

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (INS) No.44 of 2020

IN THE MATTER OF:

Rajive Kaul

...Appellant

Versus

Vinod Kumar Kothari & ors

...Respondents

For the Appellant: Mr. S.N.Mookherjee, Senior Advocate, Mr. Krishnendu Dutta, Mr. Arijit Mazumdar and Mr. Devesh Ajmani, Advocates.

**For the Respondent : Mr. Sudipto Sarkar, Senior Advocate
Mr. Anirudh Wadhwa,
Mr.Lakshya Kampani, Advocate for R-1.**

With

Company Appeal (AT) (INS) No.224 of 2020

IN THE MATTER OF:

Nicco Parks and Resorts Ltd

...Appellant

Versus

Vinod Kumar Kothari & ors.

...Respondents

For the Appellant: Mr. Ratnanko Banerjee, Senior Advocate, Mr. Nilanjan Bhattacharjee, Advocates.

For the Respondent : Mr. Lakshya Kampani, Advocate for R-1.

With

Company Appeal (AT) (INS) No.1518 of 2019

IN THE MATTER OF:

Pallavi Priyadarshini Kaul

...Appellant

Versus

Vinod Kumar Kothari & ors

...Respondents

Present:

For the Appellant: Mr. S.N.Mookherjee, Senior Advocate, Mr. Krishnendu Dutta, Mr. Arijit Mazumdar and Mr. Devesh Ajmani, Advocates.

**For the Respondent : Mr. Sudipto Sarkar, Senior Advocate
 Mr. Anirudh Wadhwa,
 Mr.Lakshya Kampani, Advocate for R-1.**

J U D G M E N T

VENUGOPAL M.J.

1. The Appellants have focused the present Appeals as ‘Aggrieved Persons’ in respect of the order dated 18.12.2019 in C.A.(IB) No. 669/KB/2019 in C.P (IB) No. 03/KB/2017 passed by the Adjudicating Authority, the National Company Law Tribunal, Kolkata Bench.
2. The Adjudicating Authority, while passing the impugned order on 18.12.2019 at paragraph 52 to 56 had observed the following:

“The Ld. Counsel has further referred to Section 27 of the Companies Act and Section 149 (6) and Explanation to Section 149(7) whereby it is stated that one may not be a shareholder in a Company and even then he can be placed as a Director, the same way these nominee Directors can be removed. They have been nominated by way of some understanding and Articles of Association. It is stated that nominee Directors have nothing to do with shareholding. If it was a family Company, one of the members of the family would be a nominee Director.

It is stated that the Memorandum and Articles of Association have sanctity attached to it and, therefore, will have to be acted according to that. It is stated that there is a separate “nominee Directors”, which category does not find place in Section 169. It is stated that very often whole time Directors are employees of the Company. Section 169(6) deals with independent Directors. It is stated that Section 169 exists because of Sections 161 & 162 whereby the appointment has to be rectified by the Board who appoints will have the power to remove. The nominee Director will have to be appointed as per the agreement. Now, the Liquidator stands in the foot of the Company, i.e. NICCO and therefore the liquidator has the power to remove.

*To stress his above said view, he cited two judgments. **Bombay High Court judgment reported in Smt. Farrel Futado vs. State of Goa and Others on 3 September, 1992 and (2008) 1 CompLJ 283 Del, 2008 84 SCL 75 Delhi.** According to him, as per Section 169 (8)(b) nothing in this Section shall be taken as derogative from any power to remove the Director under other provisions of the Act and placed reliance para 17 of the Delhi High Court Judgments. It reads as under.*

Para 17. "In view of the aforesaid, it is not in doubt that though there is a mandate contained under section 284 of the said Act that is not the only methodology for removing a Director. It is noted in the judgment that there may be eventualities like retirement, dismissal, removal or vacation of office voluntarily. The present case is one of removal of the plaintiff. The judgment makes it clear that where Articles of Association confer power on the Board of Directors to remove a director, such power is not affected by the provisions of Section 284 of the said Act. I am in full agreement with this view. The Articles of Association are in the nature of an agreement between the shareholders who are the joint owners of the company. If some specific methodology is devised by consent, nothing precludes the members/shareholders from doing so. The question to be considered is whether the present Articles of Association do provide for such a procedure." and ultimately held that the 'Liquidator' has the power to remove the 'Nominee Directors' and can nominate 'Directors' and that the Fifth Respondent (NICCO Parks and Resorts Limited) is bound to act upon the proposals of replacement of existing 'Nominee Directors' of Corporate Debtor and direct R-2 and R-2 'Rajive Kaul and Pallavi Priyadarshini Kaul', to forthwith vacate their offices as Nominee Directors of the Corporate Debtor, with the further

direction to the Fifth Respondent (NICCO Parks and Resorts Limited) to accept the proposal/decision of the Liquidator in regard to nomination of Directors and shall cooperate with him providing necessary details asked for enabling him to sell the shares held by the Corporate Debtor in the Fifth Respondent.

3. The Learned Counsel for the Appellants (Comp. Appeal (AT)(Ins) 44/2020 and Comp Appeal (AT) 1518/2019) submits that the Appellant (Rajive Kaul) was appointed as Nominee Director of the Corporate Debtor on the Board of 'NICCO Parks and Resorts Limited' and further that the Appellant (in Comp. Appeal (AT) (Ins) No.1518/2019 was appointed as Nominee Director of the Corporate Debtor (NICCO) on the Board of 'NICCO Parks and Resorts Ltd.' in 2004 and that the Appellant (Rajive Kaul) on every occasion, following the inception of Joint Sector Agreement dated 23.2.1990 when he had retired by rotation, offered himself for reappointment by the NICCO Parks and Resorts Ltd. (Appellant in Comp. Appeal (AT)(Ins) No.224 of 2020 in its Annual General Meeting in accordance with Art. 140 of the Articles of Association' of NICCO Parks and Resorts Pvt. Ltd. and his appointment was converted and confirmed by NPRL, the Appellant (Rajive Kaul) ceased to be a Nominee Director of the NICCO Corporation Ltd. (Corporate Debtor).
4. The Learned Counsel for the Appellant in Comp. Appeal (AT)(Ins) 1518/2019 brings to the notice of this Tribunal that the Appellant (Pallavi Priyadarshini Kaul) appointed as Nominee Director of the NICCO Corporation Ltd (Corporate Debtor) on the Board of NICCO Parks and Resorts Ltd. in the year 2004 and subsequently, during 2008, 2010, 2012, 2014, 2016 and 2018, when she had retired by rotation, offered herself for reappointment and was appointed by the

NICCO Parks and Resorts Ltd. (NPRL). On every occasion, in its Annual General Meeting' in accordance with Art 140 of the Articles of Association of 'NICCO Parks and Resorts Ltd, '. Furthermore, on such appointments, the Appellant ceased to be a Nominee or Representative Director of the Corporate Debtor (NICCO Corporation Ltd.)

5. The Learned Counsel for the Appellants brings to the notice of this Tribunal that the shareholders of NICCO Parks and Resorts Pvt. Ltd. other than NICCO being the Government of West Bengal and the Public shareholders (since NPRL is a listed Company) account for approximately 66 per cent of the total shareholding of 'NPRL'. In this connection, it is represented on behalf of the Appellants that apart from 'NICCO', the shareholders of 'NPRL'(including the Government of West Bengal and members of the Public) who hold approximately 75 per cent of the shareholding of 'NPRL'. And therefore, the Appellants (in both the Comp. Appeals (AT) 44/2020 and Comp. Appeal (AT) 1518/2019 were appointed as Directors of 'NPRL' by the majority members (including the Public).
6. The Learned Counsel for the Appellants points out that the procedure for the appointment of the Appellants' in all the aforesaid Annual General Meetings' was mentioned under Sec 256 of the Companies Act, 1956 and/or Sec 152 of the Companies Act, 2013.
7. The Learned Counsel for the Appellants contends that the First Respondent/Liquidator's proposal for replacement of Nominee Directors was deliberated in the Board Meeting of 'NICCO Parks and Resorts Pvt. Ltd.' that took place on 3.1.2019, and the same was rejected by the Board. At this stage, the Learned Counsel for the Appellants takes a stand that the Appellants (Rajive Kaul

and Pallavi Priyadarshini Kaul) had not participated in the discussions and they abstained from voting on the Resolution.

8. The Learned Counsel for the Appellants contends that the Appellants in Comp. Appeal (AT) 44/2020 and the Appellant in Comp. Appeal (AT)(Ins) 1518/2019 were appointed as 'Directors' in their individual capacity in the Thirtieth Annual General Meeting that took place on 27.9.2019 and in the Twenty-ninth Annual General Meeting that took place on 28.9.2018 by 99.30 per cent votes and by 71.51 per cent votes respectively. Significantly, it is pointed out on the side of the Appellants, the First Respondent/Liquidator had not voted in the Thirtieth Annual General Meeting and the Twenty-ninth Annual General Meeting despite prior notice and further had not opposed the appointment of the Appellants. As such, it is projected on the side of the Appellants that the Appellants were continuously appointed as 'Directors' on the Board of 'NPRL' and when they being not the 'Nominee Directors' of the 'Corporate Debtor' (NICCO).
9. Advancing his arguments, the Learned Counsel for the Appellants contends that the Appellants can only be removed by adhering to the procedure specified in terms of Sec 169 of the Companies Act, 2013. Also, it is the plea of the Appellants that the ingredients of Sec 169 of the Companies Act, 2013 restrict the powers of removal of 'PR' to those provided under the Act. At this juncture, the Learned Counsel for the Appellants proceeded to point out that the distinction between the provisions of Sec 284 of the Companies Act, 1956 and Sec 169 of the Companies Act, 2013 was noted in the judgment **Delhi and District**

Cricket Association v. Vinod Tihara and Others, reported in 2019 SCC Online Delhi 9012.

10. The Learned Counsel for the Appellants submits that from the perusal of the Joint Sector Agreement dated 23.2.2019, it is evident that the parties to the Agreement are defined by name and such description of them does not include the expressions that would typically include the 'Heirs' or 'Assigns' or 'Successors'. More importantly, it is represented on behalf of the Appellants that the power to nominate the Managing Director was given only to 'NICCO' and such exercise of 'Right of Nomination' is the then pre-existing business relationship between the parties to the aforesaid Agreement, viz., 'The Government of West Bengal' and 'NICCO'.
11. Yet another plea raised on behalf of the Appellants is that Clause 13 of the 'Joint Sector Agreement' exclusively restricts the Assignment of Benefits or Burdens of the Agreement by any of the parties without the consent of the other and in fact, the Agreement remains in force as long as the 'parties' hold shares in proportion as mentioned in Clause 5 of the Agreement. Therefore, it is the contention of the Appellants that the 'Right to Nominate', being a 'Contractual Right' agreed between the parties is essentially 'person in character' and the right being only to NICCO cannot be exercised either by the Liquidator or any subsequent purchaser of the 'NPRL' shares.
12. To lend support to the plea that 'a contract of personal nature' or which is based on a personal right cannot possibly assigned to another,

the Learned Counsel for the Appellants refers to Sec 40 of the Indian Contracts Act, 1872 and also the decision **Kapila Ben & Ors. V. Ashok Kumar Jayantlal reported in 2019 SCC Online 1512** and the decision of the Hon'ble Supreme Court in **Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd., reported in AIR 1962 SC 1810** and added further the 'Articles Of Association' of 'NPRL' provides the right to nominate by name to 'NICCO' only vide 'Article 121' and the exercise of such rights of nomination along with the right to nominate Managing Director of the NPRL was given to only 'NICCO' and no other entity other than 'NICCO' can exercise it.

13. The learned Counsel for the Appellants contends that the 'Liquidator steps into the shoes of 'NICCO' after 'Liquidation', and that the Liquidator is only to carry out 'Beneficial Liquidation' of the Corporate Debtor as opposed to interfering and attempting to manage the affairs of another Company which is a separate entity neither 'in 'Liquidation' nor part of 'Liquidation Proceedings'.
14. The Learned Counsel for the Appellants submits that the 'Articles of Association' is a 'Commercial' or 'Business' document which is required to be interpreted to give efficacy to the same and in the exact manner in which the parties to it would have truly intended and meant to do as per decision **IL & FS Engineering and Construction Ltd. v. Vardha Power, reported in 1076 ComCas 156.**

15. The Learned Counsel for the Appellants comes out with an argument that 'the powers of a shareholder' are not inclusive of the power to remove a Director from the Board of a Company as per his/her whims and fancies. Also that, save as provided by the Companies Act, 2013, the powers of a shareholder are not to participate in the business or management of the Company and therefore, any removal of a 'Director' from the Board of a Company can only be as per Sec 169 of the Companies Act, 2013, by a ordinary resolution passed by the shareholders of the Company.
16. The Learned Counsel for the Appellants forcefully contends that the provisions of the I & B Code do not confer any power on a 'Liquidator' to assert any right to manage or interfere with the management and business of a separate Company, which is neither in liquidation nor part of the legal proceedings. In fact, it is the stand of the Appellants that 'a Liquidator's duty is only to assist the Corporate Debtor and to realise such 'sale proceeds' of the shares for distribution of 'the proceeds' in discharge of his obligation under the Code. The Learned Counsel for the Appellants contends that the 'Liquidator' neither in his letter dated 3.11.2018 nor in the course of his pleadings had shown as to how the removal of 'Directors' from the Board of NPRL and the appointment of nominees of the Liquidator on the 'Board of NPRL' is required for the beneficial Liquidation of the Corporate Debtor. The Learned Counsel for the Appellants refers to the Email of the Liquidator dated 4.4.2019 to IBBI and stated that the reasons

behind his inability to dispose of the shares of 'NICCO' in 'NPRL' and the presence of the Appellants on the Board of NPRL was not one of them.

17. The Learned Counsel for the Appellants submits that the Adjudicating Authority had directed the Appellant to vacate the office as 'Nominee Directors' of the 'Corporate Debtor' and such direction was issued in spite of the fact that the Appellants were no longer Nominee Directors of the Corporate Debtor and were appointed as Directors in their individual capacity on the Board of 'NPRL' by the shareholders of NPRL, in a duly convened Annual General Meeting in accordance with the provisions of the Companies Act. In short, the directions issued by the Adjudicating Authority were beyond its competence.

18. The Applicant/Appellant (Nicco Parks and Resorts Limited in Company Appeal (AT) (Ins) No. 224 of 2020) filed I.A No. 585 of 2020 praying for condonation of 6/7 days in refiling the Appeal and on being satisfied subjectively as to the reasons mentioned in the application, that the defects were not noticed and they were unintentional, the delay in question is condoned, to prevent an aberration of Justice.

19. The Learned Counsel for the Appellant(in Company Appeal (AT) (Ins) No. 224 of 2020) submits that the NICCO Corporation Ltd. (NICCO) is under Liquidation, as per order dated 17.10.2017, holds 1,17,00,000 shares in 'NICCO Parks and Resorts Pvt. Ltd.' and this is 25% of the 'shareholding of NPRL'. In this regard, the Learned Counsel for the Appellants takes a plea that 'NPRL' is a 'Listed Company' and shares can be sold in the market

and 'NICCO' has other properties (including immovable properties) which the Liquidator from 17th October 2017 took steps to sell and had realized 'the sale value' of many such properties. Furthermore, it is projected on the side of the Appellant that 'sale proceeds' were distributed to the 'Creditors' and 'workmen' of the 'Corporate Debtor'. Apart from that, it is brought to the notice of this Tribunal that the shares of 'NPRL' as well as any other Companies are all required to be sold by the 'Liquidator' and that the 'Liquidator' had already sold shares in some other Companies.

20. The Learned Counsel for the Appellant submits that based on 'Joint Sector Agreement' entered into between the Government of West Bengal and NICCO dated 23.2.1990 and on the basis of 'Articles of Association' of NPRL, the 'Liquidator', during this period of 'Liquidation', wants to nominate 'Two Directors' on 'Board of NPRL'. The Learned Counsel for the Appellant points out that the ultimate duty of the 'Liquidator' is to apply for 'Dissolution of the Corporate Debtor' before the 'Adjudicating Authority' and thereafter, the Corporate Debtor is to be dissolved as per Sec 54 of the I & B Code, 2016.

21. The Learned Counsel for the Appellant submits that the impugned order of the Adjudicating Authority is beyond the ambit of the Code, especially Sections 35, 36, 37 and 40 of the I & B Code. Moreover, the Government of West Bengal who owns 26% of the shareholding of NPRL as well as Public shareholders (total public shareholding is 40% approximately) had voted for appointment of both the proforma R-4 and

R-5 and that the proforma Fourth Respondent had obtained 71.5% votes to be appointed as Director and the proforma Fifth Respondent had secured 99.30% of votes to be appointed as Directors.

22. The Learned Counsel for the Appellant takes a legal plea that by virtue of Sec 6 of the Companies Act, 2013, the provisions of the Companies Act, 2013 overrides the 'Articles of Association' and that 'the Adjudicating Authority' is not to permit the 'Liquidator' to remove Directors of another Company or to direct the Liquidator to appoint its Nominees on the Board of another Company which is neither in Liquidation nor is a part of Liquidation Process. Besides this, no casual link exists as to why the appointment of Nominee Directors in another Company will be required for the purpose of selling the shares held in that Company and no casual link was shown.

First Respondent Submissions

23. The Learned Counsel for the First Respondent (Liquidator) contends that 'NICCO Parks and Resorts Ltd.' was incorporated on 17.3.1989 and on 23.2.1990, it was converted into a 'Joint Sector Undertaking' between 'NICCO' and two State-owned Corporations, (1) West Bengal Tourism Development Corporation Ltd. and (2) West Bengal Industrial Development Corporation Ltd., by means of a Joint Sector Agreement dated 23.2.1990. As a matter of fact, the shareholding of 'NPRL' was split between 'NICCO' (25%), the State-owned Corporations (26%) and the remaining 'Capital' was partly with the Public, partly with the 'Kauls' and partly with some

other shareholders. The Learned Counsel for the First Respondent submits that Clause 7 of the 'Joint Sector Agreement' recognises the right of 'NICCO' as also the Two State-owned Corporations to nominate three Directors each on the Board of 'NPRL'. Furthermore, it provides that the right to nominate the 'Chairman' is with the State-owned Corporations and the right to nominate the 'Managing Director' and in his absence, the CEO, is of NICCO and that these provisions of the Agreement are incorporated and reflected in the 'Articles of NPRL' (vide Artt 121, 140(4) , 147(1) and 147(8c) of the Articles of Association of 'NPRL'. The Learned Counsel for the First Respondent points out that pursuant to the right 'NICCO' to nominate Mr. Rajiv Kaul (Appellant in Comp. App.(AT)(Ins) 44/2020), being the Promoter of 'NICCO', as one of the first Directors on the Board of 'NPRL', and later Pallavi Kaul and Abhijit Dutta were appointed as the other two Nominee Directors of 'NICCO' on the Board of 'NPRL'. In this connection, it is pointed out by on behalf of the First Respondent that the Companies Act, 1956 and 2013 has always provided for 'rotation' and 'potential re-appointment' of 'Directors' every three years, and that the Kauls were re-appointed as Nominees of 'NICCO' on the Board of NPRL from time to time and in fact, by their re-appointment, they retained their status as 'Nominees' as per Art. 140(4) of NICCO Parks and Resorts Limited. Furthermore, as on 8.1.2018, the Nominees of NICCO on the Board of NPRL included Rajive Kaul and Ms. Pallavi Kaul.

24. The Learned Counsel for the First Respondent/Liquidator brings it to the notice of this Tribunal that the First Respondent/Liquidator, after his appointment as Liquidator of Corporate Debtor had made numerous endeavours to inform Rajive Kaul and Ms. Pallavi Kaul and Abhijit Dutta (Managing Director of 'NPRL') that due to their status of Nominees of NICCO on the Board of NPRL, they were legally obligated to follow the terms of 'Joint Sector Agreement' and 'Articles of Association', including among other things, sharing certain information relating to 'NPRL' with a view to enabling the Liquidator to effectively carry out the Liquidation Process of 'NICCO'. But the said requests were made with unwarranted resistance from Rajive Kaul and Ms. Pallavi Kaul who refused to cooperate.

25. The Learned Counsel for the First Respondent contends that because of the non-cooperation and unresponsive attitude of the Appellants and bearing in mind the apparent conflict in Kauls being disqualified from holding any office conferred by the Corporate Debtor and ineligible in terms of Sec 29A of the I & B Code, 2016, to hold or enjoy any part of the 'Estate of the Corporate Debtor' at the behest of the Monitoring Committee of NICCO (consisting of the Creditors of 'NICCO') perforced to exercise on behalf of 'NICCO' the rights attached to 25% of shares held by NICCO in NPRL and remove the Appellants as 'Nominees of NICCO on the Board of NPRL' as per notice dated 3.11.2018. In fact, neither the 'Appellants' nor 'NPRL' had adhered to the notice dated 3.11.2018 in spite of several follow-ups made by the Liquidator and through Emails dated

30.4.2019 and 1.5.2019, Rajive Kaul and Pallavi Kaul had refused to vacate the Board seats occupied by them as 'Nominees of NICCO'. Hence the First Respondent/Liquidator filed CA(IB)669/KB/209 in June 2019 before the Adjudicating Authority (NCLT, Kolkata) seeking removal of the 'Appellants' from the Board of 'NPRL' which had culminated in the impugned order being passed on 18.12.2019.

26. Expatiating his submission, the Learned Counsel for the First Respondent submits that the shares of NPRL owned by NICCO as well as the right attached to their said shares form part of the 'Liquidation Estate' as per Sec 36 of the I & B Code. The Learned Counsel for the First Respondent refers to the definition of 'Liquidation Estate' as mentioned in the I & B Code which includes 'shares held in any subsidiary of the Corporate Debtor' (Sec 36(3)(a)) and 'intangible assets' including 'contractual rights' (Sec 36(3)(d). Continuing further, it is the version of the First Respondent/Liquidator that he stepped into the shoes of 'NICCO' (under Liquidation) and acts on behalf of the Company to effectively carry out the Liquidation Process.

27. The Learned Counsel for the First Respondent advances an argument that the right to appoint nominees carries also a right to withdraw such nomination as per decision Farrel Futato v State of Goa 1992 SCC Online Bom 336. And apart from that, in the light of specific provisions of Artt 120, 140(4), 147(8)© of the 'Articles of Association of NPRL' as well as Clause 7 of the 'Joint Sector Agreement', the First

Respondent/Liquidator is entitled to remove Kauls as Nominees of 'NICCO' on the Board of 'NPRL' and replace them with Nominees of its choice. Another aspect which is brought to the notice of this Tribunal by the First Respondent/Liquidator is that it is quite evident from the compliance intimation dated 26.7.2019 sent by 'NPRL' to the Bombay and Kolkata Stock Exchanges. The Appellants allowed the State Corporations to exercise their rights under the 'Articles of Association of NPRL' by allowing them to replace their Nominees on the Board of NPRL. But, at the same time, they had illegally and with malafides prevented "NICCO" from exercising the same right on the completely unfounded pretext that provisions of Sec 169 of the Companies Act, 2013 are to be complied with for removal of the 'Nominee Directors'. Furthermore, Rajive Kaul and Pallavi Kaul do not have a right independent of them being 'Nominees of NICCO to be Directors' on the Board of NPRL'. Also that from a perusal of the 'Annual Report of NPRL' for the Financial Year 2017-18, Rajive Kaul and Ms. Pallavi Kaul were (as on 31.3.2018) continuing on the Board of NPRL as Nominees of 'NICCO' and not as Independent Directors of NICCO Park and Resorts Pvt. Ltd.

28. The Learned Counsel for the First Respondent contends that the Minutes of the Twenty-Ninth Annual General Meeting of 'NPRL' and Thirtieth Annual General Meeting of NPRL clearly point out that the Resolutions passed therein were for the 'reappointment' as Nominees of NICCO on the Board of 'NPRL'. It is the specific contention of the First

Respondent that the 'Kauls' had only offered themselves for reappointment on the Board of NPRL as seen from the notices of Twenty-Ninth and Thirtieth Annual General Meetings of NPRL and as such they could not have been appointed as Directors of 'NPRL' in their individual capacities. As such, the Kauls' contention that the Agenda in the notices for the Twenty-Ninth and Thirtieth Annual General Meetings of NPRL being identical to the Agendas in the notices for the Twenty-Fifth and Twenty-Sixth Annual General Meetings of NPRL were for their reappointment as Directors of NPRL in their individual capacities and not as 'Nominees of 'NICCO' on the 'Board of NPRL', is misconceived and a clear afterthought.

29. The Learned Counsel for the First Respondent contends that the Appellants being ineligible under Sec 29A of the Code cannot be allowed to enjoy any advantage or benefit arising out of the 'Liquidation Estate of NICCO' or to enjoy the usufructs of an asset of NICCO which they are otherwise barred to possess under the Code. In fact, Sec 19 r/w Sec 33 of the Code is to provide assistance and cooperation to the 'Liquidator' of NICCO' as may be required by him in order to carry out the Liquidation Process and hence the Appellants serving as Nominees of NICCO on the Board of NPRL constitute a clear violation of Sec 29A and Sec 19 r/w Sec 33 of the I & B Code, 2016.

30. The Learned Counsel for the First Respondent/Liquidator submits that the 'Articles of Association' of a Company is part of its very Constitution, and represents a binding contract between the

‘shareholders’, ‘company’ as well as the ‘shareholders’ inter se. The Learned Counsel for the First Respondent refers to Sec 44 of the Companies Act, 2013 and points out that the shares, debentures or other interests of a ‘shareholder’ in a Company shall be movable property transferable in the manner provided by the Articles of the Company. Also, that, Sec 2(7) of the Sale of Goods Act, 1930 defines Goods meaning every kind of movable property other than actionable claims and money; and includes stocks and shares. Moreover, the Learned Counsel for the First Respondent submits that the ‘shares’ being in the nature of movable property carry with them all the attributes of such property and further represent a bundle of rights including inter alia, the right to exercise the voting rights attached to the shares, right to elect Directors and thus to participate in the management through such Directors. As per decisions **LIC of India v Escorts Ltd. & Ors., (1986) 1 SCC 264 (vide paragraph 72, 74, 78-80, 84, Vodafone International Holdings v UOI, (2012) 6 SCC 613 vide paragraphs 160, 240, 269-274; Borland’s Trustee v Steel Brothers & Co. Ltd., (1901) 1 Ch. 279 at paragraphs 9-13.**

31. The Learned Counsel for the First Respondent points out that Sec 43(a)(ii) of the Companies Act, 2013 read with Rule 4 of the Companies (Share Capital and Debenture) Rules, 2014 corresponding to Sec 2(46) and Sec 86 of the Companies Act, 1956 allows a Company to issue Equity Shares with ‘differential rights’ as to dividend, voting or otherwise’. In this connection, the Learned Counsel for the First Respondent contends that

25% 'NICCO Parks and Resorts Pvt. Ltd' held by 'NICCO' carry with them several differential rights, including among other things, the right to appoint three Nominees on the Board of Trustees of NPRL and in his absence, the CEO of NPRL. Furthermore, it is the contention of the First Respondent that these differential rights are not just personal to NICCO but are in the nature of class rights that are inextricably attached to the said shares held by NICCO in NPRL vide **Cumbrian Newspapers Group Ltd. v Cumberland & Westmorland Herald Newspaper & Printing Co. Ltd., (1986) 3 WLR 26 pages 34, 37(d-h), 38(b-e), 42(g); Bushell v. Faith, (1970) 2 WLR 272 page 10 Paras 2,3.**

32. The Learned Counsel for the First Respondent advances an argument that the special/differential rights enjoyed by NICCO in respect of the shares held by it in NPRL flowing from the Articles of 'NPRL', are attached to the shares themselves and are in the nature of 'class rights' as defined under Sec 43(a)(ii) of the Companies Act, 2013. Apart from that, these rights cannot be severed from the shares themselves and must continue to flow with the said shares at all times **(as per decision Radhakrishnan & Ors. V. P.R. Ramakrishnan, 1992 SCC Online Mad 115 at Paras 27,28,30,33,35,37-39,41-46)**. The Learned Counsel for the First Respondent submits that the issue of assignability as to contractual rights may arise where the contract involved depends upon the individual skill or competency of the promisor but in the present case, the rights attached to the shares held by NICCO in NPRL are clearly not 'personal in

nature’ and that they are in the nature of ‘class rights’ annexed to the shares and flowing from the ‘Articles of NPRL’ and they are inseparable from the shares and are thus transferable and assignable with the shares. The Learned Counsel for the First Respondent comes out with the plea that the ingredients of Sec 238 of the I & B Code have an overriding effect in respect of other Laws. Further, in the instant case, the rights attached to the shares of ‘NPRL’ or ‘not merely contractual rights’ but arising out of holding the property, i.e., ‘the shares of NPRL’ and that upon liquidation of NICCO, the rights attached to the holding of NICCO in ‘NPRL’ cannot be said to disappear and that the First Respondent/Liquidator cannot be held Not to have such a right as the rights are attached to the shares itself.

The Learned counsel for the 1st Respondent/Liquidator cites the decision of Hon’ble Supreme Court Assistant Commissioner, Ernakulam V. Hindustan Urban Infrastructure Limited and ors. (2015) 3 SCC at page 745 at spl. Page 748 wherein it is inter alia observed as under:

“..... An Official Liquidator (i) derives his authority from the provisions of the 1956 Act; (ii) acts on behalf of the Company in liquidation for the purposes prescribed by the 1956 Act; (iii) is appointed by and i9s under the control and supervision of the court while discharging his duties”.

33. The Learned counsel for the 1st Respondent refers to the decision of Hon’ble Supreme Court Balkrishan Gupta and Ors. V. Swadeshi Polytex

Ltd. and another (1985) 2 SCC at page 167 at special page 169 wherein it is observed and held as under:

“ In the Companies Act the expressions ‘a member’, ‘a shareholder’ or ‘holder of a share’ are used as synonyms to indicate the person who is recognized by a Company as its owner for its purposes. The ownership denotes the relation between a person and any right that is vested in him and that which he owns in this sense is a right. The right of ownership comprises benefits which may be curtailed by the disadvantages in the form of burdens attached to it. An owner may be divested of his claims etc., arising from the right owned to such an extent that he may be left with no immediate practical benefit. He remains the owner nonetheless because his interest will outlast that of other persons in the thing owned. The owner possesses that right which ultimately enables him to enjoy all rights in the thing owned by attracting towards himself those rights in the thing owned which for the time being belong to others, by getting rid of the corresponding burdens. The different kinds of rights of ownership flowing from the ownership of a right depend upon the nature of the rights owned.

A Receiver appointed under Order XL, CPC, which is made applicable by Section 182-A (4) of the U.P. Land Revenue Act, only holds the property committed to his control under the order of the court but the property does not vest in him. A Receiver appointed under Section 51, CPC will be able to realise the amounts due from a garnishee and his powers are akin to the powers of a Receiver appointed under Order 40, Rule 1,. But he would not have any beneficial interest in the assets of the judgment-debtor. He collects the debts not as his own but as an officer of the court. The authority competent to appoint a Receiver may give directions regarding the property. It does not imply that the right of the Company to exercise the right to vote on the basis of the shares of another company held by it at the meeting of such other company becomes automatically suspended. Thus, whatever may be the other powers of a Receiver dealing with the property which is in custodia legis while in his custody, he is not to be construed as either an assignee or beneficial owner of such property. The privileges of a member of the Company can be exercised by only that person whose name is entered in the Register of members. A Receiver whose name is not entered in the Register of Members cannot exercise any of those rights

unless in a proceeding to which the Company concerned is a party and an order is made therein.”

34. The Learned counsel for the 1st Respondent refers to the decision of the Hon’ble Supreme Court Harsh Vardhan Lodha V. Devendra Kumar Mantri 2012 SCC Online Cal 8684 wherein it is held an administrator derives his title wholly from the ‘Ecclesiastical Court’. He has none until the letters of administration are granted and the property of the deceased vests in him only from the time of the ‘Grant’. An Executor, on the other hand derives his title from the will itself and the property vests in him from the moment of the testator’s death.

35. Besides the above, on behalf of the 1st Respondent the following decisions are cited.

(i) In Morgan and another V. Gray and Ors. (Chancery Division) (1952 M. 4591) it is observed as under:

“There is no enactment which provides that a shareholder of a company, who is adjudicated bankrupt, but whose name remains on the register, ceases to be a member and loses the right to vote or tender a proxy at meeting of the Company provided that the Company is not in liquidation.

A bankrupt can, accordingly, exercise such rights while his name remains on the register, unless there is some express provision to the contrary in the company’s articles of

association. Such vote must be exercised in accordance with the direction of the persons beneficially entitled.”

- (ii) In *Smt. Farrel Futado V. State of Goa* Thorough the Chief Secretary and Ors. 1992 SCC Online Bom 336 wherein it is among other things observed as under:

“..... the Articles of Association is merely an agreement between the person who form the Company. The Appointment of the petitioner under Article 68(1) is also based on contractual rights which are given to the Administrator. In the circumstances the entire matter falls in the realm of contract and the impugned order of removal cannot be impugned by a writ petition under Article 226 of the Constitution. The learned counsel for the Petitioner, however, cited judgment of the Supreme Court in (*Kumari Shrilekha Vadyarthi V. State of U.P.*), reported in (1991) 1 SCC 212: AIR 1991 Supreme Court 537. The said case dealt with appointment of District Government counsel by State Government. The question arose as to whether removal en bloc of all districts Government counsel by the State Government was ultra Vires Article 14. The Supreme Court found that presence of public element was attached to the office of District Government Counsel and in the circumstances, it attracted Article 14 of the Constitution. In that connection it was observed that

requirements of Article 14 of the Constitution. In that connection it was observed that requirements of Article 14 and contractual obligations are not alien concepts but both the concepts can co-exist. The Constitution does not permit unfairness in any actions of the state in any sphere of activity (including in matters of contract). There is no dispute regarding the ratio of the said decision. In the present case, there is no presence of public element attached to the office of non-rotational Director. Secondly, as mentioned hereinafter, we have come to the conclusion that reasons have been given in the show cause notice which warranted the Government to revoke the appointment of the Petitioner as a Chairperson prior to expiry of the Contract in 1995. The said reasons do not constitute grounds for removal of a Director under Section 284 of the Companies Act. The said reasons are only to terminate the contract before 1995 and accordingly we have come to the conclusion that the impugned order of removal is not punitive in nature as alleged. The Government had adequate material to terminate the contract before 1995. In the circumstances the ratio of the said judgment in the case of Kumari Shrilekha Vidyarthi (Supra) do not apply to the present case. It may also be observed that the reliefs sought by the Petitioner in effect amounts to enforcement of the

Articles of Association which cannot be granted in exercise of jurisdiction under Article 226 of the Constitution etc.

- (iii) In the Judgment dated 24.10.2019 in Company Appeal (AT) No. 221 of 2018 Jindal Steel and Power Limited V. Arun Kumar Jagatramka and another, this Appellate Tribunal at Paragraph 8 to 11 had observed as under:

“ In view of the aforesaid decision of this Appellate Tribunal in Y. Shivram Prasad and S.C. Sekaran, we answer the first question in affirmative, i.e., to say that in a Liquidation proceeding under I&B Code, a petition under Section 230 to 232 of the Companies Act is maintainable

9. The next question arises for consideration is as to whether 1st Respondent-Arun Kumar Jagatramka (Promoter), can be said to be ineligible under Section 29A of the I&B Code and can ask for Financial Scheme of Comprise and Arrangement for itself in terms of Section 230 and 232 of the Companies Act of the I&B Code.

10. As noticed above, the Hon’ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. – Writ Petition (Civil) No.99 of 2019 held 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’.

11. The aforesaid judgment makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies

Act, the ‘Corporate Debtor’ is to be saved from its own management, meaning thereby the Promoters, who are ineligible under Section 29A, are not entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Proviso to Section 35(f) prohibits the Liquidator to sell the immovable and movable property or actionable claims of the ‘Corporate Debtor’ in Liquidation to any person who is not eligible to be a Resolution Applicant, quoted below: -

35. Powers and duties of Liquidator.—(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:-- xxx xxx xxx

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.”

- (iv) In *ArcelorMittal India Pvt. Ltd V. Satish Kumar Gupta and Ors.* (2019) 2 SCC page 1 it is held as under:

“ Held, though a shareholder is a separate legal entity from the Company in which he holds shares, but when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan, it is not only permissible but

imperative for the competent authority to find out as to who are the constituent elements that make up such company – Further, where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the corporate veil and this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole.”

- (v) In *Life Insurance Corporation of India V. Escorts Limited and Others* (1986) 1 SCC Page 264 it is held as under:

“ A company has an independent and legal personality distinct from the individuals who are its members. But the corporate veil may be lifted, the corporate personality may be ignored and the individual members, recognized in certain exceptional circumstances. The classes of cases where lifting the veil is permissible must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be effected etc.”

- (vi) In *Vodafone International Holdings BV V. Union of India and Another* (2012) 6 SCC at page 613 the Hon'ble Supreme Court has observed that the Holding Company is a Company having sufficient shares power to control the affairs of a subsidiary including appointment of Directors, though holding Company and subsidiary Company retain their independent and separate legal existence. Further it is observed that a subsidiary despite control exercised by parent/holding company, retains its own legal existence and ownership of its assets because Directors of subsidiary owe responsibility to their own company rather than to the parent/holding company and also that the assets of subsidiary, on winding up, best in liquidator and not in parent/holding company etc. Moreover, it is opined that a share, held, is a right to a specified amount of share of a company and on incorporation, corporate property i.e. assets of Company belong to company and holding of shares confers no direct proprietary rights to corporate property on shareholders, but merely to their shares in Company, shares constitute items of movable property, transferable in manner provided by Article of Association of the Company.
- (vii) In *Borlands Trustee V. Steel Brothers & Co. Limited* (1990 B 1253) (Chancery Division), wherein it is observed that a Share

in a Company cannot properly be likened to a sum of money settled upon and subject to executory limitations to arise in the future; it is rather to be regarded as the interest of the shareholder in the Company, measured, for the purposes of liability and dividend, by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with section 16 of the Companies Act, 1862, and made up of various rights and liabilities contained in the contract, including the right to a certain sum of money.”

- (viii) In *Cumbrian Newspapers Group Ltd V. Cumberland & Westmorland herald newspaper & Printing Co. Ltd.* (the Weekly Law Reports 27th June, 1986) (Chancery Division), it is held that the special rights granted by the defendant’s articles were rights that although not attached to any particular shares were conferred on the plaintiff in its capacity as shareholder in the defendant and were attached to the shares for the time being held by the plaintiff without which it was not entitled to the rights; that accordingly the plaintiff had “rights attached to a class of shares” and since section 125 of the Companies Act, 1985 provided that class rights could not be varied or abrogated without the consent of the class members the special rights enjoyed by the plaintiff could

not be varied or abrogated without the consent of the plaintiff. That on the fact, the adoption of articles by the defendant conferring the special rights on the plaintiff was a condition precedent to the agreement between the parties and was not a contractual obligation of the defendant that, accordingly, it was not a term of the agreement between the plaintiff and the defendant that the plaintiff would have the benefit of the special rights conferred on it by the articles, nor could such a term be implied.”

- (ix) In *1099 Bushell Appellant V. Faith Respondent (House of Lords) 1970 W.L.R. 272 1970 A.C 1099 wherein it is held that Article 9 was valid and applicable, despite the provisions of Section 184 (1), since Parliament was only seeking to make an ordinary resolution sufficient to remove a Director and had not sought to fetter a company’s right to issue a share with such rights or restrictions as it thought fit and these need not be of general application but could be attached to special circumstances and particular types of resolution. Accordingly, the resolution had been defeated.”
- (x) In Claude-Lila ParuLekar (SMT) V. Sakal Papers (P) Ltd and Ors. 2005 11 SCC page 73 it is held that Articles of Association constitute a contract not merely between shareholders and company but between individual

shareholder also. Further, Articles or a source of power of director, who can as a result exercised only those powers conferred by the Articles in accordance therewith and any action referable to the Articles and contrary thereto would be ultra vires and on facts it is observed that transfer of certain shares and the allotment of certain other shares to the Respondents, both being in violation of Articles of Company where void.

- (xi) In V. Radhakrishnan and 3 Ors. V. P. R. Ramakrishnan and ors. 1994 1 Law Weekly at page 163 it is observed and held as under:

“ As laid down by the Gujarat High Court in 43 Company Cases, 131, S.446 of the Companies Act, 1956, provides that the court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of any claim made by or against the company; any question of priorities or any other question whatsoever whether of law or fact, which may relate to or arise in course of the winding-up of the company. When the High Court is conducting winding-up proceedings of a company ordered to be wound up, its jurisdiction is not confined to its ordinary jurisdiction but a special jurisdiction is conferred upon it by S. 446 (2). Sub Ss.

(2) and (3) were incorporated in S. 446 by which special jurisdiction has been conferred upon the High Court to entertain certain types of proceedings or also withdraw certain types of proceedings by or against the company in liquidation pending in any court and transfer to itself and to dispose of the same. Therefore, S. 446 (2) would enable the High Court to entertain an application of the nature filed by the Official Liquidator and to grant relief in the matter. The above view, is more in consequence with the principles underlying the grant of special jurisdiction to the Company Judge and power to the Liquidator to move, the Company Judge in matters like the one which has got a good deal of similarity with the facts in the instant case.”

36. It is to be pointed out that the 1st Respondent/Applicant (Liquidator) before the Adjudicating Authority (NCLT Kolkata Bench) had filed C.A (IB) No. 669/ KB/ 2019 in CP(IB) No. 03/KB/2017 wherein the following final reliefs were sought for:

- (a)** To direct Respondents to give full details of any transactions or trades that have happened in NPRL shares since the commencement of liquidation proceedings to the Liquidator or a person appointed by the Liquidator.
- (b)** To direct Respondent No.1 and Respondent No.2 to act on the decision of Applicant and immediately vacate their offices as directors of Respondent

No.5, and to co-operate with the Applicant and all prospective buyers in such manner as may be required.

- (c)** To pass permanent injunction on respondent No.1 and Respondent and direct them not to participate in Board Meeting of Respondent No.5 and /or in the day to day running of Respondent No.5
- (d)** To direct Respondent No.1 and Respondent No.2 to refrain from any active obstruction, or failure to provide cooperation to the Applicant and abide by such instructions as given by the Applicant in course of and as required for the purpose of beneficial liquidation of the assets of the Corporate Debtor.
- (e)** To direct the Respondents to take on record and act on the decision of the Applicant for replacement of nominees of the Corporate Debtor on the board of Respondent No.5, and note the induction of a new nominees nominated by the Applicant vide decision dated 03.11.2018.
- (f)** To direct the Respondents to refrain from interfering or obstruction the Appellant from having possession, control or disposition of NPRL shares in the manner considered expedient by the Appellant.
- (g)** To direct the Respondents to provide all the requisite document/ information to the Applicant and/or the potential buyers, as may be required for the beneficial liquidation of the NPRL shares.
- (h)** To direct the Insolvency and Bankruptcy Board of India to file an appropriate proceedings before special court to take cognizance of the matter for any offences as may have been committed by the Respondents

under Section 70 and Section 235 A and other provisions of the Code or any other law for the time being in force.

- (i)** To direct Respondent No.5 to use the earliest available opportunity in disposing off the shares held by Respondent No.5 in NESL.

37. Furthermore, as interim reliefs the under mentioned reliefs were prayed for:

- (a)** Directions to Respondent No.1 and 2 to immediately cease and desist from participating in the day-to-day affairs and other executive management of Respondent No.5;
- (b)** Instruction to Respondent No.3 and management of Respondent no.5 to provide all possible assistance to potential buyers to carry out due diligence to enable Applicant to cause sale of assets of the Corporate Debtor in manner beneficial to liquidation estate.
- (c)** Stay on any change in shareholding of Respondent No.1 and 2 or entities owned or controlled by them or any other promotes of Respondent No.5, till the application is disposed of.
- (d)** Stay on any significant financial or operational decisions being made by the Board of Respondent No.5, which affects the value of the stake of the Corporate Debtor in Respondent No.5, till this Application is disposed of.
- (e)** An injunction, restraining Respondent No.1 and /or Respondent No.2 from acting as representatives of Respondent No.5 in any general meeting of any companies in which shares may be owned by Respondent No.5.

38. Section 19 of the I&B Code, 2016 is similar to Section 284 of the Companies Act, 2013. Section 19 imposes an obligation on the personnel and promoters of Corporate Debtor to extend all assistance and cooperation with 'Insolvency Resolution Professional' may require in the management of the affairs of the Corporate Debtor. The word 'Personnel' refers to Directors, Managers, Key Managerial Personnel, Designated partners and Employees, if any, of the Corporate Debtor by means of Section 5(23) of the Code. Furthermore, Section 19(2) empowers a Resolution Professional to file an Application before the Adjudicating Authority to seek necessary directions where any personnel does not assist or cooperate and that the Adjudicating Authority shall issue directions to such defaulting personnel. Moreover, any personnel of Corporate Debtor or Promoter does not render assistance or cooperation to the Insolvency Resolution Professional, the Adjudicating Authority ('NCLT') is to pass appropriate orders. Any instructions/ directions issued by an Adjudicating Authority cementing on an Application filed under Section 19 (2) of the Code shall be binding on such personnel or others as the case may be.

39. Section 54 of the Code says that once the affairs of Corporate Debtor were wound up and its assets were wholly Liquidated, the Liquidator shall make an application before an Adjudicating Authority for 'Dissolution of the Corporate Debtor'. In fact Section 54 of the Code is similar to Section 302 of the Companies Act, which deals with 'Dissolution of a Company'. Section 290 of the Companies Act, 2013 has a provision like that of Section

35 of the I&B Code, which specifies the power of Liquidator in an exclusive manner i.e. the Liquidator shall exercise his power subject to the Directions of the Tribunal. As per Section 36 (3) of the Code, Liquidator estate include both tangible and intangible assets. A Liquidator has only sale power of a Liquidation estate as seen from the I&B Code, 2016.

40. Section 34 of the Code, deals with the appointment of a Liquidator with a view to carry out the Liquidation process of the Corporate Debtor. A Resolution Professional under Chapter -II of the Code shall act as Liquidator of the Corporate Debtor and shall have all the powers of the Board of Directors, Key Managerial Personnel. In Section 34 of the Code, the term 'Vest' is synonymous with title and it is concerned with title as per decision *Daya Wanti Punj And Ors. vs New Delhi Municipal Committee* report in 1982 Del. 534. Proviso to Section 35(f) of the Code, fetters a Liquidator to sell the immovable or movable property or actionable claims of Corporate Debtor in Liquidation to any person who is not eligible to be Resolution Applicant.
41. It is to be remembered that as per Section 35(1)(e) of the Code is to carry on the business of the Corporate Debtor and not the business of any other entity which is not the Corporate Debtor.
42. It cannot be lost sight of that a Director removed under Section 169 of the Companies Act, is not deprived of his right to receive compensation for the loss of office if he is otherwise entitled to it, as per the Act 2013 and by virtue of his term of appointment, a removal a Director in terms of the

‘Article of Associations’ is not a defective one as per decision Ravi Prakash Singh V. Venus Sugar Ltd, (2007) 140 Com cases Page 823. A permanent Director entitled under the ‘Article of Associations of a Company’ is to hold office for Life can be removed from office as per decision Tarlok Chand Khanna V. Rajkumar Kapoor as per decision (1983) 54 com cases page 12 (Delhi). As per section 169 (8) of the Companies Act, 2013 (old Section 284(7) of 1956 Act) enjoins that compensation or damages in the case of wrongful removal of a Director and the same can be claimed not only in respect of the termination of the Office but also any other offence which all terminate along with the office like that of ‘Managing Director’.

43. When a Corporate Debtor is Liquidated, the Liquidator shall file an ‘Account of Liquidation’ exhibiting in what manner it was conducted and how the Corporate Debtor’s Assets were Liquidated. A Final report shall form part of Application for dissolution of a ‘Corporate Debtor’ to the Adjudicating Authority, to be filed under Section 54 of the Code.
44. In terms of Regulation 38 of the Liquidation process regulations 2016 a Liquidator with the permission of Adjudicating Authority, may distribute among the stakeholders the assets that are to be readily or gainfully sold because of its peculiar character or other circumstances. As a matter of fact, the application praying for permission before the Adjudicating Authority under sub-Regulation shall identify the assets provide, a value of asset, mentioning the endeavours to sale the assets if any and to provide reasons for such distribution.

45. As per Regulation 44 of the Liquidation process Regulations 2016, the Liquidator shall Liquidate the Corporate Debtor within two years. If the Liquidator fails to liquidate with Corporate Debtor within two years, he shall file an application to the 'Adjudicating Authority' to proceed with the liquidation along with a report specifying the reason for not completing the liquidation process and to mention the further time require by filing an Application before the Authority to continue.
46. In the decision Home Chaudhary(AK) V. National Textile Corporation Uttar Pradesh Limited (1984) 48 FacI'r page 96 at 101 (Allahabad), it is observed that where the Articles of Association shower, powers on the Board of Directors to remove the Managing Director or other Directors such power is not affected by Section 284 of the Companies Act, 1956 (corresponding to Section 169 of the Companies Act, 2013).
47. Section 161(3) of the Companies Act, 2013 specifies that subject to the articles of a Company, the Board may appoint any person as a Director nominated by any institution in pursuant of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government Company.
48. In fact, there is no statutory provision which addresses the powers of Directors in a 'Compulsory Liquidation' but in the decision Re Mawcon Ltd (1969) 1 All E.R at page 188 it is observed that the 'Powers of Directors' cease.

49. The real grievance of the 1st Respondent/Liquidator is that the Appellant (Rajive Kaul) and Ms. Pallavi Priyadarshni Kaul ('The Appellant' in Company Appeal (AT) (Ins) No. 44 of 2020 and Company Appeal (At) (INS) 158 of 2019 R-1 and R-2) were refusing to step down as nominees of the 'Corporate ' (Nicco Corporation Ltd.) (Under Liquidation) and the same being bad in law mala fide and rife with conflict of interest on numerous grounds, inclusive of the fact that they were nominees and the provisions of the joint sector agreement. Further, Article 121 of the Articles of Association of Nicco Parks and resort Pvt. Ltd (Appellant in Company Appeal (At) (Ins) No. 224 of 2020 and the rudimentary law of nomination 'Directors' leave no scope of any discretion on the part of nominees by the decision of the nominator in replacing the nominees. Moreover, it is not within the rights of the Appellants (in Company Appeal (AT) (Ins) No. 44 of 2020 and Company Appeal (AT) (Ins) 1518 of 2019, who were driven by their personal interest, whether such replacement and the rights under the 'Joint Sector Agreement' or within the ambit of powers of Liquidator or not.

50. Apart from that, the Appellants in Company Appeal (AT) (Ins) 44 of 2020 and the Appellant in Company Appeal (AT) (Ins) No. 1518 of 2019 were erstwhile Directors and promoters of the Corporate Debtor viz. Nicco Corporation Limited. The crystalline stand of the 1st Respondent/Liquidator is that the aforesaid two Appellants were not continue to hold the office of directors in Nicco Parks and Resorts Pvt. Ltd

(the Appellant) in Company Appeal (AT) (Ins) No. 224 of 2020 and hence, they were ineligible in terms of Section 29A read with Section 33(7) of the I&B Code, 2016. Also, that as per Section 166 of the Companies Act, 2013 the Appellants (Rajive Kaul & Pallavi Priyadarshni Kaul) they could not place themselves in 'conflict of Interest' scenario and utilise the position for an undue gain or benefit of self or family.

51. The 1st Respondent/Liquidator also averred in the Application before the Adjudicating Authority that there was non-cooperation, active obstruction, Breach of statutory duty of Director, Breach of Code of Conduct by the two Appellants in Company Appeal (AT) (Ins) 44 of 2020 and Company Appeal (AT) (Ins) 1518 of 2019. The Appellants Code of conduct for Directors and Senior management Personnel of Niccoo parks and Resorts Limited viz. Article 121 was clearly violated by the Appellants in Company Appeal (AT) (Ins) 44 of 2020 and Company Appeal (AT) (Ins) No.1518 of 2019.

52. The Appellants in Company Appeal (AT) (Ins) No. 44 of 2020 and Company Appeal (AT) (Ins) No.1518 of 2019 had denied the averments of the Liquidator and according to them the allegations against them and the Managing Director of Niccoo Parks and Resorts Ltd., and Niccoo Parks and Resorts Ltd (Company) were speculative in character and they were not proved. Continuing further, according to the Appellants in Company Appeal (AT) (Ins) No. 44 of 2020 and Company Appeal (AT) (Ins) No.1518 of 2019, the instant proceedings do not pertain to affairs of Niccoo Parks

and Resorts Ltd., Appellant in Company Appeal (AT) (Ins) No. 224 of 2020 either in regard to management or administrative matters. In fact it is the plea of the Appellants in Company Appeal (AT) (Ins) No. 44 of 2020 and Company Appeal (AT) (Ins) No.1518 of 2019 that the Articles of Associations of the Appellant in Company Appeal (AT) (Ins) No. 224 of 2020 (Niccoo Parks and Resort Pvt. Ltd) do not allow any entity other than the Company from exercising any right as per Article 121 of the 'Article of Associations'.

53. In this regard it is worthwhile to make a relevant mention of Article 140 (1) of the 'Article of Association' which runs as under:

“Article 140: (1) Not less than two thirds of the total number of Directors of the Company shall be persons whose period of office is liable to determination by retirement of Directors by rotation and, save as otherwise expressly provided in the Act and these Article, be appointed by the Company in general meeting.

(2) the remaining Directors shall be appointed in accordance with the provisions of these Articles.

(3) At every Annual General Meeting of the Company one third of such of the Directors for the time being as are liable to retire by rotation or if their number is not three or a multiple of three, then, the number nearest to one third, shall retire from office;

(4) if and so often as a Director representing Government of West Bengal or Nicco as the case may be retires by rotation his position shall be filled in by a Director representing Government of West Bengal or Nicco as the case may be and duly nominated by Government of West Bengal or Nicco.”

54. It is to be borne in mind that Article 140 (4) of the ‘Articles of Associations’ is to be read along with the letter dated 26.07.2019 viz. the compliance intimation sent by the ‘Nicco Parks and Resorts Pvt. Limited’ to the Stock Exchanges (Bombay and Calcutta Stock Exchanges) and that the Appellants had permitted the state corporation to exercise their rights in terms of the ‘Articles of Associations’ of the Nicco Parks and Resorts Pvt. Ltd by permitting them to replace their nominees on the board of ‘NPRL’.
55. It is an axiomatic principle in Law that a Company in liquidation acts through the ‘Liquidator’ and the ‘Liquidator’ steps into the shoes in the Board of the Directors of the Company under Liquidation for the purpose of discharging its statutory duties. In reality, the property of the Company forming part of Liquidation still remain vested in the Company.
56. The Promoters and Directors of the Corporate Debtor (Nicco) viz. the Appellants in Company Appeal (AT) (Ins) No. 44 of 2020 and Company Appeal (AT) (Ins) No.1518 of 2019 were appointed as nominees of Nicco on the Board of the Appellant (Nicco Parks and Resorts Limited), Appellant in Company Appeal (AT) (Ins) No. 224 of 2020 and they served before the disputes arose and they refuse to vacate their office. As a matter of fact

the aforesaid Appellants, on account of ineligibility as per section 29 A of the I&B Code, 2016 are not to be permitted to derive any benefit to gain any advantage at the Liquidation stage of Nicco (Corporate Debtor) or to avail the fruits of an assets of Nicco. It cannot be brushed aside that the contentions of the Appellants (Kauls) that they were nominees of Nicco on the Board of NPRL only before the 29th and 30th Annual General Meetings and Later in the aforesaid Annual General meeting they were appointed as a Directors on the Board of Nicco Parks and Resort Pvt. Ltd, in a personal/individual capacity can only be termed as an inconceived one.

57. It is to be remembered that the 30th Annual General Meeting of the Appellant (Nicco Parks and Resorts Pvt. Ltd) took place only after the 1st Respondent/Liquidator prefer the Application C.A (IB) 669 /KB/ 2019 before the 'Adjudicating Authority' praying for the removal of the Kauls from the Board of 'NPRL'. Not lending an unstinted assistance and cooperation to the 1st Respondent/ Liquidator of Nicco with a view to carry out the liquidation process cannot be countenanced by any means whatsoever, in the considered opinion of this Tribunal.

58. As regards the aspect of assignability of 25% shares held by the Nicco in NPRL along with rights attached thereto, the same has not cropped up, inasmuch as 1st Respondent/Liquidator had not sold the said shares which formed part of the Liquidation estate. There is no two opinion of a prime fact that the 'Articles of Associations of a Company reflects' a binding contract *inter se* between the shareholders and the

Company etc. Shares, Debentures or other interests of a shareholders in a Company undoubtedly movable property, which can be transferred as per the 'Articles of Associations of the Company'. To put it explicitly, the shareholders do have rights like voting, to elect Directors and to take part in the management through Directors. If, an agreement speaks of the rights of nomination and removal of a person who has shares of the 'Nicco Park and Resorts Limited then the said right may pass on by way of Assignment or selling. In case of any fetter pertaining to 'Nomination Right' as per 'Articles of Associations', then the said right may not be assigned in a given case.

59. The 'Articles of Nicco parks and Resorts Ltd' does not impose a restraint relating to the transfer of shares held by the Corporate Debtor (Nicco) in 'NPRL' along with rights attached therein. In fact, the Articles of Associations clearly recognized that the shares of Corporate Debtor (Nicco) or transferrable subject to a right of 1st refusal of the stated owned corporation. To put it succinctly, the shares held by the Corporate Debtor (Nicco) in NPRL, together with class rights, in law can be assigned by the 1st Respondent/Liquidator with a rider being that the same is to be exercised subject to the limitation mentioned in the 'Articles of NPRL' (Appellant in Company Appeal (AT) (Ins) 224 of 2020).

60. It is relevant to point out that Section 238 of the I& B Code, 2016 has an 'overriding effect of other Laws'. The maximisation of value of Liquidation estate can only be certain if the said shares of NPRL as held

by the Corporate Debtor (Nicco) together with the class rights or termed as part of the Liquidation estate attached to it, are held to be forming part liquidation estate and assignable, as enshrined in IBC, 2016. To take a contra view, will have a deleterious effect on the value of said shares and also will have a catastrophic effect on the Liquidation estate of Nicco as opined by this Tribunal.

61. There is no simmering doubt that the Directors of a Company appointed by the shareholders in the 'Annual General Meeting' are to be removed as per 'Ordinary Resolution' passed in the 'General Body Meeting'. There is no different opinion on this well settled proposition. The aspect of a dismissal removal, retirement or one vacating the office voluntarily are covered by the covenants of an Agreement, but Section 33(7) of the I& B Code, 2016 speaks of deemed notice of discharge in respect of officers, employees and workmen of the 'Corporate Debtor' etc. As per Section 33(7), of the Code, the Directors concerned would stand discharged automatically and in practice the procedure mentioned in Section 169 of the Companies Act, 2013 need not be. Rule 39 of IBBI (Liquidation Process) Regulation 2016, clearly spells out that a Liquidator shall make an attempt to recover and realise all the assets and outstanding of a 'Corporate Debtor' in a time bound manner for the purpose of 'Maximation of Value' of the stakeholders.

62. It cannot be gained said that the Appellant ('Nicco Parks and Resort Pvt. Ltd') is bound by the terms of Agreement and the Appellant is bound

by the proposal and is to present the same before the 'Annual General Meeting' for its accord/approval, without any iota of doubt. As a matter of fact, the proposal submitted by the Liquidator in terms of the power bestowed on him under the I&B Code, read with Rule, Article 140 (4) of the 'Articles of Associations' cannot be ignored and a self-serving decision being arrived at in this regard. The Appellant ('Nicco Parks and Resorts Pvt. Ltd') is not required to be informed of the reasons behind the replacement of existing 'Nominee Directors' by the 'Liquidator', although the said 'Directors' were elected as 'Directors' because of the fact that they had secured the shares of 'Nicco Parks and Resorts Pvt. Ltd', in an individualistic manner. No wonder, unless and until the 'Liquidator' permits the 'Nominee Directors' to continue, they do not have any right in this regard.

63. In the backdrop of the foregoing detailed discussions and because of the fact that the Appellants in Company Appeal (AT) (Ins) No.1518 of 2019 and Company Appeal (AT) (Ins) No.224 of 2020 had acted against the Liquidator, the impugned orders passed by the Adjudicating Authority in discharging their 'Nominee Directors' position w.e.f. 17.10.2017 etc., are free from any legal flaws.

64. Further it is held that the Liquidator is armed with requisite powers to remove the 'Nominee Directors' (in the present case, the Appellants in Company Appeal (AT) (Ins) No. 44 of 2020 & Appellant in Company Appeal (AT) (Ins) No. 1518 of 2019) and is entitled to nominate the 'Directors' and

the Appellant 'Nicco Park and Resorts Pvt. Ltd.' (in Company Appeal(AT)(Ins) No. 224 of 2020/Respondent No.5 in C.A(IB) 669/KB/2019 is enjoined to act upon the replacement proposal of the 'Existing Nominee Directors' of 'Corporate Debtor'.

65. Looking from any point of view, the Appeals san merits and accordingly, they are dismissed. There shall be no order as to costs. Connected I. A Nos. 130, 131, 591, 592 of 2020, & I.A No. 4317 to 4319 of 2019 stand closed.

[Justice Venugopal M.]
Member (Judicial)

(V. P. Singh)
Member(Technical)

[Alok Srivastava]
Member (Technical)

New Delhi

20th March, 2020

RS