पश्चिमबंग पश्चिम बंगाल WEST BENGAL 38AB 081023

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

C.P. (IB) No. 61 / KB / 2018

In the matter of the Insolvency and Bankruptcy Code, 2016: Section – 9

AND

In the matter of: Jayanta Panja

-VS-

Fort Gloster Industries Ltd.

Certified Copy of the Order dated 27.09.2019 passed by this Bench.

राष्ट्रीय कम्पनी विधि अधिकरण
National Company Law Tribunal
Kolkata Bench
कोलकाता न्यायपीठ

Recived by
Vikash Singh
18.10.19

105172

Sl. No. :

Name :

Address :

Rs.

Kolkata Collectorate
11, Netaji Subhas Rd.,
Kolkata-1

Date 23 SEP 2019

Amal Kr. Saha
Licensed Stamp
Vendor

Arun Kumar Singh
Advocate
E. No.UP/13937/2010

Arun Kumar Singh
Advocate
E.No.UP/13937/2010

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IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

Coram : Shri Jinan, K.R., Hon'ble Member (Judicial)
Shri Harish Chander Suri, Hon'ble Member (Technical)

CA (IB) No. 584/KB/2019
&
CA (IB) No. 647/KB/2019
&
CA (IB) No. 650/KB/2019
&
CA (IB) No. 712/KB/2019
&
CA (IB) No. 713/KB/2019
&
CA (IB) No. 736/KB/2019
&
CA (IB) No. 887/KB/2019
Or
CA (IB) No. 1100/KB/2019
&
CA (IB) No. 1122/KB/2019
&
CA(IB) No. 1168/KB/2019
IN
CP(IB) No. 61/KB/2018

CA(IB) No. 584/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

An application u/s. 30(6) of the Insolvency and Bankruptcy Code, 2016

Sd

Sd

And

In the matter of:

Mr. Bijay Murmuria, Resolution Professional, having registered office at Middleton Street, 6A, Geetanjali Apartments, Kolkata 700071.

... ... Applicant/Resolution Professional

And

In the matter of:

Jayanta Kumar Panja ... ... Operational Creditor

-vs-

Fort Gloster Industries Ltd. ... Corporate Debtor.

CA(IB) No. 647/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

Hooghly Infrastructure Private Limited ... Applicant

-vs-

Sri Bijay Murmuria, Resolution Professional & Ors. ... Respondents

CA(IB) No. 650/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

Fort Gloster Industries Limited (Cable Works) Sramik Karmachari Unio (INTUC) & others

... ... Applicants

-vs-

Resolution Professional, Fort Gloster Industries Ltd. & Others

... ... Respondents

CA(IB) No. 712/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

An application u/s. 60(5) of the Insolvency and Bankruptcy Act, 2016;

And

In the matter of:

Stressed Assets Stabilization Fund (SASF) ... Applicant

-vs-

Sri Bijay Murmuria, Resolution Professional & Ors. ... Respondents

CA(IB) No. 713/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

An application u/s. 60(5) of the Insolvency and Bankruptcy Act, 2016;

And

In the matter of:

Gloster Cables Limited ... Applicant

-vs-

Sri Bijay Murmuria, Resolution Professional & Ors. ... Respondents

CA(IB) No. 736/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

An application u/s. 60(5) of the Insolvency and Bankruptcy Act, 2016;

And

In the matter of:

West Coast Paper Mills Ltd. ... Applicant

-vs-

Sri Bijay Murmuria, Resolution Professional & Ors. ... Respondents

CA(IB) No. 887/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

An application u/s. 60 of the Insolvency and Bankruptcy Act, 2016;

And

In the matter of:

Hooghly Infrastructure Private Limited ... Applica

-vs-

Sri Bijay Murmuria, Resolution Professional & Ors. ... Responden

CA(IB) No.1100/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

An application u/s. 60(5)(c) of the Insolvency and Bankruptcy Act, 2016 re with Rule 13 of the Insolvency and Bankruptcy Board of India (Insolver Resolution Process for Corporate Person) Regulations, 2016;

And

In the matter of:

Corporate Sales (India ... Applicar

-vs-

Sri Bijay Murmuria, Resolution Professional & Ors. ... Respondent

CA(IB) No.1122/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

Insolvency and Bankruptcy Code, 2016;

And

In the matter of:

Pradip Kumar Das & Ors. ... Applicant

-vs-

Sri Bijay Murmuria, Resolution Professional & Ors. ... Respondents

CA(IB) No.1168/KB/2019 in CA(IB) No. 61/KB/2018

In the matter of:

An application u/s. 47 and 60(5) of the Insolvency and Bankruptcy Code, 2016;

And

In the matter of:

Wind Power Vinimay Private Limited ... Applicant

-vs-

Sri Bijay Murmuria, Resolution Professional & Ors. ... Respondents

Counsels appeared:

1.	Mr. Bijoy Murmuria	] Resolution Professional
2.	Mr. Joy Saha, Sr. Advocate	]
3.	Mr. Anuj Singh, Advocate	] For the Resolution
4.	Mr. Parikshit Poddar, Avocate	] Professional
5.	Ms. Madhuja Barman, Advocate	]
6.	Mr. Ritoban Sarkar, Advocate	]
7.	Mr. S. Rudra, Advocate	]

1.	Mr. Jishnu Saha, Sr. Advocate	]
2.	Mr. Rajarshi Dutta, Advocate	]
3.	Ms. Rashmi Bothra, Advocate	] For CoC
4.	Mr. Nikunj Berua, Advocate	]

1.	Mr. S.N.Mookerjee, Sr. Advocate	] For Successful Resolution
2.	Mr. Sounak Mitra, Advocate	] Applicant
3.	Mr. P. K. Jhunjhunwala, Advocate	]
4.	Mr. V. K. Kothari, Pr. CS	]
5.	Mr. S. Rudra, Advocate	]
6.	Ms. Richa Saraf, Advocate	]
7.	Mr. Ranjan Bachwat, Advocate	]
8.	Ms. Sonali Mitra, Advocate	]

1.	Mr. S. K. Kapur, Sr. Advocate	]

2.	Mr. Siddhartha Datta, Advocate	] For Gloster Cables Ltd.
3.	Ms. Suhani Dwivedi, Advocate	]
3.	Mr. Sakabda Roy, Advocate	] (CA 713/2019)
4.	Mr. Deepanjan Dutta Roy, Advocate	]

1.	Mr. Ratnanko Banerji, Sr. Advocate	] For HIPL
2.	Mr. D. N. Sharma, Advocate	] CA 647 & 887/2019
3.	Ms. Srimoyee Basu, Advocate	]
4.	Mr. Manohar Mishra, Pr. CS	]

1.	Mr. Abhrahit Mitra, Sr. Advocate	]
2.	Mr. Jishnu Chaudhury, Advocate	] For Workers' Union
3.	Ms. Rashmi Bothra, Advocate	]
4.	Mr. Nikunj Berlia, Advocate	]

1.	Mr. Lokenah Chatterjee, Advocate	] For aggrieved
2.	Mr. Souvik Chakraborty, Advocate	] workmen
3.	Ms. Sinthia Bala, Advocate	]

1.	Mr. K. C. Garg, Advocate	] Corporate Sales
2.	Ms. Sunita Agarwal, Advocate	] (CA 1100/2019)
3.	Ms. Rabiya Khan Advocate	]
4.	Md. Dilawar Khan, Advocate	]

1.	Mr. Bidyut Banerjee, Advocate	] Pradip Kr. Das & Ors.
2.	Md. Dilawar Khan	] (CA 1122/2019)

1.	Mr. Ajay Gaggar, Advocate	] For SASF
3.	Mr. Ramanuj Ray Chaudhuri, Advocate	]
2.	Ms. Rakhi Purnima Paul, Advocate	] (CA 712/2019)

1.	Ms. Manju Bhuteria, Advocate	]
2.	Mr. Krishnaraj Thakkar, Advocate	]
3.	Mr. Sidhartha Sharma Advocate	] For the applicant in
4.	Mr. Ujjaini Chatterjee, Advocate	] CA 736/2019
5.	Mr. Dipto Sen, Advocate	]
6.	Ms. Diprani Thakur, Pr. CS	]

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Order pronounced on 27th September, 2019.

ORDER

Per Shri Jinan, K.R., Member (Judicial)

All the applications are taken together for convenience and for avoiding repetition of facts and since common questions arise for consideration.

CA (IB) No. 584/KB/2019

1. This is an application filed by the resolution professional (RP) u/s.30(6) of the Code, for obtaining the direction of the Hon'ble Tribunal to approve the Resolution Plan of Fort Gloster Industries Ltd, submitted by Gloster Limited duly approved by the Committee of Creditors by a vote share of 73.21% of the members of the CoC.

2. The **CP (IB) No. 61/KB/2018 was** admitted by allowing the application filed by an operational creditor Shri. Jayanta Panja against Fort Gloster Industries Limited vide Order dated 09.08.2018 and appointed Mr. Manish Jain as the Interim Resolution Professional.

3. In the Second Meeting of Committee of Creditors Mr. Manish Jain was replaced by Mr. Bijay Murmuria as the Resolution Professional and the said replacement was approved by this Bench on 04.12.2018.

4. The resolution professional/the applicant published Form G for Invitation of Expression of Interest on 05.02.2019 in Financial Express in English Language and in Aajkaal in Vernacular Language (Bengali) at the location of the registered office of the Corporate Debtor wherein the last date for submission of EoI was 20.02.2019.

5. The Applicant received EoI from Two Prospective Resolut Applicants on 20.02.2019 from the following:

a. Prudent ARC Limited
b. Gloster Limited

6. In the meanwhile M/s. Hooghly Infrastructure Private Limited filed application for receiving its EoI. This Bench allowed the applica permitting submission of Expression of Interest (EoI) for the Corpo Debtor vide Order dated 01.04.2019.

7. The applicant thereafter received two Resolution Plans from following Prospective Resolution Applicants namely, M/s. Gloster Lim and M/s. Hooghly Infrastructure Private Limited till the last date submission of Resolution Plans i.e., 06.04.2019 (17:00 hours).

8. On 10.04.2019, the Resolution Professional received the Fore Audit/Due Diligence Report of the Corporate Debtor from the Aud namely, V. Singhi & Associates, Chartered Accountants stating that t were no preferential transactions, undervalued transactions, transac defrauding creditors, extortionate credit transactions, fraudulent tradin wrongful trading pursuant to Sections 43, 45, 49,50 & 66 of the Insolve and Bankruptcy Code, 2016 respectively and recorded the same in minutes.

9. The Applicant in the Sixth meeting of Committee of Credi apprised the Members of the Committee of Creditors the details of the as received from respective resolution applicants. Amongst other things Resolution Professional brought to the attention of the members that Resolution Plan as received by Hooghly Infrastructure Private Limited certain inconsistencies in terms of the requirements of the Code, 2016.

10. As deliberated in the Sixth Meeting of Committee of Creditors the Resolution Applicants submitted their respective Updated Resolu

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Plan by 5:00 PM on 19th April, 2019 vide email and the corresponding Hard copy by 12:00 noon on 20th April, 2019.

11. The Applicant received certification given by Advocate Mr. Saumendra Kabiraj where the attorney found that both the Resolution Applicants namely, Gloster Limited and Hooghly Infrastructure Private Limited were eligible in terms of the provisions of Section 29A of the Insolvency and Bankruptcy Code, 2016.

12. The Gloster Limited scored total score of 51 in terms of Qualitative Criteria and Quantitative Criteria of the Evaluation Matrix as against the score of 30 obtained by Hooghly Infrastructure Private Limited. **The members of Committee of Creditors unanimously declared Gloster Limited as H1 Bidder for Fort Gloster Industries Ltd.**

13. The Resolution Plan of Gloster Limited being declared H1 was put for Voting through the E-voting mechanism. The said resolution plan from Gloster Limited was approved by voting of 73.21% where Pegasus Asset Reconstruction Pvt. Ltd., Punjab National Bank & Andhra Bank voted in favour of the referred plan. However, Stressed Assets Stabilization Fund (SASF) with voting of 26.79% voted against the said resolution plan. It is the said plan that has come before us for approval. As usual several applications were filed by stakeholders like secured and unsecured financial creditors, operational creditors, individual workmen and trade unions representing the workmen of the CD objecting to the approval of the resolution plan.

CA(IB) No. 713/KB/2019

14. CA(IB) No. 713/KB/2019 is an Application filed by Gloster Cables Limited, (In short GCL), challenging the approval of the Resolution Plan, praying for exclusion of Trademark 'Gloster' from the Resolution Plan and claiming exclusive ownership of trademark 'Gloster'. The resolution plan

that came up for consideration no doubt included the trademark 'Gloster iii)
one of its assets. Gloster is a trademark originally registered in the nam
the corporate debtor/Fort Gloster Industries Ltd (CD). The Corporate Det
incorporated as a company in the year 1890, was originally engaged in iv)
manufacturing of industrial cables and wires and selling LT cable in
name of Gloster. The said name was registered as its Trademark
Reg.No.690772. The Corporate Debtor Company was doing business
functioning till the year 2003 before it became sick due to lack v)
management efficiency, lower capability utilization, lower producti
liability to face competition and disproportionate increase in the cost
inputs. It having failed in doing its business, the secured creditors
compelled to refer the Corporate Debtor Company for revival of the uni vi)
Board for Industrial & Financial Reconstruction (BIFR). The CD company
thus declared a sick industrial company within the meaning of Clause (
Section 3(1) of the **Sick Industrial Companies (Special Provisions)**
1985 (in short SICA) and Industrial Development Bank of India (IDBI) vii)
appointed as the operating agency vide order of admission of refer
dated 10.09.2001.

15. It is informed that the applicant company was originally regist
as a company by name Crust Cable Pvt.Ltd in the year 1923. Its name
changed in the year 2004 as Gloster Cable Pvt.Ltd., in short, the GCL,
they got license to use the trademark Gloster from the CD. The CD also
16.7% shareholding in the GCL. It claimed exclusive title, right, user,
ownership over the trademark as per the documents read as under:-

i. Technical collaboration agreement dated 2nd May, 1995 for the
to use the trade mark Gloster for a period of 8 years in between
Cable Pvt. Ltd and the CD.

ii) Renewal of technical collaboration agreement dated 2nd may 2
for the right to use the trade mark for further period of 5 y
between Crust Cable Pvt.Ltd and the CD;

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iii) Trademark agreement dated 29th July, 2004, for a long term license to use the trade mark between GCL and the CD;

iv) Loan cum hypothecation agreement dated 10th November, 2006, hypothecating trademark in favour of GCL by the CD for a loan of 10 Crores;

v) Supplementary trademark assignment deed dated 15th July, 2008 for a value of 10 lacs between GCL and the CD subject to the result of pending proceedings before BIFR:

vi) Deed of assignment dated 20th September, 2017, reconfirming the assignment of the trademark in favour of GCL by the CD for a valuable consideration of 10 lacs:

vii) Registration of trademark in favour of GCL by the Registrar on 17th September,2018, valid up to December,2022.

16. According to the Ld. Senior Counsel Mr.S.K Kapur who is appearing for the GCL, as per the terms in the supplementary trademark deed dated 15-07-2008, the assignment in favour of the Applicant Company became complete as on 01.12.2016 when the SICA Act was repealed. He would further submit that with the abatement of the BIFR/AAIFR proceedings of the CD, the period of reference in terms of Section 22 and the operation of the Order dated 10-09-2001 u/s.22A, expired, abated as on 01.12.2016, and any direction would thus cease to exist and the Applicant Company and the Corporate Debtor became entitled to enforce their rights in accordance with law, as if, no declaration, reference or restriction ever existed. According to him, the applicant has got absolute right over the trademark and hence the CD company if resolved by approving any resolution plan, the ownership of the Trademark cannot be transferred in the name of the resolution applicant along with the CD. It cannot be used by any person other than the GCL. If it is allowed to be used by anybody else, other than the GCL, it would infringe the right to use the trademark exclusively by the GCL. There is no right in

favour of the Corporate Debtor, to continue the use of the trademark by Corporate Debtor, argued by the Ld Sr. Counsel Mr. Kapur.

17. This application was objected to by the Resolution Professio CoC, and the successful bidder, contending that the claim of exclusive to use the trademark by the Applicant/GCL is not at all sustainable u law and none of the assignment deeds and the registration certifi produced in the case, could be held good to confer ownership of trademark under dispute in the Application.

18. Three-fold objections have been raised on the side of the RP, and the resolution applicant (in short RA). Firstly, they submit that Corporate Debtor was referred to BIFR in the year 2001 and vide O dated 10-09-2001, the BIFR admitted the reference by directing Corporate Debtor/FGIL not to dispose of any fixed or current assets of without the consent of its co-creditors and the BIFR. That being so, the of license agreement executed prior to the execution of the assign deed dated 20-09-2017, has no legal effect. Any transfer made in viol of the Order of injunction passed by the BIFR, is void ab initio and there on the strength of the license granted by the Corporate Debtor in favo the Applicant also, the Applicant cannot claim any exclusive ownership or usage of the trademark as claimed.

19. Secondly, they would submit that the claim on the strengt assignment deed dated 20-09-2017 is in violation of Section 43 read Section 46 of the I&B Code, 2016. The assignment of trademark belon to the Corporate Debtor in favour of the Applicant/GCL comes unde purview of preferential transaction under section 43(2)(a) of the Code. transaction is within the period of one year preceding the insolv commencement date as provided under Section 46(1)(i) and that the of assignment dated 20th September, 2017 is undervalued and insuffici stamped and hence is a sham document which cannot be acted upon. being so, on the strength of deed of assignment dated 20-09-2017 also

Applicant cannot make a claim over the trademark in dispute in the Application argued by the Ld. Sr. Counsel for the RP.

20. Thirdly, they would submit that the registration of trademark in the name of the Applicant, GCL, is invalid because it was registered in the name of GCL in violation of Section 14 of the I&B Code, 2016. According to him, the CIRP was initiated in the case in hand on 09-08-2018 and registration of the certificate in the name of GCL was on 27-09-2018, being subsequent to the declaration of moratorium under section 14 of the I&B Code, 2016 in CP(IB) No. 61/KB/2018. On the strength of this registration certificate, the Applicant cannot claim ownership or right to use the trademark as claimed.

21. To strengthen the submission that the injunction order passed by the BIFR upon admission of the reference of the Corporate Debtor under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985, no right would pass to the Corporate Debtor he referred to Section 22(A) of SICA. According to him, till the date of repeal of the SICA, the order of injunction was in force and therefore, the deed of assignments prior to 01-12-2016, do not confer any absolute right to use the trademark by the Applicant herein. It is good to read Section 22(A) of SICA:

"22-A. Direction not to dispose of assets.- the Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing, direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets-

c. *during the period of preparation or consideration of the scheme under section 18; and*

d. *during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court."*

22. The BIFR upon admission of the reference, issued directions as per Section 22(A) of SICA,Act on 10th September,2001, which read as under:-

> *"The company/promoters were directed under Sec.22A of the Act not to dispose any fixed or current assets of the company without the consent of the secured creditor and the BIFR. In case the company was running the current assets could be drawn down to the extent required for day to day operations proper accounts of which would be maintained."*

23 Truly this order of BIFR was deemed to have been vacated upon repealing of the SICA Act. The **SICA (Special Provision) Repeal Act, 2016** came into force with effect from **01-12-2016.** So no doubt till then the said direction was in force. All the assignment deeds executed prior to 01.12.2016, evidently do not confer any title as regards the trademark on the GCL. On the other hand, it confers right to use the trademark by the GCL for a royalty of 2 lacs. Hypotecation deed executed on 10th November,2016 hypothecating the trademark in favour of the GCL by the CD, supplementary assignment deed executed on 15th July,2008 and deed of assignment dated 20th September, 2017 demonstrate that the CD and the GCL executed all the assignment deeds subject to the final verdict of the BIFR. A reading of one of the terms in the deed dated 15th July,2018 itself makes the intention of parties to the deed, crystal clear. It reads as follows:-

> ***"The assignment shall become effective without any further act or deed until after the order dated 10-09-2001, passed by the BIFR, is vacated and/or discharged or in the event FGIL/Corporate Debtor is wound up"***

24. It has come out in evidence that none of the creditors consented to the said transfer, on the other hand PEGASUS challenged the transfer/alienation of trademark by the CD in favour of the GCL before the BIFR. However BIFR had not passed or approved the **rehabilitation plan of the CD** and it is at that juncture the BIFR proceedings abated because of

the invocation of I&B Code as on 01.12.2016. ***It is also significant to note here that the GCL also participated in the bidding for the CD, before the BIFR, but was unsuccessful.***

25. The law is settled as to the effect of executing a deed in violation of an order which was in force on the date of execution of the deeds. Ld. Sr. Counsel for the RP cited a decision of Hon'ble Supreme Court **AIR 2013 Supreme Court 2235 in Jehal Tanti & Ors. V. Nageshwar Singh (D) thr. LRs**.

26. In the above said judgment, the Hon'ble Supreme Court has considered the effect of alienation made in violation of an order of injunction. The Hon'ble Supreme Court has held that:-

> *"in a case of violation of the interim order while it was in force, the defendant cannot escape the consequence of their disobedience and violation of interim injunction committed by them prior to the High Court decision on the question of jurisdiction".*

> *"A mere objection to jurisdiction does not instantly disable the court from passing any interim orders. It can yet pass appropriate orders. At the same time, it should also decide the question of jurisdiction at the earliest possible time. The interim orders so passed are orders within jurisdiction when passed and effective till the court decides that it has no jurisdiction to entertain the suit."*

27. Bearing in mind the above said proposition, that the transfer was not consented to by the creditors, and that one among the creditors challenged the transfer before the BIFR, we are of the view that the GCL cannot claim any right or title to use the trademark as a licensee on the strength of the assignment deeds executed in between 10th September, 2001 and 1st December, 2016. Those deeds were executed in between GCL

and the CD knowing fully well the effect of the prohibition of transfer of right in respect of the subject matter of the deed i.e. the right to use the trademark by the GCL. Any transaction, design, arrangement or assignment conferring right to use or right to transfer title of the trade mark, during the currency of the prohibition order, became illegal and will be held as void ab initio. Therefore, no doubt it would not be binding on the corporate debtor.

28. At this juncture the Ld. Senior Counsel, appearing for the Applicant submits that the order or directions issued by the BIFR dated 10-09-2001 do not include the trademark, as trademark is not included under the purview of current assets of the Corporate Debtor and does not relate to intangible assets and hence there is no prohibition in executing assignment deed assigning the right to use the trademark.

29. The Ld. Sr. Counsel appearing for the resolution applicant/H1 bidder submits that the fixed or current assets referred to in the order of directions of BIFR includes the trade mark. He took us to Sec.3(2)(a) and (b) of SICA Act,1985. It reads as follows:-

> *"(2)(a) Words and expressions used and not defined in this Act shall have the meanings, if any, respectively assigned to them in the Companies Act, 1956 (1 of 1956).*
>
> *(b) Words and expressions used but not defined either in this Act or in the Companies Act, 1956 (1 of 1956) shall have the meanings, if any, respectively assigned to them in the Industries (Development and Regulation) Act, 1951 (65 of 1951)."*

30. Referring to sub Sec.2(a) of Sec.3 of SICA, Act Ld.Sr.Counsel further submits that nowhere in the SICA Act defines the assets and therefore, the assets as provided under Sec.211(1) and (2) of the Companies Act, 1956 is to be relied upon which read as under:-

"211(1) Every balance sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of the financial year and shall subject to the provisions of this section, be in the form set out in Part I of Schedule VI or as near thereto as circumstances either generally or in any particular case, and in preparing the balance sheet due regard shall be had, as far as may be, to the general instructions for preparation of balance sheet under the heading "Notes" at the end of that Part:"

31. A reading of Sec.211 would make it clear that the mandatory disclosures to be disclosed in a balance sheet is to be as shown in Part 1 of Schedule VI. The relevant portion of the schedule which includes the fixed assets as per Schedule VI read as follows:-

	Share capital	Fixed assets	
Terms of redemption or conversion (if any), of any redeemable preference capital to be stated together with earliest date of redemption or conversion.	Authorised shares of Rs. Each Issued (distinguishing between the various classes of capital and stating the particulars specified below in respect of each class) shares of Rs. Each.	Distinguishing as far as possible between expenditure upon (a) goodwill, (b) land, (c) buildings, (d) leaseholds, (e) railway sidings (f) plant and machinery, (g) furniture and fittings, (h) development of property, (i) **patents, trade marks and designs,** (j) livestock and (k) vehicles, etc.	Under each head the original cost, and the additions thereto and deductions therefrom during the year, and total depreciation written off or provided up to the end of the year to be stated.

32. The Schedule VI read with Sec.211 made it clear that fixed or current assets of the company include the intangible assets like patents,

goodwill, trademarks and designs. So, no doubt the order of prohibition passed by the BIFR includes all kind of the assets of the CD, inclusive of the trademark. The terms stipulated in the 15th July, 2008, and inclusion of trademark in the financial statement of the CD for the year ending 31.03.2018 add strength to the said view that the parties to the deeds knew very well that the trademark is one of the assets of the CD executed the deeds. So the submission that the direction dated 10th September,2001 does not include trademark is found devoid of any merit.

33. At this juncture referring to GUIDE TO THE COMPANIES ACT, BY A RAMAIYA 15th edition the Ld.Sr.Counsel for the GCL attempted to explain that a schedule of the Companies Act cannot be taken for interpreting the meaning of the Fixed assets. The Ld.Author explained the fixed assets as the "asset held with the intention of being used for the purpose of providing goods or services and is not held in the normal course of business". A reading of the text relied upon by the Ld.Sr.counsel what we understood is that the fixed assets come under the purview of VI th schedule does not define fixed assets. However, it includes intangible assets like trademark. So Schedule VI read with section 211 of the Companies Act,1956 make it clear that assets includes intangible assets and shall disclose in the Financial Statement.

34. Citing the undermentioned judgements the Ld. Sr. Counsel also attempted to convince us that an order passed by the BIFR has no force after repealing the Act under which BIFR was functioning and hence the assignment deeds cannot be challenged on the strength of an order or injunction passed on the strength of an Act subsequently repealed. According to him the effect of repealing is that the Act had never been passed.

i) (2018) 2 Supreme Court Cases 9 – Civil Appeals Nos. 4767-69 of 2001 with Nos. 19937 of 2017, 19938 of 2017 and SLP(C) No. 30121 of 2012 - Patel Field Marshal Agencies and Another -Vs.- PM Diesels Limited and Others;

ii) (2012) 12 Supreme Court Cases 642 – Civil Appeals No. 7234 of 2012– Paras Nath Rai and Others – Vs.- State of Bihar and Others;

iii) (2011) 5 Supreme Court Cases 305 – Civil Appeals No. 10229-30 of 2010– State of Uttar Pradesh and Others – Vs.- Hirendra Pal Singh and Others;

iv) (2009) 2 Supreme Court Cases 1 – CriminalCivil Appeals No. 1113 of 2005 with Nos. 1498 to 1500 of 2005, 359 of 2006, 734-36 f 2007 and 1651-52 of 2008 – Mahmadhusen Abdulrahim Kalota Shaikh(2) – Vs.- Union of India and Others.

35. Referring to the above cited judgements, the Ld. Sr.counsel for the GCL submits that as per settled legal proposition laid down in the above cited judgements, it is clear that whenever an ACT is repealed, it must be considered as if it had never existed. So, according to him, the SICA Act, being repealed with effect from 01-12-2016, any deed of assignment executed, can be considered as executed without any prohibition. We are unable to agree with the view attempted to convince us by the Ld.Sr.Counsel. What we understood from the said propositions laid down in the cited decision is that after the date of repeal, the effect of the orders passed is that the Act had never been passed. That does not mean that while an injunction order was in force an act done in violation of the injunction would become infracutous. The effect of repeal cannot be equated with an order violated while the order of injunction was in force before the date of repeal. So till the date of repeal the order of injunction was in force. Upon repealing an Act, the order of injunction passed under the provisions of the Act, shall be deemed to have been vacated. The GCL cannot claim any right on the strength of a deed executed in violation of the order of injunction. The only one deed executed before passing of the order of injunction referred to us is the deed dated 2nd May 1995 entered into between the parties for technical collaboration and the period of that collaboration had expired after a period of 8 years of the date of execution. The renewal was subsequent to the order of prohibitory injunction of BIFR.

So we are of the view that all the deeds executed between the CD and the GCL become void and illegal.

36. Coming to the second objection that the assignment of trademark belongs to the Corporate Debtor in favour of the Applicant/GCL comes under the purview of preferential transaction under section 43(2)(a) of the Code and that transaction being done within the period of two year preceding the insolvency commencement date as provided under Section 46(1)(ii) any claim on the strength of assignment deed dated 20th September,2017 is in contravention of Section 43 of the Code and therefore on the strength of the said deed also the GCL cannot claim absolute title over the trademark.

37. Referring to the deed dated 20th September, 2017, one another argument is also advanced that it is an under-valued transaction and is insufficiently stamped. According to the Ld.sr.Counsel for the RP, the CD admittedly availed a loan of Rs.10 crore hypothecating the trademark on 10th November,2006 and it is that trademark which was assigned to the GCL by the CD for a value of Rs.10 Lakh and therefore it prime facie appears to be an undervalued transaction.

38. The CD was declared a sick company in the year 2001. The company admittedly stopped its production and business and was non-functional thereafter. The only earning it had was from GCL for allowing the use of the trademark for which it was being paid Rs.2 lacs as annual royalty by GCL and the commission for marketing the product of GCL by the CD. So, no doubt the trademark of the CD has got good market value. In the said background if we take the loan agreement dated 10th November, 2006 it is understood that the parties to the deed valued the trademark at Rs.10 crores. The trademark was hypothecated for Rs.10 crores. It is the same trademark that has been valued in the assignment deed dated 20th September, 2017, at Rs.10 lacs only. The above said valuation is self explanatory. The value of 10 lacs for conferring absolute title over the trademark to GCL is no doubt is far lesser a value than that of a reasonable value to be fetched for the trademark. The above said circumstances lead

us to a legitimate conclusion that the transaction relied upon by the GCL is an under-valued transaction and therefore, is hit by section 45(2) (b) of the Code.

39. At this juncture Ld. Sr. Counsel for the GCL submits that the RP has neither opined that it is an undervalued transaction during the CIRP period before the approval of the resolution plan by the CoC, nor filed any application within the stipulated period alleging preferential or undervalued transaction under section 43 of the Code, and thus they are estopped from contending that the transaction is hit by section 43 of the Code.

40. In answer to the challenge raised by the Ld. Sr. Counsel for the GCL, Ld. Sr. Counsel Mr.Jishnu Saha for CoC submits that the application filed by the GCL claiming right over the trademark, the Adjudicating Authenticity (AA) can declare the transaction void and reverse the transaction under Section 44 or 45 or under Section 47 of Code. According to him the RP truly has not formed any opinion because he and the CoC relied upon the forensic audit report and when the applicant comes forth claiming exclusive right over the trademark, the AA is asked to have a determination on the basis of its claim and hence the AA independent of filing an application under sections 43, 44, 45 and 46 by an RP, is bound to have a determination of the dispute raised by the GCL and the RP has every right to challenge the application and object to its raising the grounds under the provisions of section 43 and 45 of the Code.

41. On a careful reading of the above referred sections, it is understood that such a declaration can be made upon an application filed by the Resolution Professional, that the assignment under challenge was executed by the Corporate Debtor by playing fraud or is undervalued. Here in this case neither such an application was made nor any opinion seen made by the RP before filing the application for approval of the plan before us. However, an application was seen filed at the fag end of hearing of the application filed for the approval that is on 17.09.2019 by one of the shareholders of the CD, Wind Power Vinimay Pvt.Ltd, [CA 1168 of 2019]

u/s.47 and 60(5) of the Code praying for declaration that the purported transfer/assignment of the Trademark in favour of the GCL is illegal fraudulent and undervalue transaction.

42. According to the Ld. Sr. Counsel for the GCL, since the RP failed t form any opinion and he has not opted to file any application filing of th application late by a shareholder of the CD cannot be taken fo consideration because no such powers is given to the AA to determine th prayer of declaration in the absence of an application which is ought to hav been filed by the RP and therefore no such declaration could be made in th application filed by the GCL.

43. Referring to Sections 43, 44, 45, b 46, 47 and 66 of the Insolvency Bankruptcy Code, 2016, the Ld. Senior Counsel for the GCL also submits tha in the absence of taking any opinion by the Resolution Professional that th transaction under challenge was preferential during the relevant period time or that the transaction under challenge has been executed for consideration, the value of which is significantly less than the value of th trademark, the Adjudicating Authority is prohibited from making suc opinion under Section 43 and 45 of the Code even if materials sufficient hold is available from the records and the Adjudicating Authority cann pass an order under Section 48 of the code declaring that the transaction void.

44. The materials brought out before us sufficiently establish that th transaction related to the trademark by the Corporate Debtor in favour GCL was not done in good faith. It has come out in evidence that GC received a benefit from the preferential transaction not in good faith. The got the trademark at a reduced consideration. It has come out in evidenc that the very same trademark has been hypothecated at a value of Rs.1 Crores has been assigned in favour of GCL for a nominal value of Rs.1 lakhs. In the above said proved facts let us consider the objection on th side of the GCL

45. By citing below mentioned judgements the Ld. Senior counsel, appearing for the GCL attempted to convince us that a Tribunal or the Adjudicating Authority cannot go behind the provisions of the statutes wherein the RP failed in recording his opinion regarding preferential transaction and undervalued transaction.

i) (2001) 4 Supreme Court Cases 112 – Criminal Appeal No. 1000 of 1999 – Dhanajaya Reddy – Vs.- State of Karnataka

ii) (2008) 1 SCC - Supreme Court Cases 728 – Civil Appeals No. 4843 of 2007 with No. 4844 of 2007 – Devinder Singh and Others – Vs.- State of Punjab and Others

iii) (2009) 6 Supreme Court Cases 735 – Civil Appeals No. 2625 of 2009 with Nos. 2626 of 2009 and Contempt Petition (C) No. 90 of 2008 in SLP (C) No. 22330 of 2007 – Ram Deen Maurya (Dr.) -Vs.- State of Uttar Pradesh and Others

46. The question here in this case in hand, is whether non compliance of the procedural requirement as per Section 43, 44, 45 and 46 of the Code by the Resolution Professional would prohibit the Adjudicating Authority in determining the question of under valuation and preferential transaction as per Section 43 and 45 of the Code. On a reading of the proposition above cited, what we understood is that a procedural compliance is directory, if provision for non compliance is not provided in it. Evidently the RP did not opt to file an application for a declaration as provided under section 43,44,45 and 46. The provision is silent in case the RP failed in taking steps under the said provisions or not opted to take action as per the said sections, even if there are materials enough to hold that the transaction under challenge is preferential and undervalued. In the said peculiar circumstances shall we shut out our eyes and ignore the materials and legitimise the transaction by holding that the transaction is not hit by section 43 and 45 of the Code. We would say No. The Adjudicating Authority is empowered to look into the materials brought to our notice so as to see

whether there were preferential transaction and undervalued transactio benefiting the GCL and depriving the right of the Corporate Debtor i realizing its assets as its own. It is good to read paragraph 52 in **(2009) Supreme Court Cases 735** cited above. It reads as follows:

> ***"While considering the non-compliance with procedur requirement, it has to be kept in view that such requirement is designed to facilitate justice and furth its ends and, therefore, if the consequences non-compliance is not provided, the requirement may b held to be directory."***

47. The Code is silent in regards consequences of inaction on the side the RP or what would be done for non compliance of the procedure to b followed by the Resolution Professional. Truly, u/s. 25(2)(j) of the Code an R is duty bound to examine all the transactions undertaken by the CD durin the period of 2 years preceding the insolvency commencement date and fi an application for avoidance of such transaction if any. Here in the case hand, the Resolution Professional, has neither formed an opinion within th stipulated time under section 25(2)(j) or under Regulation 35A nor filed an Applications under Sections 43, 44 or under Section 45 of the Code. In th absence of filing such an Application, it appears to us that none of th provisions of the Code prohibit the Adjudicating Authority from passin orders under section 44 of the Code, in case of preferential transactions an under section 48 of the Code, in case of undervalued transactions. It significant to note that GCL on the other hand filed this application prayin for declaration that the trademark belongs to it on the strength of the deed which were found executed within the period of 2 years precedin commencement of CIRP.

48. At this juncture, the Ld. Senior Counsel, referring to a judgement the NCLT, Cuttack Bench in TP No. 41/CTB/2019, CP(IB) No. 352/KB/201 attempting to stress an argument that the Adjudicating Authority has n right to determine disputed title in respect of trademark under challenge. H

also cited a judgement of the Hon'ble National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) Insolvency Nos. 229 and 262 of 2018, wherein the Hon'ble Appellate Tribunal observed the following :

> *"16. In 'Binani Industries Limited Vs Bank of Baroda & Anr. and other appeals' in Company Appeal (AT) (Insolvency) No. 82 of 2018, etc. this Appellate Tribunal held that Corporate Insolvency Resolution Process is not a money claim nor a suit or a litigation, therefore, we are of the view that the Adjudicating Authority cannot decide the disputed question of fact including claim and counter claim made by one or other party qua, any material in current case."*

49. The facts in the above cases are different with that of the facts in the case in hand. The question of title of of a disputed documents does not arise for consideration at the stage of admission of an Application filed under Section 7 or Section 9 of the Insolvency & Bankruptcy Code, 2016. The issues for consideration under Section 7 & 9 of the Insolvency & Bankruptcy Code, 2016, is not similar to the issues arises for consideration in an application of this nature. Section 48 of the Code, empowers the Adjudicating Authority to pass an order directing the parties who got the benefit of a transfer of an asset of the Corporate Debtor to re-transfer in the name of the Corporate Debtor. It is good to read Section 48 of the Code. It reads as follows:

> *"48. Order in cases of undervalued transactions.*
>
> (1) *The order of the Adjudicating Authority under sub-section (1) of section 45 may provide for the following:*
>
> (a) *require any property transferred as part of the transaction, to be vested in the corporate debtor;*
>
> (b) *release or discharge(in whole or in part) any security interest granted by the corporate debtor;*

(c) *require any person to pay such sums, in respect of benefi received by such person, to the liquidator or the resolutio professional as the case may be, as the Adjudicating Authori may direct; or*

(d) *require the payment of such consideration for the transacti as may be determined by an independent expert."*

50. Therefore, the contention that the Adjudicating Authority is n empowered to adjudicate as to the question of title involved in t Application in hand, seems to be devoid of any merits. In view of the abo said discussion we are of the considered opinion that the transactio disputed in the application is hit by section 43 and 45 of the Code.

51. The third objection is that the registration of trademark in the nam of the Applicant, GCL, is invalid because it was registered in the name GCL in violation of Section 14 of the I&B Code, 2016. The CP 61 of 2018 w admitted on 09.08.2018 by declaring moratorium under section 14 of t Code. The application for registration was submitted on 15th Septemb 2018. The registrar upon receipt of no objection from Transfer Agents GCL and CD, registered the trademark in the name of the GCL on 1 September, 2018. No doubt the registration by conferring title to t trademark owned by the CD is hit by section 14(1) (b) of the Code. Havi regard to what is discussed above, we do not find any illegality irregularity or contravention of any of the provisions of the Code applicable law and Regulation in treating the trademark "**Gloster**" as one the valuable assets of the CD.

52. Having regards to the facts and circumstances said above we come to a legitimate conclusion that the application filed by GCL is liable to be dismissed holding that the trademark "Gloster" is the asset of the CD.

53. **CA (IB) No. 647/KB of 2019** is an application filed by an unsuccessful bidder/ Hooghly Infrastructure Ltd, objecting to the approval of the resolution plan. The Ld.Sr.Counsel Mr. Ratnako Banerji challenged the approval of the plan raising the following grounds:-

i) The Resolution Professional has played serious fraud upon the Adjudicating Authority submitting a Resolution Plan, evidently approved by the Committee of Creditors by vote share of 73.21% in the COC meeting held on 24-04-2019, by swearing in an affidavit on 24th April, 2019. The EOI is finalised on 26th April, 2019 and thereby, filing an application for approval of the Resolution Plan approved in the COC meeting held on 24-04-2019, is pre-approval of the Plan. Such filing of the Application is, therefore, a serious fraud upon the Adjudicating Authority.

ii) The Resolution Professional has failed in discharging its duties under Section 17 & 18 of the Insolvency & Bankruptcy Code by not including all the assets of the Corporate Debtor. One of such assets is a land admeasuring about 57.2950 acres situated at Uluberia. Non-inclusion of all the assets belonging to the Corporate Debtor, in the Information Memorandum, caused prejudice to the Applicant in submitting the Resolution Plan.

iii) The resolution bid amount offered by the Applicant is higher than the resolution bid amount offered by the H1 bidder. The Applicant proposed the resolution fund of Rs.72.31 cores, whereas the H1 bidder shows the Resolution Plan has been approved by the Committee of Creditors offered at Rs.72 crores.

iv) The Resolution Plan fund offered by the Applicant includes Rs. 12.31 Crores earmarked to meet the claims of the workers/employees of the

Sd/

Sd/

Corporate Debtor, as revealed from Information Memorandum. On the other hand, the H1 bidder has not offered the above said full amount but offered Rs.3.90 crores which is much lesser than the offer of the H2 bidder.

v) The Committee of Creditors has been constituted by the Resolution Professional by including the related parties and thereby the constitution of the Committee of Creditors is contrary to the provisions of the Insolvency & Bankruptcy Code, 2016.

vi) The Resolution Professional and the Committee of Creditors have failed to ensure level playing fields for all the Resolution Applicants. Conversion of the land of the Corporate Debtor is found permissible as per the Resolution Plan submitted by the H1 bidder which is against the applicable law of the land.

vii) The Resolution Professional and the Committee of Creditors failed in not ranking the Applicant as H1 bidder, who had offered higher employment opportunities to the extent of about 3000 workmen under the Plan submitted to the Committee of Creditors, while the H1 bidder provided employment opportunities to the extent of 600 workmen alone.

viii) The Resolution Plan is conditional upon allowing waiver of statutory liabilities due to the statutory regulatory authorities that all the legal proceedings before any Court or Tribunal to be automatically abated, settled and extinguished and that upon modification or disallowing the waiver, asked for by the H1 bidder, the H1 bidder has the right to withdraw from the Plan making the Plan not feasible or viable.

ix) The Resolution Professional deliberately not included the trademark Gloster in its Information Memorandum. On the other hand, in the Plan submitted by the Resolution Applicant, the Applicant treated the trademark as the assets of the Corporate Debtor.

x) The H1 bidder is also disqualified under Section 29A of the Insolvency & Bankruptcy Code. The claim for extinguishment of

Income-tax and other statutory dues, electricity, water or pollution control, whether computed or assessed or crystallised or contingent, is claimed to be an illegal clause which should be declared null and void. Many of the clauses in the Resolution Plan, specially, Clause 18 of Section 7(ix), Clause (cc) of Section 7 of the Resolution Plan is in contradiction of Regulation 18 of Section 2 of the Plan and therefore, is liable to be declared as invalid or null and void.

xi) The Form H under Regulation 39(4) is incomplete and for the said reason also, the Resolution Plan under consideration is liable to be rejected.

54. In answering the objections as to illegal constitution of the Committee of Creditors, the Ld. Senior Counsel, appearing for the Resolution Professional, submits that the constitution of the Committee of Creditors was originally done by the erstwhile Resolution Professional, Mr. Manish Jain without realising that related parties are also included in the Committee of Creditors and upon replacement of the Resolution Professional, Mr. Manish Jain by Mr. Bijay Murmuria, the Committee of Creditors was reconstituted after considering the legal opinion and considering that related parties could not be a member of the Committee of Creditors.

55. In regard to non-inclusion of asset admeasuring 57.29 acres, it is contended that the land measuring 57.2950 acres is the subject matter of dispute in TS No. 987 of 2014 before the Hon'ble Civil Judge, (Junior Division), 1st Court at Uluberia. The title of the land, being in dispute, the non-inclusion of the said property does not amount to suppression of material information in the Information Memorandum. It is also submitted that the Resolution Applicant (H1 bidder) claimed absolute title in respect of 57.2950 acres of land based on a Scheme of Demerger sanctioned by the Hon'ble High Court at Calcutta on 31-05-1993 and till such time, the title of the Respondent No. 2 in respect of the said land has not been determined by the competent Court.

56. The Ld.Sr.Counsel for the RP also submits that as far as the asse belongs to the CD the RP got information about the land after th publication of the information memorandum and all the properties belong to the CD were included in the Virtual Data Room (in short VDR) and th property referred to by the applicant is included in the VDR and downloaded copy proving inclusion is also brought to our notice by givin copy to the Ld.Sr.Counsel for the applicant. Though he attempted t convince us that it is not the property included in the VDR we are no inclined to go in detail about the title at this juncture because we ar satisfied that all the assets of the CD seen reflected in VDR inclusive of th assignment regarding transfer of trademark. So the contention that th details of properties owned by the CD were not known to the H2 is foun devoid of any merit. It has come out in evidence that the H2 bidder wa permitted to have access to the VDR. Nothing shows that the H1 bidder wa given details of the properties other than not included in the VDR an information memorandum and thereby the H1 bidder was managed t quote higher amount than the amount of the CD.

57. The next contention on the side of the Applicant that the Applican has not been called for deliberations in order to maximise the value of th assets of the Corporate Debtor, is incorrect. According to him, th Applicant's representatives were invited for discussions in the 6th CO meeting held on 18th April, 2019 and having deliberations with both the H and H2 bidders, the Applicant herein, was permitted to submit update Resolution Plan by 5 p.m. on 19th April, 2019 and it is that Plan submitted b the Applicant and the H1 bidder, taken for consideration by the COC in th meeting held on 24-04-2019 and therefore, the objection that the Applican was not given opportunity to enable it to maximise its value upo negotiation with the members of the Committee of Creditors is devoid of an merit.

58. It is further submitted by the Ld. Counsel for the H2 bidder that as per Regulation 39(4) of the CIRP, it is the duty of the Resolution Professiona to submit the Resolution Plan approved by the Committee of Creditors to the

Adjudicating Authority at least 15 days before the maximum period for completion of CIRP, along with compliance certificate in Form H. The Resolution Professional, in an endeavour to submit the Resolution Plan within the timeline of 270 days from the commencement of CIRP, immediately after the approval of the Resolution Plan by the Committee of Creditors submitted the Application for approval of the Plan 01.05.2019. The final scoring of the respective Resolution Applicants also was communicated by the Resolution Professional to the Resolution Applicants on 25-04-2019 itself by way of E-mail. The Resolution Professional, therefore, did not act in breach of his duties and is not guilty of dereliction of the statutory obligations or has failed to act in terms of the provisions of the Code, as alleged by the Applicant.

59. Much has been argued by the Ld Sr.Counsel for the applicant by referring to page no 20 of CA 584 of 2019 which contain an affidavit of RP allegedly prepared on 24th April,2019 and notarized on the very same date seen filed in court before the approval of the resolution plan. According to him in fact the plan was approved by the CoC on 26.04.2019 by e-voting and therefore the application is liable to be rejected. Can a resolution plan if not contravened by any of the provisions of the Code and Regulations be rejected, only because of submitting a purported false affidavit in an application filed for approval of a plan passed by the CoC by 73.21% vote share with in 270 days of expiry of CIRP also was compelled to be answered by us in this application. Ld. Senior Counsel appearing for the Resolution Professional explained that the CoC for approval of resolution plan had been convened on 24.04.2019 and the resolution plan under consideration was put to vote and the e-voting was finalized on 26.04.2019 and the application was actually prepared on 29.04.2019. However, because of strike/cease work by advocates from 24.04.2019 own wards the attestation was done by a Notary by affixing stamp dated 24.04.2019. According to him it is not deliberate and that very look at the date typed in the application adds strength to his submission. He further would submit that since the Notary affixed the date seal of 24.04.2019, he corrected the type written date **29** as **24**. On a careful screening of the page 20 of the application, it is very much

clear that the type written date was corrected as submitted. To support the said submission an affidavit is agreed to be filed by the RP. It is good to read paragraphs 10 and 11 of the affidavit filed by the RP on 25/09/2019.

> *"10. I say that it now appears that the Notary Public had changed the date from April 29, 2019 to April 24, 2019 so as to save himself from the backlash of the protesting lawyers who were on indefinite strike during that period. I say that the entire process of CIRP has been done strictly in terms of Insolvency and Bankruptcy Code, 2016 and the Rules framed thereunder."*
>
> *"11. I further say that I received the notarised document from the Notary Public in good faith and filed the same before the Hon'ble Tribunal. I say that the entire process has been conducted in most fair and transparent manner that final voting done through e-voting mechanism. As such there cannot be any doubt of e-voting."*

60. The circumstances that the advocates were on strike and did not appear in courts for about one and half months from 24.04.2019, that there is correction of type written date 29 as 24, that the application was filed only on 01.05.2019 before 4 days of expiry of the CIRP leads to an inference that what is said by the Ld. Sr.Counsel for the RP is true and is probable to be believed. Due diligence expected from an RP in drafting and filing the application though seen not taken care of by the RP, for the reason of the said discrepancy above, we are not inclined to reject the application on this ground.

61. As regards non inclusion of trademark, the Ld. Sr. Counsel appearing for the Resolution Professional submits that the Financial Statement of the Corporate Debtor is a part of Information Memorandum and it would clearly reveal that the Trade Mark belongs to the Corporate Debtor as per the disclosures in the Financial Statement and he referred to the copy of financial statement for the period 2017-2018. A look at the said

statement, under sub heading Taxes of Income, we find a disclosure reading as:-

> ***"Company has not recognised value of its Trade Mark in the books of accounts. However, the Company has borrowed money from Gloster Cables Limited by way of first and exclusive charge of its Trade Mark".***

62. The above said disclosure indicates that the ownership of trademark is with the CD. However, it is certain that the information memorandum did not disclose the entire details of the claim of GCL as against the trade mark of the CD. However, all the details of 6 assignment deeds seen executed between the GCL and the CD seen published in the **Virtual Data Room** (VDR) by the RP. In the said circumstance, the RA had to make enquiry regarding the trademark with due diligence. If it has failed in its attempt in getting more particulars about the trademark, and there is no denial on the side of the RP is alleged or proved, it cannot be held that the non furnishing of the details of the trademark in the information memorandum shall make the entire process bad. Moreover, H2 bidder in its resolution plan **clause 4.7** prayed for ***"withdrawal of action initiated or suit filed by the related party against the Corporate Debtor and waive their rights to further proceedings against the Corporate Debtor in respect of existing claims, including cancellation of the assignment of Brands made by the Corporate Debtor in favour of Fort Gloster Cables Limited"***. It is an indication that the H2 bidder was fully aware of the status of the trademark and the RP did not conceal any information necessary to prepare a plan as alleged.

63. Ld. Sr. Counsel for the applicant reiterated that the resolution bid amount proposed by the H-2 bidder is higher than the H-1 bidder and, therefore, the plan submitted by the H-1 bidder is liable to be rejected. According to the Ld. Sr. Counsel appearing for the Resolution Professional, the Resolution Bid Amount proposed by the H-2 bidder is Rs.60 Crores and not Rs.72.31 Crores as submitted by the Ld. Sr. Counsel appearing for the

H-2 bidder. Ld. Sr. Counsel is referring to us Clause 4.9 in the Resolution Plan submitted by the H-2 bidder which reads as follows :-

> ***"4.9 Payment of claims/dues to the stakeholders of the Corporate Debtor out of the Resolution Fund is given in Exhibit F. Please note that payment by Resolution Applicant through the Resolution Fund shall not exceed Rs. 60.00 Cr. (other than any amount to be brought in for settlement of CIRP Cost as provided in Clause 4.1)."***

64. The above said clause is self-explanatory as to the proposed offer for total bid amount agreed to be allocated to the stakeholders in the case in hand. An attempt on the side of the Ld. Sr. Counsel appearing for the H-2 bidder also made to show that entire amount of Rs.12.31 Crores which was once earmarked to meet the workers need of the Corporate Debtor is published in the Information Memorandum also agreed to pay by the Resolution Applicant (H-2 bidder). A reference to clause 4.4 and clause 4.8 in the Resolution Plan of the H-2 bidder proves that the so called additional fund of Rs.12.31 Crores is wholly misleading. As per clause 4.8 of the Resolution Plan, it is clearly stated that unclaimed amounts which are not admitted or accepted would stand extinguished and become 'nil' but in order to safeguard the interest of all the stakeholders of the Corporate Debtor H-2 bidder may provide ex-gratia amount against such liabilities and the same would be payable only at the sole discretion of H-2 bidder. So there is no unconditional proposal forthcoming from the side of the H-2 bidder as per the H-2 bidder resolution plan. Agreeing to pay Rs.12.31 Crores upon fulfilment of certain conditions to the workers and that the total resolution bid amount thereby comes to Rs.72.31 Crores, is not a safe proposal from the side of the applicant. In the said circumstances we do not find any merit in the above said submissions.

65. The prayer for conversion of land held by the Corporate Debtor by the Resolution Applicant also under challenge on the side of the H2 bidder. According to Ld.Sr.Counsel Mr. S.N. Mukerjee for the successful resolution applicant the conversion request never conflict with the laws of the State of West Bengal including Urban Land Ceiling Act. The successful Resolution Applicant never intended to do Conversion of land which is a State subject and use of land in West Bengal is regulated by West Bengal Land Reforms Act, 1955. The Resolution Plan of H-1 bidder is subject to the applicable law of the State. Change of use of land as contemplated in the Resolution Plan is to be read as an enabling clause for re-organising the business of the Corporate Debtor. Approval of the Resolution Plan by the Adjudicating Authority does not amount to approval of the State Government under the State legislation of change of use of land. Argued by the Ld.Sr.Counsel. It is good to read clause (oo) of the Resolution Plan submitted by the successful Resolution Applicant which reads as follows :-

> *"(oo) It is declared that the Approvals/Waiver sought from the Adjudicating Authority are as permissible under the extant guidelines and in the nature of regulations. In case Adjudicating Authority does not grant the same due being beyond purview, this Resolution Plan shall continue to be binding and the Resolution Applicant shall continue to perform as per Resolution Plan"*

66. In the above said background, it is not correct to hold that the plan that come up for consideration is conditional and that if the waiver clause referred to in the plan is not allowed the resolution applicant should withdraw from the implementation of the plan. None of the objections raised by the applicants is found deserving for consideration. The applicant has come forth with vague allegations without any substantive proof. This application also deserves an order of dismissal.

67. **C.A.(IB) No. 650/KB/2019** is an application filed by Sramik Karamachari Union (INTUC) & 9 Others Unions under Section 60(5) of 06.05.2019 praying for issuing direction to the R1 And R2 to ensure payment of the petitioners claim as detailed in Annexure B annexed to the application. Though the Resolution Professional has been informed of the claims of the Workers vide letter dated 11.3.2019, the Resolution Professional has refused even to respond the letter. The applicant entitled to realise an amount of Rs. 60,22,33,718/-. However, the admitted amount as per the website of the Corporate Debtor shows claim of the Workmen to the tune of Rs. 89,28,667/-. The Information Memorandum is not known to the Applicant. The Information Memorandum if includes only Rs 89,28,667/- it should be set aside and quashed and therefore the entire CIR based on the Information Memorandum should be set aside and the Resolution Plan is to be rejected. The above is the gist of the objections of the applicants. However, the the Ld. Sr. Counsel Mr. Abhrajit Mitra for the Applicants limited his arguments upon the following grounds:-

i) Discrimination among workmen who are equally placed under section 53 (1) (b) (i) of the Code.

ii) The provision in the resolution plan provides eviction of workmen from the workers colony. The AA being not empowered to pass an order of eviction. Such a close is contrary to the provisions of the I&B Code.

Iii) The RP prepared the information memorandum ignoring the claim of the workmen who are single largest operational creditors and hence not in accordance with section 29 of the Code.

iv) Rejection of claim of workmen for non submission of claim in Form E is arbitrary and unfair.

v) No copy of resolution plan given to the workmen despite demands and hence it violates principles of natural justice.

68. Other than the said objections the applicants also raised objections which are exactly similar to the objections raised by the H2 bidder in CA 647 of 2019 and hence not stated here for convenience. It is contended by the RP and CoC that this trad unions filed this application at the instigation of H2 bidder. The circumstances brought out are sufficient enough to believe the submission on the side of the RP as well as on the side of the CoC. It has come out in evidence that all the claims submitted by the workmen/employees were included in the list of creditors and the resolution applicants seen allocated the claim of workmen/employees as admitted by the RP.

69. It has come out in evidence that 11 employees claims alone received by the RP within the stipulated period and the total claims of the said workmen comes to 0.89 crores. So also he had admitted claims of four workmen who submitted claims beyond 90 days to the tune of Rs. 0.41Crores. The resolution plan provide allocation of the entire amount to the said workmen. So also the plan includes 4 workmen's claim which were submitted beyond 90 days inclusive of the claim of one **Mr. Apurba Ghorui** to the tune of 0.22 crores. Mr. Apurba Ghorui filed objection in the form of an affidavit claiming that he was not informed about the admission or rejection of his claim and hence he filed the objection. The total dues due to the workmen/employees as evidence from financial statement and as included in the information memorandum seen also included in the resolution plan. The total amount comes to 14.12 crores. Out of which claim of 1.30 crores allocated by the resolution applicant in the plan and

balance 12.78 crores recorded as unclaimed dues due to the workmen. The resolution applicant also agreed to pay 20% of Rs. 12.78 crores which is yet unclaimed. So according to us none of the workmen who claimed their dues or workmen who do not turn up with claim is discriminated as alleged, but the resolution applicant has taken care of their claim and also agreed to pay their dues as per Regulation 38(1) of CIRP Regulation giving priority in payment over financial creditor. So we do not find any merit in the submission on the side of the applicants in regards alleged discrimination and disallowing claims of the workmen.

70. The objection that the union was not provided a copy of the resolution plan and that the plan contain a clause of eviction of workmen from the workers colony is also found not sustainable. The Union as of right not entitled to get a copy of the plan. However, with out getting a copy of the plan it is alleged that the plan contain a clause of eviction. However, no such clause is there in the Plan. So no doubt the Unions come forward with an evasive claim. None of the objections seem substantiated with supporting materials. This is an application liable to be dismissed with cost. However we are not inclined to award cost only because the union is an association of workmen of the CD who lost their job about 15years before.

71. CA(IB) No. 736/KB/2019 is an application filed by West Coast Paper Mills Limited, allegedly a Financial Creditor of the Corporate Debtor praying for passing an order rejecting the Resolution Plan for the reason that the Resolution Plan does not provide for equal pro-rata distribution of the proceeds for the Applicant as a Financial Creditor. According to the Applicant, an amount of Rs.7,12,77,613/- (Rupees Seven Crore Twelve Lakhs Seventy Seven Thousand Six Hundred and Thirteen Only) was advanced to the Corporate Debtor agreeing to pay interest @ 18% p.a. and on the date of filing of the claim before the Resolution Professional the Applicant is entitled to realise an amount of Rs.89,20,02,003.54 (Rupees Eighty Nine Crores Twenty Lacs Two Thousand Three and Paise Fifty Four Only) from the Corporate Debtor. The Applicant has filed Form CA as a

Financial Creditor on 24th August, 2018. However, the Resolution Professional has ignored the claim of the Applicant and therefore it filed this application claiming that the Applicant has been discriminated by not providing the resolution bid amount at par with the distribution of the proceeds to other Financial Creditors. According to the Ld. Counsel appearing for the Applicant, the voting of the Resolution Plan without providing equal pro-rata distribution of the resolution bid amount is invalid and therefore the Resolution Plan came up for consideration is illegal being contrary to the provisions of Insolvency and Bankruptcy Code, 2016 and therefore liable to be rejected.

72. Ld. Sr. Counsel , Mr. Joy Saha appearing for the RP submits that the claim of West Coast Paper Mills Ltd. (In short, **WCPML**) and Gloster Cables Ltd. (GCL) were received by the RP and their claim amount to the tune of Rs.89.20 Crores and Rs. 50.15 Crores respectively submitted by the aforesaid financial creditors were admitted by the RP. However, being satisfied that both the financial creditors being related parties of the suspended management of the Corporate Debtor, their claim amount has not been included in the resolution bid amount to be distributed amongst the stakeholders by the resolution applicant because the applicant cannot be equated with the secured financial creditors or with the operational creditors.

73 At this juncture the Ld. Counsel, Ms. Manju Bhuteria, appearing for the applicant attempted to convince us that the Hon'ble NCLT Bench at Allahabad in Company Application No. 59 of 2018 in Company Petition No. (IB) 13/ALD/2017 directed the RP to modify the resolution plan as per the observation given in the body of the judgement and she relied upon the direction in the judgement which reads as follows:-

> ***"We further direct that "the unsecured debt of related party which is intragroup debt will be treated as an equity contribution rather than as an intragroup loan, with the consequence that the***

intragroup obligation will rank lower in priority than the same obligation between unrelated parties."

Thus, the intra group debt given by Jya Finance & Investment Co. Ltd., a related company of the corporate debtor be classified at par with other equity shareholder and partners as provided in water fall mechanism provided in Sec 53(1)(h) of the Code. It is further directed that all the operational creditors should be treated equally without being also classified by their ageing, i.e., without any discrimination of period of their outstanding dues."

74. An Unsuccessful Bidder in the above said Company Application No. 59 of 2018 filed an appeal before the Hon'ble Appellate Tribunal. The Hon'ble Appellate Tribunal in CA (AT) Insolvency No. 408 of 2018, confirmed the order of direction issued by the NCLT, Allahabad Bench directing the RP in the said case to modify the resolution plan as per the observation in the above said judgement. The Ld. Counsel also referred to us the order passed by the Hon'ble NCLT, Allahabad Bench in CP No. (IB) 13/ALD/2017 by approving the modified resolution plan wherein it is mentioned that all the Financial Creditors and Operational Creditors of the Corporate Debtor were equally treated. According to the Ld. Counsel for the applicant, the Committee of Creditors in the above said case, accepted the modified resolution plan by 100% vote share wherein the Unsecured Financial Creditors were treated at par with the Operational Creditors. To stress her argument, she relied upon paragraph no. 12 of the said judgement. It read as follows:-

"Pursuant to the liberty granted by the Hon'ble Appellate Tribunal, RLL modified its resolution plan (Modified Plan) on 17.10.2018 and the Modified Plan was discussed by COC in its meeting held on 20.09.2018.

Modified terms of Resolution Plan were acceptable to Operational Creditors, Unsecured Financial Creditors. Further, pursuant to the direction of the Hon'ble Appellate Authority under order dated 20th September, 2018 the Applicant filed a Report dated 20th October, 2018 to the Hon'ble Appellate Authority."

75 A joint reading of the order directing modification, the Appellate Tribunal judgment and the final order of the Hon'ble NCLT, Allahabad Bench, it appears to us that there is nothing in the judgement showing that an unrelated secured financial creditor is equated with a related financial creditor of the CD. What is observed is clear. The NCLT Bench on the other hand equated a related party with that of equity shareholders or partners as provided under section 53(1) (h) of the Code and ranked lower in level than the obligation due to unrelated financial creditors. Non allocation of fund by the resolution applicant, in the case in hand, to the related party of the Corporate Debtor do not contravene the water fall mechanism as provided in Section 53(1)(h) of the Code, 2016. Therefore, we do not find any discrimination in the treatment given to the applicant by the resolution applicant. Accordingly, the objection in that regard also appears to be not sustainable under Law.

76. CA(IB) No. 1122/KB/2019 is an application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 by Pradip Kumar Das & Two others who are the retired employees of the Corporate Debtor claiming that they are entitled to realise the Gratuity from the Corporate Debtor and prays for ensuring that the unpaid Gratuity dues of the First Applicant to the tune of Rs.25,33,154 (Rupees Twenty Five Lacs Thirty Three Thousand One Hundred Fifty Four Only), 2nd Applicant Rs.8,86,782/- (Rupees Eight Lacs Eighty Six Thousand Seven Hundred Eighty Two Only) and 3rd Applicant Rs.10,15,629/- (Rupees Ten Lacs Fifteen Thousand Six Hundred Twenty Nine Only) respectively to be paid in priority to any creditors without any haircut

to the claim of the Workmen/employee and prays for issuing direction in that regards.

77. It is submitted on the side of the RP that the workmen referred to in this application, who are retired employees of the Corporate Debtor submitted their claim for unpaid gratuity dues. What the applicant pressed for is only for issuing directions ensuring payment of the claimed amount admitted by the RP without any hair cut.

78. A reference to the claim of the workers and the employees received by the RP and approved by the CoC and the Resolution Applicant proves that the applicant, namely, Pradip Kumar Das, Pradip Kumar Pal and Devendra Prasad Ojha had submitted their claim and their claim in its entirety has been admitted by the RP. A look at the Table below indicates that RP has admitted the claim of the workmen and employees and the admitted claim have been approved by the CoC and the verified claim amount has been agreed to be paid by the Resolution Applicant. Accordingly, the challenge raised in this application is not sustainable.

(Figures in Rs. Crores)

S.No.	Name of the Employees	Claim amount filed	Claim Amount Admitted
1	Mr. Basudev Sen	0.03	0.03
2	Mr. Devendra Prasad Ojha	0.10	0.10
3	Mr. Pradip Kumar Pal	0.09	0.09
4	Mr. Uma Kanta Dubey	0.04	0.04
5	Mr. Tapan Kumar Banerjee	0.05	0.05
6	Mr. Ranju Basu	0.04	0.04
7	Mr. Pradip Kumar Das	0.25	0.25
8	Mr. Pradip Chakraborty	0.02	0.02
9	Mr. Kailash Chandra Mundra	0.15	0.15
10	Mr. Gurudas Ghosh	0.03	0.03
11	Mr. Dilip Kumar Dutta	0.09	0.09
	TOTAL	0.89	0.89

79. C.A.(IB) No. 1100/KB/2019 is an application filed on 27.08.2019 under Section 60(5) (c) of the Insolvency and Bankruptcy Code, 2016 by an Operational Creditor/Corporate Sales (India) claiming that an amount of Rs.1,23,129/- (Rupees One Lac Twenty Three Thousand One Hundred Twenty Nine Only) along with interest @ 24% p.a. is due from the Corporate Debtor to the Applicant on account of supply of goods to the Corporate Debtor as per various purchase orders and invoices raised upon the Corporate Debtor during the period of 28th July, 2003 to 14th November, 2003. In view of the default in repayment of the aforesaid amount, the applicant has preferred winding up proceeding before the Hon'ble High Court, Calcutta against the Corporate Debtor for non-payment of outstanding dues of the Applicant being Company Petition No. 201 of 2005 and the same is pending before the Hon'ble High Court at Calcutta. In the meanwhile upon getting information as to the filing of the Insolvency proceedings before this Tribunal he preferred a claim for an amount of Rs.5,66,320/- (Rupees Five Lacs Sixty Six Thousand Three Hundred Twenty Only) which has been received by the Interim Resolution Professional on 12th November, 2018. It is learnt that the claim of the Applicant is missing from the list of creditors published by the Resolution Professional. Upon knowing that the name of the Applicant is not found in the list of Creditors he sent a letter on 12th July, 2019 complaining that his claim has not been included in the list of Creditors of the Resolution Professional despite sending compliance to the Resolution Professional he did not sent a reply to the letter dated 12th July, 2019. According to the Ld. Counsel appearing for the Applicant, the Resolution Professional failed to perform his statutory duties of verifying the claim and preparing the revised list of creditors and therefore filed this application praying for issuing directions to the Resolution Professional to verify its claim and update the list of creditors by including the name of the Applicant.

80. In regard to the objection raised by the Operational Creditor in the application, it is submitted that the Operational Creditor has submitted

the claim after 90 days of CIRP day and therefore the same has not been admitted by the RP. Admittedly the OC has not submitted its claim in time. It has submitted its claim on 12/11/2018. The 90 days period for submission of its claim expired on 09/11/2018 and the RP subsequently revised the list of creditors and published the same in the web site of the CD and IBBI. As per the data furnished on the side of the RP the list of creditors was firstly published on 03/09/2019, revised list of creditors published on 06/09/2018, 21/09/2018, 12/10/2018 and lastly on 25/06/2019 respectively. However, applicant was keeping silent till 29/08/2019. This application seems to have been filed on 29/08/2019. Accordingly, there is no justifiable reasons advanced on the side of the applicant as to raising complaint against the non-inclusion of claim of the applicant in the list of creditors published as referred to above. It came with a complaint at a time when the Resolution Plan submitted before the Bench has been taken for consideration for its approval or rejection.

81. In the aforesaid circumstances, the submissions on the side of the Ld. Counsel for the applicant that there is only few days delay in submission of the claim and since there is no reply forthcoming on the side of the RP as to rejection or admission of its claim, it has failed in taking any steps though the claim has been submitted beyond time is found devoid of any merit.

82. C.A.(IB) No. 712/KB/2019 is an application filed by Stressed Assets Stabilization Fund (SASF) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 contending that the Applicant has been discriminated against by not treating it based on the charge held by it over the assets of the Corporate Debtor. According the Ld. Counsel appearing for the Applicant, the distribution of Resolution Fund is to be based on the value of the charged assets/first charge held by the Financial Creditor and not as per the voting right of the members of the CoC. He submits that the Applicant relinquished its right over the assets of the Corporate Debtor who had the first charge should be entitled firstly to recover Rs.52.66 crores out of the total amount of 64.20 crores earmarked by Respondent No. 5 in the Resolution Plan. He would further submit that the balance amount of

Rs.11.54 crores should be distributed amongst the Financial Creditors including the Applicant in the proportion to the admitted amounts and being failed in distributing the Resolution Bid amount on the basis of the value of the charged assets, the Resolution plan submitted by the Resolution Professional should not be approved as per the provisions of the Insolvency and Bankruptcy Code, 2016 as it fails to define the exact amount payable to each of the members of the Committee of Creditors.

83. What is the claim of the applicant here in this application is that distribution of bid amount should be on the basis of value of the charged assets/1st charge basis. According to the Ld. Counsel appearing for the applicant, the distribution proposed in the Resolution Plan as per voting rights is arbitrary and unfair. He further would submit that by reasons of the applicant having 1st charge on all the immovable assets of the Corporate Debtor and other Financial Creditors/Banks having 2nd charge on such assets, the applicant has a superior right to claim and has the right to be paid its entire dues out of the resolution bid amount and the balance is to be distributed among other secured creditors. It is significant to note that out of the 3 resolution plans submitted by the resolution applicant, the Gloster Cables Limited was declared as H-1 bidder and the applicant/ dissenting financial creditor never raised any challenge against the declaration of Gloster Cables Ltd. as H-1 bidder. Ld. Counsel raised challenge as against the distribution methodology. The distribution methodology seems to have been approved by the CoC after deliberation in the various meetings held by the CoC. in regard to the distribution methodology there was difference of opinion among the members of the CoC. A reference to the 6th and 7th CoC meetings leads to a conclusion that the CoC after discussions on the Resolution Plan and after considering the difference of opinion of all the members of the CoC with regard to distribution of resolution fund amongst financial creditors, the CoC had decided to the methodology proposed on the side of the members of the CoC and put to vote. There are 4 secured creditors, namely, Punjab National Bank, IDBI, Stressed Assets Stabilisation Fund (SASF), who is the applicant, Pegasus Assets Reconstruction Pvt. Ltd. and Andhra Bank. The applicant herein did not agree for distribution of the

financial bid amount as per voting percentage method. The CoC came to a conclusion that distribution of resolution bid under the same category cannot be discriminated and since there are differences among the members regarding the methodology for distribution to be adopted as per voting percentage the process of distribution methodology has been put to vote and the methodology adopted by the CoC as per voting percentage method has been approved by 73.21% of the voting shares of the members of the CoC. In the above said circumstances it appears to us that we cannot go behind the decision of the CoC, which has been approved by a majority of 73.21% voting share. We do not find any contravention of any of the provisions of the Code in deciding the allocation of fund as per the voting percentage of members of the CoC.

84. At this juncture, Ld. Counsel, Mr. Ajay Gaggar, for the applicant submits that since there is no provisions in the Code prohibiting the distribution of the proceeds of the resolution fund on the basis of the value of the charged assets/on the 1st charge basis, the claim of the applicant is liable to be allowed. According to him when the 1st charge holders disposed of assets which is charged in its favour only to recover its dues from the borrower, the 2nd charge holder is to receive residual of the assets, if any, available in the hands of the 1st charge holders. To press his arguments he cited **ICICI Bank Ltd.-vs-Sidco Leather Ltd. & Ors. [Manu/SC/2337/2016].** In rder to highlight an argument that the provisions of the Companies Act may be a special statute but such statute does not contain any specific provisions dealing with other statutory rights between different kind of secured creditors, the specific provisions contained in the general statute shall be prevailing. According to him Insolvency and Bankruptcy Code being a special statute does not deal with the right of the different class of secured creditors and therefore specific provisions as stated in the Transfer of Property Act, 1882, being the general statue, shall prevail.

85. We have gone through the decision brought to our notice. We do not find any merit in the submissions because the above said judgement was delivered by the Hon'ble Supreme Court referring to Sections 529 and 529A

of the Companies Act, 1956 and provisions under Provisional Insolvency Act, 1920 and Section 48 of the Transfer of Property Act, 1882.

86. Sections 529 and 529A of the Companies Act is not applicable in the case in hand. Herein in the instant case the CoC is empowered to determine as to the methodology to be adopted for distribution or allocation of resolution bid amount. It can be on the basis of the security interest or on the basis of voting percentage of the respective members of the CoC. Here in the instant case, the methodology adopted / accepted is on voting percentage basis and that methodology was not under challenge till the applicant has filed this application on 03/06/2019 after the CoC approved the Resolution Plan by a majority of 73.21% voting share in the meeting held on 24/04/2019. The facts in the above said case are not similar to the facts in the case in hand. Only because of the provisions of the Code are silent regarding the distribution of bid amount on the basis of the charged assets that does not give a right to the applicant to claim the resolution bid amount at par with the value of the charged assets. We are unable to borrow principle of distribution from elsewhere as submitted by the Ld. Counsel for the applicant.

87. The distribution of the resolution bid amount at no stretch of imagination can be on the basis of the value of the security interest held by the respective members of the CoC. A reference to section 53 of the Code what we understood is that the security interest will come into place only at the stage of sale of security in a liquidation proceedings. Upon the above said view we are unable to rely upon the proposition laid down in **Ms. Charu Desai (RP), Axis Bank -versus- Formation Textile LLC in MA No. 692/2018 and MA No. 811/2018 in CP(IB) No. 1399/MB/2017** of the National Company Law Tribunal, Mumbai Bench. The proposal for distribution of the resolution fund on the basis of value of the charged assets being not approved by the CoC by majority vote share, we are of the considered opinion that the distribution methodology adopted by the CoC as per voting percentage method cannot be disturbed by us as there is no contravention of the provisions of the Code. Since there is no contravention

of the provisions of the Code, it appears to us that we cannot interfere with the commercial/business decision of the Financial Creditors with respect to the approval of the Resolution Plan. The I & B Code and CIRP Regulations do not prescribe any specific manner in which money is payable or should be distributed to the secured creditors from the resolution fund or that distribution of fund amongst secured creditors keeping in mind the nature of the charge secured creditors may have on the assets of the Corporate Debtor. There is also no specific provision in the Code prescribing the distribution of total resolution fund by the Resolution Applicant. The applicant came with a challenge against the distribution methodology at a time the resolution plan came up for consideration for its approval. There is also no provisions under the Code compelling the Resolution Applicant to distribute the resolution fund considering the water fall mechanism as provided in Section 53 of the Code. Truly in the case of a liquidation proceeding, a liquidator may require to consider the average of the estimate of the value arrived under those provisions for the purpose of valuation as per Regulation 2(1)(k) of the CIRP Regulation.

88. In view of the above facts and circumstances we do not find any merits on the submissions of the Ld. Counsel appearing for the applicants. The objection raised at the fag end of the CIRP proceedings is found without any merit. It is liable to be dismissed.

89. **CA(IB) No. 887/KB/2019** is an application filed by M/s. Hooghly Infrastructure Private Limited under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 on 19.07.2019 praying for stay of all further proceedings in C.P. (IB) No. 61/KB/2018 and C.A. (IB) No. 584/KB/2019 pending consideration of C.A. (IB) No. 647/KB/2019 filed by the Applicant challenging the approval of the Resolution Plan mainly alleging suppression of the material facts regarding the claim of Workers/Employees in relation to the Factory of the Corporate Debtor and that the Respondent No. 2, the successful Resolution Applicant is disqualified within the meaning of Section 29A of the Insolvency & Bankruptcy Code, 2016 and does not qualify to submit the Resolution Plan in the CIRP of the Corporate Debtor.

90. Having heard the Ld.Sr.Counsel for the applicant and the Ld.Sr.Counsel for the RP and perusal of the records, it appears to us that the applicant who is an unsuccessful resolution applicant having knowledge about all these facts approached before this Bench with an attempt to show that the net worth of the successful resolution applicant does not satisfy the eligibility criteria if the order of amalgamation is not taken into consideration. Unless and until the order of amalgamation is set aside relying upon the order of amalgamation for proving its net worth on the strength of a scheme already approved cannot be held improper or illegal. Accordingly we do not find any merit in the submission on the side of the applicant and hence this application is also liable to be dismissed.

91. **CA(IB) No.1168/KB/2019** is an application which came up for consideration at a time we are about to conclude the arguments in the case in hand. It is an application filed by Wind Power Vinimay Ptvt.Ltd/shareholder of the CD company under section 47 and 60(5) of the Code praying for declaration that the assignment deed transferring the trademark Gloster by the CD in favour of GCL is illegal, fraudulent and undervalued transaction and thereby the purported transfer of the trademark be adjudged null and void. The issue to be considered in the application is already answered by us in the CA 713 of 2019. Therefore it appears to us that this belated CA requires no consideration. Considering this CA, filed at a belated stage and the issue arises for consideration in this application is answered in the affirmative, this CA is liable to be dismissed.

92. Upon hearing the objections of all the objectors in the above referred CA's, and considering the contentions, argument notes, citations and the documents brought to our notice, we are of the considered opinion that the application CA 584 of 2019 is liable to be allowed by approving the resolution plan without approving certain waiver clauses included in the plan. The GCL is one of the related parties of the CD. The said GCL is the major objector as against the approval of the plan which was approved by the CoC by a vote share of 73.21%. The GCL had an unsuccessful attempt

to take over the CD company while the CD had undergone rehabilitation proceedings before the BIFR. So also it had filed resolution plan to take over the assets of the CD but failed due to disqualification under section 29A of the Code. The CD company had 16.7% of shareholding in the GCL till 15th March, 2004. This 16.7% was sold to the promoter director of the CD and thereby the promoter director of the CD had 33% shareholding in the GCL. In the said background, we do not find any justifiable reasons to hold that the GCL has come to this Bench with clean hands. Ill motive and mala fide intention to undervalue the CD at the instances of the promoter director of the CD who had 33% of the shareholding in the GCL cannot be ruled out. The claim of the workmen/employees, and their trade unions also found not sustainable. The claim of the descending financial creditor is also found not sustainable.

93. Much has been argued on the side of the objectors as against RP. According to the Ld.Sr counsel for GCL and Ld.Sr.Counsel for H2 bidder, the RP attempted to misguide the Bench by filing Form H recording certain facts not admittedly correct even according to the RP. The plan was approved by the CoC as per the discussion in the meeting held on 24.04.2019 by way of e-voting finished on 26.04.2019. In the application CA 584 of 2019 filed on 01.05.2019 the RP pleaded that the plan was approved on 24.04.2019 on the other hand by way of e-voting it was approved by majority vote on 26.04.2019. The CIRP period of 270 days expired on 5th May 2019. So the plan under dispute was approved finally on finishing the e-voting on 26.04.2019 with required majority with in the CIRP period. So the pleading in the application may not be read as the pleading intending to misguide us.

94. Similarly as regards compliance of Regulation 35A, the RP has given answer as 'yes'. The description regarding compliance made it clear that no opinion was formed as to undervalue transaction and preferential transaction by him on the strength of forensic auditors report. If we glance at Form H, we do not find any deliberate omission or misrepresentation of facts in regards to the completion of the CIRP. On the other hand we are

unable to take note of any materials sufficient enough to hold that the approval of the plan was in contravention of any of the provisions of the Code or Regulations. So on that reason also, we do not find any deliberate fault committed by the RP upon the Court.

95. The resolution plan produced before us has fulfilled all the requirements in compliance of Section 29A, 30(2) and Regulation 38 (1). RP has given certification of the correctness of the disclosures as provided under Regulation 39(4). He also certified that the plan is not subjected to any contingency. The resolution plan being found in compliance with all applicable provisions of the I&B code, and the regulations therein and it does not contravene any of the provisions of the law for the time being in force we are bound by the plan and the plan is liable to be approved.

96. Having regard to what has been said above we hereby approve the resolution plan upon the following directions:-

O R D E R S

a. The **Resolution Plan of Fort Gloster Industries Ltd.** which was approved by the CoC with 73.21% voting share, is hereby **approved** under provisions of sub-section(1) of Section 31 of the Insolvency and Bankruptcy Code, 2016, which shall be binding on the Corporate Debtor, **Fort Gloster Industries Limited,** its employees, members, creditors, guarantors, the central Government, any State Government or any local authority and other stakeholders involved in the Resolution Plan subject to the below mentioned modification.

b. The clauses related to waiver sought for is **not approved** by this Bench. The outstanding statutory dues, stamp duty payable, etc will be governed by the provisions of the respective Act.

c. The clause regarding conversion of user of the land and pending litigation is to be governed by the respective laws of the State or Central Government.

d. The Resolution Plan, shall come into force from the date of pronouncement of this order.

e. The moratorium order passed under Section 14 shall cease to have effect.

f. The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and the Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded in its database.

g. **CA(IB) No. 584/KB/2019** is **allowed.**

h. **CA (IB) No.647/KB/2019, CA(IB) No. 650/KB/2019, CA(IB) No. 712/KB/2019, CA(IB) No. 736/KB/2019; CA(IB) No. 887/KB/2019, CA(IB) No. 1100/KB/2019 CA(IB) No. 1122/KB/2019 and CA(IB) No. 1168/KB/2019** are **dismissed**. However, without costs.

i. **CA(IB) No. 713/KB/2019 is dismissed holding that trademark "Gloster" is the asset of the CD. No order as to cost.**

j. **CP (IB) No. 61/KB/2018 is disposed off as above.**

k. Registry is hereby directed to communicate the order to all the Applicants, Respondents and to the Resolution Applicant through e-mail and free copy is to be given if applied for.

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I. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Sd/-

(Harish Chander Suri)
Member (T)

Sd/- 27/9/19

(Jinan K.R.)
Member (J)

Signed on this, the 27th day of September, 2019.

National Company Law Tribunal Kolkata Bench

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DD / DR / Court Officer
National Company Law Tribunal
Kolkata Bench

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