumbai Bench, Court II in IA No.187/2022 in  
IA No.1912/2020 in CP(IB)4258/MB/C-II/2019)

IN THE MATTER OF:

Kapil Wadhawan

... Appellant

Vs

Piramal Capital & Housing Finance Ltd. & Ors.

... Respondents

Present:

For Appellant: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Shivam  
Shukla, Mr. Vihesh Malviya, and Mr. Tejas Popat,  
Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Chitra  
Rentala, Ms. Shatakshi Tripathi and Mr. Aditya  
Dhupar, Advocates for R-1.

With

Company Appeal (AT) (Insolvency) No.512 of 2023  
(Arising out of Order dated 09.02.2023 passed by the Adjudicating Authority  
(National Company Law Tribunal), Mumbai Bench, Court II in IA No.188/2022 in  
IA No.1639/2020 in CP(IB)4258/MB/C-II/2019)

IN THE MATTER OF:

Kapil Wadhawan

... Appellant

Vs

Piramal Capital & Housing Finance Ltd. & Ors.

... Respondents

Present:

For Appellant: Mr. Nikhil Nayyar, Sr. Advocate with Mr. Shivam  
Shukla, Advocates.

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Ms. Chitra  
Rentala, Ms. Shatakshi Tripathi and Mr. Aditya  
Dhupar, Advocates for R-1.

Company Appeal (AT) (Insolvency) Nos. 437, 439,

ASHOK BHUSHAN, J.

All these Appeals arise out of same set of facts and proceedings, hence, have been heard together and are being disposed of by this common judgment.

2. Brief background facts giving rise to these Appeals need to be noted to appreciate the issues and contentions raised in these Appeals, are as follows:

(i) The Reserve Bank of India ("RBI") in exercise of its powers under Section 45-IE of the Reserve Bank of India Act, 1934 superseded the Board of Directors of Dewan Housing Finance Corporation Limited ("DHFL") and appointed one Mr. R. Subramaniakumar as the Administrator of DHFL. On an Application filed by RBI against Dewan Housing Finance Corporation Ltd. before Adjudicating Authority under the provisions of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") and Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (for short "Rules 2019"), the Adjudicating Authority admitted the petition by order dated

03.12.2019 and confirmed the appointment of Administrator of DHFL to perform all functions of the Resolution Professional Company Appeal (AT) (Insolvency) Nos. 437, 439, ("RP") under the Code and to conduct the Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor - Dewan Housing Finance Corporation Limited.

(ii) The Administrator of DHFL/ RP as approved by the Adjudicating Authority vide order dated 03.12.2019 filed various Interlocutory Applications ("IA") impugning certain transactions undertaken by the Corporate Debtor. Several IAs were filed by the then Administrator/ RP praying avoidance of different transactions undertaken by the Corporate Debtor in the CIRP of the Corporate Debtor. The Applications filed by the then Administrator were filed under Section 25(2)(j), 43, 44 and 66 of the Code.

(iii) In the CIRP of the Corporate Debtor, Resolution Plan submitted by Piramal Capital & Housing Finance Ltd. was approved by the Committee of Creditors ("CoC") on 15.01.2021. After 15.01.2021, two further Applications were filed by the then Administrator. After approval of the Plan by the CoC, the Administrator/ RP filed an Application before the Adjudicating Authority for approval of the Plan, which Plan stood approved by allowing the IA No.449 of 2021 filed under Section 30 of the Code by order dated 07.06.2021. The Resolution Plan contained a Clause No.2.13, providing that Piramal Capital & Housing Finance Ltd. ("Piramal") will pursue avoidance applications preferred by the Administrator. Company Appeal (AT) (Insolvency) Nos. 437, 439, In accordance with the aforesaid Clause, the Piramal - Successful Resolution Applicant filed different IAs including IA No. 2982 of 2021, 2843 of 2021, 2849 of 2021, 3129 of 2022, 475 of 2022, 3128 of 2022, 188 of 2022 and IA No. 2852 of 2021 etc. seeking to implead/ substitute itself in the place of erstwhile

Administrator. In IA No.3128 of 2022 filed by Piramal in IA No.338 of 2021 (which was filed by the then administrator), in the Application, following prayers were made:

"a. That this Hon'ble Tribunal be pleased to pass an order allowing amendment of the memorandum of parties in the interlocutory application bearing I.A. No.338 of 2021 and all necessary consequential amendments to the I.A. No.338 of 2021 such that the Applicant, being the Corporate Debtor in its new avatar under the name "Piramal Capital & Housing Finance Limited" may be substituted in the place of Mr. Subramaniakumar, the erstwhile Administrator of the Corporate Debtor. b. That this Hon'ble Tribunal be pleased to pass an order allowing/ directing all necessary consequential amendments in pleadings filed by or against the erstwhile Administrator of the Corporate Debtor in the I.A. No.338 of 2021 such that the Applicant, being the Corporate Debtor in its new avatar under the name "Piramal Capital & Housing Finance Limited" may be substituted in the place of Mr. Subramaniakumar, the erstwhile Administrator of the Corporate Debtor. c. That this Hon'ble Tribunal be pleased to pass any such orders or grant any other reliefs that this Hon'ble Company Appeal (AT) (Insolvency) Nos. 437, 439, Tribunal may deem fit in the interest of justice and equity."

(iv) The Appellant filed an affidavit in reply to the aforesaid Application, raising various objections to the Application. Rejoinder affidavit was also filed by Respondent No.1 to the reply submitted by Appellant. Both parties also filed written submissions in support of their respective contentions. The Adjudicating Authority passed order dated 09.02.2023. IA No.3128 of 2022 filed by Piramal in IA No.338 of 2021 was allowed by following order:

"1. The present Application IA 3128 of 2022 has been filed by the Applicant seeking amendment of the memorandum of parties in the IA 338 of 2021 and all necessary consequential amendments to the IA 338 of 2021.

2. The Applicant has also prayed to substitute its name "Piramal Capital & Housing Finance Limited" to be substituted in place of the erstwhile Administrator, Mr. Subramaniakumar.

3. The similar issue has been dealt in the IA 2852 of 2021. In view of the same, the present Application IA 3128 of 2022 is allowed and disposed of."

(v) In the above order dated 09.02.2023, reliance on order passed in IA No.2852 of 2021 on the same date, i.e. 09.02.2023 in IA No.532 of 2022 in IA No.2852 of 2021 in IA No.721 of 2021 was placed and IA No.2852 of 2021 was allowed. IA No.532 of 2022 was filed praying to dismiss the Application. IA No.532 Company Appeal (AT) (Insolvency) Nos. 437, 439, of 2022 and IA No.2852 of 2021 were filed in IA No.721 of 2021, which was filed by the Administrator on 10.02.2021 under Section 25(2)(j), 43, 44. All IAs filed by Piramal praying for substitution of its name in place of erstwhile Administrator were allowed by different orders passed on the same date, i.e. 09.02.2023 relying on order passed on the same date in IA No.532 of 2022 in IA No.2852 of 2021 in IA No.721

of 2021.

(vi) All these Appeals have been filed, challenging the different orders passed on same date.

3. Company Appeal (AT) (Ins.) No.437 of 2023 has been filed by the Appellant, challenging the order dated 09.02.2023 passed in IA No.3128 of 2022; Company Appeal (AT) (Ins.) No.439 of 2023 has been filed challenging order passed by the Adjudicating Authority in IA No.2843 of 2021, which was filed by the Piramal in IA 257 of 2021, filed by the erstwhile Administrator; Company Appeal (AT) (Ins.) No.441 of 2023 has been filed against the order dated 09.02.2023 in IA No.3129 of 2022 filed by Piramal praying for substitution of its name in place of erstwhile Administrator; Company Appeal (AT) (Ins.) No.442 of 2023 has been filed against the order dated 09.02.2023 in IA No.475 of 2022 filed by the Piramal Group seeking amendment to the Memorandum of Parties in IA No.2523 of 2020; In Company Appeal (AT) (Ins.) No.445 of 2023 has been filed against the order dated 09.02.2023 passed in IA No.2982 of 2021 filed by the Piramal in IA No.2524 of 2020 seeking amendment to the Memorandum of Parties and Company Appeal (AT) (Insolvency) Nos. 437, 439, all necessary consequential amendments to IA No.2524 of 2020; Company Appeal (AT) (Ins.) No.451 of 2023 has been filed against the order dated 09.02.2023 passed in IA No.2849 of 2021 filed by Piramal seeking amendment in the Memorandum of Parties in IA No.328 of 2021, which has been allowed. Company Appeal (AT) (Ins.) No.452 of 2023 has been filed against the order dated 09.02.2023 passed in IA No.187 of 2022 filed by Piramal seeking amendment in the Memorandum of Parties in IA No.1912 of 2020, which has been allowed; Company Appeal (AT) (Ins.) No.512 of 2023 has been filed against the order dated 09.02.2023 passed in IA No.188 of 2022 filed by Piramal seeking amendment of the Memorandum of Parties in IA No.1639 of 2022, which has been allowed. Facts and issues raised in all these Appeals being similar in nature, it is sufficient to refer to the record of Company Appeal (AT) (Ins.) No.437 of 2023 for deciding all these Appeals.

4. We have heard learned Senior Counsel for the Appellant as well as learned Senior Counsel appearing for Respondent No.1.

5. The learned Senior counsel for the Appellant challenging the order contends that after completion of the CIRP and after approval of the Resolution Plan, avoidance applications could not have been allowed to continue and the order of Adjudicating Authority permitting continuance of the avoidance applications by Resolution Applicant is not in accordance with law. It is submitted that Successful Resolution Applicant cannot continue prosecution of the avoidance applications since the RP is persona Company Appeal (AT) (Insolvency) Nos. 437, 439, designate under the Code, whose power and duties cannot be delegated. It is submitted that judgment of the Delhi High Court in TATA Steel BSL Ltd. vs. Venus Recruiter Pvt. Ltd. & Ors. decided on 13.01.2023 is not authority for the proposition that Successful Resolution Applicant can prosecute the avoidance applications after completion of the CIRP. It is submitted that impugned order is contrary to the decision of the Delhi High Court in Tata Steel BSL Ltd. (Supra). The Successful Resolution Applicant, who has different legal interests from the Administrator, cannot be substituted in place of Administrator/ RP. The Piramal - Successful Resolution Applicant has vested interest in the outcome and it would act in its own interest, contrary to Administrator/ RP, who plays an impartial role under the Code. It is

submitted that two of the avoidance applications have been filed by the Administrator, subsequent to voting on Resolution Plan on 15.01.2021, which could not be allowed to continue. After voting on Resolution Plan no avoidance applications can be filed.

6. The submissions made by learned Senior Counsel for the Appellant has been countered by the learned Senior Counsel appearing for the Respondent - Piramal. It is submitted that Appellant, who is Ex-Promoter of the Dewan Housing Finance Corporation Limited has no locus to challenge the impugned order. The Appellant is not a person aggrieved by the substitution order passed by the Adjudicating Authority. The substitution order merely permits Piramal to pursue the avoidance applications pending before the Adjudicating Authority. The Appellant, who is Ex-Promoter is estopped from assailing the substitution orders. The Company Appeal (AT) (Insolvency) Nos. 437, 439, Resolution Plan after its approval by CoC has been implemented. The right of Piramal - Successful Resolution Applicant to pursue the avoidance applications emanates from the approved Resolution Plan. Clause 2.13 of the Resolution Plan provides that Piramal will pursue the avoidance applications preferred by the Administrator. The Plan approval order has been unsuccessfully challenged by the Appellant, the avoidance applications can continue post CIRP. The proceedings pertaining to avoidance applications are entirely different from CIRP. The RP is not a persona designate under the Code for the purpose of prosecuting the avoidance applications. All applications were heard jointly on several dates and Adjudicating Authority afforded the parties an effective opportunity of hearing and permitted the parties to file detailed reply, rejoinder and written Submissions. The Appellant has filed the propositions in brief on the Authority of Successful Resolution Applicant to prosecute avoidance applications on behalf of Respondent No.1.

7. We have considered the submission of learned Counsel for parties and have perused the record.

8. We may first notice relevant provisions of the Code and the Regulations relating to the avoidance application. Section 25, sub-section (2) enumerates the duties of RP. Section 25, sub-section (2) provides:

"25. Duties of resolution professional. -

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

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(j) file application for avoidance of transactions in accordance with Chapter III, if any;"

9. Section 26 of the Code provides:

"26. Application for avoidance of transactions not to affect proceedings. -

The filing of an avoidance application under clause



(j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process."

10. The legislative scheme delineated by Section 26 clearly indicates that avoidance applications are not to affect the proceeding of the CIRP. The avoidance application has been treated to be in different stream than the proceedings of the CIRP, Section 26 itself indicates that avoidance application shall not affect the proceedings of CIRP and it can continue even after completion of the CIRP.

11. Regulation 35A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (for short "CIRP Regulations") and Section 43 of the Code deals with 'Preferential transactions and relevant time'. Section 43, sub-section (1) is as follows:

"43. Preferential transactions and relevant time. -

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-

section (2) to any persons as referred to in sub-section Company Appeal (AT) (Insolvency) Nos. 437, 439, (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44."

12. In similar terms, Section 45, sub-section (1), deals with 'Avoidance of undervalued transactions'. Section 66, sub-section (1) deals with 'Fraudulent trading or wrong trading', which provides as follows:

"66. Fraudulent trading or wrongful trading. -

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit."

13. We may further notice Regulation 35A of CIRP Regulations, which deals with 'Preferential and other transactions' is as under:

"35A. Preferential and other transactions.

(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been

subjected to any transaction covered under sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he Company Appeal (AT) (Insolvency) Nos. 437, 439, shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirtieth day of the insolvency commencement date.

(3A) The resolution professional shall forward a copy of the application to the prospective resolution applicant to enable him to consider the same while submitting the resolution plan within the time initially stipulated.

(4) The creditors shall provide to the resolution professional, relevant extract from the audits of the corporate debtor, conducted by the creditors such as stock audit, transaction audit, forensic audit, etc."

14. The above provisions clearly indicate that statutory scheme of the Code is that preferential transaction, undervalued transaction or fraudulent transactions have to be brought into the notice of the Adjudicating Authority by an application filed by the Resolution Professional/ Liquidator. The statutory scheme clearly states the its the duty of Resolution Professional/ Liquidator to determine the nature of transactions and file an appropriate application. One conclusion is thus inescapable that applications referred to in Section 43, 45 and 66 have to be filed by the RP before the Adjudicating Authority. In the present case, as noticed above, Administrator appointed by the Reserve Bank of India and approved by the Adjudicating Authority to function as RP of the Dewan Company Appeal (AT) (Insolvency) Nos. 437, 439, Housing Finance Corporation Ltd. - the Corporate Debtor, has filed all avoidance applications in the present case.

15. The first submission raised by the learned Counsel for the Appellant is that after completion of the CIRP, avoidance applications, which are not decided by that time, becomes infructuous and cannot be proceeded any further. The above submission of the learned Counsel for the Appellant is not acceptable on account of the statutory scheme delineated by the Code and the Regulations. As noted above, Section 26 itself gives clear legislative intent that avoidance applications are different stream than the stream of insolvency resolution process. We may also notice provision of Section 36, sub-section (3) (f), which also gives clear indication of the statutory scheme that even after completion of the CIRP, the statute envisages recoveries through proceedings for avoidance transactions. Section 36, sub-section (3) (f) is as follows:

"36 (3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;"

16. Admittedly, the liquidation process begins when no Resolution Plan is approved in CIRP. Continuance of the avoidance application is implicit by provision of Section 36, sub-section (3), sub-clause (f). What is contemplated in Section 36(3)(f) is also clear from CIRP process, which is Company Appeal (AT) (Insolvency) Nos. 437, 439, reflected by Regulation 38(2)(d) of CIRP Regulations. Regulation 38 provides for 'Mandatory contents of the resolution plan'. Regulation 38, sub-regulation (2), sub-clause (d) provides as follows:

"38(2)(d) provides for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed:

Provided that this clause shall not apply to any resolution plan that has been submitted to the Adjudicating Authority under sub-section (6) of section 30 on or before the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022"

17. Regulation 38(2)(d) has been inserted by Notification dated 14.06.2022. The insertion of Regulation 38(2)(d) by the above amendment clearly makes the legislative intent clear that Resolution Plan shall provide manner in which proceedings in respect of avoidance transactions will be pursued after approval of Resolution Plan. We may also refer to the recent judgment of the Delhi High Court in TATA Steel BSL Ltd. vs. Venus Recruiter Pvt. Ltd. & Ors. - (2023) SCC OnLine Del 155 decided on 13.01.2023 where it has been held that avoidance application can be heard after conclusion of CIRP. The learned single Judge in Venus Recruiter Pvt. Ltd. vs. Union of India, against which Appeal was filed before the Company Appeal (AT) (Insolvency) Nos. 437, 439, Division Bench had taken a view that avoidance application cannot be allowed to continue after approval of Resolution Plan in event no provision is made to that effect in the Resolution Plan. The view taken by the learned single Judge has been disapproved by the Division Bench. In paragraph 80, following has been held by the Division Bench:

"80. The Ld. Single Judge operates on the assumption that the sum or property acquired upon adjudication of the avoidance application will be appropriated by the corporate debtor in its new avatar. As laid down above, the provisions pertaining to avoidable transactions is to primarily benefit creditors. While the Corporate Debtor ceases to exist in its erstwhile avatar, in cases where the Resolution Plan is silent on the treatment of any pending applications because such information could not be made available to the applicant, the creditors of the corporate debtor can still be the beneficiaries of the sum or properties that may be recovered from adjudication of an avoidance application. The same is consistent with the scheme of the Code and in line with object sought to be achieved by it which inter-alia includes, increasing the

availability of credit within the economy."

18. The Division Bench of the Delhi High Court has also held that RP becomes functus officio upon conclusion of the CIRP, but he does not become functus officio with regard to avoidance application. In paragraph 88 and 89, the Division Bench laid down following:

"88. Sections 43-51, 66 & 67 of the IBC lay down various transactions that may be avoided by the resolution professional and the actions that can be taken. Company Appeal (AT) (Insolvency) Nos. 437, 439, against erstwhile management for fraudulent transactions. These provisions are primarily aimed at swelling the asset pool available for distribution to creditors and preventing unjust enrichment of one party at the expense of other creditors. The scheme of the Act suggests that proceedings for unearthing such transactions are ancillary proceedings and the resolution of the corporate debtor need not be stalled due to pendency of such proceedings. The insolvency professional has to thoroughly examine the transactions which the corporate debtor has undertaken in the period prior to commencement of the period of insolvency proceedings. This is a very cumbersome process and more so in respect of companies whose books and records do not properly document all its past transactions. The resolution professional has to also assess if a suspicious transaction would meet the requirements that are necessary to be seen before terming it as a suspicious transaction. Not only the investigation but the adjudication of such transaction is a lengthy process and findings of these transactions by adjudicating authority involves answering questions on both law and fact and, therefore, it will be impossible to conclude these proceedings within the time frame laid down in the process. Since investigation and adjudication of these transactions are time consuming this cannot allow persons who were managing the corporate debtor to escape from reversal of these transactions. The time line given in the IBC cannot be used as a premium by the unscrupulous persons who have forced the corporate entity into insolvency process.

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89. The concern of Union of India is that if the interpretation of the learned Single Judge is accepted then persons who were responsible for the corporate debtor to go into liquidation because of unscrupulous transactions will get away with their deeds. The submission that the scheme of IBC is not purely commercial in nature and the purpose of the Act which is also to ensure that public money is brought back into the system is not unfounded."

19. The Division Bench has recorded its conclusion in paragraph 90, which is as follows:

"90. The amount that is available after the transactions are avoided cannot go to the kitty of the resolution applicant, in this case the Appellant in LPA No. 37/2021. For the resolution applicant, it was purely a commercial contract, a commercial decision

whereunder the resolution applicant knew the ground reality, the assets and the liabilities. The benefit arising out of the adjudication of avoidance applications is not for the corporate debtor in its new avatar since it does not continue as a debtor and has gone through the process of resolution. The expectation that some more amount could come to the kitty was not present when the commercial decision was taken by the resolution applicant while agreeing to take over the corporate debtor. The purpose of the avoidance application as stated above is to enhance the asset pool available for the decision of creditors who are primarily financial institutions and have taken the haircut in agreeing to accept a much lesser amount than what was due and payable to them. This is public money, and, therefore, the amount that is received if and when transactions are avoided and receive the imprimatur of Company Appeal (AT) (Insolvency) Nos. 437, 439, adjudicating authority must be distributed amongst the committee of creditors in a manner determined by the adjudicating authority.

### Conclusion

a) The phrase "arising out of" or "in relation to" as situated under Section 60(5)(c) of the IBC is of a wide import and it is only appropriate that such applications are heard and adjudicated by the Adjudicating Authority, i.e., the NCLT or the NCLAT, as the case maybe, notwithstanding that the CIRP has concluded and the resolution applicant has stepped into the shoes of the promoter of the erstwhile corporate debtor.

b) CIRP and avoidance applications, are, by their very nature, a separate set of proceedings wherein, the former, being objective in nature, is time bound whereas the latter requires a proper discovery of suspect transactions that are to be avoided by the Adjudicating Authority. The scheme of the IBC reinforces this difference. Accordingly, adjudication of an avoidance application is independent of the resolution of the corporate debtor and can survive CIRP.

c) The endeavour of the IBC and its rules and regulations is to ensure that all processes within the insolvency framework are time efficient. While the law mandates a resolution plan to necessarily provide for the treatment of avoidance applications if the same are pending at the time of submission of resolution plans, it cannot be accepted that avoidance applications will be rendered infructuous in situations wherein the resolution plan could not have accounted for avoidance applications due to exigencies that delayed initiation of action in respect of avoidable transactions beyond the submission of a resolution plan before the adjudicating authority. This is because such an interpretation will render the provisions pertaining to suspect transactions otiose and let the beneficiaries of such Company Appeal (AT) (Insolvency) Nos. 437, 439, transactions walk away, scot-free. Money borrowed from creditors is essentially public money and the same cannot be appropriated by private parties by way of suspect arrangements. Therefore, in cases such as the present one,

wherein such transactions could not be accounted, the Adjudicating Authority will continue to hear the application.

Such benefit cannot be given in cases where the RP had already applied for prosecution of avoidance applications and the applicant ought to have been cognizant of pending avoidance applications but did not account for the same in its resolution plan.

d) It follows that the RP will not be functus officio with respect to adjudication of avoidance applications in a situation, as described hereinabove. There being a clear demarcation between the scope and nature of the CIRP and avoidance application within the scheme of the IBC, the RP can continue to pursue such applications. The method and manner of the RP's remuneration ought to be decided by the Adjudicating Authority itself.

e) The provisions pertaining to suspect transactions exist specifically to benefit the creditors of the corporate debtor by enhancing the asset pool available for resolution of the corporate debtor. The IBC also envisages increasing credit availability in the country as one of its primary objectives. It is apposite that any kind of benefit acquired from the adjudication of avoidance applications, in cases where treatment of such applications could not be accounted in the plan, must be given to the creditors of the erstwhile corporate debtor, considering especially, that in the present case, the creditors took a massive haircut towards resolution of the corporate debtor. Giving such benefit to the creditors is in consonance with the scheme of the IBC.

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f) The amount that is made available after transactions are avoided cannot go to the kitty of the resolution applicant. The benefit arising out of the adjudication of the avoidance application is not for the corporate debtor in its new avatar since it does not continue as a debtor and has gone through the process of resolution. This amount should be made available to the creditors who are primarily financial institutions and have taken a haircut in agreeing to accept a lesser amount than what was due and payable to them."

20. The Division Bench has clearly held that avoidance application is independent of the resolution of the Corporate Debtor and can survive the CIRP. We, thus, are of the view that argument of the Appellant that after conclusion of the CIRP by approval of the Resolution Plan, avoidance application becomes infructuous, cannot be accepted.

21. Another submission which has been pressed by the learned Counsel for the Appellant is that Successful Resolution Applicant cannot pursue the avoidance applications and if at all, the avoidance applications can be pursued, it could have been only by the RP and that in the present case the Administrator. It is submitted that RP is persona designate, whose jurisdiction cannot be delegated to any other person. The present is not a case where Successful Resolution Applicant is exercising any delegated powers of RP/ Administrator. In the present case, Resolution Plan envisages and specifically provides for pursuing of the applications by the Successful Resolution Applicant. The Successful Resolution Applicant is not exercising any delegated powers of RP, hence,

the argument that RP Company Appeal (AT) (Insolvency) Nos. 437, 439, being persona designate, has no relevance in the present case. The Adjudicating Authority in the present case has substituted the Piramal - Successful Resolution Applicant relying on provisions of the Resolution Plan. The Adjudicating Authority while approving the Resolution Plan vide its order dated 07.06.2021 has noted the provisions of the Plan, which empowers the Resolution Applicant to pursue the avoidance application. In order passed by the Adjudicating Authority dated 07.06.2021, following has been stated:

"i. Under Section 2.13.2 of Part A of the Resolution Plan, the Successful Resolution Applicant has provided that it intends to pursue, on a best efforts basis, the application(s) filed by the Administrator before this Hon'ble Tribunal in respect of these Avoidance Transactions (as defined in the Resolution Plan). Any positive monetary recovery received by the Corporate Debtor as a result of orders passed in relation to the Avoidance Transactions shall be distributed, net of costs and expenses (including taxes), to the Financial Creditor pro rata to the extent the Financial Debt for Financial Creditors, provided that, the CoC may in its discretion adopt a different manner of distribution (which may take into account the order of priority amongst Financial Creditors as laid down in Section 53(1) of the Code) and such decision of the CoC shall be accepted by the Successful Resolution Applicant, subject to there being no change in the Total Resolution Amount.

ii. Under Section 2.13.3 of Part A of the Resolution Plan, the Successful Resolution Applicant ascribes value of INR 1 in respect of any transactions that may be avoided/set aside by this Hon'ble Tribunal in terms of Section 66 of the Code. Accordingly, any positive recovery as a result of reversal of Company Appeal (AT) (Insolvency) Nos. 437, 439, transactions avoided or set aside by this Hon'ble Tribunal in terms of Section 66 of the Code would accrue to the sol benefit of the Successful Resolution Applicant. All the costs and expenses incurred or to be incurred towards litigation pertaining to Section 66 of the Code shall be to the account of the Successful Resolution Applicant."

22. We have noticed above the provisions of Regulation 38(2)(d), which has been inserted with effect from 14.06.2022. Although, the proviso to Regulation 38(2)(d) provides that this clause shall not be applicable to Resolution Plan, which was submitted before the commencement of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022, that is prior to 14.06.2022, however, in the present case, the Resolution Plan, which was submitted prior to the date, contained specific provision for continuance of avoidance applications by Successful Resolution Applicant, which provision in the Resolution Plan cannot be said to be contrary to any provisions of the Code or the Regulations. Regulation 38(2)(d), which is not specifically attracted with regard to Resolution Plan in question, however, legislative intendment, which has been brought in the Regulation, clarifies the law. The Resolution Plan has been approved by the Adjudicating Authority and by virtue of Section 30 and 31, the Resolution Plan approved by the Adjudicating Authority is binding on Corporate Debtor, its employees, Members, creditors, including Central and the State Government or any legal Authority,

guarantors and other stake holders involved in the Resolution Plan. When Resolution Plan specifically Company Appeal (AT) (Insolvency) Nos. 437, 439, empowers the Successful Resolution Applicant to pursue the avoidance applications, the said provisions of the Plan shall bind everyone including the erstwhile Administrator. The submission of the learned Counsel for the Appellant cannot be accepted that it is the erstwhile Administrator/ RP, who could alone, if at all, pursue the avoidance application. This argument has to be rejected in view of the specific clause, permitting the Successful Resolution Applicant to pursue the application.

23. Another argument advanced by the learned Counsel for the Appellant is that two applications filed by the Administrator were after Resolution Plan was voted on 15.01.2021. The learned Counsel for the Appellant has referred to two IAs, which are subject matter of Company Appeal (AT) (Insolvency) Nos.451 of 2023 and 439 of 2023, which according to the Appellant were not even filed till the date Resolution Plan was voted, i.e. 15.01.2021. The submission of the learned Counsel for the Appellant is that any avoidance application, which has been filed subsequent to approval of the Plan cannot be pursued and the order of the Adjudicating Authority substituting the Piramal in those application deserves to be set aside.

24. The timeline for filing avoidance application under Regulation 35A have been held to be not mandatory, however, the applications have to be filed in a reasonable time and any avoidance application, which is filed with inordinate delay can be refused to be entertained by the Adjudicating Authority. The submission which has been pressed by the learned Counsel Company Appeal (AT) (Insolvency) Nos. 437, 439, for the Appellant is that avoidance applications, which were filed after approval of the Resolution Plan by the CoC, could not have been entertained. In the Code and the Regulations, there are no such provisions, which indicate that avoidance application filed after approval of the Plan by the CoC is to be rejected or not. It depends on the facts of each case and circumstances as to whether any application filed after approval of the Resolution Plan by the CoC can be considered or not. In the present case, we noticed that Resolution Plan has noted the pending avoidance applications.

25. We may also refer to the judgment of Division Bench of the Delhi High Court in TATA Steel BSL Ltd. where the Delhi High Court has noted exigencies of delay in initiation of action in respect of avoidable transactions beyond the submission of Resolution Plan and no exception was taken by the Court to such exigency. Conclusion (c) of the Delhi High Court can be relied to reject the submission of learned Counsel for the Appellant that delay in initiation of two applications, does not entitle the Successful Resolution Applicant to pursue the applications. As noted above, admittedly, the Administrator has filed all the avoidance applications and two applications, which have been specifically referred by the Appellant, were filed subsequent to 15.01.2021 have also been rightly permitted to be pursued by the Successful Resolution Applicant. It is to be noted that present is not a case that any avoidance applications have been Company Appeal (AT) (Insolvency) Nos. 437, 439, filed after approval of the Resolution Plan by the Adjudicating Authority, i.e. after 07.01.2021.

26. As noted above, the present Appeals have been filed by the Ex- Promoter of the Dewan Housing Finance Corporation Finance Limited and allegation regarding fraudulent transactions were against the Ex- Promoters including the Appellant. The object of continuing the avoidance applications,



even after the CIRP is the discovery of dubious transactions and permitting such preferential undervalued and fraudulent transactions to continue, will be depriving the benefit of such transactions to the creditors, which is not the intent of the statutory scheme. The submission advanced on behalf of Union of India questioning the interpretation of learned single Judge in Venus Recruiter Pvt. Ltd. was accepted by the Division Bench and in paragraph 89 of the judgment, following has been observed:

"89. The concern of Union of India is that if the interpretation of the learned Single Judge is accepted then persons who were responsible for the corporate debtor to go into liquidation because of unscrupulous transactions will get away with their deeds. The submission that the scheme of IBC is not purely commercial in nature and the purpose of the Act which is also to ensure that public money is brought back into the system is not unfounded."

27. We, thus, are of the view that the impugned order has rightly permitted the Piramal - Successful Resolution Applicant to pursue the Company Appeal (AT) (Insolvency) Nos. 437, 439, avoidance applications, which were filed by the erstwhile Administrator and were pending before the Adjudicating Authority. We do not find any error in the impugned orders passed by the Adjudicating Authority permitting the Piramal to pursue the applications and rejecting the applications filed by the Appellant and other Applicants to reject such applications. We do not find any good ground in these Appeals to interfere with the impugned orders passed by the Adjudicating Authority. There are no merits in any of the Appeals. All the Appeals are dismissed.

[Justice Ashok Bhushan] Chairperson [Barun Mitra] Member (Technical) NEW DELHI 15th May, 2023 Ashwani Company Appeal (AT) (Insolvency) Nos. 437, 439,