NOTE

ANALYSIS OF THE NCLAT ORDER DATED 22.05.2020 IN THE MATTER OF UNION OF INDIA VS. ORIENTAL BANK OF COMMERCE

Date: 27th May, 2020

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1. Order dated 22.11.2019 passed by the Principal Bench of National Company Law Tribunal, Delhi (for short "NCLT") in the matter of Oriental Bank of Commerce vs. M/s Sikka Papers Ltd (for short "Impugned Order")

1.1 Vide the Impugned Order, NCLT directed that in all cases arising out of Insolvency and Bankruptcy Code and Company Law Petitions, the Union of India, Ministry of Corporate Affairs, through Secretary should be impleaded as a party.

1.2 While passing the above direction, NCLT remarked that the said direction was passed to ensure that authentic record is made available by the officers of Ministry of Corporate Affairs for proper appreciation of matters.

1.3 NCLT further directed that that this order would be made applicable to all the benches of National Company Law Tribunal throughout the country.

1.4 The relevant part of the Order is as follows:

> *"We further direct that in all cases of Insolvency and Bankruptcy Code and Company Petition, the Union of India, Ministry of Corporate Affairs, through Secretary be impleaded as a party respondent so that authentic record is made available by the officers of Ministry of Corporate Affairs for proper appreciation of matters. This shall be applicable throughout the country to all benches of National Company Law Tribunal. The Registrar shall send a copy of this order to all NCLT benches so that respective Deputy Registrar may ensure that proper parties are impleaded."*

1.5 On a perusal of the Impugned Order it is seen that the NCLT passed this order without adducing any reasons. It also did not refer to any statutory provisions in support of its power to pass such a direction. A Copy of the Impugned Order dated 22.11.2019 passed by the NCLT is annexed hereto and marked as **Annexure "A" at page nos. 6 to 7**.

2. Order dated 22.05.2020 passed by National Company Law Appellate Tribunal in the matter of Union of India vs. Oriental Bank of Commerce (for short "NCLAT Order")

2.1 The Impugned Order was challenged by Union of India in Company Appeal No. 1417 of 2019. The said challenge was based on the following grounds:

a. That NCLT was not vested with power to pass directions for impleadment of Union of India as a party.
b. That the rulemaking power is the exclusive domain of the Central Government (being a subordinate legislation) and the same is required to be approved and notified by the Central Government.
c. That because NCLT was not vested with any power to make any rules, NCLT could not have passed a direction to implead a party for all Insolvency and Bankruptcy Code and Company Law Petitions.

2.2 The relevant findings of NCLAT are recorded at paragraphs 16, 17 and 19. These findings are as follows:

a. That NCLT could not pass omnibus directions in a single order.
b. That the requirement of mandatory impleadment of Union of India as a necessary party or a Proforma Respondent has to be decided on a case to case basis.
c. That the Impugned Order was passed without hearing Union of India and without issuing notice for the same which was a violation of principle of natural justice.
d. That the order of NCLT was untenable and suffers from material irregularity and patent illegality.
e. That in all cases of IBC it is for the individual applicant who is a dominus litus to decide whether to implead as a party or not.

2.3 For the above reasons, NCLAT has set aside the Impugned Order.

A Copy of the NCLAT Order dated 22.05.2020 is annexed hereto and marked as **Annexure "B" at page nos. 8 to 17**.

3. Analysis of the Order

3.1 On a perusal of the National Company Law Tribunal Rules, 2016 (for short "**NCLT Rules**") it is clear that under Rule 11 of the NCLT Rules, the NCLT has inherent powers to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

3.2 It is also pertinent to mention Rule 51 of the NCLT Rules under which NCLT may regulate its own procedure in accordance with the rules of natural justice and equity, for the purpose of discharging its functions.

3.3 After reading the above two rules it is clear that the NCLT can regulate its own procedure and has power to make its own rules. But according to the NCLAT, the NCLT has erred by making its rule of impleading Union of India mandatorily applicable throughout the country.

The basis of the NCLAT Order has been that Union of India was not made a party to the petition in the Impugned Order and without affording an opportunity of hearing to Union of India, an order was passed. A reference was made by NCLAT to the case of ***Sree Metaliks Ltd. vs. Union of India*** (2017)203 Com Cases 442 wherein it was held that an Adjudicating Authority i.e. National Company Law Tribunal is a quasi-judicial body and it has to abide by the principles of natural justice. After providing a reasonable opportunity of being heard to the other side, the NCLT can pass appropriate orders. If an order is passed by NCLT, without affording an opportunity of hearing to the parties, the same is unsustainable in law. A Copy of the Judgment of NCLAT in *Sree Metaliks Ltd. vs. Union of India* is annexed hereto and marked as **Annexure "C" at page nos. 18 to 31**.

3.4 Further, the contentions of Union of India that NCLT lacks inherent jurisdiction to pass the Impugned Order has not been considered by the NCLAT.

In this regard, a relevant case on point is ***Deloitte Haskins & Sells LLP vs. Union of India***. In the said case, NCLAT referred to Section 424 of the Companies Act, 2013, and held that it is always open to NCLT to ask for a party to be impleaded. This is more so because Section 424 of the Companies Act, 2013 vests power of a civil court in both the NCLT and NCLAT for the purpose of Companies Act, 2013 and the Insolvency and Bankruptcy Code. However this power has to be used sparingly and on a case to case basis that is what has been the approach of the NCLAT while setting aside the Impugned Order. A Copy of the Judgment of NCLAT in *Deloitte Haskins & Sells LLP vs. Union of India* is annexed hereto and marked as **Annexure "D" at page nos. 32 to 103**.

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 119
(IB)-939(PB)/2018

IN THE MATTER OF:
Oriental Bank of Commerce .... Applicant/petitioner
v.
M/s. Sikka Papers Ltd. & Ors. .... Respondent

Order under Section 7 of Insolvency & Bankruptcy Code, 2016 (CIRP)

Order delivered on 22.11.2019

Coram:
CHIEF JUSTICE (RTD.) M. M. KUMAR
HON'BLE PRESIDENT

SH. S.K MOHAPATRA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant	Ms. Karishma Jaiswal, PCS
For the Ex-Director	Mr. Sanchit Garga, Adv.
For the ROC	Mr. Manjeet Singh, Deputy ROC along with Mr. Rao, AROC

ORDER

In pursuance of our direction, Mr. Manjeet Singh, Deputy ROC is present in the Court. He seeks and is granted one week time to file affidavit on the following issues:-

a) The direction issued in numerous orders of admission of petition under Section 7, 9 & 10 of the Insolvency & Bankruptcy Code have not been complied with wherein we have asked the ROC to update the master data of the Corporate Debtor so as to inform the public at large about the status of the company which has come under Corporate Insolvency Resolution Process.

b) By virtue of imposition of moratorium under Section 14, the board of directors is suspended and why the

uploading by RP who represent the Board of Directors/management of the company is not permitted. In the alternative the mechanism for uploading the data like annual accounts etc. on the website of the ROC, may be clarified.

2. The needful shall be done within a week with a copy in advance to the counsel for the applicant.

3. The parawise reply to the present company application may also be filed.

4. We further direct that in all cases of Insolvency & Bankruptcy Code and Company Petition, the Union of India, Ministry of Corporate Affairs through the Secretary be impleaded as a party respondent so that authentic record is made available by the officers of the Ministry of Corporate Affairs for proper appreciation of the matters. This shall be applicable throughout the country to all the benches of National Company Law Tribunal. The Registrar shall send a copy of this order to all NCLT benches so that respective Deputy Registrar may ensure that proper parties are impleaded.

5. List for further consideration on 11.12.2019.

Sd/-

(M.M. KUMAR)
PRESIDENT

Sd/-

(S.K MOHAPATRA)
MEMBER (TECHNICAL)

22.11.2019
Ritu Sharma

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
NEW DELHI

Company Appeal (AT) (Insolvency) No. 1417 of 2019

IN THE MATTER OF:

Union of India,
Ministry of Corporate Affairs
A Wing, 5th Floor, Shastri Bhawan
New Delhi–110001. ....Appellant

Vs.

Oriental Bank of Commerce
Plot No.5, Institutional Area
Sector-32, Gurgaon – 122001. ....Respondent

Present:

For Appellant: **Mr. Sanjay Sorie, Director Legal MCA, Mr. Gopal Singh and Mr. A.K. Sahoo, Advocates for DROC.**

For Respondent: **Mr. Vishal Yadav, Advocate.**

J U D G M E N T

Venugopal M., J:

The Appellant has projected the present Company Appeal being aggrieved against the order dated 22.11.2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench.

2. The Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench while passing the impugned order on 22.11.2019 in (IB)-939(PB)/2018 had observed the following: -

"In pursuance of our direction, Mr. Manjeet Singh, Deputy ROC is present in the Court. He seeks

and is granted one week time to file affidavit on the following issues:-

a) The direction issued in numerous orders of admission of petition under Section 7, 9 & 10 of the Insolvency and Bankruptcy Code have not been complied with wherein we have asked the ROC to update the master data of the Corporate Debtor so as to inform the public at large about the status of the company which has come under Corporate Insolvency Resolution Process.

b) By virtue of imposition of moratorium under Section 14, the board of directors is suspended and why the uploading by RP who represent the Board of Directors/ management of the company is not permitted. In the alternative the mechanism for uploading the data like annual accounts etc. on the website of the ROC, may be clarified.

2. The needful shall be done within a week with a copy in advance to the counsel for the applicant.

3. The parawise reply to the present company application may also be filed.

4. We further direct that in all cases of Insolvency & Bankruptcy Code and Company Petition, the Union of India, Ministry of Corporate Affairs through the Secretary be impleaded as a party respondent so that authentic record is made available by the officers of the Ministry of Corporate Affairs for proper

> *appreciation of the matters. This shall be applicable throughout the country to all the benches of National Company Law Tribunal. The Registrar shall send a copy of this order to all NCLT benches so that respective Deputy Registrar may ensure that proper parties are impleaded."* and directed the matter to be listed for further consideration on 11.12.2019.

3. It is the contention of the Appellant that the impugned order bristles with numerous infirmities and that the Adjudicating Authority does not possess the powers to pass an order, which was in the 'nature of rule' under the guise of an 'order'.

4. According to the Appellant, the 'rule making power' is the exclusive domain of the Central Government (being a subordinate legislation) and the same is required to be placed after notification before the August House of the Parliament.

5. It is represented on behalf of the Appellant that the Adjudicating Authority before passing the impugned order ought to have issued notice to the Union of India, since the subject matter in issue concerns about the imposition of a new rule, which the said Authority has no power to make especially its direction to implead.

6. It is the stand of the Appellant that the Hon'ble Supreme Court of India in the decision of ***"Antonio S.C. Preria v. Ricardina Noronha (D) By Lrs. – (2006) 7 SCC 740"*** had answered the issue, whether a 'third person' to the dispute should be heard and held that the third person

must be heard in the same dispute if he or she has suffered or is likely to suffer any substantial injury by the decision of the Hon'ble Court.

7. In this connection, on behalf of the Appellant it is brought to the notice of this Tribunal that the Appellant had issued diligently, the 'Office Memorandum' to all the concerned parties by directing them to furnish a list of companies under 'CIRP, Liquidation and Master Data' for the same. Moreover, the ingredients of Section 399(2) of the Companies Act, 2013 were taken into account.

8. Mr. Sanjay Sorie, Director Legal MCA points out that a separate application is to be filed before the 'Tribunal' or 'Court' for production of documents from the 'Registrar of Companies' by virtue of Section 399(2) of the Companies Act, 2013 stands unenforceable and not as per Law. Apart from this, the direction issued in the impugned order to the effect that 'Corporate Insolvency Resolution Professional' is bound to produce the record, which can be viewed or accessed by any public person for analyzing and scrutinizing from the 'Ministry of Corporate Affairs 21 Portal'.

9. It is brought to the notice of this Tribunal on behalf of the Appellant that the Central Government had implemented Companies (Registration of Offices and Fees) Rules, 2014 and Section 399(1) (a) & (b) of the Companies Act, 2013 had provided for inspection and furnishing the certified copies of the documents kept by the Registrar on payment of requisite fees. Added further, the Tribunal was not acting as an 'Adjudicating Authority' in terms of Section 60 of the Insolvency and

Bankruptcy Code, 2016. Further, the impugned order has a devastating effect, since the Adjudicating Authority (Tribunal) lacks inherent jurisdiction to pass the same.

10. Per contra, it is the contention of the Learned Counsel for the Respondent/ Bank that in the impugned order no direction was issued to the Bank and that the impugned order was passed in an Application No.2024 of 2019 filed by the Resolution Professional relating to the difficulties faced by him in carrying out the compliance of the provisions of the Companies Act, 2013 and other relevant provisions of Law. That apart, the general direction issued in the impugned order has no bearing on the Respondent and that the present Appeal is filed against the wrong Respondent. Hence, the Appeal is liable to be dismissed, in the interest of justice.

11. It is to be pertinently pointed out that if a certain thing is to be performed in a particular manner, then the same is to be done in that way. In fact, a procedural wrangle cannot be allowed to be shaked or shackled with.

12. It is axiomatic principle in law that if a third party is concerned with a dispute, that party is to be arrayed as a necessary or proper party to the adjudication of main issue centering around the dispute. Besides this, an opportunity of hearing is to be given to a third party to explain its stand. Suffice it for this Tribunal to make a pertinent mention that the rules of 'principles of Natural Justice' are to be adhered to by the Tribunal because

of the latent and patent fact that the act of Tribunal/ Court/ Competent Authority shall cause no harm to any person.

13. Of course, the 'principles of natural justice' are not the edicts of a statute. The 'principles of natural justice' are not to be imprisoned in a straight-jacket cast-iron formula. Notwithstanding the same, observing the tenets of natural justice is of paramount importance in the considered opinion of this Tribunal.

14. A necessary party is a person who ought to have been arrayed as a party and in whose absence no effective order can be passed by a Court of Law/ Tribunal/ Appropriate Authority. A proper party is a party who although not a necessary party is a person whose presence will enable the Authority to effectively, efficaciously, comprehensively and adequately adjudicate upon all the controversies centering around a given case.

15. In fact, 'impleadment of parties' is only a matter of fact and not a matter of Law. Addition of parties/ striking out parties of course, is a matter of discretion to be exercised by a Tribunal/ Court based on sound judicial principles. The said discretion can be exercised either on the application of a Petitioner/ Respondent or suo-motu or on the application of a person who is not a party to any pending proceedings. However, the said discretion cannot be exercised in a cavalier and whimsical fashion.

16. Whether a party is a proper/ necessary party for an effective and efficacious adjudication of the controversy involved in a given case, although it is for the concerned Tribunal/ Court/ Authority to subjectively consider the same based on facts and circumstances of a case, which float

on the surface. In this regard, with an utmost care, caution and circumspection a finding has to be rendered by passing necessary orders in a objective and dispassionate manner for impleading a party to take part in the main arena of proceedings. Undoubtedly, a notice will have to be issued to the newly impleaded party and a just, fair and final order can only be passed after hearing the Objections/ Reply of the said party. In the instant case on hand, this Tribunal on going through the impugned order dated 22.11.2019 passed by the National Company Law Tribunal, New Delhi, Principal Bench in (IB)-939(PB)/2018, is of the considered opinion that the Appellant was not provided with an adequate opportunity of being heard in the subject matter in issue, except directions being issued in regard to the filing of affidavit on the issues therein and the filing of parawise reply. The time was sought for and one week's time was granted by the Tribunal. Because of the fact that the impugned order passed by the Tribunal wherein direction was issued in all cases of the 'Insolvency & Bankruptcy Code' and Company Petition, the Union of India, Ministry of Corporate Affairs through Secretary be impleaded as a party respondent so that authentic record is made available by the officers of Ministry of Corporate Affairs for proper appreciation of the matter and this being applicable throughout the country to all the Benches of National Company Law Tribunal etc., such a wholesale, blanket and omnibus directions cannot be issued in single stroke, as opined by this Tribunal. Whether the Appellant through the Secretary, Ministry of Corporate Affairs be impleaded as a necessary Party/ even as proforma Respondent

before the Tribunal is to be determined only on a case to case basis when the need of a given case arises for rumination of issues, which comes up before the respective Tribunals and when an order like the impugned one is passed by the 'Tribunal' or 'Competent Authority' without hearing the party concerned, by not following the 'principles of Natural Justice' by not initially ordering notice and not taking into consideration of the objections of that party, certainly, it will result in serious miscarriage of justice, besides causing undue hardship.

17. As a matter of facts, there is no necessity to array the Appellant/ Union of India, Ministry of Corporate Affairs, New Delhi as a party in respect of the applications filed under Section 7, 9 or 10 of IBC for the purpose of reliable record or for appreciation of the matter. Even for the purported violation under Section 68 to 77 of IBC and for taking action as per Section 236(2) of the Code whether to implead the Central Government as a proforma Respondent it is for the individual applicant to take a call because he is the 'dominus litus' although, when no relief is claimed against the Union of India, it need not even be a proforma party in an application filed under IBC, since it is an Otiose one. In public interest/ criminal offences being taken up before the special Court under Section 435 of the Companies Act, 2013 in a Company Petition/ Appeal before the Tribunal, the Union of India through any authorized officer/ person can be added as a party and in other cases it is for the Applicant/ Appellant or for the Tribunal to take an ultimate decision for showing a person as a necessary or proper party. In case of misjoinder of a party, the Applicant/

Appellant/ the Tribunal has always the option to strike out/ remove the name of Union of India from the array of parties, in the proceedings pending before it.

18. In the present case, the 'Ministry of Corporate Affairs' was neither arrayed as a party nor impleaded in the subject matter before the Adjudicating Authority. Also, that the 'Registrar of Companies' had not filed any response/ reply/ counter (in respect of the clarification sought for) prior to the passing of the impugned order. An Adjudicating Authority (National Company Law Tribunal) has a quasi-judicial one is to abide by the principles of 'Natural Justice'. After providing a reasonable opportunity of being heard to the other side, the Tribunal can pass appropriate orders. If an order is passed by the Tribunal, without affording an opportunity of hearing to the parties, the same is unsustainable in Law as per decision Sree Metaliks Ltd. v. Union of India (2017) 203 Com Cases 442 : (2017) 140 CLA 30 (Cal).

19. Be that as it may, after going through the impugned order, this Tribunal comes to an inevitable and irresistible conclusion that the directions issued in respect of Application No.2024/ 19 filed by the Resolution Professional to implead the 'Secretary of Ministry of Corporate Affairs' as party Respondent in all cases of I&B Code is nothing but beyond the power of the Tribunal and it tantamounts to imposition of a new rule in a compelling fashion. In short, the impugned order making it applicable throughout the country to all the Benches of the National Company Law Tribunal is untenable one and the said order suffers from material

irregularity and patent illegality in the eye of Law. As a logical corollary, this Tribunal, this Tribunal set aside the impugned order dated 22.11.2019 in (IB)-939(PB)/2018 in furtherance of substantial cause of justice. Consequently, the present Appeal succeeds.

20. In fine, the Company Appeal No.1417 of 2019 is allowed. The impugned order dated 22.11.2019 in (IB)-939(PB)/2018 passed by the National Company Law Tribunal, New Delhi, Principal Bench is set-aside for the reasons ascribed by this Tribunal in this Appeal. However, there shall be no order as to costs. I.A. No.4056 of 2019 is closed with a direction being issued to the Appellant to file the certified copy of the impugned order dated 22.11.2019 within one week from today.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

NEW DELHI

22nd May, 2020

Ash

ANNEXURE - C

April 07, 2017
R.C.

W.P. 7144 (W) OF 2017
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

Sree Metaliks Limited and another
Vs.
Union of India and Anr.

For the Petitioners : Mr. P.C.Sen, Sr. Advocate
Mr. Anirban Roy, Advocate
Mr. Sanjib Dawn, Advocate
Mr. Nupur Jalan, Advocate

For the Respondent No. 2 : Mr. A. Malhotra, Advocate
Mr. Soumya Majumder, Advocate
Ms. Neelina Chatterjee, Advocate
Ms. Mukta Rani Singha, Advocate

For the Union of India : A.S.G. **Mr. Kausik Chandra, Ld.**
Mr. Asit Kumar De, Advocate

Debangsu Basak, J:-

The petitioner assails the vires of Section 7 of the Insolvency and Bankruptcy Code, 2016 and the relevant Rules under the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016. The challenge is premised upon and revolves around the contention that the Code of 2016 does not afford any opportunity of hearing to a corporate debtor in a petition filed under Section 7 of the Code of 2016.

The learned senior advocate appearing for the petitioner submits that, the first petitioner had received a notice from a firm of Company Secretaries dated January 21, 2017 intimating that, an application under section 7 of the Code of 2016 read

with Rule 4 of the Rules of 2016 had been filed before the National Company Law Tribunal, (NCLT) Kolkata Bench. He submits that, the letter does not inform the petitioners about the date when such application would be taken up for consideration by the (NCLT). He submits that, the NCLT had registered such application as Company Petition No. 16 of 2017. An order dated January 30, 2017 was passed on a hearing conducted on such Company Petition on January 25, 2017. The order was passed exparte. The petitioner was not informed of the date of hearing. The petitioner was not afforded an opportunity of hearing by the NCLT prior to the passing of such order of administration of the petitioner and appointment of Interim Resolution Professional. The petitioner had preferred an appeal from such order. Such appeal being Company Appeals (AT) (Insolvency) No. 3 of 2017 was disposed of by an order dated February 21, 2017. He submits that, pursuant to the disposal of the appeal, proceedings have taken place in the Company Petition. At no stage has the petitioner been heard by the NCLT. He submits that, the petitioner is entitled to a right of hearing under the principles of natural justice. He submits that, the Code of 2016 is silent as to the grant of hearing by the NCLT. In such circumstances, the right of hearing, on the principles of natural justice, has to be read into such Statute. He submits that, the claim of the respondent under the Company Petition is not such that the Bankruptcy Code of 2016 can be invoked. The NCLT has assumed jurisdiction under the Code of 2016 where none exists.

The learned advocate appearing for the respondent no. 2 submits that, the respondent no.2 is an award holder. The award remains unsatisfied. The respondent no. 2 was advised to invoke the provisions of Code of 2016. The respondent no. 2 had

filed a petition being Company Petition no. 16, 2017 under the provisions of Section 7 of the Code of 2016 read with Rule 4 of the Rules of 2016. An order dated January 30, 2017 was passed by the NCLT. The petitioner being aggrieved had preferred an appeal therefrom before the National Company Law Appellate Tribunal (NCLAT). In such appeal the first petitioner had submitted that, the first petitioner had no objection to the admission of the insolvency petition but objects to the appointment of the Interim Resolution Professional (IRP) under the Code of 2016. The first petitioner, therefore, cannot canvass, breach of principles of natural justice by NCLT. Such appeal was disposed of by replacing the IRP appointed by the order dated January 30, 2017. He submits that, the challenge to the vires of the Code of 2016 and the Rules of 2016 are misplaced as the application under Section 7 of the Code of 2016 is required to be heard by the NCLT established under the provisions of the Companies Act, 2013. He refers to Section 424 of the Act of 2013 and submits that, NCLT is required to follow the principles of natural justice in deciding an application taken up for consideration by it. Therefore, the challenge to the vires must fail. In the factual matrix of the present case, in spite of notice, the first petitioner did not appear before the NCLT. The first petitioner had preferred an appeal against the order dated January 30, 2017 before the NCLAT. Such appeal has since been disposed of. It did not press such point in the appeal. Therefore, it cannot be said that there is a breach of principles of natural justice.

The learned Additional Solicitor General appears in terms of the notice issued to the learned Attorney General in view of the challenge to the vires to the Code of 2016 and the Rules 2016. He refers to the Rules 2016, particularly Rule 4 thereof

which contemplates a service of notice of the application by the financial creditor on the financial debtor. He refers to Rule 10 of the Rules of 2016 and submits that, such Rules contemplate that, the provisions of Rules 20 to 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016 will be applicable. He refers to Rule 24 of the National Company Law Tribunal Rules, 2016 which contemplates service of notice of the application upon the respondent. He submits that, the proceedings before the NCLT are to be conducted keeping in view the provisions of Section 424 of the Companies Act, 2013. Section 424 of the Act of 2013 contemplates the NCLT applying the principles of natural justice in the proceedings. He submits that, the NCLT is not bound by the Code of Civil Procedure, 1908 and that, it can regulate its own procedure subject to the provisions of the Act of 2013 and the Insolvency and the Bankruptcy Code of 2016. He submits that, the Code of 2016 does not debar the applicability of the principles of natural justice in proceedings under consideration by the NCLT when it is considering an application under Section 7 of the Code of 2016. Therefore, the challenge to the vires to the provisions of Section 7 of the Code of 2016 and Rule 4 of the Rules 2016 should fail.

I have considered the rival contentions of the petitioner and the materials made available on record.

The respondent no. 2 had filed an application under section 7 of the Code of 2016 against the first petitioner, before the NCLT Kolkata Bench, which was registered as Company Petition No. 16 of 2017. The first petitioner is the respondent therein. The first petitioner claims to have received a notice from a firm of practicing company Secretaries with regard to the filing

of such Company Petition by the second respondent before the NCLT against the first petitioner. Such notice does not contain any information as to the date of hearing of the company petition.

NCLT had passed an order dated January 30, 2017 in such Company Petition filed by the respondent no.2. The first petitioner was not heard by the NCLT before passing such order. NCLT had proceeded to admit the company petition. It had done so without affording any opportunity of hearing to the first petitioner. It had acted in breach of the principles of natural justice in do so. NCLT had proceeded to appoint an IRP by such order. Such order was assailed by the first petitioner before the NCLAT. In such appeal, the first petitioner did not press the point of breach of the principles of natural justice. Rather, it had stated that, it had no objection to the admission of the company petition. The NCLAT records in its order that, the first petitioner has no objection to the admission of the Insolvency petition. Such appeal was disposed of by the order dated February 21, 2017. The personnel of the IRP appointed by the order dated January 30, 2017 was replaced.

In the facts of the present case, Section 7 of the Code of 2016 is relevant. Section 7 is as follows:

> "**7. Initiation of corporate insolvency resolution process by financial creditor**
>
> (1)A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.
>
> Explanation.—For the purposes of this sub-section, a default includes a default in respect of a

financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3)The financial creditor shall, along with the application furnish —

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section(2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

PROVIDED that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

> (b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be."

Section 7 of the Code of 2016 contemplates filing of an application by a financial creditor before an adjudicating authority. An adjudicating authority is defined in Section 5 (1) of the Code of 2016. It is as follows:

> 5. Definitions:
>
> In this Part, unless the context otherwise requires,-
>
> (1) "Adjudicating Authority", for the purpose of this Part, means National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013.

Section 7 of the Code of 2016 allows a financial creditor either by itself or jointly with other financial creditors to file an application to initiate corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred. Sub-section (2) of Section 7 states that, an application under Sub-section (1) will be made in such form and manner and accompanied with such fee as may be prescribed. Sub-section (3) of Section 7 requires the financial creditor to furnish the details as specified therein. Sub-section (4) of Section 7 mandates the adjudicating authority to ascertain an existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under Sub-section (3) within 14 days from the receipt of the application under Sub-section (2). Sub-section (5) of Section 7 allows the adjudicating authority to admit an application under Sub-section (2) where a default has occurred and the application is complete and there is no disciplinary

proceedings pending against the proposed resolution professional. It also allows the adjudicating authority to reject such an application if no default has occurred or the application under Sub-section (2) is incomplete or where any disciplinary proceedings is pending against the proposed resolution professional. However, if the adjudicating authority is proceeding to dismiss an application, on the ground of defect in the application, then the adjudicating authority will give a notice of such defect to the applicant to rectify such defect within 7 days from the date of receipt of the notice. Sub-section (6) of Section 7 stipulates that, the corporate insolvency resolution process shall commence from the date of admission of the application under Sub-section (5). Sub-section (7) of Section 7 mandates the adjudicating authority to communicate its orders within 7 days of admission or rejection of the application, as the case may be, to the financial creditor and the corporate debtor.

Section 61 of the Code of 2016 allows an appeal to be filed before the appellate authority. It is as follows:-

> "61. Appeals and Appellate Authority
> (1) Notwithstanding anything to the contrary contained under the Companies Act, 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.
> (2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:
>
> PROVIDED that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

> (3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—
>
> (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;
>
> (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
>
> (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
>
> (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
>
> (v) the resolution plan does not comply with any other criteria specified by the Board.
>
> (4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order."

Any person aggrieved by an order passed by the adjudicating authority under the Code of 2016 in respect of an application under Section 7 of the Code of 2016 is entitled to prefer an appeal to the National Company Law Appellate Tribunal (NCLAT). Sub-section (2) of Section 61 allows such an appeal to be filed within 30 days with the provision that, an appeal may be filed later, if the appellants show sufficient cause for not filing the appeal but such period of extension shall not exceed 15 days. Sub-section (3) of Section 61 recognizes some of the grounds on which an appeal may be filed. Sub-section (4) of Section 61 recognizes that, an appeal against an order of liquidation passed under Section 33 may be filed on the grounds of material irregularity or fraud committed in relation to an order of liquidation.

In the scheme of the Code of 2016, therefore, an application under Section 7 of the Code of 2016 is to be first made before the NCLT. An appeal of the order of NCLT will lie before the NCLAT. NCLT and NCLAT are constituted under the provisions of the Companies Act, 2013. The procedure before the NCLT and the NCLAT is guided by Section 424 of the Companies Act, 2013. It is as follows:

> "424. Procedure before Tribunal and Appellate Tribunal.-(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908(5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of the Act 1[or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.
> (2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act [or under the Insolvency and bankruptcy Code, 2016] the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—
>
> (a) summoning and enforcing the attendance of any person examining him on oath;
> (b) requiring the discovery and production of documents;
> (c) receiving evidence on affidavits;
> (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document from any office;
> (e) issuing commissions for the examination of witnesses or documents;
> (f) dismissing a representation for default or deciding it ex parte;

> (g) setting aside any order of dismissal of any representation for default or any other passed by it ex parte; and
> (h) any other matter which may be prescribed.
> (3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—
> (a) in the case of an order against a company, the registered office of the company is situate; or
> (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.
> (4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860), and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

NCLT acting under the provisions of the Act, 2013 while disposing of any proceedings before it, is not to bound by the procedure laid down under the Code of Civil Procedure, 1908. However, it is to apply the principles of natural justice in the proceedings before it. It can regulate it own procedure, however, subject to the other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any Rules made thereunder. The Code of 2016 read with the Rules 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is

silent whether a party respondent has a right of hearing before the adjudicating authority or not.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fretters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the

consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing.

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from Section 7(4) of the Code of 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under Section 7 of the Code of 2016. Sub-rule (3) of Rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor. Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under Sub-section (1) of Section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 or Part-III of the National Company Law Tribunal Rules, 2016.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a reasonable opportunity of hearing to the respondent before passing its order.

In a given case, a situation may arise which may require NCLT to pass an exparte ad interim order against a respondent.

Therefore, in such situation NCLT, it may proceed to pass an exparte ad interim order, however, after recording the reasons for grant of such an order and why it has chosen not to adhere to the principles of natural justice at that stage. It must, thereafter proceed to afford the party respondent an opportunity of hearing before confirming such exparte ad interim order.

In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

In such circumstances, the challenge to the vires to Section 7 of the Code of 2016 fails.

W.P. 7144 (W) of 2017 is disposed of without any order as to costs.

Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.

(DEBANGSU BASAK, J.)

ANNEXURE - D

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 190 of 2019

IN THE MATTER OF:

Deloitte Haskins & Sells LLP.

....Appellant

Vs.

Union of India ....Respondents
Through Ministry of Corporate Affairs & Ors.

Present:

For Appellant: **Mr. Kapil Sibal and Mr. Abhinav Vashith, Sr. Advocates with Mr. Himanshu Satija, Mr. Rishi Aggarwal, Mr. Arnav Behaari, Parminder Singh, Niyati Kohli, Ms. Rishika Harish, Ms. Rohini Jaiswal, Mr. Mahesh Agarwal, Mr. Rahul Dwarkadas, Mr. Rajeev Kumar, Ms. Prachi Dhyani, Advocates.**

For Respondents: **Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1**
Mr. Pratap Venugopal, Advocate for Respondent No. 14.
Mr. Sanjay Shorey and Mr. C. Balooni for MCA.

With

Company Appeal (AT) No. 193 of 2019

IN THE MATTER OF:

Kalpesh J. Mehta

....Appellant

Vs.

Union of India, ...Respondents
Ministry of Corporate Affairs & Ors.

Present:

For Appellant: **Mr. S.N. Mookherjee, Sr. Advocate with Ms. Aayushi Sharma, Mr. Vishnu Menon, Advocates.**

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Pratap Venugopal, Advocate for Respondent No. 14.
Mr. Sanjay Shorey and Mr. C. Balooni for MCA.

With

Company Appeal (AT) No. 194 of 2019

IN THE MATTER OF:

Udayan Sen.

....Appellant

Vs.

Union of India, ...Respondents
Ministry of Corporate Affairs & Ors.

Present:

For Appellant: Mr. S.N. Mookherjee, Sr. Advocate with Ms. Aayushi Sharma, Mr. Vishnu Menon, Advocates.

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Pratap Venugopal, Advocate for Respondent No. 14.
Mr. Sanjay Shorey and Mr. C. Balooni for MCA.

With

Company Appeal (AT) No. 195 of 2019

IN THE MATTER OF:

Shrenik Baid & Ors. ....Appellants

Vs.

Union of India, ...Respondents
Ministry of Corporate Affairs & Ors.

Present:

For Appellants: Mr. Arun Kathpalia, Sr. Advocate with Ms. Bani Brar and Ms. Misha Rohatgi, Mr. Kauser Husain and Ms. Dikshi Gupta, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA.

With

Company Appeal (AT) No. 196 of 2019

IN THE MATTER OF:

N Sampath Ganesh

....Appellant

Vs.

Union of India, ...Respondents
Ministry of Corporate Affairs & Ors.

Present:

For Appellant: Mr. N.K. Kaul, Senior Advocate with Mr. Raghav Seth, Mr. Aman Sharma, Mr. Deepak Joshi, Mr. V.P. Singh, Mr. Aditya Jalan, Ms. Vanya Chhabra and Ms. Anshula L. Bakhru, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA.

With

Company Appeal (AT) No. 197 of 2019

IN THE MATTER OF:

BSR & Associates LLP

....Appellant

Vs.

Union of India, ...Respondents
Ministry of Corporate Affairs & Ors.

Present:

For Appellant: Mr. Mukul Rahtogi, Sr. Advocate with Mr. V. P. Singh, Mr. Aditya Jalan, Ms. Vanya Chhabra, Ms.

Anshula L. Bakhru, Ms. Devanshi Singh, Mr. Aman Sharma, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA.

With

Company Appeal (AT) No. 205 of 2019

IN THE MATTER OF:

Milind Patel

....Appellant

Vs.

Union of India, ...Respondents
Through Ministry of Corporate Affairs & Ors.

Present:

For Appellant: Ms. Surekha Raman and Mr. Dileep Poolakkot and Mr. Muhammed Siddick, Advocates
For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA.

With

Company Appeal (AT) No. 206 of 2019

IN THE MATTER OF:

Neera Saggi

....Appellant

Vs.

Union of India & Ors. ....Respondents

Present:

For Appellant: Mr. Jayant Mehta, Mr. Avinash Tripathi, Mr. Zain Maqbool, Mr. Arpan Behl, Advocates
For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 207 of 2019

IN THE MATTER OF:

Rajesh Kotian

....Appellant

Vs.

Union of India & Ors. **....Respondents**

Present:

For Appellant: **Ms. Radhika Gautam, Advocate**

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 211 of 2019

IN THE MATTER OF:

Manu Kochhar

....Appellant

Vs.

Union of India, **....Respondents**
Ministry of Corporate Affairs & Anr.

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Saikat Sarkar and Ms. Kanika Jain, Advocates**

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 212 of 2019

IN THE MATTER OF:

Deepak Jagdish Pareek

....Appellant

Vs.

Union of India, ...Respondent
Ministry of Corporate Affairs

Present:

For Appellant: Mr. Shekhar Jagtap, Advocate.

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand Vishwakarma, Advocates for Respondent No. 1
Mr. Sanjay Shorey, MCA
Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 214 of 2019

IN THE MATTER OF:

Surinder Singh Kohli

....Appellant

Vs.

Union of India, ...Respondents
Ministry of Corporate Affairs & Ors.

Present:

For Appellant: Mr. Sudipto Sarkar, Sr. Advocate with Mr. Shikhil Suri, Ms. Nikita Thapar, Ms. Shilpa Saini, Ms. Vinishma Kaul, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 215 of 2019

IN THE MATTER OF:

Uday Ved.

....Appellant

Vs.

Union of India & Ors. ....Respondents

Present:

For Appellant: Mr. Rahul Chitnis, Mr. Kunal Mehta, Ms. Khushali, Ms. Sagarika, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 221 of 2019

IN THE MATTER OF:

Subhalakshmi Panse

....Appellant

Vs.

Union of India & Ors. ....Respondents

Present:
For Appellant: Mr. U.K. Choudhary, Sr. Advocate with Ms. Shilpa Saini, Ms. Vinishma Kaul, Mr. Dhruv Gupta, Mr. Shikhil Suri and Ms. Nikita Thapar, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 222 of 2019

IN THE MATTER OF:

Udayan Sen

....Appellant

Vs.

Union of India Through Ministry of Corporate Affairs & Ors. ....Respondents

Present:
For Appellant: Mr. S.N. Mukherjee and Mr. Arun Kathpalia, Sr. Advocates with Ms. Aayushi Sharma, and Mr. Vishnu Menon, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Ms. Pooja M. Saigal, Mr. Akshay Gupta and Mr. Amit Kumar Yadav, Advocates for Respondent No. 13
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 223 of 2019

IN THE MATTER OF:

Kalpesh Mehta

....Appellant

Vs.

Union of India Through Ministry of Corporate Affairs & Ors. **....Respondents**

Present:
For Appellant: Mr. S.N. Mukherjee and Mr. Arun Kathpalia, Sr. Advocates with Ms. Aayushi Sharma, and Mr. Vishnu Menon, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Ms. Pooja M. Saigal, Mr. Akshay Gupta and Mr. Amit Kumar Yadav, Advocates for Respondent No. 13
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 224 of 2019

IN THE MATTER OF:

Deloitte Haskins & Sells LLP

....Appellant

Vs.

Union of India Through Ministry of Corporate Affairs & Ors. **....Respondents**

Present:

For Appellant: Mr. Kapil Sibal and Mr. Abhinav Vasisht, Sr. Advocates with Mr. Mahesh Agarwal, Mr. Rishikh Harish and Ms. Niyati Kohli, Advocates.

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 225 of 2019

IN THE MATTER OF:

Shahzaad Dalal

....Appellant

Vs.

Union of India through Ministry of Corporate Affairs & Ors. **....Respondents**

Present:
For Appellant: Mr. Vivek Jain and Mr. Manish Shekhari, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 230 of 2019

IN THE MATTER OF:

C. Sivasankaran

....Appellant

Vs.

Union of India Ministry of Corporate Affairs, through Regional Director & Ors. **....Respondents**

Present:

For Appellant: Mr. Rajiv Ranjan, Senior Advocate with Mr. Ajith S. Ranganathan, Mr. Rajat Kapoor, Mr. Ankur Kashyap, Mr. Rohit Rajershi, Advocates

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

With

Company Appeal (AT) No. 285 of 2019

IN THE MATTER OF:

Renu Challu

....Appellant

Vs.

Union of India & Ors. ....Respondents

Present:

For Appellant: Mr. Diwakar Maheswari and Mr. Shreys Edupuganti, Advocates.

For Respondents: Mr. Karan Khanna, Mr. George Varghese, Ms. Ritu Anand, Advocates for Respondent No. 1
Mr. Sanjay Shorey and Mr. C. Balooni for MCA

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

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

2. In Company Petition No. 3638 of 2018, Miscellaneous Application No.2071 of 2019 was filed by the Central Government for impleadment of various persons, including the Appellant(s) herein, as parties to the said Petition. By way of an order dated 18th July, 2019, the Tribunal allowed the Miscellaneous Application and directed impleadment of *inter alia* the Appellant(s) as parties to the said Company Petition.

3. Miscellaneous Application No. 2258 of 2019 was filed by 'Deloitte Haskins & Sells LLP' and its partners challenging the maintainability of the Company Petition. By impugned order dated 9th August, 2019, the Tribunal rejected the Miscellaneous Application.

4. In another Company Petition No. 02 of 2014, the Union of India sought to debar the then present Directors (Appellants herein) from managing the affairs of the Company (M/s. Megacity Bangalore Developers and Builders Limited') and further to permit to nominate five Directors to manage the affairs of the Company while several Civil and Criminal cases were pending against the Company and its Directors. In the said Petition, the Tribunal vide impugned order dated 14th March, 2019 disposed of the said Company Petition by removing and debarring the Directors from managing the affairs of the Company and allowing the prayer of Union of India to appoint Directors.

5. In these appeals as similar question of law is involved, they were heard together and disposed of by this common judgment.

6. For the said reasons, we have noticed only the main ground taken and the arguments advanced by learned Senior Counsel in "Deloitte Haskins & Sells LLP v. Union of India– Company Appeal (AT) No. 190 of 2019".

Company Appeal (AT) No. 190 of 2019

7. According to Appellant- 'Deloitte Haskins & Sells LLP', it was an Auditor of 'IL&FS Financial Services Limited' until 2017-2018 when they rotated out as the auditors of the Company ('IL&FS') on account of operation of law. It also acted as joint auditor for 'IL&FS Financial Services Limited' together with 'BSR and Associates LLP' in the Financial Year 2017-18.

8. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as it was neither a necessary nor a proper party for adjudication of the said Company Petition and further, there was no cause of action to implead the Appellant as a party Respondent.

9. It was further submitted that impleadment on the basis of criminal complaint which was not taken cognizance by Special Court was wrong.

Company Appeal (AT) No. 193 of 2019

10. In the present appeal, the Appellant- 'Mr. Kalpesh J. Mehta' who is a partner in 'Deloitte Haskins & Sells LLP' which was acting as an Auditor of 'IL&FS Financial Services Limited'., a 100% subsidiary of 'Infrastructure Leasing & Financial Services' ('IL&FS'), until F.Y. 2017-2018 and also acted as a Joint Auditor of 'IL&FS Financial Services Limited' with 'BSR & Associates LLP'.

11. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as the Appellant during the F.Y. 2017-2018 was not at all concerned with the management and day-to-day affairs of 'IL&FS' and was only a Partner of 'Deloitte Haskins & Sells LLP', therefore, neither a necessary nor a proper party for adjudication of the said Company Petition.

Company Appeal (AT) No. 194 of 2019

12. The Appellant- 'Mr. Udayan Sen' is a partner in 'Deloitte Haskins & Sells LLP' which was acting as an Auditor of 'IL&FS Financial Services Limited'., a 100% subsidiary of 'Infrastructure Leasing & Financial Services' ('IL&FS'), until F.Y. 2017-2018 and also acted as a Joint Auditor of 'IL&FS Financial Services Limited' with 'BSR & Associates LLP'.

13. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as the Appellant during the F.Y. 2017-2018 was not related to 'IL&FS' or its management and affairs and was only a Partner of 'Deloitte Haskins & Sells LLP', therefore, neither a necessary nor a proper party for adjudication of the said Company Petition. Further, it was submitted that no final reliefs were claimed in the Company Petition against the Appellant and, therefore, there was no question of any interim protective orders being granted against the Appellant.

Company Appeal (AT) No. 195 of 2019

14. The 1st Appellant- 'Mr. Shrenik Baid' is a partner and the remaining Appellants in this appeal are employees of 'Deloitte Haskins & Sells LLP' which was acting as an Auditor of 'IL&FS Financial Services Limited'., a 100% subsidiary of 'Infrastructure Leasing & Financial Services' ('IL&FS'), until F.Y. 2017-2018 and also acted as a Joint Auditor of 'IL&FS Financial Services Limited' with 'BSR & Associates LLP'.

15. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellants have been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as the Appellants were not related to 'IL&FS' or its management and affairs and only connection was that they were partner/ employees

of the statutory auditor, therefore, neither a necessary nor a proper party for adjudication of the said Company Petition. Further, it was submitted that no final reliefs were claimed in the Company Petition against the Appellant and, therefore, there was no question of any interim protective orders being granted against the Appellant.

It was further submitted that impleadment on the basis of criminal complaint which was not taken cognizance by Special Court was wrong.

Company Appeal (AT) No. 196 of 2019

16. The Appellant- 'N. Sampath Ganesh' is a partner of 'BSR & Associates LLP' which was appointed as Joint Statutory Auditor of 'IL&FS Financial Services Limited' ('IFIN')., subsidiary of 'Infrastructure Leasing & Financial Services' ('IL&FS') for the F.Y. 2017-2018 along with 'Deloitte Haskins & Sells LLP'. During the period of audit, the Appellant was the engagement partner on behalf of 'BSR & Associates LLP' for the audit of 'IFIN'.

17. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 on an incorrect interpretation of Order 1 Rule 10 of Civil Procedure Code, 1908 and Section 245 of the Companies Act, 2013, and was neither a necessary nor a proper party for adjudication of the said Company Petition. It was further submitted that the Appellant was never

in-charge of nor responsible for the management and operations of 'IFIN' and was only the engagement partner of 'BSR & Associates LLP'.

Company Appeal (AT) No. 197 of 2019

18. The Appellant- 'BSR & Associates LLP' was the Joint Statutory Auditor of 'IL&FS Financial Services Limited' ('IFIN') for the F.Y. 2017-2018 along with 'Deloitte Haskins & Sells LLP'. It was submitted that the Appellant had never been Statutory Auditors of 'IL&FS' while 'Deloitte Haskins & Sells LLP' had been the sole auditors of IFIN for nine years prior to that i.e., for the period F.Y. 2007-2008 to 2016-2017. On May, 2018, the Statutory Auditors of 'IFIN' (including the Appellant) rendered their Audit Report on the financial statement of IFIN for the F.Y. 2017-2018.

19. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as it was neither a member of 'IL&FS' or 'IFIN', nor in any manner involved in the carrying on of business of 'IL&FS' or 'IFIN' and, therefore, neither a necessary nor a proper party for adjudication of the said Company Petition. It was further submitted that the Appellant was never in-charge of nor responsible for the management and operations of 'IFIN' and had issued only one Joint Audit Report for F.Y. 2017-18, along with 'Deloitte Haskins & Sells LLP', who had been Auditors of 'IFIN' for 10

years. Furthermore, it was submitted that there was no material against the Appellant for any fraudulent activity.

Company Appeal (AT) No. 205 of 2019

20. The Appellant- 'Mr. Milind Patel' was an Employee Director of 'IL&FS Financial Services Limited' ('IFIN') till 31st March, 2018, though he tendered his resignation on 5th February, 2018.

21. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as it was neither on the Committee of Directors, nor had ever been on the Board of Directors of 'IL&FS' and, therefore, neither a necessary nor a proper party for adjudication of the said Company Petition. It was further submitted that the Appellant had no decision or policy making role in the 'IFIN' organization and only followed the instructions of the Committee of Directors and the Uniform Approval Framework. Furthermore, the Appellant submitted that the impugned order was entirely based on the criminal complaint and the allegations contained therein which was a separate and distinct proceeding in law and merely because such a complaint had been filed against the Appellant, the Appellant could not have been joined as a party to the Company Petition, which was for relief on the basis of allegations of

oppression and mismanagement on the part of the company's management.

Company Appeal (AT) No. 206 of 2019

22. The Appellant- 'Neera Saggi' served as an Independent Director of 'IFIN' between 18th March, 2015 and 25th July, 2016 for a period of 16 months.

23. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as the Appellant had resigned from 'IFIN's Board on 25th July, 2016 and prior to that was an Independent Director of 'IFIN' and was not at all concerned with the management and day-to-day affairs of 'IL&FS'. Therefore, Appellant was neither a necessary nor a proper party for adjudication of the Company Petition filed for alleged oppression and mismanagement of 'IL&FS'.

24. It was further submitted that the Appellant was not a part of 'IFIN's audit committee and, therefore, could not have been equated with those independent directors who were on the Audit Committee.

Further, it was submitted that no final reliefs were claimed in the Company Petition against the Appellant and, therefore, there was no question of any interim protective orders being granted against the Appellant.

Company Appeal (AT) No. 207 of 2019

25. The Appellant- 'Mr. Rajesh Kotian' was the ex-director of the 'IL&FS Financial Services Limited' ('IFIN') and had resigned on 3rd July, 2019. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as no final reliefs were claimed in the Company Petition against the Appellant nor any allegations were made and, therefore, it was neither a necessary nor a proper party for adjudication of the said Company Petition.

26. It was further submitted that the Appellant could have been joined as a party Respondent only after guilt of the Appellant had been proved beyond doubt on the basis of the Serious Fraud Investigation Office Second Interim Report and the Criminal Complaint filed before Special Court.

Company Appeal (AT) No. 211 of 2019

27. The Appellant – 'Manu Kochhar' was an employee of 'IL&FS' from 23rd April, 1990 and retired on 31st August, 2018. The Appellant was appointed as Nominee Director of 'IL&FS Financial Services Limited' ('IFIN') in the year 2004 and resigned in March, 2015.

28. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as no final reliefs were claimed in the Company Petition against the Appellant and therefore, neither was a necessary nor a proper party for adjudication of the said Company Petition.

29. It was further submitted that the Appellant had neither any executive position in 'IFIN', nor had ever been part of the Audit Committee and it was never involved in day-to-day affairs of 'IFIN'. It was also submitted that the Appellant was not assigned with or responsible for the task of verifying the viability, legality and veracity of the loans/ investments made by 'IL&FS'.

30. Furthermore, the Appellant submitted that the Tribunal had on an erroneous interpretation of Order 1 Rule 10 of Civil Procedure Code, 1908 impleaded the Appellant. Also, it was submitted that impleadment by the Tribunal on the basis of criminal complaint, when the charges therein were unproven, was wrong.

Company Appeal (AT) No. 212 of 2019

31. The Appellant- 'Mr. Deepak Jagdish Pareek' was employed with 'IL&FS' since May, 1988 and was transferred from 'IL&FS' to 'IFIN'. He was promoted as Assistant Vice President and designated to head the Finance and Accounts Department in August, 2006. Thereafter the

Appellant was designated as CFO by the Board in April 2014 as per the mandate under Companies Act, 2013. It was submitted that the Appellant was neither a member of Audit Committee nor had any special privilege.

32. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as no final reliefs were claimed in the Company Petition against the Appellant who did not have any control over management and operations of lending business of 'IFIN'.

33. It was also submitted that the Tribunal had failed to consider that the Appellant had a subordinate delegated authority and limited role as an employee of the Company.

Company Appeal (AT) No. 214 of 2019

34. The Appellant- 'Surinder Singh Kohli' was an Independent Director of 'IFIN' between 21st October, 2011 and 19th September, 2018. He was a part of 'IFIN's Audit Committee but was not a member of any committee of Directors of 'IFIN'. The Appellant was only a non-executive Independent Director of 'IFIN' and held no other position, save as aforesaid being a part of its Audit Committee. The Appellant was not involved in 'IFIN's day-to-day affairs and management and had no executive powers.

35. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as the Appellant during the F.Y. 2017-2018 was not related to 'IL&FS' or its management and affairs, therefore, not a proper party for adjudication of the Company Petition filed for alleged oppression and mismanagement of 'IL&FS'. Further, it was submitted that no final reliefs were claimed in the Company Petition against the Appellant and, therefore, there was no question of any interim protective orders being granted against the Appellant.

Company Appeal (AT) No. 215 of 2019

36. The Appellant- 'Mr. Uday Ved' served as an Independent Director of 'IFIN' between 31st March, 2015 and 20th September, 2018.

37. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as the Appellant was an Independent Director of 'IFIN' and was not at all concerned with the management and day-to-day affairs of 'IL&FS'. Therefore, Appellant was neither a necessary nor a proper party for adjudication of the Company Petition filed for alleged oppression and mismanagement of 'IL&FS'.

38. It was further submitted that the Appellant was not a part of 'IFIN's audit committee and, therefore, could not have been treated similarly with those independent directors who were on the Audit Committee.

39. Further, it was submitted that no averments have been made against the Appellant by way of the Miscellaneous Application and there was no cause of action to implead the Appellant as a party Respondent.

Company Appeal (AT) No. 221 of 2019

40. The Appellant- 'Subhalakshmi Panse' was an Independent Director of 'IFIN' between 5th February, 2015 and 20th September, 2018. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as there were no allegation of fact against the Appellant and no relief sought against the Appellant in the said petition.

It was submitted that the Tribunal is jurisdictionally barred from adjudicating on matters in a petition under Section 241 on the basis of any material other than what is introduced in the petition.

Company Appeal (AT) No. 222 of 2019

41. The Appellant- 'Mr. Udayan Sen' is a partner in 'Deloitte Haskins & Sells LLP' which was acting as an Auditor of 'IL&FS Financial Services Limited'., a 100% subsidiary of 'Infrastructure Leasing & Financial

Services' ('IL&FS'), until F.Y. 2017-2018 and also acted as a Joint Auditor of 'IL&FS Financial Services Limited' with 'BSR & Associates LLP'.

42. It was submitted that by impugned order dated 9th August, 2019, the Tribunal had failed to appreciate that the Appellant being an erstwhile auditor and ceasing to act as an Auditor of IFIN from F.Y. 2017-18 could not be covered within the ambit of Section 140 (5) of the Companies Act, 2013.

43. It was submitted that Section 140(5) only applies to existing auditors and the Tribunal could not have by way of a deeming fiction interpreted the said Section to include erstwhile Auditors.

Company Appeal (AT) No. 223 of 2019

44. In the present appeal, the Appellant- 'Mr. Kalpesh Mehta' who is a partner in 'Deloitte Haskins & Sells LLP' which was acting as an Auditor of 'IL&FS Financial Services Limited'., a 100% subsidiary of 'Infrastructure Leasing & Financial Services' ('IL&FS'), until F.Y. 2017-2018 and also acted as a Joint Auditor of 'IL&FS Financial Services Limited' with 'BSR & Associates LLP'.

45. It was submitted that by impugned order dated 9th August, 2019, the Tribunal had failed to appreciate that the Appellant being an erstwhile auditor and ceasing to act as an Auditor of IFIN from F.Y. 2017-18 could not be covered within the ambit of Section 140 (5) of the

Companies Act, 2013. It was further submitted that the Tribunal has failed to consider that the functioning of the auditor at the time when the petition under Section 140(5) is initiated being a jurisdictional fact in the absence of powers under the said Section cannot be resorted to at all.

46. It was submitted that Section 140(5) only applies to existing auditors and the Tribunal could not have by way of a deeming fiction interpreted the said Section to include erstwhile Auditors. Also, such a construction would be violative of Article 20(1) of the Constitution of India.

Company Appeal (AT) No. 224 of 2019

47. According to Appellant, 'Deloitte Haskins & Sells LLP', it was an Auditor of 'IL&FS Financial Services Limited' until 2017-2018 when they rotated out as the auditors of the Company ('IL&FS') on account of operation of law. It also acted as joint auditor for 'IL&FS Financial Services Limited' together with 'BSR and Associates LLP' in the Financial Year 2017-18.

48. It was submitted that by impugned order dated 9th August, 2019, the Tribunal had failed to appreciate that the Appellant being an erstwhile auditor and ceasing to act as an Auditor of IFIN from F.Y. 2017-18 by operation of law could not be covered within the ambit of Section 140 (5) of the Companies Act, 2013. It was further submitted that the Appellant has vacated its office as an auditor of 'IFIN' w.e.f. the date of

the date of the Annual General Meeting of 'IFIN' as relevant for the end of the F.Y. 2017-2018 on account of rotation and has since then ceased to be an auditor of 'IFIN' and consequently, Section 140(5) was inapplicable.

49. It was submitted that Section 140(5) only applies to existing auditors and the Tribunal could not have by way of a deeming fiction interpreted the said Section to include erstwhile Auditors.

Company Appeal (AT) No. 225 of 2019

50. The Appellant- 'Mr. Shahzaad Dalal' was a Non-executive Director of 'IFIN' from 26th October, 2006 and resigned from the Directorship on 26th March, 2015.

51. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as there were neither any allegations made against the Appellant in the 2nd Interim Report of SFIO nor any final reliefs were claimed in the Company Petition against the Appellant giving rise to any interim protective orders being granted against the Appellant.

52. Furthermore, the Appellant submitted that the impugned order was entirely based on the criminal complaint and the allegations contained therein which was a separate and distinct proceeding in law and merely because such a complaint had been filed against the

Appellant, the Appellant could not have been joined as a party to the Company Petition, which was for relief on the basis of allegations of oppression and mismanagement on the part of the company's management.

Company Appeal (AT) No. 230 of 2019

53. The Appellant- 'Mr. C. Sivasankaran' was Ex-Chairman of 'Siva Industries and Holdings Limited' ('SIHL') until 19th March, 2017. It was submitted that 'SIHL' and its subsidiaries always had individual Directors, Shareholders, Board Members and Independent Auditors and he had no legal capacity in any of the companies that obtained loans from 'IL&FS' subsequent to his leaving from India and SIHL Group.

54. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as vague allegations were alleged on him by 2nd SFIO Report.

Company Appeal (AT) No. 285 of 2019

55. The Appellant- 'Mrs. Renu Challu' was appointed as an Independent Director of 'IFIN' on 27th September, 2017 and resigned on 17th July, 2018.

56. It was submitted that by impugned order dated 18th July, 2019 in Miscellaneous Application No. 2071 of 2019, the Appellant has been

wrongly impleaded as a party Respondent in Company Petition No. 3638 of 2018 as the Appellant was an Independent Director of 'IFIN' and was not at all concerned with the management and day-to-day affairs of 'IL&FS'. Therefore, Appellant was neither a necessary nor a proper party for adjudication of the Company Petition filed for alleged oppression and mismanagement of 'IL&FS'.

57. The main plea taken by the Appellants is that they are not related to 'IL&FS' or its management and affairs and nor they are associated in past and present and, therefore, they are not a proper or necessary party.

Case of the Appellant- 'Deloitte Haskins & Sells LLP'

58. According to Appellant- 'Deloitte Haskins & Sells LLP', it ceased to be the auditor of 'IFIN' at the end of the Annual General Meeting held for F.Y. 2017-18 on account of operation of law on expiry of its term under Section 139 of the Companies Act, 2013 and was not the statutory auditor of the company on the date of filing of the said Company Petition or at the time of filing of the Miscellaneous Application No. 2071 of 2019.

Necessary and/ or proper party

59. It was submitted by the Appellant- 'Deloitte Haskins & Sells LLP' that whereas the Impugned Order has directed the Appellant to be impleaded as a party to the said Company Petition, the Impugned Order does not in fact render a finding that the Appellant is a necessary or a

proper party to the said Company Petition. [See "***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay*** **(1992) 2 SCC 524"**-Para 61] Even otherwise, it may be noted:

(a) the said Company Petition does not contain any statements, averments, allegations against the Appellant or its partners /employees and further no such averments have been sought to be added to the said Company Petition by way of the said Miscellaneous Application No. 2071 of 2019;

(b) the Appellant's presence is not necessary to effectually and completely adjudicate the real controversy, which pertains to the management of the affairs of 'IFIN'- with which the Appellant in its capacity as a statutory auditor (now rotated out0 has never been concerned; and

(c) the final reliefs originally sought in the said Company Petition were limited to replacement of the Board of Directors of 'IL&FS' and its subsidiaries including 'IFIN' (of which the Appellant was a statutory auditor), which has been done by way of order dated 1st October, 2018. Though the said Company Petition has been amended from time to time, at the time of passing of the Impugned Order no further final prayers or reliefs had been added. In fact, even in the said Miscellaneous Application, there is no mention of any final reliefs being sought against the

Appellant. It is submitted that it is only on the touchstone of reliefs sought that it can be determined whether a person is a necessary or proper party to a proceeding.

Jurisdiction under Sections 241-242 vis-à-vis past auditors

60. The Tribunal has no jurisdiction to pass orders against an auditor under Section 241 or Section 242 of the Companies Act, 2013. The provision contained in Sections 241 and 242 of the Companies Act, 2013 pertain to oppression and mismanagement of the affairs of the company. An auditor is not involved in the management of the affairs of a company and, therefore, cannot be covered within the ambit of Sections 241 and 242 of the Companies Act, 2013. A reference to Section 242 (a) to (l) of the Companies Act, 2013 will demonstrate that none of the actions contemplated therein can be ordered against past statutory auditors of a company. Insofar as the general powers under Section 242(m) of the Companies Act, 2013 are concerned, it is submitted that the same must be read *ejusdem generis with* the remainder of Section 242 of the Companies Act, 2013 and not *de hors* the same.

61. The power of the Central Government under Section 241(2) of the Companies Act, 2013 is limited to cases of on-going oppression and/or mismanagement inasmuch as the said sub-section states that the Central Government may appeal to the Tribunal for reliefs

where it is of the opinion that the affairs of the company "*are being carried out in a manner prejudicial to the public interest*". The words 'are' in Section 241 (2) of the Companies Act, 2013 denotes *in praesenti* and, therefore, the said provision cannot apply to a past auditor. Given that the Appellant rotated out as the auditor of 'IFIN' at the end of the Annual General Meeting for F.Y. 2017-2018, there can be no question of the Appellant being concerned with how the affairs of the company are being run.

62. The jurisdictional fact required to invoke the Tribunal's jurisdiction under Sections 241 and 242 of the Companies Act, 2013 are entirely absent in this case and the Appellant ought not to be impleaded as a party in the said Company Petition.

63. Reliance was placed on the report of the Serious Fraud Investigation Office ('SFIO'). It was submitted that the application for the impleadment of *inter alia* the Appellant is based solely on the 2nd Interim Report of the SFIO dated 28th May, 2019. In the impugned order, the Tribunal has referred extensively to some of the allegations contained in the report against the Appellant and has held that, *"The SFIO report clearly reveals prima facie evidence of involvement of proposed respondents."*. In this regard, it is submitted as under:

a. The SFIO investigation and the 2nd Interim Report prepared in pursuance thereof form part of an entirely separate and

distinct proceeding in law and the 2nd Interim Report cannot automatically justify impleadment of the Appellant as a parry in a Petition under Sections 241-242 of the Companies Act, 2013;

b. The contents of the 2nd Interim Report, are only allegations and the same must be proven by means of trial and by leading evidence before the Special Court (and the persons against whom allegations are raised are presumed 'innocent until and unless proven guilty'); and

c. Under Section 223 of the Companies Act, 2013, reports under Section 212 of the Companies Act, 2013 (such as the 1st and 2nd Interim Reports) are specifically excluded and as such the 1st and 2nd Interim Reports would not be admissible in any legal proceeding as evidence in relation to any matter contained in the report.

Section 339 of the Act:

64. It has been contended that the provisions of Section 339 of the Companies Act, 2013 are applicable in the facts of the present case in view of Section 246 of the Companies Act, 2013 and thus the Appellant is a necessary and/or a proper party. The said contention is baseless in view of the following:

a. Section 339 of the Companies Act, 2013 cannot apply to auditors at all and applies only to a director, manager or officer of the company or persons who are knowingly *party to the carrying on of business of the company.* It is submitted that an auditor, by definition, is not party to the carrying on of the business of a company. Nor is it anybody's case that the auditor was carrying on the business of the company;

b. In any event, there is no pleading in the said Company Petition or the said Miscellaneous Application No.2071 of 2019 that there have been any unlawful gains by the Appellant that would attract the provisions of Section 339 of the Companies Act, 2013 read with Section 246 of the Companies Act, 2013; and

c. Without prejudice to the aforesaid, even the 2nd Interim Report of the SFIO, which is the entire basis for the impleadment application, does not contain any allegation against the Appellant of any unlawful gains and thus there is no question of any disgorgement under Section 339 read with Section 246 of the Companies Act, 2013.

Section 213 of the Companies Act, 2013:

65. Section 213 of the Companies Act, 2013 provides that on an application being made if the Tribunal is satisfied that the business

of a company is being conducted with an intent to defraud creditors or members; or in a manner oppressive to any of its members; or that the company was formed for any fraudulent or unlawful purpose or for the other reasons stated therein, the Tribunal may direct that the affairs of the company be investigated by an inspector or officer by the Central Government.

66. However, Section 212 (2) of the Companies Act, 2013 provides that where a case has been assigned to the SFIO for investigation under Section 212 of the Companies Act, 2013, no other agency or officer of the Central government or any State Government can initiate or continue any other investigation in this behalf. As an investigation under Section 212 of the Companies Act, 2013 is continuing in the present case, no other investigation can be initiated/proceeded with.

Section 245 of the Companies Act, 2013:

67. In the Impugned Order, the Tribunal has erroneously equated a Petition filed under Section 241 (2) of the Companies Act, 2013 with Petitions filed under Section 245 of the Companies Act, 2013 with a view to supporting their application for impleadment. In this regard it is submitted as under:

a. Whilst the Tribunal has rightly observed that Section 245 was not in operation at the time of the filing of the present

Petition under Section 241(2) of the Companies Act, 2013, the Tribunal erroneously holds that Section 245 having been notified after the filing of the Petition, Respondent No. 1 *"was authorised to initiate action under this Chapter, which is also class action suit / petition."* It may be notified that the thresholds under Section 245 were notified on 8th May, 2019, *i.e.* prior to the filing of the said Miscellaneous Application.

b. The Tribunal has failed to appreciate that there were neither any averments not any reliefs in the impleadment application, which correspond to Section 245 or seek to incorporate the provisions of Section 245 into the present impleadment application; and

c. It is submitted that the very fact that Section 245 specifically makes reference to auditors makes it all the more evident that auditors are excluded from the ambit of proceedings under Sections 241-242 of the Companies Act, 2013, which make no reference to auditors or any relief being sought against them.

Special and specific remedies available against auditors:

68. The role of an auditor, whether it be in the nature of negligence or misconduct or fraud, can be investigated by, as Regulator, the National Financial Reporting Authority established under Section 132

of the Companies Act, 2013 or by the Institute of Chartered Accountants established under the Chartered Accountants Act, 1949 or under Section 447 of the Companies Act, 2013 by a Special Court established under Section 435 of the Companies Act, 2013. In view of the specific and special alternate remedies available against auditors, there is no question of invoking the jurisdiction under Sections 241 and 242 of the Companies Act, 2013 to seek any remedy or relief against the Appellant.

69. Almost similar plea has been taken by other Appellants including the partners of 'Deloitte Haskins & Sells LLP', Employees, Directors of 'IL&FS', the person who has renounced its Indian Citizenship, Independent Directors of 'IL&FS', Auditors and the Executive Directors of 'IL&FS' etc.

70. The Central Government has highlighted the brief background and circumstances necessitating the filing of the petition under Sections 241-242 of the Companies Act, 2013 and the proceedings thereafter, as under:

70.1. Due to the continuous failure of 'IL&FS' to service its debts and the imminent possibility of contagion effect on the financial market, the Department of Economic Affairs vide its Office Memorandum dated 30th September, 2018, requested the Ministry of Corporate Affairs to take action against the then Board of Directors of 'IL&FS' and its Group Companies under the Companies Act, 2013.

70.2. In view of the above, the Ministry of Corporate Affairs, the very same day, directed the Serious Fraud Investigation Office **("SFIO")** by way of an Office Order, to investigate the affairs of 'IL&FS' and its group companies.

70.3. On 1st October, 2018, the Ministry of Corporate Affairs filed Company Petition No. 3638 / 2018 under Sections 241 and 242 of the Companies Act, 2013 before the Tribunal. The reliefs sought were, *inter-alia,* (i) suspension of the then Board of Directors of IL&FS and subsequent appointment of a new Board of Directors in terms of Section 242(2)(k) of the Companies Act, 2013 (ii) that such Board of Directors be authorized to replace directors of subsidiaries etc. of IL&FS (iii) seeking leave of the Tribunal, Mumbai to file supplement/ enlarge / amend / modify the scope of the reliefs sought and prayers made in the petition by filing any other documents or application in view of the extraordinary nature of the circumstances.

70.4. It is submitted that the Ministry of Corporate Affairs approached the Tribunal by way of an application seeking a moratorium on creditor proceedings against IL&FS and its group companies and to enable formation of an orderly resolution plan in light of the current circumstances facing the IL&FS group. The Tribunal declined to grant such reliefs by way of an order dated 12th October, 2018.

70.5. It was submitted that this Appellate Tribunal in an appeal from the order dated 12th October, 2018 passed by the Tribunal, while recognising the exigent and extraordinary circumstances that had arisen due to the financial irregularities within the IL&FS group that became apparent, granted an order protecting the whole IL&FS Group against any potential coercive action by creditors and other parties, in larger public interest on 15th October, 2018.

70.6. On 31st November, 2018, in pursuance to the Office Order, the SFIO submitted its first report in respect of the involvement of the Committee of Directors of IL&FS and an Employee Welfare Trust associated with IL&FS.

70.7. On the basis of the 1st SFIO Report and *a prima-facie* opinion of the Institute of Chartered Accountants dated 4th December, 2018 (which categorically holds the auditors of IL&FS, IL&FS Financial Services Limited ("IFIN") and 'IL&FS Transportation Networks India Limited' ("ITNL") guilty of professional misconduct), the Ministry of Corporate Affairs filed an application under Section 130 of the Companies Act, 2013 before the Tribunal, Mumbai praying, *inter-alia,* that the books of accounts of IL&FS, IFIN and ITNL for the past five years be reopened and recast.

70.8 By an order dated 1st January, 2019, the Tribunal, Mumbai directed that the accounts of IL&FS, IFIN and ITNL for the past 5 years,

be re-opened and recast, observing that the affairs of these companies had indeed been mismanaged, casting a doubt on the reliability of their financial statements and accounts.

70.9 By an order dated 31st January, 2019, this Appellate Tribunal dismissed an appeal filed by one of the ex-directors against the order of the Tribunal, Mumbai allowing the re-opening and recasting of accounts.

70.10 Thereafter, on 22nd March, 2019, the Reserve Bank of India **("RBI")** submitted an inspection/investigation report on IFIN to the IFIN Board, pursuant to an investigation conducted by it under Section 45N of the Reserve Bank of India Act, 1934.

70.11 On 4th April, 2019, the ICAI, after giving the auditors a due hearing, passed a reasoned order holding the auditors of IL&FS, IFIN and ITNL guilty of professional misconduct.

70.12 Pursuant to the Office Order, the SFIO submitted its second report on 28th May, 2019, specifically in respect of IFIN ("2nd SFIO Report").

70.13 Based on the 2nd SFIO Report, a sanction order bearing reference number Legal-35/16/2019 was issued by the Ministry of

Corporate Affairs to the Regional Director (Western Region) and SFIO, requesting them to initiate appropriate proceedings.

70.14 In pursuance thereof, the SFIO, on 20th May, 2019 filed a Criminal Complaint before the Special Judge, Mumbai, against and amongst others, the parties sought to be impleaded.

71. Learned counsel for the Central Government submitted that the Tribunal has wide powers under Section 241(2) read with Section 242 of the Companies Act, 2013.

72. With regard to the former statutory auditors of 'IL&FS Financial Services Limited' ('IFIN') and its partners, it is submitted that the Central Government has not formed opinion on the basis of the SFIO Report as has been alleged by the Appellant(s). There are other facts, including 'RBI Inspection Report', 'ICAI Report' etc. which have also been taken into account while filing the application for impleading, *inter alia*, the Appellants.

73. Learned counsel for the Central Government has highlighted certain allegations as reported in the '2nd SFIO Report'/ 'RBI Inspection Report'/ 'ICAI Report' based on which the opinion is formed by the Central Government and placed in a tabular form:

S.NO	Parties	Specific Allegations in the SFIO Report/RBI Inspection Report/ ICAI Report
	AUDITORS	
1.	**Delloite Haskins & Sells LLP** - CA No. 190 of 2019 - Statutory Auditors from 2008-09 to FY 2017-18 - Proposed Addl. Resp No. 326 - Para 64, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 74	• Statutory auditors connived with the management of the company. • Concealed material information/facts by not reporting on fraudulently falsified books and financial statements from FY 2011-12 to 2017-18 • Did not report the true state of affairs of the company, particularly negative NOF and negative CRAR, which led to loss to creditors of company who invested in NCDs. • Auditors along with their engagement team did not perform their duties diligently. • Despite having knowledge of impact of funding of default borrowers for principal and interest payments, auditors did not report in the Auditors Report from FY 2013-14 to 2017-18. (non-compliance of section 143(1)(a)) • Attempt to postpone the provisioning, recognitions of NPA by transferring the loans by mere book entry which resulted in showing old loans as closed and non-provisioning of new loans.
2.	**Kalpesh J Mehta** - CA No. 193 of 2019 - Engagement Partner on Behalf of Delloite - Proposed Addl. Resp No. 324 - Para 62, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 73	
3.	**Udayan Sen** - CA No. 194 of 2019 - Partner in Delloite - Proposed Addl. Resp No. 323 - Para 61, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 72	
4.	**Shrenik Baid** - CA No. 195 of 2019 - Partner in Delloite - Proposed Addl. Resp No. 337 - Para 75, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 79	
5.	**N Sampath Ganesh** - CA No. 196 of 2019 - Engagement Partner on behalf of BSR & Associates - Proposed Addl. Resp No. 325 - Para 63, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 73	
6.	**BSR & Associates LLP** - CA No. 190 of 2019 - Joint Statutory Auditors from 2008-09 to FY 2017-18 - Proposed Addl. Resp No. 327 - Para 65, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 74	

	DIRECTORS	
7.	**Milind Patel** - CA No. 205 of 2019 - Joint Managing Director - Proposed Addl. Resp No. 321 - Para 59, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 72	• Aware of the potential problematic accounts which were getting stressed from the reports generated through Management Information System(MIS) of IFIN. • Adopted fraudulent practices to not let loan/credit facility be classified as NPA. • While lending to ITNL, breached RBI guidelines/directions and devised an illegal strategy to lend the money to its group companies. • Supported the group entities by lending through vendors/third parties. • Connived with management/directors and became mute spectators. • Overlooked impairment indicators in contravention of accounting standards.
8.	**Rajesh Kotian** - CA No. 190 of 2019 - Statutory Auditors from 2008-09 to FY 2017-18 - Proposed Addl. Resp No. 326 - Para 62, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 73	
	INDEPENDENT DIRECTORS	
9.	**Surinder Singh Kohli** - CA No. 214 of 2019 - Independent Director - Proposed Addl. Resp No. 328 - Para 66, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 74	• Part of the Audit Committee of IFIN • Aware about the stressed asset portfolio, the modus operandi used for granting loans to group companies of existing defaulting borrowers, preventing the account from being classified as NPA. • Did not ensure adequate disclosure or reporting of facts brought out by RBI Inspection Reports for FY 2016-17 and 2017-18 and non receipt of fees and income especially from group entities.
10.	**Subhalakshmi Panse** - CA No. 221 of 2019 - Independent Director - Proposed Addl. Resp No. 329 - Para 67, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 74	
	OTHER CATEGORIES OF DIRECTORS	
11.	**Neera Saggi** - CA No. 206 of 2019 - Independent Director - Proposed Addl. Resp No. 336 - Para 74, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 78	• Although appointed with the objective to help the company in improving corporate credibility and governance standards. • Ignored all alarming indicators. • Failed to save the interest of company and its stakeholders. • Aware about the stressed asset portfolio, the modus operandi used for granting loans to group companies of existing defaulting borrowers, preventing the account from being classified as NPA.

		• Connived with the management and continued lending from IFIN to group entities by causing wrongful loss to IFIN & its stakeholders. • Overlooked numerous impairment indicators in contravention of accounting standards and principles of prudence.
12.	**Manu Kochhar** - CA No. 211 of 2019 - CEO-Special Initiatives - Proposed Addl. Resp No. 326 - Para 71, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 76	
13.	**Deepak Pareek** - CA No. 212 of 2019 - Chief Financial Officer (CFO) - Proposed Addl. Resp No. 330 - Para 68, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 75	
14.	**Uday Ved** - CA No. 215 of 2019 - Independent Director - Proposed Addl. Resp No. 335 - Para 73, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 77	
15.	**Shahzad Dalal** - CA No. 225 of 2019 - Non-Executive Director - Proposed Addl. Resp No. 332 - Para 70, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 76	
16.	**Renu Challu** - CA No. 285 of 2019 - Independent Director - Proposed Addl. Resp No. 334 - Para 72, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 77	
	OTHER IMPLEADED PARTIES	
17.	**C. Sivasankaran** - CA No. 230 of 2019 - Proposed Addl. Resp No. 331 - Para 69, Annexure 1, Vol 1, CA 190 of 2014 @ Pg 75	• C. Sivasankaran was chairman of Siva Group of Companies. • His companies borrowed money from the IFIN on several occasions. • Sivasankaran had personal relationship Ravi Prathasarthy and Hari Sansakaran (ex- director of IL&FS) • Management of IFIN abused their position by giving loans to Siva Group of companies as some companies of Siva Group had failed to repay their earlier loans granted to them by IFIN. • Wrongful loss ensued to IFIN as amount could not be recovered from Siva Group of the companies. • Wrongful gain caused to C. Sivasankaran as the lending was fraudulently approved in furtherance of connivance with C. Sivasankaran.

74. It is submitted that Section 143 of the Companies Act, 2013 provides for powers and duties of the auditors and accounting standards. It provides that the financial statements provided by the Auditors should give a true and fair view of the state of company's affairs [Section 143(2)]. Further, Section 143(12) provides that if an auditor of the company, during the course of performance of his duties has reason to believe that an offence of fraud involving accounts, is being or has been committed in the company by its officers or employees, the auditors shall report to the Central Government. In view of the same, it is humbly submitted that the auditors failed to fulfil their statutory duties and report to the Central Government regarding the fraudulent accounts of 'IFIN'.

75. Further, Section 149(8) of the Companies Act, 2013 provides that company and independent directors shall abide by Schedule IV to the Companies Act, 2013, which provides for roles, functions and duties of the independent directors. It was submitted that it is the duty of the independent directors to report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy. Therefore, the independent directors have also failed to fulfil their statutory duties and report acts of fraud and suspected fraud, as statutorily obliged to.

76. Before deciding the issue, it is relevant to notice certain pleadings made by the Central Government in its application filed under Sections 241-242 of the Companies Act, 2013 before the Tribunal as under:

76.1. 'Infrastructure Leasing and Financial Services Limited' ('IL&FS'), is a Company incorporated under the Companies Act, 1956. Over the years the IL&FS has inducted institutional shareholders to include Life Insurance Corporation of India (LIC), ORIX Corporation- Japan (ORIX), State Bank of India and Abu Dhabi Investment Authority. Besides the above, the 'IL&FS Employees Welfare Trust' also holds significant shares in 1st Respondent. The shareholding pattern of the IL&FS, as on 31st March, 2018, as derived from the Annual Report of the IL&FS, for the year 2018, is as follows:

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

10	Others	1.17%
	TOTAL	**100%**

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

76.2. Although the equity shares of the IL&FS are not listed on any stock exchange, the secured non-convertible debentures as well as the non-convertible redeemable cumulative preference shares of the IL&FS are listed on the Bombay Stock Exchange. There are six major group companies of the 1st Respondent which contribute over 60% to the consolidated assets of the 'IL&FS Group'. A brief of the four major group companies is provided hereunder:-

a) IL&FS Transportation Networks Limited (ITNL)

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

b) 'IL&FS Financial Services Limited (IFIN)

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

c) IL&FS Energy Development Company Limited (IEDCL)

The IL&FS is engaged in the power sector through its subsidiary IEDCL, which develops, owns and operates power generation and transmission assets in India and abroad.

d) IL&FS Tamil Nadu Power Company Limited (ITNPCL)

'ITNPCL' is another subsidiary of the IL&FS engaged in the implementation of the thermal power project at Cuddalore in Tamil Nadu.

e) Noida Toll Bridge Limited

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

f) IL&FS Engineering and Construction Co. Limited

It is an Associate Company of IL&FS with over 42% equity. It is into multinational infrastructural development construction business.

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

76.3. That further it has come to light through various reports and filing by the 'IL&FS' itself that the group companies of the 'IL&FS' have started defaulting on their debt obligations, which defaults are likely to grow and become severe in the coming months. It has been admitted by the IL&FS in its company application no. 1044 of 2018:

(i) ITNL has been, in default on its debt obligations since June 30, 2018.

(ii) The IL&FS itself has been in default on its debt obligations since August 25, 2018.

(iii) IFIN, the key subsidiary of the IL&FS engaged in financial services, has been in default since September 12, 2018. This has led to the resignation of the Managing Director & CEO and four independent directors of IFIN on September 21, 2018.

(iv) IEDCL, the IL&FS's power generation subsidiary, has defaulted on its payment obligations since August 22 2018.

76.4. Furthermore, the IL&FS has admitted that total debt across the IL&FS Group is approximately Rs. 91,000 crore as on March 31, 2018 and the IL&FS is contemplating monetizing of significant assets of the group companies for servicing the debts besides seeking further financial assistance from the institutional shareholders by way of a proposed rights issue. It is further submitted that the consolidated debt of the company increased to Rs. 91,091.3 crore in 2018 from Rs. 48,671.3 crore in 2014. Interest outgo rose to Rs. 7,922.8 crore from Rs. 3,970.7 crore during the same period. By 2018, the company has not even been making enough profits to take care of its interest expense leading to the default. It has to be kept in mind that out of the Rs. 91,000 crore debt obligations of the IL&FS, Rs. 57,000 crore has been borrowed from the Public Sector Banks.

76.5. That subsequent to spreading defaults by the IL&FS Group, credit rating agencies CARE and ICRA have downgraded the credit rating of the Respondent No.1, ITNL and IFIN to 'default' or 'junk' grade. The said fact has also been admitted by the IL&FS in its company application no. 1044 of 2018. This indicate that IL&FS management was suppressing material information about its financial solvency and its ability to meet its obligation. The over exposure of loans and borrowings have been without prudent commercial practices and without any application of mind by the management of IL&FS over the several years. In fact, the management of

IL&FS is responsible to bring it to this low due to its acts of commission & omission for which Union of India has ordered an investigation into the affairs of IL&FS and its group companies through SFIO. The Union of India seeks leave of the Tribunal to bring the findings of investigation on record.

76.6. That from the financials and filings of the IL&FS and its group companies, it has been noticed that the flagship IL&FS holds 73.22% equity share capital in its direct listed company ITNL, out of which 98.23% is pledged. Similarly, IL&FS holds 50.42% equity share capital in another of its major subsidiary 'IL&FS Investment Managers Limited', all of which is pledged. Furthermore, the IL&FS also holds 42.25% equity share capital in one of its associate company namely 'IL&FS Engineering and Construction Company Limited' and 34.05% of that equity holding is also pledged which indicate that company has basically withdrawn from the financial management of its key subsidiaries as it has no financial left. Furthermore, IL&FS Investment Managers Ltd., a subsidiary of IL&FS is holding company of 'Noida Toll Bridge Company Ltd. (a Listed Company) wherein it holds 50.42% equity share capital of which all equity is pledged.

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

76.8. That in light of the above, it is stated that the IL&FS and Ors., being either members of the Board of Directors, Promoters, Auditors, etc. are privy to the inner working of their respective businesses, and as such cannot evade responsibility for the fraudulent activities, misfeasance, persistent negligence and continuous defaults in carrying out their duties. Further, as a result of this fraudulent intent of such a huge magnitude, the entire stock market would be adversely affected which will have cascading impact not only on IL&FS but on the business sentiment in particular and economy in general and on the large section of common investors and creditors, etc. The siphoning of funds have been systematically carried out by way of excessive withdrawal of remuneration and otherwise which is apparent as under:

No.	Name of the Director	Rs. in Million	SGD	Euro
1	Mr. Ravi Parthasarathi	3.66	-	1315.79
2	Hari Sankaran	4.24	-	2631.58
3	Arun K Saha	4.68	6000	5263.16

Further, the fraudulent intent has been so apparent that many of the directors realized that IL&FS along with its group companies has become titanic ship, thus resigned their Directorship.

The Ex-director(s) namely Sh. Ravi Ramaswamy Parthasarathy (DIN: 2392), Sh. Ramesh Bawa (DIN: 040523) and present Director(s) namely Sh. Hari Sankaran (DIN: 2386), Sh. Karunakaran Ramachand (DIN: 051769) are likely to flee the country overnight, therefore the Ministry has to make a request for look-out notice for these persons.

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

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

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

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

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

iii. NBFC licenses could be cancelled: In the wake of the IL&FS crisis, as many as 1,500 smaller NBFCs may have their licenses cancelled because these don't have adequate capital.

iv. Liquidity crunch: A liquidity crunch and recent events hitting market sentiment will lead to cost of funds for NBFCs increasing, impacting profitability.

v. Impact on debt market as reported by NSE:

Bond yields had increased already on the back of Oil Price and Rupee depreciating, Government bonds had seen yields rising from 7.70 to

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

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

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

On consolidated basis, the borrowing of IL&FS from banks and financial institutions (debentures, loans, cash credit and commercial paper) comes to about Rs. 63,000 crores as per the balance sheet of 2017-18. If the exposure of banks to the IL&FS Group is assumed to be about Rs. 53,000 crores, then considering that the exposure of the entire banking sector to all the NBFCs is about Rs. 3.3 lakh crores, IL&FS Group is not inconsequential, but, critical to the financial stability as its share in the total exposure of

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

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

i. The IL&FS Group has shown a loss of Rs. 2670 core for the year 2017-18 in the consolidated balance sheet. The leverage is about 13 times as the borrowing of about Rs.91000 crores is on the base of equity capital and reserves of about Rs. 6950 cores. The CRAR (Capital to Risk Weighted Asset Ratio) of 15% for Systemically Important Non-Deposit Accepting Non-Banking Finance Company (NBFC-ND-SI) would result in a leverage ratio of about 6-7 times and the CRAR of 30% (for core Investment Company) would result in a leverage of about 3-4 times.

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

ii. IFIN, a Subsidiary of IF&SL, is registered with the Reserve Bank of India (RBI) as a Systemically Important Non-Deposit Accepting Non-Banking Finance Company (NBFC-ND-SI). IFIN specializes in infrastructure financing transactions, with a unique combination of investment banking skill sets comprising of Debt Structuring and Distribution (DS&D), Corporate Advisory and Lending capabilities. IFIN has evolved as one stop solution provider for all the Funding, Debt raising and Advisory requirements of the clients. The RBI in its inspection reports required IFIN to consider exposures as per section 370 (1B) of the Companies Act, 1956 (now replaced with the Companies Act, 2013) for determining 'companies in the same group'. This impacts computation of Net Owned Funds (NOF) and Capital to Risk Assets Ratio (CRAR) of IFIN. The RBI has given time up to March 31, 2019 to fulfil

the minimum NOF and CRAR requirements as the IFIN does not satisfy these prudential requirements.

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

iv. The IL&FS Group is involved in many infrastructure projects by way of project financing and also equity and debt financing. Any impairment in its ability to finance and support the infrastructure projects would be quite damaging to the overall infrastructure sector, financial markets and the economy, considering its systemically important nature and its borrowing level of Rs.91000 crores.

The business model of IL&FS is such that the company borrows from the money market and debt market besides

bank borrowing to fund its income generating activities and assets, which are medium to long-term. So, there is a clear mismatch in its assets and liabilities. It is, therefore, imperative that the risk management framework of the company is robust. That is why RBI has issued the Non-Banking Financial Companies-Corporate Governance (Reserve Bank) Directions, 2015 for NBFCs. Although the Corporate Governance Principles are not strictly applicable to Core Investment Companies, however, Systemically Important Core Investment Companies are encouraged to follow these as a prudent measure. The said Directions provide for Risk Management Committee and reporting of its, role and functions, periodicity of the meetings and compliance with coverage and review functions, etc. The Risk Management Committee of IL&FS did not meet during the period 2015 to 2018 except once in July 2015. The responsibilities of the Risk Management Committee, inter-alia, include:

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

b. provision of guidance on strengthening of risk management practices to respond to emerging global and national market and regulatory developments;
c. approval of overall limits for management of credit risk, liquidity risk and market risks;
d. review of asset liability management reports and provision of directions on improved management of liquidity and interest rate risk;
e. review of the capital adequacy requirements of the Company and provision of recommendations for the consideration of the Board in relation to the parameters to be considered in this regard;
f. review of the Company's compliance programme; and
g. review of the status of any enquiry, investigation and other disciplinary action initiated by RBI, SEBI or other regulatory agencies.

Findings of this Appellate Tribunal:

77. As the matter is pending consideration before the Tribunal, we are not inclined to express any opinion whether the allegations made against one or other require further investigation and the order what is required to be passed in public interest.

78. The only question arises in these appeals is as to whether this Appellate Tribunal should interfere with the impugned order dated

9th August, 2019 whereby the Appellants have been impleaded as party Respondents.

79. In similar case of ***"Union of India, Ministry of Corporate Affairs v. Gitanjali Gems Ltd. & Ors. etc.— Company Appeal (AT) No. 103 of 2018 etc."*** while discussing wide powers of the Tribunal under Sections 241-242 of the Companies Act, 2013, conjointly read with Section 246 and Sections 337 to 341, this Appellate Tribunal held:

> *"38. In the interest of regulating the conduct of the Company's affairs the interim order cannot be restrictive to any particular or individual person, including the Company/companies, existing or erstwhile Officers and employees of the Companies if investigation for alleged fraud is pending.*
>
> *39. For the purpose of passing interim order the Tribunal cannot fix the personal liability of delinquent Directors or Managers or Officers or other employees in absence of any specific evidence. Therefore, during the process of investigation and pendency of an application under Section 241(2) read with Section 242 of the Companies Act, 2013 and in view of powers*

conferred under Section 221, the Tribunal is not only empowered to pass appropriate interim order against the Company but also against any person or individual, including the order to desist.

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42. The power of Tribunal is wide enough as is evident from sub-section (1) of Section 242 in terms of which 'it may make such order as it thinks fit', with a view to bringing to an end the matters complained of.

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45. From the aforesaid provisions, it is clear that on an application made by the Central Government alleging affairs of the Company are being conducted in a manner prejudicial to public interest, the Tribunal can pass any order in terms of Chapter XVI, which includes Section 242 and other provisions under the said Chapter.

46. Section 246 is part of Chapter XVI, the provisions mentioned therein will be also covered by sub-section (2) of Section 241. Therefore, in an application made by the Central Government

alleging conduct of the Company in a manner prejudicial to public interest, the provisions of Sections 337 to 341 will be also applicable mutatis mutandis to an application made to the Tribunal under Section 241 or Section 245.

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50. Therefore, on an application under sub-section (2) of Section 241, the Tribunal can pass not only any order under Chapter XVI and if it is read with Section 246, it will be evident that Sections 339, 340 and 341 being applicable mutatis mutandis, in relation to an application made to the Tribunal under Section 241, the Tribunal can pass order in terms of those extended provisions.

51. This apart under Section 420, the Tribunal is empowered to pass such orders as it thinks fit after giving the parties to any proceeding before it, a reasonable opportunity of being heard. The Tribunal has also inherent powers to make such orders as may be necessary for meeting the ends of justice or ***to prevent abuse of the process of***

the Tribunal under Rule 11 of the NCLT Rules, 2016.

52. Therefore, if sub-section (4) of Section 242 is read with Sections 339 & 340 and Section 221, it is clear that apart from ***'freezing of assets of company on inquiry and investigation'****, it is also open to the Tribunal to freeze the assets of any person, including other companies and individuals, even during inquiry and investigation of fraud under Section 212 of the Companies Act, 2013".*

80. Similar issue was raised by one Mr. Hari Sankaran, Ex-Director of 'IL&FS' who moved before the Hon'ble Supreme Court in ***"Hari Sankaran v. Union of India & Ors. (2019) 6 SCC 584"*** wherein it held:

"12. Now so far as the submission on behalf of the appellant that all the three provisions, viz., Section 130, Sections 211/212 and Sections 241/242 operate in different fields and in different circumstances and they are in the different Chapters and therefore any observation made while passing the order/orders with respect to a

particular provision may not be considered while passing the order under relevant provisions is concerned, it is required to be noted that all the three provisions are required to be considered conjointly. While passing an order in a particular provision, the endeavour should be to see that the order/orders passed under other provisions of the Companies Act are given effect to, and/or in furtherance of the order/orders passed under other Sections. Therefore, the observations made while passing order under Section 241/242 of the Companies Act can be said to be relevant observations for passing the order under Section 130 of the Companies Act. At this stage, it is required to be noted that even otherwise in the order passed by the Tribunal under Section 130 of the Companies Act, there is a specific observation made by the learned Tribunal with respect to mismanagement of the affairs of the company, and even with respect to the relevant earlier accounts prepared in a fraudulent manner.

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18. Now so far as reliance placed upon the subsequent report of the RBI and the objection by

the learned counsel appearing on behalf of the appellant to rely upon the subsequent report and the reliance placed upon the decision of this Court in the case of Mohinder Singh (supra) is concerned, as the impugned order passed by the learned Tribunal is in the larger public interest, this Court can take note of the subsequent development/report. However, at the same time, the same shall be in support of the order under challenge. Even otherwise, it is required to be noted and as observed hereinabove, independent to the subsequent report of the RBI, there is a specific finding with respect to the mismanagement and the fraudulent accounts. Therefore subsequent Report of the RBI Report can be taken note of, while upholding the order passed by the learned Tribunal under Section 130 of the Companies Act. As observed hereinabove, a larger public interest has been involved and reopening of the books of accounts and recasting of financial statements of the aforesaid companies is required to be carried out in the larger public interest, to find out the real truth, and as observed hereinabove both the conditions precedent while invoking

power under Section 130 of the Companies Act are satisfied/complied with, therefore in the facts and circumstances of the case, we are of the opinion that the order passed by the learned Tribunal passed under Section 130 of the Companies Act, confirmed by the learned Appellate Tribunal, is not required to be interfered with."

81. The Hon'ble Supreme Court in unequivocal terms has held that the provisions of Sections 130, 212 and 241/242 operate conjointly so as to give full effect to the provisions of the Companies Act, 2013.

82. It is not necessary to discuss Section 140(5) of the Companies Act, 2013 for the present as the main issue is still pending consideration. The Ex- Auditors are to be removed or not is not the subject matter of Section 241(2) read with Section 242 of the Companies Act, 2013, till such relief is sought for and granted. If any such finding is given by the Tribunal with regard to the Ex-Directors only thereafter this Appellate Tribunal can decide such issue.

83. In ***"Aliji Momonji & Co. v. Lalji Mavji & Ors.– (1996) 5 SCC 379"***, the Hon'ble Supreme Court held:

"5.....It is settled law by catena of decision of this Court that where the presence of the

respondent is necessary for complete and effectual adjudication of the dispute, though no relief is sought, he is a proper party. Necessary party is one without whose presence no effective and complete adjudication of the dispute could be made and no relief granted."

84. The question of grant of final relief against one or other is not the question for the present, as such we are not inclined to give such findings on such issue.

85. Section 424 of the Companies Act, 2013 deals with 'procedure before the Tribunal and Appellate Tribunal' as under:

*"**424. Procedure before Tribunal and Appellate Tribunal.**—(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [1]["or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and*

the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act [1]["or under the Insolvency and Bankruptcy Code, 2016"], the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

(e)issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it ex parte;

(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

(a)in the case of an order against a company, the registered office of the company is situate; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the

Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973."

86. As rules of natural justice are to be followed, if any order is passed against one or other, including investigation, it is always open to the Tribunal to ask such party to be impleaded.

87. The Tribunal is empowered to pass order under Section 242 of the Companies Act, 2013 in a petition under Section 241(2) if it forms opinion that the affairs of the company have been conducted in a manner prejudicial to the public interest. Once such opinion is formed by the Tribunal, it may pass any order as it deem fit and proper.

88. The allegations show that the 'IL&FS Group Companies' has suffered majority debt obligation of 'IL&FS'. Rs. 57,000 Crores out of Rs.91,000 Crores, is from public sector banks and institutions. The 'Life Insurance Corporation of India', 'State Bank of India', 'Central Bank of India' besides 'UTI AMC' etc. in whose favour the fund is payable could not be paid. There are number of funds including 'Army Pension Fund', 'Provident Fund' etc. who have invested in the Group Companies will suffer. In effect, the public in general may suffer as the 'Army Pension Fund', 'Provident Fund' etc. are not the Government money but of the public in general.

89. The various acts prejudicial to public interest have been highlighted which has cascading impact on various sectors of economy. The Department of Economic Affairs which is responsible for the financial stability of economy and in the Country too has raised Red Signals of the likely collapse of 'IL&FS' and has expressed its deep concern on the impact of Indian Economy in its Confidential Note dated 30th September, 2018.

90. In the circumstances, before passing any appropriate order in public interest and to save the economy of the Country from collapse, if the Tribunal is of the opinion that it requires to give appropriate hearing to the concerned parties, including those who audited 'IL&FS' and/ or those who have managed or were concerned with 'IL&FS' or its Group Companies, it cannot be held to be illegal.

We find no merit in these appeals. They are accordingly, dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
4th March, 2020
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04.03.2020:

N.B. After the Judgment was pronounced in the open Court, a request was made by the learned Counsel for the Appellant(s) to allow the interim order to continue for another two weeks to enable the Appellant(s) to decide their course of action. We allow the prayer and continue the interim order passed on 29th July, 2019 for another two weeks.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

Ash/RR