NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
APPELLATE JURISDICTION
Company Appeal(AT)(Insolvency) No. 146 of 2020

[Appeal Filed under Section 61 of the I & B Code, 2016, arising out of impugned order dated 4th December, 2019 (delivered on 17th December, 2019) passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench, Chennai) in MA/1189/2019 in Company Petition No. IBA/434/2010]

IN THE MATTER OF:

Dr. P Mahalingam
R/o T-17/T-21, 6th Avenue, Besant Nagar,
Chennai – 600 090
Tamil Nadu .. **Appellant**

Versus

1. **Muthoot Fincrop Limited**
   5th Floor, Muthoot Centre, Punnen Road,
   Thiruvananthapuram – 695 039
   Kerala

   Also at:

   103A, 1st Floor, Navins Presidium,
   Nelson Manickam Road, Aminjikarai,
   Chennai – 600 2

2. **DCB Bank Limited**
   No. 6, Rajaji Road, Nungambakkam,
   Chennai – 600 034,
   Tamil Nadu

3. **Santosh Hospitals Private Limited**
   Through Liquidator Ms. Deepa Venkat Ramani
   Office No. 40, TNHB Complex,
   180, Luz Church Road,
   Luz Mylapore,
   Chennai – 600 004. .. **Respondents**

Present:

Appellant: **Dr. U.K. Chaudhary Sr. Advocate with Mr. Saurabh Kalia, Mr. Vardaan Bajaj, Mr Siddharth Tandon, Ms. Prachi Bhatia, Advocates**

Respondents: **Mr. Arun Kathpalia, Sr. Advocate, with Mr. Angad Mehta, Mr. Gautam Swaroop, Mr. Kartike Jaiswal, Ms. Gunjan Jindal, Advocates for Respondent No. 1**

Mr. Abhishek Kumar, Mr. Chandra Mouli Prabhakar, Mr Abhishek Kumar, Advocates for Respondent No. 3

With

Company Appeal(AT)(Insolvency) No. 1121 of 2020

[Appeal Filed under Section 61 of the I & B Code, 2016, arising out of impugned order dated 17th December, 2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division –II, Chennai) in IA/699/2019 in Company Petition No. IBA/434/2010]

IN THE MATTER OF:

Dr. P Mahalingam
R/o T-17/T-21, 6th Avenue, Besant Nagar,
Chennai – 600 090
Tamil Nadu .. **Appellant**

Versus

1. **Muthoot Fincrop Limited**
   5th Floor, Muthoot Centre, Punnen Road,
   Thiruvananthapuram – 695 039
   Keraka

   Also at:

   103A, 1st Floor, Navins Presidium,
   Nelson Manickam Road, Aminjikarai,
   Chennai – 600 2

2. **DCB Bank Limited**
   No. 6, Rajaji Road, Nungambakkam,
   Chennai – 600 034,
   Tamil Nadu

3. **Santosh Hospitals Private Limited**
   Through Liquidator Ms. Deepa Venak Ramani
   Office No. 40, TNHB Complex,
   180, Luz Church Road,
   Luz Mylapore,
   Chennai – 600 004.

4. **Greater Chennai Corporation**
   Greater Chennai Corporation,

Ripon Building,
Chennai,
Tamil Nadu- 600 003 .. **Respondents**

Present:

Appellant: **Dr. U.K. Chaudhary Sr. Advocate with Mr. Saurabh Kalia, Mr. Vardaan Bajaj, Mr Siddharth Tandon, Ms. Prachi Bhatia, Advocates**

Respondents: **Mr. Arun Kathpalia, Sr. Advocate, with Mr. Angad Mehta, Mr. Gautam Swaroop, Mr. Kartike Jaiswal, Ms. Gunjan Jindal, Advocates for Respondent No. 1**

Mr. Abhishek Kumar, Mr. Chandra Mouli Prabhakar, Mr Abhishek Kumar, Advocates for Respondent No. 3

JUDGMENT
(Virtual Mode)

M. VENUGOPAL, Member (J)

Preamble:

The Appellant had preferred the instant Comp. App (AT)(Ins) 146 of 2020 being aggrieved against the impugned order dated 4th December, 2019 (delivered on 17th December, 2019) in MA/1189/2019 in Company Petition No. IBA/434/2010 (filed by the Applicant/Resolution Professional) passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench, Chennai).

2. The 'Adjudicating Authority' (National Company Law Tribunal, Division Bench, Chennai) while passing the 'impugned order' dated 04.12.2019 (delivered on 17.12.2019) in MA/1189/2019 in Company Petition No. IBA/434/2010 (filed by the Applicant/Resolution Professional under Section 33 & 60(5) of the I & B Code, 2016 read with Regulation 33(2) of IBBI

(Liquidation Process Regulations, 2016) at paragraphs 8 to 17 had observed the following:-

> *"8. At this juncture, it is pertinent on the part of us to mention that since the Suspended Directors and their counsel have kept on saying that money would come from various sources so as to avoid sending this company to liquidation, we have also believed that this payment would avert sending this company into liquidation in that belief waited again and again hoping that this money, which the Suspended Directors promised to bring in, would come but whereas the timelines given by them have been postponed time after time. In between, these Suspended-Directors, brought letters from one or the other persons saying that money would come, but no money has come till date. Since everybody was under the belief that it would be settled, CIRP has not gone in the way it is to go.*
>
> *9. Since all of us were under the belief that money would come, MA/363/2019 seeking adjudication on the Title over some part of the land as well as Mas filed by the Suspended-Directors for putting valuation, forensic audit and invitation for Expression of Interest on hold have not been taken to their logical end.*
>
> *10. In the meantime, the CIRP period of 180 days is over on 04.10.2019. For the Suspended-Directors were still saying that funds would come, the CoC at the fag end of 180 days period has passed a resolution for extension of CIRP period for another 15 days in addition to 180 days of CIRP period.*

11.In pursuance of the said resolution dated 30.09.2019, this Bench extended the CIRP period for another 15 days in MA/1057/2019. As no funds forthcoming from the Suspended Directors despite CIRP was running on extension, the CoC ultimately passed a resolution on 18.10.2019 for liquidation of the company as contemplated under the IBC.

12. On Section 19 application filed by the Resolution Professional, it appears part of the information was given to the Resolution Professional by the Suspended-Directors, as to remaining information, it has not yet come from the Suspended-Directors.

13. Since in the 5th CoC meeting held on 18.10.2019, it has been mentioned that the Resolution would continue as Liquidator, the Resolution Professional is ordered to continue as Liquidator.

14. It is pertinent to mention that on the undertaking given by the Suspended-Directors which has kept everything under suspended amination this Bench passed order on 26.07.2019 which is as follows:

(IBA/434//2019)

"The suspended director, namely, Mr. Pahalingam has filed an affidavit stating that the ex-director proposes to pay a sum of Rs.57,50,00,000 to M/s Muthoot Fincorp Ltd (Financial Creditor) as full and final settlement in respect of the outstanding dues pending to the aforesaid Financial Creditor (M/s Muthoot Fincorp Ltd) within a period of sixty days with effect from 23.07.2019,

upon which the Financial Creditor (M/s Muthoot Fincorp Ltd) shall exit from the Committee of Creditors.

The suspended director has further stated that the aforesaid sum will be paid by raising funds through DCB Bank and/or Phoenix ARC and/or Kotak Mahindra Bank and/or Financial Institutions and friends and relatives with an undertaking that upon failure to pay the aforesaid amount within sixty days i.e. with effect from 23.07.2019, the Financial Creditor (M/s Muthoot Fincorp Ltd) may proceed in accordance with the procedure under Insolvency and Bankruptcy Code, 2016 (IBC). The suspended director has also mentioned that the undertaking has been given to Muthoot Fincorp Ltd (Financial Creditor) without prejudice to the rights and contentions of the suspended director.

Looking at the affidavit filed by the suspended director, we hereby hold that he shall procced as stated in the affidavit but until such time, the management of the company will run as contemplated under IBC by making it clear that the affidavit will be considered without prejudice to the rights and contentions of the suspended director as well as M/s Muthoot Fincorp Ltd.

List this application as fixed earlier i.e. 23.09.2019."

15.In the above order, it was held that the affidavit of undertaking given by the Suspended-Director Dr. Mahalingam to pay Rs.57.50 Crores to M/s Muthoot Fincorp Ltd will not cause any prejudice to the rights of either Suspended-Directors of M/s Muthoot fincorp Ltd. However, the Suspended-Director has failed to riase and pay

the money to M/s Muthoot Fincorp Ltd within 60 days or even as on the date of issuing this order.

16.In view thereof at least to expedite the liquidation process since this Bench is competent enough to pass an order to give direction to the Suspended-Directors to provide all the information which is required to determine the liquidation value of the company and also to liquidate the company as envisaged under the code, we hereby direct the Suspended-Directors to provide information forthwith.

17. In the back drop of these facts, it is evident that no resolution plan has come because no Expression of Interest was issued by the Resolution Professional for the reasons aforementioned. However, since the CoC has taken a decision for liquidation of the company the same being permitted and explicitly stated u/s 33(2) of the Code as amended on 16.08.2019 since the CoC has already passed resolution for liquidation of the Corporate Debtor with 73.44% voting share on 18.10.2019, we hereby order for liquidation of the company with the directions as follows:

a) This Bench hereby orders the Corporate Debtor to be liquidated in the manner as laid down in the Chapter by issuing a public notice stating that the Corporate Debtor is in liquidation with a direction to the liquidator to send this order to ROC with which this company has been registered."

and resultantly, ordered the 'Liquidation' of the 'Corporate Debtor' in the manner as laid down in the Chapter etc. and further had appointed Ms. Deepa Venkatramani as the 'Resolution Professional' to act as 'Liquidator'.

Appellant's contentions (Comp App.(AT)(Ins) No.146/2020)

3. Challenging the Validity, Legality and Correctness of the 'impugned Order' dated 04.12.2019 (delivered on 17.12.2019) passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench, Chennai) in MA/1189/2019 in Company Petition No. IBA/434/2010, the Learned Counsel for the Appellant submits that the 'impugned order' passed by the 'Adjudicating Authority' is bad in law and is in complete negation to the Letter and Spirit of the provisions of the I & B Code, 2016.

4. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had failed to appreciate that the 'Corporate Applicant' should have remained as a 'Going Concern' under the I & B Code with a view to arrive at a suitable Resolution Plan.

5. According to the Learned Counsel for the Appellant, the 'Adjudicating Authority' had not taken into account of the prime fact that without the 'Corporate Applicant' being a 'Going Concern' the pending debts would not possibly be repaid by it which would finally affect the interest of all stake holders.

6. The Learned Counsel for the Appellant takes a plea that the 'Adjudicating Authority' had committed an error in not appreciating the fact that the 'Suspended Directors' were not in possession of the Hospital Premises under the Equipment and Machinery present therein had provided all the information that were available with them.

7. The Learned Counsel for the Appellant proceeds to point out that the physical possession of the Hospital(asset of the 'Corporate Applicant') was with the 1st Respondent, which should have been under the custody of the 'Resolution Professional' after the order of 'Moratorium' dated 4.4.2019 in terms with Section 14 r.w. Section 18 (f), Section 25 of the I & B Code, 2016.

8. It is represented on behalf of the Appellant that the Interim Resolution Professional filed MA 363 of 2019 in Competition No. 434/IBA/2019 before the 'Adjudicating Authority' claiming possession of the property owned by the 'Corporate Applicant' from the custody of the 1st Respondent.

9. The Learned Counsel for the Appellant comes out with a plea that the order of 'Liquidation' was passed by the 'Adjudicating Authority' without ascertaining the issue of Ownership of the Hospital premises, which is pending in MA 363 of 2019. In this regard, it is contention of the Appellant side that the Hospital premises are owned by the 'Corporate Applicant' and not by the Promotor of the 'Corporate Applicant' as alleged by the 1st Respondent.

10. The Learned Counsel for the Appellant brings it to the notice of the 'Tribunal' that the 'Adjudicating Authority' had not appreciated the fact that the sole business of the 'Corporate Applicant' was to run the Super Speciality Hospital, having approximately 100 beds coupled with numbers state of the art Medical equipment, stalling operations which was affecting the Doctor's, Paramedical Personnel apart from the Staff Members all of whom were willing and waiting to get back work upon reopening and recommencement of the Hospital.

11. The Learned Counsel for the Appellant takes a stand that the 'Adjudicating Authority' had committed an error in law as the rehabilitation/reorganisation of the 'Corporate Entity' under the statement of 'object and reasons' and essential provisions of the Code were not undertaken by the 1st Respondent/majority of shareholders in the 'Committee of Creditors' of the 'Corporate Applicant.

12. Advancing his argument, the Learned Counsel for the Appellant contends that the relevant documents proving the ownership and title of the subject property in favour of the 'Corporate Debtor' were placed on record by the 'Corporate Debtor' through the Application made under Section 10 of the Code and later, by the 'Interim Resolution Professional', vide MA/363/2019 before the 'Adjudicating Authority.

13. The Learned Counsel for the Appellant brings it to the notice of the 'Tribunal' that the 'Loan Agreement', relied upon by the 1st Respondent was drafted and prepared by the 1st Respondent unilaterally as against the records of the 'Corporate Debtor'. Moreover, the 'Memorandum of Deposit of Title Deed' was prepared by the 1st Respondent and presented before the 'Office of the Sub-Registrar' where the Director of 'Corporate Applicant' had executed the said document and that 1st Respondent had conveyed that only on execution of 'Deposit of Title Deeds', the balance amount of Rs. 7 Crores would be released to the 'Corporate Applicant'.

14. The Learned Counsel for the Appellant submits that the 1st Respondent had only released a sum of Rs. 3 Crores, as against Rs. 7 Crores and the balance of Rs. 4 Crores was not released by the 1st Respondent till date.

15. The Learned Counsel for the Appellant, pertaining to the issue of 'Application' under Section 87 of the Companies Act, 2013 made by the 1st Respondent and the resultant order dated 10.01.2018 passed by the 'Regional Director' points out that the 'Corporate Debtor' was filing the statutory compliance before the 'Registrar of Companies' and the 'Ministry of Corporate Affairs', maintaining the records of the 'Corporate Debtors' for 30 years and having access to all the information relating to the loan facilities availed by the 'Corporate Debtor', including the facility availed from the Indian Overseas Bank (taken over by 1st Respondent subsequently) and the consequent security created on the assets of the 'Corporate Debtor' should not have passed such an order as the charged documents in regard to various loan facilities were already available in the 'Ministry of Corporate Affairs Records'.

16. It is the submission of the Learned Counsel for the Appellant that the Application for 'Charge' was moved by the 1st Respondent before the 'Regional Director' and not by the 'Corporate Applicant' and in fact, the order dated 10.01.2018 passed by the 'Regional Director' was wrong in law and the same cannot be relied upon. As a matter of fact, the order was never communicated to the 'Corporate Applicant/Appellant'.

17. The Learned Counsel for the Appellant contends that the intent behind the execution of Settlement Deed' by Dr. P.M. Nargunam was only to enable the Appellant to execute 'Deed of Solemn undertaking' which proceeds to the following effect:

> *"The above Hospital was incorporated as a Private Limited Company and the Scheduled Property i.e. the land and the Hospital were vested in the Company on incorporation as assets of the Company and was registered by the Registrar of*

Companies, Tamil Nadu vide Registration Certificate No. 18-15367 of 1988 dated 12.02.1988....

... Since the property i.e. the land and the Hospital were already vested in the company named "Santosh Hospitals Pvt Ltd." and were forming part of company assets, the Party of the first part felt it necessary and expedient to execute an undertaking and affidavit by way of abundant caution and to recognise and regularize the legal vesting of the schedule mentioned property in the Company in 1998 i.e. even before the Settlement in favour of the Party of the First Part on 28th September 2002."

18. It is the version of the Appellant that Dr. P.M. Nargunam was not the 'Director' of the Company at the time of execution of Settlement Deed and in the Settlement Deed, it was recited "... Whereas the Settlee has constructed the Hospital and running the Hospital under the name and style of "Santosh Hospital (P) Ltd" on the Schedule standing in the name of Settlor..." and therefore, it cannot be said that just because the 'Settlement Deed' was executed, the property is vested with the Appellant.

19. The Learned Counsel for the Appellant contends that the 'Deed of Solemn Undertaking' was executed by the Appellant, to keep the record straight and to recognize that the Schedule Property stands vested with 'Corporate Applicant' by means of incorporation and to undertake that the Appellant will not treat the property as his personal property.

20. The Learned Counsel for the Appellant submits that on 13.01.2020, the 1st Respondent had issued a notice under Section 13(4) of the SARFAESI Act 2002 read with Rules 8(6) of the Security Interest (Enforcement) Rules, 2002 of the 'Corporate Applicant' and its 'Suspended Director' providing one last

and final opportunity to them, to discharge their liability within a period of 30 days, post which the 'Assets of the 'Corporate Applicant' presently under the physical possession of the 1st Respondent shall be exposed for Sale through e-auction. In fact, the action of the 1st Respondent is in contradiction to Section 52 of the Code and that the Appellant apprehends that the 1st Respondent might illegally and against the provisions of the I & B Code, 2016, Sell Off of the Hospital under SARFAESI Act, 2002 which the 'Adjudicating Authority' had failed foresee.

21. On behalf of the Appellant, it is brought to the fore that the 'Corporate Applicant' had filed an Application under Section 10 of the Code with a bonafide intention to repay all its pending debts and achieve at fare, transparent and reasonable 'Resolution Plan' by remaining as 'Going concern' as per I & B Code. Indeed the 'Adjudicating Authority' on 04,04,2019 had granted 'Moratorium' to the 'Corporate Applicant'.

22. The Learned Counsel for the Appellant adverts to the Preamble of the I & B Code, 2016 which is to the effect:

> *"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation 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 order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."*

23. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' could not appreciates that repayment of pending 'Debts' owed to the 1st Respondent and other stakeholders could have only be made once the

operations once the Hospital/'Corporate Applicant' recommence and the 'Corporate Applicant continued to remain as a 'Going Concern'.

24. The Learned Counsel for the Appellant advances a plea that the actions of the 'Resolution Professional' misguided by the 1st Respondent in the 'Committee of Creditors' and 'Insolvency Proceedings' lead to the locking up of the machinery such MRI Scan and other costly medical high end machineries and instead of preserving the value of the 'Equipment', there was a deprivation of High End utilities which could have earned atleast Rs. 5 Crores if the possession was given to the 'Resolution Professional' as per the provisions of I & B Code, 2016 and the Moratorium dated 04.04.2019.

25. The Learned Counsel for the Appellant urges that the total value of the machinery illegally possessed by the 1st Respondent is worth of Rs. 40 Crores, out of which Rs. 13 Crores machineries was bought with the fund of DCB Bank and Rs. 1.7 Crores machineries was owned by the 'Corporate Applicant' and the possession of the Hospitals was illegally retained by the 1st Respondent.

26. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had failed to appreciate that the delay in settlement was on account of the 1st Respondent and after the filing of MA No. 1189/2019 by the Resolution Professional praying to liquidate the 'Corporte Applicant' on 22.10.2019, the Promotors on 06.11.2019 had filed the Memo before the 'Adjudicating Authority' mentioning that leading Financial Institutions are in constant touch to settle the outstanding dues and whole deal would be struck in the next 15 days and that the outstanding dues of the 1st Respondent will be settled by them and sought to exclude the 26 days from the CIRP period.

However, the 'Adjudicating Authority' without considering these prays, had passed the 'Liquidation' order.

27. The Learned Counsel for the Appellant projects an argument that only 180 days plus 30 days extension was granted to the 'Corporate Applicant' but the Code as it stood had provided for the time period of 180 days and extension upto 90 days namely viz., 270 days for the resolution of the 'Corporate Debtor'. In fact, the 3rd Respondent had prayed for an extension of 30 days only in spite of availability of extension upto 90 days.

28. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' could not see the reasons behind the non-grant of 90 days of extension, in addition to the 180 days CIRP period claimed by the 'Corporate Applicant's Suspended Director' in regard to which only 15 days' time period was approved by the 'Committee of Creditors'. In reality, in the 'Committee of Creditors' meeting dated 30.09.2019, 2nd Respondent/DCB Bank had voted in favour of the extension of the CIRP period by 90 days and that the 1st Respondent had deliberately voted against the extension, to not to allow to keep the 'Corporate Applicant' as a 'Going Concern' or to allow it undergo resolution.

29. The Learned Counsel for the Appellant forcefully submits that the 'Adjudicating Authority' had proceeded with the 'Liquidation' of the 'Corporate Applicant' without providing an opportunity to the 'Corporate Applicant' to undergo CIRP. Also, the 'Interim Resolution Professional'/Resolution Professional had not invited the 'Expression of Interests' and Resolution Plan from the prospective Resolution Applicants to keep the 'Corporate Applicant' as a 'Going Concern'.

30. The Learned Counsel for the Appellant contends that physical possession of the Hospital/'Asset' of the 'Corporate Applicant' was with the 1st Respondent/Financial Corporation and that the Hospital premises was not handed over the 'Interim Resolution Professional', although there was an order of 'Moratorium' on 04.04.2019. As such, MA No. 363/2019 in the main Competition Petition No. 434/IBA/2019 was filed before the 'Adjudicating Authority' on 14.04.2019 claiming possession of the property owned by the 'Corporate Applicant' from the custody of the 1st Respondent.

31. It is the plea of the Appellant that the 'Interim Resolution Professional' sought an explanation from the Statutory Auditor on the determination of the ownership of property situated at Besant Nagar, Chennai and later preferred an Additional Affidavit before the 'Adjudicating Authority' with a view to bring on record the explanation submitted by the 'Statutory Auditor' with regard to (1) 'Scrutiny of Title Deeds', (2) 'Disclosure in the Financial statement of the 'Corporate Applicant' and (3) 'Charged Documents' filed with the Registrar of Companies.

32. The Learned Counsel for the Appellant contends that the explanation of the 'Statutory Auditor' categorically stated that the 'Ownership of the Property' vests with the 'Corporate Applicant'.

33. The Learned Counsel for the Appellant submits that the 'Resolution Professional' Sripriya Kumar was replaced in the first meeting of the CoC dated 03.07.2019 (the 1st Respondent/Majority Member of CoC had voted in the first meeting of the CoC to replace the 'Resolution Profession' Sripriaya Kumar with that of Deepa V Ramani) and that the replaced Resolution Professional Ms Deepa V Ramani had not pressed for the adjudication of MA

363/2019, but moved an 'Application' to Liquidate the 'Corporate Applicant' at the instant of 1st Respondent/Financial Institution. Apart from that, the Resolution Professional/Liquidator was reluctant to take possession on numerous occasions.

34. The Learned Counsel for the Appellant comes out with a stand that the 'Resolution Professional' had time and again failed to take possession of the Assets of the 'Corporate Debtor' as per Section 25(2)9a) of the Code which reads:

> *"Section 25 – Duties of resolution professional:*
> *2(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor:"*

35. The Learned Counsel for the Appellant submits that the Appellant had requested the 3rd Respondent/Liquidator to take possession of the Assets and records of the 'Corporate Debtor' from the 1st Respondent pursuant to the Order dated 24.01.2020 passed by this 'Tribunal' in Company Appeal(AT)((Ins) No. 146/2020 wherein the following order was passed:

> *"..If the control of the assets and records of the 'Corporate Debtor' is with the 1st Respondent – 'Muthoot Fincorp Limited", it will hand over the same to the liquidator immediately failing which appropriate order may be passed including order under Section 65 of the 'Insolvency and Bankruptcy Code, 2016'*

36. The grievance of the Appellant is that no action was taken by the 3rd Respondent/Liquidator to take possession of the Assets of the 'Corporate Debtor'. Besides this, during March, 2020, when the lockdown was declared by the appropriate Government in our Country, the Greater Chennai

Corporation in April, 2020 had made request to utilise the 'Hospital Premises' but due non-cooperation of the 3rd Respondent, the Government of Tamil Nadu had approached the 'Adjudicating Authority' to hand over the 'Hospital' for Covid 19 patient care and on 12.04.2020, the 'Adjudicating Authority' had directed the 1st Respondent/Respondent No. 3 to hand over the whole 'Hospital' premises to the Tamil Nadu Government for treating the patients suffering from Covid-19 Pandemic.

37. In fact, 4th Respondent took possession of the 'Hospital' in compliance with the Order passed by the 'Adjudicating Authority' dated 12.04.2020 and under the 4th Respondent during September had informed the 3rd Respondent to take back the possession of the 'Hospital' since Covid-19 patient are receding and they do not want bear the electricity dues of the 'Corporate Applicant' and requested to take back possession. But the 3rd Respondent had addressed the 4th Respondent to clear the dues prior to the taking over the possession.

38. The Learned Counsel for the Appellant points out that the 1st Respondent availed this opportunity and pressurised the 4th Respondent through e-mail to hand over the physical possession to it and also filed IA 699/IB/2020 along with an 'Application' for urgent hearing before the 'Adjudicating Authority' at Chennai with misleading information seeking to direct the 4th Respondent to hand over the physical possess to it, against the order dated 24.01.2020 passed by this 'Tribunal' in Company Appeal (AT)(Ins) 146/2020.

39. The Learned Counsel for the Appellant adverts to the fact that IA 699/IBA/2020 filed by the (1st Respondent/Financial Corporation) was

allowed by the 'Adjudicating Authority in disregard to the 'Principles of Natural Justice' and contrary to the pleadings and documents available on record, without hearing the impleadment Application IA 933/IB/2020 filed by the Appellant and also without considering the corrected pending MA No. 363/2019. As such, a request is made on behalf of the Appellant for passing of an order against the 1st Respondent/Financial Corporation under Section 65 of the I&B Code for taking steps against the Order dated 24.01.2010 passed by this 'Tribunal'.

40. The Learned Counsel for the Appellant makes a fervent plea before this 'Tribunal' to consider IA 2936/2020 (Filed by the Appellant/Applicant) in permitting the Appellant to complete the process of settlement within 90 days of acceptance of the same from the 1st Respondent or from 90 days of the Order as passed by this 'Tribunal' and to allow the Appellant to deposit the amount so calculated and communicated by the Respondents within a period of 90 days.

41. While rounding up, the Learned Counsel for the Appellant prays for allowing Company Appeal (AT)(Ins) No. 146/2020 on the file of this Tribunal.

APPELLANT'S CITATIONS

42.(i) The Learned Counsel for the Appellant refers to the Judgement of the Hon'ble Supreme Court in Duncans Industries Ltd V.A.J. Agrochem (vide Civil Appeal No.5120 of 2019) dated 04.10.2019 wherein at paragraph 7.3 and 7.4 it is observed as under:-

> *"7.3 After noticing and considering the Statement of Objects and Reasons for the IBC and the Preamble to the Code, thereafter this Court has observed and held in paragraphs 27 and 28 as under:*

"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 reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time bound manner, the value of the assets of such persons will deplete. Therefore, maximisation 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 maximise 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 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.

(See ArcelorMIttal (Arcelor Mittal (India)(P)Ltd V Satish Kumar Gupta, (2019) 2 SCC 1] at para 83, fn 3).

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.

7.4 Section 16G(1)(c) refers to the proceeding for winding up of such company or for the appointment of receiver in respect thereof. Therefore, as such, the proceedings under Section 9 of the IBC shall not be limited and/or restricted to winding up and/or appointment of receiver only. The winding up/liquidation of the company shall be the last resort and only on an eventuality when the corporate insolvency resolution process fails. As observed by

this Court in Swiss Ribbons Pvt. Ltd. (supra), referred to hereinabove, the primary focus of the legislation while enacting the IBC is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate debt by liquidation and such corporate insolvency resolution process is to be completed in a timebound manner. Therefore, the entire "corporate insolvency resolution process" as such cannot be equated with "winding up proceedings". Therefore, considering Section 238 of the IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable and the provisions of the IBC shall have an overriding effect over the Tea Act, 1953. Any other view would frustrate the object and purpose of the IBC. If the submission on behalf of the appellant that before initiation of proceedings under Section 9 of the IBC, the consent of the Central Government as provided under Section 16(G)(1)(c) of the Tea Act is to be obtained, in that case, the main object and purpose of the IBC, namely, to complete the "corporate insolvency resolution process" in a timebound manner, shall be frustrated. The sum and substance of the above discussion would be that the provisions of the IBC would have an overriding effect over the Tea Act, 1953 and that no prior consent of the Central Government before initiation of the proceedings under Section 7 or Section 9 of the IBC would be required and even without such consent of the Central Government, the insolvency proceedings under Section 7 or Section

9 of the IBC initiated by the operational creditor shall be maintainable."

(ii). The Learned Counsel for the Appellant cites the judgement of the Hon'ble Supreme Court in K. Shasidhar Vs Indian Overseas Bank and Ors (vide Civil Appeal No. 10673 of 2018) dated 05.02.2019 wherein at paragraph 61 and 62 it is observed as under:-

> 61. Assuming that this provision was applicable to the cases on hand, non-recording of reasons for approving or rejecting the resolution plan by the concerned financial creditor during the voting in the meeting of CoC, would not render the final collective decision of CoC nullity per se. Concededly, if the objection to the resolution plan is on account of infraction of ground(s) specified in Sections 30(2) and 61(3), that must be specifically and expressly raised at the relevant time. For, the approval of the resolution plan by the CoC can be challenged on those grounds. However, if the opposition to the proposed resolution plan is purely a commercial or business decision, the same, being non-justiciable, is not open to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT). If so, non-recording of any reason for taking such commercial decision will be of no avail. In the present case, admittedly, the dissenting financial creditors have rejected the resolution plan in exercise of business/commercial decision and not because of non-compliance of the grounds specified in

Section 30(2) or Section 61(3) AS SUCH. Resultantly, the amended regulation pressed into service will be of no avail.

62. Relying on the dictum in Mardia Chemicals (supra) in particular paragraph 45, it was argued that even in regard to the option exercisable by the financial creditors under Section 30(4), the requirement of giving reasons for approval or disapproval of the proposes resolution plan must be read into it. In that case, the Court had considered the mechanism specified in section 13 of the Securitisation and Reconstruction of financial Assets and Enforcement of Security Interest Act, 2002, which provided for giving a notice to the borrower and upon receipt of such notice the borrower could raise objections as to why the proposed action of the security creditor was uncalled for. In that context, this Court in paragraph 45, observed thus:

> 45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non- compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in

the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an

> occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non- acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub- section (4) of Section 13 of the Act.
>
> (emphasis supplied)

In the present case, however, we are concerned with the provisions of I&B Code dealing with the resolution process. The dispensation provided in the I&B Code is entirely different. In terms of Section 30 of the I&B Code, the decision is taken collectively after due negotiations between the financial creditors

who are constituents of the CoC and they express their opinion on the proposed resolution plan in the form of votes, as per their voting share. In the meeting of CoC, the proposed resolution plan is placed for discussion and after full interaction in the presence of all concerned and the resolution professional, the constituents of the CoC finally proceed to exercise their option (business/commercial decision) to approve or not to approve the proposed resolution plan. IN such a case, non-recording of reasons would not per se vitiate the collective decision of the financial creditors. The legislature has not envisaged challenge to the "commercial/business decision" of the financial creditors taken collectively or for that matter their individual opinion, as the case may be, on this count."

(iii) The Learned Counsel for the Appellant adverts to the Judgement of the Hon'ble Supreme Court in Kridhan Infrastructure Pvt Ltd (now known as Krish Steel and Trading Pvt Ltd) Vs. Venkatesan Sankaranayan & Ors (Civil Appeal No.3299 of 2020) dated 01.03.2021 wherein at para 3 (9) it is observed as under:-

"Liquidation of the Corporate Debtor should be a matter of last resort. The IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not the mere recovery of monies due and outstanding."

(iv) The Learned Counsel for the Appellant refers to the Judgement of the Hon'ble Supreme Court of India in Swiss Ribbons Pvt Ltd and others V. Union

of India and others 2019 4 SCC 17 wherein at paragraph 27 it is observed as under:

> *"27. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business.*
>
> *Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately.*
>
> *Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable."*

(v) The Learned Counsel for the Appellant refers to the judgement of this Tribunal in Encore Asset Reconstruction Co Pvt Ltd. V. Charu Sandeep Desai

Others (vide Comp App(AT)(Ins) 719/2018 wherein at para 13,15,16 it is observed as under:-

> *"13. It is not the case of the Appellant that the title of the assets has already been transferred or they have sold the assets in terms of Section 13(4) of the 'SARFAESI Act, 2002'. It is also not the case of the Appellant that the assets owned by a third party is in possession of the 'Corporate Debtor' in terms of Section 18, as it is the duty of the 'Interim Resolution Professional' to take control and custody of any asset over which the 'Corporate Debtor' has "ownership rights" as recorded in the balance sheet of the 'Corporate Debtor'. Even if it is not in possession of the 'Corporate Debtor', a person who is in possession of the same, including the 'Dena Bank' or 'Encore Asset Reconstruction Company Pvt. Ltd.' is bound to hand over the same to the 'Resolution Professional', when title still vests with 'Corporate Debtor'.*
>
> *15. 'SARFAESI Act, 2002' being an existing law, Section 238 of the 'I&B Code' will prevail over any of the provisions of the 'SARFAESI Act, 2002' if it is inconsistent with any of the provisions of the 'I&B Code'.*
>
> *16. In the aforesaid background, we hold that Section 18 of the 'I&B Code' will prevail over Section 13(4) of the 'SARFAESI Act, 2002' and the 'Dena Bank' cannot retain the possession of the property in question of which the 'Corporate Debtor' is the owner".*

(vi) The Learned Counsel for the Appellant cites the judgement of this Tribunal in **M/s Unigreen Global Pvt Ltd V. Punjab National Bank** (vide Comp App (AT)(Ins) No.81/2017 wherein at paragraph 26 it is observed as under:-

> *"26. Any proceeding under Section 13(4) of the SARFAESI Act, 2002 or suit under Section 19 of the DRT Act, 1993 pending before Debt Recovery Tribunal or appeal pending before Debt Recovery Appellate Tribunal cannot proceed in view of the order of moratorium as may be passed."*

(vii) The Learned Counsel for the Appellant adverts to the order of the 'Adjudicating Authority' dated 12.12.2019 (NCLT Mumbai Bench in MA No.130/2019 CP/IB/3863/MB/2018) in Goa Auto Accessories V Suresh Saluja, Nagpur wherein at paragraph 17, 19, 23,26, 29 it is observed as under:-

> 17. The counsel representing the RP relied on the judgement of NCLAT in CA No.719 of 2018, wherein it was held that at para 13 as follows:
>
> > *13. It is not the case of the Appellant that the title of the assets has already been transferred or they have sold the assets in terms of Section 13(4) of the 'SARFAESI Act, 2002'. It is also not the case of the Appellant that the assets owned by a third party is in possession of the 'Corporate Debtor' in terms of Section 18, as it is the duty of the 'Interim Resolution Professional' to take control and custody of any asset over*

which the 'Corporate Debtor' has "ownership rights" as recorded in the balance sheet of the 'Corporate Debtor'. Even if it is not in possession of the 'Corporate Debtor', a person who is in possession of the same, including the 'Dena Bank' or 'Encore Asset Reconstruction Company Pvt. Ltd.' is bound to hand over the same to the 'Resolution Professional', when title still vests with 'Corporate Debtor'.

At para 16 the Court held has follows:

16. In the aforesaid background, we hold that Section 18 of the 'I&B Code' will prevail over Section 13(4) of the 'SARFAESI Act, 2002' and the 'Dena Bank' cannot retain the possession of the property in question of which the 'Corporate Debtor' is the owner.

In view of the above, the counsel for the RP claims that his right in claiming the possession of the said property belonging to Corporate Applicant under Section 18(1)(f)(ii) and that his right to claim possession is not affected under section 18(1)(f)(ii)vi) wherein the property in question is subject to determination of ownership by a Court of Authority. He reiterates that the subject matter of the said suit is with regard to the possession of the Shed and the right to use the Shed was transferred to the applicant. Further, there is no dispute with regard to the ownership of the Shed. The counsel for RP further claimed that the judgement of Learned Dissenting member has not considered that there is no

dispute of ownersh9ip rights and went to hold that he has to take a symbolic possession of the property.

19. In Innoventive Industries Ltd Vs ICICI Bank reported in MANU/SC/1063/2017,it was held that the objective of the Code is to bring insolvency law in India within a single unified umbrella. The scheme of the Code is to make an attempt in divesting the erstwhile management of the Corporate Applicant of its power and vesting it in a professional agency to continue the business of the Corporate Body as a going concern until the resolution plan in drawn up in a time bound period of 270 days is an exhaustive Code by itself.

23.Section 60(5) and (b)(c) of the Code empowers NCLT to entertain the dispute raised in the suit, section 63 of the Code further bars the jurisdiction of the Civil Court in matters pertaining to the NCLAT, section 231 of the Code also bar the jurisdiction of the civil court from granting any injunction in respect of any action taken or in pursuance of any order passed by the Adjudicating Authority under this Code. This code is a self-contained legislation conferring the supervisory powers on the NCLT over CIRP process right from the stage of application being made for initiation of the CIRP process to the completion of the CIRP/Liquidation as the case may be.

Upon conjoint reading of section 60(5), Section 63, Section 231 and section 238, the jurisdiction of Civil Court is excluded related

to the matters related to I&B Code. Therefore, it can be held that NCLT can order possession of the property of Corporate Applicant to facilitate the CIRP process and allow the Resolution Professional to take possession of the assets of Corporate Applicant.

26. Further the non-obstante clause as prescribed section 238 of the I&B Code, 2016, provides that the provisions of the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

29.Therefore, in view of the overriding powers under section 238 of the Code and Rule 11 of NCLT Rules 2016, and it is directed that Resolution Professional/Liquidator shall be allowed to take possession of the Shed from the Applicant.

FIRST RESPONDENT'S SUBMISSIONS:

43. The Learned Counsel for the 1st Respondent submits that the 'Adjudicating Authority' had provided ample adequate opportunities to the 'Appellant' and other 'Suspended Directors' to make good on their assurances in respect of their 'Settlement of Claims' of the 3rd Respondent/'Corporate Debtor'.

44. The Learned Counsel for the 1st Respondent brings it to the Notice of this 'Tribunal' that in regard to the 'Settlement' the 'Appellant' furnished an express undertaking by way of an 'Affidavit of Undertaking' dated 26.7.2019,

in terms of which it undertook to pay a sum of Rs. 57,50,00,000/- to the 1st Respondent within a period of 60 days.

45. The Learned Counsel for the 1st Respondent adverts to paragraph-15 of the impugned order which runs to the following effect:

> *"15. In the above order, it was held that the affidavit of undertaking given by the Suspended-Director Dr. Mahalingam to pay Rs 57.50 crores to M/s Muthoot Fincorp Limited will not cause any prejudice to the rights of either Suspended-Directors or (sic) M/s. Muthoot Fincorp Limited. However, the Suspended-Director has failed to raise and pay the money to M/s Muthoot Fincrop Limited within 60 days or even as on the date 0of issuing this order."*

and points out that in spite of repeated requests, no funds or any indication thereof were forthcoming from the 'Appellant'. Also, that similar undertakings in regard to the 'Settlement' were made before the Hon'ble High Court of Madras in Writ Petition No. 24867 of 2018 and the said Writ Petition was filed by the 3rd Respondent against the action taken by the 1st Respondent for the enforcement of its charge qua the property at No. 1, 7th Avenue, Besant Nagar, Chennai- 90 (the subject property) under Section 13(4) of the SARFAESI Act, 2002, which was affirmed through the Order of Possession dated 12.07.2018 passed by the Chief Metropolitan Magistrate.

46. The Learned Counsel for the 1st Respondent refers to the Order of the Hon'ble High Court, dated 20.02.2019 wherein at paragraphs 11 & 12 it is observed as under:

> *"11. From the above reply it is also clear that the petitioner has not disputed the claim made by the 1st Respondent. In*

fact they specifically admitted the claim and only sought three months' time to settle the outstanding. But in spite of seeking for three months' time to settle the outstanding as early as 03.10.2007, it is pertinent to note that even till date, the petitioner has not settle the loan account with the 1st Respondent…."

"12. It is also pertinent to note that even before this Court, when the matter came up on 11.10.2018, undertaking was made by the petitioner that the entire due payable to the respondent would be paid within a period of 45 days. To that effect the petitioner has also filed an affidavit of undertaking dated 17.10.2018. Thereafter, without honouring the undertaking given before this Court, the petitioner filed an application seeking for an extension of time and this court also showed indulgence to the petitioner by order dated 05.12.2018 extending the time for compliance till 10.01.2019. Even then, without complying with the undertaking given before this Court the petitioner again sought for extension of time. However, this Court declined to accept the request of the petitioner and posted the Writ Petition on 28.01.2019 for hearing on merits. Therefore, the conduct of the petitioner has been to merely seek time and not repay the loan as promised by them. In spite of filing of an affidavit of undertaking before the Court, so far as the petitioner has not honoured their commitment. Therefore, just for the sake of prolonging the matter, they have filed an affidavit of undertaking dated 17.10.2018 before this Court stating that they would settle the entire dues within a period of forty-five days."

and comes out with plea that the very same pleadings are averred before this 'Tribunal'.

47. The Learned Counsel for the 1st Respondent advances an argument that in view of the unambiguous and clear wording of Section 12(2) of I & B Code, 2016, the 'Adjudicating Authority' 'may' in the event of CIRP was not to be completed within the prescribed period of 180 days and upon an Application in this regard filed by the 'Resolution Professional' on behave of 'Committee of Creditors', allow an extension of 'CIRP' by a further period of not exceeding 90 days.

48. The Learned Counsel for the 1st Respondent takes a plea that the 'Adjudicating Authority' may grant an extension of 'CIRP' in terms of Section 12 of the Code, only upon an Application by the 'Resolution Professional' pursuant to positive majority approval for such extension by the 'Committee of Creditors'. In short, it is the contention of the 1st Respondent that in the instant case, no such 'Approval' was given by the 'Committee of Creditors' and as such, there can be no case made out for the grant of any extension as prayed for by the Appellant, or otherwise. In any event, the 'Suspended Directors' of a 'Corporate Debtor' have no 'Locus Standi' even to approach the 'Adjudicating Authority' for seeking an extension to the 'CIRP'.

49. The Learned Counsel for the 1st Respondent places reliance on the ingredients of Section 33(2) of the I & B Code which enjoins the 'Adjudicating Authority' who shall pass an order of liquidation of the 'Corporate Debtor' in the event of a prescribed majority vote of the Member of 'Committee of Creditors' to that effect.

50. The Learned Counsel for the 1st Respondent contends that the impugned order passed by the 'Adjudicating Authority' was pursuant to the 'Resolution' dated 18.10.2019, passed by the properly constituted 'Committee

of Creditors' by a majority of 73.44% and even the 'remainder' of the 'Committee of Creditors' had just abstained from voting, but had not voted against the said 'Resolution' and in this regard, the pertinent portion of the said 'Resolution' of the 'Committee of Creditors' qua Liquidation of the 'Corporate Debtor' is mentioned as under:

> *"Resolved that pursuant to the provisions of Section 33 of the Insolvency and Bankruptcy Code, 2016 of the Committee of Creditors be and is hereby given for submitting an application to the Honourable National Company Law Tribunal, Chennai Bench for Liquidation of M/s Santhosh Hospitals Private Limited, in the event of non-completion of the Settlement and withdrawal of the process under Section 12-A of the Code by 19.10.2019 and subject to the decision of the Hon'ble Tribunal on 21.10.2019."*

51. The Learned Counsel for the 1st Respondent forcefully submits that the language of the I & B Code is very clear and once a 'Resolution' was passed by the 'Committee of Creditors' of the 'Corporate Debtor', in terms of Section 33 of the I & B Code, the commercial wisdom of the 'Committee of Creditors' cannot by questioned and the same is binding.

52. The Learned Counsel for the 1st Respondent projects an argument that the 'Corporate Insolvency Resolution Process' qua the 3rd Respondent was initiated pursuant to Application under Section 10 of the I & B Code, 2016 and therefore, it is not open to the 'Suspended Directors' of the 3rd Respondent (including its promotors) to make an attempt of the 'Resolution' of the 'Debts' of the Company after having failed to do so for a substantial amount of time. In fact, Section 12-A of the I & B Code, 2016 provides for a clear procedure for

'Settlement of Claims' and withdrawal/culmination of the 'CIRP', which was not adhered to by the 'Appellant' in letter and spirit.

53. The Learned Counsel for the 1st Respondent points out that the 'Appellant' and 3rd Respondent were not able to fulfil the requirements of section of 12-A of I & B Code, 2017 and also were not successful to secure the additional funding. From 12.09.2018, the 3rd Respondent was not in operation for substantial point of time.

54. It is brought to the fore that the 1st Respondent took a symbolic possession of the subject property on 11.10.2017 itself and during that period of time, there were hardly any operations being carried out in the 'Hospital' and the same was noted in the 1st Meeting of the 'Committee of Creditors' wherein it was pointed out that the Hospital was not 'operational as a Going Concern' from 12.07.2018. As a matter of fact, the Minutes also point out that from February, 2016, 'the Hospital was not admitting the in patients' and was hardly operational. Therefore, it is the clear cut stand of the 1st Respondent that when the order of 'Liquidation' was passed by the 'Adjudicating Authority' (under Section 33 of the I & B Code, 2016), the 'Appellant' cannot take a plea and stake a claim for the 3rd Respondent, to be restored to a position of 'Going Concern'.

INELIGIBILITY UNDER SECTION 29A OF THE CODE

55. The Learned Counsel for the 1st Respondent contends that the 'Appellant' and other 'Suspended Directors of the Corporate Directors' are not eligible to participate in the Resolution of the Corporate Debtor by virtue of Section 29A of the I&B Code which prohibits 'related parties' from submitting a 'Resolution Plan' and also from participating in the 'Liquidation Process of a

'Corporate Debtor' in respect of whom a 'Liquidation Order' was passed by the 'Adjudicating Authority'.

AVAILING OF LOAN

56. The Learned Counsel for the 1st Respondent submits that the 3rd Respondent availed the loan from the 1st Respondent to a sum of Rs.42,00,00,000/- as per sanction letter dated 14.07.2016 and later executed a loan agreement dated 06.08.2016 indicating clearly that the 'Appellant' stood as 'Guarantors' and furnished security, in the nature of the subject property. Furthermore, the subject property was mortgaged by the Appellant, being the owner of the same, through a 'Memorandum of Deposit of Title Deeds' dated 17.08.2016, registered in the 'Office of the Sub-Registrar' (vide Document No.8571 of 2016).

57. The Learned Counsel for the 1st Respondent takes a plea that the 'Resolution' passed by the Board of Directors of the 3rd Respondent specifically mentions that the Appellant (and not the 'Corporate Debtor') was to mortgage the said property in favour of the 1st Respondent and the recitals of the 'Resolution' is as follows:-

> *"the company do request Dr. P. Mahalingam to agree to provide equitable mortgage of the landed property owned by him presently occupied by M/s Santhosh Hospitals Private Limited and to offer the said immovable properties as securities to the loan."*

58. The Learned Counsel for the 1st Respondent points out that any of the rights of the 1st Respondent qua the subject property are separately enforceable under the provisions of the SARFAESI Act, 2002. In fact, a Notice

of repayment dated 08.08.2017 under Section 13(2) of the SARFAESI Act, 2002 was issued for the repayment of loan facility because of the persistent defaults committed by the 3rd Respondent and since the loan was not repaid and there being no sufficient response, the 1st Respondent had proceeded further in issuing the Possession Notice dated 11.10.2017 as per Section 13(4) of the SARFAESI Act, 2002 thereby taking over the symbolic possession of the subject property.

59. The Learned Counsel for the 1st Respondent submits that 1st Respondent filed an application as per Section 87 of the Companies Act, 2013 before the 'Regional Director', 'Ministry of Corporate Affairs' for the condonation of delay in filing details of the charge created as per Section 77 of the Companies Act, 2013, on the 'subject property' in favour of the 1st Respondent/Applicant. The said application was dismissed by an order dated 10.01.2018 passed by the Regional Director of the Ministry of Corporate Affairs, who pointed out that the 'subject property' over which the charge was created belongs to the Appellant and not the 'Corporate Debtor' and therefore, the application was without merits.

60. The Learned Counsel for the 1st Respondent brings it to the notice of this Tribunal that the 1st Respondent filed an application in Crl.MP No.3133/2018 before the Chief Metropolitan Magistrate, Chennai, who on 12.07.2018 had directed the actual possession of the subject property to be handed over to the 1st Respondent and appointed an 'Advocate Commissioner' to assist and he visited the 'subject property' on 27.08.2018 and subsequently

filed an affidavit dated 13.12.2018 before the Chief Metropolitan Magistrate among other things mentioning that no hospital services were being rendered and further that there were no patients in the Hospital.

61. The Learned Counsel for the 1st Respondent refers to the affidavit filed by the Corporate Debtor in WP No.24867 of 2018 before the Hon'ble High Court of Madras wherein the 'Corporate Debtor' had admitted that the subject property is owned by the Appellant and not the Corporate Debtor and the relevant portion is as follows:

> *"..4. I state that the land of commercial Plot No.1, 7th Avenue, Besant Nagar, Chennai – 600090, comprised in Survey No.154 Part, Thiruvanmiyur Village, Mylapore-Triplicane Taluk, measuring about 7 Grounds and 963 Sq. Fee was originally owned by Dr. P.M. Narguman (wife of Dr. P. Mahalingam) and thereafter by renowned cardiologist Dr. P Mahalingam (the Petitioiner's Founder and Chairman).."*
>
> *"...6. I state that the loan Agreement executed----Subsequent to completion of the necessary formalities, legal requirements and in pursuance of the Loan Agreement, a Memorandum of Deposit of Title Deeds in respect of the premises, being land and building situated at Commercial Plot No.1, 7th Avenue, Besant Nagar, Chennai 600090 comprised inn Survey No.154 Part, Thiruvanmlyur Village, Mylapore –Triplicane Taluk measuring about 7 Grounds and 963 Sq feet was executed on 17.08.2016 by Dr. P. Mahalingam in favour of the 1st Respondent, as required by it, to secure the Petitioner's loan.*

62. The Learned Counsel for the 1st Respondent points out that the Writ Petition No.24867 of 2018 was dismissed by the Hon'ble High Court of Madras and it was observed that the proper remedy, if any, for the Respondents was to approach the Debt Recovery Tribunal, as per Section 17 of the SARFAESI Act, 2002.

63. The Learned Counsel for the 1st Respondent submits that the Appellant had preferred a Statutory Appeal before the Debt Recovery Tribunal (vide Section 17 of the SARFAESI Act, 2002) which came to be dismissed by an order dated 12.04.2019, whereby the possession order was upheld.

64. The Learned Counsel for the 1st Respondent contends that the subject property at which the 'place of operations' and Registered Office of the 3rd Respondent is situated is not within the scope of the present Insolvency and Liquidation proceeds, as per Section 14(3)(b) of the Code. Therefore, the 'subject property' cannot be within the purview of the Insolvency & Liquidation Proceedings and in this connection the Learned Counsel by referring to Section 14(3)(b) of the Code.

65. The Learned Counsel for the 1st Respondent submits that as per Section 18(1)(f) of the Code. the 'Asset' should be owned by the 'Corporate Debtor' and explanation to Section 18 of the Code expressly mentions that such 'Assets' even though recorded in the Balance Sheet of the corporate debtor, would not form part of the estate of the corporate debtor for the purpose of Insolvency proceedings if the same are "assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment.

66. The Learned Counsel for the 1st Respondent contends that even liquidation proceedings pertaining to a 'Corporate Debtor', the liquidator appointed under Section 34 of the Code is required to form the Liquidation Estate as per Section 36 only from the Assets over which the 'Corporate Debtor' has ownership right. In fact, in regard to such Assets as well, an express carve out is created under Section 36(4) in respect of 'Assets' that, despite being evidenced on the Balance Sheet of the 'Corporate Debtor', are owned by a third party and is in possession of the 'Corporate Debtor'. Hence, it is the stand of the 1st Respondent, that the 'subject property' never ought to have been subject to 'insolvency proceedings' qua the 'Corporate Debtor' and also sought to be excluded from the ambit of the instant 'Liquidation Proceedings'.

67. The Learned Counsel for the 1st Respondent submits that the Appellant furnished an 'undertaking' through an 'Affidavit' dated 26.07.2019 in and by which he undertook to pay a sum of Rs.57,50,00,000/- to the 1st Respondent in satisfaction of the debt owed by the 3rd Respondent, within 60 days.

1ST RESPONDENT'S CITATIONS:

68.(a) The Learned Counsel for the 1st Respondent adverts to the Judgement of this 'Tribunal' dated 31.07.2019 in ***'Kautilya Industries Pvt. Ltd. v. Parasrampuriya Synthetic Ltd.*** [Comp. Appeal (AT)(INS) No. 282 of 2019] wherein at paragraph 6 to 11 it is observed as under:

> *"6. On 3rd January, 2019, the Hon'ble High Court of Judicature for Rajasthan, Bench at Jaipur, taking into consideration the fact that the 'Resolution Professional' has been appointed under the 'I&B Code' by the Adjudicating Authority on 17th May, 2018, recalled*

the earlier order and disposed of all the Company Petitions to enable the 'Resolution Process' to continue.

7. From the aforesaid fact, it appears that there was no specific prohibition on the 'Committee of Creditors' for considering one or other 'Resolution Plan'. They held meeting after the first order of the Hon'ble High Court of Judicature for Rajasthan, Bench at Jaipur, i.e. on 27th September, 2018 and on different dates i.e. 8th October, 2018, 22nd October, 2018, 30th October, 2018, 6th November, 2018, 10th December, 2018 and 18th January, 2019.

8. The 'Resolution Plan' of the Appellant as was placed was not accepted.

9. In view of the aforesaid facts, we find that no case is made out for exclusion of any of the period for the purpose of counting 270 days which stands completed on passing the impugned order of liquidation. However, this order will not come in the way of the Liquidator who is required to follow the provisions of Sections 35, 36, 37, 38, 39 & 40 of the 'I&B Code' and Section 230 of the Companies Act as ordered by this Appellate Tribunal passed in "Y. Shivram Prasad Vs. S. Dhanapal & Ors.— Company Appeal (AT) (Insolvency) No. 224 of 2018".

10. The Liquidator is also required to ensure that during the liquidation the 'Corporate Debtor' remains a going concern and in case no Scheme is approved under Section 230 of the Companies Act, 2013, then to sell the Company as going concern alongwith

employees as ordered in "Y. Shivram Prasad Vs. S. Dhanapal & Ors." (Supra) before taking recourse of final liquidation.

11. It is open to the Liquidator/class of creditors such as, 'Committee of Creditors' and 'Financial Creditors' or members or class of members of the 'Corporate Debtor' to consider the 'Resolution Plans' as were filed by one or other 'Resolution Applicants' but were not taken up for the purpose of preparation of Scheme, but ensure that such Scheme should not violate the Statement of Objects and Reasons of the 'I&B Code' which is the maximization of the assets of the 'Corporate Debtor', feasibility and viability of the Scheme and balancing the stakeholders as observed in "Y. Shivram Prasad Vs. S. Dhanapal & Ors." (Supra).

(b). The Learned Counsel for the 1st Respondent refers to the Judgment of this 'Tribunal' dated 24.07.2018 in '***Chandra Kalian Prakash v. Rajeev Mannadiar & Ors***.' [vide Comp. App. (AT)(INS) 149 of 2018] wherein it is observed as under:

"The grievance of the appellant is that 180 days was to be completed by 21st January, 2018 but much prior to the same, without taking further course of calling for 'Resolution Plan', the matter was hurriedly closed by the 'Committee of Creditors' in its meeting held on 3rd October, 2017 decided to proceed with the liquidation.

From the record we find that there was no 'resolution applicant' who came forward to file a 'Resolution Plan'. The 'Committee of

Creditors' in its meeting held on 31st August, 2017 asked the 'Resolution Professional' to come forward with concrete proposal for revival of the company as otherwise they will have to consider the question of liquidating the company. Thereafter in absence of 'resolution plan', the 'Committee of Creditors' decided to go ahead with the liquidation of the company. Learned counsel appearing on behalf of the promoter submits that the appellant could have submitted a 'Resolution Plan' but in view of Section 29A, as the appellant is not eligible to file the 'Resolution Plan', no such claim can be accepted.

We find no ground to interfere with the impugned order. The appeal is dismissed. No cost."

(c). The Learned Counsel for the 1st Respondent refers to the Judgment of this 'Tribunal' dated 10.002.2020 in ***'Sunil S. Kakkad v. Atrium Inforcom Private Limited & Ors.***' [vide Comp. App.(AT)(INS 194 of 2020] wherein at paragraph 19, 20 and 21 it is observed as under:

"*19. It is pertinent to mention that explanation to sub-section (2) of Section 33 of the I&B Code, 2016 depicts that the CoC is fully empowered to order for liquidation at any stage of the CIRP, but before the confirmation of the Resolution Plan.*

20. In the circumstances, it is apparent that statutory provision permits CoC to take the decision for liquidation of Corporate Debtor at any stage of CIRP, but before confirmation of Resolution Plan. In the instant case, the CoC intentionally deferred the matter for approving EoI for inviting the Expression of Interest for submission

of Resolution Plan and unanimously decided to liquidate the Corporate Debtor. As per the explanation added to sub-clause (2) of Section 33 of the I&B Code, it is clear that the CoC has the power to order for liquidation at any stage of CIRP but before confirmation of Resolution Plan.

21……..Thus, it is clear that there is no illegality in the decision of CoC in liquidating the Corporate Debtor before taking any steps for inviting Expression of Interest for submission of Resolution Plan."

and points out that the said judgement in CA (AT)(Ins) No.194/2020 was upheld by the Hon'ble Supreme Court in Civil Appeal No.3968 of 2020.

(d). The Learned Counsel for the 1st Respondent refers to the judgement of this Tribunal dated 02.03.2021 in **Gulab Chand Jain Vs Resolution Professional of Vijay Timber Industries (**vide Comp App (AT)(Ins)No.142/2021),wherein at paragraph 2 it is observed as under:-

"2. After hearing Mr. Sunil Bhavsar, learned counsel for the Appellant, we find that the Suspended Management being the Promoter was all along represented in the COC meetings and never raised any objection as emanates from para 1 of the impugned order. This being a matter of record, the Appellant- Promoter's disputing the factum of his participation in the COC meetings cannot be entertained. That apart, under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 read together with explanation inserted by Act 26 of 2019 enforced w.e.f. 16th August, 2019, the COC is empowered to take a decision in regard to liquidation of the Corporate Debtor even after an application has

been filed by the Resolution Professional placing the Resolution Plan approved by the COC before the Adjudicating Authority for approval. Of course, the withdrawal of the Resolution Plan can be done before its approval by the Adjudicating Authority. This implies that even after approval of the Resolution Plan by the COC and laying it before the Adjudicating Authority, the COC can change its mind and pass a Resolution liquidating the Corporate Debtor subject to only exception that such course cannot be adopted after its confirmation i.e. after approval of the Resolution Plan by the Adjudicating Authority.

We find no merit in this appeal. The same is dismissed."

and the same was upheld by the Hon'ble Supreme Court in Civil Appeal No.5640 of 2021.

(e). The Learned Counsel for the 1st Respondent places reliance on the decision of the Hon'ble Supreme Court in ***'K Shashidhar v. Indian Overseas Bank'*** [(2019) 12 SCC 150 at Spl Pages 183 and 184] wherein at paragraphs 52 & 53 it is observed as under:

"52. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and

mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non justiciable.

53. In the report of the Bankruptcy Law Reforms Committee of November 2015, primacy has been given to the CoC to evaluate the various possibilities and make a decision. It has been observed thus:

> *"The key economic question in the bankruptcy process When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.*
>
> *The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the Government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it." (emphasis supplied)*

(f). The Learned Counsel for 1st Respondent refers to the decision of the Hon'ble Supreme Court in Committee of Creditors of Essar Steel V. Satish Kumar Gupta 2019 SCC Online SC 1748 wherein at paragraph 46 it is observed as under:-

> "46. In K. Sashidhar (supra) this Court was called upon to decide upon the scope of judicial review by the Adjudicating Authority. This Court set out the questions to be determined as follows:
>
> > "18. Having heard learned counsel for the parties, the moot question is about the sequel of the approval of the resolution plan by the CoC of the respective corporate debtor, namely KS&PIPL and IIL, by a vote of less than seventy five percent of voting share of the financial creditors; and about the correctness of the view taken by the NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. Further, is it open to the adjudicating authority/appellate authority to reckon any other factor (other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be) which, according to the resolution applicant and the stakeholders supporting the resolution plan, may be relevant?
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> > xxx xxx xxx
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> > 25. The Court, however, was not called upon to deal with the specific issue that is being considered in the present cases namely, the scope of judicial review by the adjudicatory authority in relation to the opinion expressed by the CoC on the proposal for approval of the resolution plan."

(g). The Learned Counsel for the 1st Respondent relies on the decision of the Hon'ble Supreme Court in MCGM V. Abhilash Lal (2020) 1 13 SCC 234 wherein at paragraph 47 it is observed as under:

> "47. In the opinion of this court, Section 238 cannot be read as overriding the MCGM's right – indeed its public duty to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92A of the MMC Act. This court is of opinion that Section 238 could be of

> importance when the properties and assets are of a debtor and not when a third party like the MCGM is involved. Therefore, in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands. No doubt, the resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question which undeniably are public properties. The resolution plan therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)."

and points out that in the instant case, ownership of the 'subject property' should be governed by the proper and legitimate 'Title Documents' and not in terms of the Balance Sheet entries in the 'Corporate Debtor's Financial Statements'.

THE REGISTRATION ACT, 1908

69. The Learned Counsel for the 1st Respondent refers to Section 51 of the Registration Act, 1908 and submits that documents concerning immovable property are required to be maintained only in Book I which relates to 'Register of Non-Testamentary Document relating to Immovable Property'.

70. The Learned Counsel for the 1st Respondent contends that only a legally recognised registered document will convey Title/Ownership, (vide as per Section 54 of the Transfer of Property Act, 1882) as per decision of the Hon'ble

Supreme Court in **Suraj Lamp Industries V State of Haryana** (2012) 1 SCC 656 wherein it is observed as under:-

> 11. Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas V S.A Kamtam and Anr.
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> (1977) 3 SCC 247, observed:
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> A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. See Rambaran Prosad V. Ram Mohit Hazra [1967]1 SCR
>
> 293. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein." In India, the word `transfer' is defined with reference to the word `convey'. The word `conveys' in section 5 of Transfer of Property Act is used in the wider sense of conveying ownership... ...that only on execution of conveyance ownership passes from one party to another....
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> In Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra [2004 (8) SCC 614] this Court held:
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> "Protection provided under Section 53A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party."
>
> It is thus clear that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred.
>
> 12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements

of sections 54 and 55 of TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of TP Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

ASPECT OF DEED OF SOLEMN UNDERTAKING

71. The Learned Counsel for the 1st Respondent comes out with a plea that the 'Deed of Solemn Undertaking' vest/convey the property in favour of the 'Corporate Debtor' in the year 1988, prior to the 'Asset' coming into ownership of Dr.PM Nargunam, as per Sale Deed dated 30.01.1989 and prior to the gift thereof to the Appellant (28.09.2002) and this is contrary to the Financial Statements of the 'Corporate Debtor' which only recorded the 'subject property' as an asset of the 'Corporate Debtor' only from the year 2002 and not from its incorporation in the year 1988.

PROCEEDING UNDER SARFAESI ACT, 2002

72. The Learned Counsel for the 1st Respondent points out that the 'Appellant' was a Guarantor qua the debts of 'Corporate Debtor' and that the 1st Respondent is empowered to proceed against the Appellant, in terms of SARFAESI Act, 2002 and in this regard adverts to the decision of Hon'ble Supreme Court in State Bank of India V. V.Ramakrishnan & Others 2018 17 SCC 394 wherein it is held that SARFAESI proceedings against the personal Guarantor of Corporate Debtor (as already initiated in present case), can continue under the SARFAESI Act, even though a moratorium may be

enforced against the Corporate Debtor under Section 14 of the I&B Code, 2016.

73. The Learned Counsel for the 1st Respondent cites the decision of the Madras High Court in B. Pattabhiraman V Authorised Officer 2019 SCC OnLine Madras 9182 wherein it is observed and held that the proceedings of NCLT will not stand in the way of invoking SARFAESI Act proceedings as against security given as 'Guarantor' to a debt and further, there is no bar in proceeding against the 'personal properties of Guarantors', even when the order of liquidation is in force as against the principal borrower. Furthermore, it is observed that there is no provision in the I&B Code prohibiting the Bank to proceed against the Guarantors under SARFAESI Act on account of liquidation of 'Corporate Debtor'

HON'BLE HIGH COURT'S DECISIONS

74. The Learned Counsel for the 1st Respondent adverts to the decision of the Hon'ble High Court of Delhi dated 02.11.2020 in the case of Kiran Gupta V. State Bank of India 2020 SCC OnLine Delhi 1390 wherein at paragraph 12 to 14 it is observed as under:-

> "12. Since the liability of a guarantor is co-extensive with that of the principal debtor and not in the alternative, it cannot be said that proceedings in the NCLT against the principal debtor can be a bar to institution or continuation of proceedings against the guarantor under the SARFAESI Act.
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> 13. The question as to whether the respondent/Bank can proceed against a guarantor even after initiation of proceedings under the

IB Code also stands settled. As correctly pointed out by Mr. Kapur, learned counsel appearing for the respondent/Bank, the said issue is squarely covered by the judgment of the Supreme Court in State Bank of India (supra). Paras 20 and 25 of the said decision that answer the issue raised by Mr. Sethi, Senior Advocate against him, read as under:-

> "20. Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said section. A plain reading of the said section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.
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> XXX XXX XXX
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> 25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as

to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him." (emphasis added)

14. The view expressed by the Supreme Court amply demonstrates that neither Section 14 nor Section 31 of the IB Code place any fetters on Banks/Financial Institutions from initiation and continuation of the proceedings against the guarantor for recovering their dues. That being the position, the plea taken by the counsel for the petitioner that all proceedings against the petitioner, who is only a guarantor, ought to be stayed under the SARFESI Act during the continuation of the Insolvency Resolution process qua the Principal Borrower, is rejected as meritless. The petitioner cannot escape her liability qua the respondent/Bank in such a manner. The liability of the principal borrower and the Guarantor remain co-extensive and the respondent/Bank is well entitled to initiate proceedings against the petitioner under the SARFESI Act during the continuation of the Insolvency Resolution Process against the Principal Borrower."

75. The Learned Counsel for the 1st Respondent seeks in aid of the decision of Hon'ble High Court of Calcutta in Gouri Shankar Jain Vs Punjab National Bank and Another dated 13.11.2019 wherein at paragraph 27 and 37 it is observed and held as under:-

"27. An application under Section 7 of the Code of 2016 once admitted under Section 7(5) thereof has two terminal points for the corporate debtor. The Code of 2016 does not contemplate withdrawal of an application under Section 7 once it is admitted under Section 7(5). The terminal points are, firstly, the approval of a Resolution Plan and secondly, the initiation of liquidation proceeding on a Resolution Plan not being approved. When a financial creditor applies under Section 7 of the Code of 2016 it is exercising a statutory right. The exercise of such statutory right does not depend upon the contractual obligations of the parties bound by the respective contracts between the creditor, principal debtor and the surety. Such contracts cannot be said to have rescinded, novated, frustrated, modified, altered or affected in any manner, on an application under Section 7 of the Code of 2016 being filed. After its admission under Section 7(5) of the Code of 2016, when an order under Section 14 is passed, then also only the statutory right of a financial institution to proceed under the SARFAESI Act, 2002 remains suspended for a limited period. The existing contracts between the surety, principal debtor and the creditor remains unaffected.

37. Section 14 of the Code of 2016 does not apply to a personal guarantor. The Code of 2016 does not allow personal guarantors to escape their liability. When an application under Section 7 of the Code of 2016 is admitted by the Adjudicating Authority, the

steps taken subsequent thereto flows out of the statute. The two termination points of an application under Section 7 of the Code of 2016, after the admission of such application, do not result in any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor to constitute a discharge of a surety under Section 133 of the Act of 1872."

APPELLATE TRIBUNAL'S DECISIONS

76. The Learned Counsel for the 1st Respondent refers to the judgement of this 'Tribunal' in Karan Gambhir, Director, Forgings Pvt Ltd V. Sajeve Bhushan Deora dated 09.01.2019 (vide Comp App (AT)(Ins) No.779/2018 wherein at paragraph 1 to 4 it is observed as under:-

"1.This appeal has been preferred by the appellant – Mr. Karan Gambhir, Director of Forgings Private Ltd. (Corporate Debtor) against the order dated 26th October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal) Principal Bench, New Delhi whereby the Adjudicating Authority passed the order under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 (for short, the 'I&B Code') directing for liquidation of the 'corporate debtor'. On the last occasion when the matter was taken up on 14th December, 2018, learned counsel for the appellant submitted that the order of liquidation had passed only after 80 days but such submission was not

accepted by this Appellate Tribunal in view of the fact that within the time for filing of resolution plan, no plan was submitted. Learned counsel for the appellant today submits that only 14 days' time was given to submit the 'resolution plan' and it was very short period to submit the same. However, that issue was not raised by the appellant or any other person before the Adjudicating Authority at appropriate stage.

2.Learned counsel appearing on behalf of the 'Committee of Creditors' submits that in absence of any 'resolution plan', the application under Section 33 was filed by the 'Resolution Professional' with the approval of the 'Committee of Creditors' after 80 days. However, the Adjudicating Authority awaited to find out whether any other person is ready to file 'resolution plan'. The impugned order was passed on 26th October, 2018 only on completion of 180 days.

3.In view of the aforesaid stand taken by the respondent and not denied by the appellant and in absence of any 'resolution plan', no other option left but to dismiss the appeal.

4.The appeal is accordingly dismissed. No cost."

77. The Learned Counsel for the 1st Respondent cites the judgement of this Tribunal in Amit Basia & Anr Vs Anant Overseas Ltd and Anr reported in 2018 SCC OnLine NCLAT 592 wherein at paragraph 4 and 5 it is observed as under:-

4. Similar issue fell for consideration before this Appellate Tribunal in **'Quantum Limited (Corporate Debtor)' vs 'Indus Finance Corporation Limited in CA(AT) (Insolvency) No. 35 of 2018** wherein the Appellate Tribunal by order dated 20th February, 2018 taking into consideration the relevant provisions of 'I&B Code' observed as follows:

> 4. From sub-section (2) of Section 12, it is clear that resolution professional can file an application to the Adjudicating Authority for extension of the period of the corporate insolvency resolution process, only if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 75% of the voting shares. The provision does not stipulate that such application is to be filed before the Adjudicating Authority within 180 days. If within 180 days including the last day i.e. 180th day, a resolution is passed by the committee of creditors by a majority vote of 75% of the voting shares, instructing the resolution professional to file an application for extension of period in such case, in the interest of justice and to ensure that the resolution process is completed following all the procedures time should be allowed by the Adjudicating Authority who is empowered to extend such period up to 90 days beyond 180th day.

5. In the present case, the Adjudicating Authority has not hold that the subject matter of the case do not justify to extend the period. It has not been rejected on the ground that the committee of creditors or resolution professional has not justified their performance during the 180 days. In such circumstances, it was duty on the part of the Adjudicating Authority to extend the period to find out whether a suitable resolution plan is to be approved instead of going for liquidation, which is the last recourse on failure of resolution process.

6. For the aforesaid reasons, we set aside the impugned order dated 18th December, 2017 and extend the period of resolution process for another 90 days to be counted from today. The period between 181st day and passing of this order shall not be counted for any purpose and is to be excluded for all purpose. Now the Adjudicating Authority will proceed in accordance with law."

5. The case of the appellants being covered by aforesaid decision we set aside the impugned order of clarification dated 25th January, 2018 and declare that the 90 days of extended period be counted w.e.f. 16th January, 2018 i.e. the date on which the Adjudicating Authority passed order for extension of 90 days period. The period between 181st day and the date of passing of the order by the Adjudicating Authority i.e. 16th January, 2018

shall not be counted for any other purpose and is to be excluded for counting the extended period. The appeal is allowed with aforesaid observations. No Costs.

78. The Learned Counsel for the 1st Respondent relies on the decision of this Tribunal in Amar Remedies Ltd V. IDBI Bank Ltd and others (vide Company Appeal (AT)(Ins) No.59/2018 decided on 05.03.2018) reported in 2018 SCC OnLine NCLAT 635 wherein at paragraph 3 to 5 it is observed as under:-

> "3. In the present case, the Adjudicating Authority has not hold that the subject matter of the case do not justify to extend the period. It has not been rejected on the ground that the committee of creditors or resolution professional has not justified their performance during the 180 days. In such circumstances, the Adjudicating Authority was required to extend the period of Resolution process to enable the Committee of Creditor to find out whether a suitable resolution plan is to be approved or not instead of passing order for liquidation, which is the last recourse to be taken on failure of resolution process.
>
> 4.For the reasons aforesaid, we set aside the impugned order dated 9th January, 2018 and extend the period of resolution process for another 90 days to be counted from today. The period between 181st day and passing of this order shall not be counted for any purpose and is to be excluded for all purpose. Now the

Resolution Professional, Committee of Creditors and the Adjudicating Authority will proceed in accordance with law.

5.The appeal is allowed with the aforesaid observations. No cost."

3RD RESPONDENT'S PLEAS:

79. The Learned Counsel for the 3rd Respondent submits that the 3rd Respondent/Liquidator is a proforma party to the present Appeal and that the Interim Resolution Professional preferred MA 363/2019 before the 'Adjudicating Authority', on 13.04.2019 claiming 'possession of the Hospital premises' from the 1st Respondent and that the 1st Respondent took a plea that the land upon which the Hospital was situated belongs to the Appellant, in its individual capacity and was not an Asset of the 'Corporate Debtor'. However, no orders was passed in MA 363/2019 although the matter was argued on numerous occasions and that no orders were passed as regards the Issue of possession of such premises and despite the Status Quo orders passed by the 'Adjudicating Authority' on 23.4.2019, 2.5.2019 and 27.5.2019 the possession of the Hospital Premises continued to remain with the 1st Respondent.

80. It is represented on behalf of 3rd Respondent that an 'Affidavit of Undertaking' dated 23.7.2019 was filed before the 'Adjudicating Authority' wherein, the Appellant undertook to pay the 1st Respondent a sum of Rs.57.5 crores as full and final settlement on or before 23.9.2019 and that the said Undertaking was recorded by the 'Adjudicating Authority' on 26.7.2019,

based on which, no orders were passed by the 'Adjudicating Authority' in MA 363/2019.

81. The Learned Counsel for the 3rd Respondent points out that the 3rd Respondent assumed charge as 'Resolution Professional' on 30.07.2019,and that the dispute relating to possession and title of the Hospital premises was already sub judice before the 'Adjudicating Authority', who had recorded the Affidavit of Undertaking dated 23.7.2019 of the Appellant.

82. It is projected on the side of the 3rd Respondent that the Appellant had agreed to settle the 1st Respondent for a sum of Rs.57.5 crores and that the 'Adjudicating Authority' had directed the 3rd Respondent not to proceed with the 'expression of interest' and 'forensic Audit' till 23.9.2019. But the said 'undertaking' was not to be complied with by the Promoters till the completion of 180 days of CIRP period on 04.10.2019, the CoC had approved an extension of 15 days only and that the 'adjudicating authority' in MA 1057/2019, on 4.10.2019 was pleased to extend the CIRP period of the 'Corporate Debtor' only till 19.10.2019.

83. The Learned Counsel for the 3rd Respondent brings it to the notice of this Tribunal that because of the completion of the CIRP extended period, on 19.10.2019, the CoC on 18.10.2019 had passed a resolution to prefer an appropriate application, in terms of Section 33 of the Code and that MA 1189/2019 in IBA/434/2019 was filed by the Resolution Professional, before the 'Adjudicating Authority' on 23.10.2019, upon the expiry of the CIRP period, as per the Scheme of the Code, requiring the Resolution Professional

to file an application, in the event of No Resolution Plan being approved during the CIRP period and in terms of the Resolution dated 18.10.2019 passed by the Committee of Creditors.

APPRAISAL

84. At the outset, this 'Tribunal' points out that before the 'Adjudicating Authority', the Applicant/Resolution Professional in MA 1189/2019 in IBA/434/2019 (filed under Section 33 of the I&B Code, 2016 r/w Regulation 33(2) of the Insolvency and Bankruptcy Board of India (Liquidation Process), Regulations, 2016 and Section 60(5) of the Code) had prayed for passing of an appropriate order to liquidate Corporate Debtor as per Chapter III of the I&B Code and Regulations framed thereunder etc.

85. As a matter of fact, the Applicant/Resolution Professional in MA 1189/2019 in IBA/434/2019 had averred that the Committee of Creditors at the 5th CoC Meeting that took place on 18.10.2019 had passed a Resolution for liquidation of the Corporate Debtor, because of the fact that the extended time for completion of 'CIRP' had lapsed on 19.10.2019.

86. Furthermore, in the 5th Meeting of the Committee of Creditors (Members holding 73.44%) had voted in favour of liquidating the 'Assets of the Corporate Debtor' and the Assets of the Company be sold by the liquidator either as a going concern (if feasible as deemed by the decision of the Stakeholders' Consultation Committee) or individual sale of assets or any other manner as deemed fit by the Liquidator in order to maximise the value of the Assets of the Company.

87. It comes to be known that the Applicant/Resolution Professional (Ms Deepa Venkataramani) was appointed by the CoC (Members holding 73.44%) as the Liquidator of the Corporate Debtor and act as such after expiry of the office of the Resolution Professional till the end of the liquidation process.

88. In short, the Applicant/Resolution Professional in MA 1189/2019 in IBA/434/2019 had averred that as the Corporate Insolvency Resolution Process as envisaged under Section 12 of the Code had concluded without any Resolution Plan being approved or without the settlement process as undertaken by the 'Promoters' not having been concluded till the date of filing of the said Miscellaneous Application, a prayer was made by the Applicant/Resolution Professional before the Adjudicating Authority, to initiate the 'liquidation of the Corporate Debtor' and to pass consequential orders.

89. It comes to be known that the Corporate Applicant/M/s Santhosh Hospital Pvt Ltd before the 'Adjudicating Authority' had filed an application IBA/434/2019 (under Section 10 of the I&B Code) seeking to initiate CIRP against the 'Operational Creditors' based on the reason that the Corporate Applicant was unable to pay its debt as mentioned in Company Petition (vide Form VI).

90. The Corporate Applicant's default sum mentioned in the Company Petition in Form VI is shown in the tabular column as under:-

Particulars	Default Amount (Rs)

The amount payable to Muthoo Fincorp Ltd	Rs.39,00,00,000
The amount payable to Regenix Drugs Ltd	Rs. 9,50,000
The amount payable to I-Net Solutions	Rs.13,64,941
The amount payable to Chennai Healthcare Engineers	Rs.29,09,135
Total	Rs.39,52,24,076

91. The 'Adjudicating Authority' after taking into account of the fact that the Corporate Applicant had defaulted in repaying the debt payable to the 1st Respondent/Muthoot Fincorp Ltd and others ultimately came to the conclusion that the CP IBA/434/2019 was a fit case for admission under Section 10 of the Code and appointed Mrs Sripriya Kumar as 'Interim Resolution Professional' by admitting the Company Petition on 04.04.2019 (but delivered on 08.04.2019).

92. The Interim Resolution Profession/Applicant filed MA 363/2019 in CP No.IBA/434/2019 (under Section 14 r/w 18 and Section 60(5) of the Code) seeking permission from the 'Adjudicating Authority' to permit the Applicant/Resolution Professional to take possession, control and custody of the land and building of Hospital at Besant Nagar, Chennai, (described in Schedule to the application) and with relevant aid and assistance as may be necessary to take possession of such land and building and to stay all further proceedings in respect of Sale Notice dated 11.04.2019.

GIST OF REPLY

93. The 1st Respondent/Muthoot Fincorp Ltd in its reply/counter to MA 363/2019 had averred that the 'Corporate Debtor'/Santhosh Hospital Pvt Ltd

had approached the 1st Respondent in 2016 with a request to give financial assistance to take over its liability with the Indian Overseas Bank and fund its project for renovation and its working capital requirements. In fact, the Corporate Debtor had offered 'collaterals' including mortgage of 7 grounds 963 sq. ft of land with building thereof in survey No.154(Part), Besant Nagar, Thiruvanmiyur Village, Mylapore Triplicane Taluk, Chennai, owned by Dr. P. Mahalingam (Appellant).

94. According to the 1st Respondent/Muthoot Fincorp, it accorded approval of loan of Rs.42.00 crores to the 'Corporate Debtor' as per approval letter dated 14.7.2016, conveying the terms and conditions of the approval, (including the securities against which the loan was sanctioned) which among other things mentioned that the primary security as equitable mortgage of the site measuring 177.63 sq ft and 5 storey building in survey No. 154(Part), Besant Nagar, Chennai in the name of the Appellant (Dr. P. Mahalingam). In fact, the Corporate Debtor/Santhosh Hospital Pvt Ltd and others parties (including the Guarantors/Directors of the Corporate Debtor) had accepted the terms and conditions and executed 'Loan Agreement' (other than loan documentation).

95. It is the stand of the 1st Respondent that the Appellant (Dr. P. Mahalingam) the owner of the property stipulated as security and it was in mortgage to the Indian Overseas Bank by Indentures dated 07.11.2013 and 11.06.2014, registered before the SRO Saidapet, Chennai (vide Document No.11176/13 and 6180/2014), the same was released from the Indian Overseas Bank, upon clearance of their liability by the 1st Respondent.

96. It is to be pointed out that on 17.08.2016 the Appellant had executed and registered the 'Memorandum of Title Deeds' for securing its property, for the loan availed by the 'Corporate Debtor' from the 1st Respondent. Indeed, the land and building was provided by way of 'Collateral' by the Guarantors/Appellant, to the 'Loan' approved by the 1st Respondent to the Corporate Debtor/Santhosh Hospital Pvt Ltd.

97. It is the version of the 1st Respondent that the Appellant/Guarantor to the loan had extended the equitable mortgage of the property owned by him and under the said property, at one point of time was leased out to the 'Corporate Debtor/Santhosh Hospital Pvt Ltd' and the said 'Lease' itself was cancelled by mutual consent on 24.09.2013. Therefore, it is the plea of the 1st Respondent that the 'Corporate Debtor/Santhosh Hospital Pvt Ltd' cannot make a claim against the property, under the lawful possession of the 1st Respondent, taken with due procedure of law and sustained by the Hon'ble High Court of Madras and the Debt Recovery Tribunal, Chennai. Further, the 'Corporate Debtor', who has no right over such properties can exhibit the same, as 'Asset' in its 'Annual Balance Sheet' and other 'Statutory Returns' and Filings, from September, 2013.

98. According to the 1st Respondent 'Moratorium' under Section 14 of the Code is inapplicable to the property of the Guarantor/Surety and that the property being reflected in the 'Balance Sheet' will not confer any 'Title or Ownership' in law. That apart, it is the duty of the 'Interim Resolution Professional' to submit a valid evidence of 'Title' to the land, claimed to be in the ownership of 'Corporate Debtor' (including for the plot of land valued at

Rs.1.37 crores in the 'Balance Sheet'). As such, the stand of the 1st Respondent is MA/363/2019 is to be dismissed.

99. As seen from the GOMS No.635 Housing & Urban Development Department dated 07.05.1987 of the Government of Tamil Nadu, the Chairman of the Tamil Nadu Housing Board through its letter dated 01.04.1987 had recommended to allot the vacant land in SO No.154(Part) in Thiruvanmiyur Village with an extent of 7 grounds and 963 sq. feet to Tmt P.M. Nargunam in lieu of the site already allotted as she has represented that the site No.E.158A allotted to her at Besant Nagar is not suitable for construction of Nursing Home and the Government after due consideration had accepted the recommendation of the Chairman, Tamil Nadu Housing Board and allotted the vacant site measuring 7 grounds and 0.963 sq feet in S.No.154/Part Thiruvarmiyur Village to Dr. (Tmt) P. M.Nargunam No.140, Tiger Varadhachari Road, Kalakeshtra Colony, Besant Nagar, Madras-90 on hire purchase basis subject to the usual terms and conditions prescribed by the Tamil Nadu Housing Board as per allotment rules.

100. The Executive Engineer and ADM Officer, Besant Nagar Division of the Tamil Nadu Housing Board had addressed a letter dated 02.06.1987 to Dr. (Tmt) P.M. Nargunam, the Appellant's wife by issuing the 'Regular Allotment Order' in respect of Commercial Plot No.1, Besant Nagar, measuring 7 grounds 963 sq ft (in lieu of Plot 158). The cost of the plot was mentioned as Rs.8,51,965/- (the rate per ground Rs.103500/per ground for 4 Grd.27 and Rs.12000/- per Ground for 3 Grounds. As a matter of fact, the total amount paid towards 1/4th cost was mentioned as Rs.2,05,492/- and the balance to

be paid in respect of the cost of the plot was mentioned as Rs.6,16,473/-. The amount to be paid in monthly instalments with a period of five years was mentioned as Rs.14611/-.

SALE DEED

101. The Tamil Nadu Housing Board, through its Executive Engineer and Administrative Officer, Besant Nagar Division, had executed a registered 'Sale Deed' dated 30.01.1989 to and in favour of the Appellant's wife Dr. (Tmt) P.M. Naragunam in respect of the piece of land situation the sanctioned plan of South Madras Neighbourhood Scheme, Commercial Site at 7th Avenue S.No.154 (Part) of Thiruvanmiyur Village and measuring 7 Grounds 0963 Sq ft and thereabouts, more fully described in the Schedule.

SETTLEMENT DEED

102. On 28.09.2002, the Appellant's wife had executed a registered 'Settlement Deed' on the file of Joint Sub-Registrar I, South Chennai (vide Document No.4613 of 2002) to and in favour of her husband, the Appellant (Dr. P. Mahalingam) in respect of the piece and parcel of the land bearing No.1, 7th Avenue, Besant Nagar, Chennai 600090 in S.No.154 Part of Thiruvanmiyur Village, formerly Saidapet Taluk, at present Mylapore Triplicane Taluk with an extent of 7 Grounds 0963 Sq Ft within the stated boundaries in the Schedule.

103. A mere perusal of the contents of the 'Settlement Deed' dated 28.09.2002 indicates clearly that the 'Settlor' (The Appellant's wife Mrs. P.M.

Nargunam) had executed the said 'Deed' in respect of the subject property, out of her own love and affection, towards the 'Settlee' (the Appellant – Dr. P. Mahalingam) by conveying, transferring and assigning the same absolutely etc.

RECTIFICATION DEED

104. It comes to be known that the Tamil Nadu Housing Board through its Manager, Marketing and Service, Besant Nagar Division, Chennai 20 had executed a registered 'Rectification Deed' to and in favour of the Appellant in correcting the Schedule of the property in accordance with the Plan annexed with the Sale Deed dated 30.01.1989 (vide Document No.258/89, DRO Madras (South)). It is evident that the measurement mentioned in the Schedule at Page No.8 in Line No.5 of the Original Sale Deed executed by the vendor was rectified and to be read as 'measuring on the North 185' on the East 100' on the'. In all other aspects, it was mentioned that the Sale Deed dated 30.01.1989 (vide registered as Document No.258/1989 DRO, Madras (South)) was held to be good.

DEED OF SOLEMN UNDERTAKING

105. It is evident that the Appellant and M/s Santhosh Hospitals Pvt Ltd (through a registered Document No.1503 of 2002) on the file of Joint Sub-Registrar-I South Chennai had executed a 'Deed of Solemn Undertaking' dated 05.11.2002 (in respect of the Scheduled Land bearing Plot No.1, 7th Avenue, Besant Nagar, Chennai 90, comprised in S.No.154 Part of Thiruvanmiyur Village formerly Saidapet Taluke at present Mylapore-

Triplicane Taluk with an extent of 7 Ground 0963 Sq Ft with specified boundaries) mentioning that the Appellant (the party of the 1st Part) recognises and declare that the Schedule mentioned property stands vested in the party of the 2nd Part (M/s Santhosh Hospitals Pvt Ltd) by virtue of its incorporation in 1988 and further that the Appellant has no absolute right over the property after vesting the property in the company in accordance with law.

106. Furthermore, a declaration was made by the Appellant (party of the 1st Part) in the 'Deed of Solemn Undertaking' dated 05.11.2002 that he will not treat the property as its individual property and will not transfer the property, in any manner, by way of Sale, Conveyance, Gift, Settlement, Lease, Release, Partition, Mortgage, Memorandum of Title and other forms of Transfer to any person or persons except in the capacity as the Chairman and Managing Director of the 2nd Party (M/s Santhosh Hospitals Pvt Ltd).

107. To be noted, that in the 'Deed of Solemn Undertaking' dated 05.11.2002 (vide Regd. Document no. 1503 of 2002), the Appellant had solemnly declared and affirmed that the schedule property vested in the Company in 1988 and was treated as the 'Assets of the Company' till date and also shall be treated as Company Assets in accordance with the provisions of Companies Act, 1956 hereafter.

THE REGISTRATION ACT, 1908

108. In this connection this 'Tribunal' relevantly points out that Section 51(1) to 51(3) of the Registration Act, 1908 under the caption 'Register-books to be

kept in the several Offices' (Part XI of the Duties and Powers of the Registering Officers (A) as to the register-books and indexes) envisages the following:

> *"(1) The following books shall be kept in the several offices hereinafter named, namely:-*
>
> *A- In all the registration Offices-*
>
> *Book 1, "Register of non-testamentary documents relating to immovable property";*
>
> *Book 2, "Record of reasons for refusal to register";*
>
> *Book 3, "Register of wills and authorities to adopt"; and*
>
> *Book 4, "Miscellaneous Register";*
>
> *B- In the offices of Registrars-*
>
> *Book 5, "Register of deposits of wills",*
>
> *(2) In Book 1 shall be entered or filed all documents or memoranda registered under Sections 17, 18 and 89 which relate to immovable property, and are not wills.*
>
> *(3) In Book 4 shall be entered all documents registered under clause (d) and (f) of section 18 which do not relate to immovable property."*

109. The ingredients of Section 17 of the Registration Act, 1908 enjoins "Documents of which registration is compulsory"

> *1. The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which Act XVI of 1864, or the Indian Registration Act, 1866 or the*

Indian Registration Act, 1871 or the Indian Registration Act, 1877, or this Act came or comes into force namely:-

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration , assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

MORTGAGE, MORTGAGOR, MORTGAGEE AND MORTGAGE DEED

110. Section 58(a) of the Transfer of Property Act, 1882 defines 'Mortgage' as the transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

The aim of 'Mortgage' is to secure a 'Debt'. A 'Mortgage' is a transfer of an interest in a specific immovable property as 'Security' for repayment of a 'Debt'. But such interest itself is an immovable property. The 'Debt' subsists in a 'Mortgage'. A 'Mortgage' is a

document of title of the 'Mortgagee'. The intention that 'Title Deeds' will be security for the 'Debt' in question is the essence of transaction.

MORTGAGE BY DEPOSIT OF TITLE DEEDS

111. Section 58 (f) of the Transfer of Property Act, 1882 under the caption 'Mortgage by Deposit of Title Deeds' enjoins that 'where a person in any of the following towns namely, the towns of Calcutta, Madras and Bombay and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds'.

112. In the instant case, the 'Memorandum of Title Deed' was executed before the Office of Sub Registrar by the 'Director of the Corporate Applicant' on 17.08.2016 and according to the Appellant, even after the execution of 'Deposit of Title Deeds', the 1st Respondent had released a sum of Rs. 3 crores only and the balance 4 crores was not released by the 1st Respondent till date. In fact, the loan of the Indian Overseas Bank, availed by the Santosh Hospitals Pvt. Ltd. was taken over by the 1st Respondent.

113. An intention to create an 'Equitable Mortgage' may be inferred from a delivery of the document to be held, or a direction to hold them, until the settlement of an account or the execution of a mortgage or for the purpose of preparing a legal mortgage, for an existing debt (vide Fisher and Lightwood's Law of Mortgage 7th Edn P. 19)

114. The intent to create an 'Equitable Mortgage' by delivery or the deposit of writings may be proved by written documents or coupled with parole evidence or by an inference arising from deposit, where the possession of the document by the holder cannot be otherwise explained.

115. If the form of documents of title were delivered to the creditor is such that from the deposit of such document alone the Court would be entitled to conclude that the documents were deposited with the intention of creating a security for the repayment of the debt, prima facie a mortgage by deposit of title deeds would be proved.

116. It cannot be gainsaid that only by a 'Valid Registered Document' 'the ownership/title of an immovable property' shall be conveyed and that the 'Deed of Solemn Affidavit Undertaking' dated 05.11.2002 is not a 'substitute one' pertaining to the Title/Transfer of the immovable property. In this connection, it is not out of place for this Tribunal to make a relevant mention that Section 6 of the Transfer of Property Act, 1882 provide that 'property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force'.

WHAT MAY BE TRANSFERRED AND OPERATION OF TRANSFER

117. Also, Section 6 of the Transfer of Property Act, 1882 refers to the list of property rights which could not to be transferred. Section 8 of the Transfer of Property Act, 1882 which relates to the effect of transfer 'unless a different intention is expressed or necessarily implied, a transfer of property passes

forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof'.

118. A mere glance of the 'Deed of Solemn Affidavit Undertaking' dated 05.11.2002 clearly points out that prior to the immoveable property coming into the hands and ownership of Appellant's wife to the 'Sale Deed' dated 30.01.2989 and before the coming into existence of the 'Settlement Deed' dated 28.09.2002, the property, in favour of the 'Corporate Debtor'/Santosh Hospitals Pvt. Ltd' came to be vested in the year 1988 which is an unacceptable one, in the considered opinion of this 'Tribunal'.

119. It cannot be lost sight of that Book 4, 'Miscellaneous Register' is to be kept in the 'Registering Office' as per Section 51(1) of the Registration Act, 1908 and in short, the 'Deed of Solemn Affidavit of Undertaking' dated 05.11.2002 is not a legally valid document of transfer/conveyance, in the manner known to law.

120. Apart from the above, the 'Financial Statements' of the 'Corporate Debtor/Santhosh Hospitals Pvt. Ltd.' had recorded the 'subject property' as an asset of the 'Corporate Debtor/Santosh Hospitals Pvt Ltd.' from the year 2002 and not from the year of incorporation during the year 1988, which is certainly, not a favourable circumstance to and in favour of the 'Appellant'.

121. It is to be remembered that in law, the ownership of an immovable property is regulated and governed by a valid 'Title Deed' and in fact, as regards the plea taken on behalf of the 'Appellant' that Section 238 of the I & B Code, 2016 overrides the SARFAESI ACT, 2002 is not acceded by this

'Tribunal' because of the reason that the' Mode of Transfer' of an 'immovable property' is to be effected by way of legitimate instruments, recognised by law.

122. In law, by virtue of the 'Settlement Deed' the title to the property vests with the 'Settlee' on execution of the 'Settlement Deed'. In the instant case, the 'Settlement Deed' dated 28.09.2002 executed by the Appellant's wife in favour of the 'Appellant', being an 'Absolute Settlement' unerringly points out that the 'Appellant' is a lawful owner, in respect of the subject property. As such, the contra plea taken on behalf of the Appellant that the ownership and title in respect of the subject property is in favour of the Corporate Debtor/Santhosh Hospitals Pvt Ltd is negatived by this Tribunal.

123. When the Corporate Debtor executed a loan agreement dated 06.08.2016 with the 1st Respondent, the 'Appellant', as owner of the said property stood as 'Guarantor' and 'Mortgagor' as evidenced from the sanctioned Letter dated 14.07.2016 in respect of the loan taken by the 3rd Respondent from the 1st Respondent. In fact, the Appellant in his personal capacity had executed the 'Memorandum of Deposit of Title Deeds' dated 17.08.2016 in favour of the 1st Respondent.

124. To put it precisely, in respect of an application filed by the 1st Respondent before the Regional Director, Ministry of Corporate Affairs, under Section 87 of the Companies Act, 2013, the 3rd Respondent's plea that the subject property was a personal property and hence 'charge' could not be registered in the name of the 'Corporate Debtor' was turn down and through an order dated 10.01.2018 the Regional Director had clearly mentioned that

the 'subject property' over which the 'charge' was created belonged to the Appellant and not that of the 'Corporate Debtor'. Even in the Audited Financial Statements of the Corporate Debtor for the Financial Year 2014-2015 these transactions are mentioned.

125. The Appellant being a 'Guarantor' in respect of the debts of the 'Corporate Debtor/Santhosh Hospitals Pvt Ltd, the 1st Respondent as per Section 14(3) of the I&B Code, the moratorium under Section 14 will not apply to a 'Surety' in respect of a 'Contract of Guarantee' to a 'Corporate Debtor'. Therefore, it is crystalline clear that the 1st Respondent is entitled to proceed against the Appellant under the relevant provisions of the SARFAESI Act, 2002 and there is no fetter in this regard.

MISCELLANEOUS APPLICATION

126. It is worthwhile to point out that in Crl MP No.3133/2018 (filed by the 1st Respondent/Muthoot Fincorp Ltd under Section 14 of the SARFAESI Act, 2002 praying for an order to be passed enabling the 1st Respondent/Petitioner to take possession of the 'secured assets' described in the Schedule), the Chief Metropolitan Magistrate had opined that the petitioner was entitled to take possession of the Schedule mentioned assets and ultimately allowed the application by means of order dated 12.07.2018.

127. Moreover, the 'Corporate Debtor/M/s Santhosh Hospitals Pvt Ltd' filed WP No.24867 of 2018 before the Hon'ble High Court of Madras against the 1st Respondent/M/s Muthoot Fincorp Ltd and two others, seeking to restore the 3rd Respondent/Corporate Debtor/Petitioner's possession to the subject

property etc. and on 20.02.2019 at paragraph 12 and 13 it is observed as under:--

"12.It is also pertinent to note that even before this Court when the matter came up on 11.10.2018, an undertaking was made by the petitioner that the entire dues payable to the respondent would be paid within a period of 45 days. To that effect, the petitioner has also field an affidavit of undertaking dated 17.10.2018. Therefore, without honouring the undertaking given before this Court, the petitioner filed an application seeking for extension of time and this Court also showed indulgence to the petitioner by order dated 05.12.2018 extending the time for compliance till 10.01.2019. Even then, without complying with the undertaking given before this Court the petitioner again sought for extension of time. However, this Court decided to accept the request of the petitioner and posted the Writ Petition on 28.01.2019 for hearing on merits. Therefore, the conduct of the petitioner has been to merely seek time and not repay the loan as promised by them. Inspite of filing of an affidavit of undertaking before this Court, so far the petitioner has not honoured their commitment. Therefore, just for the sake of prolonging the matter, they have filed an affidavit of undertaking dated 17.10.2018 before this Court, stating that they would settle the entire dues within a period of 45 days.

13.In these circumstances, the ratio laid down by the Apex Court in the judgement reported in 2018 (2) GTC 569 (ITC Vs Blue Coast Hotels Ltd, & Others) squarely applies to the facts and circumstances of the present

case. Following the ratio laid down by the Apex Court, we are of the considered view that non-compliance of sub-section (3-A) of Section 13 cannot be of any avail to the petitioner whose conduct has been merely to seek time and not to repay the loan as promised on several occasions."

and the 'Writ Petition' came to be dismissed without costs.

128. It is pointed out that the 3rd Respondent/Resolution Professional inspected the whole premises of the Corporate Debtor and informed the First Meeting of Committee of Creditors on 03.07.2019 stating that the Hospital was not functional from February, 2016 etc. Even the Advocate Commissioner appointed by the Chief Metropolitan Magistrate (in respect of the proceedings under SARFAESI Act, 2002) in his report dated 13.12.2018 had mentioned that the Hospital was defunct for a substantial period and no patients were admitted.

129. According to the 1st Respondent, the possession of the subject property as per Section 13(4) of the SARFAESI Act, 2002 was taken on 11.10.2018 during which period the Hospital was defunct and provided no facility.

AMBIT OF SECTION 12

130. The Interim Resolution Professional is to complete the CIRP within a period of 180 days extendable for another 90 days. A period of 180 days from the date of admission of the application is provided by Section 12(1) of the Code. Section 12(3) of the Code says that further period of 90 days (beyond 180 days) may be granted upon the satisfaction of the Adjudicating Authority,

on receipt of application from the Resolution Professional under Section 12(2) of the Code. Section 12(3) of the Code says that the CIRP shall mandatorily be completed within a period of 330 days from the Insolvency commencement date, including any extension of the period of CIRP granted under this Section and the time taken in legal proceedings in relation to such Resolution process of the Corporate Debtor.

AIM OF RESOLUTION

131. The first purpose under the Code is one of 'Resolution'. The other aim is 'maximisation of value of assets of the 'Corporate Debtor' and the next objective is 'promoting entrepreneurship, availability of credit and balancing interest'.

INTERIM RESOLUTION PROFESSIONAL'S DUTIES

132. As per Section 18(1) of the I&B Code specifies that the Interim Resolution Professional is to collect all information pertaining to the financial position of the 'Corporate Debtor' and to constitute a 'Committee of Creditors' at the earliest point of time. As per Section 18(b) the Interim Resolution Professional shall perform the duty of receiving and collating all the claims submitted by the creditors to him. He is to take control over and monitoring the assets of the 'Corporate Debtor' and he shall collect the debt claims etc. He is to file the information so collected with the Information Utility wherever required. Where the sum claimed by a creditor is not precise due to any contingency or other reason, the 'Interim Resolution Professional' or the Resolution Professional, shall make the best estimate of the sum of the claim

resting on the information available with him as per Regulation 14 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

133. The Interim Resolution Professional/Resolution Professional as per Regulation 10 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim. As per Regulation 12 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 a creditor is to submit the 'proof of claim' on or before the last date mentioned in the public announcement but a creditor, who fails to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the Interim Resolution Professional or the Resolution Professional, till the approval of the Resolution Plan by the Committee. If a creditor is a financial creditor, he/it shall be included in the Committee from the date of admission of such claim. In fact, the said inclusion will not affect the validity of any determination made by the Committee before such inclusion.

134. The 'Interim Resolution Professional' or the 'Resolution Professional', may make an application to the 'Adjudicating Authority' seeking an order to provide assistance of the 'Local District Administration' in performing his duties as per Regulation 30 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

135. If any person of the 'Corporate Debtor' or 'Promoter' is not to render any assistance or cooperation to the Interim Resolution Professional an

Adjudicating Authority, based on the application filed by the 'Interim Resolution Professional' is to pass an 'order' and direct the said person to comply with the directions/instructions of the 'Interim Resolution Professional' and to cooperate with him in regard to the collection of information and management of the 'Corporate Debtor'.

RESOLUTION PROFESSIONAL'S DUTIES

136. Section 25 of the Code spells out the duty of Resolution Professional to preserve and protect the assets of the 'Corporate Debtor' and specifies the duties/functions he is to perform the same. A 'Resolution Professional' is entitled to raise interim finance (whether secured or unsecured) with the prior approval of the Committee of Creditors.

LIQUIDATION

137. If no 'Resolution Plan' is approved by the Committee of Creditors, an Adjudicating Authority is left with no option but to pass an order of 'liquidation' of the company, where the time prescribed under Section 12 had expired, the Adjudicating Authority can pass an order of liquidation against the 'Corporate Debtor' regardless of whether the 'Management of the Corporate Debtor' or the 'Resolution Applicant', as the case may be, had an adequate opportunity to come up with the suitable plan.

LIQUIDATION PROCESS

138. The 'Liquidation Process' will be triggered as per Section 33 of the Code, if (a) either no Resolution Plan is filed within the time prescribed under

Section 12 of the Code or a Resolution Plan was rejected by the Adjudicating Authority; (b) where the Resolution Professional, before affirmation of the Resolution Plan, informs the Adjudicating Authority of the decision of the Committee of Creditors to liquidate the Corporate Debtor or (c) where the Resolution Plan approved by an Adjudicating Authority is violated by the concerned Corporate Debtor. The reality of the matter is anyone, other than the Corporate Debtor, whose interest are vitally affected by such breach may apply to the Adjudicating Authority, who may then pass a liquidation order, on such application.

PURVIEW OF SECTION 65 OF I&B CODE

139. Section 65 of the I&B Code, 2016 mentions penalty for fraudulent or malicious initiations of proceedings, which can be levied by the 'Adjudicating Authority' if a person initiates the IRP or liquidation proceedings either fraudulently or with malicious intent or for any other aim other than the resolution of insolvency or liquidation.

140. To impose a penalty, under Section 65 of the Code, an 'adjudicating authority' is to arrive at an ex facie opinion in the subject in issue. No such penalty under sub-section (1) or sub-section (2) of Section 65 can be saddled upon a person, by an 'adjudicating authority' without recording an opinion for arriving at an conclusion that the prime facie case is made out to suggest that the person 'fraudulently' or with 'malicious intent' for the purpose, other than the resolution insolvency or liquidation or with the intent to defraud any person has filed the application. It is pertinently pointed out that Section 424

of the Companies Act, 2013 is applicable to the proceedings under the I&B Code.

141. This 'Tribunal' aptly points out the decision of Hon'ble Supreme Court in 'Pratap Technocrats (P) Ltd and others V. Minitoring Committee of Reliance Infratel Ltd and another 2021 SCC OnLine SC 569 wherein at paragraph 50 it is observed as under:-

> *"Hence, once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty bound to abide by the discipline of the statutory provisions. It needs no emphasis that neither the Adjudicating Authority nor the Appellate Authority have an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework."*

142. Further, in the Judgement of the Hon'ble Supreme Court in E.S. Krishnamurty V. M/S. Bharath Hi Tech Builders Pvt Ltd (Civil Appeal No.3325/2020 decided on 14.12.2021), the Hon'ble Supreme Court at para 29 has observed as under:-

> *"29 The IBC is a complete code in itself. The Adjudicating Authority and the Appellate Authority are creatures of the statute. Their jurisdiction is statutorily conferred. The statute which confers jurisdiction also structures, channelises and circumscribes the ambit of such jurisdiction. Thus, while the Adjudicating Authority and Appellate Authority can encourage settlements, they cannot direct them by acting as courts of equity."*

143. As far as the present case is concerned, the CIRP period of 180 days came to an end on 4.10.2019. Despite the 'Affidavit of Undertaking' furnished by the 'Appellant' to pay Rs. 57.50 Crores to the 1st Respondent/M/s Muthoot Fincorp Ltd, the 'Appellant' had not raised the amount and to pay the same to the 1st Respondent. In short, there was no iota of any indication from the side of the 'Appellant' to raise funds for making payment. In fact, no Resolution of the Corporate Insolvency Process is allowed except as per Section 12-A of the I & B Code.

144. To settle the 'Corporate Debtor'/Company's Debts adequate opportunities were provided by the 'Adjudicating Authority' and they proved 'Otiose'. Undoubtedly, the 1st Respondent has right in law, qua the 'subject property' as per the terms of mortgage, created by the 'Guarantor' of the 3rd Respondent/Santosh Hospitals Pvt. Ltd.

145. Even the Hon'ble Madras High Court in WP 24867/2018, on 20.02.2019 (filed by the 3rd Respondent/Santosh Hospitals Pvt. Ltd against the 1st Respondent/M/s Muthoot Fincorp Ltd) had clearly observed at paragraph-12 that 'for the sake of prolonging the matter, they have filed an Affidavit of Undertaking dated 17.10.2018 before this Court that they would settle the entire dues within a period of 45 days. Also, the Hon'ble High Court went on to observe at paragraph-13 that 'we are of the considered view that non-compliance of sub section (3-A) of Section 13 cannot be of any avail to the Petitioner whose conduct has been merely to seek time and not to repay the loan as promised on several occasions.'

146. Any person who desires to submit a 'Resolution Plan', if he or it does so acting jointly or in concert with other persons, which person or other persons happened to either manage or control or be promotors of a 'Corporate Debtor'/classified as a 'Non-Performing Asset' and whose Debts were not paid for a period atleast one year prior to the commencement of CIRP, is not eligible to furnish a Resolution Plan. Section 29-A of the I & B Code applies to the individuals. Viewed in that perspective, this 'Tribunal' holds that the 'Appellant' is not entitled to take part in Corporate Insolvency Resolution Process.

147. In view of the detailed upshot, this 'Tribunal', considering the entire conspectus of the facts and circumstances of the instant case, in an encircling manner and also on going through the 'impugned order' passed by the 'Adjudicating Authority' (National Company Law Tribunal Division Bench, Chennai) in MA 1189/2019 in IBA/434/2019 dated 04.12.2019 (and delivered on 17.12.2019 comes to a consequent conclusion that in view of the fact that the 'Committee of Creditors' had already passed a Resolution for liquidation of the Corporate Debtor with 73.44% voting share on 18.10.2019 and in the teeth of the same, the order of liquidation of the Company passed by the 'Adjudicating Authority' is free from legal infirmities. Resultantly the Appeal fails.

COMPANY APPEAL (AT)(INSOLVENCY) NO.1121/2020

148. The Appellant (Suspended Director of Santosh Hospitals Pvt Ltd) has filed the instant Comp App (At)(Ins) No.1121/2020 being dissatisfied with the

order dated 17.12.2020 in IA/699/IB/2020 in IBA/434/2019 (filed by the 1st Respondent/M/s Muthoot Fincorp Ltd under Section 60(5) of the Code).

149. The 'Adjudicating Authority' while passing the impugned order on 17.12.2020 in IA/699/IB/2020 in IBA/434/2019 (filed by the 1st Respondent/Applicant had inter alia observed the following:-

> "*The question as to the ownership of the said property is yet to be adjudicated. The property appears to be in possession of the Appliant prior to the order dated 12.04.2020. The question as to whether the property is the asset of the Corporate Debtor is not yet decided. Connected MA/363/2019 is pending on the file of this Adjudicating Authority.*
>
> *In view of the same, this Adjudicating Authority directs the 1st Respondent (Greater Chennai Corporation) to hand over the keys of the Hospital premises at No.1, 7th Avenue, Besant Nagar, Chennai 600090 to the Applicant herein (Muthoot Fincorp Ltd). The Applicant herein shall hold the possession of the property till the adjudication of MA/363/2019."*

and allowed the application.

SUBMISSIONS OF THE APPELLANT

150. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had committed an error in wrongly handing over the possession of the Hospital premises/asset of the Corporate Applicant, which should

actually be under the custody of the Liquidator/3rd Respondent as per order dated 24.01.2020 in Comp App (AT)(Ins) No.146/2020 passed by this Tribunal.

151. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' was not correct in allowing the IA/699/IB/2020 in CP No.434/IBA/2019 by passing the impugned order on 17.12.2020 when custody of the Hospital premises in IA/363/2019 in CP No.434/IBA/2019 was pending adjudication.

152. The other contention of the Learned Counsel for the Appellant is that because of the allowing of IA/699/2020 in CP No.434/IBA/2019 by the 'Adjudicating Authority' on 17.12.2020, the total value of the machinery which might get under the possession of the 1st Respondent, worth about Rs.40 crores, the possession of the Hospital building will be retained by the 1st Respondent against the order dated 04.04.2019 passed by the 'Adjudicating Authority'.

153. The Learned Counsel for the Appellant submits that the 1st Respondent cannot be allowed to take the benefit on the ground that they violated the order dated 24.01.2020 passed by this Tribunal in Comp App (AT)(Ins) No.146/2020 to the effect that 'if the control of the assets and records of the 'Corporate Debtor' is with the 1st Respondent/Muthoot Fincorp Ltd, it will hand over the same to the Liquidator immediately etc.

154. The Learned Counsel for the 3rd Respondent contends that because of the pendency of MA 363/2019 before the 'Adjudicating Authority', the

question of whether the land upon which the Hospital premises is situated would be an asset of 'Corporate Debtor' (as contended by the Appellant) or not would depend upon the outcome of an order being passed in the pending MA 363/2019 by the 'Adjudicating Authority'.

ASSESSMENT

155. In IA/699/2019 in CP No.434/IBA/2019, the 1st Respondent/Financial Creditor/M/s Muthoot Fincorp Ltd (filed under Section 60 (5)(a) of the I&B Code) had averred that the Hospital land and building was in physical possession of the Applicant/1st Respondent while it was temporarily taken over by the Greater Chennai Corporation, (possession of the Hospital building was handed over to the Greater Chennai Corporation on 13.04.2020) and later the Greater Chennai Corporation had sent a letter to the Liquidator informing that the Hospital was serving the purpose for which it was taken over etc. Under this circumstance, the 1st Respondent/Financial Creditor/Muthoot Fincorp Ltd filed IA 699/2019 in CP No.434/IBA/2019 before the 'Adjudicating Authority' seeking direction to be issued to the Greater Chennai Corporation to hand over the Hospital building situated at Plot No.1, 7th Avenue, Besant Nagar, Chennai which was taken possession from the Applicant, pursuant to the order passed by the 'Adjudicating Authority' on 12.04.2020.

156. Considering the fact that the 1st Respondent/Muthoot Fincorp Ltd (Financial Creditor) had filed IA No.699//2019 in CP No.434/IBA/2019 praying for a direction being issued to the Greater Chennai Corporation to

hand over to it the Hospital Building at Plot No.1, 7th Avenue, Besant Nagar, Chennai (which was taken possession from the 1st Respondent/Financial Creditor based on the order of the 'Adjudicating Authority' dated 12.4.2020) since the Greater Chennai Corporation was no longer in requirement of the building for the purpose which they sought for, the impugned order of allowing the IA 699/2020 passed by the 'Adjudicating Authority' is free from any legal flaw. Consequently the Appeal fails.

DISPOSITION- Company Appeal (AT)(Ins) No.146/2020.

In fine, the Company Appeal (AT)(Ins) No.146/2020 is dismissed. No costs. IA No.365/2020 (for stay) is closed.

Company Appeal (AT)(Ins) No.1121/2020

In fine, the Company Appeal (AT)(Ins) No.1121/2020 is dismissed. No costs. IA No.3003/2020(for stay) is closed.

[Justice M. Venugopal]
Member(Judicial)

(V.P. Singh)
Member(Technical)

(Dr. Ashok Kumar Mishra)
Member(Technical)

14th February, 2022
Bm/Akc