

Infrastructure Leasing And Financial ... vs Union Of India & Ors on 12 March, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 346 of 2018

With

Interlocutory Application Nos.3616, 3851,3860,3962,4103,4249 of
2019, 182, 185 of 2020

IN THE MATTER OF:

Union of India

....Appellant

Vs

Infrastructure Leasing &
Financial Services Ltd. & Ors.

....Respondents

With

Company Appeal (AT) No. 347 of 2018

With

Interlocutory Application Nos.3850, 3859 of 2019

IN THE MATTER OF:

Infrastructure Leasing and
Financial Services Ltd.

....Appellant

Vs

Union of India & Ors.

....Respondents

With

Company Appeal (AT) No. 256 of 2019

IN THE MATTER OF:

Somany Provident Fund Institution

....Appellant

Vs

Union of India & Ors.

....Respondents

Present:

Mr. Kapil Sibal, Sr. Advocate with Mr. Manmeet Singh, Ms. Ria Kohli and Ms. Abhilasha Khanna, Advocates for L & T IDF.

Mr. Gopal Jain, Sr. Advocate with Mr. Ashish Mukh and Mr. Dhruv Malik, Advocates for UTI MF, UTI AMC, UTI RSL, SBI PF, Kotak Mahindra Pension Fund, HDFC PF.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962,
4103,4249 of 2019,182,185 of 2020,

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Mr. Gopal Jain, Sr. Advocate with Mr. Shiven Verma, Advocate

for Hindustan Zinc Ltd, Employees Provident Fund, Employees Provident Fund Trust.

Mr. Salman Khurshid, Sr. Advocate with Mr. Amit Agrawal, Mr. Ayesha Jamal and Ms. Aanchal Tikmani, Advocates for Army Group Insurance Fund (AGIF).

Mr. Gopal Jain, Sr. Advocate with Mr. Amar Gupta, Mr. Divyam Agarwal and Ms. Pallavi Kumar, Advocates for SRS Orion Investments Ltd.

Mr. Arun Kathpalia, Sr. Advocate with Sidharth Sethi and Mr. Avinash Das, Advocates for PIC India Financial Services Ltd.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. L. Viswanathan, Ms. Gauri Rasgotra, Mr. Abhijeet Das, Mr. Raunak Dhillon, Mr. Vikash Kumar Jha, Mr. Karan Khanna, Ms. Ishneet Kaur, Ms. Ritu Viswakarma, Advocates for IL & FS for R-1.

Mr. Ramji Srinivasan, Senior Advocate with Mr. Sanjay Shorey, Director (Legal), MCA and Mr. Rakesh Tiwari for Union of India (Appellants) and R-1 in CA (AT) No. 347 of 2018.

Dr. Abhishek Manu Singhvi, Sr. Advocate with Mr. Diwakar Maheshwari, Mr. Avishkar Singhvi, Ms. Aditi Bagri, Mr. A. Ramaiah and Mr. Shreyas Edupuganti, Advocates for IndusInd Bank (Respondent No. 16).

Mr. Dushyant D. Sr. Advocate with Mr. Diwakar Maheshwari, Ms. Aditi Bagri, Mr. A. Ramaiah and Mr. Shreyas Edupuganti, Advocates for Bajaj Finance Ltd. (Intervenor).

Mr. Sandeep Sethi, Sr. Advocate with Mr. Sanjay Kapur, Ms. Megha Karnwal and Mr. V.N.Kannan, Advocates for SBI 2 Axis Bank.

Mr. Diwakar Maheshwari and Mr. Shreyas Edupuganti, Advocates for CESE Limited and CESE Provident Fund.

Mr. S.N. Mukharjee, Sr. Advocate with Mr. Arya Bhargava, Ms. Vanita Bhargava, Mr. Wamika Trehan and Ms. Raddhika Khanna, Advocates for ABFC (Applicant).

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Mr. Ajay Bhargava, Ms. Vanita Bhargava, Ms. Wamika Trehan and Ms. Raddhika Khanna, Advocates for Catgate Pamolive (I) Ltd., Appalo, Mcloyd Russel India Ltd., Max Bhupa, West Cost

Paper and Hur Fund.

Mr. Atul S. Mathur, Ms. Priya Singh and Mr. Umang Kataria, Advocates for BHEL PF Fund, Mother Dairy and National Dairy.

Mr. Jeevan B. Panda, Ms. Shalini S. Prasad and Ms. Meher Tandon Advocates for Birla Industries and Siemens Ltd.

Mr. Manish Paliwal, Mr. Vikas Kumar and Mr. ArchitKatlana, Advocates for Corporate Legal Partners.

Mr. Abhirup Das Gupta and Mr. Mr. Ishaan Duggal, Advocates for Pramerica Life Insurance and TATA power Consolidated PF.

Mr. Siddarth Pandey, Advocate for PFC, ELF & SMF.

Mr. Mahesh Agarwal, Mr. Ajitesh Soni and Mr. Divyang G.C, Advocates for 63 Moons Technologies Ltd. and SBI Insurance of GE Shipping.

Mr. Vivek Malik, Mr. Vivek Sinha and Ms. Kartikiya, Advocates Ms. Varsha Banerjee and Mr. Mukund Rawat, Advocates for Panjab Bank.

Mr. Pallav Mongia and Mr. Dawneesh Shaktivats, Advocates for Balco & Yokogava.

Mrs. Priya Puri, and Mr. Yati Sharma, Advocates for IOCL Mr. Anuj Aggarwal, Advocate for Kudremukh Iron Orn. Comp. Mr. Rahul Kripayani and Ms. Rea Bhalla, Advocates for Cow Town Infotech Services Pvt. Ltd.

Mr. Partha Sarathy Bose and Mr. T. Singh, Advocates for Cent Bank Financial Services.

Mr. Abhishek Pratap Singh and Aswini Kumar Singh, Advocate for Mudra & Sidbi.

Mr. Rakesh K. Sharma, Mr. Nishant Sharma, Mr. Ashutosh Chaturvedi, Advocates for Andhra I I Transo.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020,
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Mr. Kabir Shankar Baso and Mr. Shuvodeep Roy, Advocates for State of Tripura.

Mr. Shuvodeep Roy, Advocate for State of Assam.

Mr. Abhinav Raghuwanshi, Ms. Gaurika Mohan and
Mr. Prakhar Khanna, Advocates for Applicant Sepco 3.

Mr. Mayank Sapra and N. Sasank, Advocates for the Intervenor
M/s AKG Shutterings Private.

Ms. Jahnvi Agrawal, Advocate for Intervenor Boxco Fareast
Pvt. Ltd.

Mr. Vishnu Sharma and Mr. Sowrabh Roy, Advocate for NOIDA
Authority.

Mr. Dhruv Malik, Advocate for DSP Mutual Fund Ltd.

Mr. P.B.A Srinivasan and Ms. Ichchha, Advocates for Andhra
Bank (Dy. No. 9722, 9723 and 9727).

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Mr. Debarshi Bhuyan, Advocate for Godrej Consumer Products
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Mr. Amit Tyagi, Advocate for TLG India Pvt. Ltd., Sapient
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Ms. Madhu Shweta and Ms. Shivangi Khanna, Advocates for
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Mr. Pawan Kumar Bansal, Advocate for Applicants.

Mr. Manik Dogra and Mr. Balkishan Ladhania, Advocates for
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Ms. Anushree Kapadia, Advocate.

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Mr. Anand Shankar Jha and Mr. Arpit Gupta, Advocates for
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Provident Fund, Dewan Housing and Finance Limited and MCC India Employees Provident Fund Trust.

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Ms. Aditi Sharma, Advocate for India Factoring & Finance Solution, Rashtriya Chemical and Mazagon Deck.

Mr. Rahil Sharma, Advocate for GHV India.

Mr. Ritu Singh Mann, Mr. B. Banerjee and Mr. Dheeraj Kumar Garg, Advocates for British Airways PLC Staff Pension Fund (India), British.

Airways Cabin Crew Pension Fund (India) and British Airways Superannuation Scheme.

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Mr. Ramesh Babu, Ms. Manisha Singh Ms. Nisha Sharma and Ms. Tanya Chowdhary, Advocates for RBI.

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Medical Benefit Fund, India Provident Fund of BPCL, BPCL Employees Post Retirement Medical Benefit Fund and L. Ltd. Staff Provident Fund.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Dharav Shah and Mr. Garanjivi Sharma, Advocates for HDFC MF.

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Mr. Saurabh Jain and Mr. Pankaj Yadav. Advocates for Applicant SREI Injra Ltd.

Ms. Shweta Sahu, Advocate for Infosys Employees Provident Fund.

Mr. Pankaj Vivek and Mr. Anurag, Advocates for R-13, Bank of Baroda.

Mr. Vishnu Sharma and Mr. Sourav Roy, Advocates for NOIDA Authority.

Mr. Sanjay Bhait, Advocate for IDBI Trusteeship Services Ltd.

Ms. Anusha Sharty and Ms. Smiriti R. Nair, Advocates for PPL Employee and Zurari Industries.

Ms. Richa, Advocate for IOB Bank.

Mr. Rishi Sood and Mr. Gaurav Singh, Advocates for Bhopal Cooperative Central Bank Ltd.

Mr. Rajat Prakash, Advocate for Karnataka Bank and PSB.

Mr. R. Sudhinder, Ms. Ekta Bhasin and Ms. Shreya Singh, Advocates for HDFC Provident Fund, Gratuity Fund & Superannuation Fund and GRUH Finance Ltd., Employees Provident Fund, Gratuity fund and Superannuation Fund. Mr. Nishant Menon, Ms. Kavita Sarin and Mr. Shafiq Ahmed, Advocates for ECIPL Provident Fund.

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Mr. Ashish Rana and Mr. Harshit Gara, Advocates for Exim. Bank.

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Mr. Pulkit Deora and Mr. Utsav Vasudeva, Advocates for CEC Construction Ltd.

Mr. Arjun Harkauli, Mr. Prateek Garg, Ms. Aarjoo Wahrona and Mr. Anshuman Gargesh, Advocates for C.G. Power and Industrial Ltd. (Intervenor).

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Mr. Maynk Sappa and Mr. N. Saanak Iyer, Advocates for AKG Shuticrings Pvt. Ltd.

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Central Government having an opinion that affairs of 'Infrastructure Leasing and Financial Services Limited' ("IL&FS") and its Group Companies are conducted in a manner prejudicial to the public interest, it applied before the National Company Law Tribunal ("Tribunal" for short), Mumbai Bench, Mumbai for issuance of appropriate orders and directions as sought for and as the Tribunal deemed fit.

2. In the Company Petition, initially, interim orders were passed relating to change of the management. Subsequently, the Central Government Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, moved an application for interim relief seeking moratorium qua IL&FS, which is a Group Company for such period against the following acts: -

"2. The Petitioner filed this application seeking comprehensive moratorium qua R1 Company and the group Companies of R1 for three months or such other period against the following acts:

(i) The institution or continuation of suits or any other proceedings by any party against R1 Company and any of the group companies in any Court of Law/ Tribunal/Arbitration Panel or Arbitration Authority and

(ii) Any action by any party to foreclose, recover or enforce any security interest created over the assets of R1 Company and/ or any of the group companies including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(iii) The acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations vailed by R1 Company and/ or the group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein."

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3. The tribunal by impugned order dated 12th October, 2018 observed that the provision of IBC do not apply to IL&FS - a financial service provider.

Therefore, it cannot move an application under Section 10 and order of moratorium cannot be passed under Section 14 of the IBC. The Tribunal further held that provision of Section 242 of the Companies Act, 2013 and the remedy can be granted after being satisfied that the affairs of the Company is mismanaged. Therefore, the Tribunal refused to grant any interim relief in terms of the prayer.

4. On 15th October, 2018, when the matter was taken up, this Appellate Tribunal while raising the question of law, passed the following order: -

"15.10.2018□These appeals have been listed on urgent mentioning and taken up for admission even on a holiday taking into consideration the nature and importance of the appeals.

2. From the impugned order dated 12th October, 2018 in MA 1173/2018 in C.P. No. 3638(MB)/2018, we find that the National Company Law Tribunal ('Tribunal' for short) while accepted that no petition under any of the provision of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) can be preferred by any party for initiation of 'Corporate Insolvency Resolution Process' against 'Infrastructure Leasing and Financial Services Limited' ('IL&FS' for short) and its 348 Group Companies till the Central Government issue appropriate notification with regard to one or other making the provisions applicable to them, refused to pass the interim order in view of prayer of 'Moratorium' made by the Appellant- 'Union of India'. Otherwise the Tribunal has appreciated Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, the difficulties which are being faced by the 'IL&FS' and its 348 Group Companies.

3. The questions arise for consideration in these appeals are:

(i) Whether the Tribunal can pass appropriate order under Section 241 read with Section 242 of the Companies Act, 2013 for resolution of the problems faced by the Company in a time-bound manner for maximisation of value of assets of the

Company, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders, and in case of failure of resolution pass appropriate order of liquidation; and

(ii) Whether the Tribunal in exercise of powers conferred Under Section 242 (1) (b) read with Section 242 (2)(m) and Section 242(4) of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016, can pass appropriate interim order similar to order under Section 14 of the Insolvency and Bankruptcy Code, 2016.

4. According to Mr. Tushar Mehta, Learned Solicitor General for the Appellant- 'Union of India' and Mr. Ramji Srinivasan, Learned Senior Counsel for the 'IL&FS', the Tribunal has much wider power under Sections 241 and 242 of the Companies Act, 2013 than the powers vested under provisions of Insolvency and Bankruptcy Code, 2016.

5. Taking into consideration the nature of the case, we are of the view that five largest creditors should be Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, also impleaded as party Respondents to these appeals in the representative capacity of the Creditors. Learned counsel for the Appellant(s) will make necessary correction in the cause title and other pages of the appeals in course of the day. Defects, if pointed out by office, may be removed before the next date.

6. Issue notice on Respondents, including newly impleaded Respondents by speed post. Requisite along with process fee, if not filed, be filed in course of the day. If the Appellant(s) provides the e-mail address of Respondents, let notice be also issued through e-mail. Dasti service is permitted particularly in the newly impleaded Respondents.

Post these appeals 'for admission' on 13th November, 2018 on the top of the list.

Taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the Company and 348 group companies, there shall be stay of

(i) The institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against 'IL&FS' and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and

(ii) Any action by any party or person or Bank or Company, etc. to foreclose, recover or enforce any security interest created over the assets of 'IL&FS' and its 348 group companies including any action under the Securitization and Reconstruction of Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Financial Assets and Enforcement of Security Interest Act, 2002;

(iii) The acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of

support, commitment or comfort and other financial facilities or obligations vailed by 'IL&FS' and its 348 group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein.

(iv) Suspension of temporarily the acceleration of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits and any other financial facility by the 'IL&FS' and its 348 group companies by any party or person or Bank or Company, etc. as of the date of first default.

v) Any and all banks, financial institutions from exercising the right to set off or lien against any amounts lying with any creditor against any dues whether principal or interest or otherwise against the balance lying in any bank accounts and deposits, whether current or savings or otherwise of the 'IL&FS' and its 348 group companies.

The interim order will continue until further orders and not be applicable to any petition under Article 226 of the Constitution of India before any Hon'ble High Court or under any jurisdiction of the Hon'ble Supreme Court."

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5. The interim order passed continued for more than one year and this Appellate Tribunal noticed the developments. A number of Intervention Applications were moved for one or the other reliefs and different interim orders were passed from time to time.

6. Taking into consideration the fact that the matter relates to more than 302 Group Companies apart from IL&FS, by order dated 4th February, 2019, this Appellate Tribunal allowed the Union of India and IL&FS to engage Hon'ble Justice (Retd.) D.K. Jain to supervise the operation of the resolution process. We allowed the management to get clearance from Hon'ble Justice (Retd.) D.K. Jain who is supervising the resolution process of different Group Companies.

7. Now, after more than one year, when a number of 'resolution process' in respect of more than fifty Companies have already taken place, some of the Financial Creditors/ Secured Creditors who have already taken advantage of the interim order have now raised question of jurisdiction of this Appellate tribunal to pass interim order as passed on 15th October, 2018.

8. Before deciding the question whether to vacate the interim order or to continue with the same and/ or to decide the issues as raised, it is desirable to notice certain pleadings made by the Central Government in its application under Section 241 and 242 of the Companies Act, 2013. The relevant of which are as under: -

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8.1 'Infrastructure Leasing and Financial Services Limited' ('IL&FS'), is a Company incorporated under the Companies Act, 1956. Over the years the IL&FS has inducted

institutional shareholders to include Life Insurance Corporation of India (LIC), ORIX Corporation- Japan (ORIX), State Bank of India and Abu Dhabi Investment Authority. Besides the above, the 'IL&FS Employees Welfare Trust' also holds significant shares in 1st Respondent. The shareholding pattern of the IL&FS, as on 31st March, 2018, as derived from the Annual Report of the IL&FS, for the year 2018, is as follows:

S.NO.	NAME OF SHAREHOLDER	PERCENTAGE HOLDING
1	Life Insurance Corporation of India	25.34%
2	ORIX Corporation -Japan.	23.54%
3	IL&FS Employees Welfare Trust	12%
4	Abu Dhabi Investment Authority	12.56%
5	Housing Development Finance Corporation Limited	9.02%
6	Central Bank of India	7.67%
7	State Bank of India	6.42%
8	UTI- Unit Linked Insurance Plan - UTI	0.82%
9	Asset Management Company Limited	
	India Discovery Fund	0.86%
10	Others	1.17%
	TOTAL	100%

In addition to the above, the total subscribed and paid up capital of the 1st Respondent, presently is Rs.983 Crores.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, 8.2. Although the equity shares of the IL&FS are not listed on any stock exchange, the secured non-convertible debentures as well as the non-

convertible redeemable cumulative preference shares of the IL&FS are listed on the Bombay Stock Exchange. There are six major group companies of the 1st Respondent which contribute over 60% to

the consolidated assets of the 'IL&FS Group'. A brief of the four major group companies is provided hereunder:-

a) IL&FS Transportation Networks Limited (ITNL) ITNL, incorporated in the year 2000, has business activities ranging from developer, sponsor, construction manager and operator of surface transportation infrastructure, taking Greenfield Projects from conceptualization through commissioning to operations and management of such projects. The company develops projects on build, operate and transfer basis and is the largest vertical of the IL&FS Group, admittedly holding over 40% of the total assets of the group. ITNL operates through special purpose vehicles (SPVs) and presently has 32 such SPVs in India and overseas.

b) 'IL&FS Financial Services Limited (IFIN) The IL&FS is engaged in the financial services sector through one of its material subsidiaries, IFIN, which is registered as a systematically important non-banking financial company (NBFC) with the Reserve Bank of India. IFIN admittedly contributes approx. 14.16% to the assets of the IL&FS Group and has a significant asset base with involvement in asset and project finance, structured debt and asset finance, syndication and corporate project advisory business.

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c) IL&FS Energy Development Company Limited (IEDCL) The IL&FS is engaged in the power sector through its subsidiary IEDCL, which develops, owns and operates power generation and transmission assets in India and abroad.

d) IL&FS Tamil Nadu Power Company Limited (ITNPCL) 'ITNPCL' is another subsidiary of the IL&FS engaged in the implementation of the thermal power project at Cuddalore in Tamil Nadu.

e) Noida Toll Bridge Limited It is a listed company, subsidiary of IL&FS with 50.42% equity share capital all of which is pledged is running Infrastructure Flyover project connecting Delhi with Uttar Pradesh.

f) IL&FS Engineering and Construction Co. Limited It is an Associate Company of IL&FS with over 42% equity. It is into multinational infrastructural development construction business.

In addition to the aforementioned major group companies, the IL&FS is engaged in maritime sector to develop maritime and logistic assets besides urban development sector for developing new cities, affordable housing, etc. The consolidated list of 169 group companies as derived from the Annual Report of the IL&FS for the year 2018, has been annexed herewith as Annexure P-4.

8.3 That further it has come to light through various reports and filing by the 'IL&FS' itself that the group companies of the 'IL&FS' have started defaulting on their debt obligations, which defaults are likely to grow and Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962,

4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, become severe in the coming months. It has been admitted by the IL&FS in its company application no. 1044 of 2018:

- (i) ITNL has been, in default on its debt obligations since June 30, 2018.
- (ii) The IL&FS itself has been in default on its debt obligations since August 25, 2018.
- (iii) IFIN, the key subsidiary of the IL&FS engaged in financial services, has been in default since September 12, 2018. This has led to the resignation of the Managing Director & CEO and four independent directors of IFIN on September 21, 2018.
- (iv) IEDCL, the IL&FS's power generation subsidiary, has defaulted on its payment obligations since August 22 2018.

8.4 Furthermore, the IL&FS has admitted that total debt across the IL&FS Group is approximately Rs. 91,000 crore as on March 31, 2018 and the IL&FS is contemplating monetizing of significant assets of the group companies for servicing the debts besides seeking further financial assistance from the institutional shareholders by way of a proposed rights issue. It is further submitted that the consolidated debt of the company increased to Rs. 91,091.3 crore in 2018 from Rs. 48,671.3 crore in 2014.

Interest outgo rose to Rs. 7,922.8 crore from Rs. 3,970.7 crore during the same period. By 2018, the company has not even been making enough profits to take care of its interest expense leading to the default. It has to be Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, kept in mind that out of the Rs. 91,000 crore debt obligations of the IL&FS, Rs. 57,000 crore has been borrowed from the Public Sector Banks.

8.5 That subsequent to spreading defaults by the IL&FS Group, credit rating agencies CARE and ICRA have downgraded the credit rating of the Respondent No.1, ITNL and IFIN to 'default' or 'junk' grade. The said fact has also been admitted by the IL&FS in its company application no. 1044 of 2018. This indicate that IL&FS management was suppressing material information about its financial solvency and its ability to meet its obligation.

The over exposure of loans and borrowings have been without prudent commercial practices and without any application of mind by the management of IL&FS over the several years. In fact, the management of IL&FS is responsible to bring it to this low due to its acts of commission & omission for which Union of India has ordered an investigation into the affairs of IL&FS and its group companies through SFIO. The Union of India seeks leave of the Tribunal to bring the findings of investigation on record.

8.6 That from the, financials and filings of the IL&FS and its group companies, it has been noticed that the flagship IL&FS holds 73.22% equity share capital in its direct listed company ITNL, out of

which 98.23% is pledged. Similarly, IL&FS holds 50.42% equity share capital in another of its major subsidiary 'IL&FS Investment Managers Limited', all of which is pledged. Furthermore, the IL&FS also holds 42.25% equity share capital in one of its associate company namely 'IL&FS Engineering and Construction Company Limited' and 34.05% of that equity holding is also pledged which Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, indicate that company has basically withdrawn from the financial management of its key subsidiaries as it has no financial left. Furthermore, IL&FS Investment Managers Ltd., a subsidiary of IL&FS is holding company of 'Noida Toll Bridge Company Ltd. (a Listed Company) wherein it holds 50.42% equity share capital of which all equity is pledged.

8.7. That the Central Government submits that the act of fraud perpetuated is on account of mis-representation and falsehoods about the financial state of affairs of the concerned company, which has jeopardized the financial health apart from causing serious damage and financial loss to various stakeholders.

8.8 That the facts detailed above by the Central Government clearly spell out the widespread mismanagement of funds by the current management of the IL&FS, in not only the holding company but throughout the IL&FS Group, leading to such a severe crisis that the group is reeling to meet even its day to day operational expenditures. The unscrupulous manner in which public money has been mismanaged and stuck in projects indicate that management of IL&FS has not only failed to manage but were involved in operation cover up till the end and wilfully created financial mess of IL&FS is astonishing. It has been admitted by the IL&FS in its company application no. 1044 of 2018 that there is severe liquidity crunch in the company with no immediate source of funding, so much so that the IL&FS is in no position to service its debt in the 'short term'. IL&FS is left with no assets to raise funds, no credibility to bank, no takers to buy its promises and nothing to Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, offer to the stakeholders in particular and public at large in general to assure its continuation.

8.9 That, last but not the least, Department of Economic Affairs which is responsible for the financial stability in economy too has raised Red Signals of the likely collapse of IL&FS and has expressed its deep concern of such a collapse would have on the economy in its Confidential Note dated 30.09.2018. It has also highlighted various acts of mismanagement from economic perspective which if become reality would have cascading impact on various sectors of economy.

8.10. According to Department of Economic Affairs, the following are the repercussions the economy would face:

- i. Redemption pressure to continue: Now hereafter other AMCs having exposure of Rs. 2800 crores to IL&FS bonds would get redemption pressure from Corporate Clients who have invested in this Rs. 16 trillion Debt MF industry.

ii. Debt market sell-off expected: It's impossible for such mutual fund schemes to get the redemption amounts in a short period of time. Further, illiquid Corporate Debt Market and DHFL saga may force AMC's to sell Government Securities. Hence, Government Securities will face a huge selling pressure so either Bond Yield will shoot up to 8.30-8.50% levels or the RBI has to do OMO (Open Market Operations). If RBI opts for OMO, then the Government's spending capacity will reduce by an equal amount.

iii. NBFC licenses could be cancelled: In the wake of the IL&FS crisis, as many as 1,500 smaller NBFCs may Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, have their licenses cancelled because these don't have adequate capital.

iv. Liquidity crunch: A liquidity crunch and recent events hitting market sentiment will lead to cost of funds for NBFCs increasing, impacting profitability. v. Impact on debt market as reported by NSE:

Bond yields had increased already on the back of Oil Price and Rupee depreciating, Government bonds had seen yields rising from 7.70 to 8.20 levels. Corporate bond yields had widened commensurately. However post IFSL announcement and downgrade, the Mutual Funds, who are the main buyers in Corporate Bonds, have completely stopped buying. RBI's liquidity inducing measures and announcements have helped Government bond yields to drop to 8.05- 8.08 levels, but corporate bond yields have risen further by about 40-50 bps post IFSL crisis. Primary market in Corporate Bonds has completely dried up as no one is willing to buy currently in expectation of further redemptions from MFs.

The added pressure is half yearly, seasonal redemptions MFs face anyway at this time of year. Hence Corporate Bond market is currently very illiquid and not seeing much volumes.

8.11 Further, the importance of the IL&FS and its group from financial stability perspective as highlighted by the Department of Economic Affairs are as under:

On consolidated basis, the borrowing of IL&FS from banks and financial institutions (debentures, loans, cash credit and commercial paper) comes to about Rs. 63,000 crores as per the Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, balance sheet of 2017-18. If the exposure of banks to the IL&FS Group is assumed to be about Rs.

53,000 crores, then considering that the exposure of the entire banking sector to all the NBFCs is about Rs. 3.3 lakh crores, IL&FS Group is not inconsequential, but, critical to the financial stability

as its share in the total exposure of the banks to the NBFC sector is about 16%. Therefore, there is a substantial public interest in ensuring financial solvency and good governance and management of this Group. The cascading impact of the default by the IL&FS Group on the financial sector would be quite substantial as evidenced from a partial default of some companies and its repercussions in the financial market in the month of September, 2018. The future impact of more defaults in the Group may be catastrophic for the financial stability.

In addition to above, from economic perspective, various acts of mis-governance and mis-management in IL&FS and its group companies are as under:

i. The IL&FS Group has shown a loss of Rs.

2670 core for the year 2017-18 in the consolidated balance sheet. The leverage is about 13 times as the borrowing of about Rs.91000 crores is on the base of equity capital and reserves of about Rs. 6950 cores. The CRAR (Capital to Risk Weighted Asset Ratio) of 15% for Systemically Important Non-Deposit Accepting Non-

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Banking Finance Company (NBFC-ND-SI) would result in a leverage ratio of about 6-7 times and the CRAR of 30% (for core Investment Company) would result in a leverage of about 3-4 times.

The indebtedness of the IL&FS at the end of Financial year 2017-18 is about 16468 crores and with debt market drying up for this company, it would be quite difficult to raise the fresh debt to service the existing debt or to do ever greening of debt. The leverage levels are quite elevated and need to be reduced to some, manageable levels, which require new thinking, and new management.

ii. IFIN, a Subsidiary of IF&SL, is registered with the Reserve Bank of India (RBI) as a Systemically Important Non-Deposit Accepting Non-Banking Finance Company (NBFC-ND-SI). IFIN specializes in

infrastructure financing transactions, with a unique combination of investment banking skill sets comprising of Debt Structuring and Distribution (DS&D), Corporate Advisory and Lending capabilities. IFIN has evolved as one stop solution provider for all the Funding, Debt raising and Advisory requirements of the clients. The RBI in its inspection reports required IFIN to consider exposures as per section 370 (1B) of the Companies Act, 1956 (now replaced with Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, the Companies Act, 2013) for determining 'companies in the same group'. This impacts computation of Net Owned Funds (NOF) and Capital to Risk Assets Ratio (CRAR) of IFIN. The RBI has given time up to March 31, 2019 to fulfil the minimum NOF and CRAR requirements as the IFIN does not satisfy these prudential requirements.

iii. The restoration of solvency of the Group would require confidence of the money and debt markets and the banks in the credibility of, the Group. The defaults as on 29th September, 2018 are about Rs.3761 cores. The confidence of the financial market needs to be restored, and the present management has lost all credibility to service any further financing to the company and it is mentioned above that the existing debt of about Rs.16468 crores needs to be serviced. The replacement of the existing management by the new management would be the first step towards restoring that confidence and to avoid any suboptimal liquidation of assets.

iv. The IL&FS Group is involved in many infrastructure projects by way of project financing and also equity and debt financing. Any impairment in its ability to finance and support the infrastructure projects would be quite damaging to the overall infrastructure sector, financial Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, markets and the economy, considering its systemically important nature and its borrowing level of Rs.91000 crores.

The business model of IL&FS is such that the company borrows from the money market and debt market besides bank borrowing to fund its income generating activities and assets, which are medium to long-term. So, there is a clear mismatch in its assets and liabilities. It is, therefore, imperative that the risk management framework of the company is robust. That is why RBI has issued the Non-Banking Financial Companies-Corporate Governance (Reserve Bank) Directions, 2015 for NBFCs.

Although the Corporate Governance Principles are not strictly applicable to Core Investment Companies, however, Systemically Important Core Investment Companies are encouraged to follow these as a prudent measure. The said Directions provide for Risk Management Committee and reporting of its, role and functions, periodicity of the meetings and compliance with coverage and review functions, etc. The Risk Management Committee of IL&FS did not meet during the period 2015 to 2018 except once in July 2015. The responsibilities of the Risk Management Committee, inter-alia, include:

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

a. Review of the adequacy of the risk management framework and operational procedures developed for new businesses and products from time to time;

b. provision of guidance on. strengthening of risk management practices to respond to emerging global and national market and regulatory developments;

c. approval of overall limits for management of credit risk, liquidity risk and market risks; d. review of asset liability management reports and provision of directions on improved management of liquidity and interest rate risk;

e. review of the capital adequacy requirements of the Company and provision of recommendations for the consideration of the Board in relation to the parameters to

be considered in this regard;

f. review of the Company's compliance
programme; and
g. review of the status of any enquiry,

investigation and other disciplinary action initiated by RBI, SEBI or other regulatory agencies."

Development

9. On 11th February, 2019, when the 'Financial Creditors'/ 'Operational Creditors' and other Secured Creditors were allowed to file application, the Union of India filed a list of '302 IL&FS Group Entities' as follows:-

"3. The 'Union of India' has filed a list of '302 IL&FS Group Entities' at Annexure B; a list of 'Indian IL&FS Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Group Entities' has been shown as Annexure C comprising of 169 entities as follows:

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

4. Another list of 'Overseas IL&FS Group Entities' incorporated outside India comprising 133 entities has been shown as Annexure D, as follows:

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

5. With regard to the aforesaid 133 entities of the 'IL&FS Group Companies (Offshore)' incorporated outside the territorial jurisdiction of India as shown at Annexure D, prayer has been made that these 'Offshore Group Entities' be excluded from the purview of the interim order passed by this Appellate Tribunal on 15 th October, 2018, though, the resolution of the 'Offshore Group Entities' will be subject to the decision of the management of the Board of Directors and supervision of the Hon'ble Justice (Retd.) D.K. Jain."

10. This Appellate Tribunal accordingly passed further order as follows: -

"6. Taking into consideration the stand taken by the 'Union of India' as agreed by the 'IL&FS', we exclude '133 Offshore Group Entities' incorporated out of India as shown in Annexure D from the purview of our order dated 15th October, 2018. However, the resolution for those 'Offshore Group Entities' may be taken up by the Board of Directors of 'IL&FS' under the supervision of the Hon'ble Justice (Retd.) D.K. Jain. The decision as may be taken with regard to the 'Offshore Group Entities' incorporated outside the territorial jurisdiction of India may be presented before the National Company Law Tribunal, Mumbai Bench, which is hearing the main petition.

7. Out of '169 Group Entities' incorporated within the territorial jurisdiction of India (Domestic Group Entities) as shown in Annexure C have been marked as (a) "Green Entities" (b) "Amber Entities" (c) "Red Entities".

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

8. The stand of the 'Union of India' in regard of those Entities is as follows:

"7. Further, as per the order dated February 4, 2019 passed by this Hon'ble Tribunal in the present appeal, this Hon'ble Tribunal directed the Appellant to give details of:

a) "Green Entities" : Domestic Group Entities which can continue meet all their payment obligation (both financial and operational) as and when they become due;

b) "Amber Entities" : Domestic Group Entities which are not able to meet all their obligations (financial and operational), but can meet only operational payment obligations and payment obligations to senior secured financial creditors; and

c) "Red Entities" : Domestic Group Entities which cannot meet their payment obligations towards even senior secured financial creditors, as and when such payment obligations become due.

The classification of entities into "Green", "Amber" and "Red" has been done by the Resolution Consultant appointed by the New Board of Respondent No.1 based on a 12- month cash flow based solvency test."

9. From the aforesaid list, we find that '22 Group Companies' have been marked as "Green Entities", '10 Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Group Companies' have been marked as "Amber Entities" and '38 Group Companies' have been marked as "Red Entities". Remaining 'Indian IL&FS Group Entities' approximately 100 in total are yet to be classified. List of "22 Green Entities" at Annexure E, are as follows:

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

10. List of "10 Amber Entities" at Annexure F, are as follows:

11. List of "38 Red Entities" at Annexure G, are shown below:

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

12. With regard to "22 Green Entities", prayer has been made to allow the 'Board of Directors' of 'IL&FS' to permit all "Green Entities" to service their debt obligations as per scheduled repayment. It has been further clarified that the resolution of the "Green Entities"

will be within the 'Resolution Framework' as described in the affidavit dated 25th January, 2019 and subject to supervision of the Hon'ble Justice (Retd.) D.K. Jain.

13. Taking into consideration the stand taken by 'Union of India' and 'IL&FS', we allow the Board of Directors of 'IL&FS' and to permit all "Green Entities"

including the entities which may be declared 'Green' out of the 100 entities to service their debt obligations as per scheduled repayment, which should be within the 'Resolution Framework' as described in the affidavit dated 25th January, 2019 and

subject to the supervision of the Hon'ble Justice (Retd.) D.K. Jain.

14. In so far "10 Amber Entities", prayer has been made to permit "Amber Group Entities" to make necessary payments only to maintain and preserve them as "Going Concern".

15. Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of 'IndusInd Bank' while submits that the 'IndusInd Bank' is lender of one of the "Amber Group Entities", further submits that 'IndusInd Bank' should be allowed to participate in the 'Resolution Process'.

16. Mr. Abhinav Vashisht, learned Senior Counsel appearing on behalf of the 'Senior Secured Financial Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Creditor' wants to raise objection with regard to the prayer made on behalf of the 'Union of India' and 'IL&FS' in regard to the "Amber Companies".

17. Mr. Arun Kathpalia, learned Senior Counsel appearing on behalf of the 'Aditya Birla' and 'Capital Funds' have also raised objections with regard to the prayer as made above for the 'Amber Group of Entities'.

18. Similar objections have been raised by many of the counsel for 'Financial Creditors' and the 'Operational Creditors' appearing on behalf of the Intervenor(s).

19. With regard to "38 Red Entities", prayer has been made to permit "Red Group Entities" to make payments necessary only to maintain and preserve the "Going Concern Status".

20. Objections have been raised by learned counsel aforesaid and other counsel with regard to such prayer made by the Appellant.

21. In the circumstance, we intend to hear the matter with regard to "Amber Group Entities" and "Red Group Entities" on the next date.

22. We also intend to hear the 'Union of India' and the Board of Management of the 'IL&FS' as to how they intend to resolve all the entities particularly "Amber Group Entities" and "Red Group Entities". Whether they intend to constitute any 'Committee of Creditors', as normally done in the case of 'Corporate Insolvency Resolution Process'. They will also give a timeframe for such resolution with regard to the aforesaid Group Companies as the interim order passed on 15th October, 2018 cannot continue for indefinite period.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

23. Learned Senior Counsel appearing on behalf of the 'Union of India' referred to Paragraph 11 of the Affidavit dated 11th February, 2019 and alleged that certain lenders of 'IL&FS Group' are marking lien on monies and not making Operations and Maintenance payments and other payment,

including salary, which are essential for maintaining the Companies "going concern".

24. In regard to aforesaid issue, while we are not issuing any specific observations at this stage, we are of the view that if any amount is payable by lenders to any of the members of the 'IL&FS Group Companies, they may release it, failing which this Appellate Tribunal may pass necessary order after hearing the parties on the next date.

Post these appeals 'for orders' on 12th March, 2019 at 4.00 p.m."

11. From the aforesaid facts, it is clear that 133 Entities of IL&FS Group Companies incorporated outside the territorial jurisdiction of India, i.e., Offshore Group Entities were excluded from the purview of interim order passed by this Appellate Tribunal on 15th October, 2018. However, 'resolution' of Offshore Group Entities has been allowed subject to decision of the Management of the Board of Directors and supervisions of the Hon'ble Justice (Retd.) D.K. Jain.

12 Twenty-two entities have been classified as 'Green Entities', who were in a position to clear the dues of many of the Secured Creditors including the Interveners/ Respondents, who are objecting and derived the benefit of the Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, interim order. Thirteen Entities were declared "Amber Entities" who had the ability for making payment to some of the Senior Secured Creditors as and when fall due. Many of them had the cash flow sufficiency to meet current operational payments. In fact, out of 13 Amber entities, four were declared 'Green Entities' who can meet the liability of Secured Creditors and other creditors. It is only the Red Entities, which are about 55 in number, with regard to whom the resolution process is yet to be started.

13. It is informed that against Rs.91,000 crores, for about Rs.40,000 crores resolution plans are pending consideration. Pursuant to interim order many of the Secured Creditors and other creditors of Green Entities have derived benefit. The 'Committee of Creditors' has been constituted in which the Financial Creditors, Senior Secured Creditors/ Lenders including many of the objectors/ Respondents herein are the Members and have taken part as Members of the 'Committee of Creditors'.

14. On 8th August, 2019, this Appellate Tribunal while hearing matter relating to settlement of claim of the creditors, with regard to three 'Amber/ Green Entities' namely - (i) Moradabad Bareilly Expressway Limited; (ii) Jharkhand Road Projects Implementation Company Limited; and (iii) West Gujarat Expressway Limited, as per signed Term Sheet, the Union of India/ ILFS were asked to give notice to all the 'Financial Creditors' and rest of the 10 Amber Entities and to take preliminary steps by taking their consent in the manner, which was followed in the cases of three Amber Entities. The Union of India/ ILFS were asked to intimate the steps to be taken with regard Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, to 82 Red Entities before selling, transferring, encumbering, alienating, dealing with or creating any third party right, title or interest on any movable or immovable assets of any of the Red Entities, after obtaining prior

permission of Hon'ble Mr. Justice D.K. Jain, Former Judge of Supreme Court of India.

15 Union of India and ILFS were allowed to call for the meeting of the 'Financial Creditor'/ Lenders and if necessary to take up the matter on day to day basis to ensure that the total process with regard to all 13 Amber entities particularly three Amber-cum-Green Entities and rest of the 10 Amber Entities are taken care of.

16. As noticed above, the matter progressed in smooth manner in view of the interim order enabling number of Companies including Green Entities to make payment through Senior Secured Creditors, Financial Creditors and other creditors and for resolution process. This in addition to the 133 Offshore Entities of IL&FS Group Companies, which were kept out of the purview of the interim order. They having become competent, the interim order was vacated. On 19th September, 2019, the following order was passed "19.09.2019 - Mr. Ramji Srinivasan Learned Sr. Counsel appearing on behalf of ILFS submits that in terms of earlier order passed by this Appellate Tribunal, the matter relating to individual and three Amber Entities was considered. Out of them three entities namely (i) Moradabad Bareilly Expressway Limited; (ii) Jharkhand Road Projects Implementation Company Limited; and (iii) West Gujarat Expressway Limited have been declared green entities.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

2. It has been ordered to pay the dues of all the 'Financial Creditors' as per schedule of repayment and many of the Creditors have already been paid.

3. It is stated that out of the rest 10 Amber entities with regard to one entity namely 'ITNL Road Infrastructure Development Company Ltd.', a settlement has been entered with its Concessioneing Authority as per which the said Amber entity will receive approx. Rs. 144 crores and the said amount will be utilized for cost of settling the liability of all the Creditors for which the meeting of the Creditors of the said Company has been called for.

4. It is submitted that there is a chance of settlement and if it is reached, the amount will be released. The matter will be reported by the next date.

5. In relation to remaining 10 Amber Entities, including one which we have already discussed above, the following chart flow have been shown:-

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

6. Learned Sr. Counsel appearing on behalf of number of lenders including Secured Lenders have raised various objections with regard to a number of Amber Entities as detailed above.

7. With regard to one of the entity namely 'Jorabat Shillong Expressway Limited (JSEL), one of the Counsel for the Lender submitted that it is similarly situated like 'Hazaribagh Ranchi Expressway Limited (HREL).

8. Mr. Gopal Jain, Learned Sr. Counsel appearing on behalf of one of the Secured Lenders of one of the 'Jorabat Shillong Expressway Limited (JSEL), submits that cases of the said Amber Entities is similar to that of 'Hazaribagh Ranchi Expressway Limited (HREL) and, therefore, no haircut is required.

9. Mr. Arun Kathpalia, Learned Senior Counsel appearing on behalf of one of the Lender in the 'Hazaribagh Ranchi Expressway Limited (HREL) submits that as per the chart flow and the financial Matrix, 'Hazaribagh Ranchi Expressway Limited (HREL) should be declared as green entities and should not be kept in the list of Amber Entity.

10. Dr. Abhishek Manu Singhvi, Learned Sr. Counsel appearing on behalf of one of the Lenders and Mr. Avinash, Learned Sr. Counsel appearing on behalf of all the Secured Lenders submits that 10% hair cut proposed therein is arbitrary and is not required.

11. According to him, if any such financial decision is taken, the matter should be also referred to the Hon'ble Justice D.K. Jain, Former Judge of the Hon'ble Supreme Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Court of India who is supervising the matter with appropriate opinion.

12. Some of the counsel raised question about the amount payable to other Creditors such as ILFS Group Entities, who are also Lenders. However, we are not inclined to give any finding with regard to them as all similarly situated Lenders are to be treated equally and nobody can be discriminated except for exceptional grounds. In any case that will be decided by the Authority first wherein after this Appellate Tribunal may decide the issue.

13. Certain development with regard to Red Entities will be deliberated upon the next date.

14. However, in the meantime, the Appellant Union of India and ILFS will also simultaneously deal with all the red entities and the cases where there is no chance of resolution, may be released for the purpose of Resolution through some other process.

15. By the next date, learned counsel for the ILFS and Union of India will also state as to what step is to be taken on payment of dues of different funds such as 'Pension Funds', 'Gratuity Funds', 'Provident Fund', 'Insurance Funds' including 'Army Group Insurance Funds' etc. as ordered on 12th July, 2019.

I.A. No.____/2019 Ms. Nimisha Jain, Advocate appears on behalf of National Highways Authority of India and submits that though she and Ms. Divya Bhalla, Advocate appeared on behalf of National Highways Authority of India, but in the order dated 30th August, 2019, the presence was Company

Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, wrongly recorded on behalf of Union of India. It is accordingly ordered to read the presence of Ms. Divya Bhalla and Ms. Nimisha Jain as Advocates for the National Highways Authority of India in the order dated 30th August, 2019. Necessary corrections be made in the appearance of the said order dated 30th August, 2019 and free copy of the same be supplied to the Counsel, i.e., Ms. Divya Bhalla and Ms. Nimisha Jain and others. I.A. is disposed of.

Post these appeal(s) for 'Orders' on 18th November, 2019 at 3.00 P.M."

17. Time to time interim orders were passed enabling the Entities to resolve to pay the dues of the Senior Secured Creditors, Financial Creditors and other Lenders. Their details are not recorded.

18. On 20th December, 2019, for the first time the question arose as to whether the Shareholder's permission was required for resolution and distribution in terms of the Agreement. Subsequently, on behalf of Union of India, a request was made to allow the Shareholders to take amount and get their shares. A question is also raised as to whether a person who have invested the money during the constitution of the Companies, should be paid like the Lenders, Financial Creditors and others creditors out of the amount generated by way of resolution. It is at this stage, an objection has been raised not to allow the Shareholders, who have formed a Company to derive any advantage out of the resolution process and at that stage, the jurisdiction of the Tribunal has been challenged.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

19. Mr. Kapil Sibal, learned Counsel appeared on behalf of 'L&T Infra Debt Fund Limited' and 'India Inftebt Limited' submitted as follows: -

19.1 Both L&T IDF and IIDL are senior secured debenture holders of Hazaribagh Ranchi Expressway Limited, a subsidiary of IL&FS Transport & Networks Limited, which in turn is a subsidiary of Infrastructure Leasing & Financial Services Limited. L&T IDF and IIDL are intervenors in the captioned matter vide I.A. No.388/2019. While the Written Submissions are being filed with specific reference to HREL, however, the submissions hold true for all the SPVs of ITNL.

19.2 This Hon'ble Appellate Tribunal has exercised its appellate jurisdiction in the Appeals against the order dated 12.10.2018 made by the Hon'ble National Company Law Tribunal, Mumbai ("Adjudicating Tribunal") in an application filed by Union of India under Section 241 and 242 of the Act. The Hon'ble Appellate Tribunal has thereby passed various orders in the captioned matter, including the order dated 15.10.2018 ("Interim Order"), the order dated 11.02.2019 and subsequent orders, which have caused grave prejudice to the debenture holders of fully solvent companies.

19.3 There can be no deprivation of property except in accordance with law:

Contractual rights of L&T IDF and IIDL and the right to receive its legitimate dues thereunder constitute 'property' protected under Article 300A of the Constitution of India. Therefore, L&T IDF and IIDL cannot be deprived of their right in property i.e. the right to recover the interest and principal amounts thereunder, by modifying the terms of such contract inter alia by Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, way of resolution framework report dated 25.10.2019 ("Resolution Framework Report"), save under authority of law.

19.4 No proceeding in respect of HREL under Section 241 before the Hon'ble Adjudicating Tribunal: No proceeding was initiated under Section 241 of the Act against HREL, before the Hon'ble Adjudicating Tribunal.

Therefore, no order under Section 242 of the Act could have been made one, in respect of HREL; and second in respect of lenders who are counter parties of contracts entered by HREL.

19.5 HREL not even a party to the proceedings before Hon'ble Appellate Tribunal: The Hon'ble Appellate Tribunal cannot make orders in relation to counter-parties of HREL when HREL is not an Appellant in the instant matter and even L&T IDF and IIDL have not made HREL a party to the Appeals.

19.6 Beyond the scope of power to interfere/ modify with third party contracts under Section 241/242 of the Act:

(i) The proviso to Section 242(2)(f) of the Act provides that any variation of a contract entered into with a third party can only be done with due notice and consent of the third party, in this case L&T IDF and IIDL.

(ii) The safeguards provided under proviso to Section 242(2)(f) of the Act cannot be made redundant by way of an order made under Section 242(2)(m) of the Act.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

(iii) Section 424(1) of the Act only deals with the procedure to be followed by the Hon'ble Appellate Tribunal. It does not permit importing substantive provisions of the Insolvency & Bankruptcy Code 2016 ("Code") in an appeal, that too which are ex- facie contrary to the express provisions of the Act. Further, the power of the Hon'ble Appellate Tribunal to regulate its own procedure is subject to the provisions of the Act. Contractual rights protected by Article 300A cannot be tampered with by reliance on Section 424 of the Act.

(iv) In the light of the specific requirement of consent under the proviso to Section 242(2)(f) of the Act, the Hon'ble Appellate Tribunal cannot modify third party agreements under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 ("NCLAT Rules"). Equitable powers under Rule 11 of NCLAT Rules cannot empower the Hon'ble Appellate Tribunal to amend and vary third party contracts which are protected by Article 300A of the Constitution of India.

(v) The Union of India could have invoked Sections 230-232 of the Act, which deal with approval of a scheme of compromise and arrangement, for the resolution framework report and wherein the rights of lenders can be varied with the consent of ¾th of the lenders. However, in the present proceedings under Sections 241 and 242 of the Act, the Hon'ble Appellate Tribunal cannot in derogation of the protection of the proviso of Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Section 242(2)(f) of the Act, interfere with contracts of third parties.

19.7 Separate Legal Personality of borrower companies cannot be obliterated in proceedings under Section 241/242 of the Act:

(i) The concept of group insolvency is completely alien to Section 241/242 of the Act. Companies which are solvent cannot be brought under group insolvency. No proceedings has been initiated by the Union of India w.r.t. to HREL under Section 241/242 before the Hon'ble Adjudicating Tribunal.

(ii) The Resolution Framework Report and the various affidavits filed by the Union of India seek the exercise of powers by this Hon'ble Appellate Tribunal in complete derogation of the well settled principle of a subsidiary being a separate legal entity.

(iii) HREL is a separate legal entity entirely unaffected by insolvency/ cashflow issues of IL&FS.

19.8 Other aspects concerning jurisdiction of the Hon'ble Appellate Tribunal in the present proceedings:

(i) In the Appeals filed by the respective Appellants, there is no a whisper of a stay on the normal debt servicing by any company of IL&FS Group.

Therefore, the Interim Order does not restrict normal debt servicing. However, the subsequent orders starting with order dated 11.02.2019 travel beyond the relief sought in the Appeals. The Union Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, of India (acting at the instance of the IL&FS) has misled the Hon'ble Appellate Tribunal during the course of present proceedings. All affidavits of the Union of India in relation to the Resolution Framework Report, starting with the affidavit dated 25.01.2019, merely rubber stamp the decisions of IL&FS board (all affidavits of Union of India are entirely based on the letters of IL&FS enclosed to such affidavits), and therefore cannot be taken to be the stand of Union of India.

(ii) The Union of India and IL&FS have filed an appeal against the order dated 12.10.2018 of the Hon'ble Adjudicating Tribunal. The scope of jurisdiction of the Hon'ble Appellate Tribunal is therefore narrow and restricted to such order of the Hon'ble Appellate Tribunal. The Hon'ble Appellate Tribunal cannot pass interim orders on the purported "Resolution Framework Report", as it is not the court of first instance. The Resolution Framework Report ought to have been first submitted before the Hon'ble Adjudicating Tribunal and not before the Hon'ble Appellate Tribunal.

19.9 Implication on Rule of Law and public Interest:

(i) If a party is permitted to give a complete go-by to its contractual obligations in the illegal manner as sought inter alia under the Resolution Framework Report, without any authority of law, it will have adverse consequences for the rule of law in India and both foreign and domestic investors would lose faith in India as a jurisdiction.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

(ii) Most public private partnership (PPP) infrastructure projects are undertaken in separate special purpose companies and the lenders finance them based on the integrity of the separate legal personality of such special purpose companies. If the sanctity associated with separate legal personality is lost, it will have a debilitating effect on the infrastructure sector where banks and financial institutions provide financing on the basis of the project being undertaken in separate company ringfenced from the other liabilities of the parent company's group. This will also significantly impact creation of infrastructure in India and hurt public interest.

(iii) Interference with third party contracts will precipitate a crisis in infrastructure financing in India, as it would undermine the credibility of the ring-fenced escrow account/ trust account mechanisms, the sanctity of which is crucial for all banking and finance transactions and would not be in public interest. Sanctity of contracts, which is the greatest public interest in country founded on the premise of rule of law, is being sought by the Appellants to be utterly disregarded in this matter.

20. Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of IndusInd Bank, Lender of one Amber Entity and two Red Entities made similar submission challenging the jurisdiction of the Appellate Tribunal to pass interim order.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

21. Mr. Dushyant Dave, learned Senior Counsel appearing on behalf of Bajaj Finance Limited submitted that this Appellate Tribunal does not have the jurisdiction to pass any orders under Sections 241 and 242 of the Companies Act, 2013 including the 15th October, 2018 order. It was submitted that settled principle of law laid down inter-alia under P. Ramesh Kumar v. Dr. Shankernarayana Gupta (2011) 100 CLA 125 (CLB) that the Tribunals do not have the jurisdiction

under Section 242 of the Companies Act, 2013 to interfere with the day to day management of the affairs of a company. Such powers are vested with the shareholders and Board of Directors of the concerned Company. It was submitted that when the Tribunals exercise their powers under Section 242 of the Companies Act, 2013 and appoint a new Board of Directors to manage the affairs of the concerned company, the management of the Company should be vested with such new board and the Tribunals do not have the jurisdiction to interfere with the commercial wisdom of such new Board in managing the affairs of such company.

22. It was submitted that the NCLT Mumbai vide its 1st October, 2018 order appointed the New Board to manage the affairs of the ILFS Group as per the articles and memorandum of association of the respective ILFS Entities. Therefore, any decision in relation to the management of IL&FS Group, including the decision of resolving the stress in the ILFS Group should be vested with the New Board. The Tribunals do not have the Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, jurisdiction to pass directions interfering with the management of the New Board.

23. Further, according to the learned Senior Counsel Section 242(1) of the Companies Act, 2013 lays down that the NCLT may pass such necessary orders to bring to an end 'the matters complained of'. This Appellate Tribunal vide 15th October, 2018 order imposed a stay inter-alia on the lenders to the ILFS Group from taking any enforcement actions against any entity of the ILFS Group after taking into consideration, a) nature of the case; b) larger public interest; c) economy of the nation; and d) interest of the IL&FS Entities. Reliance has also been placed on the decision of the Bombay High Court in the matter of 'Bennet Coleman and Company v. Union of India and Ors.' that "...the only limitation that could be impliedly read on the exercise of the power would be that nexus must exist between the order that may be passed thereunder the object sought to be achieved by these sections and beyond this limitation which arises by necessary implication it is difficult to read any other'.

24. Learned Senior Counsel further submitted that when the Tribunals exercise their powers under Section 241 or Section 242 of the Act, they can award remedies with the intent of bringing to an end mismanagement of the company. Furthermore, it has been laid down by the Hon'ble Supreme Court of India in 'Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd. and Ors. - AIR 1981 SC 1298 that the power of the Tribunals to pass directions under Sections 397, 398 of the Companies Act, 1956 (which Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, corresponds to Section 241 of Companies Act, 2013) and Section 402 of the Companies Act, 1956 (which corresponds to Section 242 of Companies Act, 2013) is restricted to be exercised strictly "with a view to bringing to an end the matters complained of". In the instant case, the Appellant filed an application under Section 241 of the Companies Act, 2013 alleging gross mismanagement of the affairs of the ILFS Group by the erstwhile Board of Directors of ILFS. Therefore, the power of the Tribunals in this context is restricted only to the extent of bringing an end to the mismanagement of IL&FS Entities by the Erstwhile Board which was already done by the NCLT's order suspending the Board of Directors of the ILFS Group and reconstituting the Board with new Directors under Section 241 of Companies Act, 2013 along with subsequent orders issuing substantial and sufficient safeguards to the New Board to conduct the management and affairs of

the ILFS Group. It was also submitted that the Tribunals do not have the Authority to pass an order similar to moratorium under IBC or any such order which prejudicially affects the rights of third parties.

25. Mr. S.N. Mukherjee, learned Senior Counsel appears on behalf of Aditya Birla Finance Ltd. and Wavell Investment Private Limited made the following submissions: -

(i) The Tribunal's powers under Section 241(1) and 241(2) of the Companies Act, 2013 are identical. Section 242 makes no distinction between orders under Section 241(1) and 242(2). As such, Section 241(2) merely grants an additional right to the Central Government to Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, file a petition if it is of the opinion that the affairs of the company are being run in a manner prejudicial to public interest, and the ultimate scope of the Tribunal's powers are however still defined under Section 242. Prejudice to 'public interest' is only a qualifying factor for the Central Government to file petition under Section 241(2), and it does not in any manner enhance the Tribunal's power beyond those provided under Section 242.

(ii) The Resolution/ Distribution Framework has been proposed in a petition filed under Section 241/242 of the Act and any reliefs prayed for therein have to be in terms of the provisions of the same. Section 242(2)(f) specifically requires the consent of the Applicant (or other contracting party) to be obtained prior to modification of any terms of its contract. Unilateral modification of terms of financing agreements is in direct contradiction to the provisions of Section 242(2)(f).

(iii) It is submitted that since the Facility Agreements have not been challenged as being prejudicial to public interest or causing mismanagement/ oppressions, it is no longer possible to post facto seek modification of these agreement in the garb of 'public interest' under Section 241(2). The terms of Section 242 must be read harmoniously and not in a manner that would make the provisions of Section 242(2)(f) redundant/ 'dead letter'.

(iv) Rule 11 of the NCLT Rules also only saves/ protects the inherent powers which are already present with the Tribunal. It cannot be said to bestow any new powers beyond the Act itself.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

(v) Further, it is a settled position of law that inherent powers of a Court / tribunal are not unfettered and must be exercised within the confines of the governing statute. In particular, inherent powers do not allow a court / tribunal to take away substantive rights of third parties and/ or nullify or stultify a statutory provision.

26. Similar submission is made by Mr. Arun Kathpalia, learned Senior Counsel appearing on behalf of PTC India Financial Services Ltd.

27. There are other Lenders, who have also raised the similar objections by filing their written submissions and taking similar plea. Hence, no separate submissions are recorded.

28. Hindustan Zinc Limited Employees Contributory Provident Fund Trust claimed to be a Secured Creditor of IFIN raised the similar objection.

29. Mr. Salman Khurshid, learned Senior Counsel appeared on behalf of Army Group Insurance Fund (AGIF). According to him, the AGIF had infused the funds contributed as compulsory deduction from the army personnel in secured non-convertible debentures issued by IL&FS and IFIN. These companies are presently categorized as 'Red Entities'. Principal debt of Rs.210 crore along with applicable interest is due and payable to AGIF. AGIF collects the deductions from every soldier of the Indian Army and seeks to provide inter alia the relief to the kith and kin of the army personnel i.e. the widows, children and their aging parents. AGIF herein is espousing the sacred cause for social security of widows/ orphans/ old parents/ next of Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, kin of the martyred soldiers while they were selflessly defending the national borders in extremely hard, dangerous and challenging situations. It is submitted that this Appellate Tribunal on 12th July, 2019 directed the ILFS and Union of India to specifically state as to what steps they will take to release the amount payable to 'Pension Fund', 'Provident Fund', 'Army Group Insurance Fund', 'Gratuity Fund', 'Superannuation Fund', 'Postal Life Insurance Fund' etc. if invested in one or other 'Red Entity'. It was made clear that if any fund is generated, this Appellate Tribunal may direct ILFS and Union of India to release the amount to the aforesaid fund, even of the Red Entities. However, ILFS and Union of India have till date neither released the funds of AGIF nor provided as to when and how the funds shall be released. The affidavit filed by Union of India on 9th January, 2020 in fact simply seeks to avoid the issue of the payments to AGIF or other such funds, which is in gross violation of the above orders. It is clear that funds raised by ILFS and IFIN generally were passed to various group companies.

However, when it comes to repayment, Union of India is seeking to effectively repay the debts only from the concerned entity which obtained the monies to the concerned creditors of that company. This approach is outlined by the Union of India in paragraph 25(a) to 25(c) of the affidavit filed by Union of India on 9th January, 2020, wherein cost of resolution process incurred by the group as a whole is to be recovered from the sale of the concerned entity, but the repayments to creditors is to be made only to that of the "relevant Group Company". This approach cannot be accepted and cannot Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, be stated to be 'fair and equitable' as propounded. In any case, it is submitted that any fund which is generated by the ILFS Group or by the Red Entities should first be used to repay the monies to AGIF. The AGIF has not infused any funds into the companies which are classified as Green entities, and therefore, to that extent the proposal of repayment by Green Companies to AGIF is an eyewash.

30 The learned Counsel submits that in the public interest under Section 241/242 of the Companies Act, 2013 a specific entity wise resolution/ repayment model should not be adopted especially in the case of the nature such as the present one where monies obtained by one company in ILFS Group

were funneled/ transferred to other group companies. There is no basis or purport for applying the Section 53 IBC principle for Red Entities as such especially considering that there are findings of:

(a) mis-governance and mismanagement of ILFS group.

(b) ILFS Group having undertaken significant intra-group financial transactions within the Respondent No.1 Group, and significant borrowings having been made by ILFS and IFIN for deployment at operating companies, and that such deployment of funds has been made on an unsecured basis in a significant majority of the cases, and that but for such deployments many of the ILFS Group companies would not have been able to complete their projects and generate cash flows."

31. It was submitted that in the face of the above, permitting certain 'Green' companies to discharge their debt obligations to third parties would Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, work serious injustice to entities such as AGIF who infused funds to ILFS/ IFIN as such.

32. It was further therefore submitted that the distribution framework/ revised distribution framework as proposed by the Union of India is not in keeping with the orders of the Hon'ble NCLAT dated 12th July, 2019. It was prayed that any money which is generated by ILFS Group should be, after realization of the resolution costs, first applied towards repayment of the dues of AGIF.

33. Union of India and IL&FS have justified the interim order passed by this Appellate Tribunal on 15th October, 2018. According to the learned Counsel for the Union of India and IL&FS, those who have already derived advantage of the interim order should not be allowed to raise objection at this belated stage.

34. The learned Counsel highlighted the benefits of the interim order derived by the parties during last one year by way of resolution of different Companies and payment of dues to Secured Creditors/ Financial Creditors and other Creditors.

35. According to State Bank of India, the present case is unique and unprecedented which involves the resolution of IL&FS Group involving 348 companies including off-shore entities. The Board of IL&FS Group now comprises the nominees of UoI upon its petition u/s 241 & 242 of the Companies Act, 2013 being admitted by the NCLT Mumbai on the allegation Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, that the affairs of the IL&FS Group companies were being conducted in a manner prejudicial to public interest. It was submitted that it must be borne in mind that the resolution of IL&FS Group arose as a special case since the defaults by the entities of IL&FS had rattled the market and economy was at stake. Therefore, the present case must not be treated as a precedent.

Furthermore, the following suggestions of the State Bank of India may not be construed as views of other Financial Creditors/ CoC.

36. Learned Counsel for SRS Orion I Investments Ltd. & Ors. submitted that SRS Orion I Investments Ltd. a foreign investor invested Rs.520 crores in each Hill County Properties Limited (HPCL) (formerly Maytas Properties Limited) an IL&FS Group Company, categorized as a 'Red' entity. The grievance has been made that IL&FS proposed to disinvest its stake in HCPL in contravention of the Applicants' right. It is stated that there were defaults under the investment agreement due to breakout of "Maytas Scandal"

(following Satyam scandal) and legal proceedings were initiated as a consequence thereof. The then Company Law Board inducted IL&FS as a New Promoter of HCPL and the legal proceedings continued.

37. It was further submitted that to resolve all outstanding issues, the Applicants, HCPL and IL&FS Group entered into Settlement Terms dated January 15, 2013, which were recorded in and given effect to in a Consent Decree dated July 26, 2014 passed by the Lok Adalat organized by the City Civil Court Legal Services Authority, in LAC No. 518 of 2014 that was pending on the file of the Hon'ble City Civil Court in Arbitration O.P. No. 138 of 2010.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

38. The Settlement Terms inter alia provided that:

"(a) HCPL and IL&FS Group (amongst others) will purchase the CCDs from the Applicants in four tranches [Clause 3]

(b) Till any amounts are due and payable to the Applicants, IL&FS Group was required to maintain Majority Control in HCPL [Clause14.3]

(c) In terms of the Settlement Terms, HCPL incorporated Jeedimetla (an SPV wholly owned by HCPL) and the irrevocable development rights in Kondapur Lands and Jeedimetla Lands situated at Andhra Pradesh were vested in it.

(d) Jeetimetla was to develop a project on the above-

mentioned lands as per its business plan. All free cash flows from the project were to be utilised first towards payments due and payable to the Applicants with respect to Tranche 3 obligation [Clause 6.4.7-6.48]

(e) In case of default in purchase of the CCDs under Tranche 3, the Applicants will be entitled to Takeover Rights i.e. the right to take over the share capital of Jeedimetla which holds the Kondapur and Jeedimetla Lands for development of the project[Clause 6.5.2]. These lands have thus been

segregated and kept aside to secure the fulfilment of obligation of HCPL under Tranche 3 of the Settlement Terms.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

(f) In case of default in purchase of CCDs under Tranche 4, HCPL will, and IL&FS will cause HCPL to, liquidate HCPL and its subsidiaries' properties and assets of whatsoever nature, are required to satisfy the obligation to purchase the Tranche 4 CCDs [Clause 7.3.2.1].

39. It was submitted that pertinently, the role of the IL&FS Group and HCPL in relation to the development of the lands in question was that of facilitator and they had no economic interest in the same. HCPL was to develop the lands and the proceeds from the development of land was to be appropriated, first, for payment to the Applicants in exchange of the CCDs and then the residual proceeds, if any, were to be paid to the landowners.

The transaction will, thus, cause no financial loss to IL&FS and /or HCPL, since it was playing the role of a facilitator as regards the ownership and control of the assets. To the contrary, it will reduce the liabilities of HCPL and /or IL&FS Group. [Refer clauses 6.4.2,6.4.3,6.4.8,6.5.2.1 and 6.5.2.3].

40 It was alleged that HCPL has failed to fulfil its obligations under the Settlement terms citing the order of this Appellate Tribunal dated October 15, 2018. Owing to the aforesaid default by HCPL and IL&FS Group under Tranche 3,the Applicants have exercised Takeover Rights i.e. to take over Jeedimetla by acquiring the entire share capital of Jeedimetla by swapping the Tranche 3 CCDs such that Jeedimetla will be entirely owned and controlled by the Applicants and JMF(the other investor) (Swap). The Applicants are entitled to 86.67% shares of Jeedimetla. However, HCPL failed Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, to transfer the said shares. Till date, the Swap has not taken place and HCPL has failed to transfer 86.67% shares of Jeedimetla, despite the following categorical admissions on part of HCPL and IL&FS Group of their default under the Settlement Terms:

"(i) The order dated December 26,2019 passed by Ld. City Civil Court, Hyderabad notes at para 16 that HCPL and IL&FS Group do not dispute the violation/non-compliance of the Consent Decree;

and

(ii) E-mail dated January16,2020 from the Claims Management Advisor of HCPL to the Applicants, admitting the entire amount of INR 443.75 crores claimed by Applicants as being due and payable under the Settlement Terms."

41. It was submitted that as per Clause 7.3.2.1 of the Settlement Terms, if HCPL does not fulfil its obligation to purchase the Tranche 4 CCDs, HCPL will, and IL&FS will cause HCPL to, Liquidate

HCPL and its subsidiaries' properties and assets of whatsoever nature, as are required to satisfy the obligation to purchase the Tranche 4 CCDs. The Applicants thus have a right to liquidate HCPL and its subsidiaries for enforcing its rights under Tranche

4. Therefore, any sale of IL&FS stake in HCPL will result in violating the Settlement Terms and the Applicants will be left remediless insofar as the rights under Tranche 4 is concerned. In September 2019, IL&FS has issued an Invitation for EOI for disinvestment of the 80% equity stake held by it in Company Appeal (AT) No. 346 of 2018 With I.A. 3616, 3851, 3860, 3962, 4103, 4249 of 2019, 182, 185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, HCPL. The Invitation for EOI is contrary to the terms of the Settlement Terms, in particular Clause 14.3, which reads as below: -

"As long as any amounts are due and payable to the Investors in terms hereof, IL&FS Group will continue to have Majority Control over MPL and MPL Subsidiaries."

Majority Control has been defined as "the power to exercise at least 40% (forty per cent) of the voting rights attached to voting securities, together with management control of MPL".

42. It was submitted that the Invitation for EOI is contrary to the Settlement Terms/Consent Decree, which will be clear from the chart below:

"Invitation for EOI Proposed sale of equity shareholding of 9%, 40% and 31% (aggregating to 80% stake) in HCPL held by IL&FS, IL&FS Township & Urban Assets Ltd. and IL&FS Engineering and Construction Company Limited respectively. HCPL houses various land parcels/ development rights. Some of these are provided in the Invitation for EOI.	Settlement Terms Clause 14.3- As long as any amounts are due and payable to the Investors (this includes the Applicants). IL&FS Group will continue to have Majority Control over HCPL. Majority Control has been defined in Clause 16) as the power to exercise at least 40% of voting rights attached to voting securities, together with management control to HCPL.
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Company Appeal (AT) No. 346 of 2018 With I.A. 3616, 3851, 3860, 3962, 4103, 4249 of 2019, 182, 185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Clause 6.5.2.1- If the Applicants exercise their Takeover Rights, IL&FS Group and HCPL will cause the entire share capital of the Jeedimetla to be swapped i.e. transferred to the Applicants (and the other investor) proportionately against the Tranche 3 CCDs held by the Applicants.

Clause 7.3.2.1- In case of default in purchase of CCDs under Tranche 4, HCPL will, and IL&FS will cause HCPL to, liquidate HCPL and its subsidiaries' properties and assets, as are required to satisfy the Tranche 4 obligation."

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Therefore, according to the learned Counsel, the 'Expression of Interest' is violative of the Settlement Terms and Consent Decree.

43. The application has been filed by the Union of India under Section 241(2), which reads as follows: -

"241. Application to Tribunal for relief in cases of oppression, etc--

(1) xxx xxx xxx (2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter."

44. Section 242 vests the Tribunal with the power, if, on an application made under 241, the Tribunal is of the opinion - 'that the Company's affairs have been or are being conducted in a manner prejudicial to the public interest or in a manner prejudicial to the interests of the company; and (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, then in such case the Tribunal, with a view to bring to an end the matters complained of, make such order as it thinks fit'.

45. The present case shows that prima facie case has been made out by the Central Government that the affairs of the six Companies of IL&FS & Group Companies are being conducted in a manner prejudicial to the public Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, interest and there is a likelihood of the winding up of the Company for the reasons in view of the facts as discussed above. Therefore, the Tribunal with a view to bring an end to the matter complained of is required to pass final order.

46. The question is before passing final order, what nature of interim order can be passed in the present case.

47. Section 242(4) deals with the interim order: -

"242. Powers of Tribunal (1), (2), (3) xxx xxx xxx (4) The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable."

48. Therefore, it is clear that for regulating the conduct of the company's affairs upon such terms and conditions, it is open to the Tribunal to pass interim order, which is just and equitable.

49. Section 424 of the companies Act, 2013, relates to procedure before the Tribunal and Appellate Tribunal and reads as under:-

"424. Procedure before Tribunal and Appellate Tribunal (1) The Tribunal and the Appellate Tribunal Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, 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 (5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [or of the 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 the Code of Civil Procedure, 1908 (5 of 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 (1 of 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;
 - (f) dismissing a representation for default or deciding it ex parte;
- Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,
- (g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; 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 (45 of 1860), 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 (2 of 1974)."

50. From the aforesaid provision, it is clear that Tribunal/ Appellate Tribunal is required to follow principles of natural justice and other provisions of the 'Companies Act, 2013' or the 'Insolvency and Bankruptcy Code, 2016' and of any rules made thereunder for regulating its own procedure. Since the amendment of Section 424 with effect from 15th Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, November, 2016, the Tribunal/ Appellate Tribunal is vested with the power to follow the procedure of Insolvency and Bankruptcy Code, 2016, in addition to the procedure laid down in the Companies Act, 2013 and the rules framed under the aforesaid Code and Act.

51. The Hon'ble Supreme Court in "Swiss Ribbons Pvt. Ltd. and anr vs. Union of India and Ors. - (2019) 4 SCC 17" noted the statement of objects and reasons of the Code as under:-

"2. The objective of the Insolvency and Bankruptcy Code, 2015 is 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 interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Company Appeal (AT) No.

346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for Regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, the Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013."

The Hon'ble Supreme Court further observed: -

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, "27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code.

The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in

any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.

28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

52. It cannot be said that NCLT while dealing with winding up matter or a matter under Section 241 r/w Section 242 particularly in a case under Section 241(2), which relates to public interest, the principle of Insolvency and Bankruptcy Code cannot be followed.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

53. The Hon'ble Supreme Court held that steps should be taken for resolution of the Corporate Debtor and death of Corporate Debtor (Company) is not the answer. In IL&FS and its Group Companies, the aggravating situation has been noticed and highlighted, which called for interim order in the nature, which we have already passed on 15th October, 2018.

54. It is true that power of moratorium us Section 14 of the I&B Code cannot be exercised under the Companies Act, 2013, but same power can be exercised by Tribunal under Section 242(4) of the Companies Act by way of an interim order, if the Tribunal thinks fit for regulating the conduct of the Company's affair upon such terms and conditions, which is just and equitable.

55. Apart from Union of India and IL&FS, major investors like State Bank of India has accepted that the present case is unique and unprecedented involving resolution of IL&FS and its 302 Group Companies including Off-shore entities. It is accepted that because of interim order, resolution plan of Rs.40,000 crores has offered and there is likelihood of getting Rs.10,000 crores to Rs.20,000 crores more. It has also been noticed that all the 133 Off-shore Companies (incorporated outside India) have been released out of the interim order and are now doing good business. 169 Entities incorporated in India, out of them about more than 33 Entities have been made 'Green Entities' and are paying to their Secured Creditors, Financial Creditors and other Creditors. Out of the 13 'Amber

Entities', 3 have already been turned 'Green Entity' and 4th is also going to be a 'Green Entity' because Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, of the interim order and is now in a position to pay the dues of all the Secured Creditors, Financial Creditors and other Creditors. The other 'Amber Entities' are also in a position to pay the Secured Creditors and other Creditors. Out of more than 55 'Red Entities' there are purchasers, who have given highest bid in one or the other case and in some cases transfer of asset has also taken place.

56. In India, there is no provision for 'group insolvency'. IL&FS and its Entities, being financial service providers, no application under Section 7, or 9 or 10 of the I&B Code can be filed against them. Parties have to move before the Tribunal by filing petition for winding-up.

57. On the other hand, about 169 Companies, which are on the resolution process in the present case under 'Green Entities', 'Amber Entities' and 'Red Entities', if the parties are allowed to move an application under Section 7, or 9, or 10, there will be equal number of cases, which will be filed before the Adjudicating Authority (NCLT) at different places/ State and Benches. They cannot be clubbed together in absence of any power under the Companies Act or I&B Code. It will give rise to number of cases and consume much time of different Tribunals and the process would be much lengthy, if individual cases are allowed to be filed. There are parties, who may also move in suits in different Civil Courts/ High Courts and there will be separate proceedings, which will be pending against one or the other Group Companies, which will multiply the litigations.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

58. Taking into consideration the aforesaid fact, we hold that Tribunal/ Appellate Tribunal has ample power to pass interim order in terms of Section 242(4) of the Companies Act as passed on 15th October, 2018 and requires no modification/ recall.

The Procedure to be followed

59. Already a procedure is being followed for resolution of different Companies in the General Resolution Frame Work.

60. The maximization of the asset and distribution of it to all the stake holders are the object to be kept in mind while following any Resolution Framework for the IL&FS Group Companies.

61. The Union of India on the basis of the present procedure as is followed under the guidance of this Appellate Tribunal and under the supervision of Hon'ble Justice (Retd.) D.K. Jain, has highlighted the key of the Resolution Framework as follows: -

"Key Highlights of the Resolution Framework Initial Resolution Framework (1) As set out above, the Initial Resolution Framework and the First Addendum were filed by the Appellant with this Hon'ble Tribunal vide the January 25 Affidavit.

(2) The Initial Resolution Framework sets forth that an 'asset by asset' solution, being explored through various methods i.e., an "Asset Level Resolution"

(and in some cases, the sale of the business Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, vertical comprising of a basket of companies) is the most feasible option for the resolution of Respondent No.1. Group.

(3) Set out below are the salient features of the Initial Resolution Framework:

(i) Crystallisation of claims as of "Cut-Off Date"

(i.e. October 15, 2018): No interest, additional interest, default interest, penal charges or other similar charges to accrue after the Cut-Off Date of October 15, 2018.

(ii) Appointment of valuers for determining the fair value and liquidation value:

valuers to be appointed to determine the fair value and liquidation value in respect of "Sale Companies" (i.e., entities being monetized as part of the 'Asset Level Resolution').

(iii) Categorisation of entities (Category I and Category II): Based on the H1 bid value received, a Sale Company would either be, a:

- (a) Category I Company i.e., where the bidder is willing to assume liabilities of the Sale Company whether operational or financial without compromise of the debt; or
- (b) Category II Company i.e., where the financial bid amount offered by the

applicant is less than all the liabilities of the Sale Company.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

(iv) Constitution of a Creditors' Committee: In respect of the relevant Sale Company, Creditors' Committee will be constituted (in lieu of individual creditor consents, which are to be dispensed with) in the following manner:

(a) For a Category I Company, the Creditors' Committee shall constitute all the financial creditors of the Respondent No.1 Group Company (including Respondent No.1 Group Companies that have provided financial debt to such Respondent No.1 Group Company) which is the "selling shareholder(s)" of that Sale Company;

(b) For a Category II Company, the Creditors' Committee shall constitute all the financial creditors of the Sale Company (including Respondent No.1 Group Companies that have provided financial debt to such Respondent No.1 Group Company).

(c) Each member of each Creditors' Committee will have voting rights (by value of the financial debt owed to that member) and will be called upon to only consider the highest bid in respect of the Sale Company.

Specifically, the Creditors' Committee would not have the ability to Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, determine distribution of the bid amounts.

(v) Decision by the New Board: The decision of the Creditors' Committee to either approve or reject the highest bid for a Sale Company will be placed before the New Board for its consideration.

(vi) Approval of Justice (Retd.) D.K. Jain: If the New Board approves a sale proposal, the same will be placed before Justice (Retd.) D.K. Jain (appointed by this Hon'ble Tribunal vide order dated February 11, 2019) for his approval.

(viii) Approval of the Hon'ble NCLT: Upon receipt of approval of Justice (Retd.) D.K. Jain, the proposal will be placed with the Hon'ble NCLT for its approval. Upon receipt of approval of the Hon'ble NCLT and payment of consideration by the successful bidder, the shares/assets of the relevant Sale Company will be transferred free and clear of all encumbrances, liens, third party rights to the successful bidder."

62. Initially, it was suggested that distribution in accordance with I&B code be followed. Now it is suggested that following distribution procedure should be followed in the public interest:-

"4. Public Interest Rationale for 'Fair and Equitable' Distribution to Creditors Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, (15) Given the circumstances unique to the Respondent No. 1 Group, it is submitted that the Resolution Framework (including the Revised Distribution Framework in the Second Addendum) ought to be approved by this Hon'ble Tribunal in view of the following:

(i) as of October 8, 2018, the aggregate principal amounts of the external fund based debt exposure of the Respondent No.1 Group was approximately INR 94,000 crores (in addition to a non-fund based exposure of approximately INR 5,100 crores). These borrowings were availed by the Respondent No. 1 Group by accessing possibly every source of funding available to corporates in India, including but not limited to banks (including nationalised banks, private banks, foreign banks and scheduled co-

operative banks) and financial institutions, retail investors (by tapping into the listed bond markets in India and abroad), as well as the Public Fund Creditors such as Pension Funds, Provident Funds, Employee Welfare Funds, Gratuity Funds, Superannuation Funds, Army Group Insurance Funds;

(ii) It was submitted that a significant portion of the Aggregate External Fund Based Debt has been availed by members of the Respondent No. 1 Group (and particularly by 4 key HoldCos) from entities such as Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Pension Funds, Employees Welfare Funds, Army Group Insurance Fund), Provident Funds, Provident Funds, Gratuity Funds, Super Annuation Funds (Public Fund Creditors). These Public Fund Creditors which includes the Army Group Insurance Funds comprise of savings and Funds contributed inter alia by employees, army personnel etc. to provide for retirement benefits and related entitlements to employees of such entities, widows of army personnel etc. The amounts have been invested by the Public Fund Creditors in debt instruments issued by various Respondent No. 1 Group Entities particularly at the level of the HoldCos, which in turn have granted debt to various other entities of the Respondent No. 1 Group. Accordingly, for the Public Fund Institutions to be repaid atleast part of their dues by the HoldCos (and other such members of the Respondent No. 1 Group which have availed debt from these Public Fund Creditors), it is critical that the Respondent No. 1 Group Lenders who have lent amounts (mostly on an unsecured basis) to the Respondent No. 1 Group Entities are also able to receive some payments from the sale proceeds from the Asset Level Resolution currently underway. It is submitted that there cannot be economic Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, recovery from the debt contagion that infected the financial markets of the nation Group if and in the event that persons such as employees, army personnel etc. who are responsible for the security, integrity and economic prosperity are not repaid their dues which actually constitute their hard earned savings.

(iii) the intervention of the Appellant that was necessitated on account of the public interest aspects relating to the Respondent No. 1 Group and to avoid the catastrophic effect of the Respondent No. 1 defaults on the Indian financial markets (as elaborated in the DEA Report) and the replacement of the erstwhile board of directors of Respondent No. 1 by the New Board vide the October 1 Order on account of the burgeoning debt levels at the Respondent No. 1 Group and mismanagement of the erstwhile board of directors of Respondent No. 1;

(iv) the resolution of the Respondent No. 1 Group which comprises of 302 entities (of which 169 are Domestic Group Entities, and 133 entities are incorporated in jurisdictions outside India) is being undertaken under Sections 241/242 of the Companies Act, 2013 (which provides this Hon'ble Tribunal with very wide powers to pass orders that Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, are 'fair and equitable'), is a test case for 'group insolvency' in India and represents a watershed moment in the relatively recent and evolving insolvency and bankruptcy laws of India. It is pertinent to note that currently, no framework exists under Indian law, which pertains to or could (in its entirety) apply in a 'group insolvency' scenario;

(v) while the borrowings were availed at the relevant holding company level within the Respondent No. 1 Group by leveraging high credit ratings and a wider investor base, it is pertinent to note that the borrowings at this level (including those availed from investors who subscribed to high rated debt instruments) were primarily utilized to provide unsecured financial debt (barring some cases, where the financial facilities are secured) to the operating level entity, to fund inter alia cost overruns and working capital funding, which enabled the operating level entities to complete the project, thereby generating cash and resulted in creation in assets for the Respondent No. 1 Group (including those which are currently being monetised) as well as enabling the relevant operating level entity to service its secured financial debt. It is also pertinent to note that the bonds issued and loans availed by Respondent No. Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, 1 were assigned "AAA" rating until almost August 2018, when the date of first default by Respondent No. 1. was August 25, 2018.

Respondent No. 1, on a standalone basis, has availed of financial debt aggregating to approximately INR 18,000 crores, which was primarily borrowed by leveraging superior credit ratings. Without this funding Group entities the assets would not have been created at the operating level entity and accordingly no debt servicing would have happened to the operating level entity lenders as well. Accordingly, it is 'just and equitable' that the interest of the lenders at the holding company levels are also considered in the resolution framework for the Respondent No. 1 Group;

(vi) as far as individual creditors (and individual Creditors' Committees) are concerned, they would in all likelihood only be concerned with maximising their recovery at an individual entity level without regard to the adverse impact this would have on the creditors across different levels of the Respondent No. 1 Group, from whom debt has been availed of which a significant portion has been invested in these operating assets to make the viable entities;

(vii) the challenges being faced by the New Board in overseeing the resolution process Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, for the Respondent No. 1 Group are immense and the New Board faces an uphill task in devising and implementing a 'fair and equitable' resolution framework, to ensure that interests of all stakeholders are considered and balanced. It is pertinent to note that the Respondent No.1 Group has operations across more than 10 distinct business verticals and are spread across 4 different continents and more than 10 countries, and accordingly, given this diverse presence of the Respondent No.1 Group, the resolution process of the Respondent No.1 Group, the resolution process and mechanisms have to be formulated after evaluating the judicial/ regulatory processes across business sectors and jurisdictions; and

(viii) the resolution of the Respondent No.1 Group, in larger public interest considering the impact on the various classes of stakeholders across various levels in the Respondent No.1 Group, will assist in restoring the confidence of Indian and foreign investors, and have a positive impact on the Indian bond market."

63. The State Bank of India has suggested the following distribution formula for 'Red' and 'Amber Entities' of IL&FS "(i) SBI is the lead financial creditor with respect CNTL and some other IL&FS group entities along with Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, other secured financial creditors. The security inter alia comprise of 1st pari passu charge in favour of the Term Lenders by way of mortgage/ hypothecation of the immovable/ movable assets of the Borrower other than Project Assets, Charge on the monies lying in Escrow Account as per the terms of Escrow Agreement & Concession Agreement.

(ii) Out of the 347 Group Companies 169 domestic entities have been categorized as "Red", "Amber" and "Green" companies. The Resolution Consultant (Alvarez & Marsal India Pvt. Ltd.) must be directed to forthwith categorise the remaining domestic entities.

(iii) Committee of Creditors (CoC) may be directed to be constituted for all the IL&FS companies. In respect of CoC already constituted, meetings thereof be directed to be called immediately. The Resolution Consultant may be directed to immediately provide latest status of resolution in each of the accounts to the CoC along with:

- a. valuation reports (Fair Market & Liquidation Value),
- b. audit reports,
- c. bids received from Resolution Applicants,
- d. analysis/ reasoned recommendations of the Resolution Consultant

Where the above information is already available, the same should be directed to be provided to the Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, CoC, on priority. In other cases, the Resolution Consultant should be directed to arrange for the same.

(iv) It is submitted that a stay/ moratorium was ordered on 15.10.2018 by this Hon'ble Appellate Tribunal in respect of the IL&FS entities. Time and again, it has been emphasized by this Hon'ble Appellate Tribunal that a long time has elapsed since the said interim order which in any event, cannot continue indefinitely. Nearly 1 year and 3 months has since elapsed and therefore, the following timelines may be considered by this Hon'ble Appellate Tribunal:

- a. with a period of two weeks, the CoCs of all the IL&FS entities must be constituted. Where such CoCs are already in place, a meeting to be convened to consider the bids, if any.
- b. Within a period of 4 weeks thereafter, the Resolution Consultants should obtain the requisite Audit Reports and Valuation Reports (Fair Market Value and Liquidation Value) for entities where such reports have not been obtained yet.

c. Within a period of 4 weeks thereafter, bids must be solicited for the relevant IL&FS entities and the same must be placed before CoC for a decision on such bids.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

(v) A central Co-ordinating Team under the supervision of a Former Judge/ Senior Advocate comprising 7 to 8 representative of IL&FS, senior lender banks, Resolution Consultant may further be constituted for monitoring and supervising the developments."

64. As noticed that many of the Financial Creditors/ Secured Creditors are opposing the aforesaid distribution, but wanted the distribution as per Section 53 of the I&B Code. However, we are not inclined to follow the procedure of I&B Code including Section 53, as this is a case where public interest is involved for the following reasons: -

(i) Over the years the IL&FS has inducted institutional shareholders to include Life Insurance Corporation of India (LIC), ORIX Corporation- Japan (ORIX), State Bank of India and Abu Dhabi Investment Authority. Besides the above, the 'IL&FS Employees Welfare Trust' also holds significant shares in 1st Respondent. The shareholding pattern of the IL&FS, as on 31st March, 2018, as already been noticed, which includes share holding of Central Bank of India; State Bank of India; UTI-Unit Linked Insurance Plan,; India Discovery Fund, Housing Development Finance Corporation Limited, apart from Life Insurance Corporation of India and IL&FS Employees Welfare Trust.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, Similarly, six major Group Companies, i.e., IL&FS Transportation Networks Limited (ITNL); IL&FS Financial Services Limited (IFIN);

IL&FS Energy Development Company Limited (IEDCL); IL&FS Tamil Nadu Power Company Limited (ITNPCL); Noida Toll Bridge Limited and IL&FS Engineering and Construction Co. Limited, large number of banks and different funds have invested in them by purchasing their shares.

65. It cannot be said that 'Shareholders' including the Life Insurance Corporation, IL&FS Employees Welfare Trust, Housing Development Finance Corporation Limited, Central Bank of India, State Bank of India, UTI-Unit Linked Insurance Plan etc. should not be paid by following the procedure under Section 53 of the I&B Code. This would be against the public interest as the money invested by purchasing shares by Life Insurance Corporation of India, IL&S Employees Welfare Trust, Central Bank of India, State Bank of India are public money, who are the shareholders.

66. In this background, while we reject the objections raised by some of the Creditors, as noticed above, we accept the suggestion of pro-rata distribution as suggested by Union of India and the

procedure as suggested by it for the purpose of completing resolution process.

67. So far as cut-off date is concerned, for the present 15th October, 2018 being the date of interim order, we accept the cut-off date for distribution of the asset because the said date is the date of initiation of the resolution Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850, process of the Companies. Hence, the said date should be treated as initiation of the resolution process of the IL&FS and Group Companies.

68. In so far as claim of SRS Orion Investments Ltd. and others is concerned, we are of the view that the matter should be taken up by the new Management/ Board of Directors, who should take into consideration the decision of the Company Law Board and the settlement reached between the parties. It will be open to the New Management / Board of Directors of IL&FS and Group Companies to negotiate with SRS Orion Investments Ltd.

and others (Applicants) for fresh terms of settlement, if they intend to change the shareholding of HCPL and sell it to some other person. Thereafter, the matter should be placed before the Hon'ble Justice (Retd.) D.K. Jain for its approval and if approved such proposal should be placed before the NCLT for its approval. Upon receipt of such approval, only the shareholding of HCPL be transferred.

69. If no terms of settlement is reached or decision is disapproved by Hon'ble Justice D.K. Jain or the NCLT, in such a case, the NCLT will decide the claim of the Applicant - SRS Orion Investments Ltd. and others. The Interlocutory Application No.3616 of 2019 filed by SRS Orion Investment Ltd.

and others and the objections raised by some of the Lenders stands disposed of.

70. Applications, which are filed for renewal of the Fixed Deposit, are allowed. They are allowed to be renewed for another period of three months.

Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962, 4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,

71. Other Interlocutory Application in which other prayer has been made will be taken up on the subsequent dates as may be fixed.

72. The Union of India, the Board of Directors of IL&FS and the 'Committee of Creditors' already constituted or which may be constituted are directed to conclude resolution of all the Entities preferably within 90 days. The development should be brought to the Notice of this Appellate Tribunal every month.

Place the case 'for orders' on 14th April, 2020.

[Justice S. J. Mukhopadhaya] Chairperson [Bansi Lal Bhat] Member (Judicial) NEW DELHI 12th March, 2020 Ash Company Appeal (AT) No. 346 of 2018 With I.A.3616, 3851, 3860,3962,

4103,4249 of 2019,182,185 of 2020, Company Appeal (AT) No. 347 of 2018 With I.A. No. 3850,