

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH - II, CHENNAI**

**MA/537/2019 in CP/710/IB/2018**

*Filed under Section 60(5) read with Sections 43 and 66 Of the  
Insolvency and Bankruptcy Code, 2016*

*In the matter of Gemini Arts Private Limited*

**T.V. Balasubramanian**

The Resolution Professional for  
Gemini Arts Private Limited  
Having Office at  
No. 60, Mount Road,  
Chennai – 600 006

*... Applicant*

-Versus-

**1. K. Bharathi,**

W/o Mr. K. Bapaiah,  
New No.15, Old No. 22,  
3<sup>rd</sup> Main Road, Seethamal Colony,  
Chennai –600 068

**2. Akkineni Manohar Prasad**

Former Managing Director of  
Gemini Arts Pvt Ltd  
S/o Anand Rao,  
Residing at No. 3, Sarangapani Street,  
T. Nagar, Chennai – 600 017

**3. Akkineni Sriramulu**

Former Director of Gemini Arts Pvt. Ltd  
121, Mount Road,  
Chennai – 600 006

**4. Ananthakrishnan Balakrishnan**

Former Director of Gemini Arts Pvt Ltd  
No. 2, Vembuli Amman Koil Street,  
Chennai – 600 092

**5. Green Gardens Pvt. Ltd.**

Represented by its Resolution Professional  
No. 601, Anna Salai,  
Chennai – 600 002

*...Respondents*

Along with

**MA/538/2019 in CP/710/IB/2018**

*Filed under Section 60(5) read with Sections 49, 65 and 68 of the Insolvency and Bankruptcy Code, 2016 along with Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016*

In the matter of *Gemini Arts Private Limited*

**M/s. Kotak Mahindra Bank Ltd**

No. 401 L, 5<sup>th</sup> Floor, Samson towers,  
Pantheon Road, Egmore,  
Chennai – 600 008

*...Applicant*

-Versus-

**1. K. Bharathi,**

W/o Mr. K. Bapaiah,  
New No.15, Old No. 22,  
3<sup>rd</sup> Main Road, Seethamal Colony,  
Chennai – 600 068

**2. Green Gardens Pvt Ltd**

Reg. Off.:-  
No. 60, Mount Road,  
Chennai – 600 006

**3. Gemini Arts Pvt Ltd.**

Reg. Off.:-  
No. 60, Mount Road,  
Chennai – 600 006

**4. Sripriya Kumar,**

Resolution Professional of  
Green Gardens Pvt Ltd.

**5. T. V. Balasubramaniam**

Resolution Professional of  
Gemini Arts Pvt Ltd

**6. A. Manohar Prasad**

Represented by the Official Assignee  
Promoter – Green Garden Pvt Ltd  
And Gemini Arts Pvt Ltd  
I Floor, Family Court Building,

High Court Complex,  
Madras High Court, Chennai

...Respondents

Along with

**MA/539/2019in CP/709/IB/2018**

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In the matter of *Gemini Green Gardens Private Limited*

**M/s. Kotak Mahindra Bank Ltd**

No. 401 L, 5<sup>th</sup> Floor, Samson towers,  
Pantheon Road, Egmore,  
Chennai – 600 008

...Applicant

-Versus-

**1. K. Bharathi,**

W/o Mr. K. Bapaiah,  
New No.15, Old No. 22,  
3<sup>rd</sup> Main Road, Seethamal Colony,  
Chennai – 600 068

**2. Green Gardens Pvt Ltd**

Reg. Off.:-  
No. 60, Mount Road,  
Chennai – 600 006

**3. Gemini Arts Pvt Ltd.**

Reg. Off.:-  
No. 60, Mount Road,  
Chennai – 600 006

**4. Sripriya Kumar,**

Resolution Professional of  
Green Gardens Pvt Ltd.

**5. T. V. Balasubramaniam**

Resolution Professional of  
Gemini Arts Pvt Ltd

**6. A. Manohar Prasad**

Represented by the Official Assignee  
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I Floor, Family Court Building,  
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Madras High Court, Chennai

*...Respondents*

*Along with*

**MA/863/2019 in CP/709/IB/2018**

*(Filed under Sections 43, 66 read with Sections 60(5) Of the  
Insolvency and Bankruptcy Code, 2016)*

*In the matter of Gemini Green Gardens Private Limited*

**Sripriya Kumar**

The Resolution Professional for  
Gemini Green Gardens Private Limited  
Having Office at  
No. 60, Mount Road,  
Chennai – 600 006

*...Applicant*

*-Versus-*

**1. K. Bharathi,**

W/o Mr. K. Bapaiah,  
New No.15, Old No. 22,  
3<sup>rd</sup> Main Road, Seethamal Colony,  
Chennai – 600 068

**2. Akkineni Manohar Prasad**

Former Managing Director of  
Gemini Arts Pvt Ltd  
S/o Anand Rao,  
Residing at No. 3, Sarangapani Street,  
T. Nagar, Chennai – 600 017

**3. Tarun Reddy**

Director, Green Gardens Pvt Ltd  
14, Taylors Estate, First Street Kodambakkam,  
Chennai -24

**4. A.K. Balakrishnan**

Director of Green Gardens Pvt Ltd  
New No. 8, Old No. 4A, Subbarao Avenue,  
2<sup>nd</sup> Street, Greams Road,  
Chennai – 600 006

**5. Kotak Mahindra Bank Ltd.**

Montieth Road, Egmore,  
Chennai – 600 008

...Respondents

Along with

**IA/939/IB/2019 in CP/709/IB/2018**

*Filed under Section 60(5) Of the Insolvency and Bankruptcy Code,  
2016*

In the matter of *Gemini Green Gardens Private Limited*

**Komma Reddy Tarun Kumar**

Director, Green Gardens Private Limited  
No.14, Taylors Estate, First Street, Kodambakkam,  
Chennai – 600 024

...Applicant

-Versus-

**1. Ms. Sripriya Kumar,**

Resolution Professional of Green Gardens Private Limited  
1<sup>st</sup> Floor, GEMS Court, Khader Nawaz Khan Road,  
Nungambakkam, Chennai – 600 006

**2. M.K. Dandeker & Co.,**

Chartered Accountants,  
No.185, (Old No. 100), 2<sup>nd</sup> Floor,  
Poonamalle High Road,  
Kilpauk, Chennai – 600 010

...Respondents

Present:

For RP

:

N.P. Vijaykumar, Advocate  
For RP of M/s. Green Gardens Pvt. Ltd.

Thriyambak Kannan, Advocate  
For RP of M/s. Gemini Arts Pvt. Ltd.

*For Applicant* : *Karthik Seshadri, Advocate  
For Kotak Mahindra Bank*

*V. Prakash, Senior Advocate  
Mr. Manorajan, Advocate  
For Applicant in IA/939/2019*

*For Respondents* : *P.S. Raman, Senior Advocate  
Dwarkesh Prabhakaran, Advocate  
For Mrs. K. Bharathi*

*Shubharanjani Ananth, Advocate  
Neelambal, Advocate  
For Mr. A. Balakrishnan*

*Order pronounced on 25<sup>th</sup> April 2022*

### **COMMON ORDER**

***Per: ANIL KUMAR B, MEMBER (TECHNICAL)***

MA/863/2019 is an Application filed by the RP of M/s. Gemini Green Gardens Private Limited under Section 43,66 of IBC, 2016 seeking relief as follows:

- a. Set aside the mortgage deed dated 25.05.2018 registered as Document No. Pending channel Central Joint 22.2018 in Chennai Central Joint as being null and void in view of provisions of Section 43 of the Code and communicate such order to the sub registrar - Chennai Central Joint.
- b. Declare that the loan agreement dated 19.06.2009 and the unregistered mortgage deed dated 01.04.2015 entered by the Respondents 1 to 4 as fraudulent, collusive, sham and nominal thereby rendering the very claim filed by 1<sup>st</sup> Respondent to be non est and invalid.
- c. Direct the 1<sup>st</sup> Respondent and her men, agents, servants to return all the documents of title to the Schedule property to the Applicant for the benefit of the Corporate Debtor.
- d. Pass such other orders in the interest of justice



2. MA/537/2019 is an Application filed by RP of M/s. Gemini Arts Private Limited under Section 60(5) of IBC, 2016 seeking relief as follows:

To set aside the mortgage created in favour of the 1<sup>st</sup> Respondent by way of Memorandum dated 01.04.2015 pursuant to the loan agreement dated 19.06.2009, and consequently direct the 1<sup>st</sup> Respondent to return to the Applicant all title deeds and documents relating to the mortgage created, thereby rendering the very claim of the 1<sup>st</sup> Respondent to be non-est and fraudulent and transferring the said property back in the name of the Company and pass any other or further orders as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.

3. MA/538/2019 is an Application filed by Kotak Mahindra Bank under Section 60(5) of IBC, 2016 seeking relief as follows:

- (i) to declare that claims submitted by the 1<sup>st</sup> Respondent Mrs. K Bharathi as null and void.
- (ii) to set aside such transactions as may be found to be entered into with a view to defraud Creditors and order investigation into the same based on the materials made available in the CIRP.
- (iii) to take appropriate action against the 1<sup>st</sup> Respondent as envisaged under Section 65 of the IBC, 2016.
- (iv) to take appropriate action against the directors of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as envisaged under section 68 of the IBC, 2016.
- (v) Pass such further or other orders as deemed fit and proper in the circumstances of the case and thus render justice.

4. MA/539/2019 is an Application filed by Kotak Mahindra Bank under Section 60(5) of IBC, 2016 seeking relief as follows:



- (i) to declare that claims submitted by the 1<sup>st</sup> Respondent Mrs. K Bharathi as null and void.
- (ii) to set aside such transactions as may be found to be entered into with a view to defraud Creditors and order investigation into the same based on the materials made available in the CIRP.
- (iii) to take appropriate action against the 1<sup>st</sup> Respondent as envisaged under Section 65 of the IBC, 2016.
- (iv) to take appropriate action against the directors of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as envisaged under section 68 of the IBC, 2016.
- (v) Pass such further or other orders as deemed fit and proper in the circumstances of the case and thus render justice.

5. MA/939/2019 is an Application filed by the suspended Director of M/s. Gemini Green Gardens Private Limited under Section 60(5) of IBC, 2016 seeking relief as follows:

- (i) That this Hon'ble Adjudicating Authority may be pleased to reject the "Avoidance & Forensics Review Report" dated 30.07.2019 as invalid, unenforceable and unlawful which was filed in the matter of M/s. Green Garden Private Limited, a company under CIRP and appoint any other independent Auditor as the Adjudicating Authority may decide to do the Fresh Forensic Audit into the affairs of the Corporate Debtor.
- (ii) Direct the Resolution Professional to file a status report on the conduct of the CIRP.
- (iii) Appoint an independent professional to review the work carried out by the First Respondent in the capacity of a Resolution Professional.
- (iv) Pass any such further orders as this Hon'ble Adjudicating Authority may deem fit and necessary on the facts and circumstances of the case and thus render justice.



**MA/863/2019**

6. The Application in MA/863/2019 has been filed by the Resolution Professional of the Corporate Debtor who was appointed by this Adjudicating Authority vide Order dated 13.02.2019. The present Resolution Professional has replaced the erstwhile Resolution Professional following a Reconstitution of the Committee of Creditors. The erstwhile Committee of Creditors comprised only of the Applicant one Mrs. K. Bharathi, who had initiated CIRP being. The Reconstituted Committee of Creditors now consists of only one Creditor viz. Kotak Mahindra Bank Limited that had sought for change of RP culminating in the Order dated 13.02.2019.

7. The 1<sup>st</sup> Respondent filed a Preliminary Counter Affidavit. Both parties have filed documents in support of the pleadings. Documents were also permitted to be filed with Written Submission and the matter as such was heard on several occasions.

**CONTENTIONS OF THE RP OF GREEN GARDENS PVT LTD**

8. According to the Applicant / Resolution Professional: -
- a. The 2<sup>nd</sup> Respondent and his deceased brother Ravishankar Prasad are sons of A. Anand Rao and Indira Anand.
  - b. The 2<sup>nd</sup> Respondent and his brother Ravishankar Prasad are Promoters of Gemini Group of Companies which



includes Corporate Debtor, Gemini Arts Pvt.Ltd. and list of entities which is part of Forensic Audit Report.

- c. The 1<sup>st</sup> Respondent is wife of K. Bapiah. Their daughter Mrs. Padma Manohar is wife of the 2<sup>nd</sup> Respondent.
- d. The 3<sup>rd</sup> Respondent is related to the 2<sup>nd</sup> Respondent and is a Director on the Board of the Corporate Debtor.
- e. The 2<sup>nd</sup> Respondent by himself and his wife, through his father-in-law K. Bapiah and his wife 1<sup>st</sup> Respondent and through his brother's wife Mrs. Sai Sivajothi and their daughter Anjali Krishnamani control the Gemini Group.

9. According to the Resolution Professional, the Respondents act in concert and as a group. Further, it was submitted that the Mortgage Deed dated 25.05.2018 from the Corporate Debtor executed in favour of the 1<sup>st</sup> Respondent hereto is a preferential transaction since the same is within a period of two years from the CIRP Commencement date. The CIRP Commencement date is 05.07.2018. Since the look-back period for a preferential transaction with a Related Party is two years as per the provisions of IBC, 2016, according to the Resolution Professional, the said transaction is preferential in nature and has the effect of putting the 1<sup>st</sup> Respondent in a preferential position over other Creditors and is accordingly liable to be avoided by the Resolution Professional in terms of the provisions of IBC, 2016. For this purpose, certain sequence of events has been relied upon by the

Resolution Professional to show the absence of *bonafides* in the creation of mortgage in favour of the 1<sup>st</sup> Respondent.

a) The Agreement dated 19.06.2009 had been executed between the 1<sup>st</sup> Respondent, the Corporate Debtor and a group entity called Gemini Arts Private Limited.

b) The purported transaction of loan arises on account of the following:-

- i. The 1<sup>st</sup> Respondent purportedly owned shares of Sun TV Limited.
- ii. The 1<sup>st</sup> Respondent purportedly pledged 97,89,919 equity shares of SUN TV Limited in favour of India Bulls Financial Services Limited (IFSL) in loan of Rs.240 crore purportedly extended by IFSL to Corporate Debtor.
- iii. IFSL apart from these shares also received securities of properties held by various entities in Gemini Group including properties of Corporate Debtor, Gemini Arts Pvt. Ltd., Positive Housing Private Limited, 100% equity shares in ACS Private Limited.
- iv. IFSL disbursed Rs.227 crore out of sanctioned amount of Rs.240 crore. Out of this Rs.227.50 crore, Rs.150 crore was disbursed to a Company called as Manoharamma Hotels Private Limited. Balance Rs.77.50 crore was disbursed to Corporate Debtor which was utilised as follows:-

<b>NAME OF THE PARTY</b>	<b>AMOUNT IN INR</b>
India Bulls Loan received 2008 – Amount Received	77,50,00,000
Less: Utilised	

India Bulls Securities	7,39,32,800
Gemini Industries and Imaging	29,44,80,000
Anand Cine Trust	12,50,00,000
Anand Cine Services	12,02,51,000
Manoharamma hotel Investment Pvt Ltd.	5,99,85,000
Anandram Developers P. Limited	7,33,67,000
Bharani Hospitals Private Limited	2,68,00,160
Ravishankar Industries	5,00,000
Media Matrix	4,61,000
	<b>75,76,00,960</b>

- v. IFSL purportedly had fixed margin requirements in terms of value of security to be maintained by 'Gemini Group'. When there was default in maintaining the margin requirement apart from default in repayment of loan, IFSL sold the shares of 1<sup>st</sup> Respondent in Sun TV Ltd. on 19.12.2009 in open market and adjusted the proceeds of such sale against the loan due to IFSL.
- vi. The 1<sup>st</sup> Respondent purportedly entered into loan agreement on 19.06.2009 with Corporate Debtor and Gemini Arts Pvt. Ltd. in respect of loss suffered on account of alleged wrongful sale of shares of 1<sup>st</sup> Respondent in Sun TV Limited in discharge of loan.
- vii. In this regard it is pertinent to point out that the 1<sup>st</sup> Respondent filed C.S.No.1177 of 2008 apprehending sale of shares by IFSL as IFSL had already sold shares of another pledge Indira Anand. Though an order of interim injunction was granted regarding sale of suit schedule shares, IFSL sold the suit schedule shares on 19.12.2008. As a result, the suits filed by Indira Anand (another pledge) and 1<sup>st</sup> Respondent were clubbed and these suits were referred to arbitration by Hon'ble High Court, Madras by order dated 10.09.2009 on the basis of joint memo filed by all parties before the Court. The terms of joint memo which are pertinent in this regard are as follows:-

*"Whereas at a time when the interim applications in the abovementioned suits were argued before the Learned Single Judge, the parties wherein mutually agreed that all the disputes between them arising out of Loan documents dated 28.12.2007 and 26.06.2008 and the pledge agreements, supplementary agreements, mortgage deeds and the incidental matters thereto could be resolved by resorting to Arbitration by Sole Arbitrator".*

*And Whereas on the aforementioned premises it is agreed between the parties as follows:-*

*"All disputes inter-se between the parties shall be referred to Hon'ble Mr. Justice P.K.Balasubramanyan (Retd. Judge of Supreme Court), the Sole Arbitrator by consent of all the parties;....."*

10. Thereafter, the 1<sup>st</sup> Respondent had initiated arbitration against the Gemini Group apart from IFSL for a claim of Rs.589,84,26,197/-. The same culminated in the Arbitral Award dated 18.02.2012. According to the Applicant Resolution Professional, the existence of a Loan Agreement as on 19.06.2009 ought to have been disclosed in such Arbitral Proceedings since the very foundation of her claim had been wrongful sale of her Pledged shares that had been a collateral to the loan availed from India Bulls (IFSL). The Applicant Resolution Professional has further contended that the 1<sup>st</sup> Respondent "consciously chose to make a claim only against IFSL and did not make any claim against the Corporate Debtor or any of the parties other than IFSL". Therefore, it was further contended that by not filing a claim against the Corporate Debtor, the 1<sup>st</sup> Respondent had given up her claim by waiver and cannot trace any of her rights against the Corporate Debtor to the India Bulls Arbitration.

11. It was submitted that suddenly after about 8 years of the alleged Loan Agreement, a disclosure is made for the first time only in the month of March 2017 and that the absence of a Mortgage Deed creating security in favour of the 1<sup>st</sup> Respondent after 8 years of the alleged loan transaction shows that the entire transaction has been conjured up for the purpose of this case. Such a stand of the Applicant RP has led to the filing of the present Application for setting aside a preferential mortgage in favour of the 1<sup>st</sup> Respondent. The same has also emboldened the filing of MA/539/2019 by the sole Financial Creditor in the CoC viz. Kotak Mahindra Bank who claims that the very initiation of CIRP is bad in law and is hit by Section 65 of IBC, 2016 and further attracts punishment under Section 68 of IBC, 2016. The said Application is being dealt with separately.

12. According to the Applicant Resolution Professional, the circumstances surrounding the Loan Agreement are rather suspicious for want of Board Authority towards execution of such Loan Agreement and for non-creation of a charge in favour of the 1<sup>st</sup> Respondent. Accordingly, it is contended that the loan was never meant for the Corporate Debtor. For this para 28 of the Award dated 18.02.2012 passed by the Sole Arbitrator has been relied upon.



13. On this basis, it has been emphatically submitted that the loan, if any, was only for the purpose of the Promoter Directors being the son-in-law of the 1<sup>st</sup> Respondent and his brother. Therefore, the Corporate Debtor received no part of the benefit of such funds but is now the entity against whom the 1<sup>st</sup> Respondent has chosen to stake her claim only because of the valuable asset which the Corporate Debtor holds and in respect of which the Sole Financial Creditor in the CoC has an executable decree.

14. In addition to the aforesaid, the Applicant Resolution Professional has averred that the 1<sup>st</sup> Respondent and her husband Mr. K. Bapiah had received various payments to the entities where they are interested from and out of the Gemini Group. Also that the Arbitration before the Learned Judge Mr. Vegi Suri Appa Rao was conducted in suppression of material facts and by suppressing relationship between the parties. Thereby a collusive Award had been obtained only to remove the property of the Corporate Debtor and to deny benefits to other Creditors. By this, the Applicant Resolution Professional has assailed the Loan Agreement dated 19.06.2009 and the Mortgage Deed dated 25.05.2018 to be collusive and a sham.

15. Parallely and of much significance to the present proceedings are the claims of an Execution Petitioner before the Hon'ble Madras High Court who claims to have a charge on the

entire property of the Corporate Debtor and in whose favour the Hon'ble Madras High Court had passed an Order dated 26.05.2020 in Application No.6897 and 6898 of 2018 in EP No.194 filed by such Execution Petitioner/Decree Holder with Vanbey Holdings Private Limited. This Decree Holder claims to be one of the Allottees of built-up area in the Commercial Complex developed by the Corporate Debtor and another Corporate Debtor called Gemini Arts Private Limited (Group Company). The parties to this Application have also been parties to the said Proceedings before the Hon'ble Madras High Court, are in respect of the same property of the Corporate Debtor and are in respect of the same loan transaction in favour of the 1<sup>st</sup> Respondent. The true import of the decision rendered therein and the observations of the Hon'ble High Court as recorded in the said Order are aptly discussed subsequently in this Judgement.

16. Be that as it may, the Execution Proceedings initiated by the said Judgement Holder/Decree Holder makes it amply clear that there are other similarly placed Allottees and the same would render them as Secured Financial Creditors under Section 5(8)(b)(ii) of IBC, 2016 in terms of being Allottees of a Real Estate Project and therefore the mortgage in favour of the 1<sup>st</sup> Respondent would not have the effect of putting her in a preferential position over the Sole Financial Creditor in the CoC. In fact, much reliance



has been placed on the case of the said Execution Petitioner by the RP of Gemini Arts Pvt Ltd, whose submissions are succinctly extracted hereinafter.

**MA/537/2019**

17. The said Application has been filed by the RP of Gemini Arts Pvt Ltd. According to the Applicant RP, on having been appointed as Resolution Professional, replacing the erstwhile Resolution Professional on 13.02.2019, she was made aware of certain other proceedings initiated by Kotak Mahindra Bank, another Financial Creditor and sole member of the CoC of the Corporate Debtor. The Applicant herein was made aware that the Corporate Debtor and the Son-in-law of the 1<sup>st</sup> Respondent, in his then capacity as Managing Director of the Corporate Debtor, had breached the terms of a settlement entered into with Kotak Mahindra Bank, which terms had been made the basis of a Consent Decree passed by the Hon'ble Madras High Court. That thereafter, the said Bank approached the Debt Recovery Tribunal, Chennai (DRT), seeking issuance of a Debt Recovery Certificate, as was contained in the Consent Decree passed by the Hon'ble High Court of Madras. Accordingly, the DRT issued a Debt Recovery Certificate for a sum of Rs.217,11,30,041/- along with interest. It was then that Kotak Mahindra Bank while initiating proceedings seeking attachment of the assets of the Company and the 5<sup>th</sup>

Respondent, found that a charge had already been created in respect of the properties that it was seeking attachment for. The Hon'ble DRT by way of order dated 03.07.2009 attached the properties of the said 5<sup>th</sup> Respondent and the Corporate Debtor which were to operate as security for the amount to be repaid to the bank in terms of the recovery certificate.

18. The Learned Counsel for the Applicant contended that the Parties had failed to disclose the Loan Agreement dated 19.06.2009 with the 1<sup>st</sup> Respondent before the DRT. Further, the financial statements of the Company and the 5<sup>th</sup> Respondent did not indicate the existence of any such material liability owed to the 1<sup>st</sup> Respondent for several years and it was only in the financial statements filed with the ROC for the financial year 2016-17 that this liability miraculously seemed to have appeared. Further, it was submitted that there has been no registration of charge recorded with the ROC for the said agreement allegedly entered into on 19.06.2009.

19. According to the Learned Counsel appearing for the RP, after the CIRP had commenced and the CoC had been constituted based on the provisional verification of claims by the erstwhile RP; Kotak Mahindra Bank had raised the issues relating to the Related Party status of Mrs. K. Bharathi, with reference to the financial statements for 2016-17 which were filed with the ROC. It was in

these statements that Mr. Manohar Prasad and Mrs. Padma Manohar were not reflected as shareholders and instead one Ms. Anjali Krishnamani was reflected as a shareholder. Further, these financial statements were signed by the 4<sup>th</sup> Respondent as Director instead of Mrs. Padma Manohar. These financials were filed in November 2018 with the ROC. The financial statements filed with the ROC are clearly distinct from the ones filed by the 1<sup>st</sup> Respondent in the main Section 7 of IBC, 2016.

20. The Learned Counsel for the RP contended that during the CIRP, on 09.04.2019 the RP received an e mail from the Counsel of a Company called Vanbey Holdings Private Limited informing him of certain execution proceedings pending before the Hon'ble Madras High Court, in which Gemini Arts Private Limited has been arrayed as the 2<sup>nd</sup> Respondent (2<sup>nd</sup> Judgement Debtor). The Counsel for Vanbey Holdings had previously addressed an email to the erstwhile RP, Mr.N.S. Suryanarayanan informing him of the said proceedings before the Hon'ble High Court. The erstwhile RP had even replied to this email informing the Counsel of his appointment and asked him to file a claim in terms of the provisions of the IBC, 2016. However, no such claim was filed by the said Vanbey Holdings Pvt Ltd.

21. The Learned Counsel further contended that the erstwhile boards of the Company and the 3<sup>rd</sup> Respondent in an attempt to

defraud creditors and avoid repaying the amounts owed by them chose to instead give a preference to the alleged loan given by the 1<sup>st</sup> Respondent completely bypassing and without revealing to this Adjudicating Authority the existence of the two orders passed by the Hon'ble High Court i.e. of prohibition and subsequent as well as the orders passed by the Hon'ble DRT. Further, according to him, after taking into consideration the allegations raised by Vanbey Holdings, the proceedings before the DRT initiated by Kotak Mahindra Bank and the bringing up of the loan agreement dated 19.06.2009 subsequent to the orders of both the DRT and the Hon'ble High Court, that the very intention of the erstwhile Management was to make the 1<sup>st</sup> Respondent, a Related Party, a Secured Creditor preventing other *bonafide* creditors from recovering their dues from the Company and the 5<sup>th</sup> Respondent. It would now seem that the agreement which was the very basis on which the Section 7 Petition was allowed could have been a facade, as a preferential transaction so as to circumvent the due process of law and defraud the rightful and *bonafide* creditors of the Company and 3<sup>rd</sup> Respondent from making valid recoveries.

22. Accordingly, on behalf of the Applicant RP it was strenuously contended that the mortgage created in favour of the 1<sup>st</sup> Respondent was not in accordance with law and cannot be countenanced. He further submitted that not only was the



mortgage created in favour of a Related Party, but it was also created in spite of the order of prohibition and attachment in force passed by the Hon'ble High Court. That therefore the parties have clearly acted in a fraudulent manner with the sole attempt to defraud *bonafide* creditors, thereby constituting a violation of the provisions of IBC, 2016. Further, since the mortgage was created in favour of the mother-in-law of the erstwhile Managing Director, bypassing *bonafide* financial creditors, this can only be said to be violation of the Section 43 of IBC, 2016. Accordingly, the Applicant RP submitted that the mortgage created in favour of the 1<sup>st</sup> Respondent by way of the Memorandum dated 01.04.2015 ought to be *set aside* as the same is pursuant to an illegal loan agreement dated and consequently the title deeds ought to be returned and any other document relating to the mortgage created by the 1<sup>st</sup> Respondent to the Applicant RP.

23. The said Application of the RP has been resisted by the 1<sup>st</sup> Respondent and 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent is also a Suspended Director of the Corporate Debtor. However, before proceeding to analyse the contentions of the Respondent Suspended Directors and/or the 1<sup>st</sup> Respondent (Petitioning Creditor u/Section 7 of the Code), it is essential to examine MA/539/2019 filed by Kotak Mahindra Bank Ltd against Mrs. K.Bharathi and 5 others.

**MA/538 & 539/2019**

24. These Applications have been filed by Kotak Mahindra Bank Limited assailing the very initiation of CIRP at the behest of the 1<sup>st</sup> Respondent.

25. Apart from the 1<sup>st</sup> Respondent (*Applicant under Section 7 of IBC, 2016*), the other Respondents are the Corporate Debtors and Resolution Professionals of the respective Corporate Debtors. None of the Suspended Directors as on CIRP commencement date are parties. Only one Erstwhile Director – A.Manohar Prasad who is an adjudicated Insolvent is the 6<sup>th</sup> Respondent. He is not represented by the Office of the Official Assignee although the array of parties in the cause-title suggests so.

26. The contentions of Kotak Mahindra Bank are tersely set out as follows: -

- i. That the Applicant Bank holds a Debt Recovery Certificate dated 20.10.2017 for an amount of Rs.256,69,16,821 (including interest) against the 2nd Respondent Company. That the illegal acts of the Suspended Directors of the Corporate Debtor have prevented recovery of the legitimate dues of the Bank. The Learned Counsel for the Bank vehemently contended that the erstwhile Promoter Director of the Corporate Debtor and his family are habitual defaulters and have deep rooted intent to defraud the creditors at



large. In this connection, he also drew attention of this Tribunal to certain observations of the Hon'ble Supreme Court with respect to the Promoters of the Corporate Debtors vide Order in SLP (CRI) No.8854/57 of 2008 in the case of **Central Bureau of Investigation (CBI) vs. A. Ravishankar Prasad** and others:

*"According to the Appellant, the Promoters of the Corporate Debtors herein have committed serious offences, such as, forgery, fabrication of documents and using the said documents, as genuine. The Respondents A. Ravishankar Prasad and A. Manohar Prasad also entered into conspiracy with the Chairman and Managing Director and other officials of Indian Bank, Chennai with the object of cheating the Indian Bank in the matter of recommending, sanctioning, disbursing huge credit facilities".*

According to him such observation shows the fraudulent intent of the 6th Respondent and his family members.

- ii. That in such background, the Applicant clearly apprehends that the 1<sup>st</sup> Respondent (i.e. the Petitioner in the main Petition) who is the Mother-in-Law of Respondent 6 and erstwhile Promoters of the Corporate Debtor has mis-represented facts before the NCLT and obtained CIRP Orders only to defraud the Applicant Bank and take away the substantial asset in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (Corporate Debtors), thereby leaving this Applicant, who is a Financial Creditor, high and dry.
- iii. Further, it was argued on behalf of the Bank that when it came to the knowledge of the Bank that the Corporate Debtors along with the 6<sup>th</sup> Respondent and Late Mr. A.



Ravishankar Prasad, had hoodwinked the existing Creditors and augmented huge loans to the tune of Rs.240 crore from an NBFC and created mortgage over the assets of the Corporate Debtor situated at Anna Salai, Chennai; at once they rushed to the Debts Recovery Tribunal in the pending OA No.47/2008 and OA No.46/2008 before the DRT I, Chennai and during the pendency of issuance of a Recovery Certificate in their favour; they sought attachment of the properties of the Corporate Debtor. Such Attachment Order according to the Bank would operate as security to satisfy any certificate for the Recovery of the debt. That accordingly, upon satisfaction of the Charge created in favour of India Bulls Financial Service in the year 2015, the charge status for Kotak Mahindra Bank is elevated to first Charge. Therefore, according to the Bank, the present CIRP has been initiated only to defeat the rights of the Bank that has now been elevated to 1<sup>st</sup> Charge-Holder according to the Bank. Pertinently, it has not been explained whether the Prohibitory Order of the Hon'ble High Court had been placed before the DRT which passed the Attachment Order in favour of Kotak Mahindra Bank.

- iv. Further, the Learned Counsel for the Bank contended that CIRP has been initiated against the Corporate Debtor by the Mother-in-Law of Mr. A. Manohar Prasad, the erstwhile Promoter of the Corporate Debtor and Mother of the Director, A. Padma Manohar, who has been shown as 28.5% shareholder in Green Garden Private Limited and 40.6% shareholder in Gemini Arts Private Limited as per the Financials filed by the 1<sup>st</sup> Respondent only to defraud



this Applicant, knowing well that there is consent decree in favour of the Applicant. The Learned Counsel emphasised that the Applicant Bank holds a Debt Recovery Certificate (DRC) to the tune of Rs.256.69 crore and Rs.217 crore along with 20% interest payable with quarterly rests, issued by the Hon'ble DRT- I, Chennai vide its Order dated 30.06.2017 and 31.03.2017 respectively for Green Gardens and Gemini Arts Private Limited, along with an attachment order of the property subject to the rights of M/s. India Bulls Financial Services Limited, as a secured creditor / mortgagee vide orders of the Hon'ble DRT dated 03.07.2009 as intimated by the DRT to the Sub Registrar – Thousand Lights, Chennai, conveying interim injunction restraining further proceedings in respect of the said property.

- v. According to the Bank, the dues payable to Indiabulls Financial Services has been settled and the Mortgage Dues got discharged / redeemed. Hence, no mortgage can be created thereupon on the charge of M/s. Indiabulls Financial Services Limited in favour of Ms. K. Bharathi, as orders restraining creation of any encumbrance over the assets of the Corporate Debtors were passed by the DRT vide its Order dated 03.07.2009. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents connived with the 1<sup>st</sup> Respondent, obtained an Arbitration Award and filed an Application before the Rajahmundry Civil Court, without obtaining a Court order based on an undertaking filed before the Rajahmundry Court created an MOD, which is false and it has to be disgorged to protect the interest of the Creditors and the Mortgage created is null and void. Now the Suit filed



before the Rajahmundry Court is withdrawn by the 1<sup>st</sup> Respondent as not pressed is also another act of suppression of facts and also a fraud on the Judicial process. Hence, any mortgage or charge created in favour of Ms. K. Bharathi will be null and void ab initio, taking cognizance of the DRT 1 Chennai order.

- vi. Therefore, according to the Applicant Bank, the claims submitted by the 1<sup>st</sup> Respondent tantamounts to a Transaction defrauding Creditor under Section 49 of IBC, 2016. Moreso, because had the Loan Agreement really been entered into in the year 2009, the said loan amount in the financial statements in the year 2009-10, 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15 would have reflected the name of Ms. K. Bharathi as a Creditor. However, from the year 2012-13 to the year 2014-15 the financials had only reflected the name of Ms. K. Bharathi as Creditor. Ironically the exact same year on which Mr. A. Manohar Prasad was declared Insolvent, Mrs. K. Bharathi's name is replaced in the financials with the exact same loan amount of Rs.84.79 Crore. This clearly establishes the fact that the financials were manipulated and the name of Mrs. K. Bharathi, the Mother-in-law of Mr. A. Manohar Prasad was replaced in the name of A. Manohar Prasad. According to the Bank, the Suspended Directors had thereafter created an ante-dated (2009) document in the year 2016-17 and swapping the names in the financial statements in the year 2016-17, Mrs. K. Bharathi had mooted a false Arbitration proceedings in January 2018, produced all these fake/back dated documents and obtained an Arbitration award in her



favour against the Corporate Debtor in April 2018. This fabricated Award according to the Bank is the basis for the proceedings before the Rajahmundry Court leading upon registration of the Memorandum of Deposit of Title Deeds in her favour; within 5 days thereof, she approached this Adjudicating Authority.

- vii. According to the Applicant Bank, this clearly establishes the fact that the whole CIRP was initiated by Mrs. K. Bharathi, who had acted on the behest of her son-in-law Mr. A. Manohar Prasad, a declared insolvent and the Promoter Directors of the said Corporate Debtor, with a clear intent to defraud all other Creditors and usurp the property available with the Corporate Debtor.
- viii. The Loan Agreement dated 19.06.2009 is a forged document and Signature of A. Ravishankar Prasad, signed for the Corporate Debtor and the Guarantor is forged and the significant variation / dis-similarities can be found from the Loan Document, the dis-similarities of the signature are significant and fundamental. Hence according to the Bank, the claim of K. Bharathi, the 1<sup>st</sup> Respondent herein is not only false and non-est in law but also that it is only appropriate to take necessary action against the 1st Respondent under Section 65 of IBC, 2016. The Bank has further sought a proper investigation by Competent Authority which would unravel the truth and the true intentions behind the operations of the Corporate Debtors and its Promoters/Directors and appropriate action would be required under the necessary laws.



27. Having exhaustively considered the contentions of all the Applications *aforestated*, this Tribunal shall now examine the rival submissions of the contesting Respondents to MA Nos. 863, 537-539 of 2019 and of the Applicant in MA No. 939 of 2019.

**CONTENTIONS OF 1<sup>ST</sup> RESPONDENT – MRS. K. BHARATHI**

28. According to the 1<sup>st</sup> Respondent, she is a Financial Creditor of M/s. Gemini Green Gardens Private Limited (GGPL) and M/s. Gemini Arts Private Limited (GAPL) by sheer operation of law and became entitled to a charge on the properties of GGPL and GAPL upon her pledged shares having been sold to discharge the borrowings from Indiabulls Financial Services Ltd. The genesis of her case dates to the loan availed for the very acquisition of the Gemini Group of Companies from their original Promoters – Mr. SS Vasan & Others. According to her, the Corporate Debtors had been acquired from the funds borrowed from Indian Bank in the year 1991. This loan had been repaid by Group Companies by *inter alia* borrowing from Infrastructure Leasing & Financial Services Co Ltd. That this subsequent loan had been taken over by India Bulls Finance Ltd who sold her pledged shares leading to a series of litigation. The first round being against India Bulls, in her capacity as a Guarantor cum Pledgor for allegedly wrongful invocation of the Pledge. Therefore, the 1<sup>st</sup> Respondent contended that the

Guarantor steps into the shoes of the Creditor on satisfaction of the loan and to the extent of the contribution made by such Guarantor.

29. The Learned Senior Counsel for the 1<sup>st</sup> Respondent contended that properties were originally subject to charge in favour of Indian Bank from 1995 to 2006. The said Indian Bank treated the Account of Gemini Group of Companies as one composite unit. When the said loan of Indian Bank was required to closed, a group Company called Manoharamma Hotel Investments Pvt Ltd availed a loan from IL&FS. The Corporate Debtor benefitted from such loan availed from IL& FS. A Charge on the property of the Corporate Debtors came to be created in favour of IL&FS while the Principal Debtor remained Manoharamma Hotel Investments Pvt Ltd. Thereafter, the loan of IL &FS was taken over by Indiabulls Finance. This Indiabulls insisted on additional security for the loan facility, for which the 1<sup>st</sup> Respondent pledged her 97.89 equity shares of Sun TV Network Limited in favour of Indiabulls on 26.06.2008. This Pledge security was in addition to the immovable property security provided by the Corporate Debtor and Corporate Guarantor by way of mortgage of their property located at 601, Anna Salai, Chennai 600 001 and other properties including the personal guarantee of Mr. Manohar Prasad and Mr. Ravi Shankar Prasad. Clause 22.1 of Facility Agreement dt.26.06.2008.



30. It was submitted that the said Indiabulls sold some of 1<sup>st</sup> Respondent pledged shares on various dates in December 2008 on the premise that the market value of the pledged shares did not meet the margin requirement and adjusted the sale proceeds against GGPL's and GAPL's liabilities. This led to the 1<sup>st</sup> Respondent approaching the Hon'ble Madras High Court in CS No. 1177 of 2008 *inter alia* seeking to restrain Indiabulls from selling further shares. Despite the interim order granted by the High Court, Indiabulls sold all remaining shares. This was vehemently argued by the Learned Senior Counsel to be a 'wrongful' sale of the shares of the 1<sup>st</sup> Respondent. He further contended that at this juncture, the Corporate Debtors entered into a Loan Agreement dt. 19.06.2009 with the 1<sup>st</sup> Respondent recording that Rs.84.79 crore realised from sale of the shares of the 1<sup>st</sup> Respondent for discharging the companies' dues would be treated as a loan repayable to her "after the Indiabulls litigation was over". The amount was repayable with interest @ 24% p.a.

31. In the meantime, in the said CS No. 1177 of 2008, the Hon'ble Madras High Court had appointed Mr. Justice P.K. Balasubramanyan (Retd.) as the Arbitrator by consent of Parties. By the Award dated 18.02.2012, the Learned Arbitrator had *inter alia* allowed the claim of the 1<sup>st</sup> Respondent for Damages towards wrongful sale of her shares and awarded a compensation to her of

a sum of Rs. 33 crore towards the same. This money although payable to the 1<sup>st</sup> Respondent was also instead appropriated towards the balance unpaid loan of the Gemini Group to Indiabulls for their exit as a Creditor. The Memorandum of Settlement signed with Indiabulls on 13.05.2013 also shows that the Corporate Debtor – Green Gardens Pvt Ltd was required to make further payments to close the loan account. Accordingly, the amount of Rs.139.40 Crore realised by sale of shares together with the award of Rs.33 Crore (Rs. 23 Crore from Indiabulls and Rs.10 Crore from Indiabulls Securities Limited), aggregating to Rs.172.40 Crore was adjusted against the dues of the Corporate Debtor to Indiabulls. Thus, according to the Learned Senior Counsel, the 1<sup>st</sup> Respondent settled debts of the Gemini Group and the Corporate Debtors having benefitted therefrom, accepted and acknowledged the debts now payable to the 1<sup>st</sup> Respondent.

32. It was submitted that the Arbitral Award dated 18.02.2012 was confirmed by the Hon'ble Madras High Court on 30.04.2013. The Learned Senior Counsel further contended that the sale of shares owned by 1<sup>st</sup> Respondent towards repayment of loan taken by the Corporate Debtor from Indiabulls is not disputed by the present RP or Kotak Mahindra Bank. Also, it was submitted that there is no evidence produced to show that the amount of Rs.172.40 Crore belonging to the 1<sup>st</sup> Respondent, which was

adjusted against the loan of the Corporate Debtor, was repaid to the 1<sup>st</sup> Respondent by the Corporate Debtor at any point in time. This being the case, the Financial Debt of the 1<sup>st</sup> Respondent stands established and in view of the utilisation of the funds for the debt incurred by the Corporate Debtor as well the said funds being utilised for the benefit of the Gemini Group; there can be no doubt that she is a financial creditor who has funded for the benefit of the Corporate Debtor and its group companies.

33. According to the 1<sup>st</sup> Respondent, the Corporate Debtor – Green Gardens Pvt Ltd then entered into a Memorandum of Equitable Mortgage dt. 01.04.2015 recording that the amount payable under Loan Agreement is to be repaid by 15.12.2017. A similar Memorandum of Equitable Mortgage was executed by the other Corporate Debtor – Gemini Arts Pvt Ltd on 15.04.2016.

34. According to the 1<sup>st</sup> Respondent, after depositing the Original Title Deeds with the intention to create a Mortgage in her favour, the Suspended Directors did nothing else. The Corporate Debtor and Corporate Guarantor were refusing to register the agreement. Aggrieved by this the 1<sup>st</sup> Respondent had approached an Arbitrator as contemplated under the Loan Agreement and an Award came about to be passed by the Hon'ble Arbitrator Justice (Retd.) Vegi Suri Appa Rao on 11.04.2018 crystallising the amount due to the 1<sup>st</sup> Respondent and for registering the Equitable Mortgage on the

property of the Corporate Debtor and Corporate Guarantor. This lead upto execution and registration of the Memorandum of Deposit of Title Deeds (MODT) on 25<sup>th</sup> May 2018 and the same was duly registered as Document No.572 of 2018 in the books of the Sub Registrar of Chennai Central Joint I.

35. The Learned Senior Counsel for the 1<sup>st</sup> Respondent accordingly argued that that absence of collusion can in fact be inferred from the very fact that it required so many rounds of litigation, time and effort for the 1<sup>st</sup> Respondent to secure her rights *vis-à-vis* the Corporate Debtor despite her own son-in-law and his brother making promises in oral and writing. As long as the debt of the 1<sup>st</sup> Respondent is genuine, upon stepping into the shoes of the Lender Indiabulls, she acquires the benefit of all securities held by such Creditor by sheer operation of law and that nothing further ought to have been done by her only to approach this Adjudicating Authority. He says the litigation between the parties had already happened in the past and culminated in an enforceable right in her favour, which she exercised through the present proceedings. Such actions are being doubted only because of the Related Party angle and according to the Learned Senior Counsel, Related Parties are not required in law to write off their claims nor are they barred from approaching this Adjudicating Authority.



36. According to the Learned Senior Counsel, any other charge or encumbrance in respect of the properties of the Corporate Debtor and Corporate Guarantor subsequent to the charge created in favour of Indian Bank can only be subservient to the charge of Indian Bank and its successor creditors who had stepped into the shoes of Indian Bank and thereafter. He also assailed the conduct of the RP in re-verifying the claims already verified and admitted by the previous RP, while there is no such provision empowering the RP to do so under the IBC.

37. The Learned Senior Advocate Mr. P.S.Raman has also opposed the challenge to the Loan Agreement dated 19.06.2008. According to him, a preferential transaction under IBC, 2016 can be adjudged only under Section 43 of IBC, 2016 which has a clear lookback period of only two years in case of Related Party Transactions. If it is this Loan Agreement that allegedly puts the 1<sup>st</sup> Respondent in a preferential position over other Creditors, then such Preferential Transaction ought to have occurred before two years of the CIRP Commencement Date. Since that is not the case, he urged that the challenge to the Loan Agreement is frivolous.

38. As for the allegations of fraud pertaining to Arbitral Awards, the Learned Senior Counsel has contended that allegations of fraud



in respect of Judicial proceedings cannot be simply made. The burden of proof is heavy on the party insisting fraud committed in judicial proceedings. He further argued that such burden has not been discharged by the RP and/or the Bank. The entire allegations of fraud are nothing but conjectures and surmises on their own assumptions of human conduct and/or court proceedings. No proof of fraud has been adduced in substance. The same shows only an effort to cause prejudice in the mind of the Court. According to him, it is normal in Courts that matters are passed-over and parties give Undertakings which are then recorded and matters closed. This has been willfully blown out of proportion only to repeatedly emphasise on fraud while none actually exists. It was also contended on behalf of the 1<sup>st</sup> Respondent, that nothing prevented the mighty Applicant Bank from approaching the concerned Court seeking recall of the Order or from exercising other remedies in law to set aside or declare the Judicial Order dated 10.05.2018 passed by the District Court of Rajahmundry to be null and void. However, instead of doing so, the Bank is wilfully attacking the said Order collaterally before this Adjudicating Authority knowing full that the proceedings before this Tribunal are summary in nature. This according to the 1<sup>st</sup> Respondent shows the intent to attack judicial proceedings rather recklessly only so that a false cloud is created over the rights of the 1<sup>st</sup> Respondent. According to him, the allegations pertaining to wrongful initiation of

CIRP are totally misconceived. Moreso, since the Applicant Bank has averred in its Written Submissions that though there was allegedly no basis for R1 to file a petition under Section 7 of the IBC, CIRP should be continued for both the companies. It was accordingly argued that the Bank cannot blow hot and cold.

39. The gamut of the matter does not end here. An application preferred by the Suspended Director assailing the Forensic Audit Report dated 30.07.2019 also merits consideration. This Application has been filed by a Suspended Director – Mr. Komma Reddy Tarun Kumar aggrieved by the manner of conduct of the RP, the Forensic Audit conducted as per the instructions of the RP and the contents of such Forensic Audit Report.

**MA/939/2019**

40. The Learned Senior Counsel Mr. V.Prakash appearing for the Suspended Director, assailed the Forensic Report dated 30.07.2019 as sham, absurd and a product of collusion between the Forensic Auditor, the RP and Kotak Mahindra Bank.

41. According to the Learned Senior Advocate, the very manner and conduct of Forensic Audit lacks *bonafides*. It was submitted by the Learned Senior Advocate, the fundamental premise itself of the Forensic Audit is wrong inasmuch as the Terms of the Reference are beyond the purposes enshrined in the IBC, 2016. In fact, the

Appointment, Terms and reference of engagement of the Forensic Auditor as issued by the RP have not been produced in the Report nor before this Adjudicating Authority. It was submitted that the Forensic Audit Report (FAR) sets out the 2<sup>nd</sup> Respondent's understanding of such terms of reference and not the very reference *per se*. Failure to produce such terms of reference shows lack of transparency especially because the 2<sup>nd</sup> Respondent was a hurried replacement to a previous Auditor who had originally been appointed by the 1<sup>st</sup> Respondent and to whom the Applicant herein had exhaustively explained the malpractice and misbehaviour of the 1<sup>st</sup> Respondent by an e-mail dated 24.04.2019.

42. In this context, the Applicant Suspended Director contended that the 1<sup>st</sup> Respondent RP of Green Gardens Pvt Ltd had been hostile towards the Suspended Director in view of the trespass Police Complaint given against her by another Company into whose property she had allegedly entered without authorisation and copied some data/collected some material claiming that such data belonged to the Corporate Debtor. This high-handed behaviour and illegal trespass has been caught on camera and a video thereof has been filed by the Applicant Suspended Director before this Adjudicating Authority. According to the Applicant / Suspended Director, the Respondent RP has procured some data from premises not belonging to the Corporate Debtor and claims it to be

the data of the Corporate Debtor. Such data obtained was not witnessed by independent persons who could vouch for its contents and/or veracity or atleast confirm the extent and nature of data because the so-called witness is the other RP of Gemini Arts Pvt Ltd, who was a co-trespasser.

43. Further, according to the Applicant/Suspended Director, originally one M/s. SCV & Co. LLP was appointed as the Forensic Auditor. The Applicant/Suspended Director was introduced to the said Forensic Auditor by the RP and instructed to provide data to such Forensic Auditor. The Applicant/Suspended Director provided details sought, addressed queries and by email dated 24.04.2019 explained the high-handed conduct of the RP in seizing some data and calling it as Tally Records of the Corporate Debtor.

44. After this, the Respondent RP informed the said Forensic Auditors that she would place the matter before the CoC so that "we can re-assess on what terms of reference of the Forensic Audit & Avoidance Review would be and how the Audit can/should be carried out". However, the next event was replacement of the said Forensic Auditors without any rhyme or reason explained to the Suspended Directors who had already shared all data and given co-operation to the fullest. Instead, the present Forensic Auditor viz. one M/s. Dandekar & Co. came to be appointed. According to the Learned Senior Counsel, there was no scope for "reassessing on



the terms of reference" be it with the CoC or anyone because for approaching the Adjudicating Authority through avoidance applications, all that is required is the formation of an opinion by the Resolution Professional. The same may or may not be necessary through a Forensic Audit. In any event the terms of reference of the Forensic Audit ought to be laid down by the Resolution Professional alone and cannot be subject matter of a discussion with the CoC. This is because the IBIC, 2016 itself makes it amply clear that avoidance applications lie only in respect of transactions that are preferential, under-valued, extortionate credit and fraudulent in nature (PUFE transactions). Therefore, it was submitted that the Forensics Audit Report itself cannot go beyond an examination of PUFE transactions in terms of the provision of IBC, 2016 as the Resolution Professional also is expected to act only within the parameters fixed by IBC, 2016. This being the case there is nothing for 'reassessment' according to the Learned Senior Counsel, as identification and elaboration of PUFE transactions alone can possibly be the subject matter of anForensic Audit Report.

45. In this backdrop, the Learned Senior Counsel emphasized that the terms of reference to the Forensic Auditor could have never been beyond identification and elaboration of PUFE transactions. *Per contra*, the very terms of reference as set out in



the Forensic Audit Reportare in excess and beyond the scope of IBC, 2016 particularly:-

- i. The Reference to the Forensic Auditor to examine the claim of Mrs. K. Bharathi (Applicant in Section 7 Proceedings).
- ii. The Reference seeking Comments of the Auditor on loss of documents of the Corporate Debtor by floods.
- iii. The Reference instructing Preparation of financial statements of the Corporate Debtor from 2007-08 to 2017-18 based on MCA data or data obtained from client and comments if any thereon.
- iv. The Reference seeking Comparison of the different "versions" of tally for the period upto 2017-18.

46. According to the Learned Senior Counsel the Forensic Auditor has been asked to render a Finding on the correctness of the Application admitted by the Adjudicating Authority. Such concurrent jurisdiction exercised by a non-judicial person is unheard. Likewise, the very terms of reference is to report on the "reliability of the financial statements" which pre-supposes existence of un-reliable material. The instruction to re-cast the balance sheet is in violation of Section 130 of the Companies Act, 2013 and in any event neither the Resolution Professional nor the Forensic Auditor are empowered in law to do so. The reference to the Forensic Auditor to comment on loss of books of the Corporate

Debtor due to floods is an unnecessary exercise which has been indulged only to mislead the Adjudicating Authority that there is a fraud by accordingly comparing the version of the Resolution Professional as against the records handed over by the Suspended Director of the Corporate Debtor. In other words, according to the Learned Senior Counsel, the loss of records of the Corporate Debtor is being twisted by the Resolution Professional to suggest falsification by contrasting the same with engineered data which the Resolution Professional claims to belong to the Corporate Debtor.

47. According to the Learned Senior Counsel, the identification of PUFÉ transactions is only last on the mind of the Resolution Professional as it has been enlisted as item 'K' of the Reference by the Resolution Professional. The same only shows that from the very outset, the Forensic Audit was never meant to serve the purpose set out in IBC, 2016.

48. Adding to this submission, the Learned Senior Counsel vehemently stressed on the impropriety of fixing of a 10 year period for conduct of Forensic Audit review. According to him, the look-back period under IBC, 2016 for preferential transactions is only 2 years in the case of Related Parties and 1 year in the case of Un-related Party. This is the same in the case of under-valued

transactions and extortionate credit transactions. He conceded that there is no such look-back period prescribed for a fraudulent transaction but also drew our attention to a letter dated 01.03.2019 from the Respondent Resolution Professional to the Statutory Auditor of the Corporate Debtor wherein this same Resolution Professional had clearly stated that she intended to set a reference of not less than 8 years preceding CIRP commencement date as the relevant look-back period for the purpose of Section 66 of IBC, 2016. This being the case the sudden deviation to 10 years following an opaque procedure of replacement of Forensic Auditor; does now show *bonafides*. He also laid emphasis on Section 129 of the Companies Act, 2013 which mandates maintenance of Records only for only a period of 8 years.

49. On behalf of the Applicant Suspended Director it was argued that once the terms of reference to the Forensic Auditor are found to lack *bonafides*, no reliance can be placed on such a Report which is a product of ulterior motives. Nevertheless several contentions were advanced assailing the contents of the Forensic Audit Report dated 30.07.2019 broadly on the following grounds:-

- A. The Forensic Audit exceeds the scope and purpose vis-a-vis the Code.
- B. Wilful use of wrong data only to produce wrong results.



- C. Failure to Understand functioning of the group as a whole
- D. Sensationalised Report only to prejudice the Reader.
- E. Obvious malafides.
  - (i) Pre-conceived Notions and reverse Engineered Report to suit the pre-determined Result.
  - (ii) Wilful suppression of actual Extortionate Credit Transactionsthat have caused loss to Corporate Debtor.
- F. Clear Absurdities in the Report
- G. Forensic Audit as a weapon for harassment.

50. According to the Learned Senior Counsel, the irrational look-back period of 10 years has led to improper and half-baked conclusions. As an instance, it was shown that the very acquisition of the Corporate Debtor was from funds received from Indian Bank. This debt was discharged by borrowing from IL & FS by another group entity called Manoharamma Hotel & Investments Private Limited. This being the case, upon satisfaction of India Bulls loan, when Manoharamma Hotel & Investments Private Limited was debited by IL & FS for the debt of *inter alia* the Corporate Debtor, the said Manoharamma Hotel & Investments Private Limited correspondingly became a Creditor in the books of the Corporate Debtor. Such a transaction has been wrongly understood by the Forensic Auditor to be a diversion of funds.



Such an incorrect conclusion is due to the failure of the Forensic Auditor to understand and appreciate the working of the Gemini Group as a whole.

51. It was submitted that admittedly, the Resolution Professional in the Application filed has alleged preferential transaction against the 1<sup>st</sup> Respondent in MA/863/2019; has stated clearly that the Corporate Debtor forms part of the Gemini Group which is to be treated and considered as a whole. In such circumstances, the Forensic Auditor has misunderstood and mis-reported transactions inter se Group Companies without understanding the purpose and underlined benefit that accrue to each group company on account of cross settlement and cross-collateralization.

52. It was further contended that the Corporate Debtor is an entity with only an authorised share capital of Rs.1 lakh with an un-finished building having no permission or sanction as its asset. The said Corporate Debtor also did not have much business of its own to generate income. In these circumstances an irrational look-back period of 10 years has misled the Forensic Auditor in not understanding the history of the Corporate Debtor and/or its development and particularly the accretion of assets in the books of the other Corporate Debtor i.e. Gemini Arts Private Limited. Pertinently, it was submitted that no Forensic Audit has been conducted in the affairs and books of Gemini Arts Private Limited



where there is an accretion in the assets of the said Corporate Debtor. If only, a holistic view of the functioning of the group as a whole and with a commonsensical approach had been taken, it would have amply demonstrated the fact that the Corporate Debtor when originally acquired had only 3 floors as against 7 floors that have thereafter been added and the building till this date continues to stand 10 storeys tall. It was further urged that typically in Group Companies, income earning entities attract credit by leveraging on the assets of the weaker asset owning entities for mutual development and growth of the group as a whole. Such an arrangement is perfectly commercially permissible and is not in violation of any statute, much less the IBC, 2016. Interestingly, no part of the Forensics Audit Report shows how utilisation of funds, *inter se* group companies was objected or prohibited by any lender including India Bulls. Therefore, it was contended that in the absence of any dispute between the lender and fund user on fund deployment, the Forensic Auditor ought not to have treated repayment to a group company in isolation of the borrowing raised by such group company for the benefit of the Corporate Debtor. Accordingly, it was argued that the very acquisition of the Corporate Debtor was from funds borrowed from Indian Bank for which the borrowing entity was Ravishankar Industries Private Limited for settlement of whose borrowing, another group company called Manoharamma Hotel & Investments Private Limited was the



subsequent borrower for settlement for which IL & FS was approached. The loan of IL & FS was in turn settled *inter alia* from funds received from Indian Bulls Finance *inter alia* on the security of pledge of shares of the Promoter family and by mortgaging the immovable property security of the Corporate Debtor.

53. As for the contents of the Forensics Audit Report, the Learned Senior Counsel assailed the same to be a highly sensationalised report only to prejudice the reader. He pointed out to the portion of the Forensics Audit Report where the alleged deposition of Mr. A. Manohar Prasad as a Prosecution Witness in the 2G Spectrum scam has been extracted. The Learned Senior Counsel contended that when the 2G Spectrum scam itself was held to have never happened, an out of context reliance on the alleged deposition of a Prosecution Witness therein has been deliberately extracted in the Forensics Audit Report only to sensationalize the report and prejudice the mind of the reader. The same demonstrates amply the extreme prejudice and abject lack of *bonafides*. He argued that the purpose of conducting Forensic Audit is only to identify and report PUFE transactions and not to pass Judgements on conduct and financial character of Suspended Directors. At this juncture, the Learned Senior Counsel relied upon a decision of the Hon'ble Madras High Court in CrI.OP No.24856 of 2016 wherein there is a reference to the Forensic



Auditor in the present case to be an Accused in an economic offence under investigation by the Enforcement Directorate.

54. Further, the Learned Senior Advocate broadly submitted that the other conclusions of the Forensic Auditor on Shell Company etc. are not only un-warranted but are also unsound in law and facts. To sum up, it was basically contended that ordinary commercial and business arrangements that are not prohibited in law and are done in the ordinary course of business have been misconstrued as fraudulent transactions only to harass the Suspended Directors. To conclude, the Learned Senior Counsel submitted that the Suspended Directors were being harassed through a Forensic Audit for purposes other than those in the provisions of IBC, 2016 only because a police complaint was filed against the Resolution Professional for trespassing. This personal enmity is the alleged reason for victimisation especially because no part of the Forensic Audit Report has been able to conclude or show any frittering away of the assets of the Corporate Debtor and/or loss of public funds.

55. Adopting the contentions of the Applicant in MA/939/2019, the Learned Counsel appearing for the other Suspended Director, Respondent No. 4 added that the Disclaimer and Limitations set out in the Report have rendered the very Report meaningless. Also, the letter dated 02.02.2007 from IL & FS to Indian Bank

clearly shows that the Gemini Group functioned as one composite unit and Manoharamma Hotel & Investments Private Limited had been sanctioned INR 1250 Million for settling the dues of Gemini Group upon release inter alia of the property of the Corporate Debtors.

56. As for the creation of Mortgage dated 25.05.2018 pursuant to the Order of the District Court at Rajahmundry, it was submitted that the Judgement of the Court at Rajahmundry directing creation of the equitable mortgage in favour of the Applicant, has not been set aside by any Court of Law of competent jurisdiction. The Order is valid and binding. It was therefore contended that as per the settled law, even void judgements are to be set aside by a Court of Law and shall continue to operate until so set aside. The Bank cannot by its own presumption declare and treat a Judgement of a Court of Law as null and void. The decision of the Hon'ble Supreme Court in the matter of **Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group**(2011) 3 SCC 363, was relied upon, wherein on the following Paragraphs it has been held as follows:

"Para 16. It is a settled legal proposition that even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void. In State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil, Tayabbhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd., M. Meenakshi v. Metadin Agarwal and Sneha Gupta v. Devi Sarup, this Court held that whether an order is valid or void,



cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum."

57. Admittedly, Kotak Mahindra Bank has not approached the District Court at Rajahmundry and/or challenged the Decree in favour of Smt. K.Bharti. Therefore, unless set aside, it continues to remain binding and in operation.

58. It was also contended on behalf of the said 4<sup>th</sup> Respondent/Suspended Director that when the Tally data was available in the registered office of the Corporate Debtor there was no necessity whatsoever for the Resolution Professional to go elsewhere and obtain data from elsewhere. In any event, once the Suspended Directors who are duty-bound under the Code to provide data had done so; there was no reason to refer to or rely upon any other data.

59. Finally, it was contended that the following were un-disputed facts:-

- a) The pledge of shares of Mrs. K.Bharathi for the loan availed from India Bulls by the Corporate Debtor.
- b) That such pledged shares were sold by India Bulls i.e. an invocation of the guarantee by sale of pledged shares is also a fact.

60. Therefore, all other averments and allegations challenging the right of the Applicant Mrs.K.Bharathi as a Financial Creditor are

meaningless. It was emphatically urged that the said 4<sup>th</sup> Respondent/Suspended Director is not in any manner related to the Applicant Mrs. K. Bharathi.

61. Before analyzing the contentions and concluding thereon, it is pertinent to note that during the course of the previous hearings in the matter, an Order dated 26.05.2020 passed by a Learned Single Judge of the Hon'ble Madras High Court was placed before this Adjudicating Authority. Directions were subsequently passed by the Hon'ble Madras High Court in WP No. 12957 of 2021 preferred by Kotak Mahindra Bank Limited assailing the Order dated 26.03.2021 passed by this Adjudicating Authority on the question of whether the NCLT could proceed to hear the IBC cases in view of the pendency of the Appeals filed by Mrs. K.Bharathi before the Hon'ble Madras High Court in OSA Nos. 219 and 220 of 2021. This Adjudicating Authority had noted that the questions of whether the Applicant Mrs.K.Bharathi was a financial creditor was left open. The Hon'ble Madras High Court had left it to the NCLT to decide the matter in accordance with law.

62. Now having considered the rival contentions on various dates and the matter having stood over for consideration, the following questions of law and fact arise for consideration;

A. *Whether the 1<sup>st</sup> Respondent is a Financial Creditor within the meaning of Section 5(7) of the IBC, 2016?*



- B. *Whether the Loan Agreement dated 19.06.2009 between the Corporate Debtor and the 1<sup>st</sup> Respondent can be treated as fraudulent, nominal and a sham?*
- C. *Whether the initiation of CIRP by the 1<sup>st</sup> Respondent is hit by Section 65 of IBC, 2016?*
- D. *Whether the Forensic Audit Report dated 30.07.2019 is to be rejected?*
- E. *Whether the Mortgage Deed dated 25.05.2018 is a preferential transaction within Section 43 of IBC, 2016?*
- F. *Whether investigation ought to be ordered into the affairs of the Corporate Debtor and its group Companies?*

#### **ANALYSIS, REASONS & CONCLUSION**

63. For the sake of convenience, the Applicant in the Petition under Section 7 of the Code is referred to as the Applicant Mrs.K. Bharathi.

64. Each of the Issues Framed are answered in seriatim as below:-

- A. Whether the 1<sup>st</sup> Respondent is a Financial Creditor within the meaning of Section 5(7) of IBC, 2016?**
  - B. Whether the Loan Agreement dated 19.06.2009 between the Corporate Debtor and the 1<sup>st</sup> Respondent can be treated as fraudulent, nominal and a sham?**
  - C. Whether the initiation of CIRP by the 1<sup>st</sup> Respondent is hit by Section 65 of IBC, 2016?**
- h



65. Since the submissions and enquiry in respect of these aforesaid Issues are common and overlapping, they are taken up first and decided together.

66. At the outset, we find that the question of whether Mrs.K.Bharathi is a Financial Creditor is not required to be decided at this stage at all. This is because the matter is presently in the stage of Corporate Insolvency Resolution Process. No Decision on Admission or Rejection of Claim is required to be done at this stage as it has been clearly laid down by the Hon'ble Supreme Court in the case of **Swiss Ribbons Pvt Ltd vs Union of India &Ors.(2019) 4 SCC 17**); wherein it has been held by the Hon'ble Supreme Court that the Resolution Professional has no role to Adjudicate the Claim. The RP is only a Facilitator and is not required to decide a Claim. At Paragraph 58 of the said decision of the Hon'ble Supreme Court, it has been held that *"It is clear from a reading of the Code as well as the Regulation that the resolution professional has no adjudicatory powers."* Further that, *"it is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial powers."* The power to adjudicate on the Claim is vested with the Liquidator subject to the decision on Appeal (if any) before this Adjudicating Authority. Therefore, the relief sought by the RP on the validity of the Loan Agreement dated 30.07.2019 was beyond the scope of



the powers and duty conferred on the RP as the RP was never required to examine the validity of the claim of the Applicant as a Financial Creditor. It is pertinent to note here that in view of the Related Party status, the Applicant Mrs.K.Bharathi had already been removed from the CoC.

67. Nevertheless, we proceed to delve into the question of whether the Applicant Mrs.K.Bharathi is a Financial Creditor within the meaning of Section 5(7) of IBC, 2016 since the same may have a bearing on other questions that have been raised before this Adjudicating Authority on whether the documents in support of the Claim of the Applicant Mrs.K.Bharathi are tenable and/or the Proceedings under Section 7 of IBC, 2016 as initiated by Mrs.K.Bharathi are bad in law and have been maliciously initiated for purposes other than for resolution of insolvency. To answer this, it is essential to advert to the Definition of certain terms in the Code.

- **Section 2(10)** of the Code defines a **Creditor** as – “Means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder.”
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- **Section 2(11)** of the Code defines **Debt** – “means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”.
- **Section 2(6)** of the Code defines **Claim** as – “means A right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured Right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to right

of payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured”.

- **Section 5(7)** of the Code defines **FINANCIAL CREDITOR** – means any person to whom financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to Section 5(8) of the Code defines Financial Debt as means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) money borrowed against the payment of interest;

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

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; Explanation. –For the purposes of this sub-clause, –

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or

any other instrument issued by a bank or financial institution; (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;

68. Thus, the definition of 'financial creditor' and 'financial debt' makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition.

69. While interpreting the term "Financial Creditor", in the Judgment in ***Pioneer Urban Land & Infrastructure Ltd vs Union of India & Others*** [(2019) 18SCC 416] ; the Hon'ble Supreme Court had observed –

The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th ed.) to mean:  
"1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable.  
2. The money so paid; an amount of money given for a particular purpose."

70. In the case of ***Shailesh Sangani Vs Joel Cardoso and another*** Company Appeal (AT) (Insolvency) No. 616 of 2018 the NCLAT, Principal Bench was deciding the issue of a shareholder having granted unsecured loans payable on demand from time to time to the Company and some of which had been repaid and in

respect of outstanding balance, the Shareholder had moved the NCLT as Financial Creditor under IBC, 2016. Corporate Debtor raised the plea before the learned Adjudicating Authority that there were cross holdings *inter-se* the respondents in various companies and the amounts so arrived at was a settlement amount which had not ended in compliance of mutual obligations between the parties. The Corporate Debtor further stated that the unsecured loan of Rs.1,45,36,475/- was a part of overall settlement and it was ready to settle the cross holding of shares and loans *inter-se* the respondents. It was also contended that none of the loans under the quasi-partnership arrangement *inter-se* the Respondents had any term for repayment or interest. The learned Adjudicating Authority found that the contention raised on behalf of Corporate Debtor was not plausible as the factum of amount advanced as loan by Respondent no.1 to Corporate Debtor was admitted and reflected in the accounts and confirmed by the Corporate Debtor. Learned Adjudicating Authority was of the view that the said amount was arrived at after the parties mutually agreed and the same was reflected in the books of the Corporate Debtor under the head 'long term borrowings', the amount of debt fell within the purview of 'financial debt' notwithstanding the fact that no interest was payable. While concluding that the amounts provided by the Shareholders to the Company though without interest are still financial debts, the NCLAT has specified that the important point to

be considered is whether the transaction has been disbursed against consideration for time value of money and not necessarily there shall be any interest payment. While doing so, the following reasoning has been adopted by NCLAT:

“Para 5 – It is manifestly clear that the liability or obligation to pay must arise out of a claim due from a debtor/ borrower. The nature of obligation and from where it springs is immaterial.”

Para 6 – The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of ‘financial debt’. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money”.

71. The upshot of the above two Judgments is that Loans and Advances from Shareholders/Promoters/Directors when tendered for settlement of a debt would constitute a “Financial Debt” and make them a “Financial Creditor” if such loan/Advance had been tendered against the consideration for time value of money. In the

instant case, the Loan Agreement dated 19.06.2009 specifically provides for payment of Interest to the Applicant Mrs. K.Bharathi.

72. Our attention is also drawn to the fact that with a view to close the IL&FS loan account, it was the Corporate Debtor that had approached Indiabulls who agreed to provide Rs. 340 crore in the following manner:-

- Rs. 100 crore to M/s. Manoharamma Hotel Investments (P) Ltd. ('MHIPL'), strictly for the purpose of part-repayment of its existing loan with IL & FS.
- The remaining Rs. 240 crore were to be disbursed in the following manner:
  - o Rs. 150 crore would be paid directly to IL & FS for settlement of the existing loan, which would in turn be treated as a borrowing by GGPL.
  - o A further Rs. 90 crore would be paid to GGPL for its requirements on the express condition (among other requirements) that this Respondent, i.e., R1, pledges her shares in M/s. Sun TV Network Ltd. as a security in favour of Indiabulls.

73. The same shows that the pledge of shares of the Applicant Mrs.K.Bharathi was vital to the very borrowing from Indiabulls and that it was as per the stipulation of Indiabulls that she was called upon to secure the money lent to the Corporate Debtor. The 1<sup>st</sup> Respondent had therefore pledged 97,89,919 equity shares in Sun TV Network Limited in favour of Indiabulls as security for the loan availed by the Corporate Debtor. The shares provided as security by the 1<sup>st</sup> Respondent were in addition to the security provided by

the Corporate Debtor and Corporate Guarantor by way of mortgage of their property located at 601, Anna Salai, Chennai 600 001 and other properties including the personal guarantee of Mr. Manohar Prasad and Mr. Ravi Shankar Prasad. Accordingly, the amount of Rs.139.40 Crore realised by sale of shares together with the award of Rs.33 Crore (Rs. 23 Crore from Indiabulls and Rs.10 Crore from Indiabulls Securities Limited), aggregating to Rs.172.40 Crore was adjusted against the dues of the Corporate Debtor to Indiabulls. It is seen that neither the Resolution Professional nor Kotak Mahindra Bank have been able to demonstrate that the sale of shares owned by Applicant Mrs. K.Bharathi was appropriated towards repayment of loan taken by the Corporate Debtor from Indiabulls. Also, neither the RP nor the Bank have proven that the amount of Rs.172.40 Crore thus adjusted from sale of the shares of the Applicant Mrs.K.Bharathi was ever repaid to her by the Corporate Debtor at any point in time. Therefore, her money deserved to be repaid cannot be a subject of quarrel at all and the existence of a valid financial debt stands emphatically proved.

74. It is also significant to refer to Clause 3 of the Pledge Agreement dated 26.06.2008 between the Applicant Mrs.K. Bharathi and Indiabulls Financial Services Ltd which has much relevance. The said Clause 3 reads as under:-

Clause 3 - "CONTINUING SECURITY:

This Agreement and the security created hereunder, is and shall be a continuing security and shall remain in full force and effect until the Final Settlement Date notwithstanding any intermediate payment or satisfaction of the whole or any part of the Secured Obligations or the Insolvency or Liquidation or any incapacity or change in the constitution or status of the Pledgor or any intermediate settlement of account. The pledge and charge created under this Agreement is in addition to and independent of the security created in accordance with the terms of the other Security Documents or the enforcement thereof, or any other action that may be commenced against the Pledgor or any person by the Lender or its nominees and any such other security shall not in any way be prejudiced or affected by this Agreement.

Any irregularity, invalidity, frustration or other unenforceability of any obligations of the Pledgor and/or the Borrower under the Finance Documents, Security Documents or any other document or security or any present or future law or order of any Government / regulatory agency (whether of right or in fact) purporting to reduce or otherwise affect any of such obligations under this Agreement shall remain in full force and this Agreement shall be construed accordingly as if there were no such irregularity, unenforceability, invalidity, law or order."

75. Thus, the Pledgor's obligation is not confined to pledged shares and that the Pledgor was liable to "any other action against the Pledgor or any person..." shows that the Pledgor's liability was not restricted to the Pledged shares and included any other assets also. In other words, the liability of this Pledgor remained co-extensive with the liability of the Borrower towards satisfaction of the debt of the Lender. Such arrangement is nothing but a Guarantee, is bound to place the Pledgor in the rights of a Guarantor. The Loan Agreement dated 19.06.2009 specifically records so.



76. The rights of the Surety/Guarantor are laid down in Sections 140 -142 of the Contract Act, 1872 are significant. These read as under:-

- **Section 140** - Rights of surety on payment or performance. - Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.
- **Section 141** - Surety's right to benefit of creditor's securities. - A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety is entitled to recover from the principal debtor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.
- **Section 145**- Implied promise to indemnify surety. - In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but, no sums which he has paid wrongfully.

77. Thus the Applicant Mrs. K.Bharathi was entitled to all the securities that were provided at the time when the guarantee was extended and there is an implied promise on the part of Corporate Debtor to repay the amounts paid by the Applicant Mrs. K.Bharathi. The creation of security interest in her favour was only a matter of documentation because the vesting of security in the surety was by operation of law. The question of whether the Loan Agreement dated 19.06.2009 can be concluded to be sham and nominal only

because it was not disclosed in the Arbitral Proceedings against Indiabulls; is to be answered in the negative.

78. On examination of the Issues framed by the Arbitral Tribunal, an issue for consideration had never been framed with respect to the money due and payable by the Corporate Debtor to the Applicant Mrs. K.Bharathi which seems to be because she never raised a claim against the Corporate Debtor and agreed to defer realisation of her money in view of the promises under the Loan Agreement dated 19.06.2009.

79. Recital XIII and Recital XX of the Loan Agreement dated 19.06.2009 therefore contextually deserve consideration –

**Recital XIII** - The borrowers agreed to acknowledge the value of shares as Loan in their books of account payable to the Lender as soon as Indiabulls litigation was over.

**Recital XX** - The Lender lost faith on the Borrower, hence, she renegotiated terms and conditions. Pursuant to fresh terms and conditions, the borrower agreed to repay the loan amount to the Lender within 365 days (one year) from the date of settlement and payment with Indiabulls. However, if the Borrower fails or commits default in making payment to the Lender on the last day of the year then the Guarantor shall stand as Guarantor for repayment to the Lender and shall also create equitable mortgage of his immovable properties in favour of the Lender.

80. Now, the same, is to be appreciated with the admission of the RP in the Additional Written Submissions dated October 2019 in MA No. 863 of 2019 that –



Name of the Party	Amount in INR
India Bulls Loan received 2008 – Amount Received	77,50,00,000
Less: Utilised	
India Bulls Securities	7,39,32,800

81. Thus leaving, no manner or doubt that the Corporate Debtor had received the benefit of the settlement of debt by the Applicant Mrs.K.Bharathi. **We accordingly conclude that the Applicant Mrs.K.Bharathi is a Financial Creditor within Section 5(7) of the Code who was entitled to approach this Adjudicating Authority under Section 7 of IBC, 2016.**

82. At this juncture, it is noted that the Hon'ble Madras High Court had decided Appln Nos. 6897 and 6898 of 2018 in EP No. 194 of 2004 by Order dated 26.05.2020. This Application had been filed by an Execution Petitioner who claimed to have a Charge over the entire property of the Corporate Debtors since 1993. The Resolution Professionals of both Corporate Debtors appear to have duly represented the respective Corporate Debtors. It is noted that by the Judgment rendered therein, the Hon'ble Madras High Court had not declared the Loan Agreement dated 19.06.2009 as null and void. In such circumstances, we are not inclined to decide the question of validity of the Loan Agreement dated 19.06.2009 as there is only a *prima facie* view expressed but the same does not have the effect of declaring the Loan Agreement dated 19.06.2009

as null and void. The matter is covered by issue estoppel and does not require adjudication by this Tribunal. Suffice to conclude that unless set aside, the Agreement does not *ipso facto* become null and void.

**D. Whether the initiation of CIRP by the Applicant Mrs.K.Bharathi is hit by Section 65 of IBC, 2016?**

83. According to Kotak Mahindra Bank, the Applicant in MA/538 and 539/2019, the CIRP initiated by the Applicant Mrs.K.Bharathi is bad in law for want of *bonafides*. According to the Bank, the proceedings are hit by Section 65 of IBC, 2016 and attract penal action against the Applicant Mrs.K.Bharathi.

**Section 65 Fraudulent or malicious initiation of proceedings.**

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

(3) If any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.]of the Code reads as under -

84. In the case of ***Innoventive Industries Ltd. v. ICICI Bank and Anr.,(2018) 1 SCC 407***, the Hon'ble Supreme Court has made it clear that under Section 7(5) of IBC, 2016, the Adjudicating Authority, on being satisfied that there is a default, has to issue notice to the corporate debtor, hear the corporate debtor, and then adjudicate upon the same. The reason why disputes raised by financial creditors are not gone into at the stage of triggering the Code is because the evidence of financial debts are contained in the documents of information utilities, banks, and financial institutions. Disputes which may be raised can be raised at the stage of filing of claims once the resolution process is underway. Also, by the very nature of financial debts, set-off and counterclaims by financial debtors are very rare and, in any case, wholly independent of the loan that has been granted to them.

85. As for the question of 'Fraud' and/or 'Malice', the same cannot ordinarily be determined in summary proceedings as the present. Moreso in the context of judicial proceedings. The main grounds of attack against initiation of CIRP are that firstly the Applicant is not a Financial Creditor who has approached this Adjudicating Authority to obtain undue advantage and secondly that the Applicant Mrs.K.Bharathi has initiated CIRP on the strength of collusive and fraudulent legal proceedings culminating

in creation of a security interest in her favour. The Learned Counsel for the RP laid much emphasis on the fact that the proceedings before the Executing Court at Rajahmundry was uncontested and was moved in the 'vacation court'. The Learned Senior Counsel appearing for the Bank contended that a Judgment obtained by playing a fraud on the Court can be challenged before any Court even in collateral proceedings.

86. We have already turned down the first contention that the Applicant Mrs.K.Bharathi is not a financial Creditor. Therefore no 'undue'advantage has accrued to the Applicant Mrs.K.Bharathi. Now therefore the question of 'fraudulent intent' and/or 'malicious intent' is to be examined.

87. At the outset, we are unable to accept this submission that merely because the matter had been moved in 'vacation' court, the same could be termed as 'fraudulent'. To accept such contention would amount to questioning the majesty and authority of a competent court of law having jurisdiction to hear and try disputes. Especially because at that stage, an Award had already been passed and the proceedings before the District Court at Rajahmundry were in the nature of execution of the Award. Whether the Court was in 'vacation' or otherwise was irrelevant.



88. As for the proceedings being fraudulent and/or a fraud having been played on the Court, the Learned Counsel for the Bank had contended that a fraud had been played upon the Court by obtaining an Arbitral Award on the strength of fake documents and further fraud had been played on the Court by utilising the fraudulent Arbitral Award in to seek registration of the MODT from the District Court at Rajahmundry. As per the law laid down by the Hon'ble Supreme Court in **A.V. Papayya Sastry v. Government of A.P.** (2007) 4 SCC 221, fraud was defined in the following words –

"Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss and cost of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants."

89. In this regard, it would also be useful to refer to the Decision of the Hon'ble Kerala High Court in **Papavinasom Subrahmoniam vs Daivani Nagaramma and Ors** (AIR1939 KER 26) wherein –

"Paragraph 8 - It is often said that fraud vitiates the most solemn proceedings of courts of justice. Lord Coke said, it avoids all judicial acts. Statutory recognition is given to this principle in Section 44 of the Evidence Act which allows a party to a suit or other proceeding to show that a judgment, order or decree proved against him was obtained by fraud or collusion so as to nullify its effect on him. But, equally well settled is the principle that a judicial decision is conclusive inter partes on

the matter decided; or, in other words, a matter decided is decided once for all. This principle of res judicata also finds statutory expression in Section 11, Code of Civil Procedure. It then becomes necessary to reconcile these two principles in their application in practice.

Paragraph 9 - The nature of 'fraud' which may entitle a party to the suit to nullify the judgment therein by another suit has been considered in a long line of decisions; and it is now well settled that fraud to be a ground for vacating a judgment must be extrinsic or collateral to the adjudications involved in the judgment and not been, or deemed to have been, dealt with by the court in the impugned judgment."

90. We find that the District Court at Rajahmundry had little else to adjudicate except to direct Registration of the MODT. As for the Arbitral Award dated 11.04.2018, the same has not been set aside by the Hon'ble High Court Appln Nos. 6897 and 6898 of 2018 in EP No. 194 of 2004 by Order dated 26.05.2020. **Therefore, the proceedings for Execution of the Award cannot be faulted either and the question of whether such Order was obtained by Fraud, does not require to be decided. In any event, the relief in terms thereof pertains to the creation of security interest and a question to be decided at the Liquidation stage only.**

**E. Whether the Forensic Audit Report dated 30.07.2019 is to be rejected?**

91. On perusal of the Forensic Audit Report (FAR) dated 30.07.2019, we do find that there are un-explained deviations from the purposes of IBC, 2016. The look-back period of 10 years is un-

explained when preferential transactions are required to be identified within the statutory look-back period of 2 years in the case of Related Party and 1 year in the case of Non-Related Party. In these circumstances a look-back period of 10 years lacks rationale especially when the Resolution Professional had originally informed vide her letter dated 01.03.2019 to the Statutory Auditor that the look-back period was to be not less than 8 years. The extension of the look-back period to 10 years is clearly an afterthought. The hurried manner of replacement of the original Forensic Auditor is also unexplained especially when the earlier Forensic Auditor had been given all data already and the later Forensic Auditor complained of lack of data. We are therefore constrained to accept the submission of the Learned Senior Counsel for the Application in MA/939/2019 that a look-back period of 10 years has been set only to sensationalise the Report. Moreso, the FAR extracts deposition of Mr. A. Manohar Prasad as a Prosecution Witness in the 2G Scam Case. While the credibility of the alleged deposition itself is questionable, the necessity to produce the same in a Forensic Audit Report and that too when such deposition does not even pertain to the Corporate Debtor; only displays vindictiveness. Also, the other terms of reference without even production of the original terms of reference by the Resolution Professional to the Forensic Auditor does not inspire any confidence in the Report. The re-casted balance sheet filed with



the FAR is not only un-warranted but runs contrary to Section 130 of the Companies Act, 2013 which prohibits re-casting of balance sheet and other books of accounts except by Orders of the Tribunal. In the present case, the Resolution Professional did not obtain any Orders for re-casting of balance sheet from this Tribunal and the instruction to the Forensic Auditor to carry out such re-casting cannot be countenanced.

92. Likewise, the conclusions on diversion of funds is also misconceived as admittedly all group entities within the 'Gemini Group' functioned in concert and as a whole. The sanction of INR 100 Crore to Manoharamma Hotel & Investments Ltd was stated to be for settlement of previous debt from IL&FS which was *inter alia* for the very acquisition of the Corporate Debtor in 1992.

93. As for the rival submissions regarding usage of data for the purpose of carrying out the Forensic Audit is concerned, we find unsavoury allegations being levelled against all Professionals be it the previous IRP, the present RP, the Forensic Auditor and even certain Counsels. The sum and substance of such allegations is only to suggest that the Resolution Professional obtained some data, labelled it as belonging to the Corporate Debtor and used it for a Forensic Audit to achieve pre-determined results. The data obtained by the Resolution Professional from third party premises

has been questioned because it was not with the due authorisation of the Suspended Directors and had not been obtained from premises of the Corporate Debtor.

94. It was further contended that the RP is victimising the Suspended Directors only because a police complaint had been given against the Resolution Professional. We are unable to accept the submission. The Resolution Professional had gone to third party premises only on the instructions of the previous IRP. Besides, such third party was a group entity of the same Corporate Debtor but for lack of independent witness to certify the content obtained by the Resolution Professional, no credibility can be accorded to the data allegedly obtained therefrom. We note the contention of the Learned Senior Counsel appearing for the Applicant in MA/939/2019 that a Seizure Memo/Mahazar ought to have been drawn up. While, this was not the function of the Resolution Professional, it has certainly vitiated any reliance on such data. *De hors* all the above, once the Suspended Director had tendered the tally back-up and other books of accounts before this Tribunal, nothing further was required or ought to have been done. The FAR dated 30.07.2009 by M/s. Dandekar & Co. deserves to be rejected in the teeth of it due to the fundamentals of such Audit being based on unreliable data.

95. Besides, the purpose of Forensic Audit itself being limited to identification of preferential, under-valued and extortionate transactions; alone, the Forensics Audit Report far exceeds its purpose and scope. **On this score, we are inclined to reject the Forensic Audit Report although other grounds on which it is assailed *inter alia* including a verbatim reproduction of paragraphs of the Affidavit of the Resolution Professional filed in this Court, conclusions that are drawn contrary to generally accepted accounting principles etc. Once the Report is found vindictive, the other contents thereof do not merit consideration.**

**F. Whether the Mortgage Deed dated 25.05.2018 is a preferential transaction within Section 43 of IBC, 2016?**

96. We now advert to the next issue as to whether the Mortgage Deed dated 25.05.2018 is a preferential transaction within the meaning of Section 43 of IBC, 2016.

97. The validity of the mortgage is being examined by the Division Bench of the Hon'ble Madras High Court in OSA Nos.219 and 220 of 2021. This Tribunal is therefore not inclined to adjudicate upon the same. In any event the validity of the mortgage is relevant only at the time of distribution of assets under Section 53 of the Code and such a situation is not a present reality.

98. Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 requires the RP to form an opinion whether the Corporate Debtor has been subjected to any avoidance transaction on or before the 75<sup>th</sup> day of the insolvency commencement date (ICD). Where he is of the opinion that the CD has been subjected to any transactions covered under the aforesaid sections, he shall make a determination, on or before the 115<sup>th</sup> day of the ICD, under intimation to the Board. Further, he shall apply to the Adjudicating Authority for appropriate relief on or before the 135<sup>th</sup> day of the ICD. These provisions aim to bring back the value lost through avoidance transactions, so that maximisation of value of the assets of the CD can be achieved. In this case, even the impugned Forensic Audit Report does not record that any assets of the Corporate Debtor have been lost or frittered away.

99. Under Section 43 of the IBC, 2016 a transaction is said to be a 'preferential transaction' if: (a) the transaction relates to transfer of the property or interest of the corporate debtor for the benefit of a creditor, surety or guarantor in relation to an antecedent / past liability; and (b) the transaction has the effect of giving such creditor, surety or guarantor a beneficial position in the distribution of assets in the event of liquidation under Section 53 of the IBC.

100. Further, for any such preferential transaction to be avoidable, it ought to have occurred: (a) in case of a transaction with a related party, within a "look back" period of two years immediately preceding admission of the corporate debtor into insolvency; and (b) in any other case, within a "look back" period of one year immediately preceding admission of the corporate debtor into insolvency. Transactions in the ordinary course of the business or financial affairs of the corporate debtor or the transferee which result in the creation of new value for the corporate debtor are exempted even if such transactions fall within the aforesaid look back periods.

101. In the case of **Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited Etc. Etc.**(2020) 8 SCC 401, the Hon'ble Supreme Court explained the duties and responsibilities of the RP in respect of avoidance transactions and held –

That the RP shall-

- i. Sift through all transactions relating to the property/interest of the CD backwards from the ICD and up to the preceding two years;
- ii. Identify persons involved in the transactions and put them in two categories:
  - (a) related party under section 5(24), and
  - (b) remaining persons;
- iii. Identify which of the said transactions of preceding two years, the beneficiary is a related party of the CD and in which the beneficiary is not a related party. The sub-set relating to



unrelated parties shall be trimmed to include only the transactions preceding one year from the ICD;

- iv. Examine every transaction in each of these sub-sets to find out whether (a) the transaction is of transfer of property of the CD or its interest in it; and (b) beneficiary involved in the transaction stands in the capacity of creditor/surety/guarantor;
- v. Scrutinise the shortlisted transactions to find, if the transfer is for or on account of antecedent financial debt/operational debt/other liability of the CD;
- vi. Examine the scanned and scrutinised transactions to find, if the transfer has the effect of putting such creditor/surety/guarantor in beneficial position, than it would have been in the event of distribution of assets under section 53. If answer is in the affirmative, the transaction shall be deemed to be of preferential, provided it does not fall within the exclusion under section 43(3); and then
- vii. Apply to the AA for necessary orders, after carrying out the aforesaid volumetric and gravimetric analysis of the transactions. The Supreme Court observed that the parameters and the requisite enquiries as also the consequences in relation to different types of avoidance transactions are different. It clarified that once transactions are held as preferential; it is not necessary to examine whether these are undervalued and/or fraudulent. In preferential transaction, the question of intent is not involved and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time, while undervalued transaction requires different enquiry under sections 45 and 46 where the AA is required to examine the intent, if such transactions were to defraud the creditors.

102. The Hon'ble Supreme Court further held that Sections 43 and 44 of the IBC, 2016 create a legal fiction with a deeming effect and if any transaction shows existence of the ingredients enlisted in Section 43, it would create a legal fiction and such transaction would come in the teeth of Section 43 of the IBC irrespective of the intent or absence thereof unless excepted by the

exceptions provided for section 43 (3) of the IBC. This Tribunal accordingly examines the issue of whether the mortgage in favour of the Applicant Mrs.K.Bharathi is preferential in nature given that the same is within a period of 2 years from the CIRP commencement date and is in favour of a Related Party.

103. It may here be recalled that this Adjudicating Authority has already found the Applicant Mrs. K. Bharathi to be a Financial Creditor. In relation to the challenge mounted by the RP of Gemini Arts Private Limited towards the claim of Mrs. K. Bharathi is concerned, this Adjudicating Authority would wish to emphasize that an IRP / RP cannot be vacillating in respect of the claims filed by the creditor and more particularly as that of the Financial Creditor. It is seen from the IBBI website that the claim of Mrs. K. Bharathi is admitted and now the RP by way of present Application cannot seek to alter the said claim. This proposition was upheld by the Hon'ble NCLAT in the matter of **Rajinish Jain V. Manoj Kumar Singh I.R.P.** vide Company Appeal (AT) (Ins)No.519 of 2020, wherein it has been held as follows;

59. "Based on the above discussion, we clarify and hold that during CIRP, the IP is authorized to collate the claims, and based on that he has empowered to constitute the Committee of Creditors. We hold that the Resolution Professional may add to existing claims of claimants already received, or admit or reject further Claims and update list of Creditors. But after categorization of a claim by the IRP/Resolution Professional we hold that they cannot change the status of a Creditor. For example, if the Resolution Professional has accepted a claim as Financial Debt and Creditor as a Financial Creditor, then he cannot review or change that position in the name of updation of Claim. It is also to be clarified that

*while updating list of Claims the Resolution Professional can accept or reject claims which are further received and update list."*

Thus, it is seen that once the RP has admitted the claim of the Financial Creditor, as per the dictum of the Hon'ble NCLAT, under the pretext of updation of claim, the RP cannot alter the claim or change its status. Precisely the Resolution Professional in the present case is trying to do the same indirectly what he cannot do directly. At this juncture, the question here is as to whether the mortgage in her favour is preferential in nature. We find that her right to security interest is traceable to 2009 when the Pledge was invoked and upon satisfaction of the Loan of India bulls, she automatically stood vested with the right of securities held by India bulls. In any event, we are unable to accept the contention of Kotak Mahindra Bank that upon satisfaction of the First Charge Holder i.e. India bulls the Second Charge Holder is elevated to the status of a First Charge Holder. This is because:-

a) Upon satisfaction of the First Charge Holder, the Party satisfying such First Charge Holder is entitled to in turn seek vesting of the Security Interest in his/her favour. This is by operation of law.

b) Admittedly, Kotak Mahindra Bank did not have an equitable mortgage in their favour and had an Order of Interim Attachment in its favour obtained from DRT, Chennai. This

did not *ipso facto* render Kotak Mahindra Bank as a Secured Creditor. Having an Attachment Order is one thing and being a Secured Creditor is another. A Secured Creditor is defined under Section 3 (30) of IBC, 2016 to mean a Creditor in favour of whom Security Interest is created. Further Section 3(31) defines 'Security Interest' as "right, title or interest or a claim to property, created in favour of, or provided for a Secured Creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person". The inclusion of a Decree Holder is conspicuously absent in the definition of Security Interest. This also goes to the root of the allegation of Kotak Mahindra Bank that an undue preference was sought to be created in favour of the Applicant Mrs. K. Bharathi because she already stood at a better position over Kotak Mahindra Bank. As already held *supra*, we have not found Proceedings initiated before this Tribunal malicious or fraudulent. Therefore, the Mortgage Deed is not preferential in nature and is not covered under the deeming fiction to Section 43 (2) inasmuch as it ought to have the effect of putting such Creditor in a beneficial position than it would have been in the event of distribution in terms of the waterfall mechanism.



**The challenge to the Mortgage Deed dated 25.05.2018  
as a preferential transaction; is accordingly dismissed.**

**G. Whether investigation ought to be ordered into the  
affairs of the Corporate Debtor and its group Companies?**

104. As per the law laid down in **Union of India vs Maharashtra Tourism Development Corporation** [*Company Appeal (AT) (Insolvency) No. 964 of 2019*], the Adjudicating Authority is not competent to straight away direct any investigation to be conducted by the 'Serious Fraud Investigation Office' and the procedure under Section 212 and 213 of the Companies Act, 2013 is to be followed. We find no case made out for the same. In any event, much valuable CIRP period has been lost to litigation before various courts. The RP's are therefore required to expeditiously proceed with the Resolution Process.

105. In the result, the Applications in MA Nos. 863, 537, 538 and 539 of 2019 fail and accordingly stand **dismissed**. MA/939/2019 stands **allowed in part** to the extent discussed *supra*. No costs.

-Sd-  
**B. ANIL KUMAR**  
MEMBER (TECHNICAL)

*Raymond*

-Sd-  
**Justice (Retd.) S. RAMATHILAGAM**  
MEMBER (JUDICIAL)