CIVIL APPEAL NOS. 8512-8527 OF 2019 and connected cases

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 8512-8527 OF 2019

ANUJ JAIN INTERIM RESOLUTION PROFESSIONAL FOR JAYPEE INFRATECH LIMITED .... **Appellant(s)**

Versus

AXIS BANK LIMITED ETC. ETC. .... **Respondent(s)**

WITH

CIVIL APPEAL NOS. 6777-6797 OF 2019

CIVIL APPEAL NOS. 9357-77 OF 2019
(ARISING OUT OF DIARY NO. 32881 OF 2019)

JUDGMENT

Dinesh Maheshwari, J.

Introductory

1. These appeals are essentially directed against the common order dated 01.08.2019 as passed by the National Company Law Appellate Tribunal, New Delhi[1] in a batch of appeals preferred by various banks and financial institutions whereby, the Appellate Tribunal set aside the order dated 16.05.2018, passed by the Adjudicating Authority, the National Company Law

1 Hereinafter also referred to as 'the Appellate Tribunal' or 'NCLAT'

Tribunal, Allahabad Bench[2] on the application moved by the Interim Resolution Professional[3] in the Corporate Insolvency Resolution Process[4] concerning the Corporate Debtor Company viz., Jaypee Infratech Limited[5] seeking avoidance of certain transactions, whereby the corporate debtor had mortgaged its properties as collateral securities for the loans and advances made by the lender banks and financial institutions to Jaiprakash Associates Limited[6], the holding company of JIL, as being preferential, undervalued and fraudulent, in terms of Sections 43, 45 and 66 of the Insolvency and Bankruptcy Code, 2016[7].

1.1. It may be noticed at the outset that the batch of appeals decided by the impugned common order dated 01.08.2019 also comprised of two appeals filed by the lenders of JAL, being Comp. App (AT) (Ins) No. 353 of 2018 and Comp. App (AT) (Ins) No. 301 of 2018 that were preferred against the orders passed by NCLT on 09.05.2018 and 15.05.2018 respectively, whereby NCLT approved the decision of IRP rejecting the claims of such lenders of JAL to be recognized as financial creditors of the corporate debtor JIL on the strength of the mortgage created by the corporate debtor, as collateral security of the debt of its holding company JAL. These two appeals also came to be allowed as per the result recorded in the impugned order dated 01.08.2019, though the

2 Hereinafter also referred to as 'the Tribunal' or 'NCLT' or 'the Adjudicating Authority'.
3 'IRP' for short.
4 'CIRP' for short.
5 'JIL' for short; also referred to as 'the corporate debtor'.
6 'JAL' for short.
7 Hereinafter also referred to as 'the Code' or 'IBC'.

entire discussion and the final conclusion therein had only been in relation to the order dated 16.05.2018 that was passed by NCLT on the application for avoidance filed by IRP. The appellant of Civil Appeal D. No. 32881 of 2019[8], IIFCL, apart from raising other contentions, has also questioned this aspect of the order impugned that the aforesaid two appeals, involving the question as to whether the lenders of JAL could be categorised as financial creditors of JIL for the purpose of IBC, have been allowed by NCLAT without recording any findings and without any discussion in that regard.

Brief Outline and the Issues Involved

2. Before proceeding further, we may draw up a brief outline of the subject-matter and the issues involved in these appeals.

2.1. As shall be noticed hereafter later, the CIRP concerning the corporate debtor JIL has already undergone several rounds and circles of proceedings in NCLT, NCLAT and at least twice over in this Court.

2.2. For what has been indicated in the introduction, it is evident that two major issues would arise in these appeals. One, as to whether the transactions in question deserve to be avoided as being preferential, undervalued and fraudulent, in terms of Sections 43, 45 and 66 of the Code; and second, as to whether the respondents (lender of JAL) could be recognized as financial creditors of the corporate debtor JIL on the strength of the mortgage created

8 Now numbered as Civil Appeal Nos. 009357-77 of 2019

by the corporate debtor, as collateral security of the debt of its holding company JAL.

2.3. For a preliminary insight into the first issue, suffice would be to notice that during CIRP, the Interim Resolution Professional preferred an application before the Adjudicating Authority seeking orders for avoidance of the impugned transactions, whereby several parcels of land were put under mortgage with the lenders of JAL, the holding company of JIL. The contention of IRP, that the transactions in question were preferential, undervalued and fraudulent within the meaning of Sections 43, 45 and 66 of the Code, were accepted in part by the Adjudicating Authority, the NCLT, in its order dated 16.05.2018 and necessary directions were issued for avoidance of at least six of such transactions. In other words, in relation to such six transactions, the security interest was ordered to be discharged and the properties involved therein were vested in the corporate debtor, with release of encumbrances. The NCLAT, however, took an entirely opposite view of the matter and upturned the order so passed by NCLT, while holding that the transactions in question do not fall within the mischief of being preferential or undervalued or fraudulent; and that the lenders in question (the lenders of JAL) were entitled to exercise their rights under the Code. Aggrieved, the IRP, one of the creditors of the corporate debtor JIL and the associations of home buyers, who have invested in the proposed projects of JIL and JAL, have preferred these

appeals.

2.4. As regards the second issue, noticeable it is that during CIRP, two of the respondent banks namely, ICICI Bank Limited and Axis Bank Limited, sought inclusion in the category of financial creditors of JIL but IRP did not agree and declined to recognize them as such. Being aggrieved by the decisions so taken by IRP, the said banks preferred separate applications under Section 60(5) of the Code before NCLT while asserting their claim to be recognized as financial creditors of the corporate debtor JIL, on account of the securities provided by JIL for the facilities granted to JAL. The NCLT rejected the applications so filed by the said banks, by way of its orders dated 09.05.2018 and 15.05.2018 respectively, while concluding that on the strength of the mortgage created by the corporate debtor JIL, as collateral security of the debt of its holding company JAL, the lenders of JAL could not be categorised as financial creditors of JIL for the purpose of the Code. As already noticed, the appeals against the said orders dated 09.05.2018 and 15.05.2018 are purportedly allowed as per the result recorded in the impugned order dated 01.08.2019, but without any discussion in that regard. Aggrieved, one of the lenders of the corporate debtor JIL, IIFCL (appellant of Civil Appeal D. No. 32881 of 2019) has also questioned this aspect of the order impugned while asserting that such mortgagees cannot be taken as financial creditors of the corporate debtor JIL.

Parties and their respective roles and interest in the matter

3. In view of the issues arising for determination in these appeals, with several parties carrying different roles, status and interests, worthwhile it would be to narrate at the outset, in brief, the relevant particulars of the key parties involved as follows:

3.1. Jaypee Infratech Limited (JIL):

It is the corporate debtor company in whose relation CIRP is pending; and the mortgage transactions concerning its properties were questioned in the application filed by the Interim Resolution Professional. Such transactions form the subject-matter of these appeals.

3.2. Jaiprakash Associates Limited (JAL):

It is the holding company of JIL; it had approximately 71.64% equity shareholding in JIL as on 31.03.2017. The impugned mortgage transactions were entered into in favour of its lenders.

3.3. Shri Anuj Jain:

He is the Interim Resolution Professional in CIRP concerning JIL who moved the application for avoidance of the transactions in question. He is the appellant in Civil Appeal Nos. 8512-27 of 2019.

3.4. Jaypee Greens Krescent Home Buyers Welfare Association; Jaypee Kasa Isles Welfare Association; Jaypee Kensington Boulevard Apartments Welfare Association; Garden Isle Welfare Association; Jaypee Klassic Apartment Welfare Association; Jaypee Kube Buyers Welfare Association; Wish Town Property Owners Welfare Society; KRH Buyers Association ABL Workplace:

They are the associations of home buyers who have invested in the projects of JIL and JAL. They are the appellants in Civil Appeal Nos. 6777-97 of 2019; and they also support the assertion of IRP that the transactions in question cannot be countenanced.

3.5 India Infrastructure Finance Company Limited:

It is the financial creditor of the corporate debtor JIL and has filed Civil Appeal in Diary No. 32881 of 2019 while asserting that the transactions in question need to be avoided; and that the lenders of JAL related with such transactions cannot be the financial creditors of JIL for the purpose of CIRP in question.

3.6 Axis Bank Limited; Standard Chartered Bank Limited; ICICI Bank Limited; State Bank of India; United Bank of India; UCO Bank; The Karur Vyasa Bank (P) Limited; L&T Infrastructure Finance Company Limited; Central Bank of India; Canara Bank; Karnataka Bank Limited; IFCI Limited; Allahabad Bank; Jammu & Kashmir Bank; South Indian Bank Limited; Bank of Maharashtra and other banks and financial institutions:

They are the lenders of JAL in whose favour the properties of JIL were put under mortgage by way of the impugned transactions. They oppose the assertions of appellants while maintaining that the transactions in question are not avoidable and are valid, investing them with the capacity of financial creditors of JIL. They are the principal contesting respondents in these appeals.

The transactions in question

4. Having taken note of the principal contesting parties and their respective interests, it would also be worthwhile to take note of the relevant particulars of the properties and the transactions involved in this dispute. It may be usefully noticed that out of seven transactions that were questioned by IRP, the Adjudicating Authority held that six of them were preferential, undervalued and fraudulent and passed the orders for their avoidance while accepting the contentions of IRP. It may also be observed that five out of these six transactions were preceded by previous mortgage transactions for securing the loans/facilities to JAL. The transactions in question, with previous transactions and flow thereof, as given out during the course of submissions, could be comprehensively viewed as under: -

4.1. The transactions in favour of the Consortium of Banks and Financial Institutions:

Property/transaction in question	**Previous transaction/s and flow thereof**
Mortgage deed dated 29.12.2016 for 167.229 acres of land situated at Village Chhalesar and Chaugan, Tehsil Etmadpur, District Agra, Uttar Pradesh executed by JIL in favour of Axis Trustee Services Ltd. to provide an additional security for term loans of Rs. 21081.5 crores sanctioned as a consortium to JAL.[9]	Initial mortgage deed dated 24.02.2015 released on 15.09.2015 and re-mortgaged on 15.09.2015 (changing facility amount from Rs. 3250 crores (appx.) to Rs. 24109 crores); thereafter released on 29.12.2016 and again re-mortgaged on 29.12.2016 (changing facility amount from Rs. 24109 crores to Rs. 23491 crores).

9 Hereinafter also referred to as 'Property No. 1'

Mortgage deed dated 29.12.2016 for 167.9615 acres of land situated at Village Tappal, Kansera and Jahangarh, Tehsil Khair, District Aligarh, Uttar Pradesh executed by JIL in favour of Axis Trustee Services Ltd. to provide as an additional security for term loans of Rs.21081.5 crores sanctioned by the consortium to JAL.[10]	Initial mortgage deed dated 24.02.2015 released on 15.09.2015 and re-mortgaged on 15.09.2015 (changing facility amount from Rs. 3250 crores (appx.) to Rs. 24109 crores); thereafter released on 29.12.2016 and again re-mortgaged on 29.12.2016 (changing facility amount from Rs. 24109 crores to Rs. 23491 crores).

4.2. The exclusive mortgage transactions in favour of ICICI Bank Limited:

Property/transaction in question	**Previous transaction/s and flow thereof**
Mortgage deed dated 07.03.2017 for 158.1739 acres situated at Village Jaganpur and Aurangpur, Uttar Pradesh, executed by JIL in favour of IDBI Trustee-ship Services Limited in the capacity of security trustee for term loan of Rs.1200 crores granted by ICICI Bank Limited to JAL against the facility agreement dated 25.05.2015.[11]	Initial mortgage deed dated 12.05.2014 for 433.35 acres of land, followed by release of land admeasuring 240 acres vide release deed dated 30.12.2015 along with release of land admeasuring 35.03 acres vide release deed dated 24.06.2016. Further release of 158.1739 acres of land vide release deed dated 07.03.2017 and thereafter re-mortgaged on 07.03.2017.
Mortgage deed dated 07.03.2017 for 151.0063 acres situated at Village Jikarpur, Tehsil Khair, District Aligarh, Uttar Pradesh, executed by JIL in favour of IDBI Trustee-ship Services Limited in the capacity of security trustee for term loan of Rs.1200 crores	Initial mortgage deed dated 12.05.2014 released on 07.03.2017 and re-mortgaged on 07.03.2017.

10 Hereinafter also referred to as 'Property No. 2'
11 Hereinafter also referred to as 'Property No. 3'

granted by ICICI Bank Limited to JAL against the facility agreement dated 25.05.2015.[12]	

4.3. The exclusive mortgage transaction in favour of the Standard Chartered Bank Limited:

Property/transaction in question	**Previous transaction/s and flow thereof**
Mortgage deed dated 24.05.2016 for 25.0040 acres of land situated at Village Sultanpur, Sector-128, Noida, District Gautam Budh Nagar, Uttar Pradesh executed by JIL in favour of IDBI Trusteeship Services Ltd, as additional security, against the facility agreement dated 29.08.2012 between Standard Chartered Bank and JAL of Rs.400 crores. The security was further extended for facility II for Rs.450 crores on 27.12.2012; for facility III for Rs.538.16 crores on 29.04.2015; for facility IV for Rs.81.84 crores on 29.04.2015 and for working capital facility Rs.297 crores on 29.08.2012.[13]	Initial mortgage deed dated 24.06.2009, extended by mortgage deed dated 27.11.2012 (for increased facility amount of Rs. 1300 crores as compared to Rs. 900 crores earlier). Vide mortgage on 23.03.2013, additional land admeasuring 25.0040 acres was added in the original land parcel to secure increased facility amount of Rs. 1750 crores as compared to Rs. 1300 crores earlier against the facility agreement dated 29.08.2012 for an amount of Rs. 400 crores. Security further extended for Facilities II, III and IV as mentioned in Column 1. The extended mortgage deed dated 23.03.2013 was released vide release deed dated 04.11.2015 (changing facility amount from Rs.1750 crores to Rs. 1470 crores) and re-mortgaged on 24.05.2016 (increasing facility amount from 1470 crores to Rs. 1767 crores).

12 Hereinafter also referred to as ‘Property No. 4’
13 Hereinafter also referred to as ‘Property No. 5’

4.4. The sixth transaction in question had been the exclusive mortgage transaction in favour of State Bank of India that was not preceded by any earlier transaction; the same had been as under:-

> Mortgage deed dated 04.03.2016 for 90 acres of land situated at Village Chaugan Tehsil Elmadpur, District Agra, Uttar Pradesh, executed by JIL in favour of State Bank of India against the facility agreement dated 26.03.2015 granting Short Term Loan Facility to JAL of Rs.1000 crores.[14]

4.5. Yet another transaction was questioned by IRP as being avoidable but the Adjudicating Authority held the same to be not falling within the relevant time as provided under Section 43 of the Code. The particulars of this transaction are as follows:

> Mortgage deed dated 12.05.2014 for 100 acres of land situated at Village Tappal, Tehsil Khair, District Aligarh, Uttar Pradesh executed by JIL in favour of ICICI Bank Limited against the facility agreement dated 12.12.2013 granting Term Loan of Rs. 1500 crores and overdraft amount of Rs. 175 crores to JAL.[15]

The relevant factual and background aspects

5. Having taken note of the principal parties to the dispute and the transactions/properties involved, but before dilating on the issues, we may briefly narrate the background in which the present CIRP is underway as also the orders passed by this Court, for ensuring its completion in accordance with law and towards the larger benefit of stakeholders.

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14 Hereinafter also referred to as 'Property No. 6'

15 Hereinafter also referred to as 'Property No. 7' (As regards this description, it is pointed out on behalf of the respondent ICICI Bank that it had been of 'Term Loan of Rs. 1500 crores under the Corporate Rupee Loan Facility agreement and General Conditions dated 12.12.2013 and mortgage deed was dated 10.03.2014')

6. JAL is stated to be a public listed company with more than 5 lakh individual shareholders. In the year 2003, JAL was awarded the rights for construction of an expressway from Noida to Agra. A concession agreement was entered into with the Yamuna Expressway Industrial Development Authority. Coming on the heels of this project, JIL was set up as a special purpose vehicle. Finance was obtained from a consortium of banks against the partial mortgage of land acquired and a pledge of 51% of the shareholding held by JAL. Housing plans were envisaged for the construction of real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur. Several other aspects of the dealings by these companies, their creditors and other stakeholders need not be dilated for the present purpose.

6.1. The crucial and relevant part of the matter is that IDBI Bank Limited instituted a petition under Section 7 of the Code before the NCLT, seeking initiation of Corporate Insolvency Resolution Process against JIL, while alleging that JIL had committed a default in repayment of its dues to the tune of Rs. 526.11 crores. JIL filed its objections to the petition but later on, withdrew the objections and furnished consent for resolution plan under the provisions of the Code. On 09.08.2017, NCLT initiated the CIRP in respect of JIL. An order of moratorium was issued under Section 14 by which, the institution of suits and continuation of pending proceedings, including execution proceedings were prohibited and an Interim Resolution Professional

was appointed. On 14.08.2017, IRP, in pursuance of the order of NCLT, called for submissions of claims by financial creditors in Form-C, by operational creditors in Form-B, by the workmen and employees in Form-E and by other creditors in Form-F. On 16.08.2017, the Insolvency and Bankruptcy Board of India made an amendment to its regulations and Regulation 9(a) was inserted to include the claims by other creditors. On 18.08.2017, the Board released a press note that the home buyers could fill in Form-F as they could not be treated at par with financial and operational creditors.

6.2. The aforesaid position led to the proceedings in this Court that were dealt with in a batch of petitions led by **Writ Petition (Civil) No. 744 of 2017: *Chitra Sharma and Ors. v. Union of India and Ors.*** Several orders were passed by this Court in the said batch of petitions from time to time, *inter alia*, to the effect that IRP was permitted to take over management of JIL and was directed to ensure that necessary provisions were made to protect the interests of home buyers. Various orders were also made with directions to JAL, as holding company of JIL, for making deposits in the Court, particularly looking to the claim of refund being made by some of the home buyers. This Court also took note of the facts that CIRP commenced on 09.08.2017; the statutory period of 180 days for concluding the CIRP had come to an end; and even the extended statutory period of 90 days also ended on 12.05.2018 but then, by way of the Amendment Ordinance, 2018, the home buyers were accorded the statutory recognition as financial creditors w.e.f. 06.06.2018.

While finally disposing of the matters on 09.08.2018, this Court took note of the interest of home buyers as also the creditors of JIL and JAL, the status of proceedings and the statutory provisions as then obtaining and ultimately issued the following directions: -

> "(i) In exercise of the power vested in this Court under Article 142 of the Constitution, we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders in accordance with the provisions of the IBC;
>
> (ii) We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression "financial creditors";
>
> (iii) We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three short-listed bidders whose bids or, as the case may be, revised bids may also be considered;
>
> (iv) JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of Section 29A;
>
> (v) RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;
>
> (vi) The amount of Rs 750 crores which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon be transferred to the NCLT and continue to remain invested and shall abide by such directions as may be issued by the NCLT."

6.3. It had been during pendency of the aforesaid proceedings that the application leading to present appeals came to be filed by IRP on 06.02.2018, complaining against the transactions in question. However, before taking note of the matters involved in such application filed by IRP and, for completion of

the narration about the orders passed by this Court, we may also point out that during the CIRP of JIL, an application came to be made by IDBI bank, for excluding the period of pendency of the application for clarification regarding the manner of counting of the votes of the concerned financial creditors, for the purpose of the period of 270 days for completion of corporate insolvency resolution process but, during the pendency of such application, NCLT, by its order dated 06.05.2019, called upon the authorities and the representatives of allottees and others to file reply on the necessity to proceed further with CIRP for considering the resolution plan received from the concerned bidder. The IDBI Bank assailed this order of NCLT by way of an appeal before the NCLAT that came to be decided on 30.07.2019 whereby, NCLAT granted relief to exclude the period from 17.09.2018 to 04.06.2019 for the purpose of counting 270 days of CIRP period and issued consequential directions. This led to further appeals in this Court[16], which were considered and decided on 06.11.2019.

6.3.1. In the order dated 06.11.2019, we took note of the fact that CIRP in relation to JIL stood revived in view of the directions in *Chitra Sharma* (supra) as also the amendments brought about in IBC. In the peculiar, rather extraordinary, situation obtaining in the matter, we passed the orders under the plenary powers so as to ensure that an attempt was made for revival of the corporate debtor JIL, lest it was exposed to liquidation process while taking

16 Being Civil Appeal No. 8437 of 2019 [@ D No. 27229 of 2019]: Jaiprakash Associates Ltd. & Anr. v. IDBI Bank Ltd. and connected case

note of the unanimity amongst the parties that liquidation of JIL must be eschewed; and while also taking note of the time limit for completion of Insolvency Resolution Process as per third proviso to Section 12(3), which came into effect from 16.08.2019. In the given circumstances, we passed the following order for the purpose of substantial and complete justice to the parties and in the interest of all the stakeholders:

> "i) We direct the IRP to complete the CIRP within 90 days from today. In the first 45 days, it will be open to the IRP to invite revised resolution plan only from Suraksha Realty and NBCC respectively, who were the final bidders and had submitted resolution plan on the earlier occasion and place the revised plan(s) before the CoC, if so required, after negotiations and submit report to the adjudicating authority NCLT within such time. In the second phase of 45 days commencing from 21st December, 2019, margin is provided for removing any difficulty and to pass appropriate orders thereon by the Adjudicating Authority.
>
> ii) The pendency of any other application before the NCLT or NCLAT, as the case may be, including any interim direction given therein shall be no impediment for the IRP to receive and process the revised resolution plan from the abovenamed two bidders and take it to its logical end as per the provisions of the I & B Code within the extended timeline prescribed in terms of this order.
>
> iii) We direct that the IRP shall not entertain any expression of interest (improved) resolution plan individually or jointly or in concert with any other person, much less ineligible in terms of Section 29A of the I & B Code.
>
> iv) These directions are issued in exceptional situation in the facts of the present case and shall not be treated as a precedent.
>
> v) This order may not be construed as having answered the questions of law raised in both the appeals, including as recognition of the power of the NCLT / NCLAT to issue direction or order not consistent with the statutory timelines and stipulations specified in the I & B Code and Regulations framed thereunder."[17]

17 It may also be noticed that by another order dated 03.02.2020, while accepting the reasons stated in an application filed by the IRP pointing out various difficulties and unavoidable circumstances which

7. Having thus referred to the orders previously passed in relation to the CIRP in question, we may, for complete narration of the orders passed by this Court, also refer to the fact that in this batch of appeals, the extensive arguments were finally concluded on 10.12.2019. Even while reserving the orders, looking to the facts and circumstances of the case, we stayed the operation of the order passed by NCLAT, insofar relating to the prayer of the lender-banks of JAL for treating them as financial creditors of JIL. The relevant part of the order dated 10.12.2019 reads as under: -

> "Civil Appeal @ Diary No(s). 32881/2019
>
> These appeals take exception to the decision of the National Company Law Appellate Tribunal allowing the appeal(s) filed by the lender-Banks of Jayprakash Associates Limited (JAL) claiming to be financial creditors(s) of Jaypee Infratech Limited (JIL). The National Company Law Tribunal had rejected that claim but we find that in the impugned judgment, without dealing with the reasons recorded by the National Company Law Tribunal, the Appellate Tribunal allowed the appeal(s) filed by the stated lender-Banks(s), who were claiming to be the financial creditor(s) of JIL.
>
> After fully hearing counsel for the parties, *prima facie*, we are of view that lender-Banks of JAL cannot be regarded as financial creditor(s) of JIL. We would elaborate on this aspect in our final judgment. Be that as it may, it is appropriate that we must stay the operation of the impugned judgment(s) of the Appellate Tribunal lest any confusion occurs in the revival process of JIL and the constitution of Committee of Creditors thereof, in view of the impugned order passed by the National Company Law Appellate Tribunal. Ordered accordingly.
>
> We clarify that the stay of operation is only in respect of order passed on the application(s) moved by the lender-Bank(s) of JAL before the National Company Law Appellate Tribunal for a declaration that they be regarded as financial creditor(s) of JIL and included in the Committee of Creditors of JIL."

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have delayed the culmination of proposal for approval of resolution plan, though submitted within the time frame prescribed by this Court, we had extended the time by four weeks for approval of the resolution plan, in the proceedings now being dealt with by the Principal Bench of NCLT at New Delhi.

The Application by Interim Resolution Professional and the order passed by NCLT

8. Having thus referred to the orders already passed in relation to the CIRP in question, we may now advert to the application filed by IRP forming subject-matter of the first issue involved in these appeals.

9. The IRP, in terms of his duties under clause (j) of Section 25(2) of the Code[18], made the application under consideration before the Adjudicating Authority stating, *inter alia*, that the corporate debtor was itself in dire need of funds; and was facing severe liquidity crunch to complete the construction of projects and deliver flats to home buyers as well as to honour the payment obligations to financial creditors, including the Fixed Deposit Holders. It was contended that JIL could have sold/mortgaged its unencumbered land to raise funds to complete the construction of flats in a timely manner and fulfil its obligation to its creditors and prevent value deterioration or erosion or insolvency but then, the mortgages in question were created in a highly questionable manner and in complete disregard to the interests of the creditors and stakeholders of the corporate debtor. Also, that the mortgage of land was

18 The relevant parts of Section 25 read as under:

> "**Duties of resolution professional. -** (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.
>
> (2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:-
>
> *** *** ***
>
> (j) file application for avoidance of transactions in accordance with Chapter III, if any;
>
> …"

in nature of asset stripping and was entered with intent to defraud the creditors of the corporate debtor without obtaining the approval of shareholders.

9.1. In opposition to the application, it was contended that the financial position of the corporate debtor was very strong notwithstanding the temporary financial crunch; that JAL was helping JIL in various ways and hence, creation of impugned mortgages was not unusual, but merely reciprocal; and such reciprocal accommodation cannot be termed without consideration. It was also contended that no transaction which was permitted by law and entered into transparently could amount to 'carrying on business for a fraudulent purpose'. It was further contended that the impugned mortgages had not been created on account of any antecedent debt liability owed by the corporate debtor; they had been within the ordinary course of business of corporate debtor and the transferees; and were not within the statutory period of one year and, therefore, Section 43 of IBC would not apply. It was maintained that the transactions in question were reciprocal and could not be termed as without consideration or undervalued. According to the contesting parties, when the essential jurisdictional conditions were not satisfied, the provisions of Section 66 of IBC were not attracted.

10. The NCLT, after having heard the parties and having scanned through the record, held that the transactions in question were to defraud the lenders of the corporate debtor JIL, as 858 acres of unencumbered land owned by the corporate debtor to secure the debt of the related party JAL was mortgaged in

the midst of the corporate debtor's immense financial crunch, while continuing with default towards the home buyers and financial creditors and after it had been declared as Non Performing Asset[19], in utter disregard to fiduciary duties and duty of care to the creditors; and further that the mortgage of land was created without any counter guarantee from the related party and with no other consideration being paid to the corporate debtor. The Tribunal was of the view that at the time when the mortgage was created, the corporate debtor was already in default to its lenders and it was unlikely that its lenders would have provided no-objection for creation of mortgages to secure the debt of a related party as that would have compromised not only the recovery of their dues but also the interests of thousands of home buyers waiting for their homes with investment of their hard earned money. The Tribunal also observed that even though the nominees of lenders attended the Board Meeting of the corporate debtor in which decision to mortgage the land was taken, but that cannot be treated as approval or no-objection of lenders, as the lenders invariably have covenants in the loan agreement that require their approval for creating interest in favor of any one of the unencumbered assets of the borrower. Moreover, directors of the corporate debtor (JIL) and the related party (JAL) were well aware of the fact that the corporate debtor was in default and had been declared as NPA by several creditors. The Tribunal, thus, formed the opinion that when the directors of the corporate debtor were fully aware that

19 'NPA' for short

they were in the twilight zone and insolvency was imminent, they ought to have exercised due diligence in minimizing the potential loss to the creditors but they entered into such transactions which *ex facie* gave benefits to the related party JAL, with a clear intent to defraud the creditors of JIL. The Tribunal further observed that the land in question could have been sold to generate cash that would have been sufficient to complete the construction of flats and the home buyers are directly and adversely affected by such a decision.

10.1. With respect to Section 43 of IBC, the NCLT held that the transaction of creating a security interest by way of mortgage in favour of lenders of the third party (JAL) on the unencumbered land of the corporate debtor without any consideration or counter guarantee cannot be treated as transfer in the ordinary course of business or financial affairs of the corporate debtor. Further, it did not benefit either the business or finances of the corporate debtor in any way and hence, was not covered under 'financial affairs'. The Tribunal held that the phrase under consideration cannot be interpreted to mean that the ordinary course of business also includes the transferee's ordinary course of business because transferee can never do the transfer himself; and that the words 'the transfer made' indicate that they relate to the transferor and not the transferee. As regards 'relevant time' for the purpose of sub-section (4) of Section 43 of the Code[20], the Tribunal observed that the Code itself has

20 This "relevant time" for the purpose of avoidance of preferential transactions is now commonly referred to as "look-back period".

provided a retrospective effect to the provisions of Section 43(4)(a) wherein it is stated that ‘it is given to a related party, during two years preceding the insolvency commencement date’. This, according to NCLT, indicates that the retrospective effect is laid down in the legislation itself and thus, the look-back period for the transactions was made dependent on the insolvency commencement date and not on the date when the Insolvency and Bankruptcy Code came into effect (01.12.2016). The Tribunal, therefore, held that for transactions of a related party, the look-back period was two years preceding the insolvency commencement date and hence, the relevant period for examining the transactions in question would be from 10.08.2015 to 09.08.2017 (date of commencement of CIRP).

10.2. The Tribunal made in-depth analysis of the facts of the case, particularly those related with the transactions in question as also the provisions of law applicable and, while rejecting the contentions urged on behalf of the opposing parties, including JAL, observed and held as under:

> “After the elaborate discussion, we have decided that impugned transactions are preferential transactions as defined in the subsection (2)(a) of Section 43 of insolvency and bankruptcy code 2016. We have found that corporate debtor Jaypee Infratech Ltd (JIL) has by way of mortgage of unencumbered land created security interest in favour of lenders of the Jaiprakash Associates Ltd. (JAL), which happens to be the holding company of JIL, without any consideration. We have also found that the corporate debtor was facing liquidity crunch and their accounts were declared as NPA and even after formation of Joint Lender Forum, without obtaining approval from Joint Lender Forum, unencumbered land of the corporate debtor has been mortgaged in favour of lenders of JAL. There by this transfer has the effect of

putting the JAL, one of the creditors of JIL in a beneficial position than it would have been in the event of distribution of assets being made by section 53 of the code.

The said mortgage of immovable properties, i.e. of the unencumbered land of the corporate debtor has been made without any consideration to the corporate debtor. Therefore the said transaction is covered under the umbrella of Sec 45(1) of the Code and will be treated as an undervalued transaction as defined under section 45 of the Code.

*** *** ***

In this case, we have found that impugned transactions are covered under preferential transactions as defined in section 43(2)(a) of the Code. Therefore, it cannot be said that section 45 does not apply for these transactions.

The impugned mortgage of unencumbered land parcels of the Corporate Debtor in favour of lenders of the JAL to create a security interest are transactions between the Corporate Debtor, lenders of JAL and JAL, who happens to be an Operational Creditor of the Corporate Debtor.

It is true that the collateral security is common practice in loan transactions. It is on record that in this case, the Corporate Debtor was under liquidity crunch and its accounts were declared NPA by LIC and other creditors. The Joint Lender Forum was formed to deal with the situation. But the Corporate Debtor entered into the transaction even without taking prior approval of Joint Lender Forum and mortgaged its unencumbered land in favour of the lenders of the JAL.

In the circumstances stated above it is clear that the impugned preferential transactions are also undervalued transactions and covered under section 45(1) of the Code. It is also clear that these transactions are undertaken during the relevant period of 2 years from the date of initiation of Corporate Insolvency Process as provided under section 46(1)(ii) of the Code. Therefore, this issue is also decided in positive, in favour of applicant Resolution Professional and against the Corporate Debtor.

In view of the above, it is clear that the mortgage of land of JIL in favour of lenders of JAL, amounts to transfer of interest in property of JIL for the benefit of its creditor i.e. JAL and putting it in a beneficial position vis-à-vis other creditors is a preferential transactions U/s 43(2)(a) & (b).

The transactions were executed within the look back period of two years before the commencement of Insolvency proceeding and is therefore covered U/s 43(4)(a). Further, transaction cannot be

> treated is in ordinary course of business or financial affairs of Corporate Debtor and is not excluded U/s 43(3)."

10.3. The Tribunal concluded in its order as follows:

> "On the above basis, it is clear that the company application filed by the Resolution Applicant deserves to be allowed. Hence, is allowed.
>
> ORDER
>
> The company application filed by the Resolution Professional under Sec. 66, 43 & 45 of the Insolvency and Bankruptcy 2016 is allowed. The impugned transactions, details of which are given in the schedule of the judgment are declared as fraudulent, preferential and undervalued transactions as defined under section 66, 43 and 45 of the Code respectively.
>
> Transactions given in the following schedule of property have been found as preferential, undervalued and fraudulent, therefore, we pass the order for release and discharge of the security interest created by the Corporate Debtor in favour of lenders of the Jaiprakash Associates Ltd. under the provision of Section 44(c) of the Insolvency and Bankruptcy Code 2016. We also pass an order under Section 48(a) of the Code that the properties mortgaged by way of preferential and undervalued transactions shall from now on be deemed to be vested in the Corporate Debtor."[21]

Appeals before NCLAT: the impugned order

11. Assailing the aforesaid order passed by NCLT accepting the application of IRP in relation to six of the mortgage transactions, the aggrieved parties filed separate appeals before the Appellate Tribunal, the NCLAT. The Appellate Tribunal took note of the facts of the case and the rival contentions and

21 In the schedule to the order aforesaid, NCLT gave out the description of six transaction with particulars of the properties which were treated as preferential, undervalued and fraudulent and also gave the description of one transaction that was not coming within the ambit of 'relevant time' per Section 43 of the Code. (as fully taken note of in paragraph 4 and its sub-paragraphs under the heading 'Transactions in question' *ibid*.).

proceeded to upturn the order passed by NCLT on the considerations as indicated *infra*.

11.1. As regards the assertion of IRP that the transactions in question were preferential transactions within the relevant time as envisaged by Section 43 of the Code, the NCLAT observed that the corporate debtor had created interest over its property, but such interest had not been created in favour of any creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor and hence, Section 43(2)(a) of the Code was not attracted. It was further observed that the mortgages in question were made in the ordinary course of business and financial affairs of the transferees, ruling out the applicability of Section 43 as such and hence, the Adjudicating Authority had no power to pass the order under Section 44 of the Code. The Appellate Tribunal observed and held, *inter alia*, as follows:

> "62. In the present case, the 'Corporate Debtor' has created interest on the property of the 'Corporate Debtor', but such interest has not been created in favour of any creditor or a surety or a guarantor *for or on account of an antecedent financial debt or operational debt or other liabilities* ***owed by the 'Corporate Debtor'.***
>
> 63. The aforesaid interest on the property of the 'Corporate Debtor' has been created in all these cases with regard to financial debt given by the Appellants to 'Jaiprakash Associates Ltd.', which is not the 'Corporate Debtor'.
>
> 64. Thus, it is clear that the interest on the property of the 'Corporate Debtor' has not been created in favour of the Appellants- 'Financial Creditors' *of an antecedent financial debt of the Appellants owed by the 'Jaypee Infratech Ltd.' ('Corporate*

> *Debtor')*. Therefore, we hold that clause (a) of sub-section (2) of Section 43 is not attracted in any of the case of the Appellants Bank, thereby none of the Appellants Bank come within the meaning of 'deemed to have given a preference', as used in Section 43. Therefore, the mortgage(s) created in their favour cannot be annulled on the ground of preferential transaction in terms of Section 43 (2) (a) of the 'I&B Code'.
>
> 65. Clause (b) of sub-section(2) of Section 43 relates to transfer under clause (a) of sub-section (2) of Section 43, which in effect puts such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53. As clause (a) of sub-section (2) of Section 43 is not attracted, the question of applicability of clause (b) of sub-section (2) of Section 43 does not arise.
>
> 66. Apart from the aforesaid position of law in respect of mortgage, in question, as per sub-section (3) of Section 43, for the purposes of sub-section (2), "a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the 'Corporate Debtor' or the transferee". The mortgages in question which were made in favour of the Appellants-Banks and Financial Institutions have been made in ordinary course of business and financial affairs of the transferee, as apparent from the relevant facts.
>
> 67. Therefore, we hold that Section 43 is not attracted to any of the transaction/mortgage(s) made in favour of the Appellants."

11.2. The Appellate Tribunal further proceeded to hold that the provisions of Section 45 of Code, for avoidance of undervalued transactions, were not applicable in relation to the transactions in question while observing as under:-

> "71. For holding a transaction undervalued, the 'Resolution Professional'/'Liquidator' is required to examine the transactions which were made during 'the relevant period' as prescribed under Section 46, if any of it is undervalued. As per sub-section (2) of Section 45, the transaction shall be considered 'undervalued' *'where the 'Corporate Debtor' makes a gift to a person or enters into a transaction with a person which involves the transfer of one or more assets by the 'Corporate Debtor' for a consideration the*

> *value of which is significantly less than the value of the consideration provided by the 'Corporate Debtor' and such transaction has not taken place in the ordinary course of business of the* '*Corporate Debtor'*.'
>
> 72. In these appeals, we find that the transactions as has been made i.e. mortgage(s) in favour of the Appellants as and when made against the amount payable by 'Jaiprakash Associates Limited' (borrower), the amount is not payable by the 'Corporate Debtor'. Therefore, clause (a) of sub-section (2) of Section 45 is not attracted. For the same very reason, clause (b) of sub-section (2) of Section 43 or Section 45 cannot be made applicable with regard to transaction in question which are not related to any payment due from the 'Corporate Debtor'.
>
> 73. As Section 44 is not attracted, it is not necessary to notice Section 46 which is not attracted and, therefore, the Adjudicating Authority has no power to pass any order under Section 48 of the 'I&B Code'. "

11.3. With respect to Section 66 of the Code dealing with fraudulent trading or wrongful trading, the Appellate Tribunal observed that the corporate debtor, being one of the group company, like a guarantor, had executed mortgage deeds in favour of the lender banks and financial institutions; and the transactions were in the ordinary course of business of the corporate debtor. Thus, according to NCLAT, in the absence of any contrary evidence to show that they were made to defraud the creditors of the corporate debtor or for any fraudulent purpose, it was not open to the Adjudicating Authority to hold that the mortgage deeds in question were made by way of transactions within the meaning of 'fraudulent trading' or 'wrongful trading' under Section 66. The Appellate Tribunal held,-

> "76. In the present case, we have noticed that the transactions in question i.e. mortgage(s) were made in favour of the 'Banks and Financial Institutions' by the 'Corporate Debtor' ('Jaypee Infratech Limited') in the ordinary course of business of the 'Corporate Debtor'. The Appellants-Banks and Financial Institutions have given loans to the holding Company namely-'Jaiprakash Associates Limited'. The 'Corporate Debtor' being one of the group company, like a guarantor, executed mortgage deed(s) in favour of the Appellants-'Banks and Financial Institutions'. We have seen that none of the transactions were 'preferential transaction' or 'undervalued transaction'. It has not been alleged that the transactions, in question, were made to defraud the creditors in terms of Section 49 so allegation has been made that such transactions amount to 'extortionate credit' as defined under Section 50. Therefore, the Adjudicating Authority in absence of any such finding is not empowered to pass order under Section 51. Further, as we have held that the transactions were made in the ordinary course of business in absence of any contrary evidence to show that they were made to defraud the creditors of the 'Corporate Debtor' or for any fraudulent purpose, on mere allegation made by the 'Resolution Professional', it was not open to the Adjudicating Authority to hold that mortgage deeds, in question, were made by way of transactions which come within the meaning of 'fraudulent trading' or 'wrongful trading' under Section 66."

11.4. The Appellate Tribunal, therefore, allowed the appeals and set aside the impugned order passed by NCLT on 16.05.2018 in so far relating to the lenders in question in the following:-

> "80. For the reasons aforesaid, we set aside the impugned order dated 16th May, 2018 so far it relates to the Appellants. In view of such findings, the Appellants-'Axis Bank Ltd', 'Standard Chartered Bank', 'ICICI Bank Ltd.', 'State Bank of India', 'Jai Prakash Associates Ltd.', 'Bank of Maharashtra', 'United Bank of India', 'Central Bank of India', 'UCO Bank', 'Karur Vyasa Bank (P) Ltd.', 'L&T Infrastructure Finance Company Ltd.', 'Canara Bank', 'Karnataka Bank Ltd.', 'IFCI Ltd.', ' Allahabad Bank', 'Jammu & Kashmir Bank', and 'The South Indian Bank Ltd.' are entitled to exercise their rights under the 'I&B Code'.

> 81. All the appeals are allowed. However, we make it clear that we have not made any observations with regard to the Promoters or Directors in absence of any appeal preferred on their behalf. No costs.”

The relevant provisions

12. For comprehension of the subject-matter and appropriate dealing with the issues involved, before proceeding further, suitable it would be to take note of the relevant statutory provisions.

12.1. It may be observed that while generally, the expressions used in the Code are defined in Section 3 thereof but then, the expressions employed for the purpose of Part II of the Code, dealing with insolvency resolution and liquidation of corporate persons, are defined in Section 5 thereof. The relevant definitions as occurring in Sections 3 and 5 are as under:-

> “Section 3(4): "**charge**" means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage;
>
> Section 3(6): "**claim**" means--
>
> (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
> (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
>
> Section 3(8): "**corporate debtor**" means a corporate person who owes a debt to any person;
>
> Section 3(10): "**creditor**" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

Section 3(11): "**debt**" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3(12): "**default**" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;

Section 3(30): "**secured creditor**" means a creditor in favour of whom security interest is created;

Section 3(31): "**security interest**" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:
Provided that security interest shall not include a performance guarantee;

Section 3(33): "**transaction**" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

Section 3(34): "**transfer**" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;

Section 3(35): "**transfer of property**" means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property;

Section 5(5A): "**corporate guarantor**" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;

Section 5(7): "**financial creditor**" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5(8): "**financial debt**" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

(a) money borrowed against the payment of interest;

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

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
(e) receivables sold or discounted other than any receivables sold on non-recourse basis;
(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
Explanation.-- For the purposes of this sub-clause,--
(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);[22]
(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Section 5(20): **“operational creditor”** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Section 5(21): **“operational debt”** means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

Section 5(24): “**related party**”, in relation to a corporate debtor, means –

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22 This explanation was inserted w.e.f. 06.06.2018.

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent of its paid-up share capital;

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of ---

- (i) participation in policy making process of the corporate debtor; or
- (ii) having more than two directors in common between the corporate debtor and such person; or
- (iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor;"

12.2. The concept and consequences of preferential transactions at a relevant time are provided in Sections 43 and 44 of the Code, which may also be usefully extracted as follows:-

"**Section 43. Preferential transactions and relevant time.-**

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.
(2) A corporate debtor shall be deemed to have given a preference, if—
(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.
(3) For the purposes of sub-section (2), a preference shall not include the following transfers—
(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;
(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—
(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and
(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation.—For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if —

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

Section 44. Orders in case of preferential transactions.-

(1) The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order:

(a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;

(b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

(c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;

(d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;

(e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;

(f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a

> security or charge released or discharged wholly or in part by the giving of the preference; and
> (g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:
> Provided that an order under this section shall not—
> (a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;
> (b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.
> *Explanation I*.-For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference, —
> (i) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;
> (ii) is a related party,
> it shall be presumed that the interest was acquired or the benefit was received otherwise than in good faith unless the contrary is shown.
> *Explanation II*.-A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13.”

12.3. As the transactions in question are the mortgage(s) of the assets of corporate debtor JIL, the concept and connotations of mortgage, as occurring in Section 58 of the Transfer of Property Act, 1882[23], could also be usefully noticed as under:-

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23 Hereinafter also referred to as ’the Transfer of Property Act’.

“58. “Mortgage”, “mortgagor”, “mortgagee”, “mortgage-money” and “mortgage-deed” defined.-

(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

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

(b) Simple mortgage.-Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.-Where, the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage.-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

> **(e) English mortgage.-**Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.
> **(f) Mortgage by deposit of title-deeds.-**Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.
> **(g) Anomalous mortgage.-** A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

12.4. The provisions contained in Sections 124, 126 and 127 of the Indian Contract Act, 1872[24] shall also have bearing on the issues at hand and hence, the same may also be noted as follows:-

> "**124. "Contract of indemnity" defined.-** A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."
>
> **126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor' –** A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.
>
> **127. Consideration for guarantee.-** Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

24 Hereinafter also referred to as 'the Contract Act'.

WHETHER THE TRANSACTIONS IN QUESTION ARE PREFERENTIAL

Broad features of rival contentions and submissions

13. As noticed, being aggrieved by the order so passed by NCLAT, three sets of parties have preferred these appeals. Multidimensional and wide-ranging submissions have been made by learned counsel for the respective parties, raising the issues as to whether the transactions in question could be said to be preferential and/or undervalued and/or fraudulent, essentially within the meaning of Sections 43, 45, 49 and 66 of the Code. Elaborate submissions have also been made raising the issue as to whether the lenders of JAL, in whose favour the security interest by way of impugned transactions were created, would fall in the category of 'financial creditors' of the corporate debtor JIL.

14. Having regard to the overall circumstances, appropriate it would be to deal, at the first, with the contentions related with the issue as to whether the transactions in question are preferential transactions within the meaning of Section 43 of the Code. We may briefly summarize the contentions of the appellants, with particular focus on this issue as *infra*:

Interim Resolution Professional for Jaypee Infratech Limited – the appellant In C.A. No. 8512-8527 of 2019

14.1. It has been contended on behalf of the appellant Interim Resolution Professional, who moved the application for avoidance of the transactions in question, that the impugned transactions have the effect of putting JAL, which

is an equity shareholder and an operational creditor (for an amount of Rs. 261.77 crores) of the corporate debtor JIL, in a beneficial position than it would have been in the event of distribution of assets under Section 53 of the Code vis-à-vis other creditors; and that if the transactions are held to be valid, the liability of JAL towards its own creditors gets secured and becomes realisable from the value of the mortgaged properties whereby, JAL's liabilities are reduced and JAL gets benefitted in exclusion of creditors of the corporate debtor JIL. It is submitted that, in the event of distribution of assets in terms of Section 53 of IBC, for the sake of argument, even if JAL is to get full value of its shares (Rs. 995 crores), such amount is significantly less than the value of assets which have been mortgaged by way of impugned transactions for satisfaction of debts owed by JAL to its lenders.

14.1.1. It is submitted on behalf of the appellant Interim Resolution Profession that the assets in question were released from the earlier mortgages and fresh mortgages were created during the look-back period with increased/enhanced amount of facilities as provided under each individual transaction. The said so-called re-mortgage essentially amounts to a fresh mortgage within the relevant time of two years before the date of commencement of CIRP and was not done in the ordinary course of business of JIL and hence, is hit by Section 43 of the Code.

14.1.2. It is further urged that in the exclusionary clause under Section 43(3)(a), which pertains to the transfer being made in the ordinary course of

the business or financial affairs of the corporate debtor or the transferee, the expression "*or*" will have to be read conjunctively and not in the alternative. That is to say, the word "or" will have to be read as "and". This is because if "or" is read textually, it would mean that an overwhelming majority of transactions like the present one, whereby banks who would accept the security interest over properties belonging to a third party, after disbursing financial facilities to its loan, would get out of the net of "preferential transactions", even if the transfer in question is not made in the ordinary course of business of the corporate debtor. It is submitted that the intention of legislature behind enacting a provision like Section 43 is that preferential transactions are avoided so that such assets would be available either with the resolution professional or with the liquidator, as the case may be, to put the corporate debtor back on its wheels or if that is not possible, to ensure that the creditors of the corporate debtor get a fair deal. With reference to the decisions of this Court in ***State of Bombay v. R.M.D. Chamarbaugwala and Anr*.: 1957 SCR 874** and ***Mazagaon Dock Ltd v. Commissioner of Income-Tax and Excess Profits Tax:* 1959 SCR 848,** it is submitted that on the well-known cannons of interpretation, "or" could be read as "and" if it is warranted to bring the provision in question in sync with the intention of the legislature which is to be discerned.

14.1.3.It is contended that Section 43 ought to be read keeping in mind the intention of the legislature in introducing such provision, which had been to

protect the creditors against siphoning away of corporate assets by the management of the company, who have special knowledge of the company's financial troubles by virtue of its position.

India Infrastructure Finance Company Limited – the appellant in C.A.@ D No. 32881 of 2019.

14.2. This appellant is one of the entities who has advanced loan to JIL and has preferred appeal with permission, assailing the order passed by NCLAT and maintaining, *inter alia*, that in any case, the lenders of JAL cannot be taken as 'financial creditors' of JIL. While referring to the theory behind the provisions for avoidance of certain transactions, it is submitted on behalf of this appellant that the Court should consider substance rather than legal form in evaluating the true economic effect of a transaction or a set of transactions in applying the relevant provisions. On behalf of this appellant, the following submissions have been made in regard to the relevant expressions and phrases occurring in the provisions under consideration:

Ordinary Course of Business

14.2.1. It is submitted that mortgages could not have been made in the ordinary course of business of the corporate debtor JIL, as it is difficult to fathom why a subsidiary would furnish security to its parent company in the ordinary course and, on the contrary, it is the parent company which at times furnishes security on behalf of its subsidiary since it derives economic value from the subsidiary. According to the appellant, it is difficult to appreciate that when the corporate debtor JIL was itself reeling under financial stress, why it

would routinely undertake to secure the indebtedness of JAL by furnishing such high valued securities and that too when the amount of debt secured by way of mortgaging the assets of the corporate debtor increased from Rs. 3,000 crores to approximately Rs. 24,000 crores and the number of creditors also went up from 2 to 24 with respect to the consortium mortgage. It is submitted that even though creation of third party security is a normal practice, the creation of every third party security cannot be always deemed to have been done in the ordinary course of business; that such 'ordinary course' has to be determined under the circumstances when such transactions were entered into; and, considering that JIL was declared NPA and had defaulted on its indebtedness to some of its lenders, securing of JAL's indebtedness under such circumstances cannot be construed to have been done in the ordinary course of business of the corporate debtor JIL. The learned counsel for the appellant has referred, *inter alia*, to the decision in ***Downs Distributing Co Pty Ltd v. Associated Blue Star Stores Pty Ltd (in liq):*** **(1948) 76 CLR 463.**

Relevant Period and Related Party

14.2.2.It is further submitted that the term 'transaction' under the Code includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services from or to the corporate debtor. The use of the word 'include' would signify its natural import and is to be given a wide interpretation. It is submitted that as JAL was not only *ad idem* to the terms of the transaction but was also the beneficiary thereof, it cannot be said that the

transaction was only between the corporate debtor and the lenders of JAL; rather, the transaction was with a 'related party' and the look-back period would be two years.

Home buyers – the appellants in C.A. No. 6777-97/2019

14.3. On behalf of the home buyers, who have invested in the projects of the corporate debtor and whose interests would be diluted if the impugned transactions are upheld, the flow of transactions in question has been referred and essentially, the same contentions have been urged with respect to Section 43 of the Code, with reliance on the decision in *Downs Distributing Co* (supra), that the impugned transactions were not made in the ordinary course of business of the corporate debtor JIL; and had been preferential transactions, putting JAL in a beneficial position at the cost of bona fide creditors of JIL, including the home buyers. We are not re-narrating all their contentions to avoid repetition. However, we may observe that to substantiate their arguments with respect to Section 43 of the Code, on behalf of these appellants, reliance is also placed on the interim report of the ***Bankruptcy Law Reforms Committee (February 2015)*** and the decision of this Court in ***Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd*.: (2018) 2 SCC 674**.

The respondents

15. The contesting respondents have refuted the contentions of the appellants with essentially similar submissions that the transactions in

question cannot be termed as preferential transactions within the meaning of Section 43 of the Code.

15.1. The respondents, particularly the lenders of JAL, while maintaining a consistent stand that the transactions in question are not preferential and do not fall under Section 43 of the Code, have submitted that they being the bankers and financial institutions, are regularly engaged in the business of extending loans and other facilities which form the backbone of economic growth; and taking of such securities, including third party security, is one of the normal and ordinary feature of their business and dealings, particularly that of corporate money lending. According to these respondents, if at all such third party securities are avoided on the allegation of being preferential, it is likely to have a devastating effect on the entire economy because the bankers and financial institutions would then be left high and dry; and for future dealings, they shall have no alternative but to restrict their activities only to the direct party securities which would, in turn, result in retardation and regression. It is submitted that in a given case, the borrower may not be able to offer matching security to secure the entire advance requisite for its business and growth; and legally it is not impermissible between the related companies that one may provide security towards the loan/advance/facility obtained by the other. According to the respondents, the scheme of the Code, and particularly its Part II, has never been to allow the processes of insolvency resolution or liquidation to operate detrimental to the interests of the financers like

themselves (lenders of JAL). It is contended that on the true scope of the provisions contained under Section 43 of the Code, with reference to the intent and object, the transactions in question, representing the security and guarantee extended by the corporate debtor JIL, cannot be construed as preferential, particularly when they were entered into in the ordinary course of business and financial affairs of the corporate debtor as also the transferees.

15.2. Apart from expressing such concerns about likely prejudice to themselves and to the economy if the transactions in question are held preferential, a variety of contentions have been advanced on behalf of the respondents, while refuting those of the appellants. We may briefly summarize the leading contentions on behalf of the contesting respondents while omitting repetitions.

Axis Bank

15.3. While maintaining that the impugned transactions cannot be considered as preferential within the meaning of Section 43 of the Code, the principal contentions on behalf of this respondent are as under: -

a. The transactions did not occur within the 'relevant time'.

15.3.1. It is contended that the 'relevant time' in the present circumstances could be only one year as the transfer of property interest was to this respondent, which is a Bank and an unrelated party. It is further contended that, in any event, the land parcels were mortgaged on 24.02.2015, which is beyond even the two years formulation, the relevant time being from

10.08.2015 to 09.08.2017. The subsequent re-execution of the mortgage deeds on 15.09.2015 and then again on 29.12.2016 cannot be considered to be a substantive event since the nature and identity of the security remained the same and no fresh encumbrances were created. The re-mortgage was done to reflect the increase in the amount of facilities and number of members in the consortium. It is not the case that the existing facilities were paid, the mortgage satisfied, and fresh facilities were created for which a fresh mortgage was required.

b. Without prejudice to the above, the ingredients of Section 43(2) are not met.

15.3.2. It is further submitted that Sections 43/44 of the Code are expropriating provisions as they affect concluded transactions and have the potential to render void the transfers of property done through the transactions which are otherwise legitimate and hence, such provisions must be strictly construed. The decisions of this Court in ***Devinder Singh & Ors v. State of Punjab & Ors*: (2008) 1 SCC 728** and ***Nareshbhai v. Union of India* : (2019) SCC Online SC 1027** have been relied upon.

15.3.3. It is submitted that the requirements set out under Section 43(2) must be strictly construed and in the instant case, the two prongs under Section 43(2) have not been satisfied. With reference to **UNCITRAL Legislative Guide on Insolvency Law at para 177**, it is submitted that as per Section 43(2)(a), a preference could only be given to an existing creditor such that he is preferred over other creditors but in this matter, the security was provided

for the benefit of the respondent bank, which did not have a pre-existing creditor-debtor relationship with the corporate debtor. Further, the security was provided on account of the debt obligations of JAL, and not any antecedent debt obligations of the corporate debtor.

15.3.4. It is further submitted, without prejudice to the above, that even if JAL is taken to be a creditor within the meaning of Section 43(2)(a), then the requirements of Section 43(2)(b), the second prong of the two-fold requirement for a transaction to be a preference, are not met. It is submitted that the transfer in the instant case has no effect whatsoever on the relative position of JAL in the distribution waterfall – it remains an operational creditor without any security interest.

c. Without prejudice to the above, security was provided in the ordinary course of business.

15.3.5. While pointing out that Section 43(3)(a) carves out exception for the transactions made in the ordinary course of business or financial affairs of either the corporate debtor or the transferee, it is contended that no material particulars/evidence have been produced to show that the provision of the security was not in the ordinary course of business of the corporate debtor. On the contrary, according to the respondent, (i) creation of third party security is an established commercial business practice; (ii) the corporate debtor has continuously disclosed details of the security in its annual reports beginning from the financial year ending 31.03.2015 and thus, creation of security was known to all and disclosed in public documents; and (iii) no evidence of dissent

from any existing creditor of the corporate debtor has been shown at the time of creation of the security. The transaction in question, according to the respondent, had been in the ordinary course of business of the corporate debtor and remains unexceptionable.

15.3.6. It is further contended that the provision of security was also in the ordinary course of business of the respondent who is a scheduled commercial bank and is duly authorized by statute to carry out the business of commercial lending on a secured basis [per Section 6(1)(a) of the Banking Regulation Act, 1949]; and is statutorily entitled to seek credit enhancement on account of outstanding debts by way of creation of security interests by borrowers or their related entities. For this reason too, with the transaction being in the ordinary course of business of the transferee i.e., the respondent, it cannot be termed as a preferential transaction.

15.3.7. It is yet further submitted that the contention of IRP that the corporate debtor ought not to have given the security as its accounts had turned NPA with certain banks is fallacious as it conflates the concepts of ‘NPA’ and ‘willful defaulter’ and ignores that the security was given to the respondent even before the account turned NPA *qua* certain banks. With reference to the interim report of the Bankruptcy Law Reforms Committee issued in February 2015, it is submitted that as per the said report, avoidance transactions relate to ‘willful defaulters’ and not ‘NPAs’. It is further argued that the distinctive position of a willful defaulter and an NPA is also indicated in Section 29A of

Code, where Section 29A(b) provides that a willful defaulter can never be a resolution applicant whereas, Section 29A(c) provides that a company whose account has become non-performing may only be disqualified if the account has remained non-performing for a period of one year. It is submitted that RBI Master Circular on asset classification issued in July 2015 and June 2019 set out that an account may turn NPA *qua* a particular bank if the debts are not being serviced regularly but this does not mean that a particular company's accounts would have turned non-performing *qua* all its lenders. It is also submitted that the other account of corporate debtor with this respondent turned NPA only in 2017, i.e., much after the creation of security in question. It is further contended that a company's account may easily become standard if, *inter alia,* the company regularizes its payment timelines or if lenders decide to revise the company's repayment obligations. Reliance is placed on the decisions of this Court in ***Keshavlal Khemchand & Sons Pvt. Ltd. & Ors v. Union of India & Ors*****: (2015) 4 SCC 770** and ***State Bank of India v. Jah Developers*** **Pvt. Ltd. & Ors.: (2019) 6 SCC 787**.

d. *Section 44 does not come into operation unless a transaction is made out to be preferential under Section 43.*

15.3.8. It is further submitted that the jurisdictional condition of exercising power under Section 44 is the finding that a transaction is preferential under Section 43, as is evident from the heading of Section 44 i.e., 'Orders in cases

of preferential transactions'; and, for the transaction in question being not preferential under Section 43, no orders could be made under Section 44.

Standard Chartered Bank

15.4. Most of the contentions urged on behalf of this respondent are analogous to the contentions noticed in the preceding paragraphs and, therefore, we are not repeating the same. It is maintained on behalf of this respondent that in whatever way the relevant time is reckoned for the purpose of Section 43 of the Code, its transactions would not fall therein because the initial mortgage in favour of this respondent was made in the year 2012, which is beyond the two years formulation. The further submission is that the subsequent conversion of registered mortgage into an equitable mortgage on 04.11.2015 and thereafter, re-conversion from equitable mortgage to registered mortgage on 24.05.2016, in relation to the same subject property as a security, cannot be considered as a fresh creation of mortgage and hence, the transaction in question does not fall within relevant time.

ICICI Bank

15.5. Again, for most of the contentions on behalf of this respondent being similar in nature, we are not repeating the same. However, we may notice that with reference to Section 43(4) of the Code, it has been contended that since this respondent bank is an unrelated party to both the corporate debtor and JAL, the relevant look-back period would be one year and not two years. It is submitted that the mortgages were created on 15.09.2015 and the same

property was re-mortgaged on 29.12.2016, which is much before the look-back period of one year and thereby, this transaction could not be challenged as being preferential. The decisions of the Bombay High Court in ***Monarch Enterprises v. Kishan Tulpule & Ors*** **: (1992) 74 Comp Case 89 (Bom)** and that of Madras High Court in ***IDBI Bank Ltd. v. The Administrator, Kothari Orient Finance Ltd., the Official Liquidator & S. Ramaiah :*** **(2009) 152 Comp Case 282 (Mad)** have been referred while submitting that a mere transfer of the assets within the look-back period would not make the transaction preferential except when it is coupled with the intent to prefer one creditor over the other. Further, for contending that the impugned transactions were made in the ordinary course of business of both the respondent Bank and the corporate debtor, the Annual Reports of corporate debtor JIL have been referred with the submissions that the mortgaged properties were disclosed as 'inventories' for the corporate debtor being a real estate company; and hence, dealing with the 'inventories'/'stock-in-trade' is in the ordinary course of business.

15.5.1. It is further submitted that there is no relation between the financial position of the corporate debtor and the impugned transaction for another reason that as on the date of commencement of insolvency proceedings, the corporate debtor had 740 acres of unencumbered land, which could have been used to create security for the creditors of corporate debtor. While pointing out that 11 out of 13 lenders of the corporate debtor JIL are also a

part of the consortium of JAL lenders whose loans were secured by mortgages made by the corporate debtor, it is submitted that prior to 15.09.2015, when the questioned Consortium of Mortgages was created, only Jammu and Kashmir Bank had declared the corporate debtor as NPA, which was followed by the other lenders declaring the corporate debtor as NPA. It is contended that prior to the said declaration, the transactions with this respondent had been made as also the mortgages created on 15.09.2015, which had also secured the interests of Jammu and Kashmir Bank and, therefore, the impugned transactions could not be said to be preferential.

Other respondent-lenders

15.6. Broadly speaking, similar submissions as noted above have been made on behalf of other respondent-lenders while maintaining that the impugned transactions are covered by the exclusion clause under Section 43 inasmuch as the transfers had been made in the ordinary course of business of the corporate debtor as also the transferees; and that for the purpose of Section 43 of the Code, the relationship between the respondent-lenders and JIL ought to be looked into rather than assuming JAL to be the primary transferee. It has also been argued, while relying on the decision of this Court in ***Purbanchal Cables & Conductors Pvt. Ltd. & Ors v. Assam State Electricity Board & Ors :*** **(2012) 7 SCC 462,** that the provisions of Section 43 of the Code, by their very nature, would come into operation at least one year after the enactment of the Code i.e., it would have only the prospective effect and

cannot be given retrospective effect so as to operate over any period prior to the enactment.

Jaiprakash Associates Ltd. (JAL)

15.7. As noticed, this respondent JAL is the holding company of corporate debtor JIL; and the transactions in question had been for securing the loans/facilities obtained by this respondent. Even while broadly adopting the contentions advanced by other respondents, further submissions have been made on behalf of this respondent to assert on the credence of the transactions in question. With reference to its relationship with JIL, it is contended on behalf of this respondent that being the holding company, JAL had been providing financial, technical and strategic support to JIL in various ways being: (i) Investment made in 99,50,00,000 shares of JIL (paid up value Rs. 995 crores) at its very nascent stage, which means contribution of substantial funds for the business of JIL without interest; (ii) Pledge of its 70,83,56,087 equity shares held in JIL in favour of the lender of JIL; (iii) Promoter Support Agreement to meet the Debt Service Reserve Account (DSRA) obligation of JIL towards its lenders; and (iv) Bank Guarantees of Rs. 212 crores in aggregate to meet the DSRA obligation of JIL for the financial assistance obtained by JIL. It is submitted that such dealings/transactions by JAL in favour of JIL depict the nature of business relationship between JAL and JIL and makes it amply clear that the impugned transactions were done in

the ordinary course of business and financial affairs of JIL. It is further submitted that the mortgage of 858 acres of land made in favour of lenders of JAL fall within the ambit of Section 186 of Companies Act, 2013[25] and is not unauthorized.

15.7.1. It is contended that avoidance of preferential transactions applies to a case where the company's accounts has become stressed and there is a strong likelihood of it going into liquidation but in the present case, it is a matter of record that the accounts of JIL had been categorised as NPA only to an extent of 29.04% whereas the remaining accounts were still 'standard'. According to the respondent JAL, this fact was specifically pleaded at the stage of opposing the application filed before the NCLT for initiating CIRP against JIL but JIL gave its consent for CIRP on the bona fide belief that it would be able to restructure its loans and get back the management of JIL. The submission is that, in the given economic scenario, JIL was not in any such stress or problem that it could not have continued with the existing mortgages for securing the facilities advanced to JAL by the lender banks and financial institutions.

Insolvency and Bankruptcy Code, 2016: historical background, objects, scheme and structure of the relevant parts

16. The basic issue raised in the matter being related with the effect and operation of Section 43 of the Code, concerning '**Preferential transactions**

25 Hereinafter also referred to as 'the Act of 2013'.

and relevant time', appropriate it shall be to comprehend the principles underlying the concept of 'preferential transactions'. A little insight into the objects sought to be achieved by the Insolvency and Bankruptcy Code, 2016 and its historical background shall be apposite.

16.1. As noticed from Preamble, the Code came to be enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons and even of partnership firms and individuals in a time bound manner; the objectives, *inter alia*, being for maximisation of value of assets of such persons and balance of interest of all the stakeholders.

16.1.1. In the case of ***Swiss Ribbons Private Limited and Anr. v. Union of India and Ors.:* (2019) 4 SCC 17**[26]**,** this Court had the occasion to traverse through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions therein. One part of such challenge had also been founded on the ground that classification between 'financial creditor' and 'operational creditor' was discriminatory and violative of Article 14 of the Constitution of India.[27] This ground as also several other grounds pertaining to various provisions of the Code were rejected by this Court after elaborate dilation on the vast variety of rival contentions and the provisions so contained in the Code were upheld as valid. In the course of

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26 Hereinafter also referred to as the case of *'Swiss Ribbons'.*

27 The law declared by this Court in this case of *Swiss Ribbons,* while rejecting the contentions that the classification between 'financial creditor' and 'operational creditor' was discriminatory and violative of Article 14, shall have some bearing on the issues at hand, particularly in relation to the second issue on the claim of the respondent-lenders for being treated a financial creditors of JIL, as shall be noticed hereafter later.

such distillation, this Court took note, *inter alia*, of the pre-existing state of law as also the objects and reasons for enactment of the Code. While observing that the focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation is to be availed of only as a last resort, this Court pointed out that on its scheme and frame work, the Code was a beneficial legislation to put the corporate debtor on its feet, and not a mere recovery legislation for the creditors. This Court said,-

> **"27.** As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business

> of the corporate debtor as a going concern. (See *ArcelorMittal*[28] at para 83, fn 3)
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> **28.** It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

16.2. Keeping in view the objectives, discernible from the Preamble as also from the Statement of Objects and Reasons of the Code and the observations of this Court, we may now take an overview of the scheme and structure of the relevant parts of the Code. Part I thereof contains the provisions regarding title, extent, commencement and application of the Code as also defines various expressions used and employed in the Code. Different provisions have come into force on different dates, as permissible under proviso to sub-section (3) of Section 1. Part II of the Code deals with insolvency resolution and liquidation for corporate persons. Chapter I of Part II makes provision for its applicability and also defines various expressions used in this Part (Sections 4

28 ***ArcelorMittal India (P) Ltd. v. Satish Kumar Gupta & Ors*: (2019) 2 SCC 1**

and 5). Chapter II of Part II contains the provisions for corporate insolvency resolution process in Sections 6 to 32 whereas Chapter III of this Part II contains the provisions for liquidation process in Sections 33 to 54[29].

16.3. Though the provisions relating to 'preferential transactions and relevant time' (in Section 43 of the Code) occur in Chapter III of Part II, relating to liquidation process, but such provisions being for avoidance of certain transactions and having bearing on the resolution process too, by their very nature, equally operate over the corporate insolvency resolution process, and hence, the resolution professional is obligated, by virtue of clause (j) of sub-section (2) of Section 25 of the Code, to file application for avoidance of the stated transactions in accordance with Chapter III. That being the position, Section 43 of the Code comes into full effect in CIRP too.

Preferential transaction at a relevant time: concept and connotations

17. Having regard to the questions involved, a brief insight into the theory relating to avoidance of certain transactions as being preferential would be pertinent at this stage.

17.1.The basic concept of 'preference' as per the law dictionaries and lexicons is the act of '*paying or securing to one or more of his creditors, by an insolvent debtor, the whole or part of their claims, to the exclusion of the rest*'.[30] We may

29 Sections 4 to 33 came into force on 01.12.2016 whereas Section 33 to 54 came into force on 15.12.2016.
30 P. Ramanatha Aiyar's Advanced Law Lexicon (5th Ed.-Vol 3, p.4002)

usefully take note of the meaning, definition and basic ingredients of 'preference' and 'preferential transfer', as defined in Black's Law Dictionary[31]:

> **"preference**. (15c) 1. The favouring of one person or thing over another. 2. The person or thing so favoured. 3. The quality, state, or condition of treating some persons or things more advantageously than others. 4. Priority of payment given to one or more creditors by a debtor; a creditor's right to receive such priority. 5. *Bankruptcy*. PREFERENTIAL TRANSFER.
>
> ➢ **insider preference.** (1981) A transfer of property by a bankruptcy debtor to an insider more than 90 days before but within one year after the filing of the bankruptcy petition.
>
> ➢ **liquidation preference.** (1936) A preferred shareholder's right, once the corporation is liquidated, to receive a specified distribution before common shareholders receive anything.
>
> ➢ **voidable preference .** See PREFERENTIAL TRANSFER"
>
> *** *** ***
>
> **"preferential transfer**. (1874) *Bankruptcy*. A prebankruptcy transfer made by an insolvent debtor to or for the benefit of a creditor, thereby allowing the creditor to receive more than its proportionate share of the debtor's assets; specif., an insolvent debtor's transfer of a property interest for the benefit of a creditor who is owed on an earlier debt, when the transfer occurs no more than 90 days before the date when the bankruptcy petition is filed or (if the creditor is an insider) within one year of the filing, so that the creditor receives more than it would otherwise receive through the distribution of the bankruptcy estate.
>
> Under the circumstances described in 11 USCA §547, the bankruptcy trustee may, for the estate's benefit, recover a preferential transfer from the transferee. – Also termed *preference; voidable preference; voidable transfer; preferential assignment; preferential debt payment…."*

17.2. It could be readily noticed that as far back as from 15th century, the concept of 'preference' has been taken note of and the principles relating to avoidance of certain preferences have evolved, particularly in the fields of

31 10th Edition – pp. 1369 and 1370

mercantile laws and more particularly in the laws governing insolvency and bankruptcy[32]; and definitively from 1874, various jurisdictions have defined, described and dealt with 'preferential transfer' as being the transaction where an insolvent debtor makes transfer to or for the benefit of a creditor so that such beneficiary would receive more than what it would have otherwise received through the distribution of bankruptcy estate. Section 547 of US Bankruptcy Code provides for the circumstances in which a bankruptcy trustee may, for the benefit of the estate in question, recover a preferential transfer from the transferee. Section 239 of the UK Insolvency Act, 1986 also provides for the same measures for avoidance of preference given to any person at the relevant time. The time factor also plays a crucial role in such measures of avoidance. This 'relevant time' for the purpose of avoidance of preferential transactions is now commonly referred to as the 'look-back' period. Significantly, when the preferential transaction is with an unconnected party, the look-back period is comparatively lesser than that of the transaction with a connected party, who is referred to as 'insider' or 'related party'[33].

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32 It may in the passing be observed that 'an insolvency' essentially refers to financial distress, i.e., financial state in which a person or entity is unable to pay its dues or meet with other akin obligations. Insolvency may be temporary in character. 'A bankruptcy', on the other hand, essentially refers to the legal process to regulate as to how an insolvent entity shall pay off his dues.

As noticed, the primary focus of IBC is *'to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation'*. In other words, insolvency resolution is the main object; and liquidation with bankruptcy is the last resort.

33 We may also indicate that any attempt by an insolvent, of alienating or encumbering the assets in favour of one person so as to cause harm to the interest of a bona fide creditor had been sternly dealt with by the legislature even in relation to the individuals, as could be readily noticed from the provisions contained in the erstwhile Presidency - Towns Insolvency Act, 1909 and Provincial

17.3. Coming now to the corporate personalities, it is elementary that by the very nature and legal implications of incorporation, ordinarily, several individuals and entities are involved in the affairs of a corporate person; and impact of the activities of a corporate person reaches far and wide, with the creditors being one of the important set of stakeholders. If the corporate person is in crisis, where either insolvency resolution is to take place or liquidation is imminent; and the transactions by such corporate person are under scanner, any such transaction, which has an adverse bearing on the financial health of the distressed corporate person or turns the scales in favour

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Insolvency Act, 1920. These enactments stand repealed by IBC but the relevant provisions therein give an insight into the concepts. Section 56 of the Act of 1909 provided thus:

> "56.**Avoidance of preference in certain cases. -** (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they became due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the official assignee.
>
> (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent."

The relevant part of Section 69 of the Act of 1920 had been as under:

> "69. **Offences by debtors. –** If a debtor, whether before or after the making of an order of adjudication, -
>
> *** *** ***
>
> (c) fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors, -
>
> (i) has discharged or concealed any debt due to or from him, or
>
> (ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,
>
> he shall be punishable on conviction with imprisonment which may extend to one year."

of one or a few of its creditors or third parties, at the cost of the other stakeholders, has always been viewed with considerable disfavour[34].

17.4. Noteworthy distinctive features, in the scheme of the Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016, as regards preferences in relation to the corporate personalities, are that while Section 328 of the Act of 2013 deals with fraudulent preference and Section 329 thereof deals with transfers not in good faith but, on the other hand, in the Code, separate provisions are made as regards the transactions intended at defrauding the creditors (Section 49 IBC) as also for fraudulent trading or wrongful trading (Section 66 IBC). The provisions contained in Section 43 of the Code, however, indicate the intention of legislature that when a transaction falls within the coordinates defined therein, the same shall be deemed to be a preference given at a relevant time and shall not be countenanced. Therefore, intent may not be of a defence or support of any preferential transaction that falls within the ambit of Section 43 of the Code.

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34 In relation to the corporate personalities, the concept of 'fraudulent preference', earlier embodied in Section 531 of the Companies Act, 1956 now occurs in its modified form in Sections 328 and 329 of the Companies Act, 2013. Tersely put, fraudulent preference means parting with assets of the corporate person in favour of one or a few of its creditors, which has the effect of defeating the claim of other creditors. Per Section 329 of the Act of 2013, any transfer of property by a company, other than that in the ordinary course of business, if made within a period of one year before presentation of a petition for winding up by the Tribunal and not in good faith and for valuable consideration, is regarded as void against the liquidator. Per Section 328 of the Act of 2013, if a company has given preference to one of its creditors or a surety or a guarantor for any of the debts or other liabilities and the company does or suffers anything which has the effect of putting that person in a better position in the event of company going into liquidation than the position he would have been in but for such preference prior to six months of making winding up application, the Tribunal, on being satisfied that the transaction was of a fraudulent preference, may order for restoring the position to what it would have been if the preference had not been given. More particularly, as regards transfer of property, it is provided in sub-section (2) of Section 328 that if the transaction is made six months before winding up application, the Tribunal may declare such transaction invalid and restore the position.

17.5. At this juncture, we may usefully refer to paragraph 177 of UNCITRAL Legislative Guide on Insolvency Law, as referred to and relied upon by learned counsel for the respondent as also paragraphs 178 and 179 thereof, to indicate the basic theory and principles governing the provisions under consideration. In the said Guide, while dealing with the topic of treatment of assets on commencement of insolvency proceedings, it is stated broadly on the theory of avoidance of preferential transactions as follows:

> *"(c) Preferential transactions*
> *(i) Criteria*
> 177. Preferential transactions may be subject to avoidance where: *(a)* the transaction took place within the specified suspect period; *(b)* the transaction involved a transfer to a creditor on account of a pre-existing debt; and *(c)* as a result of the transaction, the creditor received a larger percentage of its claim from the debtor's assets than other creditors of the same rank or class (in other words, a preference). Many insolvency laws also require that the debtor was insolvent or close to insolvent when the transaction took place and some further require that the debtor have an intention to create a preference. The rationale for including these types of transaction within the scope of avoidance provisions is that, when they occur very close to the commencement of proceedings, a state of insolvency is likely to exist and they breach the key objective of equitable treatment of similarly situated creditors by giving one member of a class more than they would otherwise legally be entitled to receive.
> 178. Examples of preferential transactions may include payment or set-off of debts not yet due; performance of acts that the debtor was under no obligation to perform; granting of a security interest to secure existing unsecured debts; unusual methods of payment, for example, other than in money, of debts that are due; payment of a debt of considerable size in comparison to the assets of the debtor; and, in some circumstances, payment of debts in response to extreme pressure from a creditor, such as litigation or attachment, where that pressure has a doubtful basis. A set-off, while not avoidable as such, may be considered prejudicial when it occurs within a short period of time before the application for

commencement of the insolvency proceedings and has the effect of altering the balance of the debt between the parties in such a way as to create a preference or where it involves transfer or assignment of claims between creditors to build up set-offs. A set-off may also be subject to avoidance where it occurs in irregular circumstances, such as where there is no contract between the parties to the set-off.

(ii) Defences

179. One defence to an allegation that a transaction was preferential may be to show that, although containing the elements of a preference, the transaction was in fact consistent with normal commercial practice and, in particular, with the ordinary course of business between the parties to the transaction. For example, a payment made on receipt of goods that are regularly delivered and paid for may not be preferential, even if made within proximity to the commencement of insolvency proceedings. This approach encourages suppliers of goods and services to continue to do business with a debtor that may be having financial problems, but which is still potentially viable. Other defences available under insolvency laws include that the counterparty extended credit to the debtor after the transaction and that credit has not been paid (the defence is limited to the amount of the new credit); that the counterparty gave new value for which it was not granted a security interest; the counterparty can show that it did not know a preference would be created; that the counterparty did not know or could not have known that the debtor was insolvent at the time of the transaction; or that the debtor's assets exceeded its liabilities at the time of the transaction. Some of these latter defences, in particular those involving the intent of the parties to the transaction, suffer from the disadvantage of being difficult to prove and may make avoidance proceedings complex, unpredictable and lengthy."

Analysing Section 43 of the Code

18. In the backdrop of the foregoing, we may now scrutinise Sections 43 and 44 of the Code. Section 44 provides for the consequences of an

offending[35] preferential transaction i.e., when the preference is given at a relevant time. Under Section 44, the Adjudicating Authority may pass such orders as to reverse the effect of an offending preferential transaction. Amongst others, the Adjudicating Authority may require any property transferred in connection with giving of preference to be vested in the corporate debtor; it may also release or discharge (wholly or in part) any security interest created by the corporate debtor. The consequences of offending preferential transaction are, obviously, drastic and practically operate towards annulling the effect of such transaction. Looking to the contents, context and consequences, we are at one with the contentions urged on behalf of the respondents with reference to the decisions in *Devinder Singh* (supra) and other cited cases, that these provisions need to be strictly construed. However, even if we proceed on strict construction of Section 43 of the Code, the underlying principles and the object cannot be lost sight of. In other words, the construction has to be such that leads towards achieving the object of these provisions.

18.1. Looking at the broad features of Section 43 of the Code, it is noticed that as per sub-section (1) thereof, when the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has, at a relevant time, given a preference in such transactions and in such manner as specified in sub-section (2), to any person/persons as referred to in

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35 Note: Here the expression ‘offending’ is only to denote the unacceptability of such transaction and not any criminality.

sub-section (4), he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in Section 44. If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (a) of sub-section (2) of Section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be for the benefit[36] of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under Section 53.[37]

18.2. However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of Section 43 of the Code, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time". The relevant time is reckoned, as per sub-section (4) of Section 43 of the Code, in two ways: (a) if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the

36 It may be intended benefit or may even be unintended benefit

37 Section 53 IBC makes provision for distribution of the proceeds from sale of the liquidation assets, in case of liquidation of the corporate debtor.

insolvency commencement date; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within the mischief sought to be remedied by Sections 43 and 44 of the Code, it ought to be a preferential one answering to the requirements of sub-section (2) of Section 43; and the preference ought to have been given at a relevant time, as specified in sub-section (4) of Section 43.

18.3. However, even if a transaction of transfer otherwise answers to and comes within the scope of sub-sections (4) and (2) of Section 43 of the Code, it may yet remain outside the ambit of sub-section (2) because of the exclusion provided in sub-section (3) of Section 43.

18.4. Sub-section (3) of Section 43 specifically excludes some of the transfers from the ambit of sub-section (2). Such exclusion is provided to: (a) a transfer made in the ordinary course of business or financial affairs of the corporate debtor or transferee[38]; (b) a transfer creating security interest in a property acquired by the corporate debtor to the extent that such security interest secures new value and was given at the time specified in sub-clause (i) of clause (b) of Section 43(3) and subject to fulfilment of other requirements of sub-clause (ii) thereof. The meaning of the expression “new value” has also been explained in this provision.

38 Whether the expression “or”, as occurring in between the expressions ‘corporate debtor’ and ‘transferee’ in clause (a) of sub-section (3) of Section 43, is to be read as “and” has been one of the significant questions raised in this matter and shall be dealt with hereafter later.

<u>Indicting parts – deemed preference at a relevant time</u>

19. In order to understand and imbibe the provisions concerning preference at a relevant time, it is necessary to notice that as per the charging parts of Section 43 of the Code i.e., sub-sections (4) and (2) thereof, a corporate debtor <u>shall be deemed to have given preference at a relevant time</u> if the twin requirements of clauses (a) and (b) of sub-section (2) coupled with the applicable requirements of either clause (a) or clause (b) of sub-section (4), as the case may be, are satisfied.

19.1. To put it more explicit, the sum total of sub-sections (2) and (4) is that a corporate debtor shall be deemed to have given a preference at a relevant time if: (i) the transaction is of transfer of property or the interest thereof of the corporate debtor, for the benefit of a creditor or surety or guarantor for or on account of an antecedent financial debt or operational debt or other liability; (ii) such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets in accordance with Section 53; and (iii) preference is given, either during the period of two years preceding the insolvency commencement date when the beneficiary is a related party (other than an employee), or during the period of one year preceding the insolvency commencement date when the beneficiary is an unrelated party.

19.2. By way of these statutory provisions, legal fictions are created whereby preference is deemed to have been given; and is deemed to have been given

at a relevant time, if the stated requirements are satisfied. Variegated features of a deeming provision have been discussed by this Court in the case of *Pioneer Urban* (supra) with reference to several of the past decisions, albeit in the context of such deeming expression occurring in the *Explanation* added to sub-clause (f) of Section 5(8) of the Code[39]. We may usefully extract some of the relevant passages from the said decision in *Pioneer Urban* as follows:

19.2.1. As regards construction of a deeming fiction, this Court pointed out the basic and settled principles in the following:

> "88. In every case in which a deeming fiction is to be construed, the observations of Lord Asquith in a concurring judgment in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*: 1952 AC 109 (HL) are cited. These observations read as follows: (AC pp. 132-133)
>
> > "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."
>
> These observations have been followed time out of number by the decisions of this Court. (See, for example, *M. Venugopal* v. *Divisional Manager, LIC*: (1994) 2 SCC 323 at page 329).
>
> ***   ***   ***
>
> 94. Although a deeming provision is to deem what is not there in reality, thereby requiring the subject-matter to be treated as if it were

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39 Such discussion in *Pioneer Urban* essentially led to this Court holding that the said deeming provision was clarificatory of the true legal position as it already obtained; and was to put beyond the pale of doubt the fact that allottees are to be regarded as financial creditors within the meaning of the enacting part contained in Section 5(8)(f) of the Code. The crucial aspects relating to Section 5(8) of the Code shall be dilated hereafter during the discussion on the second issue involved in these matters.

real, yet several authorities and judgments show that a deeming fiction can also be used to put beyond doubt a particular construction that might otherwise be uncertain. Thus, *Stroud's Judicial Dictionary of Words and Phrases* (7th Edition, 2008), defines "deemed" as follows:

> "Deemed"- as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote", is often a convenient device for reducing the verbiage or an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or things has-the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an indisputable conclusion."

19.2.2. In *Pioneer Urban,* this Court further extracted extensively from the decision in ***Hindustan Cooperative Housing Building Society Limited v. Registrar, Cooperative Societies and Anr.:*** **(2009) 14 SCC 302** on various features of the processes of construction of different deeming provisions in different contexts. Some of the relevant parts of such extraction (as occurring in paragraph 95 of *Pioneer Urban)* read as follows (in SCC at pp. 524):

> " '… The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.'
>
> (Per Lord Radcliffe in *St. Aubyn* v. *Attorney General:*1952 AC 15 (HL), AC p. 53)
>
> *14*. 'Deemed', as used in statutory definitions [is meant]
>
> 'to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing

the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has — the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion.'

(Per Windener, J. in *Hunter Douglas Australia Pty.* v. *Perma Blinds:* (1970) 44 Aust LJ R 257)

15. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per Cave, J., in *R.* v. *Norfolk County Court:* (1891) 60 LJ QB 379).

'When a statute gives a definition and then adds that certain things shall be "deemed" to be covered by the definition, it matters not whether without that addition the definition would have covered them or not.' (Per Lord President Cooper in *Ferguson* v. *McMillan :* 1954 SLT 109 (Scot))

16. Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context (see *St. Leon Village Consolidated School District* v. *Ronceray:* (1960) 23 DLR (2d) 32 (Can)).

'…. I … regard its primary function as to bring in something which would otherwise be excluded.'

(Per Viscount Simonds in *Barclays Bank Ltd.* v. *IRC:* 1961 AC 509 at AC p. 523.)

' "Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken.'

[See *R.* v. *Brixton Prison (Governor), ex p Soblen*: (1963) 2 QB 243 at QB p. 315.]'"

19.3. On a conspectus of the principles so enunciated, it is clear that although the word 'deemed' is employed for different purposes in different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand i.e., Section 43 of the Code, it could

reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so.

Exclusion part

19.4. Even when the above-stated indicting parts of Section 43 as occurring in sub-sections (4) and (2) are satisfied and the corporate debtor is deemed to have given preference at a relevant time to a related party or unrelated party, as the case may be, such deemed preference may yet not be an offending preference, if it falls into any or both of the exclusions provided by sub-section (3) i.e., having been entered into during the ordinary course of business of the corporate debtor or[40] transferee or resulting in acquisition of new value for the corporate debtor.

40 As noticed, whether this expression "or", as occurring in between the expressions 'corporate debtor' and 'transferee' in clause (a) of sub-section (3) of Section 43, is to be read as "and" remains a question to be dealt with.

Net concentrate of Section 43

19.5. Thus, the net concentrate of Section 43 is that if a transaction entered into by a corporate debtor is not falling in either of the exceptions provided by sub-section (3) and satisfies the three-fold requirements of sub-sections (4) and (2), it would be deemed to be a preference during a relevant time, whether or not in fact it were so; and whether or not it were intended or anticipated to be so.

20. The analysis foregoing leads to the position that in order to find as to whether a transaction, of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of Section 43 of the Code, ordinarily, the following questions shall have to be examined in a given case:

(i). As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?

(ii). As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?

(iii). As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53?

(iv). If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period

of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date?

(v) As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?

21. Having taken note of the salient features of Section 43 of the Code and the questions germane for its applicability over any transaction, we may now examine the questions calling for determination in these appeals. Obviously, if the transactions in question are to fall squarely within the mischief of Section 43, they must satisfy all the specifications and ingredients of sub-sections (2) and (4) of Section 43 and ought not to be within the exclusion provided in sub-section (3) thereof.

Whether impugned transactions are preferential, falling within the ambit of sub-section (2) of Section 43 IBC

22. For the purpose of dealing with the crucial question as to whether the impugned transactions are preferential and fall within the prescription of sub-section (2) of Section 43 of the Code, appropriate it shall be to recapitulate and summarize the overall scenario of this case.

22.1. The fact that JAL, a public listed company with more than 5 lakh individual shareholders, is the holding company of the corporate debtor JIL is neither of any doubt nor of any dispute. As on 31.03.2017, JAL owned 71.64%

of shares of JIL, having a value of Rupees 995 crores. The background had been that when in the year 2003, JAL was awarded the rights for construction of an expressway and a concession agreement was entered into with the Yamuna Expressway Industrial Development Authority, JIL was set up as a special purpose vehicle. Finance was obtained from a consortium of banks against partial mortgage of land acquired and pledge of 51% of the shareholding of JAL. Housing plans were envisaged for construction of real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur.

22.1.1. Shorn of other details which may not be necessary for the present purpose, relevant it is to notice that JIL was declared NPA by Life Insurance Corporation of India on 30.09.2015 and by some of its other lenders on 31.03.2016. Then, IDBI Bank Limited instituted a petition under Section 7 of the Code before NCLT, seeking initiation of Corporate Insolvency Resolution Process against JIL, while alleging that JIL had committed a default to the tune of Rs. 526.11 crores in repayment of its dues. On 09.08.2017, NCLT passed an order under Section 7 of the Code and appointed an Interim Resolution Professional[41]-[42]. The IRP made an application on 06.02.2018, seeking directions that the transactions entered into by the directors and promoters of corporate debtor creating mortgages of 858 acres of immovable property

41 CIRP in relation to JIL is underway by virtue of the orders passed by this Court on 09.08.2018 and 06.11.2019 (as referred to in paragraphs 6.2 and 6.3.1 - supra)

42 This date i.e., 09.08.2017 is the “insolvency commencement date” for the purpose of the questions under consideration

owned by it to secure the debts of JAL are preferential, undervalued, wrongful, and fraudulent; and hence, the security interest created by corporate debtor JIL in favour of the lenders of JAL be discharged and such properties be deemed to be vested in corporate debtor. The NCLT allowed the said application on 16.05.2018 with respect to six of the impugned transactions covering about 758 acres of land. On the appeals filed by lenders of JAL, NCLAT, by its impugned order dated 01.08.2019, set aside the order passed by NCLT and held that such lenders of JAL were entitled to exercise their rights under the Code.

22.2. At this juncture, we may again take note of the transactions that were questioned by IRP for the purpose of the application for avoidance, which had been the following: 1. Mortgage deed dated 29.12.2016 for 167.229 acres of land (Property No. 1) executed by JIL in favour of Axis Trustee Services Limited to provide an additional security for term loans of Rs. 21081.5 crores sanctioned as a consortium to JAL; 2. Mortgage deed dated 29.12.2016 for 167.9615 acres of land (Property No. 2), again executed by JIL in favour of Axis Trustee Services Limited to provide an additional security for term loans of Rs.21081.5 crores sanctioned by the consortium to JAL; 3. Mortgage deed dated 07.03.2017 for 158.1739 acres of land (Property No. 3) executed by JIL in favour of IDBI Trustee-ship Services Limited for term loan of Rs.1200 crores granted by ICICI Bank to JAL; 4. Mortgage deed dated 07.03.2017 for 151.0063 acres of land (Property No. 4), again executed by JIL in favour of

IDBI Trustee-ship Services Limited for term loan of Rs.1200 crores granted by ICICI Bank to JAL; 5. Mortgage deed dated 24.05.2016 for 25.0040 acres of land (Property No. 5) executed by JIL in favour of IDBI Trustee-ship Services Limited, as additional security against the facility agreement dated 29.08.2012 between Standard Chartered Bank and JAL for Rs.400 crores and other facilities, respectively for Rs.450 crores, Rs.538.16 crores and Rs.81.84 crores as also for working capital facility of Rs.297 crores; and 6. Mortgage deed dated 04.03.2016 for 90 acres of land (Property No. 6), executed by JIL in favour of State Bank of India for Short Term Loan Facility to JAL to the tune of Rs.1000 crores.

22.2.1. As noticed, 09.08.2017 is the insolvency commencement date in this case. The transactions in question, even if of putting the concerned properties under mortgage with the lenders, carry the ultimate effect of working towards the benefit and advantage of the borrower i.e., JAL who obtained loans and finances by virtue of such transactions. It is true that there had not been any creditor-debtor relationship between the lender banks and corporate debtor JIL but that will not be decisive of the question of the ultimate beneficiary of these transactions. The mortgage deeds in question, entered by the corporate debtor JIL to secure the debts of JAL, obviously, amount to creation of security interest to the benefit of JAL.

22.2.2. Now, the capacity of JAL is admittedly that of the holding company of JIL as its largest equity shareholder (with approximately 71.64 %

shareholding). Moreover, JAL had admittedly been the operational creditor of JIL, for an amount of approximately Rs. 261.77 crores. JAL itself maintains that it had been providing financial, technical and strategic support to JIL in various ways. It is the assertion that apart from making investment in terms of equity shareholding to the tune of Rs. 995 crores, JAL had pledged its 70,83,56,087 equity shares held in JIL in favour of the lenders of JIL; had also entered into Promoter Support Agreement to the lenders of JIL to meet the DSRA obligation of JIL towards its lenders; and had further extended Bank Guarantees of Rs. 212 crores to meet the DSRA obligation of JIL. These assertions, in our view, put JAL in such capacity that it is a related party to JIL and is a creditor as also surety of JIL. In other words, the corporate debtor JIL owed antecedent financial debts as also operational debts and other liabilities towards JAL.

22.3. In the scenario taken into comprehension hereinabove, there is nothing to doubt that the corporate debtor JIL has given a preference by way of the mortgage transactions in question for the benefit of its related person JAL (who has been the creditor as also surety for JIL) for and on account of antecedent financial debts, operational debts and other liabilities owed to such related person. In the given fact situation, it is plain and clear that the transactions in question meet with all the requirements of clause (a) of sub-section (2) of Section 43.

22.4. It is also not far to seek that in the given scenario, the requirements of clause (b) of sub-section (2) of Section 43 are also met fair and square. On behalf of the respondents, emphasis is laid on the fact that in the distribution waterfall in case of liquidation (per Section 53 of the Code), JAL, as an operational creditor, stands much lower in priority than the other creditors and stakeholders. Such submissions, in our view, only strengthen the position that by way of the impugned transfers, JAL is put in a much beneficial position than it would have been in the absence of such transfers. It has rightly been contended on behalf of the appellants that with the transactions in question, JAL has been put in an advantageous position vis-à-vis other creditors on the counts that: a) JAL received a huge working capital (approx. Rupees 30000 crores), by way of loans and facilities extended to it by the respondent-lenders; and b) by way of the transactions in question, JAL's liability towards its own creditors shall be reduced, in so far as the value of the mortgaged properties is concerned, which is said to be approximately Rs. 6000 crores. As a necessary corollary of the beneficial and advantageous position of the related party JAL with creation of such security interest over the properties of JIL, in the eventuality of distribution of assets under Section 53, the other creditors and stakeholders of JIL shall have to bear the brunt of the corresponding disadvantage because such heavily encumbered assets will not form the part of available estate of the corporate debtor. Obviously, JAL stands dearly benefited and has derived such benefits at the cost, and in exclusion, of the

other creditors and stakeholders of the corporate debtor JIL. The applicability of clauses (a) and (b) of sub-section (2) of Section 43 of the Code is clear and complete in relation to the impugned six transactions.

22.5. Therefore, in relation to the present case, the answers to questions (i), (ii) and (iii) as referred in paragraph 20 are that: the impugned transactions had been of transfers for the benefit of JAL, who is a related party of the corporate debtor JIL and is its creditor and surety by virtue of antecedent operational debts as also other facilities extended by it; and the impugned transactions have the effect of putting JAL in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53 of the Code. Thus, the corporate debtor JIL has given a preference in the manner laid down in sub-section (2) of Section 43 of the Code.

The requirements of sub-section (4) of Section 43 IBC - related party and look-back period

23. Even when all the requirements of sub-section (2) of Section 43 of the Code are satisfied, in order to fall within the mischief sought to be remedied by Section 43, the questioned preference ought to have been given at a relevant time. In other words, for a preference to become an avoidable one, it ought to have been given within the period specified in sub-section (4) of Section 43. The extent of 'relevant time' is different with reference to the relationship of the beneficiary with the corporate debtor inasmuch as, for the persons falling within the expression 'related party' within the meaning of Section 5 (24) of the

Code, such period is of two years before the insolvency commencement date whereas it is one year in relation to the person other than a related party. The conceptions of, and rationale behind, such provisions could be noticed in the excerpts from the interim report of Law Reforms Committee, as referred on behalf of the appellants. We may usefully extract the same as under: -

> “c. TRANSACTIONS WITH RELATED PARTIES
>
> The law on avoidance in the UK provides for close scrutiny of transactions entered into with persons connected with the company (other than employees) by incorporating longer time periods in relation to which such transactions can be challenged. Thus, while the relevant time period for avoiding preferences is six months prior to the onset of insolvency, the time period is increased to two years in the case of persons connected with the company. Similarly, for late floating charges other than for new value, the vulnerability period for non-connected persons is twelve months while it is two years in the case of connected persons. The avoidance provisions under the CA 2013 does not provide for longer time periods in case the transactions are with connected persons. It is submitted that providing for longer time periods for vulnerability would be significant in improving the efficacy of these provisions. This is because a wider range of transactions diminishing creditor wealth entered into with insiders occur not in the ‘zone of insolvency’ but as soon as early signals of trouble are visible. Such insiders have superior information of the company’s deteriorating financial position and may raid corporate assets knowing that the company may become insolvent. These provisions are of special significance in the Indian context where even the larger corporates are often promoter/family controlled with such insiders often enjoying significant informational advantages over even well-advised secured lenders.”

23.1. Before examining as to whether the questioned preferences were given at the relevant time as specified in sub-section (4) of Section 43, we may deal

with one part of the submissions made on behalf of some of the respondents that in view of the look-back periods provided in sub-section (4), the provisions of Section 43 of the Code, by their very nature, would come into operation at least one year after the enactment of the Code and else, it would be giving retrospective effect to these provisions which is not permissible. The submissions, in our view, remain bereft of substance.

23.1.1. The scheme of IBC is to disapprove and disregard such preferential transaction which falls within the ambit of Section 43 and to ensure that any property likely to have been lost due to such transaction is brought back to the corporate debtor; and if any encumbrance is created, to remove such encumbrance so as to bring the corporate debtor back on its wheels or in other event (of liquidation), to ensure *pro rata*, equitable and just distribution of its assets. Such provisions as contained in Sections 43 and 44 came into operation as the comprehensive scheme of corporate insolvency resolution and liquidation from the date of being made effective; and merely because look-back period is envisaged, for the purpose of finding 'relevant time', it cannot be said that the provision itself is retrospective in operation. Reference to the decision of this Court in the case of *Purbanchal Cables* (supra) is entirely inapt. In the said case, by virtue of the enactment in question, i.e., Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, a new liability of high rate of interest was created against the buyer in displacement of the general principles of Section 34 of the

Code of Civil Procedure. Hence, this Court found that the enactment creating new liability would only be prospective in operation. As noticed, fraudulent preferences in the affairs of corporate persons had been dealt with by the legislature in the Companies Act, 1956 and have also been dealt with in the Act of 2013. Though therein, essentially, the fraudulent preferences and transfers not in good faith are dealt with whereas, in the scheme of IBC, separate provisions are made as regards the transactions intended at defrauding the creditors (Section 49 IBC) as also for fraudulent trading or wrongful trading (Section 66 IBC). The provisions contained in Section 43, however, indicate the intention of legislature that when a preference is given at a relevant time and thereby, the beneficiary of preference acquires unwarranted better position in the event of distribution of assets, the same may not be countenanced. Looking to the scheme of IBC and the principles applicable for the conduct of the affairs of a corporate person, it cannot be said that anything of a new liability has been imposed or a new right has been created. Maximisation of value of assets of corporate persons and balancing the interests of all the stakeholders being the objectives of the Code, the provisions therein need to be given fuller effect in conformity with the intention of the legislature.

23.1.2. We may also observe that if the contentions urged on behalf of the respondents were to be accepted, the result would be of postponing the effective date of operation of sub-section (4) of Section 43 by two years in the

case of related party and to one year in the case of unrelated party, and thereby, effectively postponing the application of entire Section 43 for a period of two years! That cannot be and had never been the intention of legislature. It is also noteworthy that by virtue of proviso to sub-section (3) of Section 1 of the Code, different dates can be provided for enforcement of different provisions of the Code; and in fact, different provisions have been brought into effect on different dates. However, after coming into force of the provisions, if a look-back period is provided for the purpose of any particular enquiry, it cannot be said that the operation of the provision itself would remain in hibernation until such look-back period from the date of commencement of the provision comes to an end. There is nothing in the Code to indicate that any provision in Chapter II or Chapter III be taken out and put in operation at a later date than the date notified. Such contentions being totally devoid of substance, deserve to be, and are, rejected.

24. We may now take up the question as to which of the transactions in question would entail in giving preference at a relevant time or otherwise. As noticed, the preference is given to JAL who is a related party of JIL. Hence, the look-back period is two years preceding insolvency commencement date i.e., 09.08.2017 per clause (a) of sub-section (4) of Section 43; and accordingly, the point of enquiry would be as to whether the preference had been given during the period of two years preceding 09.08.2017. Therefore, the transactions commencing from 10.08.2015 until the date of insolvency

commencement shall fall under the scanner. As noticed, it has been one of the major contentions of the respondents that most of the impugned transactions were not of creation of any new encumbrance by JIL and in fact, most of the properties in question had already been under mortgage with the respective lenders much before the period under consideration i.e., much before 10.08.2015.

24.1. It may at once be noticed that the transaction that was clearly falling beyond the period under consideration was, in fact, kept out of the purview of Section 43 of the Code by NCLT itself, being that relating to Property No. 7 (as mentioned in paragraph 4.5 hereinbefore).

24.2. So far as the transaction relating to Property No. 6 is concerned, being the mortgage deed dated 04.03.2016, towards Short-Term Loan Facility to JAL of Rs. 1000 crores by State Bank of India, the same obviously falls within the look-back period. Even if JAL had allegedly entered into the facility agreement with this lender bank on 26.03.2015, this date is hardly of any bearing so far as transaction by the corporate debtor JIL is concerned, which was made only on 04.03.2016.

24.3. In relation to the transactions concerning Property No. 1 and Property No. 2, for securing loans by the Consortium to JAL, it is submitted that there had been initial mortgage dated 24.02.2015 that was released on 15.09.2015 and a so-called re-mortgage was made on 15.09.2015 and thereafter, this was also released on 29.12.2016 and again the so-called re-mortgage was made

on 29.12.2016. It is sought to be asserted that it had not been a case of creation of a fresh mortgage. Similarly, in relation to the transactions concerning Property No. 3, it is alleged that there had been initial mortgage dated 12.05.2014 for 433.35 acres of land of which, 240 acres was released on 30.12.2015, 35.05 acres was released on 24.06.2016 and the remaining 158.1739 acres of land was also released on 07.03.2017 but was re-mortgaged on this very date 07.03.2017. As regards Property No. 4, it is alleged that the same was put under mortgage initially on 12.05.2014, was released on 07.03.2017 and was re-mortgaged on this very date 07.03.2017. As regards Property No. 5, it is alleged that the same was put under mortgage initially on 24.06.2009, the mortgage was extended on 27.11.2012 and on 23.03.2013; it was released on 04.11.2015 and was re-mortgaged on 24.05.2016.

24.3.1. It has been one of the major contentions of the respondents that most of the impugned transactions were not of creation of any new encumbrance by JIL and in fact, most of the properties in question had already been under mortgage with the respective lenders. The submissions of respondents in relation to the aforesaid five transactions, that they had been of so-called re-mortgage/s, carry their own shortcomings and cannot be accepted. In the first place, we are clearly of the view that on release by the mortgagee, the mortgage ceases to exist and it is difficult to countenance the concept of a so-called re-mortgage. The so-called re-mortgage, on all its legal effects and

connotations, could only be regarded as a fresh mortgage; and it obviously befalls on the mortgagor to consider at the time of creating any fresh mortgage as whether such a transaction is expedient and whether it should be entered into at all. Noticeable it is that in relation to Property No. 1 and 2, even if the initial mortgage had been dated 24.02.2015 falling beyond the look-back period, it was released on 15.09.2015 and this date (15.09.2015) falls within the look-back period. Even if the same property has been again mortgaged with the same lender/s on the same day of release, the same cannot be countenanced for the transaction operates towards extending unwarranted preference to JAL by the corporate debtor JIL. Significant it is to notice that while making this mortgage dated 15.09.2015, the facility amount being obtained by JAL got swelled from Rs. 3250 crores to a whopping Rs. 24109 crores and the number of creditors went up from 2 to 24. Such a transaction, in our view, had only been of a fresh mortgage to secure extra facilities obtained by JAL and thereby, extending unwarranted advantage to JAL at the cost of the estate of JIL. In the other transaction dated 29.12.2016, by which the properties in question were again put under mortgage with the lender/s, the facility amount was shown as Rs. 23491 crores. The transactions on 15.09.2015 and 29.12.2016 cannot be given credence with reference to the previous mortgage deed dated 24.02.2015. Similar is the case in relation to Property No. 3. Even when the previous mortgage was given on 12.05.2014 i.e., beyond the look-back period, there had been release deeds on

30.12.2015 and 26.06.2016 as regards certain parcels of land. So far the release of land to JIL is concerned, the same causes no problem and only works to the benefit of JIL and its stakeholders. However, when the remaining land was also released on 07.03.2017, its fresh mortgage, even if on the same date, cannot be countenanced and is hit by Section 43, being a deemed preference. The very same considerations apply in relation to the Property No. 4 too. As regards Property No. 5, even if there had been certain previous mortgage transactions falling beyond the look-back period, the property got released on 04.11.2015; and thereafter, the fresh mortgage on 24.05.2016, with increased facility amount from Rs. 1470 crores to Rs. 1767 crores, suffers from the same vice, of being a deemed preference to a related party during the period of two years preceding the insolvency commencement date.

24.4. For what has been discussed hereinabove, the conclusion is inevitable that the impugned preference was given to a related party during a relevant time. However, before concluding on this part of discussion, we may also observe that reference to the decisions of Madras and Bombay High Courts in the case of *IDBI Bank Ltd* and *Monarch Enterprises* respectively, is neither apposite nor advances the cause of the respondents for the reason that the said decisions had essentially been on the question/s as to whether the impugned transactions were of fraudulent preference per Section 531 or lacking in good faith per Section 531A of the Companies Act, 1956. In fact, in the case of *IDBI Bank* (supra) the corporate debtor attempted to transfer one

of its property to the appellant bank, who was one of its creditors and in that regard, certain transactions like agreement for sale and handing over possession were suggested and it was alleged that the contract for sale was partly performed about one year and four months prior to the winding-up proceedings; and such being beyond the look-back period of six months as envisaged by Section 531 of the Companies Act, 1956, it was argued that it had not been a fraudulent transfer. The contentions were not accepted by the Single Judge and by the Division Bench of the High Court for the reason that mere handing over of possession or documents did not complete the sale; rather the Court was of the view that such documents were created only in order to avoid the transaction being called a fraudulent preference. Apart that the element of fraud is not the essential ingredient of Section 43 of the Code, the said decision in *IDBI Bank*, on the approach of the Courts towards corporate transactions makes it clear that any transaction favouring one stakeholder at the cost of the other is viewed with disfavour and is disapproved, particularly if it takes place during the prescribed look-back period.

24.5. For what has been discussed hereinabove, the answer to question (iv) as referred in paragraph 20 is that the transactions in question had been of deemed preference to related party JAL by the corporate debtor JIL during the look-back period of two years and have rightly been held covered within the period envisaged by sub-section (4) of Section 43 of the Code.

Ordinary course of business or financial affairs

25. Even when it is held that the impugned transactions answer to the requirements of sub-section (2) of Section 43 and fall within the period specified in sub-section (4) thereof, the question still remains as to whether the impugned transactions do or do not fall within the exclusion provided by sub-section (3) of Section 43 of the Code? As noticed, two types of transfers, as specified in clauses (a) and (b) of sub-section (3) of Section 43, are not to be treated as preference for the purpose of sub-section (2). It has been the mainstay of respondent-lenders that, in any case, the transfers in question were made in the ordinary course of their business and hence, fall within clause (a) of Section 43(3) that excludes the transfer made in the ordinary course of business or financial affairs of the corporate debtor or the transferee. It has been forcefully argued that the lenders of JAL are the transferees in the transactions in question and their ordinary course of business being of providing financial support with loans and advances, such transfers are not included in sub-section (2) of Section 43 by virtue of the exclusion provided in sub-section (3) thereof. On the other hand, the main plank of submissions on behalf of the appellants has been that the expression “or” occurring in clause (a) of sub-section (3) of Section 43, seemingly disjunctive of corporate debtor on one hand and transferee on the other, is required to be read as “and” so as to be conjunctive and covering only the transfers made in the ordinary course of business or financial affairs of the corporate debtor and the transferee. It is

submitted on behalf of the appellants that such mortgage transactions had neither been in the ordinary course of business or financial affairs of the corporate debtor JIL nor secure new value in the property acquired by the corporate debtor and hence, are not excepted transactions within the meaning of sub-section (3) of Section 43 of the Code.

25.1. Having taken into comprehension the scheme of the Code and the purpose and purport of the provisions contained in Section 43, we find force and substance in the submissions made on behalf of the appellants.

25.2. As noticed, in the scheme of such provisions in the Code, the underlying concept is to disregard and practically annul such transactions which appear, in the course of insolvency resolution or liquidation, to be preferential so as to minimise the potential loss to other stakeholders in the affairs of the corporate debtor, particularly its creditors. What is to be examined for the purpose of Section 43 is the conduct and affairs of the corporate debtor. If the beneficiary of the transaction in question is a related party of the corporate debtor, the period of enquiry is enlarged to two years whereas this period is one year in other cases. During such scanning, by virtue of sub-section (3) of Section 43, two types of transfers are kept out of the purview of sub-section (2), which would not be treated as preference. Though in the present case, we are concerned only with the phraseology occurring in clause (a) of sub-section (3) but, we may usefully refer to clause (b) thereof, for an insight into the

underlying concept for providing exception in regard to certain transfers and keeping them out of the purview of ‘preference’.

25.2.1. By virtue of clause (b) of sub-section (3) [read with *Explanation* thereto], any transfer creating a security interest in the property ‘acquired’ by the corporate debtor is not to be treated as preference to the extent that such security interest secures new value in monetary terms or in terms of goods, services or new credit or in release of a previously transferred property. Any micro dissection of clause (b) of sub-section (3) of Section 43 is not required in the present case. Suffice it to notice that even a bare look at the provision brings forth the concept that value enhancement or strengthening of the corporate debtor ought to be the result of a transfer, if it is to remain out of the ambit of sub-section (2) and not to fall within the mischief of being preferential.

25.2.2. Another feature of vital importance is that the matter is examined with reference to the dealing and conduct of the corporate debtor; and *qua* the health and prospects of the corporate debtor. Applying the well-known principles of *noscitur a sociis*, whereunder the questionable meaning of a doubtful word could be derived and understood from its associates and context; and usefully recapping that the scheme of Section 43 of the Code is essentially of scanning through the affairs of the corporate debtor and to discredit and disregard such transaction by the corporate debtor which tends to give unwarranted benefit to one of its creditor/surety/guarantor over others, in our view, the purport of clause (a) of sub-section (3) of Section 43 is also

principally directed towards the corporate debtor's dealings. In other words, the whole of conspectus of sub-section (3) is that only if any transfer is found to have been made by the corporate debtor, either in the ordinary course of its business or financial affairs or in the process of acquiring any enhancement in its value or worth, that might be considered as having been done without any tinge of favour to any person in preference to others and thus, might stand excluded from the purview of being preferential, subject to fulfilment of other requirements of sub-section (3) of Section 43.

25.3. Needless to reiterate that if the transfer is examined with reference to the ordinary course of business or financial affairs of the transferee alone, it may conveniently get excluded from the rigour of sub-section (2) of Section 43, even if not standing within the scope of ordinary course of business or financial affairs of the corporate debtor. Such had never been the scheme of the Code nor the intent of Section 43 thereof. It has rightly been contended on behalf of the appellants that for the purpose of exception under clause (a) of sub-section (3) of Section 43, the intent of legislature is required to be kept in view. If the ordinary course of business or financial affairs of the transferee (lenders of JAL in the present case) would itself be decisive for exclusion, almost every transfer made to the transferees like the lender-banks/financial institutions would be taken out of the net, which would practically result in frustrating the provision itself.

25.4. It remains trite that an interpretation that defeats the scheme, intent and object of the statutory provision is to be eschewed and for that matter, if necessary, by applying the principles of purposive interpretation rather than literal. In the case of *R.M.D. Chamarbaugwala* (supra), the Constitution Bench of this Court has held that well known cannons of construction of statutes permit the Court to read the word “or” as “and” after looking at the clear intention of the legislature. In the case of *Mazagaon Dock Ltd* (supra), when the expression “or” occurring in sub-section (2) of Section 42 of the Income Tax Act, 1922 did appear bringing out the result which could not have been intended, the same was read in the context as meaning “and”. This Court said:

> “10. The word “or” in the clause would appear to be rather inappropriate, as it is susceptible of the interpretation that when some profits are made but they are less than normal profits, tax could only be imposed either on the one or on the other, and that accordingly a tax on the actual profits earned would bar the imposition of tax on profits which might have been received. Obviously, that could not have been intended, and the word “or” would have to be read in the context as meaning “and”….”

25.5. Looking to the scheme and intent of the provisions in question and applying the principles aforesaid, we have no hesitation in accepting the submissions made on behalf of the appellants that the said contents of clause (a) of sub-section (3) of Section 43 call for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives. Therefore, the expression “or”, appearing as disjunctive between the expressions “corporate debtor” and “transferee”, ought to be read as “and”; so as to be conjunctive of the two expressions i.e.,

"corporate debtor" and "transferee". Thus read, clause (a) of sub-section (3) of Section 43 shall mean that, for the purposes of sub-section (2), a preference shall not include the *transfer made in the ordinary course of the business or financial affairs of the corporate debtor* <u>*and*</u> *the transferee*. Only by way of such reading of "or" as "and", it could be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer of the core question as to whether corporate debtor has done anything which falls foul of its corporate responsibilities.

25.6. The result of discussion in the foregoing paragraphs is that the transfers in question could be considered outside the purview of sub-section (2) of Section 43 of the Code only if it could be shown that same were made in the 'ordinary course of business or financial affairs' of the corporate debtor JIL and the transferees. Even if transferees submit that such transfers had been in the ordinary course of their business, the question would still remain if the transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL so as to fall within the exception provided by clause (a) of sub-section (3) of Section 43 of the Code.

25.6.1. Thus, the enquiry now boils down to the question as to whether the impugned transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL. It remains trite that an activity could be regarded as 'business' if there is a *course of dealings,which are either actually*

continued or contemplated to be continued with a profit motive.[43] As regards the meaning and essence of the expression 'ordinary course of business', reference made by the appellants to the decision of the High Court of Australia in *Downs Distributing Co* (supra), could be usefully recounted as under:-

> "As was pointed out in Burns v. McFarlane the issues in sub-s. 2(b) of s. 95 of the Bankruptcy Act 1924-1933 are "(1) good faith; (2) valuable consideration; and (3) ordinary course of business." This last expression it was said "does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor." It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. **It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation.**"
>
> (emphasis supplied)

25.6.2. Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of 'ordinary course of business' of a particular corporate entity only if it falls in place as part of 'the undistinguished common flow of business done'; and is not arising out of 'any special or particular situation', as rightly expressed in *Downs Distributing Co* (supra). Though we may assume

43 vide ***State of Andhra Pradesh v. H. Abdul Bakshi and Bros.:*** **1964 STC 644** (at p. 647).

that the transactions in question were entered in the ordinary course of business of bankers and financial institutions like the present respondents but on the given set of facts, we have not an iota of doubt that the impugned transactions do not fall within the ordinary course of business of the corporate debtor JIL. As noticed, the corporate debtor has been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial affairs of JIL that it would create encumbrances over its properties to secure the debts of its holding company. In other words, we are clearly of the view that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health. As noticed, JIL was already reeling under debts with its accounts with some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the home buyers. In the given circumstances, we have no hesitation in

concluding that the transfers in questions were not made in ordinary course of business or financial affairs of the corporate debtor JIL.

25.7. The submissions that security was disclosed in the Annual Reports or that none of the creditors expressed dissent are of no effect because such disclosure or want of objection by creditors, by themselves, do not operate as estoppel against anybody nor would take the transaction out of the purview of the legal fiction predicated in Section 43, if it is otherwise of a preference at a relevant time. Similarly, the distinction between 'NPA' and 'wilful default'; the submission that NPA could be regularised; and further the submission that the mortgages were created before JIL was declared NPA, are hardly of any bearing on the question as to whether the impugned transactions had been in the ordinary course of business or financial affairs of JIL. Thus, reference to the decisions like that in *Keshavlal Khemchand* and *Jah Developers* (supra) is not of any consequence and need not be dilated upon. The answer to this question, in our view, could only be in the negative. That is to say that the impugned transactions had not been in the ordinary course of business or financial affairs of JIL.

25.8. Therefore, the answer to question (v) as referred in paragraph 20 is that the impugned transactions are not of excepted transfers in terms of sub-section (3) of Section 43 of the Code.

The concern expressed by lenders of JAL is legally untenable

26. The argument of lenders, that holding the transactions in question as preferential would result in impacting large number of transactions undertaken by the bankers/financial institutions, of financing in the ordinary course of their business; and the consequences may be devastating and irreversible on the economy, has only been noted to be rejected.

26.1. It needs hardly any emphasis that in the ordinary course of their business, when the bankers or financial institutions examine any proposal for loan or advance or akin facility, they are supposed to, and they indeed, take up the exercise commonly termed as 'due diligence'[44] so as to study the viability of the proposed enterprise as also to ensure, *inter alia*, that the security against such loan/advance/facility is genuine and adequate; and would be available for enforcement at any point of time. Given the nature of transaction, the lenders must prefer a clean security to justify the transaction as being in the ordinary course of their business. In the same exercise, in the ordinary course of their business, if they are at all entering into a transaction whereby a third party security, including that of a subsidiary company, is to be taken as collateral, they are obliged to undertake further due diligence so as to ensure

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44 As regards the present context, the term 'due diligence' is explained in P. Ramanatha Aiyar's Advanced Law Lexicon (5th Ed.-Vol 2, p.1654) in the following:

> "The detailed review of the borrower/issuer's overall position, which is supposed to be undertaken by the lead manager of a new financing in conjunction with the preparation of legal documentation.
>
> Analysis of the financial status and prospects of company before it receives a major investment of capital. It is usually carried out by an independent accountant."

that such third party security is a prudent and viable one and is not likely to be hit by any law. In that sequence, they remain under obligation to assure themselves that such third party whose security is being taken, is not already indebted or in red and is not likely to fail in dealing with its own indebtedness. In the context of IBC, such requirement is moreover imperative on a bare look at the provisions contained in Part II thereof. Interesting it is to notice on the facts of the present case that in fact, several of the respondent lenders are shown to be the direct creditors of JIL too, to the extent of the advances made to JIL. They and the co-respondents cannot plead ignorance about the actual state of affairs and financial position of JIL. Despite such knowledge, if they chose to take the business risk of accepting security from JIL and that too, for securing the loans/advances/facilities made over to JAL, who was a directly related party of JIL for being its holding company, they themselves remain responsible for present legal consequences.

Summation: The transactions in question are hit by Section 43 IBC

27. For what has been discussed hereinabove, we are clearly of the view that the transactions in question are hit by Section 43 of the Code and the Adjudicating Authority, having rightly held so, had been justified in issuing necessary directions in terms of Section 44 of the Code in relation to the transactions concerning Property Nos. 1 to 6. NCLAT, in our view, had not been right in interfering with the well-considered and justified order passed by NCLT in this regard.

Search and commandeering of preference at a relevant time

28. Although we have analysed the transactions in question on the anvil of Section 43 with reference to the submissions made and the facts of the present case but, before moving on to other aspects, we deem it appropriate to point out the manner in which the provisions concerning preference at a relevant time are expected to be applied, particularly by the resolution professional, in a given case. It could be readily recapitulated that as per the charging parts of Section 43 i.e., sub-sections (4) and (2) thereof, a corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of clauses (a) and (b) of sub-section (2) coupled with the applicable requirements of either clause (a) or clause (b) of sub-section (4), as the case may be, are satisfied. However, even if the requirements of sub-sections (4) and (2) are satisfied, a transaction may not be regarded as an offending preference if it falls in either or both of the exceptions provided by sub-section (3) of Section 43.

28.1. Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

1. In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire

cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of ‘related party’ in terms of Section 5(24) of the Code and another of the remaining persons.

2. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into two sub-sets: One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

3. Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor *qua* the corporate debtor. These steps

shall lead to shortlisting of such transactions which carry the potential of being preferential.

4. In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to clause (a) of sub-section (2) of Section 43.

5. In yet further step, such of the scanned and scrutinised transactions that are found covered by clause (a) of sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by sub-section (3) of Section 43.

6. In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the clauses (a) and (b) of sub-section (3) of Section 43.

> 7. After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3).

28.2. On a motion made by the resolution professional after and in terms of the exercise aforesaid, the Adjudicating Authority, in its turn, shall have to examine if the referred transaction answers to all the descriptions noted above and shall then decide as to what order is required to be passed, for avoidance of the impugned transaction or otherwise.

28.3. In our view, looking to the legal fictions created by Section 43 and looking to the duties and responsibilities of the resolution professional and the Adjudicating Authority, ordinarily an adherence to the process illustrated hereinabove shall ensure reasonable clarity and less confusion; and would aid in optimum utilization of time in any insolvency resolution process.

Other aspects of the application made by IRP – allegations of transactions being undervalued and fraudulent

29. Having found that the transactions in question cannot be countenanced, for being of preference during a relevant time to a related party; and having approved the order passed by NCLT in that regard, we do not consider it necessary to deal with the other length of arguments advanced by the learned

counsel for parties on the questions as to whether the transactions are undervalued and/or fraudulent too. In the totality of circumstances, we would prefer leaving the said questions at that only, while also leaving all the related questions of law open; to be examined in an appropriate case.

29.1. However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the creditor under Section 47 of the Code. The consequences of undervaluation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons

responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.

29.2. In the present case, it is noticed that NCLT in its detailed and considered order essentially dealt with the features of the transaction in question being preferential at a relevant time but recorded combined findings on all these three aspects that the impugned transactions were preferential, undervalued and fraudulent. Appropriate it would have been to deal with all these aspects separately and distinctively.

29.3. We are conscious of the fact that IBC is comparatively a new legislation and various aspects expected therein are in the progression of taking proper shape, particularly in the adjudicatory processes envisaged. Having said so, we would leave this aspect at that only, while expecting all the concerned to be

more attentive to the scheme, object and requirements of the provisions contained in the Code.

SECOND ISSUE: WHETHER LENDERS OF JAL COULD BE CATEGORISED AS FINANCIAL CREDITORS OF JIL

Preliminary and background

30. The discussion and summation in the foregoing paragraphs and conclusion on the first issue itself would have been the end of the matter because the transactions in question stand disapproved as being preferential. However, there remains another significant issue to be adjudicated herein, which, though not adverted to by NCLAT, is indeed involved in these matters.

30.1. The issue is as to whether the lenders of JAL could be categorised as financial creditors of JIL for the purpose of IBC?

31. The issue aforesaid was raised before NCLT by two of the respondent banks namely, ICICI Bank Limited and Axis Bank Limited by way of separate applications under Section 60(5) of the Code, seeking to question the decision of IRP rejecting their claims to be recognized as financial creditors of the corporate debtor JIL on account of the securities provided by JIL for the facilities granted to JAL. The NCLT rejected the applications so filed, by way of its orders dated 09.05.2018 and 15.05.2018 respectively, while concluding that on the strength of the mortgages created by the corporate debtor JIL, as collateral security of the debts of its holding company JAL, the applicants cannot be treated as financial creditors of the corporate debtor JIL.

31.1. The aforesaid orders dated 09.05.2018 and 15.05.2018 were questioned before NCLAT by the said lenders of JAL in Comp. App (AT) (Ins) No. 353 of 2018 and Comp. App (AT) (Ins) No. 301 of 2018 respectively. These appeals formed part of the bunch of appeals decided by NCLAT by way of the impugned common order dated 01.08.2019 and, as per the final result recorded therein, these two appeals also stand allowed. However, fact of the matter remains that nothing has been discussed by NCLAT in the impugned order dated 01.08.2019 as regards the subject-matter of these two appeals i.e., as to whether the said lenders of JAL could be categorised as financial creditors of JIL or not; and the entire discussion in the impugned order and the final conclusion therein had only been in relation to the order dated 16.05.2018 that was passed by NCLT on the application for avoidance filed by IRP.

31.2. The appellant of Civil Appeal D. No. 32881 of 2019, IIFCL, apart from raising other contentions, has also questioned this aspect of the order impugned that the aforesaid two appeals, involving the issue as to whether the mortgagees of the corporate debtor could be taken as financial creditors, have been allowed by NCLAT without recording any findings and without any discussion in that regard.

31.3. Though, ordinarily, such omission in the impugned order dated 01.08.2019 might have resulted in the matter being remitted to the Appellate Tribunal for appropriate consideration and finding but, as aforesaid, in the entire process, adherence to the time limit is also of significance; and in view

of the fact that learned counsel for the respective parties have advanced elaborate submissions on the merits of the issue as to whether such lenders of JAL could be treated as financial creditors of the corporate debtor JIL and have invited the decision of this Court, we deem it just, proper and expedient to finally decide the relevant questions in this regard.

31.4. We may, of course, reiterate that in view of the conclusion that we have reached in relation to the principal issue, the transactions in question are denuded of their value and worth, per the force of the order by NCLT under Section 44 of the Code, which has been approved by us. To be more specific, the security interests created by the corporate debtor JIL over the properties in question stand discharged in whole. Therefore, the respondent-lenders cannot claim any status as creditors of the corporate debtor JIL and there could arise no question of their making any claim to be treated as financial creditors as such. However, for its relevance, we deem it appropriate to determine the issue as to whether the lenders of JAL, because of creation of the mortgages in question, could be treated as financial creditors of JIL, independent of the finding that the transactions in question are hit by Section 43 of the Code.

32. Before proceeding further, apposite it would be to take note of the reasons assigned by NCLT in its impugned orders for rejecting the claim of two of the lender banks to be treated as financial creditors of JIL.

Reasoning and Findings of NCLT

33. The Adjudicating Authority, NCLT, in its order dated 09.05.2018 as passed on the application moved by ICICI Bank Limited, with reference to the nature of transaction in question, whereby JIL had extended collateral security towards the facility extended to its holding company JAL as also with reference to the definition and connotations of the expressions 'financial debt' and 'financial creditor' as occurring in IBC, essentially proceeded to find that in such a transaction, as regards the corporate debtor JIL, no consideration for time value for money was involved; and hence, the transaction in question did not qualify as 'financial debt' *qua* the corporate debtor JIL. The NCLT, *inter alia*, observed as under:-

> "9. In the present case undisputedly corporate debtor has mortgaged its property for creating collateral security for the debt of its holding company JAL. The Corporate debtor is not a borrower, it has created a mortgage in favour of financial institutions for creating collateral security for the money borrowed by its holding company JAL. In the said transaction time value of money is not involved. The corporate debtor's liability is not regarding the debt owed by its holding company JAL. In case of default in making payment by the principal borrower, for which security interest has been created by the corporate debtor by mortgaging its property in favour of Applicant bank, the debt amount can be realized from the sale of the mortgaged property but not from the corporate debtor, i.e. Jaypee Infratech Ltd.
>
> *** *** ***
>
> 9.2 In this case, the applicant has not disbursed the debt along with interest against the consideration for the time value of money. It is also not the case of the applicant that the corporate debtor has borrowed money against payment of interest from the applicant. It is also not the case that the corporate debtor has raised any amount from the applicant under any credit facility. It is not the case of the

> applicant that there is any liability towards the corporate debtor in respect of any lease or higher purchase contract. It is further not the case of an applicant that any receivables been sold or discounted. It is further not the case of the applicant that any amount has been raised for the corporate debtor under any other transaction having the commercial effect of borrowing to the corporate debtor. It is not the case of the applicant that any derivative transaction has been entered with the corporate debtor. It is also not the case of the applicant that any counter indemnity obligation in respect of a guarantee, indemnity, bond, documentary, letter of credit or any other instrument issued by a bank or a financial institution for the corporate debtor. Further, no amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to above has been issued by the corporate debtor."

33.1. The NCLT also distinguished the decision of this Court in the case of ***Rajkumari Kaushalya Devi v. Bawa Pritam Singh & Anr.*****: AIR 1960 SC 1030,** as relied upon by the learned counsel for the applicant, while pointing out the distinct context of the said decision and while observing that the connotations of the expressions 'debt', 'financial debt', 'financial creditor' and 'creditor' in the present context would be limited to the definitions given in the Code. The NCLT further distinguished the decision of Gujarat High Court in the case of ***State Bank of India v. Smt. Kusum Vallabhdas Thakkar*****: 1991 SCC Online Guj 14,** while again pointing out that in the present case, the corporate debtor has created a mortgage of its property in favour of third party without any consideration for time value of money.

33.2. Yet further, the NCLT rejected the contentions that the transaction in question could be termed as either 'guarantee' or 'indemnity' while observing, *inter alia*, as under:-

“13. The contention of the applicant that mortgage created by the corporate debtor can be termed as either a guarantee or indemnity is not tenable. In terms of the mortgage deeds the corporate debtor has created a mortgage over its immovable properties, which is either money borrowed against payment of interest nor indemnity or a guarantee as claimed by the applicant and therefore, the same does not fall within the definition of the financial debt in terms of Sec. 5 (8) of IBC. It is stated that the corporate debtor has neither issued any guarantee nor has provided an indemnity to the applicant in respect of the financial assistance granted to JAL.

14. The Resolution Professional further submitted that the mortgage deed shows that the corporate debtor has only agreed to create a mortgage in favour of the applicant towards the financial assistance granted to its holding company, i.e. JAL. On perusal of mortgage it is clear that the corporate debtor has neither given any guarantee to repay or any indemnity qua the repayment of the loans granted by the applicant to JAL. The definition of Mortgage Debt as per the mortgage deed dated 7th March 2017 is as under : -

> “Mortgage debt shall mean the principal amount of the facility, all interest therein additional interest, default interest, liquidated damages, fees, costs, charges, expenses, any other amounts due and payable to secured parties under the transaction documents, premia on prepayment, costs, charges, and expenses and other monies whatsoever stipulated in or payable together with other debts and liabilities of JAL to lender under the transaction document and/or these presents.”

It is important to point out that sec. 124 of the Indian Contract Act defines a “Contract of Indemnity” as being a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. In the instant case, as per the Mortgage deed the repayment obligation of the loan granted to JAL by the applicant is upon JAL as stated above and therefore, no contract of indemnity as claimed by the applicant has been entered even by conduct of the corporate debtor, and therefore, the contention of the applicant that the applicant is a financial creditor of the corporate debtor is completely untenable in law.”

33.3. While observing that in the scheme of the Code and CIRP Regulations thereunder, the claims are invited from the creditors of the corporate debtor i.e., financial creditors, operational creditors and other creditors, and not from any person or creditors of the holding company of the corporate debtor; and while further observing that the resolution professional had righty observed that the mortgages in questions were not like guarantee or indemnity, NCLT observed that the basic ingredient of financial debt i.e., 'debt alongwith interest disbursed against time value of money' was lacking in the impugned transactions. NCLT also referred to the interpretation of the expression 'financial creditors' by NCLAT in the case of ***Nikhil Mehta and Sons v. AMR Infrastructure Ltd. Company: Appeal (AT) (Insolvency) No. 07 of 2017*** and endorsed the decision of IRP while holding that,-

> "15. ….On the above basis, we are of the view that The Resolution Professional has correctly rejected the claim of the applicant on the ground that the Applicant is not a financial creditor of the corporate debtor concerning the Mortgages and the Mortgaged Debt. The resolution professional has rightly observed that guarantee and indemnity are distinct documents under the relevant laws and the mortgages executed by the corporate debtor are not like guarantee and indemnity. The basic ingredient of the financial debt as defined under the Code is that debt along with interest disbursed against time value of money lacks in the impugned transaction…."

33.4. Accordingly, NCLT rejected the application of ICICI Bank Limited by way of its order dated 09.05.2018, while concluding as under:-

> "…Therefore, by the mortgage created by the corporate debtor, as collateral security by the debt of its holding company, i.e. Jaiprakash Associates Ltd. ("JAL") in favour of the Applicant i.e.

> ICICI Bank, the applicant cannot be treated as Financial Creditor of the Corporate Debtor. Therefore in our view, Resolution Professional has rightly rejected the claim of the applicant, which was filed by the Applicant in the capacity of Financial Creditors of the corporate debtor, i.e. Jaypee Infratech Ltd. ("JIL")".

33.4.1. Thereafter, the other application filed by Axis Bank Limited was rejected by NCLT on 15.05.2018, while following the earlier order dated 09.05.2018.

34. As noticed, the aforesaid orders dated 09.05.2018 and 15.05.2018 were questioned in two appeals before NCLAT by the said lenders of JAL; and the said appeals stand allowed in the impugned order dated 01.08.2019 without any discussion as regards the issue involved therein. We have heard learned counsel for the parties at length in relation to this issue too, and, in the circumstances of the case, as noticed, we had indicated *prima facie* view in the order dated 10.12.2019[45], that such lenders of JAL cannot be categorised as financial creditors of JIL and had stayed the operation of impugned order to that extent.

Rival submissions

35. Having noticed the relevant background, we may now take note of the contentions of learned counsel for the parties in regard to the issue under consideration.

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45 Reproduced in paragraph 7 hereinbefore.

Submissions on behalf of the appellant

36. It has essentially been argued on behalf of the appellant IIFCL that as per sub-section (7) of Section 5 of the Code, only such creditor could be the 'financial creditor' of the corporate debtor to whom a 'financial debt' is owed by the corporate debtor; and, as per sub-section (8) of Section 5 of the Code, the key requirement of a financial debt is '*disbursal against the consideration for the time value of money*', which includes the events or modes of disbursement as enumerated in sub-clauses (a) to (i) of Section 5(8). It is submitted that in the present case, the lenders of JAL having not disbursed any debt against the consideration for the time value of money to the corporate debtor JIL, the corporate debtor does not owe any 'financial debt' to such lenders; and the transactions in question do not fall within the brackets of 'financial debt' only for the reason that the corporate debtor JIL created mortgages as collateral security in favour of lender banks for the money borrowed by JAL. Concisely put, the submission is that in the said mortgage transactions, disbursal against the consideration for the time value of money *qua* the corporate debtor JIL being not involved, the lenders of JAL are not the 'financial creditors' of JIL and cannot be included in the Committee of Creditors[46], as to be constituted per Section 21 of the Code.

36.1. It is further submitted that the said lenders of JAL have no right to demand the mortgage money from the corporate debtor nor is the corporate

46 'CoC' for short

debtor JIL under any liability to pay the same; and mere holding of security interest, which too had not been extended for direct disbursement of any credit to JIL, cannot make the JAL lenders as financial creditors of JIL within the meaning of IBC. Learned counsel for the appellant has referred to the judgment and order dated 22.12.2017 by the NCLAT in ***Dr. B.V.S. Lakshmi v. Geometrix Laser Solutions (P) Ltd.:*** **Company Appeal (AT) (Insolvency) No. 38 of 2017**, to substantiate this submission.

36.2. It is contended on behalf of the appellant that though the definition of 'financial debt' extends to include various types of transactions, yet it does not include a mortgage, as could be gathered from a plain and simple reading of the said provision. The counsel for the appellant has further relied on the judgment of this Court in *Swiss Ribbons* (supra), wherein the concept of 'financial creditor' has been explicated to mean and include a person who has direct engagement in the functioning of corporate debtor right from the beginning, while assessing the viability of corporate debtor; and who would also engage in restructuring of debts and reorganising the corporate business in case of financial stress. With reference to the case at hand, it is submitted that mere holding of security interest, not meant for direct disbursement of any credit to corporate debtor JIL, cannot convert the lenders of JAL into the financial creditors of JIL.

36.2.1. It is also contended that the respondents, the lenders of JAL to whom mortgages were extended by the corporate debtor JIL, could at best be

construed as plain creditors, who are entitled to file Form F and to specify their security in column 8 thereof; and in any case, they cannot become financial creditors of JIL.

36.2.2. It is further contended that a secured creditor under the Code can be a financial creditor under two circumstances i.e., (i) when corporate debtor directly avails a debt from the creditor and such a debt is a secured debt; and (ii) if corporate debtor furnishes a guarantee to any person. Learned counsel for the appellant submits that a mortgagee, who has not disbursed any debt to the corporate debtor, may be a secured creditor because of the corporate debtor creating a security to secure the payment of a third party but cannot be a financial creditor of the corporate debtor within the meaning of Section 5(8) of the Code.

36.3. Elaborating on the submissions relating to the nature of transactions, learned counsel for the appellant has strenuously argued that 'mortgage' is not included within the framework of Section 5(8) of the Code and its sub-clauses (a) to (i); and that 'financial debt' is limited only to the transactions enumerated thereunder and its coverage cannot be enlarged while interpreting the provision. It is also argued that 'mortgage' cannot be deemed to mean 'guarantee', for a mortgagor has no intentions to undertake to discharge the liability of a third person in case of his default in repayment of debts. In other words, only where the debtor and the mortgagor are the same person that the mortgagor would be liable to pay his debts and else, the mortgage itself does

not create a pecuniary liability. Moreover, in the present case, when there is a tri-partite contract wherein, the mortgagor and debtor are different, the impugned transactions do not satisfy the ingredients of Section 126 of the Contract Act, as JIL has not undertaken specifically to discharge the liability of JAL nor has entered into a 'contract of guarantee' with the lenders of JAL nor has provided any indemnity; and therefore, the corporate debtor JIL is not bound by any liabilities and obligations incurred by JAL. To support the contention that liability always flows from debt and not from the security created under the mortgage, learned counsel for the appellant has also relied on several decisions including that in ***Ramchand Sur v. Ishwar Chandra Giri:* 61 Ind Cases 539.**

36.4. It is submitted that a general reference to the transaction documents would not be sufficient to fasten liability for JIL to pay any outstanding debt of JAL because any payment obligation has to be unequivocal and ought to be of specific undertaking to discharge such obligations; and that general words of incorporation or general covenant in some mortgage deeds cannot bind JIL to all the terms and conditions of the documents, particularly any liability to incur JAL's indebtedness by fastening payment obligations. It is further submitted that when the intention of parties is ascertained with reference to the terms of documents and all the surrounding factors, it cannot be inferred that JIL undertook the liability to discharge the indebtedness of JAL when it was itself reeling under financial stress, was declared NPA and had surmounting

liabilities towards home buyers and its own lenders. With reference to the financial statements of JIL, it is pointed out that therein, it was specifically disclosed that the mortgages had been provided as a security for the financial assistance availed by JAL but such mortgages were not declared either as contingent or as direct liability. It is also submitted that the common loan agreement between JIL and its lenders, including the appellant, contained negative covenants prohibiting JIL from creating, assuming or incurring any additional indebtedness or from encumbering any property or creating any security on the assets of JIL. The sum and substance of such submissions had been that the corporate debtor JIL could have neither incurred a liability to discharge the indebtedness of JAL nor it had done so under the mortgages in question.

36.5. As regards the decision of this Court in ***Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta :*** **2019 SCC OnLine SC 1478**[47], as relied upon by the respondents, learned counsel for the appellant has submitted that the generalised assertion on the part of the respondents, that per the force of the said decision, a secured creditor *ipso facto* becomes financial creditor, is not a correct appreciation of the ratio thereof. It is submitted that in the scheme of the Code, a secured creditor could also be a financial creditor under two circumstances: First, when the corporate debtor directly avails a debt from the creditor and

47 Hereinafter also referred to as the case of '*Essar Steel*'.

such debt is secured by a security interest like in the form of a charge or mortgage or hypothecation; and such a creditor, the secured one, is regarded as financial creditor because of direct disbursement of debt to the corporate debtor; and secondly, when the corporate debtor furnishes guarantee to any person, such person would also become a financial creditor and a secured creditor by virtue of sub-clause (i) of Section 5(8) of the Code, of course, such guarantee may even be to secure the debt obligation of a third party. However, according to the counsel for the appellant, when the corporate debtor creates mortgage to secure payment obligation of a third party, without disbursement of any debt to itself (the corporate debtor), the mortgagee, even if becoming a secured creditor because of creation of mortgage, could only be described as 'indirect secured creditor' and cannot be treated as a 'direct secured creditor' so as to become a 'financial creditor' because, the mortgage transaction is not envisaged to be a 'financial debt' in Section 5(8) with its sub-clauses (a) to (i).

36.5.1. It is submitted that *Essar Steel* judgment envisages the position and priorities of secured creditors, mainly in the context of a creditor who has disbursed direct debt to the corporate debtor and has secured its debt by a security interest, who should have priority over unsecured creditors of the corporate debtor. However, the said decision, according to the learned counsel, cannot be read to the effect that even the indirect secured creditor be also necessarily construed as financial creditor. It is submitted that the crux of

the said decision is that creditors not similarly situated cannot be at par; that the arrangements of the corporate debtor with its creditors must be taken into consideration; and that the aim of equitable treatment is based on the notion that creditors with similar legal rights should be treated evenly while receiving distribution in accordance with their relative ranking and interest. It is submitted that *Essar Steel* cannot be read as laying down the law that even the lenders of third party, who hold mortgages from the corporate debtor, be also treated as such secured creditors who would fall within the sect of 'financial creditors'.

36.6. Learned counsel for the appellant would further submit that existence of a security interest is not relevant while construing whether a creditor is financial creditor or not because, in the composition of CoC, even a non-secured creditor could also be a financial creditor, if the ingredients of Section 5(8) of the Code are satisfied. It is also argued that the financial facilities availed by JAL from the respondents were not utilized for any business operation of JIL and hence, the respondents cannot be construed as financial creditors of JIL.

Submissions on behalf of respondents

37. Learned counsel for the contesting respondents have made elaborate submissions in support of the counter-assertion that on account of security provided by the corporate debtor JIL, the respective lenders have become financial creditors of JIL for the purpose of proceedings under the Code. We

may briefly summarise the principal facets of the contentions urged on behalf of the main contesting respondents in this regard as *infra*.

Axis Bank

37.1. It has been strenuously argued on behalf of this respondent that the nature and character of a 'mortgage' is such that it secures a debt; and in the present case, the mortgage in question, as made by JIL, had been to secure the debt obligations of its holding company JAL. With reference to Section 58 of the Transfer of Property Act and the decision of this Court in ***Prithvi Nath Singh & Ors. v. Suraj Ahir & Ors. :*** **(1963) 3 SCR 302** as also the decision of Mysore High Court in ***Dassappa & Ors v. Jogaiah & Ors*** **: (1964) ILR 545**, it is submitted that the purpose of 'mortgage' is to secure a debt; and with reference to the decision in ***Manik Chand Raut v. Baldeo Chaudhary & Ors*****: (1949) SCCOnline Pat 64**, it is also contended that mortgage, by its very nature, presupposes existence of a debt and the transaction by which a debt is extinguished is not a mortgage but a sale. Further, with reference to the aforementioned decision of this Court in case of ***Rajkumari Kaushalya Devi v. Bawa Pritam Singh & Anr*****: AIR 1960 SC 1030**, it is contended that a mortgage debt creates pecuniary liability upon the mortgagor; and that a mortgagor who transfers an interest in immovable property so as to secure a debt, incurs a mortgage debt. With reference to the decision of Delhi High Court in the case of ***State Bank of India v. Samneel Engineering Co. & Ors:*** **1995 (35) DRJ 485**, it is further submitted that a mortgage is both a promise by

a debtor to repay the loan as well as a real property right; of course, the right being intended to secure the due payment of the debt; and a suit on a mortgage is essentially a suit for recovery of a debt.

37.1.1. With reference to principles aforesaid, it is contended that a mortgage debt is a 'debt' within the meaning of Section 3(11) of the Code; that a debt can be classified to be a debt due from 'any person' and not necessarily restricted to the borrower alone. The aforementioned decision of Gujarat High Court in ***State Bank of India v. Smt. Kusum Vallabhdas Thakkar*: 1991 SCCOnline GUJ 14** has again been referred to submit that Indian Law recognizes that a person, other than the borrower, can also execute a mortgage to secure the debt of the borrower. In this context, learned counsel for the respondent has also relied upon the provisions contained in Section 126 of the Contract Act, to contend that JIL stands in the position of a guarantor for the debts owed by JAL. The learned counsel has also referred to an order dated ***13.03.2019*** in ***M.A. No. 1584/2019 in CP No. 402 of 2018*** as passed by NCLT (Mumbai Bench) in the case of ***SREI Infrastructure Finance Limited v. Sterling International* Enterprises Ltd.,** wherein it is held that a third party mortgagor, who mortgages the property to secure the financial obligation of another party, stands in the position of a guarantor; and the mortgagee is a financial creditor of the third party mortgagor. In the case at hand, it is submitted, the corporate debtor JIL stands in the position of a guarantor with respect to the security provided to this respondent and hence,

the impugned mortgage transactions are covered within the meaning of Section 5(8)(i) of the Code.

37.1.2. It is also submitted that looking to the nature of transaction in question, the question whether JAL has defaulted on repayment and consequently, the security is to be invoked is irrelevant for the purposes of the issue at hand; and whether JAL committed default or not is not decisive of the question as to whether the mortgage debt in question is financial debt or not.

37.1.3. It is further submitted that in the present case, the mortgage transactions were executed to secure the payment of debts/liabilities of JAL; and that such creation of mortgage undoubtedly is a 'security interest' as defined in Section 3(31) of the Code inasmuch as, a security interest includes any creation of right/title/interest/claim in property for the purpose of securing the payment or performance of an obligation; and also includes a mortgage. Hence it is contended that the respondent bank comes within the ambit of 'secured creditor' per Section 3(30) of the Code.

37.1.4. It is emphasised by learned counsel for this respondent that a mortgage debt constitutes a 'financial debt' within the meaning of Section 5(8) of the Code even if no amount is directly disbursed to the corporate debtor. While relying on the decision of this Court in ***Pioneer Urban Land and Infrastructure Ltd. & Anr.* v. *Union of India & Ors.*: (2019) 8 SCC 416**[48]**,** it is contended that the definition of 'financial debt' under Section 5(8) of Code

48 Hereinafter also referred to as the case of '*Pioneer Urban*'

has been given an extended meaning so as to include the situations which may not directly involve disbursal against the consideration for time value money.

37.1.5.Further, with reference to the aforementioned UNCITRAL Legislative Guide on Insolvency Law and the decisions of this Court in the cases of *Essar Steel* and *Swiss Ribbons,* it is submitted that a holistic interpretation of the Code would support the position that the respondent, being a secured creditor and a financial creditor, should be included in CoC so as to protect its security interest.

37.2. The submissions and contentions made on behalf of this respondent largely cover the stand of other respondents too. Hence, we may only notice, in brief, the other or additional part of major submissions on behalf of other respondents, while avoiding repetition.

Standard Chartered Bank

37.3. It is submitted on behalf of this respondent that the terms envisaged in the mortgage deed dated 24.05.2016 make it abundantly clear that the corporate debtor JIL had unequivocally promised to pay to this respondent the debts/liabilities owed by JAL in accordance with the terms and conditions of the secured financing documents executed between this respondent and JAL[49]. Hence, it is contended that though the claim of this respondent is limited

49 Clause B & B(a) of the Mortgage Deed produced as Annexure-1 at Pg. 8-43

to the extent of the value of the properties mentioned in the Schedule to the Mortgage Deed but, to that extent, it remains a financial creditor of JIL.

37.3.1.As regards similar arguments with respect to Section 58 of the Transfer of Property Act, that a mortgage presupposes the subsistence of a debt and hence it is a secured debt, apart from above referred decisions, learned counsel has also referred to the decision in ***Pomal Khanji Govindji & Ors. v. Brajlal Karsandas Purohit & Ors*: (1989) 1 SCC 458.**

37.3.2.It is contended that when the objective of the Code is to revive the corporate debtor, the resolution plan ought to contain all claims against the corporate debtor, whether matured or not, so that if the liability again creeps in, the Company may be prevented from being dragged into insolvency or liquidation proceedings. It is further submitted that this respondent, who is holding public money, ought to be a part of CoC; and its absence in CoC would be defeating the very object of the Code because the resolution plan may provide for various measures which might take away the security interest created in favor of this respondent; and without its participation, the entire process would be prejudicial to the interest of this respondent. It is submitted that as per the ratio in ***K. Sashidhar v. Indian Overseas Bank and Ors.* : 2019 SCC OnLine SC 257** read with the decision in the case of *Essar Steel*, once a resolution plan is approved by the wisdom of the CoC, the same cannot be challenged and looking to the scheme of the Code, presence of the

mortgagees like this respondent in the CoC of JIL is necessary and is rather unavoidable.

ICICI Bank

37.4. On behalf of this respondent, it is maintained that in view of Section 5(8)(i) read with Section 5(8)(a) of the Code, the creation of impugned mortgage had resulted in creation of a 'financial debt' as defined under the Code, for the transaction being akin to that of a 'guarantee' as defined under Section 126 of the Contract Act. Again, with reference to the decision in *Smt. Kusum* (supra), it is submitted that even a third party mortgage leads to creation of an implied guarantee with an obligation to pay the mortgage debt. In other words, since the definition of 'financial debt' is not exhaustive, any transaction which is akin to creation of a guarantee would come under the purview of the definition of 'financial debt' and as such, the mortgage provided by the corporate debtor JIL, being akin to the guarantee, would be squarely within the definition of 'financial debt'. It is further submitted that in the given scenario, this respondent takes on the role of a 'financial creditor' of the corporate debtor JIL within the meaning of Section 5(8)(i) of the Code and hence, ought to be admitted as a member of the CoC.

37.4.1.It is submitted on behalf of this respondent that on a holistic reading of the mortgage deeds, it is clear that 'exclusive mortgages' were executed in favour of this respondent with express clauses whereby, the corporate debtor JIL had undertaken to either discharge the debt or to ensure repayment of

facilities extended to JAL and in the event of default, this respondent shall have the right to sell the mortgaged properties. Such stipulations, it is contended, clearly put the respondent in the category of 'financial creditors'.

37.4.2.With reference to the duties of IRP as laid out in the Code, and with analysis of the definition of 'claim' as found in Section 3(6) of the Code, it is submitted that the definition of 'claim' is wide enough to include all stakeholders of the corporate debtor, even if a claim had not matured on the date of insolvency commencement. The ***Report of Banking Law Reform Committee*** has also been referred in this regard.

37.4.3.It is further submitted that Regulations 12, 13 and 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 require the IRP to admit all claims, including contingent claims, as on the insolvency commencement date; that as per Section 29 of the Code, the IRP ought to prepare an information memorandum for formulating a resolution plan; that as per Regulation 37 of CIRP Regulations, the insolvency resolution of the corporate debtor should include sale of all or part of the assets, irrespective of whether they are subject to security interest and satisfaction or modification of any security interest; and that sub-section (4) of Section 30 of the Insolvency and Bankruptcy (Amendment) Act, 2019 clarifies that priority of secured creditors has to be considered. With reference to the processes so envisaged by the Code, it is

contended that the secured creditors like the respondent cannot be kept away from the class of financial creditors.

Central Bank of India

37.5. Apart from the submissions carrying essentially the substance as above-noted, it is also contended that this respondent, being a secured creditor, would be entitled to enforce its security interest in the mortgaged property upon vacation of the order of moratorium in terms of the Securitisation and Reconstruction Of Financial Assets and Enforcement of Security Interest Act, 2002[50]; and that the resolution plan, without including the secured creditors, would be unenforceable, as the secured creditors will then seek enforcement against mortgage property under the SARFAESI Act. It is, therefore, contended that the secured creditor, like the respondent, needs to be recognized as financial creditor, and thereby a participant in CoC of the corporate debtor JIL.

Bank of Maharashtra

37.6. While going in tandem with the submissions aforesaid, it is asserted on behalf of this respondent that the corporate debtor JIL is under a pecuniary obligation to discharge the liability in view of the Indenture of Mortgage (IOM) dated 29.12.2016, which is a contract of guarantee and, therefore, the relationship between the parties cannot be classified merely as that of mortgagor and mortgagee, but is also of a guarantor and guarantee which, in

50 Hereinafter also referred to as ‘the SARFAESI Act’

turn, is covered under Section 5(8) of the Code and thereby, this respondent is a 'financial creditor' within the meaning of Section 5(7) of the Code.

Unique position of financial creditor- as explained in *Swiss Ribbons*

38. Having taken note of the rival contentions on the issue as to whether the lenders of JAL could be categorised as 'financial creditors' of JIL for the purpose of CIRP in question, gist of the matter is as to whether the subject transactions could be categorised as 'financial debts' within the meaning of Section 5(8) of the Code so as to confer the status of 'financial creditors' upon the respondents, lenders of JAL.

38.1. The expressions "financial creditor" and "financial debt" as occurring in the Code have come up for consideration before this Court in several decisions, including those in the above-mentioned cases of *Swiss Ribbons* (decided on 25.01.2019), *Pioneer Urban* (decided on 09.08.2019) and *Essar Steel* (decided on 15.11.2019), which have been referred to and relied upon by learned counsel for the parties for one proposition or another. In fact, the observations as occurring in the last of the said decisions, in the case of *Essar Steel*, as relied upon by the learned counsel for the respondents, are based on those occurring in the decision in *Swiss Ribbons*[51].

51 We have referred to the case of *Swiss Ribbons* in paragraph 16.1.1 hereinbefore while pointing out that in *Swiss Ribbons*, this Court had traversed through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions of the Code and while rejecting such challenge, this Court had observed that the focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation is to be availed of only as a last resort; and that the Code was a beneficial legislation to put the corporate debtor on its feet, and not a mere recovery legislation for the creditors.

39. As indicated hereinbefore, the law declared by this Court in the case of *Swiss Ribbons*, while rejecting the contentions that classification between financial creditor and operational creditor was discriminatory and violative of Article 14, shall have some bearing on the claim of the respondent-lenders for being treated as financial creditors of JIL. Having regard to the submissions made, it shall now be pertinent to take note of the relevant aspects from the said decision in requisite details.

39.1. The broad features of the expressions used in Sections 5(7) and 5(8) of the Code in defining the terms “financial creditor” and “financial debt” were indicated by this Court in the case of *Swiss Ribbons* in the following:

> “**42.** A perusal of the definition of “financial creditor” and “financial debt” makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an “operational debt” would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.”

39.2. The unique position assigned to a ‘financial creditor’, who plays a crucial role in insolvency resolution process as against the role of other creditors, has been extensively explained by this Court in the case of *Swiss Ribbons*, albeit in the context of its differentiation with the category of ‘operational creditor’, in the following:

> **“50.** According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors

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

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia

> between the two which has a direct relation to the objects sought to be achieved by the Code.
>
> *** *** ***
>
> **75.** Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear."
>
> (emphasis supplied)

39.3. The enunciation aforementioned illuminates the reasons as to why at all a financial creditor is conferred with a major, rather pivotal, role in the processes contemplated by Part II of the Code. It is the financial creditor who lends finance on a term loan or for working capital that enables the corporate debtor to set up and/or operate its business; and who has specified repayment schedules with default consequences. The most important feature, as this Court has said, is that a financial creditor is, from the very beginning, involved in assessing the viability of the corporate debtor who can, and indeed, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress. Hence, a financial creditor is not only about *in terrorem* clauses for repayment of dues; it has the unique parental

and nursing roles too. In short, the financial creditor is the one whose stakes are intrinsically inter-woven with the well-being of the corporate debtor.

Financial debt - ratio of *Pioneer Urban*

40. Having imbibed the basic features associated with a ‘financial creditor’, we need to examine as to who could at all fall in this category. In order to address this core question, delving into the finer connotations of the expression “financial debt”, as defined in Section 5(8) of the Code is, obviously, necessary. As noticed, while defining ‘financial creditor’ and ‘financial debt’ in Section 5(7) and Section 5(8) of the Code, both the expressions “means” and “includes” have been used. As per the definition, while “financial creditor” means a person to whom a “financial debt” is owed, it also includes a person to whom such debt has been legally assigned or transferred to. Obviously, a comprehension of this definition of “financial creditor” cannot be complete without taking into account as to what is the meaning assigned to the expression “financial debt”. Again, the term “financial debt” has also been defined with the expressions “means” and “includes”. A “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money; and it includes the money borrowed or raised or protected in any of the manners prescribed in sub-clauses (a) to (i) of Section 5(8).

41. The larger parts of the expressions employed in the definition of “financial debt” in sub-section (8) of Section 5 of the Code with their

connotations were explicated in *Pioneer Urban* by a three-Judge Bench of this Court; and, in view of the contentions urged, it would be appropriate to take a deeper look into the exposition of law by this Court, while also keeping in view the plain basic principle that a decision of the Court is required to be understood in the context of the facts and issues involved therein.

41.1. In the case of *Pioneer Urban*, this Court was concerned with the challenge to the constitutional validity of amendments made to the Code pursuant to a report dated 26.03.2018 prepared by the Insolvency and Bankruptcy Law Committee. The amendments were essentially to the effect of putting the allottees of real estate projects into the sect of 'financial creditors' and thereby investing them with the rights and entitlement to trigger the proceedings under Section 7 of the Code against the real estate developers and to be represented in the Committee of Creditors. In the background of such amendments had been certain important decisions/orders by NCLAT and by this Court. One had been the order dated 21.07.2017 by the NCLAT in the case of ***Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Limited:*** **(2017) SCC Online NCLAT 859,** where it was held that the amount raised by the developers had the commercial effect of a borrowing and the allottees of such developers were financial creditors within the meaning of Section 5(7) of the Code. The other one had been the order dated 11.09.2017 passed by this Court in *Chitra Sharma* (supra) whereby, a representative of the home buyers was appointed to participate in the meetings of the Committee of Creditors for

protection of their interests. Yet another order was passed by this Court on 22.11.2017, on practically the same lines, *qua* another group of builders in the case of ***Bikram Chatterjee v. Union of India*: 2019 (8) SCC 527**. In the wake of such orders, the Insolvency Committee Report suggested for amendment to the Code that ultimately culminated into the Insolvency and Bankruptcy (Second Amendment) Act, 2018. The amendments were made, *inter alia*, with insertion of *Explanation* to sub-clause (f) of Section 5(8) of the Code and with the co-related insertion of sub-section (6A) to Section 21 as also with further insertion of Section 25-A in the Code. These amendments were under challenge in *Pioneer Urban*. Several contentions were urged before this Court questioning the treatment of allottees as financial creditors. In this context and in the wake of such issues this Court dealt with the contentions related with Section 5(8), particularly sub-clause (f) thereof. The relevant part of the consideration of this Court in *Pioneer Urban* under the heading '**Interpretation of Section 5(8)(f) of the Code'** needs to be noticed and is extracted as under:-

> "66. Section 5(8)(*f*) of the Code has been set out in the beginning of this judgment. What has been argued by learned counsel on behalf of the petitioners is that Section 5(8)(*f*), as it originally stood, is an exhaustive provision which must be read noscitur a sociis, and if so read, sub-clause *(f*) must take colour from the other clauses of the provision, all of which show that the sine qua non of a "financial debt" is a loan of money made with or without interest, which must then be returned as money. This, according to the learned counsel for the petitioners, is clear from even a cursory reading of Section 5(8). Secondly, according to learned counsel for the petitioners, by no stretch of imagination, could an

allottee under a real estate project fall within Section 5(8)(*f*), as it originally stood and the Explanation must then be read prospectively i.e. only on and from the date of the Amendment Act. Several sub-arguments were made on the effect of deeming fictions generally and on the functions of an explanation to a section. Let us address all of these arguments.

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68. Thus, in order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person. "Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes "default", which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor. Learned counsel for the petitioners relied upon the judgment in *Union of India* v. *Raman Iron Foundry* : (1974) 2 SCC 231, and, in particular relied strongly upon the sentence reading: (SCC p.243, para 11)

> "*11*....Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority."

69. It is precisely to do away with judgments such as *Raman Iron Foundry* (supra) that "claim" is defined to mean a right to payment or a right to remedy for breach of contract *whether or not such right is reduced to judgment*. What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by a judgment or decree or order. The expression "payment" is again an expression which is elastic enough to include "recompense", and includes repayment. For this purpose, see *H.P. Housing and Urban Development Authority* v. *Ranjit Singh Rana* : (2012) 4 SCC 505 (at paragraphs 13 and 14 therein), where the *Webster's Comprehensive Dictionary* (International Edn.) Vol. 2 and the *Law Lexicon* by P. Ramanatha Aiyar (2nd Edn., Reprint) are quoted.

70. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in *Black's Law Dictionary* (10th Edn.) to mean:

> "1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose."

71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. We were shown the *Dictionary of Banking Terms* (2nd Edn.) by Thomas P. Fitch in which "time value for money" was defined thus:

> "*present value*: today's value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the *time value of money*. Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis." (emphasis supplied)

That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

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74. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by para (*f*) and that the precise scope of para (*f*) is uncertain. Equally, para (*f*) seems to be a "catch all" provision which is really residuary in nature, and

which would subsume within it transactions which do not, in fact, fall under any of the other sub-clauses of Section 5(8).

75. And now to the precise language of Section 5(8)(*f*). First and foremost, the sub-clause does appear to be a residuary provision which is "catch all" in nature. This is clear from the words "any amount" and "any other transaction" which means that amounts that are "raised" under "transactions" not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression "transaction" is defined by Section 3(33) of the Code as follows:

> **3.(33) "transaction"** includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

As correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely.

76. Sub-clause (*f*) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to *Collins English Dictionary & Thesaurus* (2nd Edn., 2000) for the meaning of the expression "borrow" and the meaning of the expression "commercial". They are set out hereinbelow:

> "*borrow*-vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball uphill of the direct path to the hole: make sure you borrow enough."
>
> ***   ***   ***
>
> "*commercial*. -adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: *commercial television*. 3. having profit as the main aim: *commercial music*. 4. (of chemicals, etc.)

> unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television."

77. A perusal of these definitions would show that even though the petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression "borrow" is wide enough to include an advance given by the homebuyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the homebuyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)*(f)* as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same – the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)*(f)* even without adverting to the explanation introduced by the Amendment Act.

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79. That this amendment is in fact clarificatory is also made clear by the Insolvency Committee Report, which expressly uses the word "clarify", indicating that the Insolvency Law Committee also thought that since there were differing judgments and doubts raised on whether homebuyers would or would not be included within Section 5(8)(*f)*, it was best to set these doubts at rest by explicitly stating that they would be so covered by adding an explanation to Section 5(8)(*f*). Incidentally, the Insolvency Law Committee itself had no doubt that given the "financing" of the project by the allottees, they would fall within Section 5(8)(*f*) of the Code as originally enacted."

41.1.1. It is, therefore, evident that this Court, even while interpreting sub-clause (f) of Section 5(8) on the question as to whether an allottee under a real estate project could fall thereunder, analysed the gamut of the relevant expressions of ‘disbursement’, ‘borrowing’ and ‘time value of money’, being the root ingredients of ‘financial debt’ within the meaning of the Code.

41.1.2. It is significant to notice that in the case of *Pioneer Urban*, one line of arguments on behalf of the petitioners, who led challenge to the amendments, had been that the use of expression “means and includes” in Section 5(8) was indicative that the provision was exhaustive and in that position, alien subject-matter such as home buyers could not have been inserted therein. The decision of this Court in the case of ***P. Kasilingam & Ors. v. P.S.G. College of Technology & Ors :*** **(1995) Suppl. 2 SCC 348** was relied upon by the petitioners wherein, this Court had rejected an argument that the expression “means and includes” indicated that the definition was inclusive in nature and would also cover the categories which were not mentioned therein. In *P. Kasilingam,* this Court had said that the use of the word ‘means’ indicates that the definition is a hard and fast definition and no other meaning could be assigned to the expression than is put down in the definition. As regards the word ‘includes’, this Court said that it enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. Further, this Court said that the words 'means and includes', on

the other hand, indicate ‘an exhaustive explanation’ of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions. On the other hand, another decision of this Court in ***Krishi Utapadan Mandi Samiti & Anr v. M/s Shankar Industries & Ors*****: 1993 Suppl. (3) SCC 361** was referred on behalf of the respondents wherein, the Court had considered a definition clause whereby the expression “agricultural produce” was defined to mean such items of produce of agriculture, horticulture, viticulture, apiculture, sericulture, pisciculture, animal husbandry, or forest as specified in the Schedule and then, the definition included therein admixture of two or more of such items, and further included any such item in processed form and yet further included specific items like gur, rub, shakkar, khandsari and jaggery. While examining such definition in *Krishi Utapadan Mandi Samiti*, the Court proceeded to say that under the rules of interpretation, when the words ‘means and includes’ are used in a definition, they are to be given a wider meaning and are not exhaustive or restricted to the items contained therein. This statement of law in *Krishi Utapadan Mandi Samiti* was held by the three-Judge Bench of this Court in *Pioneer Urban* to be not that of good law for it ignored the earlier precedents of larger and coordinate Benches and was also out of sync with the later decisions on the same point. However, and at the same time, the arguments on behalf of the petitioners, that sub-clauses (a) to (i) of Section 5(8) of the Code must necessarily reflect the fact that the financial debt could only be a debt disbursed against the consideration

for the time value of money and which permeates sub-clauses (a) to (i), was also not accepted as a matter of statutory interpretation while observing that the expression "and includes" speaks of the subject matter which may not necessarily be reflected in the main part of the definition. These observations of the Court, after reproduction of the relevant extracts from the referred decisions, read as under:

> "82. This statement of the law, as can be seen from the quotation hereinabove, is without citation of any authority. In fact, in *Jagir Singh.* v. *State of Bihar*.: (1976) 2 SCC 942 at paras 11 and 19 to 21 and *Mahalakshmi Oil Mills* v. *State of A.P*.: (1989) 1 SCC 164, at paras 8 and 11 (which has been cited in *P. Kasilingam* : 1995 Supp (2) SCC 348) this Court set out definition sections where the expression "means" was followed by some words, after which came the expression "and includes" followed by other words, just as in the *Krishi Utpadan Mandi Samiti case* : 1993 Supp (3) SCC 361 (2). In two other recent judgments, *Bharat Coop. Bank (Mumbai) Ltd*. v. *Employees Union*: (2007) 4 SCC 685, at paras 12 and 23 and *State of W.B*. v. *Associated Contractors* : (2015) 1 SCC 32 at para 14, this Court has held that wherever the expression "means" is followed by the expression "and includes" whether with or without additional words separating "means" from "includes", these expressions indicate that the definition provision is exhaustive as a matter of statutory interpretation. It has also been held that the expression "and includes" is an expression which extends the definition contained in words which follow the expression "means". **From this discussion, two things follow. *Krishi Utpadan Mandi Samiti* cannot be said to be good law insofar as its exposition on "means" and "includes" is concerned**, as it ignores earlier precedents of larger and coordinate Benches and is out of sync with later decisions on the same point. Equally, Dr. Singhvi's **argument that clauses (*a*) to (*i*) of Section 5(8) of the Code must all necessarily reflect the fact that a financial debt can only be a debt which is disbursed against the consideration for the time value of money, and which permeates clauses (*a*) to (*i*), cannot be accepted as a matter of statutory interpretation, as the expression "and includes" speaks of subject-matters which**

> **may not necessarily be reflected in the main part of the definition**."
>
> (emphasis supplied)

41.1.3. In the end, however, this Court rejected the contentions urged on behalf of the petitioners while accepting other line of submissions on behalf of the respondents that the legislature is not precluded by way of amendment from inserting words into what may even be an exhaustive definition and while observing that an exhaustive definition is exhaustive only for the purposes of interpretation of a statute by the Courts. This Court said,-

> "83. In any event, as was correctly argued by learned Additional Solicitor General Mrs. Madhavi Divan, the legislature is not precluded by way of amendment from inserting words into what may even be an exhaustive definition. What is an exhaustive definition is exhaustive for purposes of interpretation of a statute by the courts, which cannot bind the legislature when it adds something to the statute by way of amendment. On this score also, there is no substance in the aforesaid argument."

41.1.4. This Court ultimately found that the *Explanation* was added by the Amendment Act only to clarify the doubt that had arisen as to whether home buyers/allottees were subsumed within Section 5(8)(f) of the Code. In essence, the amendment in question was interpreted to be clarificatory in nature so as to put beyond doubt that allottees are to be regarded as financial creditors within the enacting part of Section 5(8)(f) of the Code. The Amendment Act was upheld with this Court holding as under:

> "96. In the present case, it is clear that the deeming fiction that is used by the Explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within the enacting part contained in Section 5(8)(*f*) of the Code.

> 97. It was also argued that an explanation does not enlarge the scope of the original section and for this purpose *S. Sundaram Pillai* : (1985) 1 SCC 591 was relied upon. This very judgment recognises, in para 46, that an explanation does not ordinarily enlarge the scope of the *original* section. But if it does, effect must be given to the legislative intent notwithstanding the fact that the legislature has named a provision as an explanation. [See *Hiralal Ratanlal* v. *State of U.P.*: (1973) 1 SCC 216 at p. 225, followed in para 51 of *Sundram Pillai*]. **In any case, it has been found by us that the Explanation was added by the Amendment Act only to clarify doubts that had arisen as to whether homebuyers/allottees were subsumed within Section 5(8)(*f*). The Explanation added to Section 5(8)(*f*) of the Code by the Amendment Act does not in fact enlarge the scope of the original section as homebuyers/allottees would be subsumed within Section 5(8)(*f*) as it originally stood** as has been held by us hereinabove. As a matter of statutory interpretation, that interpretation, which accords with the objects of the statute in question, particularly when we are dealing with a beneficial legislation, is always the better interpretation or the "creative interpretation" which is the modern trend of authority, and which is reflected in the concurring judgment of *Eera* v. *State (NCT of Delhi) : (2017) 15 SCC 133* paras 122 and 127. This argument must, therefore, also be rejected.
>
> 98. **We, therefore, hold that allottees/homebuyers were included in the main provision, i.e. Section 5(8)(*f*) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen**."

(emphasis supplied)

41.1.5. For taking into comprehension the ratio of *Pioneer Urban (*supra) and for its application to the question at hand, appropriate it would be to recount the basic principles expounded and explained by a three-Judge Bench in the case of ***Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr.:*** **(2002) 3 SCC 496** that the observations of the Court in a judgment are always required to be read in the context in which they appear. This Court has said,-

"**19.** Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd.* v. *Horton* : 1951 AC 737 (at p. 761) Lord MacDermot observed: (All ER p. 14C-D)

> "The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."

20. In *Home Office* v. *Dorset Yacht Co.* : (1970) 2 All ER 294 Lord Reid said (at All ER p. 297*g-h*), "Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances". Megarry, J. in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament." And, in *Herrington* v. *British Railways Board*: (1972) 2 WLR 537 Lord Morris said: (All ER p. 761*c*)

> "There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

41.1.6. Read as a whole and with reference to its context, it is but clear that in *Pioneer Urban* this Court has not enunciated that the scope of the expression

‘financial debt’ be read as if to encompass any debt of whatsoever nature. Rather, a submission made therein, with reference to the decision in *Krishi Utapadan Mandi Samiti,* that ‘and includes’ part in a definition may lead to it being extensive, was rejected by this Court while holding that the said decision was not a good law. However, the other extreme of submissions, seeking restrictive interpretation with reference to ‘means’ part of the definition, was also not accepted and, in that context, the Court observed that the expression ‘and includes’ *speaks of subject-matters which may not necessarily be reflected in the main part of the definition.* Obviously, there could be several subject-matters which may not, as such, be found squarely manifested in the expressions employed in the ‘means’ part of a definition and could be reasonably found in the ‘includes’ part. However, it has not been laid down as a rule of statutory interpretation that the ‘includes’ part could stand alone, disjunct from and totally alien to the ‘means’ part.

The expressions “means and includes” in the definition clauses - effect

42. Looking to the frame of the Code, where the significant expressions “financial creditor” and “financial debt” have been defined with the words “means” and “includes”, we may further refer to the principles of construction of such a definition clause in a statute. Tersely put, the law remains settled that where a word is defined to ‘mean’ something, the definition is *prime facie* restrictive and exhaustive. On the other hand, where the word defined is declared to ‘include’

something more, the definition is *prima facie* extensive. However, a little difficulty arises when the definition contains both the words 'means' and 'includes'[52].

42.1. As noticed, in the case of *Pioneer Urban*, a suggestion made on behalf of the respondents with reference to the decision in *Krishi Utapadan Mandi Samiti,* that when the words 'means and includes' are used in a definition, they are to be given a wider meaning and are not exhaustive or restricted to the items contained therein, was not accepted by this Court; and the statement of law in *Krishi Utapadan Mandi Samiti* was held to be not that of good law for it ignored the earlier precedents of larger and coordinate Benches and was also out of sync with the later decisions on the same point. However, the other extreme of interpretation, as canvassed by the petitioners, that a financial debt could only be a debt which is disbursed against the consideration for the time value of money, and such requirement pervades all sub-clauses (a) to (i), was also not accepted as a matter of statutory interpretation by this Court while observing that the expression 'and includes' speaks of subject matters which may not necessarily be reflected in the main part of the definition. Thus, it is evident that this Court did not accept either of the extremities suggested by the parties in *Pioneer Urban* for interpretation and implication of the expressions 'means and includes' in a definition clause of the statute. Significantly, in

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52 Craise on Statue Law (Seventh Ed.-Indian reprint 1999 page 213) has stated this feature as follows:

There are two forms of interpretation clause. In one, where the word defined is declared to "mean" so and so, the definition is explanatory and prima facie restrictive. In the other, where the word defined is declared to "include" so and so, the definition is extensive, e.g. "sheriff" includes "under-sheriff". Sometimes the definition contains the words "mean and include"," which inevitably raises a doubt as to interpretation.

Pioneer Urban, none of the extremities had any bearing on the conclusion because, eventually, the amendment in question was held to be only clarificatory in nature; and this Court held that the *Explanation* added to Section 5(8)(f) of the Code by the Amendment Act did not enlarge the scope of the original Section.

42.2. Various features of the process of interpretation while dealing with such definition clauses were explained by this Court in the case of ***Delhi Development Authority v. Bhola Nath Sharma*** **(Dead) by LRs & Ors: (2011) 2 SCC 54** in the following:

> "**25.** The definition of the expressions "local authority" and "person interested" are inclusive and not exhaustive. The difference between exhaustive and inclusive definitions has been explained in *P. Kasilingam* v. *P.S.G. College of Technology* : 1995 Supp (2) SCC 348 in the following words: (SCC p. 356, para 19)
>
> > "*19*. … A particular expression is often defined by the legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that 'definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition'. (See *Gough* v. *Gough :* (1891) 2 QB 665 (CA); *Punjab Land Development and Reclamation Corpn. Ltd.* v. *Labour Court* : (1990) 3 SCC 682, SCC p. 717, para 72.) The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words 'means and includes', on the other hand, indicate 'an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions'. [See *Dilworth* v. *Commr. of Stamps* : 1899 AC 99 (Lord Watson); *Mahalakshmi Oil Mills* v. *State of A.P. :* (1989) 1 SCC 164, SCC p. 170, para 11.] The use of the

> words 'means and includes' in Rule 2(*b*) would, therefore, suggest that the definition of 'college' is intended to be exhaustive and not extensive and would cover only the educational institutions falling in the categories specified in Rule 2(*b*) and other educational institutions are not comprehended. Insofar as engineering colleges are concerned, their exclusion may be for the reason that the opening and running of the private engineering colleges are controlled through the Board of Technical Education and Training and the Director of Technical Education in accordance with the directions issued by the AICTE from time to time."

26. In *Bharat Coop. Bank (Mumbai) Ltd.* v. *Employees Union* : (2007) 4 SCC 685 this Court again considered the difference between the inclusive and exhaustive definitions and observed: (SCC p. 695, para 23)

> "*23*. … when in the definition clause given in any statute the word 'means' is used, what follows is intended to speak exhaustively. When the word 'means' is used in the definition … it is a 'hard-and-fast' definition and no meaning other than that which is put in the definition can be assigned to the same. … On the other hand, when the word 'includes' is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word 'means' followed by the word 'includes' in [the definition of 'banking company' in] Section 2(*bb*) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other."

27. In *N.D.P. Namboodripad* v. *Union of India* : (2007) 4 SCC 502 the Court observed: (SCC p. 509, para 18)

> "*18*. The word 'includes' has different meanings in different contexts. Standard dictionaries assign more than one meaning to the word 'include'. *Webster's Dictionary* defines the word 'include' as synonymous with 'comprise' or 'contain'. *Illustrated Oxford Dictionary* defines the word 'include' as: (*i*) comprise or reckon in as a part of a whole; (*ii*) treat or regard as so included. *Collins Dictionary of English Language*

> defines the word ‘includes’ as: (*i*) *to have as contents* or part of the contents; be made up of or contain; (*ii*) to add as part of something else; put in as part of a set, group or a category; (*iii*) to contain as a secondary or minor ingredient or element. It is no doubt true that generally when the word ‘include’ is used in a definition clause, it is used as a word of enlargement, that is to make the definition extensive and not restrictive. But the word ‘includes’ is also used to connote a specific meaning, that is, as ‘means and includes’ or ‘comprises’ or ‘consists of’.”
>
> (emphasis in original)
>
> **28.** In *Hamdard (Wakf) Laboratories* v. *Labour Commr*. : (2007) 5 SCC 281 it was held as under: (SCC p. 294, para 33)
>
> “*33*. When an interpretation clause uses the word ‘includes’, it is prima facie extensive. When it uses the word ‘means and includes’, it will afford an exhaustive explanation to the meaning which for the purposes of the Act must invariably be attached to the word or expression.”

42.3. In the case of ***Black Diamond Beverages & Anr. v. Commercial Tax Office, Central Section, Assessment Wing, Calcutta & Ors.:*** **(1998) 1 SCC 458**, while examining a definition that carried both ‘means’ and ‘includes’ expressions, this Court pointed out that the natural meaning of the ‘means’ part of the definition is not narrowed down by the ‘includes’ part. This Court extracted the definition in question and said,-

> **“5.** The 1954 Act generally provides for levy of a single-point tax at the first stage on commodities notified under Section 25 of that Act. On the other hand, the 1941 Act is a general statute providing for multipoint levy of sales tax on commodities not covered by the 1954 Act. Sub-clause (*d*) of Section 2 of the 1954 Act reads as follows:
>
> > “2. (*d*) ‘sale-price’ used in relation to a dealer *means* the amount of the *money consideration* for the sale of notified commodities manufactured, made or processed by him in West Bengal, or brought by him into West Bengal from any place outside West Bengal,

> for the purpose of sale in West Bengal, less any sum allowed as cash discount according to trade practice, but *includes* any sum charged for containers or other materials for the packaging of notified commodities;"
>
> (emphasis supplied)
>
> **6.** We shall first deal with the contention of the appellants' counsel based upon the non-inclusion of "freight charges" in the definition of sale price in Section 2(*d*) of the 1954 Act.
>
> **7.** It is clear that the definition of "sale price" in Section 2(*d*) uses the words "means" and "includes". The first part of the definition defines the *meaning* of the word "sale price" and must, in our view, be given its ordinary, popular or natural meaning. The interpretation thereof is in no way controlled or affected by the second part which "includes" certain other things in the definition. This is a well-settled principle of construction. *Craies on Statute Law* (7th Edn., 1.214) says:
>
> > "An interpretation clause which extends the meaning of a word does not take away its ordinary meaning…. Lord Selborne said in *Robinson* v. *Barton-Eccles Local Board* : (1883) 8 AC 798, AC at p. 801:
> >
> > > 'An interpretation clause of this kind is *not meant to prevent* the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable, but to enable the word as used in the Act … to be applied to something to which it would not ordinarily be applicable.' "
> >
> > (emphasis supplied)
>
> Therefore, the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning."

The essentials for financial debt and financial creditor

43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time

value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub-clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part

of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.

44. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.

45. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

46. Expounding yet further, in our view, the peculiar elements of these expressions "financial creditor" and " financial debt", as occurring in Sections 5(7) and 5(8), when visualised and compared with the generic expressions "creditor" and "debt" respectively, as occurring in Sections 3(10) and 3(11) of the Code, the scheme of things envisaged by the Code becomes clearer. The generic term "creditor" is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a 'financial

creditor', a 'secured creditor', an 'unsecured creditor', an 'operational creditor', and a 'decree-holder'. Similarly, a "debt" means a liability or obligation in respect of a claim which is due from any person and this expression has also been given an extended meaning to include a 'financial debt' and an 'operational debt'.

46.1. The use of the expression "means and includes" in these clauses, on the very same principles of interpretation as indicated above, makes it clear that for a person to become a creditor, there has to be a debt i.e., a liability or obligation in respect of a claim which may be due from any person. A "secured creditor" in terms of Section 3(30) means a creditor in whose favour a security interest is created; and "security interest", in terms of Section 3(31), means a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation and it includes, amongst others, a mortgage. Thus, any mortgage created in favour of a creditor leads to a security interest being created and thereby, the creditor becomes a secured creditor. However, when all the defining clauses are read together and harmoniously, it is clear that the legislature has maintained a distinction amongst the expressions 'financial creditor', 'operational creditor', 'secured creditor' and 'unsecured creditor'. Every secured creditor would be a creditor; and every financial creditor would also be a creditor but every secured creditor may not be a financial creditor. As noticed, the expressions "financial debt" and "financial creditor", having their

specific and distinct connotations and roles in insolvency and liquidation process of corporate persons, have only been defined in Part II whereas the expressions “secured creditor” and “security interest” are defined in Part I.

47. A conjoint reading of the statutory provisions with the enunciation of this Court in *Swiss Ribbons* (supra), leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression ‘financial creditor’ is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor’s business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

47.1. Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e., a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

47.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of 'financial creditors' as per the definitions contained in sub-sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of

'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code.

The respondent mortgagees are not the financial creditors of corporate debtor JIL

48. Indisputably, the debts in question are in the form of third party security; said to have been given by the corporate debtor JIL so as to secure the loans/advances/facilities obtained by JAL from the respondent-lenders. Such a 'debt' is not and cannot be a 'financial debt' within the meaning of Section 5(8) of the Code; and hence, the respondent-lenders, the mortgagees, are not the 'financial creditors' of the corporate debtor JIL.

49. Though several decisions have been cited on behalf of the respondent-lenders to contend that they do fall within the definition of 'financial creditor' but for what has been discussed hereinabove, it does not appear necessary to dilate upon all of them. However, it would be appropriate to take note of the relevant decisions strongly relied upon by the respondents as *infra*.

50. Much emphasis is laid on behalf of the respondents on the observations occurring in another three-Judge Bench decision of this Court in the case of *Essar Steel* and predominantly on the observation therein, that "*secured creditors as a class are subsumed in the class of financial creditors*". Again, the decisions of the Court are required to be understood with reference to the context. In the case of *Essar Steel,* the questions before the Court related to the roles of resolution applicant, resolution professional and Committee of

Creditors constituted under the Code and the jurisdiction of Adjudicating Authority as also the Appellate Tribunal in questioning the resolution plans. The constitutional validity of the Insolvency and Bankruptcy (Amendment) Act, 2019 was also under challenge. The problem arose essentially with the decision of NCLAT holding that in a resolution plan, there could be no difference amongst the creditors in that, a financial creditor and operational creditor deserve equal treatment under a resolution plan. It was in the setup of such background that in *Essar Steel*, this Court made the observations relied upon by the respondents.

50.1. The referred observations in the case of *Essar Steel* are essentially based on the earlier observations occurring in the case of *Swiss Ribbons*. As noticed, the decision in *Swiss Ribbons* was rendered by this Court when constitutional validity of various provisions of the Code was put to challenge. In *Essar Steel,* this Court reiterated the enunciations in *Swiss Ribbons* in paragraph 55 in the following:

> "55. Financial creditors are in the business of lending money. The RBI report on Trend and Progress of Banking in India, 2017-2018 reflects that the net interest margin of Indian banks for the financial year 2017-2018 is averaged at 2.5%. Likewise, the global trend for net interest margin was at 3.3% for banks in the USA and 1.6% for banks in the UK in the year 2016, as per the data published on the website of the bank. Thus, it is clear that financial creditors earn profit by earning interest on money lent with low margins, generally being between 1 to 4%. Also, financial creditors are capital providers for companies, who in turn are able to purchase assets and provide a working capital to enable such companies to run their business operation, whereas operational creditors are beneficiaries of amounts lent by financial creditors which are then

> used as working capital, and often get paid for goods and services provided by them to the corporate debtor, out of such working capital. On the other hand, market research carried out by India Brand Equity Foundation, a trust established by the Ministry of Commerce and Industry, as regards the Oil and Gas sector, has stated that the business risk of operational creditors who operate with higher profit margins and shorter cyclical repayments must needs be higher. Also, operational creditors have an immediate exit option, by stopping supply to the corporate debtor, once corporate debtors start defaulting in payment. Financial creditors may exit on their long-term loans, either upon repayment of the full amount or upon default, by recalling the entire loan facility and/or enforcing the security interest which is a time consuming and lengthy process which usually involves litigation. Financial creditors are also part of a regulated banking system which involves not merely declaring defaulters as non-performing assets but also involves restructuring such loans which often results in foregoing unpaid amounts of interest either wholly or partially. All these differences between financial and operational creditors have been reflected, albeit differently, in the judgment of **Swiss Ribbons** (supra)….."

50.2. In the relevant part, the Court found that NCLAT had fallen in grave error in reading paragraph 77 in *Swiss Ribbons de hors* the earlier paragraphs. In that context this Court said,-

> "56. By reading paragraph 77 *de hors* the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of <u>similarly situated creditors.</u> This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and

> equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.
>
> 57. Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above. Further, as has been reflected in **Swiss Ribbons** (supra), most financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. Shri Sibal's argument that the expression "secured creditor" does not find mention in Chapter II of the Code, which deals with the resolution process, and is only found in Chapter III, which deals with liquidation, is for the reason that secured creditors as a class are subsumed in the class of financial creditors, as has been held in **Swiss Ribbons** (supra). Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors is also looked at and gets taken care of…."

50.3. While strongly relying upon one of the observations occurring in *Essar Steel,* that secured creditors as a class are subsumed in the class of financial creditors, learned counsel for the respondents would assert that secured creditors do become financial creditors. The submission remains untenable for

more than one reason. First, the submission itself proceeds on the same shortcoming as was existing in the NCLAT's decision that was disapproved by this Court in *Essar Steel* i.e., reading of a line in a judgment disjunct from the context. Secondly, in the decisions above-referred, this Court has never expanded the scope of 'financial debt' as envisaged by Section 5(8) of the Code. Thirdly, the case of an indirect secured creditor i.e., the person having in its hand only the security interest over the property of the corporate debtor but with no corresponding involvement in the finances and growth of the corporate debtor, was never under consideration in the said decisions.

50.4. We may usefully elaborate a little. On a contextual reading of the expositions in *Essar Steel* and *Swiss Ribbons,* it is but clear that the Court had examined the status of direct secured creditor of the corporate debtor and there had not been any occasion to examine the features related with an indirect secured creditor, who is neither involved in assessing the viability of the corporate debtor nor in lending finances to the corporate debtor for setting up the business. As noticed, the prime, rather only, area of interest of such indirect secured creditor is in recovery of its debt and not in reorganization of the corporate debtor's business. Thus understood, it is absolutely clear that the class of secured creditors indicated by this Court in *Essar Steel* and *Swiss Ribbons*, as being subsumed in financial creditors, is only that of such secured creditors who are directly engaged in advancing credit to the corporate debtor and not the indirect creditors who had extended any loan or facility to a third

party but had taken a security from the corporate debtor, whose resolution is under consideration.

50.5. Hence, we are undoubtedly of the view that the decisions in *Swiss Ribbons* and *Essar Steel* do not enure to the benefit of the respondents; rather on the principles enunciated therein, they only operate against the respondents.

51. The case of *Smt. Kusum* (supra) has also been repeatedly referred by the respondents in support of their contentions that because of the transactions of mortgage, the corporate debtor JIL owes them the mortgage debt as a guarantee obligation and hence, it falls within the ambit of 'financial debt' within the meaning of Section 5(8) of the Code.

51.1. We may have a close look at the relevant background aspects of the said case of *Smt. Kusum.* Therein, the appellant-bank had advanced a loan to the firm of which, husband of the respondent was the proprietor. The respondent had executed an agreement in favour of the appellant-bank to the effect that so long as her husband's firm was indebted to the bank, she would execute, by way of collateral security, a legal mortgage of the immoveable property, being a flat belonging to her, with or without possession, in favour of the bank within 14 days of issuance of written requisition for such execution. Later on, when the bank called upon the respondent to execute the mortgage as per the agreement, she declined to do so and hence, a suit for specific performance and in the alternative for damages was filed by the appellant-

bank. The Trial Court, however, dismissed the suit while holding, *inter alia,* that the agreement in question was without consideration. The suit was dismissed on certain other grounds too with which we are not concerned herein.

51.2. In appeal by the bank, the High Court, while holding that the agreement to create a mortgage was specifically enforceable, proceeded to examine the question as to whether the promise to create mortgage, if given by a third party and not by the borrower, is for consideration and is valid. The High Court held that by making the promise, the respondent had agreed to provide collateral security and thereby to discharge the liability to a third party in case of his default. The Court observed that such guarantee was limited to the security offered and no personal liability by the promisor; and thus, the promisor became a surety and referred to Sections 126, 127 and 128 of the Contract Act.

51.3. With reference to Section 128 of the Contract Act, the Court pointed out that the liability of a surety is ordinarily coextensive with that of the debtor but in the case at hand, such liability of the surety was as otherwise provided by the contract; and such liability of the respondent was to the extent of securing the dues by creation of mortgage. The Court said that as the principal debtor could create a mortgage of his immoveable property, a third person could also agree to create a mortgage so as to secure the dues of the principal debtor. As regards the consideration, the Court said that though no direct consideration had flowed from the appellant to the respondent but, in such

tripartite agreement, anything done for the benefit of the principal debtor is sufficient consideration to the surety for giving guarantee. For their relevance, we may notice the relevant parts of paragraphs 12,13,14,17 and 21 of the said decision in *Smt. Kusum* as follows:-

> “**12.** The next question that arises is whether such promise to create a mortgage, if given by a third party and not by the borrower or the principle debtor, is for consideration and is valid. The learned trial Judge has held that for creating mortgage, the mortgagor must be a debtor and must have right to redeem mortgage on payment of the debt and since the present defendant was not the debtor, she could not create a mortgage in respect of that debt and that the mortgagor should be a debtor and there must be a relationship of debtor and creditor, the mortgage being a security for the debt. The learned trial Judge has also held that there was no consideration for giving this promise of executing the mortgage. Both these aspects are interrelated. By making the promise by Ex. 20, defendant has agreed to provide collateral security of a legal mortgage to secure repayment of all the moneys due from Nitin Pharmaceuticals. Thus, the defendant has promised to discharge the liability of a third person (the debtor) in case of his default. This guarantee is limited to the security offered by the promisor, namely, the mortgage and no further personal liability is taken by the promisor. Thus, the promisor has became a surety and this would be an agreement to offer security for due performance of that promise and to that extent. Sections 126, 127 and 128 of the Contract Act read as follows:
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> ***   ***   ***
>
> **13.** The liability of the surety is co-extensive with that of - the debtors. However, in the present case, the liability of the surety is as otherwise provided by the contract Ex. 20. Therefore, the liability of the defendant is as provided in the agreement and to that extent of securing dues by a creation of mortgage, no personal liability is accepted by the surety. It is, therefore, fallacious to say that the defendant is not a debtor and, therefore, the defendant could not have created a mortgage in favour of the creditor. The defendant has rendered himself liable to the dues of Nitin Pharmaceuticals by agreeing to provide security in the form of mortgage for the dues. Just as the principal debtor can create a

mortgage of his immovable properties, a third person can also agree to create a mortgage so as to secure the dues of the principal debtor. In that manner, he becomes a surety to the extent of the security or the mortgage. If that were not so, the present commercial and banking transactions would not be possible and would be hampered to a great extent. In the present day world of commerce, a person may not have sufficient security to offer for obtaining advances from financial institutions even though satisfying the requirements. In such cases, he draws upon resources of others by asking them to give guarantee and also security for the performance of that guarantee and it is a perfectly legitimated and legal way of conducting such commercial transactions. In fact, Chapter VIII of the Contract Act deals with indemnity and guarantee and provides for this kind of tripartite arrangement.

14. As regards consideration, it is true that no direct consideration has flowed from the plaintiff to the defendant who has made the promise to create a mortgage. But in such tripartite arrangement, anything done for the benefit of the principal debtor is a sufficient consideration to the survey for giving guarantee as expressly provided in Section 127 of the Contract Act. Thus, even though there is no consideration to the third party-surety for mortgages, the consideration of having done anything for the benefit of the principal debtor is a sufficient consideration.

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17. In the present case, the consideration that anything done for the benefit of the principal debtor is a sufficient consideration to the surety. Anything done in the present case is that the loans advanced to the principal debtor who is the husband of the present defendant. She has agreed to give collateral security to secure the dues in default of payment by her husband. Apart from the close relationship of husband and wife, there is substantial consideration by having advanced the loan.

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21. Thus, the plaintiff not enforcing the claim against the principal debtor or even the third person may be sufficient consideration by the debtor or third person to give security for the debt and the consideration for such promise is that by such forbearance, the creditor is delayed and the debtor or third party is benefited. It is

> also seen that even in absence of express promise to forbear, a simple forbearance from enforcing the claim can be held to have been implied in the present case. This promise and agreement was given in 1975 and it is clear that thereafter for two years, the claim was not pressed which shows that there is actual forbearance against the principal debtor after this Ex. 20 was executed. Thus, even under the English Law, this consideration is held to be good and sufficient consideration. Under Indian Law, which is significantly different from English Law of Contract, past consideration or the consideration towards third person is statutorily held to be good consideration as defined in Section 2(d) and as mentioned in Section 127 of the Contract Act. The observation of the learned trial Judge that as the husband of the defendant had to pay Rs. 5 lacs to the plaintiff, the writing Ex. 20 which is subsequently obtained is without consideration, is patently erroneous. In the present case, it is amply clear that the principal debtor was a defaulter in meeting his financial obligations to the bank and the bank had noticed the irregularities in his accounts and the, bank could have proceeded against the principal debtor to effect recovery. At that stage, at the instance of the principal debtor-husband, wife comes forward and agrees to give collateral security obviously to secure forbearance against the principal debtor. Thus, at the desire of the promisor (defendant) the bank has abstained from enforcing its claim against the principal debtor and has forborne itself from suing the husband. Such forbearance is sufficient and valid consideration for the promise made by the defendant to agree to create mortgage and give collateral security. The learned Trial Judge is in error in observing that "an act done at the desire of third party is not a consideration." It must, therefore, be held that the suit agreement Ex. 20 is for sufficient and valid consideration and is valid and enforceable."

51.4. The said decision in *Smt. Kusum*, at best, leads to the position that a promise to create a mortgage, even if given by a third party and not by the borrower would be deemed to be for consideration; that even if no direct consideration had flown from the plaintiff to the defendant who made the promise to create the mortgage, anything done for the benefit of the principal

debtor would be sufficient consideration to the surety for giving guarantee as provided under Section 127 of the Contract Act. When the creditor abstained from enforcing the claim against the principal debtor because of such promise to create mortgage by the defendant, such forbearance was held to be sufficient and valid consideration. It is difficult to stretch the ratio of the said decision so as to be applied to the issue at hand concerning the definition of “financial debt” under Section 5(8) of the Code, which conspicuously omits mortgage; and which requires “disbursement” against “the consideration for the time value of money” as the lead elements. As said, the respondent-lenders of JAL, while holding the mortgages in their hands, as said to have been executed by the corporate debtor JIL, may be carrying a security interest and may be the creditors who may claim to be falling within the terminology ‘secured creditors’, yet cannot become ‘financial creditors’ of the corporate debtor JIL who is not owing any ‘financial debt’ to them. The decision in *Smt. Kusum* does not make out a case in favour of the respondents, the lenders of JAL.

52. Another decision forming the mainstay of the respondents had been that in the case of *Rajkumari Kaushalya Devi* (supra). The relevant background aspects of the said case had been that the appellant had executed two usufructuary mortgages with respect to the two properties situated in Feroozepore city in favour of the respondent while also taking the same property on lease on the very same date in 1946. On default in effecting

payments by the appellant, the respondents filed an application under Section 13 of the Displaced Persons (Debts Adjustment) Act 70 of 1951[53] seeking recovery of the principal amount together with arrears of rental. While omitting other aspects which may not be relevant, noticeable it is for the present purpose that one of the points for consideration in the case had been as to whether the liability created under the said mortgage was a 'debt' within the meaning of Section 2(6) of the Act 70 of 1951. It was contended on behalf of the appellant that such liability under the mortgage was not a pecuniary liability and, therefore, Section 2(6) did not apply to a mortgage debt.

52.1. The argument aforesaid was rejected by this Court after taking note of the definition of 'debt' as occurring in the said enactment. The principal part of the said definition, relevant for the present purpose read as under:-

> " 'Debt' means any pecuniary liability, whether payable presently or in future, or under a decree or order of civil or revenue court or otherwise, or whether ascertained or to be ascertained, which —
>
> *** *** ***"

52.2. This Court, *inter alia,* observed, with reference to the definition aforesaid as occurring in Act 70 of 1951 and the definition of 'mortgage' as occurring in the Transfer of Property Act, as under:

> "3….The main contention of the appellant in this connection is that a mortgage debt is not a pecuniary liability and therefore does not fall within the definition of debt at all. We are of opinion that there is no force in this contention. The words "pecuniary liability" will cover any liability which is of a monetary nature. Now the definition of a mortgage in Section 58 of the Transfer of Property Act 4 of 1882, shows that though it is the transfer of an

53 'Act 70 of 1951' for short

> interest in specific immovable property, the purpose of the transfer is to secure the payment of money advanced or to be advanced by way of loan or to secure an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. The money advanced by way of loan, for example, which is secured by a mortgage, obviously creates a pecuniary liability. It is true that a mortgage in addition to creating the pecuniary liability also transfers interest in the specific immovable property to secure that liability; none the less the loan or debt to secure which the mortgage is created will remain a pecuniary liability of the person creating the mortgage. Therefore a mortgage debt would create a pecuniary liability upon the mortgagor and would be covered by the definition of the word "debt" in Section 2(6)…."

52.3. The proposition aforesaid, being related with the definition of 'debt' as occurring in the said enactment (Act 70 of 1951), cannot have a direct application in the present case. In any event, the said decision cannot be taken as an authority governing the transaction where there is no direct debt of the mortgagor himself.

53. The other citations, on various terminologies related with mercantile law and mortgage transactions, do not advance the cause of the respondents because of distinct and rather peculiar requirements of Section 5(8) of the Code. Of course, the decision of NCLAT in *SREI Infrastructure Finance Limited* (supra) stands disapproved for what we have held hereinabove. Equally, the other submissions about the contents of the documents in question as also the entitlement of respondent-lenders to invoke the security or to take up the proceedings under SARFAESI Act etc. do not, in any event, make the transactions in question 'financial debts' within the meaning of

Section 5(8) of the Code. Such submissions have only been noted to be rejected.

Summation on second issue

54. For what has been discussed hereinabove, on the issue as to whether lenders of JAL could be treated as financial creditors, we hold that such lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it cannot be said that the corporate debtor owes them any ‘financial debt’ within the meaning of Section 5(8) of the Code; and hence, such lenders of JAL do not fall in the category of the ‘financial creditors’ of the corporate debtor JIL.

Conclusion

55. Accordingly, and in view of the above, these appeals are allowed to the extent and in the manner that:

1) The impugned order dated 01.08.2019 as passed by NCLAT in the batch of appeals is reversed and is set aside.

2) The appeals preferred before NCLAT against the order dated 16.05.2018, as passed by NCLT on the application filed by IRP, are dismissed; and consequently, the order dated 16.05.2018 so passed by NCLT is upheld in regard to the findings that the transactions in question are preferential within

the meaning of Section 43 of the Code. The directions by NCLT for avoidance of such transactions are also upheld accordingly.

3) The appeals preferred before NCLAT against the orders passed by NCLT dated 09.05.2018 and 15.05.2018 on the applications filed by the lender banks are also dismissed and the respective orders passed by NCLT are restored with the findings that the applicants are not the financial creditors of the corporate debtor Jaypee Infratech Limited.

Acknowledgement

56. While closing on these appeals, we put on record our thanks and compliments to the learned counsel for the respective parties as also their associates and researchers for erudite and scholarly presentation of their respective view-points, in oral as also in written submissions and in rendering invaluable assistance to the Court in dealing with the vast variety of questions involved in these matters.

……………………..J.
(A.M.Khanwilkar)

……………………..J.
(Dinesh Maheshwari)

New Delhi,

Dated: 26th February, 2020.