NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1139 of 2024

[Arising out of Order dated 24.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Court-II, Mumbai Bench in IA No.2382 of 2021 in C.P. (IB) No. 220/MB/2017]

IN THE MATTER OF:

Times Innovative Media Ltd. ....Appellant

Vs.

Pawan Kumar Aggarwal (Liquidator) & Anr. ...Respondents

For Appellant: **Dr. Atul Singh, Advocate**

For Respondents: **Ms. Honey Satpal, Mr. M.S. Bhardwaj and Mr. Yash Dhyani, Ms. Nandini Choudha, Advocates for R-2**
Mr. Yahya Batatawala, Advocate for R-1/Liquidator.

J U D G M E N T
(19th September, 2024)

Ashok Bhushan, J.

This Appeal by an Operational Creditor has been filed challenging the order dated 24.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-II in IA No.2382 of 2021. The Adjudicating Authority by the impugned order rejected the IA filed by the Appellant, aggrieved by which order this Appeal has been filed.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:-

2.1. On an application filed under Section 9, Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor- 'Brand Connect Communications (India) Pvt. Ltd. commenced vide order dated 27.03.2018. By an order dated 28.01.2019, the Adjudicating Authority directed for liquidation of the Corporate Debtor. In the CIRP of the Corporate Debtor, Appellant as well as the Respondent No.2 who was ex-Director of the Corporate Debtor before the liquidator had filed their claims. In the Liquidation Proceedings, an IA No.2382 of 2021 was filed by the Appellant, the Operational Creditor where following prayers were made:-

> *"a. Be pleased to set aside order dated 03.09.2021 passed by the Learned Liquidator;*
>
> *b. Be pleased to direct the Liquidator to disburse the amount derived from liquidation process by giving priority to the Operational Creditor over the Financial Creditor when the Financial Creditor is a related party to the Corporate Debtor,*
>
> *c. That delay, if any, in filing the present application be condoned.*
>
> *d. Till the pendency and final disposal of the present application be pleased to stay the effect of the order dated 03.09.2021 pass by the Learned Liquidator;*
>
> *e. Interim/ ad-interim order in terms of prayer clause (a), (b) above;*
>
> *f. To pass Order or Orders as this Hon'ble Tribunal may deem fit and expedient in the interest of Justice."*

2.2. In the application, the Appellant has questioned the order dated 03.09.2021 communicated by liquidator. Appellant has filed objection before the Liquidator objecting to preference to be given to the Financial Creditor-Respondent No.2. The objection of the Appellant was that in the distribution under Section 53 priority be not given to the related party which objection was rejected by the liquidator vide its communication dated 03.09.2021, aggrieved by which communication, IA was filed.

2.3. The Adjudicating Authority vide impugned order dated 24.04.2024 rejected the application filed by the Appellant and has held that Appellant who is an Operational Creditor cannot be given any preference over the debt of the unsecured financial creditor. It was also held that Section 53 of the Code does not envisage any difference between unsecured financial creditor and related party unsecured financial creditor.

3. We have heard Dr. Atul Singh, Learned Counsel for the Appellant, Mr. Yahya Batatawala, Learned Counsel for the Respondent No.1 and Ms. Honey Satpal, Learned Counsel for the Respondent No.2.

4. Counsel for the Appellant in support of the Appeal submits that the Respondent No.2 being related party/financial creditor cannot be given priority in distribution of proceeds of liquidation assets of the Corporate Debtor, ahead of the Appellant/ Operational Creditor. Submission of the Appellant is that Respondent No.2 has to be treated as equity shareholder and is not entitled to a priority in the waterfall mechanism under Section 53 of the IBC. The Respondent No.2 who wears two hats, one as a promoter/director/ equity shareholder, and later, as a financial creditor, he

ought to be considered under the hat of an equity shareholder and treated under Section 53 (1)(h) of the IBC. Corporate Debtor had started repayment of loan of Respondent No.2 during which period the Appellant was left in a lurch and dues of the Appellant remain unpaid. Appellant in support of the submission has placed reliance on the judgment of the NCLT in ***"J.R. Agro Industries P. Limited v. Swadisht Oils P. Ltd.- 2018 SCC OnLine NCLT 22990"*** and the judgment of the Hon'ble Supreme Court in ***"Arun Kumar Jagatramka v. Jindal Steel and Power Limited & Anr.- (2021) 7 SCC 474"*** as well as judgment of the Hon'ble Supreme Court in ***"M.K. Rajgopalan v. Dr. Periasamy Palani Gounder & Anr.- (2024) 1 SCC 42"***. It is submitted that a related unsecured debtor has to be treated differently in the waterfall mechanism from the unrelated unsecured creditors and the Operational Creditor. Operational Creditor debt has to be given priority over debt of related party unsecured creditor.

5. Counsel for the liquidator opposing the submissions of the Appellant submits that in the present Appeal there is no issue regarding admission of claim of Respondent No.2 as unsecured financial creditor. Inclusion of Respondent No.2 as unsecured financial creditor in the list of stakeholders was never challenged and had become final. Appellant raised objection only after SCC meeting dated 07.06.2019 conducted by liquidator wherein it was discussed that in terms of Section 53, the Respondent No.2 would get preference over the Operational Creditor in distribution of liquidation estate of the Corporate Debtor. Objection was filed by the Appellant claiming priority over the Respondent No.2 which objection was rejected. The loan given by the Respondent No.2 was prior to 2012. The Company having been

incorporated only on 21.02.2011, the Respondent No.2 has submitted his resignation on 01.10.2013 from the office of director which was accepted and the Respondent No.2 thereafter did not continue as Director. On the date of initiation of the CIRP, the Respondent No.2 cannot be held to be related party. In any event, even if Respondent No.2 treated as related party unsecured financial creditor, it falls within the category of unsecured financial creditor and has priority in receipt of distribution of assets under Section 53 as in comparison of the operational creditor. Section 53 of the IBC does not distinguish between the related party unsecured financial creditor and unrelated party unsecured financial creditor. The provision of the related party is applicable only for the purpose of the constitution of the CoC under Section 21 or in the case of Section 29A of the IBC. Respondent No.2 was never a part of the CoC nor the Respondent No.2 was involved in day to day operations after his resignation. The judgment relied by Counsel for the Appellant in "J.R. Agro" (supra) has no application since the said judgment was in the context of a Resolution Plan which was approved by the CoC in its commercial wisdom which is not the case in the liquidation process. Counsel for the Respondent has relied on the judgment of the Hon'ble Supreme Court in ***"Swiss Ribbons Pvt. Ltd. vs. Union of India- (2019) 4 SCC 17"***.

6. Counsel appearing for the Respondent No.2 submitted that Respondent No.2 had given a loan in 2011 to 2012 to the Corporate Debtor for funding its growth. Part of the loan was repaid. However, the amount of Rs.1,21,74,901/- was due and payable as on 31.03.2012. Rs.16 lakhs was received back in 2013-14 and total claim admitted in the CIRP by Resolution

Professional was Rs.2,57,51,620/- of the Operational Creditor and Rs.50,56,051/- towards the only financial creditor i.e. Respondent No.2. It is submitted that the financial debt of Respondent No.2 was admitted and he was treated as unsecured financial creditor which was never challenged. When the claim of Respondent No.2 was admitted as financial unsecured creditor, Respondent No.2 is entitled for distribution as per Section 53 and the Appellant who was the only operational creditor cannot claim any priority. Counsel for the Respondent No.2 has also placed reliance on several judgments. Counsel for the Respondent No.2 submitted that Respondent No.2 is not a related party of the corporate debtor. It had resigned on 01.10.2013 and more than 5 years have elapsed when CIRP commenced against the corporate debtor.

7. We have heard Counsel for the parties and perused the record.

8. From the facts as brought on the record, following facts are undisputed:-

(i) In the CIRP of the corporate debtor, the claim of the Appellant as operational debt of Rs.2,57,24,248/- was admitted.

(ii) The claim of Respondent No.2 ex-director as unsecured financial debt was admitted of Rs.50,56,051/-. In the liquidation process, objection was raised by the Appellant claiming priority in payment of its operational debt over the payment to Respondent No.2 who was unsecured financial creditor which objection was rejected by liquidator on 03.09.2021.

9. The limited issue which has arisen for consideration in this Appeal is as to whether Appellant who is an operational creditor has priority in payment in distribution of the liquidation estate of the corporate debtor over the Respondent No.2 who was financial unsecured creditor. The fact is undisputed that in the CIRP process, the claim of Respondent No.2 was admitted as unsecured financial creditor which admission of claim of Respondent No.2 was never challenged. In the liquidation proceeding of the corporate debtor, objection which was filed by the Appellant was only qua the distribution of the liquidation estate of the corporate debtor. Objection submitted to the liquidator filed by the Appellant has annexed as Annexure A-5. In the objection submitted by the Appellant, it was noticed that during the meeting of Stakeholders' Consultation Committee dated 07.06.2019 liquidator has informed that as per provision of Section 53 of the IBC, the financial creditor (Respondent No.2 herein) may get a priority over the operational creditor in distribution of the liquidation estate of the corporate debtor. The objection filed by the Appellant contained this statement of fact at Page 83 of the paper book, which reads as follows:-

> *"It was during this meeting that it was indicated by your goodself that as per provisions of Sec 53 of the Insolvency and Bankruptcy Code, the Financial creditor may get a priority over the Operational creditor in distribution of the liquidation Estate of the Corporate Debtor. An objection was taken by our Client's representative against according such priority to the Financial Creditor and stated to file a detailed reply."*

10. The prayer in the objection filed by the Appellant was as follows:-

> *"In view of the foregoing, it is most humbly submitted that the Financial creditor can not be given preference over the Operation Creditor in case the Corporate Debtor and Financial Creditor are Related party. This is without prejudice to our rights to submit additional documents or raise additional points in support of our submission that Operational Creditor should be given priority over the Financial Creditor if the said Financial Creditor happens to be a related party."*

11. The objection came to be rejected by order dated 03.09.2021 passed by the liquidator challenging which decision the IA was filed by the Appellant being IA No.2382 of 2021 which came to be dismissed by the Adjudicating Authority. Adjudicating Authority after noticing the rival submissions of the parties in paragraph 20 of the judgment held that Section 53 does not envisage any difference between unsecured debtors and related party unsecured financial creditors. Paragraph 20 of the judgment is as follows:-

> *"20. Having thoughtfully considered the contentions raised by the Counsel for the parties and after going through the case laws relied upon by them, we are of the considered view that in the matter of Swiss Ribbons Private Limited vs. Union of India (Supra), the Hon'ble Supreme Court has unequivocally held that the rationale for differentiating between financial debts, which are secured, and operational debts which are unsecured, creates an intelligible differentia between financial debts and operational debts which are unsecured, is directly related to the objects sought to be achieved by the IB Code. The Hon'ble Supreme Court has further held that it*

can be seen that unsecured debts of various kinds and so long as there is some legitimate interest sought to be protected, having relations to the objects sought to be achieved by the statute in question, Article 14 does not get infracted and, therefore, the challenge to Section 53 of the IB Code, 2016 must also fail. It is, thus, evident from the law laid down in the matter of Swiss Ribbons Private Limited vs. Union of India that the constitutional validity of this section has been upheld. Since Section 53 of the IB Code, 2016 does not envisage any difference between unsecured debtors and related party unsecured Financial Creditors, it cannot be successfully argued on behalf of the Applicant/Operational Creditors that the Liquidator was wrong in placing Respondent No. 2 ahead of the Operational Creditors in the waterfall mechanism under Section 53 of the IB Code, 2016."

12. Section 53 of the IBC which deals with "distribution of assets" provides as follows:-

*"**53. Distribution of assets.** - (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely: -*

*** *** ***

(e) the following dues shall rank equally between and among the following: -

(i) any amount due to the Central Government and the State Government including the amount to be

received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;"

13. Section 53(1) provides that liquidation assets shall be distributed in the order of priority as enumerated therein. In the order of priority, financial debts owed to unsecured creditors are at Clause (d). Clause (f) deals with any remaining debts and dues. The operational debt of the Appellant falls under clause (f). Thus, on plain reading of Section 53(1), it is clear that financial debts owed to unsecured creditors ranked higher than debt of operational creditor. The submission which has been advanced by the Counsel for the Appellant to support the appeal is that the Respondent No.2 being related party, he need not be treated under sub-clause (d) rather he has to fall under sub-clause (h) as equity shareholder. The submission of the Appellant is that admittedly Respondent No.2 was ex-director and being related party of the corporate debtor, he cannot claim any preference over the operational creditor who have given services to the corporate debtor and who are entitled for priority in payment.

14. The Hon'ble Supreme Court in Swiss Ribbon (supra) had occasion to consider Section 53 of the IBC. In the case before the Hon'ble Supreme Court, challenge to the provisions of the IBC. In the writ petition, certain provisions of the IBC including Section 53 were challenged. In the above

context, the Hon'ble Supreme Court had occasion to consider the scheme of distribution as contained in Section 53 and while upholding the provision of Section 53, in paragraphs 116 to 119 laid down following:-

> *"**Section 53 of the Code does not violate Article 14***
>
> ***116.** An argument has been made by the counsel appearing on behalf of the petitioners that in the event of liquidation, operational creditors will never get anything as they rank below all other creditors, including other unsecured creditors who happen to be financial creditors. This, according to them, would render Section 53 and in particular, Section 53(1)(f) discriminatory and manifestly arbitrary and thus, violative of Article 14 of the Constitution of India.*
>
> ***117.** Section 53(1) reads as follows:*
>
> *"**53. Distribution of assets**.—(1) Notwithstanding anything to the contrary contained in any law enacted by Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely—*
>
> *(a) the insolvency resolution process costs and the liquidation costs paid in full;*
>
> *(b) the following debts which shall rank equally between and among the following—*
>
> *(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and*
>
> *(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52;*

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be."

118. *The BLRC Report, which led to the enactment of the Insolvency Code, in dealing with this aspect of the matter, has stated:*

"The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to

faster economic growth. The Government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer.

For the remaining creditors who participate in the collective action of liquidation, the Committee debated on the waterfall of liabilities that should hold in liquidation in the new Code. Across different jurisdictions, the observation is that secured creditors have first priority on the realisations, and that these are typically paid out net of the costs of insolvency resolution and liquidation. In order to bring the practices in India in line with the global practice, and to ensure that the objectives of this proposed Code is met, the Committee recommends that the waterfall in liquidation should be as follows:

1. Costs of IRP and liquidation.

2. Secured creditors and workmen dues capped up to three months from the start of IRP.

3. Employees capped up to three months.

4. Dues to unsecured financial creditors, debts payable to workmen in respect of the period beginning twelve months before the liquidation commencement date and ending three months before the liquidation commencement date.

5. Any amount due to the State Government and the Central Government in respect of the whole or any part of the period of two years before the liquidation commencement date; any debts of the secured creditor for any amount unpaid following the enforcement of security interest.

6. Remaining debt.

7. Surplus to shareholders."

119. *It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail."*

15. The Hon'ble Supreme Court held that there is intelligible differentia between the financial debts and operational debts. The reason for differentiating between financial debt and operational debt was noticed and differentiation was upheld. The BLRC Report has also been quoted by the Hon'ble Supreme Court in paragraph 118 of the judgment. The BLRC Report also highlighted the importance of financial debt and dues of unsecured

financial creditor were kept higher than the remaining debts within which operational debt now formed.

16. When we look into Section 53(1) (h) i.e. last clause 'equity shareholders'. In the present case, Respondent No.2 is not claiming distribution as equity shareholders rather distribution is claimed on the basis of admission of financial debt (unsecured) of Respondent No.2. From the facts brought on the record, it is clear that admission of financial debt of Respondent No.2 was never questioned and the objection which was filed by the Appellant before the liquidator was regarding question of priority in the distribution. Thus, we need to proceed on the premise that debt of Respondent No.2 is unsecured financial debt.

17. Although Learned Counsel for the Respondent No.2 has contended that Respondent No.2 is not related party since Respondent No.2 has resigned from the director on 01.10.2013 i.e. about five years prior to initiation of the CIRP but for the purposes of this case, we need to examine the question on the premise that the claim of Respondent No.2 was admitted as related party financial creditor. 'Financial debt' has been defined in Section 5(8). Definition of 'financial debt' as contained in Section 5(8) does not indicate any exclusion of financial debt which is reflected by any transaction with the corporate debtor by related party. When a financial debt is extended by related party the consequence for such creditor is captured in Section 21. As per Section 21(2), a financial creditor if it is related party of the corporate debtor shall not have any right of representation, participation or voting in a meeting of the CoC. Further by virtue of Section 29A, related

party may incur any of the disqualifications under Section 29A. With respect to filing of the claim as per Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, the claim by the financial creditors can be filed as per Regulation 18. Scheme of Regulations 2016 does not indicate that related party is excluded from filing a claim.

18. Counsel for the Appellant has placed reliance on the judgment of the NCLT Allahabad Bench in "J.R. Agro Industries Pvt. Ltd." (supra) which judgment was also relied before the Adjudicating Authority and the Adjudicating Authority in paragraph 21 of the judgment made following observations:-

> *"21. So far as the law laid down by the Hon'ble NCLT Allahabad Bench, in the matter of J.R. Agro Industries Private Limited vs. Swadisht Oil Private Limited (Supra) is concerned, the same cannot be applied to the facts and circumstances of the instant case. Firstly, the order was passed by the Hon'ble NCLT, Allahabad Bench in the context of a resolution plan, which is usually approved by the CoC in its commercial wisdom which is not justiciable and secondly, since the vires of Section 53 of the IB Code, 2016 have been upheld by the Hon'ble Supreme and in absence of any specific provision Court and cannot be interpreted in the said section, it a way to hold that Operational Creditors can be placed ahead and above of the unsecured Financial Creditor even if it may be a related party of the Corporate Debtor."*

19. An Appeal was filed against the judgment of the NCLT Allahabad Bench in "J.R. Agro Industries Pvt. Ltd." (supra) namely Company Appeal (AT) (Insolvency) No. 408 of 2018- ***"Jya Finance and Investment Company***

Ltd. vs. J.R. Agro Industries Pvt. Ltd. & Ors.”. The order passed by the Adjudicating Authority has been quoted in paragraph 1 of the judgment of this Tribunal. Direction of the Adjudicating Authority was extracted where Adjudicating Authority has directed that the unsecured debt of related party which is intragroup debt will be treated as an equity contribution rather than as an intragroup loan, with the consequence that the intragroup obligation will rank lower in priority than the same obligation between unrelated parties, which order was challenged in the Appeal. This Tribunal allowed the Appellant to submit a revised Resolution Plan which was noticed in paragraphs 4 and 5 of the judgment which is as follows:-

> *“4. For the reason aforesaid, the 3rd Respondent 'Rajasthan Liquor Ltd.' sought time to submit modified resolution plan and by our order dated 20th September, 2018 we allowed the 3rd Respondent to modify the same.*
>
> *5. The Resolution Professional has filed a report enclosing a copy of the modified resolution plan submitted by the 3rd Respondent. It is informed that all the Financial Creditors have been treated equally. Similarly, all the Operational Creditors have also been treated equally. No discrimination has been made between one or other Financial Creditor. Similarly, No discrimination has been made between one or other Operational Creditor.”*

20. The Appeal by this Tribunal having been disposed of and there was no expression of opinion in the judgment of this Tribunal regarding the direction which was issued by the Adjudicating Authority. In any view of the

matter as observed by the Adjudicating Authority, the said direction is with regard to Resolution Plan and the Court was not considering the distribution in the liquidation, hence, the above judgment cannot come to the aid of the Appellant in the present case.

21. Another judgment which has been relied by Counsel for the Appellant is judgment of this Tribunal in ***"Shailesh Sangani vs. Joel Cardoso and Anr- 2019 SCC OnLine NCLAT 52"***. The aforesaid Appeal was filed by the promoter/ shareholder/ Director of the company challenging the order admitting Section 7 application. In the above case, this Tribunal had occasion to consider the definition of 'financial debt' under Section 5(8). This Tribunal clearly held in the above case that money advanced by promoter/director of the corporate debtor to improve financial health of the company and boost its corporate debtor even though there is no provision made for interest, in such situation such funds may be treated as long term borrowings. In paragraph 6, following was held:-

> *"**6.** A plain look at the definition of 'financial debt' brings it to fore that the debt alongwith interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression 'if any' as suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of 'financial debt'. The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of*

transactions which are included in the definition of 'financial debt'. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity enures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a 'financial debt'."

22. The above judgment support the submission of Respondent No.2 that loan given by Respondent No.2 to the Corporate Debtor is a financial debt which claim has already been admitted in liquidation process.

23. Counsel for the Appellant has thereafter relied on the judgement of the Hon'ble Supreme Court in ***"Arun Kumar Jagatramka vs. Jindal Steel and Power Limited and Anr- (2021) 7 SCC 474"***. In the above case, the question which came for consideration before the Hon'ble Supreme Court was as to whether a person who is ineligible under Section 29A to submit a Resolution Plan, is also barred from proposing a scheme of Compromise and Arrangement under Section 230 of the Companies Act, 2013. The facts have been noticed in paragraphs 2 and 3 of the judgment which are as follows:-

> ***2.*** *By its judgment dated 24-10-2019 [Jindal Steel & Power Ltd. v. Arun Kumar Jagatramka, 2019 SCC OnLine NCLAT 759] , the National Company Law Appellate Tribunal ("NCLAT") held that a person who is ineligible under Section 29-A of the Insolvency and Bankruptcy Code, 2016 ("IBC") to submit a resolution plan, is also barred from proposing a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013 ("the 2013 Act"). The judgment was rendered in an appeal [Company Appeal (AT) No. 221 of 2018] filed by Jindal Steel & Power Ltd. ("JSPL"), an unsecured creditor of the corporate debtor, Gujarat NRE Coke Ltd. ("GNCL"). The appeal was preferred against an order [Gujarat NRE Coke Ltd., In re, 2018 SCC OnLine NCLT 17201] passed by the National Company Law Tribunal ("NCLT") in an application [CA (CAA) No. 198/KB/2018] under*

Sections 230 to 232 of the 2013 Act, preferred by Mr Arun Kumar Jagatramka, who is a promoter of GNCL. NCLT had allowed the application and issued directions for convening a meeting of the shareholders and creditors. In its decision dated 24-10-2019 [Jindal Steel & Power Ltd. v. Arun Kumar Jagatramka, 2019 SCC OnLine NCLAT 759] , NCLAT reversed this decision and allowed the appeal by JSPL. The decision of NCLAT dated 24-10-2019 [Jindal Steel & Power Ltd. v. Arun Kumar Jagatramka, 2019 SCC OnLine NCLAT 759] is challenged in the appeal before this Court.

3. *Mr Arun Kumar Jagatramka, assails the order dated 24-10-2019 [Jindal Steel & Power Ltd. v. Arun Kumar Jagatramka, 2019 SCC OnLine NCLAT 759] of NCLAT, inter alia, on the ground that Section 230 of the 2013 Act does not place any embargo on any person for the purpose of submitting a scheme. According to the appellant, in the absence of a disqualification, NCLAT could not have read the ineligibility under Section 29-A IBC into Section 230 of the 2013 Act. This would, in the submission, amount to a judicial reframing of legislation by NCLAT, which is impermissible."*

24. In the above context, the Hon'ble Supreme Court laid down following in paragraphs 70 and 97:-

*"**70.** Undoubtedly, Section 230 of the 2013 Act is wider in its ambit in the sense that it is not confined only to a company in liquidation or to corporate debtor which is being wound up under Chapter III IBC. Obviously, therefore, the rigours of the IBC will not apply to*

proceedings under Section 230 of the 2013 Act where the scheme of compromise or arrangement proposed is in relation to an entity which is not the subject of a proceeding under the IBC. But, when, as in the present case, the process of invoking the provisions of Section 230 of the 2013 Act traces its origin or, as it may be described, the trigger to the liquidation proceedings which have been initiated under the IBC, it becomes necessary to read both sets of provisions in harmony. A harmonious construction between the two statutes [G.P. Singh, Principles of Statutory Interpretation (1st Edn., Lexis Nexis 2015) which notes that:"Further, these principles [referring to the principle of harmonious construction] have also been applied in resolving a conflict between two different Acts" and providing the following examples — "Jogendra Lal Saha v. State of Bihar, 1991 Supp (2) SCC 654 (Sections 82 and 83 of the Forest Act, 1927 are special provisions which prevail over the provisions in the Sale of Goods Act); Jasbir Singh v. Vipin Kumar Jaggi, (2001) 8 SCC 289 : 2001 SCC (Cri) 1525 (Section 64 of the NDPS Act will prevail over Section 307 CrPC, 1974 as it is a special provision in a Special Act which is also later); P.V. Hemalatha v. Kattamkandi Puthiya Maliackal Saheeda, (2002) 5 SCC 548 [conflict between Section 23 of the Travancore Cochin High Court Act and Section 98(3) of the Civil Procedure Code resolved by holding the latter to be special law]; Talcher Municipality v. Talcher Regulated Market Committee, (2004) 6 SCC 178 [Section 4(4) of the Orissa Agricultural Produce Markets Act, 1956 was held to prevail over Section 295 of the Orissa Municipalities Act, 1950 as the former was a special provision and also started with a non obstante clause]; and Iridium

(India) Telecom Ltd. v. Motorola Inc., (2005) 2 SCC 145 (Letters Patent and rules made under it constitute special law for the High Court concerned and are not displaced by the general provisions of the Civil Procedure Code)".”] would ensure that while on the one hand a scheme of compromise or arrangement under Section 230 is being pursued, this takes place in a manner which is consistent with the underlying principles of the IBC because the scheme is proposed in respect of an entity which is undergoing liquidation under Chapter III IBC. As such, the company has to be protected from its management and a corporate death. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debtor as a "going concern", are somehow permitted to propose a compromise or arrangement under Section 230 of the 2013 Act.

97. *Based on the above analysis, we find that prohibition placed by Parliament in Section 29-A and Section 35(1)(f) IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the 2013 Act, when the company is undergoing liquidation under the auspices of the IBC. As such, Regulation 2-B of the Liquidation Process Regulations, specifically the proviso to Regulation 2-B(1), is also constitutionally valid. For the above reasons, we have come to the conclusion that there is no merit in the appeals and the writ petition. The civil appeals and writ petition are accordingly dismissed."*

25. The above judgment does not come to any aid to the Appellant in the present case. The Hon'ble Supreme Court was not considering a scheme of arrangement given by a related party and Section 29A came for consideration in the above context. The Hon'ble Supreme Court was not considering the distribution under Section 53 in reference to related party unsecured financial creditor. The said judgment, thus, in no manner help the Appellant in the present case.

26. Counsel for the Appellant has also referred to ***"M.K. Rajagopalan vs. Dr. Periasamy Palani Gounder and Anr- (2024) 1 SCC 42"*** in which judgment the Hon'ble Supreme Court in paragraphs 177 and 178 laid down following:-

> *"**177.** After taking note of the fact that related party is prohibited to be a part of CoC and is further prohibited to be a resolution applicant or an authorised representative, etc. the Appellate Tribunal has rightly observed that involvement of a related party in CIRP in any capacity was seen as giving unfair benefit to the corporate debtor; and that the statutory recognition of related party as a different class would apply even to resolution plan when CoC would decide whether in its commercial wisdom it should pay to related party at all because that would mean paying to the same persons who are behind the corporate debtor. However, thereafter the Appellate Tribunal proceeded to observe that related party was required to be equated with the promoters as equity shareholders and then, further made certain observations about discrimination between related party unsecured financial creditor and other unsecured financial creditors as also between*

related party operational creditor and other operational creditors. Such far-stretched observations of the Appellate Tribunal are difficult to be reconciled with the operation of the statutory provisions.

178. *It has rightly been argued on behalf of the appellants and had rightly been observed by the adjudicating authority (vide extraction in para 66 hereinabove) that there was no provision in the Code which mandates that the related party should be paid in parity with the unrelated party. So long as the provisions of the Code and the CIRP Regulations are met, any proposition of differential payment to different class of creditors in the resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party."*

27. The above judgment was rendered in context of Section 21 of the IBC which mandates that the related party of corporate debtor is prohibited to be part of CoC. The Hon'ble Supreme Court further held that so long as the provisions of the Code and the CIRP Regulations are met, any proposition of differential payment to different class of creditors in a resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party. Those observations made by the Hon'ble Supreme Court were in context of approval of the Resolution Plan by the CoC in its commercial wisdom and in the said case also, the Hon'ble Supreme Court has not laid down any ratio with respect to distribution under Section 53 in reference to operational creditor and unsecured financial creditor.

28. In view of the foregoing discussions, we are satisfied that the Adjudicating Authority has not committed any error rejecting the application filed by the Appellant. Appellant cannot claim any priority in distribution of assets of the corporate debtor as compared to unsecured financial creditor. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi
Anjali