

Jignesh Shah vs Il & Fs Financial Services Ltd. & Anr on 21 January, 2019

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 521 of 2018

(Arising out of Order dated 28th August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in T.C.P. No. 919/I&BC/NCLT/MB/MAH/2017)

IN THE MATTER OF:

Pushpa Shah & Anr.

...Appellants

Vs

IL&FS Financial Services Limited & Anr.

....Respondents

Present:

For Appellants:

Mr. S.N. Mookherjee, Senior Advocate with Mr. Gopal Mukherjee, Mr. Abhijeet Sinha, Mr. Mihir, Mr. Anupam and Ms. Misha Rohatgi Mohta, Advocates.

For Respondents:

Mr. Venkatesh Dhond, Senior Advocate assisted by Mr. Ashish Kamat, Mr. V.P. Singh, Ms. Roopali Singh, Mr. Vivek Shetty, Ms. Oendri Neogi, Mr. Shivam and Mr. Abhishek Singh, Advocates.

WITH

Company Appeal (AT) (Insolvency) No. 643 of 2018

(Arising out of Order dated 30th August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in T.C.P. No. 919/I&BC/NCLT/MB/MAH/2017)

Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018

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IN THE MATTER OF:

Jignesh Shah

...Appellant

Vs

IL&FS Financial Services Limited & Anr.

....Respondents

Present:

For Appellants:

Mr. Sudipto Sarkar, Senior Advocate with Ms. Misha Rohatgi Mohta, Advocates.

For Respondents:

Mr. Krishnendu Datta, Ms. Roopali Singh, Ms. Oendri Neogi, Mr. Shivam and Mr. Goutham Shivshankar, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

These appeals arise out of common 'Corporate Insolvency Resolution Process' and have been preferred by shareholders of 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') against common order and, therefore, they were heard together and are disposed of by this common judgment.

2. At the instance of 'IL&FS Financial Services Limited'- ('Financial Creditor'), 'Corporate Insolvency Resolution Process' has been initiated against 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') by order dated 28th August, 2018 read with addendum-cum-corrigendum order Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 dated 30th August, 2018. The Appellants have challenged the same on different grounds.

3. 'IL&FS Financial Services Limited'- ('Financial Creditor') filed petition under Section 433(e), (f) and Section 434 of the Companies Act, 1956 on 21st October, 2016, bearing Company Petition No. 847/2016 before the Hon'ble Bombay High Court. The said petition was transferred before the

National Company Law Tribunal, Mumbai Bench, Mumbai, pursuant to Notification dated 29th June, 2017 issued by the Central Government under Section 434 of the Companies Act, 2013 read with Section 239 of the 'Insolvency and Bankruptcy Code, 2016' ('I&B Code' for short).

4. On transfer of case records from High Court to National Company Law Tribunal, Mumbai, 'IL&FS Financial Services Limited'- ('Financial Creditor') had filed the application on 25th May, 2017 on the requisite Form-1 as prescribed under Section 7 of the 'I&B Code' read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in respect of a debt of Rs. 97,79,40,000/- and default of payment of a financial debt of Rs. 266,39,08,560/- (as referred in Part-IV of Form No.1) enclosing therein the evidences of alleged debt and occurrence of alleged default, as well as a consent letter of the proposed 'Insolvency Resolution Professional'.

5. The National Company Law Tribunal, Mumbai Bench, Mumbai, functioning as Adjudicating Authority by order dated 28th August, 2018 as Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 amended on 30th August, 2018, admittedly, treated the application under Section 7 of the 'I&B Code' and admitted it for initiation of the 'Corporate Insolvency Resolution Process' against 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor').

6. At this stage, it is desirable to mention that though the application under Section 7 was considered by two Members of the Bench of the Adjudicating Authority, Mumbai, order dated 28th August, 2018 was signed by only one Member (Mr. M.K.Shrawat, Member (Judicial)) and subsequently, by addendum-cum-corrigendum order dated 30th August, 2018, it was shown that the other Member (Mr. Bhaskara Pantula Mohan, Member (Judicial)) had agreed and gave his consent on the last page of the order dated 30th August, 2018. The addendum-cum-corrigendum order dated 30th August, 2018 is extracted below:

"ADDENDUM-CUM-CORRIGENDUM ORDER

1. In the Order delivered on 28.08.2018 in CP 919/1&BC/NCLT/MB/MAH/2017 under section 7 of Insolvency & Bankruptcy Code titled as:

"IL&FS Financial Services Ltd. : Petitioner/Financial Creditor V/S La-Fin Financial Services Pvt. Ltd.: Respondent/Corporate Debtor", inadvertently Coram printed as "Hon'ble M.K. Shrawat, Member (Judicial)" instead of:-

Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 "Hon'ble M.K. Shrawat, Member (Judicial) Hon'ble Bhaskara Pantula Mohan, Member (Judicial)".

2. Said Order placed before the other Respected Member Hon'ble Bhaskara Pantula Mohan, who has expressed his agreement with the verdict pronounced. A remark on the last page No.20 of the Order is made under his signature as below:-

"I agree and hereby give my consent."

3. Consequently this Addendum-cum-Corrigendum is signed by both the Members to be made part and parcel of the Order dated 28.08.2018 (supra). Henceforth to be read as amended."

7. Learned counsel appearing on behalf of the Appellants has challenged the impugned orders mainly on the following grounds: -

There is no financial debt and there is no relationship of debtor and creditors between the 'Corporate Debtor' and 'IL&FS Financial Services Limited'- ('Financial Creditor'), for the following reasons:

a. The principal documents from which the present controversy emanates are titled "Share Purchase Agreement ('SPA')" and "Letter of Undertaking ('LoU')".

Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 b. In the 'SPA', the parties are referred to as purchasers and sellers and the monies paid by the 'Corporate Debtor' to 'Multi Commodity Exchange of India Limited ('MCX')' is referred to as the purchase consideration.

c. The 'LoU' only casts an obligation on the 'Corporate Debtor' to offer to purchase the shares of 'MCX Stock Exchange Ltd. ('MCX-SX')' acquired by 'IL&FS Financial Services Limited'- ('Financial Creditor').

d. The 'LoU' executed by the 'Corporate Debtor' at best provided an option to 'IL&FS Financial Services Limited'- ('Financial Creditor') to exit its investment in 'MCX-SX'. This option, at best was a one time option, which, if not exercised within the time period stipulated in the 'LoU' would lapse. The exercise of the option would lead to a transaction of sale and purchase of goods, namely shares of 'MCX-SX'. The non-exercise of such option would lead to 'IL&FS Financial Services Limited'- ('Financial Creditor') continuing to remain invested in 'MCX- SX'. Therefore, in either scenario the 'LoU' could not have given rise to a financial debt.

e. The letters dated 3rd August, 2012, 16th August, 2012, 21st August, 2012, 8th November, 2012, 7th January, 2013, 15th April, 2013 issued by 'IL&FS Financial Services Limited'- ('Financial Creditor') refer to the exercise of a Put Option/Buy Back for equity investment.

Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 f. 'IL&FS Financial Services Limited'- ('Financial Creditor') in its statements of Accounts for Financial Years 2009-2010 to 2016- 2017 has classified the monies paid by it to 'MCX' as an investment in shares of 'MCX-SX'.

g. The suit filed by 'IL&FS Financial Services Limited'- ('Financial Creditor') prayed for specific performance by the 'Corporate Debtor' by purchasing shares of 'MCX-SX' from 'IL&FS Financial Services Limited'- ('Financial Creditor') and in the alternate

payment of damages in lieu of specific performance and not a suit for recovery of a debt.

8. It was further submitted that the Hon'ble Bombay High Court in Writ Petition No. 213 of 2011 has already held that on the date of execution of the 'SPA' and the 'LoU' there was no forward sale or purchase agreement on the shares acquired by 'IL&FS Financial Services Limited'- ('Financial Creditor') under the 'SPA'.

9. The decision of the Hon'ble Bombay High Court in Appeal No. 274 of 2015 shows that on the exercise of the option by 'IL&FS Financial Services Limited'- ('Financial Creditor'), the 'LoU' would result in a concluded contract for purchase and sale of shares held by 'IL&FS Financial Services Limited'- ('Financial Creditor') in 'MCX-SX'.

10. It was submitted that the Adjudicating Authority has ignored the letter dated 11th August, 2010 addressed by the 'IL&FS Financial Services Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 Limited'- ('Financial Creditor') to 'Securities and Exchange Board of India', wherein it has described the arrangement as an exit arrangement.

11. According to the learned counsel for the Appellant, there was no disbursement of money to 'IL&FS Financial Services Limited'- ('Financial Creditor') by 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor').

12. Referring to one or other decision of this Appellate Tribunal, it was submitted that the Adjudicating Authority wrongly held that the 'IL&FS Financial Services Limited' comes within the meaning of 'Financial Creditor'.

13. It was also contended that the application was barred by limitation and was not maintainable. Reliance has been placed on the decision of the Hon'ble Supreme Court in "B.K. Educational Services Pvt. Ltd. v. Parag Gupta & Associates" (2018) SCC Online SC 1921".

14. It was further submitted that the petition stood abated on 5th February, 2017 in view of the Notification dated 7th December, 2016 issued by the Central Government whereby 'Companies (Transfer of Pending Proceedings) Rules, 2016' were framed, Form-1 as required as per Section 7 of the 'I&B Code' was not filed within a period of 60 days therefrom i.e. by 5th February, 2017.

15. Learned counsel appearing on behalf of the Appellants submits that the impugned order is passed in a manner contrary to settled principles. It Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 was submitted that the order dated 28th August, 2018 signed by single Member and pronounced on the same date cannot be held to be legal and the addendum-cum-corrigendum order signed by both the Members on 30th August, 2018 wrongly records that the Coram was inadvertently printed with the name of only one Member of the Bench. The nature of the error is not clerical or arithmetical or error arising from an accidental slip or omission and the same could not have been corrected by the Adjudicating Authority on its own motion and in absence of any application for rectification filed by the parties.

16. The brief facts of the case are as follows:

16.1. Prior to 20th August, 2009, the 'IL&FS Financial Services Limited'-

('Financial Creditor') was holding approximately 5% of the equity shares of 'MCX'. Pursuant to a negotiation, it was agreed between the 'IL&FS Financial Services Limited'- ('Financial Creditor') and the 'MCX' Group that

(i) the 'IL&FS Financial Services Limited'- ('Financial Creditor') would exit MCX; (ii) the 'IL&FS Financial Services Limited'- ('Financial Creditor') investment in 'MCX' would be transferred to another investor viz IFCI; (iii) part of the proceeds realized therefrom would be used by the 'IL&FS Financial Services Limited'- ('Financial Creditor') to purchase from 'MCX' 4,42,00,000 equity shares in 'MCX-SX' representing 2.46% of its equity share capital; and (iv) the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor'), as a condition to the 'IL&FS Financial Services Limited'- ('Financial Creditor') purchasing the aforesaid shares of 'MCX-SX', would Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 offer to buy or cause to be bought from the 'IL&FS Financial Services Limited'- ('Financial Creditor') the said Shares at an agreed price within a pre-determined period.

16.2. A "Share Purchase Agreement" (in short "SPA") dated 20th August, 2009 was executed between the 'IL&FS Financial Services Limited'- ('Financial Creditor'), 'MCX' and 'MCX-SX'. As per 'SPA', the 'IL&FS Financial Services Limited'- ('Financial Creditor') purchased 4.42 Cr. equity shares of 'MCX-SX' which was 2.46% of the equity share capital of 'MCX-SX'. Side by side a 'Letter of Undertaking' ('LOU') was executed on 20th August, 2009 by the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') to purchase the 'IL&FS Financial Services Limited'- ('Financial Creditor') share in 'MCX-SX' any time after a period of one year but not later than three years from the date of 'IL&FS Financial Services Limited'- ('Financial Creditor') investment pursuant to said 'SPA'. 16.3. A premium or a price was also indicated that the purchase price of the 'IL&FS Financial Services Limited'- ('Financial Creditor') share would be higher of (i) the price that would give the 'IL&FS Financial Services Limited'- ('Financial Creditor') an internal rate of return of 15% on its investment; or

(ii) the price at which the most recent transaction of 'MCX-SX's equity shares was carried out by the 'MCX Group'. Further, as per the "Letter of Undertaking" dated 20th August, 2009 the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') without the 'IL&FS Financial Services Limited'- ('Financial Creditor') written consent forbidden to issue 'MCX-SX' share to Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 any person(s) at a price below Rs.35/- per equity share. The 'IL&FS Financial Services Limited'- ('Financial Creditor'), therefore, purchased the share of 'MCX' on 20th August, 2009 at Rs. 36/- per share for total consideration of Rs. 159,12,00,000/- (Rupees One Hundred Fifty-Nine Crore Twelve Lakh Only).

16.4. On 20th November, 2009, the 'IL&FS Financial Services Limited'- ('Financial Creditor') received an 'EOGM' notice from 'MCX-SX' scheduled to be held on 15th December, 2009 for consideration to pass a Special Resolution for "Scheme of Reduction" of the Share Capital of

'MCX-SX'. The explanatory statement attached to 'EOGM' notice stated the rationale for the proposed scheme of reduction as under:

- "(i) the need to comply with the Securities Contracts (Regulation) (Manner of Increasing and Maintaining Public Shareholding in Recognized Stock Exchanges) Regulations, 2006 ("MIMPS Regulations") as stipulated by the Securities & Exchange Board Of India (SEBI) and;
- (ii) acknowledgement of the fact that the sale of the promoters' shareholding in order to comply with the MIMPS Regulations would unacceptably delay the required compliance.

Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 Under the heading "Effects of the Proposed Reduction", the Explanatory Statement set out :

"Post reduction, the promoters would not be acquire any equity shares in the Company in excess of limit specified in MIMPS Regulations, at any point of time."

16.5. As per the 'IL&FS Financial Services Limited'- ('Financial Creditor'), the proposed Scheme of Reduction was prejudicial to its interest, hence decided to vote against the proposal. The 'IL&FS Financial Services Limited'- ('Financial Creditor') has conveyed the decision to the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') through an e-mail dated 11th December, 2009. However, the 'IL&FS Financial Services Limited'- ('Financial Creditor') and the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') ('MCX Group') entered into a negotiation and arrived at a resolution between the parties, whereby in its capacity as Promoter of 'MCX-SX' addressed a letter dated 14th December, 2009 (in short "2009 MCX letter") to the 'IL&FS Financial Services Limited'- ('Financial Creditor') as under :-

- "(i) MCX would call the warrants issued in favour of the Petitioner to be purchased immediately on the approval of the Scheme of Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 Reduction and in any event before March 31, 2010;
- (ii) that the said letter and the terms thereof were in no way to be construed as a dilution of the terms of the SPA and the Letter of Undertaking and all the terms of the said documents would continue to be true and valid;
- (iii) requesting the Petitioner to approve the Scheme of Reduction at the EOGM in light of the above."

16.6. Certain legal formalities were completed. The Hon'ble Bombay High Court had passed an Order dated 12th March, 2010 sanctioning the Scheme of Reduction. Thereafter, on 26th March, 2010 'MCX' duly purchased the warrant issued in favour of the 'IL&FS Financial Services Limited'- ('Financial Creditor') for the share extinguished. 16.7. The controversy erupted when the 'IL&FS Financial Services Limited'- ('Financial Creditor') received a letter dated 23rd August, 2010 from the

'MCX-SX' stating inter-alia that 'Financial Technologies India Limited' ('FTIL') had informed 'MCX-SX' that the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') obligations under the 'Letter of Undertaking' had become infructuous on account of the Scheme of Reduction being approved by the Hon'ble High Court. Further, the said letter stated that in Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 compliance of the order of Hon'ble Bombay High Court dated 10th August, 2010 passed in Writ Petition No. 1440/2010, the Board of Directors of the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') has passed a resolution declining to honour any buy-back or other similar arrangement. 16.8. The 'IL&FS Financial Services Limited'- ('Financial Creditor') replied on 10th September, 2010 refuting the wrongful stand taken by 'MCX-SX', denying the contentions of the 'MCX Group', and reiterating that the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') continued to be responsible to honour its obligations to the 'IL&FS Financial Services Limited'- ('Financial Creditor') under the 'Letter of Undertaking'. Further, the 'IL&FS Financial Services Limited'- ('Financial Creditor') also recorded the fact that by way of the 2009 'MCX Letter', confirmed that there would be no dilution of the terms of either the 'SPA' or the 'Letter of Undertaking'. 16.9. An Order of the Hon'ble Bombay High Court is on record dated 14th March, 2012 (Writ Petition No. 213/2011) filed by 'MCX Stock Exchange Limited' (Petitioner) Vs. 'Securities and Exchange Board of India' ('SEBI') (Respondent) on the issue that the Whole Time Member of the Securities and Exchange Board of India has rejected an application filed by the Petitioner for permission to undertake business as a Stock Exchange, other than for the Currency Derivatives Segment. The order is under Section 4 of the 'Securities Contracts (Regulation) Act, 1956 ('SCRA') and Section 11(1) and 19 of the 'Securities and Exchange Board of India Act, 1992'. The Petitioner had challenged the legality of the said order before the Honble Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 Bombay High Court. As far as the question of validity of buy back agreement was concerned, the relevant observations of the Hon'ble High Court were as under :-

"74. Now, it is in this background that the finding of illegality in the impugned order must be assessed. The buyback agreements furnish to PNB and IL&FS an option. The option constitutes a privilege, the exercise of which depends upon their unilateral volition. In the case of PNB, the buy back agreements contemplated a buy back by FTIL after the expiry of a stipulated period. But, in the event that PNB still asserted that it would continue to hold the shares, despite the buyback offer, FTIL or its nominees would have no liability for buying back the shares in future. In the case of IL&FS, La-fin assumed an obligation to offer to purchase either through itself or its nominee the shares which were sold to IL&FS after the expiry of a stipulated period. In both cases, the option to sell rested in the unilateral decision of PNB and IL&FS, as the case may be.

75. In a buy back agreement of the nature involved in the present case, the promisor who makes an offer to buy back shares cannot compel the exercise of the option by the promisee to sell the shares at a future Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 point in time. If the promisee declines to exercise the option, the promisor cannot compel performance. A concluded contract for the sale and purchase of shares comes into existence only when the promisee upon whom an option is conferred, exercises the option to sell the shares. Hence, an option to

purchase or repurchase is regarded as being in the nature of a privilege.

80. In the present case, there is no contract for the sale and purchase of shares. A contract for the purchase or sale of the shares would come into being only at a future point of time in the eventuality of the party which is granted an option exercising the option in future. Once such an option is exercised, the contract would be completed only by means of spot delivery or by a mode which is considered lawful. Hence, the basis and foundation of the order which is that there was a forward contract which is unlawful at its inception is lacking in substance.

(vii) The buy back agreements cannot be held to be illegal as found in the impugned order of the Whole Time Member of SEBI on the ground that they constitute forward contracts. A buy back confers an option on the promisee and no contract for the Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 purchase and sale of shares is made until the option is exercised. The promisor cannot compel the exercise of the option and if the promisee were not to exercise the option in future, there would be no contract for the sale and purchase of shares. Once a contract is arrived at upon the option being exercised, the contract would be fulfilled by spot delivery and would, therefore, not be unlawful."

16.10. The Hon'ble Bombay High Court has expressed that the "Letter of Undertaking" was lawful and enforceable. In nutshell, held that the performance of the obligations contended in the 'Letter of Undertaking' could be lawfully done without violating 'MIMPS Regulation'. Thereafter, from 3rd August, 2012 to 26th April, 2013 as many as one dozen letters were exchanged between the 'IL&FS Financial Services Limited'- ('Financial Creditor') and the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor'), whereby the 'IL&FS Financial Services Limited'- ('Financial Creditor') repeatedly called upon the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') to fulfil its obligation as per 'LOU'. A suit was also filed (Suit No. 449/2013) against the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') seeking specific performance of 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') obligation under 'LOU'. 16.11. The 'IL&FS Financial Services Limited'- ('Financial Creditor') issued a Statutory Demand Notice on 3rd November, 2015 under sections Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 433 and 444 of Companies Act, 1956 calling upon the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') to pay outstanding debt of Rs. 232,50,00,000/- along with further interest of 15% per annum on the amount invested by the 'IL&FS Financial Services Limited' in respect of MCX shares. The 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') replied on 18th November, 2015 and denied the payment on the ground that the 'IL&FS Financial Services Limited' filed a suit (Suit No.449/2013), pending before the Honble High Court and the matter being subjudice payment could not be made.

16.12. The 'IL&FS Financial Services Limited', therefore, filed a Petition under the old provisions of the Companies Act, 1956 seeking relief that the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') be wound up by the directions of the Hon'ble High Court and the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') or its Promoter be directed to deposit an amount due as on 19th October, 2016 at Rs. 266,39,08,560/- inclusive of interest for clearing the amount due. During the

Pendency, the said Petition was transferred to National Company Law Tribunal in terms of Notification dated 29th June, 2017.

16.13. A Legal Notice dated 3rd November, 2015 was issued by the Advocate of 'IL&FS Financial Services Limited' addressed to the 'La-Fin Financial Services Pvt. Ltd.' - ('Corporate Debtor'). In a reply to the said Legal Notice, it was responded on 18th November, 2015 that a suit had already been filed bearing Suit No. 449/2013 in the Hon'ble Bombay High Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 Court pending for adjudication, the issue being subjudice no fresh suit be filed. It was suggested and called upon the 'IL&FS Financial Services Limited' to withdraw the Petition in writing.

17. The amount disbursed by 'IL&FS Financial Services Limited' - ('Financial Creditor') comes within the meaning of 'financial debt' having disbursed against the consideration for time value of money. Section 5(8) of the 'I&B Code' defines 'financial debt' and reads as follows:

"5. Definitions. □(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes--

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-

materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause"

Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018

18. On careful reading of the agreement such as 'SPA' and 'La-Fin LoU', we find that the 'IL&FS Financial Services Limited'- ('Financial Creditor') has disbursed the amount and the 'Corporate Debtor' has raised the amount with an object of having economic gain or commercial effect of borrowing. The clauses of 'SPA' if read along with the 'LoU', we find that the terms of transaction involved not only the purchase of shares but it shows the date by which the amount of transaction was to be repaid by the 'Corporate Debtor' which had fallen due on 19th August, 2012. There was an element of 'time value of money', particularly, when one of the conditions related to 'internal rate of return of 15%' on the transaction, therefore, the time value of money having already shown, we hold that the amount disbursed by 'IL&FS Financial Services Limited'- ('Financial Creditor') and the 'Corporate Debtor' had agreed to reverse the transaction by purchasing the shares within a specified time along with the payment of 15% accrual on 20th August, 2009. We hold that the amount if disbursed by 'IL&FS Financial Services Limited'- ('Financial Creditor') comes within the meaning of 'financial debt', therefore, the 'IL&FS Financial Services Limited'- ('Financial Creditor') has been rightly claimed to be a 'Financial Creditor' and filed Form-1 under Section 7 of the 'I&B Code'.
LIMITATION: -

19. The 'Limitation Act, 1963' is applicable, as held by the Hon'ble Supreme Court in "B.K. Educational Services Pvt. Ltd." (Supra) and also in terms of Section 238A of the 'I&B Code' for filing an application under Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 Section 7, Article 137 of Part II of the 'Limitation Act, 1963' will be applicable, which is as follows:

Part II-OTHER APPLICATION Description of application Period of Limitation Time
from which period begins to run

137. Any other application for which Three years When the right to no period of limitation is provided apply accrues elsewhere in this division.

20. In the present case, it is not in dispute that right to apply under Section 7 accrues to 'IL&FS Financial Services Limited'- ('Financial Creditor') since 1st December, 2016, when 'I&B Code' came into force. Therefore, the application under Section 7 being within the period of three years from the date of right to accrue the application, we hold that the application under Section 7 was well within the time.

21. The next question arises as to whether the claim was barred by limitation or not. If it is barred by limitation, then one can take plea that there is no debt payable in law. In the present case, we have noticed that the 'Share Purchase Agreement' followed by 'Letter of Understanding' was executed on 20th August, 2009. The dispute triggered when 'IL&FS Financial Services Limited'- ('Financial Creditor') received a letter on 23rd August, 2010 from 'MCX-SX' stating that 'Financial Technologies (India) Limited ('FTIL')' had informed that the obligation of 'La-Fin Financial Services Pvt. Ltd.'-

('Corporate Debtor') and the 'LoU' had become Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 infructuous. It was informed that in compliance with the directions issued by the Hon'ble Bombay High Court dated 10th August, 2010 passed in Writ Petition No. 1440/2010 filed by 'MCX-SX' against 'SEBI', the Board of Directors of the Defendant had passed a Resolution dated 12th August, 2010 declining to honour any buy-back or other similar arrangements.

22. Within the 'agreed period', 'IL&FS Financial Services Limited'- ('Financial Creditor') wrote a letter on 3rd August, 2012 expressing to sell the entire shareholding 2,71,65,000 equity shares, which 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') is under obligation to purchase. However, on 16th August, 2012, 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor') in reply had informed that there was no legal obligation and the demand of purchase was untenable.

23. A Writ Petition No. 213/2011 was filed by 'MCX-SX' against 'SEBI', which was disposed of by judgment dated 14th March, 2012 by the Hon'ble Bombay High Court wherein 'La-Fin LoU' dated 20th August, 2009 was held to be lawful, binding and enforceable.

24. A legal notice dated 3rd November, 2015 was issued by the Advocate for 'IL&FS Financial Services Limited'- ('Financial Creditor') to the 'La-Fin Financial Services Pvt. Ltd.'- ('Corporate Debtor'). In reply to the said legal notice, it was responded on 18th November, 2015 that a suit had already been filed bearing Suit No. 449/2012 before the Hon'ble Bombay High Court, pending for adjudicating the issue being subjudice no fresh suit be Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 filed. It was suggested and called upon the 'IL&FS Financial Services Limited'- ('Financial Creditor') to withdraw the petition in writing. It is only thereafter on 21st October, 2016, 'IL&FS Financial Services Limited'- ('Financial Creditor') filed application under Sections 433 and 434 of the Companies Act, 1956 showing the due date as on 19th October, 2016.

25. The aforesaid fact shows that there is a continuous cause of action and the 'Corporate Debtor' never raised the question of limitation and on the other hand, a reply vide letter dated 18th November, 2015 intimating that the suit is pending and therefore, to withdraw the petition. There being a continuous cause of action, we hold that the application under Sections 433 and 434 of the Companies Act, 1956 was not barred by limitation and the 'Corporate Debtor' cannot take plea that there is no debt payable in law.

26. Learned counsel for the Appellant referred to Suit No. 449/2013 submitted that there was not a money claim but from bare perusal of the plaint as enclosed at page 647-707 (Exhibit "A" & "B") a Suit was filed by 'IL&FS Financial Services Limited' against 'La-Fin Financial Services Pvt. Ltd.' being Suit No.449 of 2013 before the Hon'ble High Court of Judicature at Bombay, therein apart from the other relief, alternative prayer has been made by 'IL&FS Financial Services Limited'- ('Financial Creditor') for decree and order for payment by Defendant ('Corporate Debtor') to the Plaintiff ('Financial Creditor') of the difference between the price at which the shares of 'MCX-SX' held by the Plaintiff ('Financial Creditor') had to be purchased by the Defendant ('Corporate Debtor') together with the interest Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 accrued thereon and the net amount received from the sale of the 2,71,65,000 equity shares, plus the interest thereon till payment and/or realization.

ABATEMENT:-

27. One of the grounds taken by the Appellant is that the application under Sections 433 & 434 of the Companies Act, 1956 on transfer abated, 'IL&FS Financial Services Limited'- ('Financial Creditor') having failed to file Form-1 under Section 7 within 60 days i.e. by 5th February, 2017.

28. In this connection, it is desirable to notice the different Notifications issued by the Central Government from its Ministry of Corporate Affairs from time to time.

29. In exercise of powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code', the Central Government by Notification dated 7th December, 2016 framed 'Companies (Transfer of Pending Proceedings) Rules, 2016'. Rule 5 therein relates to 'Transfer of pending proceedings of Winding up on the ground of inability to pay debts'. As per the said Rule, for admission of petition under Sections 7, 8 or 9 of the 'I&B Code', as the case may be, all information other than the information forming part of records transferred including the details of the proposed insolvency professional is to be placed by Petitioner before the Tribunal within 60 days Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 from the date of the said Notification with clear understanding that failing the same the petition stands abated. It is in the said background that the counsel has taken plea that since Form 1 with the name of the 'Resolution Professional' has not been filed under Section 7 by 5th February, 2017, the application under Sections 433 & 434 of the Companies Act on transfer stood abated. However, it has been brought to our notice that the said Rule 5 issued by Notification dated 7th December, 2016 was subsequently amended by Notification dated 28th February, 2017, it followed by 'Companies (Transfer of Pending proceedings) Second Amendment Rules, 2017' made vide Notification dated 29th June, 2017, relevant portion of which reads as follows:

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.- (1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub- section (4) of section 419 of the Act, exercising Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 territorial jurisdiction to be dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any part or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relation to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15 th December, 2016, such other petition shall not be Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 transferred to the Tribunal, even if the petition has not been served on the respondent."

30. In "Zile Singh v. State of Haryana and Others" (2004) 8 SCC 1", the Hon'ble Supreme Court held as follows:

"23. The text of Section 2 of the Second Amendment Act provides for the word "upto" being substituted for the word "after". What is the meaning and effect of the expression employed therein "shall be substituted"?

24. The substitution of one text for the other pre- existing text is one of the known and well-recognised practices employed in legislative drafting.

"Substitution" has to be distinguished from
"supersession" or a mere repeal of an existing
provision.

25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (See Principles of Statutory Interpretation, ibid, p.565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 Mills Assn. and Ors. Vs. State of U.P. and Ors. (2002) 2 SCC 645, State of Rajasthan Vs. Mangilal Pindwal (1996) 5 SCC 60, Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co. (1969) 1 SCC 255 and A.L.V.R.S.T. Veerappa Chettiar Vs. S. Michael & Ors.

AIR 1963 SC 933. In West U.P. Sugar Mills Association and Ors.'s case (supra) a three-Judges Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal's case (supra) this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar's case (supra) a three-Judges Bench of this Court emphasized the distinction between "supersession" of a rule and "substitution" of a rule and held that the process of substitution consists of two steps: first, the old rule is made to Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 cease to exist and, next, the new rule is brought into existence in its place."

31. In view of the decision of the Hon'ble Supreme Court in "Zile Singh"

(Supra), we hold that the case of the Appellants is covered by the Notification dated 29th June, 2017 and it having filed Form-1 on 25th May, 2017 i.e. immediately after transfer of the case, the petition under Sections 433 & 434 of the Companies Act, 1956 has not abated.

32. In so far as the amended order dated 30th August, 2018 is concerned, under sub-section (2) of Section 420 of the Companies Act, 2013 read with National Company Law Tribunal Rules, it is always open to the Adjudicating Authority to make necessary correction in the order passed by it. It is not in dispute that the application under Section 7 was considered by Mr. M.K.Shrawat, (Member (Judicial) and Mr. Bhaskara Pantula Mohan, (Member (Judicial). The order dated 28th August, 2018 has been signed by one of the Members namely-- Mr. M.K.Shrawat, (Member Judicial), the other Member who agreed and signed, having not shown therein, it was open to the Adjudicating Authority to make necessary correction. Section 420 of the Companies Act, 2013 reads as follows:

"420. Orders of Tribunal. □(1) The Tribunal may, after giving the parties to any proceeding before it, a Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act. (3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned."

33. This apart, we do not intend to remit this matter on such technical issue as it will be futile even if we remit the matter to the Adjudicating Authority comprising of the two Hon'ble Members, the application under Section 7 being complete and we having held that 'IL&FS Financial Services Limited' is the 'Financial Creditor' and there is a debt and default, the application under Section 7 is to be admitted. If we look into the technicality, then both the appeals will be dismissed on technical ground for example, Ms. Pushpa Shah- Appellant in Company Appeal (AT) Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018 (Insolvency) No. 521 of 2018, has challenged the order dated 28th August, 2018, in the prayer portion though it has also been prayed to set aside the order dated 30th August, 2018, no separate fee has been filed for the same. The appeal filed by Jignesh Shah- Appellant in Company Appeal (AT) (Insolvency) No. 643 of 2018, has only challenged the order dated 30th August, 2018 and not challenged the order dated 28th August, 2018. However, we are not dismissing the appeal on such technical ground of challenging one or other orders or non-payment of fee.

34. As we find no merit in these appeals, we accordingly dismiss both the appeals. No cost.

[Justice S.J. Mukhopadhaya] Chairperson [Justice Bansi Lal Bhat] Member (Judicial) NEW DELHI
21st January, 2019 AR Company Appeal (AT) (Insolvency) Nos. 521 & 643 of 2018