* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13th JANUARY, 2023

IN THE MATTER OF:

\+ **LPA 37/2021 and C.M. Nos. 2664/2021, 2665/2021 & 2666/2021**

TATA STEEL BSL LIMITED ..... Appellant

Through: Mr. V. P. Singh, Ms. Anindita Roy Chawdhury, Ms. Vatsala Rai and Ms. Simran Bhat, Advocates.

versus

VENUS RECRUITERPRIVATE LIMITED & ORS..... Respondents

Through: Mr. Kapil Sibal, Sr. Advocate with Ms. Ranjana Roy Gawai, Ms. Vasudha and Ms. Aarushi Tiku, Advocates for respondent No.1.
Mr. Chetan Sharma, Additional Solicitor General with Mr. Anurag Ahluwalia, CGSC, Mr. Amit Gupta, Mr. Rishav Dubey, Mr. Danish Faraz Khan, Mr. Saurabh Tripathi, Mr. Sahag Garg and Mr. Aakarsh Srivastava, Advocates.
Mr. Manmeet Singh, Ms. Nishtha Chaturvedi and Ms. Shatakshi Tripathi, Advocates for respondent No.3.

\+ **LPA 43/2021 and C.M. Nos. 3196/2021 & 3198/2021**

UNION OF INDIA ..... Appellant

Through: Mr. Chetan Sharma, Additional Solicitor General with Mr. Anurag Ahluwalia, CGSC, Mr. Amit Gupta, Mr. Rishav Dubey, Mr. Danish Faraz Khan, Mr. Saurabh Tripathi, Mr.

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Sahag Garg and Mr. Aakarsh Srivastava, Advocates.

versus

VENUS RECRUITER PRIVATE LIMITED & ORS..... Respondents

Through: Mr. Kapil Sibal, Sr. Advocate with Mr. Rishi Agarwal, Mr. Parminder Singh and Mr. Pranjit Bhattacharya, Advocates for respondent No.1.
Mr. V. P. Singh, Ms. Anindita Roy Chawdhury, Ms. Vatsala Rai and Ms. Simran Bhat, Advocates.
Mr. Manmeet Singh, Ms. Nishtha Chaturvedi and Ms. Shatakshi Tripathi, Advocates for respondent No.4.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Letters Patent Appeals, being LPA No. 37 & 43 of 2021 have been filed by Tata Steel BSL Ltd. (hereafter, **"TSBL"**) and the Union of India (hereafter, **"UoI"**) (collectively, **"Appellants"**) respectively, impugning the Judgment and Order dated 26.11.2022 (**"Impugned Judgment"**) rendered in W.P.(C) No. 8705 of 2019 titled Venus Recruiters Pvt. Ltd. vs. Union of India & Ors., wherein the Ld. Single Judge *inter-alia* held that an application filed under Section 43 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) for avoidance of preferential transactions cannot survive beyond the conclusion of corporate insolvency resolution process (hereafter, **"CIRP"**). Accordingly, the Appellants have sought

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before this Court that the Impugned Judgment be set aside.

2. The facts of the case leading up to the filing of the present LPAs are set out hereinbelow:

a. Upon default in repayment of its credit facilities, State Bank of India (**"SBI"**) filed a petition, being C.P. No. (IB) – 201(PB)/2017 under Section 7 of the IBC before the NCLT seeking initiation of CIRP of M/s Bhushan Steel Limited.

b. On 26.07.2017, the National Company Law Tribunal, New Delhi (hereafter, **"NCLT"**) passed an order admitting Bhushan Steel Limited to CIRP. Mr. Vijay Kumar Iyer was appointed as the Interim Resolution Professional. Thereafter, pursuant to the procedure laid down in the IBC, a public announcement was made inviting submission of claims by prospective resolution applicants and the Committee of Creditors was constituted.

c. On 24.08.2017, the CoC convened for the first time wherein it inter alia confirmed the appointment of Mr. Vijay Kumar Iyer as the Resolution Professional of Bhushan Steel Limited.

d. On 20.03.2018, the CoC approved the resolution plan proposed by Tata Steel Ltd.

e. On 28.03.2018, the RP filed the resolution plan proposed by Tata Steel before the NCLT for its approval in terms of Section 31 of the IBC.

f. On 03.04.2018, after filing of the resolution plan but before its approval, the Forensic Auditor of Bhushan Steel Ltd., Deloitte, submitted a Forensic Audit Report of the Corporate Debtor to the RP. Material on record discloses that several suspect transactions were

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entered into by the Corporate Debtor, namely, (i) Potential excess payment of lease rent to Vistrat Real Estate Pvt. Ltd.; (ii) Preferential credit to various international customer sand long outstanding receivables to entities such as Shree Steel Djibouti FZCO and Shree Global Steel FZE; (iii) Excess payments to Manpower companies/contractors; (iv) Uncontracted payment of interest on advance to Peak Minerals and Mining Private Ltd. for cancelled sale-and-lease back transactions. The transactions included a transaction entered into by the writ petitioner/Venus Recruiters Pvt. Ltd., the Respondent No.1 herein. On 03.10.2009, M/s Bhushan Steel Limited (now Tata Steel BSL Ltd.) entered into an agreement for supply of manpower with Venus Recruiters Pvt. Ltd. (hereafter, **"Respondent No. 1"**), which *inter-alia* contained a clause stipulating payment of 10% service charge to Venus in lieu of the manpower supplied under the agreement. The allegation is that 10% service charge was paid in lieu of manpower supply could have been preferential in nature.

g. On 09.04.2018, the RP filed an application before the NCLT, being C.A.No.284(PB)/2018 in C.P. No. IB(201)PB/2017,under Section 25(2)(j), Sections 43 to 51 and Section 66 of the IBC wherein various transactions were enumerated as 'suspect transactions' with related parties (**"avoidance application"**).

h. On 15.05.2018, NCLT approved the Resolution Plan of Tata Steel filed by the RP before the NCLT on 28.03.2018. On 18.05.2018, the Resolution Plan was implemented in finality and the new management being Tata Steel BSL Ltd., the Appellant herein assumed

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control of Bhushan Steel Limited.

i. NCLT observed that CA-284(PB)/2018, i.e., the avoidance application, has been filed by RP on 09.04.2018 prior to the approval of the Resolution Plan and proceeded to issue notice to the respondent companies made party to the application.

j. Parallelly, on 10.08.2018, the NCLAT upheld the Order dated 15.05.2018, passed by the NCLT approving the Resolution Plan of Tata Steel.

k. Aggrieved by the Order of the NCLT issuing notice in the avoidance application, the Respondent filed W.P.(C) 8705 of 2019 before the Ld. Single Judge seeking issuance of a writ declaring the proceedings borne out of the avoidance application, pending before the NCLT, as void and *non-est* since CIRP had concluded and the successful Resolution Applicant, Tata Steel Limited had assumed control of Bhushan Steel Limited in terms of the IBC.

3. After duly considering the averments made by the parties, the Ld. Single Judge was of the view that the quintessential question to be answered was whether an application for avoidance of a preferential transaction, though filed prior to the Resolution Plan being approved, can be heard and adjudicated by the NCLT, at the instance of the RP, after the approval of the Resolution Plan. The question entailed three dimensions, which, as stated in Para 57 of the Impugned Judgment, are: -

i. Whether a RP can continue to act beyond the approval of the Resolution Plan?

ii. Whether an avoidance application can be heard and adjudicated after the approval of the Resolution Plan?

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iii. Who would get the benefit of an adjudication of the avoidance application after the Resolution Plan?

4. For the sake of convenience and ease of reference, we have discussed the findings of the Ld. Single Judge issue wise.

(A) Issue of alternate efficacious remedy before the NCLAT

5. Ld. Single Judge, at the very outset, deemed it appropriate to deal with the issue of maintainability of the writ petition in view of the Appellants' argument that the writ petition ought to have been dismissed on account of the existence of an efficacious alternate remedy since orders made in exercise of the powers under Section 60 of the IBC are appealable before the NCLAT under Section 61 of the IBC. The Ld. Single Judge observed that there is "no doubt" that in terms of Section 60 of the IBC, the NCLT/Adjudicating Authority has the jurisdiction to deal with all applications and petitions *"in relation to insolvency resolution and liquidation for corporate persons"*, however, the issue is whether the proceedings in question were in relation to insolvency resolution or not.

6. In Para 68 of the Impugned Judgment, it has been stated that CIRP ended with approval of the Resolution Plan on 15.05.2018 and after the passing of the order approving the plan, no proceedings remain pending except issues pertaining to the Plan itself. Certainty and timeliness are the hallmark of the IBC, speeding up of the CIRP is a core objective of the IBC and the continuation of the jurisdiction of NCLT beyond what is permissible under the IBC is contrary to its ethos. Accordingly, in the opinion of the Ld. Single Judge the writ petition was maintainable.

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(B) RP being functus officio after CIRP

7. Since the question framed by Ld. Single Judge was whether an avoidance application could be heard after CIRP, at the instance of the RP, an inevitable corollary to this question is whether the RP becomes *functus officio* after resolution of the corporate debtor. The Ld. Single Judge observed that the role of the RP is an administrative one and not adjudicatory in nature. Thus, the RP cannot continue beyond an order under Section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved unless there is a clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan.

8. It has been held that there is a "START and FINISH line for the Resolution Process" and the role of the RP is to manage affairs of the corporate debtor during this process and not thereafter. After enactment of proviso to Section 23, the mandate of the RP was extended until approval of the plan or appointment of liquidator, making it clear that RP's authority is limited. Proviso to Section 23(1) sets an outer limit for its functioning. In view of the scheme of the IBC, RP cannot continue to act as former RP as it would be violative of the legislative intention and the statutory prescription.

9. The Ld. Single Judge has further observed that a perusal of Section 30(4) also makes it adequately clear that the CIRP period has to be completed within the time period specified under Section 12(3) meaning that the IBC does not contemplate the continuation of the RP beyond the CIRP period. In terms of the Impugned Judgment, an RP can only continue if a clause permitting the RP to do so exists in the approved

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Resolution Plan, however, there is no such clause to that effect in the present matter.

(C) Adjudication of avoidance applications after CIRP

10. Ld. Single Judge has observed that the CIRP Regulations, 2016 under Regulation 35A, provide a specific timeline by which the RP has to form an opinion if the corporate debtor has been subjected to any of the objectionable transactions and under Regulation 39, the RP has to submit, along with the Resolution Plans, details of the objectionable transactions including preferential transactions. As is evident from the flowchart provided in Para 72 of the Impugned Judgment, the RP has to commence examination as on the insolvency commencement date, form an opinion by 75th day (post-amendment), make a determination by 115th day and if he comes to the conclusion that the Corporate Debtor has indulged in preferential transactions, apply to the NCLT for appropriate relief on or before the 135th day. As per Ld. Single Judge, the purpose of these timelines is that RP includes these details in Resolution Plans and the same are available before the NCLT before it approves the Plan.

11. Ld. Single Judge proceeded to observe that the Resolution Applicant whose Resolution Plan is approved itself cannot file an avoidance application since avoidance applications are neither for the benefit of the Resolution Applicants nor for the company after the resolution is complete. It is for the benefit of the Corporate Debtor and the CoC of the Corporate Debtor. The RP whose mandate has ended cannot indirectly seek to give a benefit to the Corporate Debtor, who is now under the control of the new management/Resolution Applicant, by pursuing such an application. It was

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held that allowing the adjudication of the avoidance application after resolution of the debtor tantamount to NCLT stepping in the shoes of the new management to decide what is good for it. The power to decide whether to continue an agreement vests with the new management after resolution. Therefore, any order with respect to suspect transactions would have to be passed prior to approval of the resolution plan.

12. It was further held that Section 26 of the IBC cannot be read in a manner so as to mean that an application for avoidance of transactions under Section 25(2)(j) can survive after the CIRP process. Once the CIRP process comes to an end, an application for avoidance of transactions cannot be adjudicated. The purpose of avoidance transactions is clearly for the benefit of the creditors of the Corporate Debtor in its erstwhile avatar and no benefit would come to the creditors after the Plan is approved.

(D) Beneficiaries of avoidance applications

13. The Ld. Single Judge relied upon Clause 2.4 of the ILC Report dated 20.02.2020 to show that the IBC envisages that the successful Resolution Applicant cannot be permitted to file an avoidance application, as the same was not factored into the bid. Therefore, the Resolution Applicant whose Resolution Plan is approved itself cannot file an avoidance application making it clear that the purpose of avoidance applications is neither to the benefit the Resolution Applicants nor for the company after the resolution is complete but the Corporate Debtor and the CoC of the Corporate Debtor before the resolution of the debtor. It has been further held that the fact that the new management can take a decision in respect of any agreement which is deemed to be not beneficial to it also supports the interpretation that after

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the Plan is approved, the company is completely in the hands of the new management and neither the NCLT nor the RP has any right or power in respect of the said company.

Contentions of the parties

I. Tata Steel BSL Ltd.

14. Mr. Ramji Srinivasan, Ld. Senior Counsel, appearing on behalf of Tata Steel BSL Ltd., has submitted that Respondent No. 1 ought to have pursued remedy under the IBC by preferring an appeal against the said order under Section 61 of the IBC before the NCLAT. The thrust of his argument is that avoidance applications are to be filed as per the provisions of the IBC and the Ld. NCLT is the appropriate and concerned forum for the same. Further, Sections 44, 48, 49, 51, 66 and 67 categorically provide for the NCLT to pass orders in respect of avoidance applications. In view of the same, the Ld. Single Judge could not have assumed jurisdiction and proceeded to pass the Impugned Judgment *de hors* the NCLT. Reliance has been placed upon the Order of this Court in *W.P.(C) 13774/2019* titled *Indian Oil Corporation Limited versus Union of India and Ors.* dated23.12.2019, wherein this Court had refrained from interfering in to stay orders passed in respect of invocation of certain bank guarantees provided by a corporate debtor and proceeded to remand the matter to the Ld. NCLT.

15. On the issue of whether an avoidance application survives after conclusion of CIRP, Mr. Srinivasan submits that the Ld. Single Judge erred in holding that an avoidance application cannot be heard after conclusion of CIRP. He vehemently contends that the requirement of the IBC, as is

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evident from the wordings of Section 25(2)(j), is that the RP is only required to file an avoidance application and that burden has been discharged in the present matter. By virtue of Section 26, it becomes abundantly clear that while the RP during his/her tenure is to collate information and basis the same file an Avoidance Application during CIRP, the same need not be completed during CIRP and neither will the pendency of the same delay and/or affect the CIRP.

16. It was further contended that it flows from Section 26 that the timelines envisaged under the IBC for the purposes of CIRP cannot be extended to proceedings borne out of avoidance applications. Timelines within IBC and its rules and regulations (for instance, Regulations 35A and 40A of the CIRP Regulations, 2016) are indicative in nature, endeavoring to make the whole process time efficient whereas proceedings under the IBC are more often than not, subject to extensions granted by NCLT, as had been done in the present matter as well vide the Order dated 21.12.2017. Attention of this Court was drawn to Chapter 3 of the ILC Report dated 20.02.2020, which states that proceedings for avoidable transactions should be initiated by the RP during the CIRP or liquidation process and prescriptive timelines for initiating such proceedings may not be necessary. The Report further states that resolution plans may provide for preservation of claims and manner of pursuing these proceedings after the plan is operational, therefore, such proceedings were never envisaged to be bound by strict timelines. It is also imperative to note that the timeline within Regulation 35A only requires the RP to form an opinion, determine and file an application before NCLT. There is no timeline for the NCLT to adjudicate such applications, once filed.

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17. He further submits that proceedings pertaining to avoidable transactions, by their very nature are such that they will meet resistance. The IBBI has acknowledged the same in its Discussion Paper on Corporate Liquidation Process' dated 27.04.2019. This buttresses the interpretation that Section 26 of the Code, in fact, clarifies that the filing of an avoidance application under section 25 by the RP shall not affect the proceedings of the CIRP. Therefore, being independent of CIRP, avoidance proceedings can continue parallelly and beyond CIRP. Reliance has also been placed on IBBI's document titled *Dealing with Avoidable Transactions dated 27.03.2019* which acknowledges that applications may not be adjudicated before conclusion of CIRP and such an eventuality is acceptable in view of Section 26.

18. He has pointed out that pursuant to such observations, the IBBI in the paper dated 27.03.2019, therefore, recommends an approach that *"Enable the Resolution Applicant to pursue the matter, in case the CIRP has ended in approval of resolution plan".* Reliance was also placed on the *Draft statement on Best Practices – Role of Ips in avoidance applications* wherein it is stated that the application for avoidance transactions is against the promoters/directors/related parties, however the resolution/liquidation is for the Corporate Debtor, making this separate class of proceedings and should therefore, these two should be treated separately. Even if the corporate debtor is resolved/liquidated, the application of avoidance transactions will be carried on. The Draft statement goes on to contemplate in para (n) also contemplates, the possibility of the Resolution Professional to continue with the Avoidance application subject to Ld. NCLT or IBBI deciding the Resolution professional rights, duties and remuneration.

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19. Mr. Srinivasan proceeds to submit that the ILC report in Para 2 of Chapter 3 suggests that the Adjudicating Authority should decide whether the recoveries from actions filed against improper trading or to avoid transactions should be applied for the benefit of the creditors of the corporate debtor, the successful resolution applicant or other stakeholders. The IBBI itself recommends the Resolution Applicant to pursue the avoidance proceedings if CIRP ends with a Resolution Plan. He submits that the Ld. Single Judge has erred in observing that that the purpose of avoidance of transactions is for the benefit of the creditors of the Corporate Debtor and that no benefit would come to the creditors after the Plan is approved. He submits that the approval of the Plan has no nexus with benefits to creditors as: -

(i) Section 26 provides for avoidance applications to not have effect on CIRP,

(ii) Avoidance applications continue beyond CIRP and the Resolution Applicant may pursue it,

(iii) Therefore, benefits can be distributed to creditors or RA or

(iv) the NCLT may decide who the benefits ought to be accorded to

20. It has also been submitted that if the Impugned Judgment is allowed to continue, it will directly result in all pending Avoidance Applications post CIRP being rendered infructuous thereby destroying the relevant provisions of the IBC, making avoidance applications nugatory, permitting

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wrong-doers who have participated in extracting monies beyond fair-market value, related parties taking advantage of unjust enrichment without any consequences and directly causing losses to the creditors and the corporate debtor in terms of value.

II. Union of India

21. Mr. Chetan Sharma, Ld. ASG appearing on behalf of the Union of India, contends that the phrases *"arising out of" or "in relation to"* in Section 60(5)(c) are of wide import, thereby extending the jurisdiction of the NCLT on subject matters related to the insolvency resolution of the corporate debtor. Chapter VI of the Code, Section 60 included, deals with the adjudication procedure under the Code, therefore, language of wide amplitude is used therein. If a proceeding is permissible under Chapter II and Chapter III of Part II of the Code, NCLT will have the jurisdiction to in respect of the same. Further, the phrase *entertain or dispose of* employed in Section 60(5) suggests that the jurisdiction of NCLT is not limited to entertain a question of law or facts, its jurisdiction extends to disposal of such proceedings**.** Accordingly, the Impugned Judgment is against dicta of the judgment of the Hon'ble Supreme Court of India in Innoventive Industries Ltd. v. ICICI Bank, **(2018) 1 SCC 407,** whereby the Court has held that the IBC is a complete code and is exhaustive in nature.

22. It has been further submitted that if orders of the NCLT are ruled to be amenable to judicial review by High Courts under Article 226 of the Constitution of India, the whole object of IBC, 2016 will be defeated. Writ jurisdiction is exercisable in cases where *vires* of a provision is itself under challenge or where private or public wrongs are so inextricably mixed up

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and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. It certainly cannot be exercised in cases where enactments are a code unto themselves and contain comprehensive procedures. Reliance has been placed upon United Bank of India vs Satyawati Tondon &Ors, **AIR 2010 SC 3413; &** Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and others, **(1985) 1 SCC 260**.

23. The RP is discharging a statutory function while forming an opinion that a transaction should be avoided under the provisions of the code. It is performing a statutory function for initiating proceedings in this regard before the NCLT. The avoidance proceedings are not personal to the insolvency professional acting as the RP. A perusal of the nature of orders that can be passed under Section 44, suggests that the immediate recipient of the outcome of the avoidance proceedings is the corporate debtor. Therefore, after the conclusion of the CIRP, the office of the RP does not become *functus officio* and the avoidance proceedings do not come to an end.

24. He proceeds to submit, even if for sake of arguments, it is presumed that the RP becomes functus officio, the NCLT can still decide those applications. The statutory duty imposed upon on the RP is to file avoidance applications in terms of Section 25(2)(j). Once it is established that the RP discharged this statutory burden, the avoidance proceedings will survive the CIRP. The reason for the same, in his opinion is, that the resolution plan cannot be linked with adjudication of avoidance transactions which is discernible from the fact that Section 12 of the Code provides time lines for completion of CIRP and the term 'CIRP' has been defined under regulation 2(e) of CIRP Regulations as "Corporate insolvency resolution process"

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means the insolvency resolution process for corporate persons under Chapter II of Part II of the Code. Chapter II of Part II deals with only till approval of the resolution plan, whereas Chapter III provides for avoidance of PUFE transactions. This view is buttressed by the wordings of Section 26 of the UBC which effectively delinks CIRP and avoidance transactions.

25. Ld. ASG has submitted that Regulation 35A does not specify any adverse consequence in case of the failure of the RP to file the avoidance application in terms of the timelines provided therein, therefore indicating that such timelines ought to be treated that the timelines provided under Regulation 35A may only be treated as directory and not mandatory. He further submits that in holding that the Code bars the survival of avoidance applications beyond CIRP, the Impugned Judgment is in the nature of legislation, ignoring the mandate of Section 26 and the fact timelines applicable to CIRP cannot be extended to avoidance applications which are a separate set of proceedings. In his view, the legislature was cognizant that admission proceedings require adjudication based on an objective criterion whereas the proceedings related to avoidable transactions would involve findings with respect to questions of law and facts.

26. Reliance has been placed upon other provisions of the IBC such as Section 47, which provides that where RP or liquidator do not report the undervalued transactions, the creditor, member or a partner of the corporate debtor may make an application to the NCLT to declares such transactions as void and reverse their effect, to further the argument that the impugned judgment is not based on sound reason insofar it holds that when RP becomes functus officio, the PUFE applications cannot be decided. Hence, the adjudication of avoidance transaction does not depend upon filing by RP

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or time lines of CIRP.

27. Ld. ASG concludes by highlighting that there are two purposes for providing provisions for avoidance of certain transactions, first, for the benefit of the creditors in general and a fair allocation of an insolvent debtor's assets to the creditors and second, to create a fair commercial conduct before declaration of insolvency and having deterrent effect to discourage creditors from pursuing individual remedies in the period leading up to insolvency. The implications of these provisions are restricting the right of parties to such transactions to benefit the same by sending the proceeds back to the corporate debtor also incidentally benefitting creditors. In the present case, the avoidance proceedings are subsisting after approval of the resolution plan by the NCLT and conclusion of CIRP. While incidental benefits to the creditors during the CIRP does not exist anymore, such proceedings do not become infructuous as parties to such impermissible preferential transactions are still benefiting out of the same.

III. Resolution Professional

28. Mr. Manmeet Singh, Ld. Counsel for the RP has made limited submissions, expressing concurrence with the stance adopted by Tata Steel BSL Ltd. and the Union of India. He submits that the Respondent No. 1 cannot be allowed to go scot-free merely because the RP is rendered functus officio under Sections 30, 31 of the Code. He further submits that there exists no requirement for the RP to pursue the avoidance application and the same can be done by the Corporate Debtor upon the successful resolution of the CIRP. The Corporate Debtor being the beneficiary of the recovered monies under an Avoidance Application in the first instance, would be

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entitled to substitute the Resolution Professional and pursue the Avoidance Application. Such an eventuality would be entirely consistent with the scheme of the Code

IV. Venus Recruiters Pvt. Ltd.

29. *Per contra,* Mr. Kapil Sibal, ld. Senior Counsel, appearing on behalf of Respondent No. 1 has submitted, at the outset, that on 14.6.2022, Regulation 38(2)(d) was inserted in the CIRP Regulations, 2016 by virtue of which the present Appeal is infructuous, inasmuch as, the possibility of continuation of proceedings regarding the avoidance transaction is no more possible in respect of Resolution Plans "*submitted before 14.06.2022*" and the Resolution Plan submitted in the present case is on 28.3.2018. It is his submission that insertion of Regulation 38(2)(d) shows that it was not possible even under the old regime to have allowed the continuation of Avoidance Applications post approval of the Resolution Plan.

30. He also submits that the jurisdiction of the NCLT ceases to exist since Section 60 of the IBC provides that the NCLT is the Adjudicating Authority "*in relation to insolvency resolution process and liquidation for corporate persons".* Therefore, all powers, authority and jurisdiction conferred upon the Ld. Adjudicating Authority have to be construed in the context of either a CIRP Process or Liquidation Process. If there is neither a CIRP Process nor a Liquidation Process, then the Ld. Adjudicating Authority has no jurisdiction.

31. He proceeds to submit that IBC being a law providing for resolution of a corporate debtor in a time bound manner, does not provide for continuation of an avoidance application after conclusion of CIRP. He has

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relied on Innoventive Industries (supra) wherein the Hon'ble Supreme Court has held that the *raison d'etre* of the IBC, taking into account numerous committee reports, expert discussions, Statement of Objects and Reasons and the legislative history, was to emphasize upon the necessity for speedy resolution under the IBC while recording the serious problems under the previous legal framework. Therefore, the wordings of Section 26, when accorded literal interpretation, the phrase "*shall not affect the proceedings of the corporate insolvency resolution process*" is construed to mean that the CIRP proceedings shall be parallel to the Avoidance proceedings. He states that the Appellants seek to introduce the word "by" and change the phrase to "*shall not be affected by the proceedings of the corporate insolvency resolution process*". In his view, this misconceived interpretation alters the entire meaning of section 26 of the IBC since by means of Section 26 of the IBC, the Parliament has retained the focus of the proceedings before the Ld. Adjudicating Authority only to the CIRP process. With the interpretation advanced by the Appellants the focus is shifted to Avoidance Application which was never the intention of the Parliament.

32. He further submits that it has been admitted by the RP itself he became functus officio upon conclusion of CIRP. He has also relied upon various provisions of the IBC to contend that the tenure of the RP cannot be extended beyond CIRP. Attention of this Court was drawn Section 23(1) read with the Proviso which, as argued by Mr. Sibal, demonstrates that the role of the Resolution Professional is confined to: (i) conduct of the CIRP; (ii) managing the operations of the corporate debtor during the CIRP period; and (iii) if a resolution plan has been submitted to the Ld. Adjudicating Authority, then to continue to manage the operations of the corporate debtor

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until the plan is approved by the Ld. Adjudicating Authority. Further, in terms of Section 30(2)(a) of the IBC, the resolution plan has to necessarily provide for payment of the insolvency resolution process costs. Such costs in terms of the definition of "insolvency resolution process cost" under Section 5(13) of the IBC includes the fee payable to any person acting as a Resolution Professional. This is an indicator of RPs limited role.

33. He proceeds to place reliance upon Section 31(3)(b) of the IBC which states that upon approval of the resolution plan by the Ld. Adjudicating Authority, the RP is bound to forward all records relating to the conduct of the CIRP and the Resolution Plan to the IBBI, which demonstrates that the process culminates upon approval of the resolution plan by the Ld. Adjudicating Authority. Under Section 43(1) of the IBC, an application for avoidance of preferential transactions may only be preferred by a RP or a liquidator. Since RP is functus officio and mandate of Section 43 is that only RP can pursue the application, no other person can be allowed to do so.

34. To conclude his submissions, Mr. Sibal submits that that Sections 43 and 44 of the IBC lay down an exclusive statutory framework wherein, transactions, which cannot be normally avoided by a company under general law, may be avoided to (a) make the Corporate Debtor attractive for the Resolution Applicant to bid; (b) bring back secreted funds to the Committee of Creditors; (c) keep the Corporate Debtor a going concern. He is of the view that in the present case the proceedings achieve neither of the avowed objectives of avoiding a so-called preferential transaction. This is because the Resolution Applicant i.e., Tata Steel Ltd did not make avoidance of the transaction with the Venus the basis of its bid. The Committee of Creditors have already issued a “No dues Certificate” after the receipt of monies from

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Tata Steel. The Corporate Debtor i.e., Tata Steel BSL Ltd. was always a going concern and the Venus' contract did not affect its status.

35. Therefore, applying the provisions of Sections 43 and 44 of the IBC in the context of a Corporate Debtor post resolution amounts to creating a class of companies that stands apart from other going concerns, without any intelligible differentia. Applying such special provisions post the CIRP Process also does not bear nexus with the objects of the IBC, as: (i) it is neither in furtherance of insolvency resolution nor in furtherance of liquidation; and (ii) the value, if any, resulting from the avoidance of preferential transactions would not in any manner enhance realization of dues by the creditors.

Object and purpose of the IBC

36. Before dealing with issues raised before us in the present LPAs, we consider it appropriate to discuss and analyze the object and purpose of the IBC in general and the intent behind the provisions pertaining to avoidable transactions specifically. The Apex Court had the occasion to analyze the IBC in its judgment in the case of Innoventive Industries Ltd (supra), wherein it was observed as under: -

> *"12. ……The Statement of Objects and Reasons of the Code reads as under:*
>
> *"Statement of Objects and Reasons.*
>
> *There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and*

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Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy.

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The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, the Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.

5. The Code seeks to achieve the above objectives."

The Hon'ble Apex Court further observed: -

"13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. As per the data available with the

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> *World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia."*

37. Thereafter, in Swiss Ribbons vs. Union of India**, (2019) 4 SCC 17** the Hon'ble Apex Court built upon the jurisprudence laid down Innoventive Industries (supra). It was observed as under: -

> *"10. The Preamble of the Code states as follows:*
>
> *"**An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders** including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."*
>
> *11. 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 reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of 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***

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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 maximize 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 38 not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See ArcelorMittal (supra) at paragraph 83, footnote 3].*

12. 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

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> *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."*
>
> *(emphasis supplied)*

38. It is discernible from the dicta of the Hon'ble Apex Court in the aforementioned judgments that the purpose and object of the IBC is: -

(i) to consolidate all laws relating to reorganization and insolvency resolution of corporate persons and bring them under a single unified umbrella.

(ii) to undertake the process of resolution in time bound manner with a view to maximize the value of assets of such a corporate person.

(iii) to ensure that the corporate debtor is a going concern, by separating it from its promoters and allowing for its reconstruction by substituting its management with an efficient and entrepreneurial one

(iv) to enhance and improve the availability of credit with lending institutions to promote further economic growth while balancing the interests of all stakeholders in the process.

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Scheme of IBC vis-à-vis avoidable transactions

(a) Nature and purpose of provisions regarding avoidable transactions

39. The Hon'ble Apex Court, has discussed the structure of the IBC in Anuj Jain, Interim Resolution Profession vs. Axis Bank Ltd., **(2020) 8 SCC 401**. It has been observed as under: -

> *"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 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.*
>
> *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***

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> ***resolution process, and hence, the resolution professional is obligated, by virtue of clause (j) of subsection (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."*
>
> *(emphasis supplied)*

40. While the judgment of the Hon'ble Apex Court in Anuj Jain (supra) primarily expounds upon the concept of preferential transactions, its elements and applicability in terms of the IBC, the Hon'ble Apex Court has also shed light upon the theoretical underpinnings of avoidable transactions as a feature of insolvency laws. It was observed: -

> *"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 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."***
>
> *(emphasis supplied)*

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41. In furtherance of the larger object and purpose of the IBC discussed in the paragraphs above, provisions pertaining to various types of avoidable transactions i.e., Sections 43-51 and 66 and 67 were especially made a part of the IBC so that they could be avoided by the RP (during the CIRP) or the liquidator thereafter to protect the interests of the creditors. On account of avoidable transactions undertaken by the erstwhile promoters/management of a corporate debtor, the pool of assets of the corporate debtor stands diminished, becoming detrimental to the successful resolution of the corporate debtor as it does not serve as a lucrative prospect to a Resolution Applicant. Even if the corporate debtor would proceed to liquidation, the diminished pool of assets harms the recovery prospect of creditors directly. Therefore, these provisions, largely endeavor to enhance the pool of assets of the corporate debtor available for either making it a lucrative prospect for a Resolution Applicant or in the event of liquidation, for distribution among creditors. The avoidance of these transactions essentially prevents unjust enrichment of one party at the expense of a creditor.

42. It is pertinent to note that by its very nature, an Avoidance Application may take more time in adjudication especially in cases where multiple parties are highlighted as having possibly entered into transactions with the corporate debtor in forensic audit reports and there may be situations where the third parties including related parties of the corporate debtor may heavily contest such applications. Further, adjudication of such applications requires proper examination of facts as opposed to making mere objective determinations (as is the case with CIRP). It is discernible that an application for avoidance transactions is against the promoters/directors/related parties, however the resolution/liquidation is for

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the Corporate Debtor. In the Appellants' view, Section 26 of the IBC exists as an acknowledgment of the fact that avoidance applications ought to be separated from CIRP.

(b) Import of Section 26

43. At this juncture, it is imperative to advert to Section 26 of the IBC which states as follows: -

> *"26. Application for avoidance of transactions not to affect proceedings.*
>
> *The filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process."*

44. There is no doubt that the entire mechanism envisaged under the IBC has been envisaged keeping in mind the considerations of timeliness and maximization of value of assets of the corporate debtor and therefore the endeavor, at all costs, should be to ensure resolution of the corporate debtor and the adjudication of avoidance applications simultaneously and as quickly as possible. However, it is apposite to construe Section 26 in furtherance of the object and scheme of the provisions pertaining to avoidable transactions.

45. The nature of avoidance applications clearly indicate that they can survive after CIRP. Section 26 only buttresses this position by clearly demarcating between the scope of proceedings pertaining to resolution on one hand and adjudication of avoidance applications on the other. Such an interpretation finds support in IBBI's '*Discussion Paper on Corporate*

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Liquidation Process' dated 27.04.2019 which states: -

> *"5.3. Vulnerable Transactions: The Code read with Regulations requiring filing of applications in respect of vulnerable transactions. The BLRC recognises recovery from vulnerable transaction as an additional source of value during liquidation. However, such applications meet tough resistance and litigation for long period. Section 26 of the Code therefore clarifies that the filing of an avoidance application under section 25 by the RP shall not affect the proceedings of the CIRP. Similarly, the liquidation proceeding, or dissolution of the CD should not be held up even if the matters relating to avoidance transactions are yet to be disposed of. If any money is recovered after dissolution of the CD, the same may be distributed as per waterfall in section 53 of the Code and the excess recoveries and unclaimed amounts may be credited to the Insolvency and Bankruptcy Fund".*

While such a discussion paper is not binding in nature, as has been vehemently contended on behalf of Respondent No. 1, it sheds light on the import and purpose of Section 26 from a legislative perspective and provides constructive guidance on the treatment of avoidance applications after conclusion of CIRP.

46. It has also been brought to our attention that in the interregnum, the ILC has published a Report in May, 2022 wherein it has made certain salient observations and recommendations on the issue of survival of avoidance applications after CIRP. The relevant excerpts of the same are reproduced hereunder: -

> *"2.19. Independence of proceedings for avoidance of transactions and improper trading It was brought to the notice of the Committee that there is confusion*

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regarding whether proceedings for avoidance of transactions and improper trading can continue after approval of a resolution plan in CIRP. This comes in the wake of a recent decision of the Delhi High Court in Venus Recruiters Private Limited v. Union of India 21 wherein the Court inter alia opined that the applications in respect of avoidable transactions do not survive beyond the conclusion of the CIRP and once the CIRP itself comes to an end, an application for avoidance of transactions cannot be adjudicated.

2.20. The Code does not provide a deadline for the initiation of proceedings for avoidance of transactions and improper trading (in the context of both CIRP and liquidation). Once filed, the Code also does not prescribe a time limit for conclusion of such proceedings. The CIRP Regulations, however, provide that the resolution professional shall determine if the corporate debtor has entered into any avoidable transactions by the 115th day from the insolvency commencement date and intimate the IBBI of the same. It also requires that, by the 135th day from the insolvency commencement date, the resolution professional shall apply to the Adjudicating Authority for appropriate relief. Given that these timelines are directory, this Committee had in its 2020 Report noted that "prescriptive timelines for initiating proceedings against avoidable transactions and improper trading during the CIRP or liquidation proceedings may not be necessary."

2.21 The Committee deliberated whether proceedings for avoidance of transactions and improper trading should be independent of the CIRP proceedings. In other words, if the proceedings for avoidance of transactions and improper trading should be permitted to go beyond the conclusion of the CIRP proceedings. The Committee discussed that hypothetically, ifproceedings for avoidance of transactions and

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improper trading were not allowed to continue after the conclusion of a CIRP proceeding, it may lead to one of two scenarios -

- *First, where the Adjudicating Authority would mandatorily be required to determine the conclusion of avoidance proceedings prior to approval of the resolution plan under Section 31. This would inordinately delay the conclusion of CIRP proceedings, undermining one of the most important objectives of the Code 25 – the timely resolution of the corporate debtor.*

It is crucial that resolution of the corporate debtor should not be stalled due to the pendency of ancillary proceedings. Investigation and adjudication of avoidable transactions is often time-consuming. It requires a thorough examination of transactions that the corporate debtor undertook in the twilight period prior to commencement of insolvency or liquidation proceedings. This is especially cumbersome in respect of companies whose books and records do not properly document all its past transactions. Further, the resolution professional is also required to assess if a suspicious transaction would meet the requirements of the requisite avoidable transaction or improper trading as set out in the Code. The Supreme Court has laid down a "volumetric as also gravimetric analysis" that the resolution professional has to undertake prior to filing an application with the Adjudicating Authority for setting aside avoidable transactions.

Not only the investigation and filing, but the adjudication of such transactions is also a lengthy process. Findings of avoidable transactions and improper trading are not purely objective assessments and involve answering questions of both law and fact. For instance, ascertaining a preference transaction would include determining if a particular transaction

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falls within the legal fiction created under Section 43(2), or within the exclusions under Section 43(3), etc. Consequently, it may be very difficult to conclude proceedings foravoidance of transaction or improper trading within the 330-day time limit for CIRP.

- *Second, where avoidance applications would be considered infructuous if they have not been concluded before the approval of a resolution plan under Section 31. This would mean that if avoidance proceedings have not been completed before approval of resolution plan, such proceedings shall abate. Since investigation and adjudication of avoidable transactions are often time-consuming, this may allow corporate debtors an escape from reversal of suspicious precommencement transactions and permit them to gain undue benefit from them. Thus, this may be susceptible to misuse by errant promoters and management of corporate debtors.*

2.22 The Committee noted that both the above scenarios would lead to undesirable outcomes. Consequently, it agreed that allowing proceedings for avoidance of transactions and improper trading to continue after approval of a resolution plan in CIRP would be more efficient. It is perhaps due to this rationale that the Code does not provide any specific timeline for completion of such proceedings. Section 26 of the Code provides that filing of an avoidance application under Section 25(2)(j) by the resolution professional "shall not affect the proceedings of the corporate insolvency resolution process". In its 2020 Report, this Committee had discussed the interpretation of Section 26 and noted that "as stated in Section 26 of the Code, the filing of an application for avoidance of transactions (excluding improper trading) by the resolution professional shall not affect the CIRP of the corporate debtor." Given this, it had concluded that proceedings in respect of avoidable

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transactions may continue beyond the timeline for the CIRP.

2.23 The Committee concurred with its earlier conclusion. It agreed that the Legislature's intent behind Section 26 was to make proceedings for avoidable transactions independent of the CIRP proceedings. Therefore, an application for avoidable transactions is not restricted by the timelines provided for the CIRP under Section 12 of the Code. To alleviate any doubts in this regard, the Committee decided that a clarificatory amendment may be made to Section 26 so that the completion of the CIRP proceedings do not affect the continuation of proceedings for avoidable transactions or improper trading. Further, as recommended by the Committee in its 2020 Report, anamendment should be made to Section 26 to expressly include proceedings related to improper trading."

(c) Filing and adjudication of an avoidance application as per applicable law

47. Section 25 of the IBC enlists the duties to be discharged by the RP. Section 25(2)(j) requires the RP to file an application for avoidance of transactions in accordance with Chapter III. Relevant portion of Section 25 is reproduced below: -

"25. 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,

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namely:

……

(j) file application for avoidance of transactions in accordance with Chapter III, if any;

……"

48. Regulation 35A of the CIRP Regulations, 2016 provides guidance in respect of the manner in which the RP ought to file such applications. It is imperative to note that the IBBI has inserted clause (3A) and (4) to Regulation 35A vide amendments dated 16.09.2022 and 14.06.2022, respectively, after which Regulation 35A reads as follows: -

"35A. Preferential and other transactions.

(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirtieth day of the insolvency commencement date.

(3A) The resolution professional shall forward a copy of the application to the prospective resolution

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> *applicant to enable him to consider the same while submitting the resolution plan within the time initially stipulated.*
>
> *(4) The creditors shall provide to the resolution professional, relevant extract from the audits of the corporate debtor, conducted by the creditors such as stock audit, transaction audit, forensic audit, etc."*

49. Taking the commencement of the CIRP as the point of reference, Regulation 35A requires that the RP forms an opinion as to whether the corporate debtor has been subjected to any avoidable transactions 75 days from the date of commencement of CIRP and thereafter make a determination regarding the same 115 days from the date of commencement of CIRP. Where a determination has been made by the RP, the RP is required to file an application 135 days from the date of commencement of CIRP.

50. The amendments to Regulation 35A provide that an application filed by the RP is to be supplied to the prospective Resolution Applicant to enable him to consider the same while submitting the resolution plan within the time initially stipulated. It also appears that to facilitate the RP in filing the application in terms of the prescribed timeline, the creditors are required to provide the RP with records of various audits undertaken by them.

51. The IBC being a special statute endeavoring to ensure that the resolution process is time bound and efficient, Regulation 35A is in line with this object in attempting to make sure that an avoidance application is determined and filed at the earliest to facilitate resolution of the Corporate Debtor. The insertion of clause 3A to Regulation 35A requires that copies of such an application is provided to the prospective applicants to ensure that

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such transactions are factored in their plans at the time of submission. The amended Regulation makes it amply clear that an avoidance application can be pending even beyond the submission of the Resolution Plan. This is consistent with our findings in respect of the nature of such proceedings, which require proper scrutiny of facts and law and are likely to meet resistance, thereby being likely to last beyond the conclusion of CIRP.

52. Even otherwise, a perusal of other regulations also makes it clear that the IBC and extant regulations have envisaged since inception that avoidance applications can survive the successful resolution of the Corporate Debtor. Regulation 36 provides for the preparation of an Information Memorandum. Details of avoidable transactions can be made a part of the Information Memorandum to be prepared by the RP. During the pendency of the present LPAs, the IBBI also inserted Regulation 38(2)(d) which mandates that all Resolution Plans to be submitted before NCLT for approval on or after 14.06.2022 must provide for treatment of avoidance applications.

53. Therefore, the general position of law is that an avoidance application will survive the CIRP if all suspect transactions and applications filed in their respect have been accounted for in the Resolution Plan. Ultimately, all details of such pending applications are required to be placed before the NCLT for approval of the Plan under Section 31 of the IBC. There is nothing in the Impugned Judgment to imply otherwise. In fact, the Impugned Judgment acknowledges that a Resolution Plan can permit the RP to function post CIRP.

54. Insofar the Resolution Plan submitted by Tata Steel Ltd. is concerned, there is no such clause that provides for treatment of avoidance applications.

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However, the same could not have been done because the RP himself filed the avoidance application after the Resolution Plan had been submitted before the NCLT. Thus, the pertinent issue that arises is whether any pending applications pertaining to avoidable transactions will lapse in cases where the Resolution Plan is unable to account for avoidable transactions.

Issues for consideration

55. In light of the foregoing, the issues that arise for the consideration of this Court are: -

(i) Whether an alternate efficacious remedy existed before the NCLAT?

(ii) Whether avoidance applications survive CIRP in cases where Resolution Plans are unable to account for such applications?

(iii) If avoidance applications survive CIRP in such cases, who pursues them? Whether RP is rendered *functus officio* upon conclusion of CIRP?

Findings and Conclusion

56. In light of the above observations, we proceed to deal with the pertinent issues that have arisen in the peculiar facts of this case.

(a) Alternate efficacious remedy before NCLAT

57. At the outset, we deem it apt to consider the preliminary issue regarding maintainability of the writ petition preferred before the Ld. Single

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Judge. Ld. Single Judge ruled that an alternate efficacious remedy did not exist in the present case since the proceedings pertaining to the avoidance application were not *in relation to insolvency resolution* of the corporate debtor. The import given to the phrase 'in relation to insolvency resolution' has been narrowed down by the Ld. Single Judge to mean that applications/petitions must only pertain to CIRP and after conclusion of CIRP, no issue survives for consideration of the NCLT, making NCLT *functus officio* in respect of any application/petition with respect to erstwhile corporate debtor.

58. Mr. Srinivasan submitted on behalf of Tata Steel BSL Ltd. that avoidance applications are filed as per the provisions of the IBC and accordingly it is the Ld. NCLT that is the appropriate and concerned forum for the same and Sections 44, 48, 49, 51, 66 and 67 categorically provide for the NCLT to pass orders in the avoidance applications. In similar vein, Ld. ASG has also submitted that the purpose and intent of the IBC being to serve as a complete code in respect of insolvency laws, the language of Section 60(5) has to be given wide import.

59. It is evident from the judgments of the Honorable Supreme Court in the Swiss Ribbons (supra) and Innoventive Industries (supra) that the one of the primary objectives of the IBC was to bring insolvency laws in India under a single, unified umbrella.

60. At this juncture, we must also refer to the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. vs. Amit Gupta**, (2021) 7 SCC 209,** wherein the Hon'ble Supreme Court has, in a comprehensive manner, interpreted and laid down the scope and import of the phrase "arising out of" and "in relation to" in the specific context of Section

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60(5)(c) of the IBC. It was held: -

> ***"I.1. Section 60(5)(c):"arising out of" and "in relation to"***
>
> ***49.*** *It has been submitted before us on behalf of the appellant that NCLT does not have any inherent powers, and its exercise of jurisdiction is circumscribed by the provisions of IBC. As such, it does not have the jurisdiction to entertain all disputes or all issues related to the corporate debtor. On the other hand, the respondents have made a limited submission that while NCLT may not have jurisdiction to adjudicate upon contractual disputes that arise independent of the insolvency of the corporate debtor, it has the sole jurisdiction to decide a dispute that arises from or relates to the insolvency of the corporate debtor or where the property of the corporate debtor (in this case its rights under PPA) is sought to be taken away on the ground of insolvency. For their argument, the respondents have relied on Section 60(5)(c) to submit that NCLT is vested with a wide jurisdiction to consider questions of law or fact "arising out of" or "in relation to" insolvency resolution proceedings.*
>
> *****
>
> ***53.*** *While the phrases "arising out of" and "relating to" have been given an expansive interpretation in the above cases, words can have different meanings depending on the subject or context. Words are after all, a vehicle for communicating ideas, thoughts and concepts. A one-size-fits-all analogy may not always hold good when we construe similar words in entirely distinct settings. Justice G.P. Singh in his authoritative commentary on the interpretation of statutes, Principles of Statutory Interpretation, has noted that the same words used in different sections of the same statute or used at different places in the same*

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clause or section can have different meanings [G.P. Singh, Principles of Statutory Interpretation (1st Edn., Lexis Nexis 2015)] . Therefore, it is necessary to bear in mind the context in which the phrases have been used. Justice G.P. Singh has stated in his commentary that [G.P. Singh, Principles of Statutory Interpretation (1st Edn., Lexis Nexis 2015)] :

"When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."

54. *Bearing in mind the above caution, it may be of relevance to discuss the interpretation of similar provisions in other insolvency laws. Textually, the provisions of Section 60(5) bear a flavour of resemblance to the provisions which were contained in sub-section (2) of Section 446 [Sub-section (2) of Section 446 provides as follows:*

"446. (2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of—(a) any suit or proceeding by or against the company;(b) any claim made by or against the company (including claims by or against any of its branches in India);(c) any application made under Section 391 by or in respect of the company;(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up

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of the company, or before or after the commencement of the Companies (Amendment) Act, 1960."] of the Companies Act, 1956, which correspond now to Section 280 [Section 280 of the Companies Act, 2013 provides as follows:

"280. Jurisdiction of Tribunal.—The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,—(a) any suit or proceeding by or against the company;(b) any claim made by or against the company, including claims by or against any of its branches in India;(c) any application made under Section 233;(d) any scheme submitted under Section 262;(e) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made."] of the Companies Act, 2013.

55. *A textual comparison of the provisions of Section 60(5) of IBC with Section 446(2) of the Companies Act, 1956 would reveal some similarities of expression, with textual variations. For the purposes of the present proceedings, it suffices to note that clause (c) of Section 60(5) confers jurisdiction on NCLT to entertain or dispose of "any question of priorities or any question of law or facts arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code". Section 446(2)(d) of the Companies Act, 1956 and Section 280(d) of the*

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Companies Act, 2013 use the expression any question of priorities or any other question whatsoever whether of law or fact. These words bear a striking resemblance to the provisions of Section 60(5)(c) of IBC. But textually similar language in different enactments has to be construed in the context and scheme of the statute in which the words appear. The meaning and content attributed to statutory language in one enactment cannot in all circumstances be transplanted into a distinct, if not, alien soil. For, it is trite law that the words of a statute have to be construed in a manner which would give them a sensible meaning which accords with the overall scheme of the statute, the context in which the words are used and the purpose of the underlying provision. Therefore, while construing of Section 60(5), a starting point for the analysis must be to decipher parliamentary intent based on the object underlying the enactment of IBC. The Statement of Objects and Reasons leading up to the enactment to IBC conveys a strong sense of the intent of the legislature. According to it:

*"**Statement of Objects and Reasons**.—There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the*

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Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating NCLT and DRT as the adjudicating authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution,

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liquidation and bankruptcy proceedings envisaged in the Code. Information utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code."

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56.9. *IBC, in a clear departure from the past, separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects.*

57. *In the decision of this Court in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , where the challenge was to the constitutional validity of some provisions of IBC, the judgment by R.F. Nariman, J. contains a section titled "Prologue : the pre-existing state of the law". The problems which arise from multiplicities of statutes and fora in the erstwhile regime were noticed (at SCC pp. 41-42, para 14) in the report of the Bankruptcy Law Reforms Committee (2015) ("BLRC"):*

"14. ... The current state of the bankruptcy process for firms is a highly fragmented framework. Powers of the creditor and the debtor under insolvency are provided for under different Acts. ... It is problematic that these different laws are implemented in different judicial fora. Cases that are decided at the tribunal/BIFR often come for review to the High Courts. This gives rise to two types of problems in implementation of the resolution framework. The first is the lack of clarity of jurisdiction. In a situation where one forum decides on matters relating to the rights of the creditor, while another decides on those relating to the rights of the debtor, the decisions are readily appealed against and either stayed or overturned in a higher court.

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Ideally, if economic value is indeed to be preserved, there must be a single forum that hears both sides of the case and makes a judgment based on both. A second problem exacerbates the problems of multiple judicial fora. The fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This leads to delays and extensions in arriving at an outcome, and increases the vulnerability to appeals of the outcome.

... a matrix of fragmented and contrary outcomes,..."

A "debtor and creditor led process of corporate insolvency" had resulted in a matrix of fragmented and contrary outcomes rather than "coherent and consistent.... precedents".

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59. *The enactment of IBC is in significant senses a break from the past. While interpreting the provisions of IBC, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the backdoor by a process of disingenuous legal interpretation. However, this is not to say that the interpretation given to the statutory provisions that existed prior to the enactment of IBC is to be rejected in toto. The interpretation given to such statutory provisions that are textually similar to Section 60(5)(c) may be relevant, provided that such interpretation is in tandem with the objective of enacting IBC, that is, inter alia, avoidance of multiplicity of fora and a timely resolution of the insolvency process.*

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69. *The institutional framework under IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora. In the absence of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different fora. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of appeal. A delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the prospects of a successful reorganisation or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner. Pursuing this theme in Innoventive [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356] this Court observed that : (SCC p. 422, para 13)*

"13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process."

The principle was reiterated in ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] where this Court held that : (SCC p. 88, para 84)

"84. ... The non obstante clause in Section 60(5) is designed for a different purpose : to ensure that NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings."

Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to

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adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor. However, in doing so, we issue a note of caution to NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the corporate debtor. The nexus with the insolvency of the corporate debtor must exist.

70. *It is appropriate to refer to the observations in the report of the BLRC, wherein it noted the role of NCLT, as the adjudicating authority for CIRP, in the following terms:*

"An adjudicating authority ensures adherence to the process

At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the Directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the regulator/adjudicator."

As such, it is important to remember that NCLT's jurisdiction shall always be circumscribed by the supervisory role envisaged for it under IBC, which sought to make the process driven by trained resolution professionals.

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xxx**…..”**

61. The ILC Report of May 2022 has documented the issue of jurisdiction of the Adjudication Authority, i.e., the NCLT and NCLAT in matters pertaining to avoidance applications after conclusion of CIRP. It has been stated: -

“ 2.24. The Committee also considered if a consequential change would be required to clarify the jurisdiction of the Adjudicating Authority to entertain proceedings for avoidance of transactions and improper trading beyond the CIRP period. The language of Section 60 is couched in a wide manner, and all proceedings permissible under Part II of the Code are to be adjudicated by the NCLT.

2.25. As per Section 60(1), the NCLT is the Adjudicating Authority in relation to insolvency and liquidation of corporate persons. Section 60(5)(c) provides that the NCLT has the jurisdiction to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings. The Committee noted that the phrases “in relation to” or “arising out of” are of wide import, thereby extending the jurisdiction of the NCLT on subject matters related to the insolvency resolution of the corporate debtor. Further, the phrase “entertain or dispose of” suggests that the jurisdiction of the NCLT is not limited to entertaining a question of law or fact. Instead, it extends to disposal of such proceedings. Given this, the Committee felt that Section 60 read with Section 26 allows the NCLT to adjudicate over proceedings related to avoidable transactions and improper trading even after the conclusion of the CIRP. Consequently, it agreed that amendments to Section 60 may not be required in this regard.”

62. In light of the aforesaid, it becomes evident that the phrase “arising out of” and “in relation to” is to be given wide import. Therefore, the Ld.

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Single Judge erred in holding the writ petition was maintainable. An appeal ought to have been preferred by Respondent No. 1 before the NCLAT under Section 61 of the IBC and the NCLAT itself was the appropriate forum to decide the controversy posed before the Ld. Single Judge.

63. There is no doubt that IBC is clearly special statute that seeks to be a single source guide for all issues relating the issue of insolvency. The Hon'ble Supreme Court, in Titaghur Paper Mills Co. Ltd vs State of Orissa, **1983 SCC (2) 433,** has observed that:

> *"Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-s. (1) of s. 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-s. (3) of s. 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under s. 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment and the impugned orders of assessment can only be challenged by the mode prescribed by the Act* ***and not by a petition under Art. 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."***
>
> (emphasis supplied)

64. The abovementioned judgment was also followed in Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and Others, **(1985) 1 SCC 260** wherein the Apex Court has observed as

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under:

> ***3.*** *In Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433 : 1983 SCC (Tax) 131 : 1983 Tax LR 2905 : (1983) 142 ITR 663 : (1983) 53 STC 315] A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ. held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.*

65. Similarly, while dealing with the issues regarding writ petitions under Article 226 of the Constitution of India in matters arising out of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Apex Court in

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Punjab National Bank vs. O.C. Krishnan and Others, **(2001) 6 SCC 569** has observed as under:

> ***6.*** *The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.*

66. The Apex Court in Commissioner of Income Tax vs. Chhabil Dass Agarwal, **(2014) 1 SCC 603** has observed as under:

> ***"13.*** *In Nivedita Sharma v. Cellular Operators Assn. of India [(2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] , this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp. 343-45, paras 12-14)*
>
> > *"12. In Thansingh Nathmal v. Supt. of Taxes [AIR 1964 SC 1419] this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to*

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the aggrieved person and observed: (AIR p. 1423, para 7)

> *'7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by the statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'*

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] this Court observed: (SCC pp. 440-41, para 11)

> *'11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford [(1859) 6 CBNS 336 : 141 ER 486] in the following passage: (ER p. 495)*
>
> > *"... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and*

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> *particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."*

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspaper Ltd. [1919 AC 368 : (1918-19) All ER Rep 61 (HL)] and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. [1935 AC 532 (PC)] and Secy. of State v. Mask and Co. [(1939-40) 67 IA 222 : (1940) 52 LW 1 : AIR 1940 PC 105] It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India [(1997) 5 SCC 536] B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

> *'77. ... So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'"*

(See G. Veerappa Pillai v. Raman & Raman Ltd. [(1952) 1 SCC 334 : AIR 1952 SC 192] , CCE v. Dunlop

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India Ltd. [(1985) 1 SCC 260 : 1985 SCC (Tax) 75] , Ramendra Kishore Biswas v. State of Tripura [(1999) 1 SCC 472 : 1999 SCC (L&S) 295] , Shivgonda Anna Patil v. State of Maharashtra [(1999) 3 SCC 5] , C.A. Abraham v. ITO [AIR 1961 SC 609 : (1961) 2 SCR 765] , Titaghur Paper Mills Co. Ltd. v. State of Orissa [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] , Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath and Sons [1992 Supp (2) SCC 312] , Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] , Tin Plate Co. of India Ltd. v. State of Bihar [(1998) 8 SCC 272] , Sheela Devi v. Jaspal Singh [(1999) 1 SCC 209] and Punjab National Bank v. O.C. Krishnan [(2001) 6 SCC 569] .)

14. *In Union of India v. Guwahati Carbon Ltd. [(2012) 11 SCC 651] this Court has reiterated the aforesaid principle and observed: (SCC p. 653, para 8)*

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta [(1979) 3 SCC 83 : 1979 SCC (Tax) 205] . In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23)

'23. ... [when] a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.'"

15. *Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in*

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question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [AIR 1964 SC 1419] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. *In the instant case, the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. v. State of Haryana [(1985) 3 SCC 267] this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility."*

67. Avoidance of certain transactions such as preferential transactions or undervalued transactions are special remedies envisaged only under the IBC to benefit a special creature of the Code itself, i.e., the Committee of

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Creditors. In view of the purpose and policy behind enactment of the IBC, it is only befitting that any petition or application arising out of the insolvency resolution or liquidation of a corporate person includes proceedings under Part III of the IBC.

68. However, we consider it apt to delve into the issues posed before us since they are important questions of law requiring our consideration.

(b) Effect of Regulation 38(2)(d)of CIRP Regulations, 2016

69. During the course of hearing of the present LPAs, the IBBI amended the CIRP Regulations, 2016 to insert Clause (d) in Regulation 38(2) of the principal Regulation. The amendment was brought on 16.09.2022 w.e.f. 14.06.2022. The Regulation is reproduced hereunder: -

> *"38. Mandatory contents of the resolution plan.*
>
> *(1)The amount payable under a resolution plan –*
>
> *(a) to the operational creditors shall be paid in priority over financial creditors; and*
>
> *(b) to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.*
>
> *(1A)A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.*
>
> *(IB) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan*

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approved by the Adjudicating Authority at any time in the past.

(2) A resolution plan shall provide

(a) the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.

(d) provides for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed:
Provided that this clause shall not apply to any resolution plan that has been submitted to the Adjudicating Authority under sub-section (6) of section 30 on or before the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022.
……." (emphasis supplied)

70. A perusal of the said amendment demonstrates that the authorities were aware that many a times a company was driven to insolvency due to dubious transactions which are extremely complicated. The Resolution Professional has a very limited time to unearth these transactions by which time the period of resolution process gets over and the Committee of Creditors are forced to take a haircut. In order to get over this, it has now

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become mandatory that the Resolution Plan will necessarily have to take into account these fraudulent transactions which if are set aside would give Committee of Creditors that extra amount which they would otherwise have lost because of the fact that the Resolution Process has come to an end. The contention of Mr. Sibal that the fact that this Resolution has come into effect only from 14.06.2022 means that all the resolution processes which have come into effect prior to 14.06.2022 cannot be re-opened and that the NCLT and the Resolution Professional becomes functous officio once the Committee of Creditors has accepted the Resolution Plan and which has been approved by the NCLT, cannot be accepted. If such an interpretation is accepted it will go against the very purpose of the IBC. The scheme of IBC is just not a commercial call taken by the Committee of Creditors. It was enacted by the legislature to ensure maximum recovery due to the creditors who had lent money to a corporate entity. The endeavour must always be to ensure maximum recovery of that money to the Committee of Creditors because it is public money and public cannot be made to suffer on account of dubious/nefarious transactions entered into by the company which has gone into the process of insolvency. The fact that after 04.06.2022, the Resolution Plan must also take into account all the dubious transactions does not give any less credence to the fact that such plans which have been approved by the Creditors prior to 14.06.2022, the NCLT will have jurisdiction to the application by the Resolution Professional for setting aside certain transactions so that the money can be recovered through the account of the Committee of Creditors. The argument of the learned Counsel for the Tata Steel BSL Ltd. that the money must come to the coffers of the company cannot be accepted because the price that has been offered by the

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Resolution applicant is a commercial decision. He has accepted to take over the entity at a particular price. He cannot be a beneficiary of that amount because that amount was actually paid by the Committee of Creditors which is a public money. Resolution Process is for the corporate debtor and also to ensure that the Committee of Creditors are not put to a loss because the amount lost by the Committee of Creditors is principally public money.

71. Ld. Senior Counsel appearing on behalf of Respondent No. 1 has argued that by virtue of insertion of the said clause, the dispute does not survive since it was not possible under the old regime to have allowed the continuation of Avoidance Applications post approval of the Resolution Plan.

72. In our view, Respondent No. 1's reliance upon this clause is misplaced. This clause has no bearing on the dispute in the present matter. Regulation 38 is titled *"Mandatory contents of the Resolution Plan"*. Regulation 38(2) requires that a resolution plan "shall" contain whatever is listed under sub-clauses (a) to (d). Therefore, the understanding is that Regulation 38(2)(d) necessitates a resolution plan to provide for the manner in which the resolution applicant seeks to deal with a pending avoidance application and the proviso sets a cut-off date for the applicability of the new regulation. Therefore, all resolution plans submitted before the NCLT for approval on or after 14.06.2022 must mandatorily provide for the manner in which they seek to deal with a sub-judice avoidance application and resolution plans submitted for approval before 14.06.2022 are not necessitated to provide for the manner in which the resolution applicant seeks to deal with such claims. Therefore, the provision only deals with what ought to be in resolution plans and cannot be interpreted to extinguish

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proceedings pertaining avoidable transactions in resolution plans submitted before 14.06.2022 altogether.

(c) Avoidance applications can be heard after conclusion of CIRP and benefits derived from adjudication will be appropriated by the creditors

73. In holding that avoidance applications cannot survive CIRP, the Impugned Judgment operates on a two-fold premise, i.e.: -

(i) Avoidance applications are required to be filed in terms of the timelines prescribed under Regulation 35A of the CIRP Regulations, 2016 and the details of such applications ought to be available before the NCLT at the time of the approval of the Resolution Plan under Section 31 of the IBC.

(ii) An avoidance application is not meant to benefit the corporate debtor in its new avatar after the approval of the resolution plan.

74. The first prong on which the Impugned Judgment holds that avoidance applications, in facts of the present case, are infructuous is because they have not been filed as per the prescribed timelines. However, it is our understanding that the timelines under Regulation 35A are directory and not mandatory in nature. This is because Regulation 35A pertains merely to the RP discharging his statutory burden of filing an avoidance application within an outer limit of 135 days from the commencement of the CIRP. This timeline takes date of commencement of CIRP as the reference point. However, the CIRP process itself is not strictly or mandatorily bound by its own timelines. The same has been held by the Hon'ble Apex Court in Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta,

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(2020) 8 SCC 531.

75. Secondly, while Regulation 35A endeavours to ensure that an avoidance application is determined and filed at the earliest to facilitate resolution of the Corporate Debtor, it does not envisage a situation where the RP is not able to form an opinion, make a determination or file an application as per the prescribed timeline. In the peculiar facts of this case, the RP did not have the requisite records to do so as per such timelines. The intent behind the insertion of clause 3A and 4 to Regulation 35A in fact appears to be that a resolution applicant is able to take cognizance of the avoidable transactions at the earliest. The duty cast by the IBC under Section 25(2) (j) is with respect to the RP filing the application before conclusion of the CIRP. The said obligation has been discharged. The premise of 35A timelines not being mandatory itself, adherence to Regulation 35A timelines cannot be required so strictly as to render the provisions of avoidable transactions redundant.

76. There is no time limit prescribed for the NCLT to adjudicate these applications. Further, there is no express penalty clause for the RP's failure to follow the timelines provided in Regulation 35A. When the law itself does not envisage a limit for the NCLT to adjudicate such an application, the Ld. Single Judge could not have imposed such a condition.

77. The Ld. Single Judge has also observed that adjudication of the avoidance application in the present case does not serve any purpose as the benefit from such adjudication will accrue to corporate debtor in its new avatar. The Ld. Single Judge has noted that the purpose of the avoidance applications is to benefit the creditors of the corporate debtor and proceeded to hold the corporate debtor in its new avatar cannot be the beneficiary of

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the sum or property acquired from adjudication of an avoidance application. The direct implication of the Impugned Judgment is that in cases such as the present one, wherein the Resolution Plan is unable to account for pending avoidance applications, the beneficiaries of avoidable transactions are allowed to walk scot-free, thereby causing unjust enrichment in favor of such beneficiaries. This view is also resonated in the ILC Report of May 2022, wherein the Committee has opined that a situation where a beneficiary of suspect transaction is absolved on account of the avoidance application becoming infructuous after conclusion of CIRP, is undesirable.

78. The Ld. Single Judge operates on the assumption that the sum or property acquired upon adjudication of the avoidance application will be appropriated by the corporate debtor in its new avatar. As laid down above, the provisions pertaining to avoidable transactions is to primarily benefit creditors. While the Corporate Debtor ceases to exist in its erstwhile avatar, in cases where the Resolution Plan is silent on the treatment of any pending applications because such information could not be made available to the applicant, the creditors of the corporate debtor can still be the beneficiaries of the sum or properties that may be recovered from adjudication of an avoidance application. The same is consistent with the scheme of the Code and in line with object sought to be achieved by it which inter-alia includes, increasing the availability of credit within the economy.

(d) RP will pursue the avoidance applications since he is only functus officio vis-à-vis CIRP and not avoidance applications

79. Upon this Court being satisfied that avoidance applications survive CIRP, a contentious issue that requires determination is as to who pursues

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such applications after conclusion of CIRP.

80. The flavour of Respondent No. 1's argument is that it is the RP who files and pursues such applications and RP being rendered functus officio there is no agency or instrumentality within the IBC which can pursue such an application. This argument furthers Respondent No. 1's stance on the issue of non-survival of avoidance applications on conclusion of CIRP. Appellants have submitted that a number of approaches can be taken in such a case.

81. During the course of arguments, the counsel appearing on behalf of the parties made various submissions in this regard. The Ld. Counsel for Tata Steel BSL Ltd. drew the attention of this Court to the following excerpt of the IBBI's Discussion Paper titled Dealing with Avoidance Transactions dated 27.03.2019**:** -

> *"2. According to information made available by IPs till28th February, 2019, a total of 215 applications in respect avoidance transactions valued at Rs.1,05,703crore have been filed with AA. Of these, only a handful of applications have been disposed of by the AA. Few appeals have been filed against the orders of the AA disposing of applications. Several issues on the way to conclusion of avoidance transactions have cropped uprequiring deliberation.*
>
> *The Governing Board considered a Board Note in this regard in the meeting held on 28th December, 2018. It broadly agreed with the approach suggested therein and authorised the Chairperson to formalize a framework for dealing with such transactions in consultation with the MCA. The matter has been discussed further with MCA and also in three roundtables - one each in Delhi, Kolkata and Mumbai -*

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with stakeholders.

…….

5. While the RP/liquidator may have filed an application with the AA based on his determination, it may not always be possible for the AA to consider and dispose of the application during the tenure of the CIRP or the liquidation process. The application may remain pending with the AA for disposal, when the corporate insolvency resolution/ liquidation process comes to an end and consequently, the IRP/RP/liquidator is relieved. Section26 of the Code clarifies that the filing of an avoidance application by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process. However, section 36(3)(f) provides that the liquidation estate shall comprise any asset or their value recovered through proceedings for avoidance of transactions. Further, the application may have been disposed of when the process was on, but an appeal against the order disposing the application may be pending when the process comes to an end. The issue that arises for consideration is by whom and how the applications would be taken to logical conclusion.

6. In view of the above, the specific issues that arise for consideration and the suggested way to deal with the mare as under:

S No.	*Issue*	*Suggested Approach*
1.	*Who would pursue(including the decision to file an application or an appeal)the matter(application/appeal)before the authorities(NCLT, NCLAT,*	*Resolution Applicant; the cost shall be borne by it.*

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	Supreme Court or any other), if the CIRP ends with a Resolution Plan? Who would bear the expenses?	
2.	*Who would pursue the matter before the authorities, if the CIRP ends with an order for Liquidation? Who would bear the expenses?*	*Liquidator ; the cost shall be part of liquidation process cost.*
3.	*Who would pursue the matter before the authorities, the NCLT, the NCLAT or the Supreme Court, if Liquidation Process ends? Who would bear the expenses?*	*The IBBI. The cost would be defrayed from the Insolvency and Bankruptcy Fund*

82. Attention of this Court was also drawn to Chapter III, Para 2 of the ILC Report, which states: -

> *"The Adjudicating Authority should decide whether the recoveries from actions filed against improper trading or to avoid transactions should be applied for the benefit of the creditors of the corporate debtor, the successful resolution applicant or other stakeholders. In arriving at this decision, the Adjudicating Authority should take note of the facts and circumstances of the case. Additionally, if the recoveries are to be vested with the creditors, they should usually be distributed per the order of priorities provided in Section 53(1) of the Code, unless the Adjudicating Authority deems an alternate manner of distribution appropriate"*

83. The Ld. Single Judge has heavily relied upon the role of the RP in the

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context of the CIRP to hold that the RP becomes *functus officio* upon the conclusion of the CIRP. The role of the RP vis-à-vis the resolution process ends, and rightly so, with the successful resolution of the corporate debtor. However, the Scheme of IBC makes it is clear that avoidance applications and CIRP are a separate set of proceedings. The avoidance of a transaction requires discovery of dubious transactions which are complex in nature and adjudication of these by the adjudicating authority takes time and the resolution process need not await the outcome of the exercise. Therefore, a distinction can be drawn between the role of the RP vis-à-vis CIRP on one hand and avoidance applications on the other.

84. Accordingly, reliance placed upon sections applicable in the context of CIRP cannot be extended to the RP for the purposes of pursuing avoidance applications. The RP, before passing of the approval order, filed an application for avoidance of certain transactions, discharging the statutory burden laid out under Section 25(2) (j) of the IBC.

85. The judgment of the learned Single Judge goes against the grain of the Insolvency and Bankruptcy Code, 2016 which was enacted not only to consolidate all laws relating to reorganisation and insolvency resolution of corporate persons and bring them under a single unified umbrella but also to enhance and improve the availability of credit with lending institutions.

86. Sections 43-51, 66 & 67 of the IBC lays down various transactions that may be avoided by the resolution professional and the actions that can be taken against erstwhile management for fraudulent transactions. These provisions are primarily aimed at swelling the asset pool available for distribution to creditors and preventing unjust enrichment of one party at the expense of other creditors. The scheme of the Act suggests that proceedings

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for unearthing such transactions are ancillary proceedings and the resolution of the corporate debtor need not be stalled due to pendency of such proceedings. The insolvency professional has to thoroughly examine the transactions which the corporate debtor has undertaken in the period prior to commencement of the period of insolvency proceedings. This is a very cumbersome process and more so in respect of companies whose books and records do not properly document all its past transactions. The resolution professional has to also assess if a suspicious transaction would meet the requirements that are necessary to be seen before terming it as a suspicious transaction. Not only the investigation but the adjudication of such transaction is a lengthy process and findings of these transactions by adjudicating authority involves answering questions on both law and fact and, therefore, it will be impossible to conclude these proceedings within the time frame laid down in the process. Since investigation and adjudication of these transactions are time consuming this cannot allow persons who were managing the corporate debtor to escape from reversal of these transactions. The time line given in the IBC cannot be used as a premium by the unscrupulous persons who have forced the corporate entity into insolvency process.

87. The concern of Union of India is that if the interpretation of the learned Single Judge is accepted then persons who were responsible for the corporate debtor to go into liquidation because of unscrupulous transactions will get away with their deeds. The submission that the scheme of IBC is not purely commercial in nature and the purpose of the Act which is also to ensure that public money is brought back into the system is not unfounded.

88. The amount that is available after the transactions are avoided cannot

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go to the kitty of the resolution applicant, in this case the Appellant in LPA No. 37/2021. For the resolution applicant, it was purely a commercial contract, a commercial decision whereunder the resolution applicant knew the ground reality, the assets and the liabilities. The benefit arising out of the adjudication of avoidance applications is not for the corporate debtor in its new avatar since it does not continue as a debtor and has gone through the process of resolution. The expectation that some more amount could come to the kitty was not present when the commercial decision was taken by the resolution applicant while agreeing to take over the corporate debtor. The purpose of the avoidance application as stated above is to enhance the asset pool available for the decision of creditors who are primarily financial institutions and have taken the haircut in agreeing to accept a much lesser amount than what was due and payable to them. This is public money, and, therefore, the amount that is received if and when transactions are avoided and receive the imprimatur of adjudicating authority must be distributed amongst the committee of creditors in a manner determined by the adjudicating authority.

89. **Conclusion**

a) The phrase "arising out of" or "in relation to" as situated under Section 60(5)(c) of the IBC is of a wide import and it is only appropriate that such applications are heard and adjudicated by the Adjudicating Authority, i.e., the NCLT or the NCLAT, as the case maybe, notwithstanding that the CIRP has concluded and the resolution applicant has stepped into the shoes of the promoter of the erstwhile corporate debtor.

b) CIRP and avoidance applications, are, by their very nature, a

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separate set of proceedings wherein, the former, being objective in nature, is time bound whereas the latter requires a proper discovery of suspect transactions that are to be avoided by the Adjudicating Authority. The scheme of the IBC reinforces this difference. Accordingly, adjudication of an avoidance application is independent of the resolution of the corporate debtor and can survive CIRP.

c) The endeavour of the IBC and its rules and regulations is to ensure that all processes within the insolvency framework are time efficient. While the law mandates a resolution plan to necessarily provide for the treatment of avoidance applications if the same are pending at the time of submission of resolution plans, it cannot be accepted that avoidance applications will be rendered infructuous in situations wherein the resolution plan could not have accounted for avoidance applications due to exigencies that delayed initiation of action in respect of avoidable transactions beyond the submission of a resolution plan before the adjudicating authority. This is because such an interpretation will render the provisions pertaining to suspect transactions otiose and let the beneficiaries of such transactions walk away, scot-free. Money borrowed from creditors is essentially public money and the same cannot be appropriated by private parties by way of suspect arrangements. Therefore, in cases such as the present one, wherein such transactions could not be accounted, the Adjudicating Authority will continue to hear the application. Such benefit cannot be given in cases where the RP had already applied for prosecution of

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avoidance applications and the applicant ought to have been cognizant of pending avoidance applications but did not account for the same in its resolution plan.

d) It follows that the RP will not be functus officio with respect to adjudication of avoidance applications in a situation, as described hereinabove. There being a clear demarcation between the scope and nature of the CIRP and avoidance application within the scheme of the IBC, the RP can continue to pursue such applications. The method and manner of the RP's remuneration ought to be decided by the Adjudicating Authority itself.

e) The provisions pertaining to suspect transactions exist specifically to benefit the creditors of the corporate debtor by enhancing the asset pool available for resolution of the corporate debtor. The IBC also envisages increasing credit availability in the country as one of its primary objectives. It is apposite that any kind of benefit acquired from the adjudication of avoidance applications, in cases where treatment of such applications could not be accounted in the plan, must be given to the creditors of the erstwhile corporate debtor, considering especially, that in the present case, the creditors took a massive haircut towards resolution of the corporate debtor. Giving such benefit to the creditors is in consonance with the scheme of the IBC.

f) The amount that is made available after transactions are avoided cannot go to the kitty of the resolution applicant. The benefit arising out of the adjudication of the avoidance application is not for the corporate debtor in its new avatar since it does not continue

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as a debtor and has gone through the process of resolution. This amount should be made available to the creditors who are primarily financial institutions and have taken a haircut in agreeing to accept a lesser amount than what was due and payable to them.

90. In view of the above, the impugned Judgment is set aside. The NCLT is directed to proceed ahead with the hearing of avoidance application. In accordance with Sections 44 to 51 of the IBC, 2016, the amount which is recovered can be distributed amongst the secure creditors in accordance with law as determined by the NCLT.

91. With these observations, the appeals are disposed of, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JANUARY 13, 2023
S. Zakir/Shk

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