

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

IA. NO. 187/ND/2022

IN

Company Petition No. (IB)-101/(PB)/2017

IN THE MATTER OF:

Educomp Solutions Limited

... Corporate Debtor

AND IN THE MATTER OF IA. NO. 187/ND/2022:

Mr. Shantanu Prakash

R/o C-11/1, DLF City Phase I,
Gurgaon Haryana,
Presently in New Delhi

... Applicant

VERSUS

1. Mr. Mahendar Singh Khandelwal,

Resolution Professional,
Educomp Solutions Limited
The Palm Springs Plaza,
Office No. 1501-8, 15th Floor
Sector-54, Golf Course Road
Gurgaon-122001

... Respondent No. 1

2. Committee of Creditors,

Educomp Solutions Limited
Corporate Office at
514, Udyog Vihar, Phase III,
Gurgaon, Haryana -122001

... Respondent No. 2

3. State Bank of India

SBI House, 3rd Floor,
1211, Padma Tower I, 5,
Rajendra Place, New Delhi-110008

... Respondent No. 3

4. State Bank of India, Singapore Branch

135 Cecil Street,
#01-00, Singapore, 069536

... Respondent No. 4

SECTION: **Section 60(5) of IBC 2016**

Order Delivered on: 25.08.2023

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

- For the Applicant** : Sr. Adv. Saurabh Kirpal, Adv. Malak Bhatt, Adv. Mandeep Singh, Adv. Nikhil Arora for Applicant Mr. Shantanu Prakash
- For the Respondent** : Adv. Ankur Mittal, Adv. Ateendra Saumya Singh for SBI Singapore/Respondent No.4
- For the CoC** : Adv. Moulshree Shukla, Adv. Krishan Singhal
- For the RP** : Sr. Adv. P. Nagesh, Adv. Abhishek Sharma, Adv. Ashly Cherian, Adv. Gaurav Arora, Adv. Kritiya Sinha, Adv. Himanshu Kohli in IA-187/2022

ORDER PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

The captioned application has been preferred by Shantanu Prakash, Ex-Director/Suspended Management of Educomp Solutions Limited (ESL/Corporate Debtor) under Section 60(5) read with Section 47 of the Insolvency and Bankruptcy Code 2016. A brief conspectus of facts giving rise to the present petition, as mentioned in the application is that the Educomp Asia Pacific Pte Limited ("Educomp Asia") is the fully owned subsidiary of ESL (CD). The Educomp Asia availed a loan facility of USD 20 million to acquire 51% stake in the US based E-learning Solutions Company i.e. The Learning Internet Inc. ("TLI") from the State Bank of India, Singapore. The ESL (CD) through its fully owned subsidiary- Educomp Asia, owns almost 55% of The Learning Internet Inc. (TLI). It was in 2008, when Educomp Asia Pacific Pte Limited (Educomp Asia) availed the aforementioned loan facility of USD 20 million from SBI Singapore.

2. The Learning Internet Inc. (TLI), which is popularly known as 'Learning.com' is described by the Applicant as among the best e-learning companies in the USA providing award-winning web-curriculum for grades K-12. As the Educomp Asia Pacific Pte Limited entered into a Facility Agreement with SBI, Singapore on 16.05.2008, in terms of Deed of Guarantee dated 22.05.2008, Educomp Solutions Limited (ESL) i.e., the holding company of Educomp Asia Pacific Pte Limited viz. CD in the present proceedings provided a corporate guarantee in favour of SBI, Singapore. In turn, Educomp Asia pledged the shares of 'The Learning Internet Inc.' (TLI) with SBI Singapore vide Stock Pledge Agreement dated 23.07.2008.

3. In March 2014, the equity valuation of The Learning Internet Inc. (TLI) was conducted by a global audit, accounting, and consulting group i.e., M/s Mazars for the purpose of restructuring of loan availed from SBI, Singapore. The valuation was based on the financial projection for 8 years, from March 31, 2014 to March 2021. As per the valuation done by Mazars on the basis of discounted cash flow method, the equity value of The Learning Internet Inc. (TLI) was estimated at USD 42.049 million as on March 31, 2014 and the valuation of the same (55% stake of Educomp Asia Pacific Pte Limited) as on the date of application i.e., 12.01.2022 was estimated over 250 million USD.

4. In terms of the order dated 12.09.2017, the CD viz. Educomp Solutions Limited (ESL) was admitted to CIRP and Mr. Mahender Singh Khandelwal was appointed as the Resolution Professional (RP). As a corollary, the Board of Directors of ESL/CD was suspended and a Committee of Creditors (CoC) was constituted. The SBI, India was part of CoC. By virtue of the invocation of

Deed of Guarantee dated 22.05.2008, SBI Singapore i.e., the Respondent No. 4 herein also became member of the Committee of Creditors (CoC).

5. Meanwhile, in terms of the order dated 30.06.2017 passed by High Court of Singapore, the Educomp Asia Pacific Limited had gone into Liquidation and Mr. Wong Joo Wan and Mr. Yong Chor Ken were appointed as its Liquidators.

6. Having come to know that the SBI Singapore i.e., the Respondent No. 4 herein was contemplating to divest shares of 'The Learning Internet Inc. (TLI) the Applicant raised a query in the 21st meeting of CoC qua Educomp Solutions Limited (ESL) held on 21.06.2021 regarding the process to be followed for divestment of the security and as to whether the realisation of the full value of the shares was going to take place or not. The query was pointed to the Respondent No. 4 herein i.e., SBI Singapore. Besides, multiple representations were made before the CoC to bring to fore that the SBI Singapore and its controlling body i.e., SBI HO India should not carry out the sale of the shares of The Learning Internet Inc. held by Educomp Asia Pacific Pte Limited unless the same is fair, transparent and in the oversight of the CoC. It was also buttressed before the CoC that the sale of the shares should be at maximum value to be arrived at by following internationally accepted and recognized principles of valuation. The Applicant also raised the issue regarding the shares of The Learning Internet Inc. held by the Educomp Asia Pacific Pte Limited i.e., a subsidiary of the Educomp Solutions Limited (CD) in the present proceedings, also in the 22nd CoC meeting qua the Educomp Solutions Limited (CD) held on 11.08.2021. In the said meeting, the Applicant

asked regarding the sale of the shares and the details of the sale, if any. The representative of the Respondent No. 4 i.e., SBI Singapore could not give any response to the question raised by the Applicant. As the shares of The Learning Internet Inc. were of considerable value and the valuation of Ed Tech companies was on rise, in terms of the e-mail dated 10.09.2021, the Applicant again espoused that the shares should not be disposed of without following the transparent process. Nevertheless, in terms of the e-mail dated 16.09.2021 sent by Mr. RC Mishra, SVP (Credit Admin), State Bank of India to the RP of the Educomp Solutions Limited (CD), with reference to the e-mail from Mr. Shantanu Prakash and in response to the same, it was espoused that the shares of The Learning Internet Inc., exclusively pledged to SBI Singapore by Educomp Asia Pacific Pte Limited, did not fall under the purview of CIRP proceedings of Educomp Solutions Limited and had been sold pursuant to an agreement executed on 03.09.2021 amongst Educomp Asia Pacific Pte Limited (through Liquidator), the purchaser and the security holder. In the said e-mail, Mr. RC Mishra also emphasized that the security holder is a secured creditor of Educomp Asia and had exclusive rights over the shares under the Stock Pledge Agreement.

7. It is the case of the Applicant that the shares of The Learning Internet Inc. owned by the subsidiary of CD, held in security by the Respondent No. 4 were sold by the security holder (the Respondent No. 4) at scrap value price i.e., lessor than the loan value which was approximately USD 14.905 million and there is no explanation by SBI, India or SBI Singapore, for sale of the asset at a throwaway price. The salient plea canvassed by the Applicant

herein is that the sale of the shares at throwaway price is significantly undervalued and is ex-facie illegal, thus the members of the CoC and Resolution Professional ought to have not permitted the same. According to Applicant, it was incumbent upon the CoC and the Resolution Professional to intervene in the sale of the shares of The Learning Internet Inc. held in security by the Respondent No. 4 (SBI Singapore) and they should have approached the concerned regulatory forums in their efforts to ensure that the blatant sale of the assets of the CD should not have taken place at a grossly undervalued price.

8. In terms of the e-mail dated 21.09.2021, the Applicant solicited certain information from SBI viz: -

- a) Details of bidders who submitted expressions of interest along with value.
- b) Details of independent valuation reports on the asset sold by SBI, Singapore
- c) Process followed to auction the asset including the appointment of any merchant bankers/advisors, advertisement given etc.
- d) Copy of the Share Purchase agreement with the actual buyer and the terms thereof.
- e) Approvals obtained to sell the asset from the various Asset Sale Committees (if any) of the bank (SBI Singapore/SBI India)
- f) Latest financial position of The Learning Internet Inc. for past 3 years.

9. In terms of the legal notice dated 18.12.2021 referred to in para 13 of the application, the Applicant apprised the CoC and RP about the undervalued transaction (sale of the shares at throwaway price). The concern expressed by the Applicant is that a genuine and transparent sale of shares

of The Learning Internet Inc. could have extinguished almost the entire debt of the CoC, which could have resulted in the revival of the Corporate Debtor as also increased in value of shares including those held by the Applicant.

10. Mr. Saurabh Kripal Ld. Senior Counsel for the Petitioner espoused extensively that: -

(i) The sale of shares (ibid) by the Respondent No. 4 i.e., State Bank of India, Singapore is an under-valued transaction and as the Resolution Professional did not report the transaction to this Adjudicating Authority, in terms of provisions of Section 47 of IBC, 2016, it was obligatory for Applicant to file the captioned application, seeking the declaration that the under-valued transaction is void and is liable to be reversed with all its effect. To buttress the plea, Mr. Saurabh Kripal read out the provisions of Section 47 (ibid).

(ii) In not questioning the sale of the shares of The Learning Internet Inc. held by the SBI, Singapore (the Respondent No. 4 herein) as security for the loan granted by it to Educomp Asia Pacific Pte Limited, the subsidiary of the CD (Educomp Solutions Limited), qua which the CD stood as guarantor, the CoC failed to exercise its commercial wisdom, thus the CIRP process stood vitiated. To buttress the plea, the Ld. Senior Counsel relied upon the judgment of Hon'ble Supreme Court **Ngaitlang Dhar Vs. Panna Pragati Infrastructure Pvt. Ltd. and Ors.** (Civil Appeal No. 3665-3666/2020)

(iii) Maybe in terms of the provisions of Section 18(1)(f) read with Section 18(1)(g)(b) of the IBC, 2016, the assets of the subsidiary may not

be treated as assets of CD for the purpose of being taken in control and custody by the IRP, but for the purpose of being preserved and declaration of moratorium qua the same as provided under Sections 20, 25 and 14 of the IBC, 2016, the same need to be treated as part of the property/asset/beneficiary interest of the CD/Holding Company.

11. To refute the plea and contentions put-forth on behalf of the Applicant, Mr. P. Nagesh Ld. Sr. Counsel appearing for the Respondent No.1 i.e., RP submitted: -

a) The captioned application preferred by a Suspended Director of Corporate Debtor is not maintainable, for the simple reason that in the present case, no transaction by or on behalf of the Corporate Debtor is involved and the assets of the subsidiary company already in liquidation cannot become the subject matter of the CIRP in process qua the holding company i.e., the CD herein.

b) It is settled law that the assets of the subsidiary company cannot be dealt with in the manner in which the assets of CD undergoing are to be dealt with. The assets of the subsidiary company viz. Educomp Asia Pacific Pte Limited could not have been subjected to Moratorium qua the CIRP for Insolvency Resolution of the CD herein.

c) The shares of The Learning Internet Inc. owned by the Educomp Asia Pacific Pte Limited, pledged with the SBI Singapore i.e., the Respondent No. 4 if could be sold for higher price, the additional price so fetched could be utilised to discharge the liabilities of the Educomp Asia Pacific Pte Limited and not that of the Guarantor i.e., the CD herein.

12. In response to a specific query raised by this Adjudicating Authority regarding the claim of SBI Singapore submitted to RP and its voting share in CoC, before and after disposal of the shares in issue, Mr. P. Nagesh Ld. Sr. Counsel for RP/Respondent No. 1 submitted that the Corporate Debtor provided a Corporate Guarantee in favour of SBI Singapore for the loan facility extended to Educomp Asia Pacific Pte Limited i.e., a subsidiary of the CD/Educomp Solutions Limited. On commencement of the CIRP against the CD/Educomp Solutions Limited, SBI Singapore filed its claim dated 19.06.2017 with the RP for an amount of INR 112,82,42,159.97 (US\$17,455,969.65). In terms of the provisions of Section 5(8) of IBC, 2016, the financial debt includes inter alia the amount of any liability in respect of any of the guarantees. Ergo, the RP admitted and verified the claim filed by SBI Singapore, in accordance with the provisions of the Code and applicable regulations. After the verification and admission of the original claim, SBI Singapore became member of the CoC with 3.73 % voting share. During the pendency of C.A. No. 195 of 2018, it was brought to the notice of the RP by SBI Singapore i.e., the Respondent No. 4 that the shares held by Educomp Asia Pacific Pte Limited in The Learning Internet Inc. had been sold and the proceeds of the sale was utilised towards the outstanding dues payable by Educomp Asia to SBI Singapore. Thereafter, SBI Singapore filed its updated claim in Form C. As per the revised claim, the amount sought by SBI Singapore has been reduced from INR 112,82,42,159.97 (US\$ 17,455,969.65) to INR 67,17,18,480.81 (US\$10,392,713.40).

13. The present application could be preferred, when the RP was in the process of verifying the revised claim, the Applicant preferred the present application challenging the shares held by Educomp Asia in The Learning Internet Inc. In the wake, the verification of the revised claim is still pending.

14. The Ld. Counsel for the Respondent Nos. 3 and 4 reiterated the submissions put forth on behalf of the Respondent No. 1. The Counsel for Respondent No. 2 adopted the arguments advanced on behalf of the Respondent Nos. 1, 3 and 4.

15. In the wake of the pleas and submissions raised by the counsels for the parties, following aspects emerge to be analysed and adjudicated by us: -

(i) Whether the shares held by Educomp Asia Pacific Pte Limited i.e., a subsidiary of the CD herein viz. Educomp Solutions Limited in The Learning Internet Inc. can be treated as an asset of the CD.

(ii) Whether in the wake of 100% shares of Educomp Asia Pacific Pte Limited being held by the CD in the present proceedings, the shares held by Educomp Asia Pacific Pte Limited in The Learning Internet Inc. can be treated as assets of the CD.

(iii) Whether the plea of under-valuation raised by the Applicant in terms of the provisions of Section 47 of IBC is tenable.

(iv) Whether Moratorium could be applied to the shares held by Educomp Asia Pacific Pte Limited, a subsidiary of Educomp Solutions Limited in The Learning Internet Inc.

(v) When the Corporate Guarantor is liable to discharge such debt of a creditor for which it stands as security/executed Deed of Guarantee, whether it can question the valuation and sale price of the security pledged by the Corporate Debtor with the secured financial creditor as collateral/security.

16. As far as the first and second propositions are concerned, though it can be seen from Section 2(87) of the Companies Act, 2013, the composition of the Board of Directors in a subsidiary company is controlled by its holding company, but still the jural relationship between a holding company and its subsidiary is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary company. In **Vodafone International Holdings BV vs. Union of India** (2012) 6 SCC 613, Hon'ble Supreme Court viewed that the Companies Act in India and all over the world have statutorily recognised subsidiary company as a separate legal entity. The legal relationship between a holding company and WOS (when a holding company holds all the voting stock of another company, the company is said to be a WOS of the parent company) is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary. Para 257 of the judgment reads thus:

“257. The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. In Bacha F. Guzdar v. CIT, this Court held that shareholders’ only rights is to get dividend if and when the company declares it, to participate in the liquidation proceeds and to vote at the shareholders’ meeting. Refer also

to Carew and Co. Ltd. v. Union of India and Carrasco Investments Ltd. v. Directorate of Enforcement.”

17. Though, the CD i.e., Educomp Solutions Limited owned 100% shares of the Educomp Asia Pacific Pte Limited, but it does not entitle it to have any interest in the assets of the Educomp Asia Pacific Pte Limited. As could be viewed in **Bacha F. Guzdar, Bombay v. Commissioner of Income Tax** AIR 1955 SC 74, a shareholder acquires a right to participate in the profit of the company, but it is not possible to accept the contention that the shareholders acquire any interests in the assets of the company. In other words, a shareholder on investing money in the purchase of shares does not become entitled to the assets of the company though undoubtedly, he acquires a right to participate in the profit of the company, if and then the company decides to determine the same. Following the said judgment, also in **Greater Noida Industrial Development Authority (GNIDA) vs. Roma Unicon Designx Consortium** (Company Appeal (AT) (Insolvency) No. 180 of 2022), Hon'ble National Company Law Appellate Tribunal viewed that the shareholder does not acquire any interest in the assets of the company by purchasing its shares. Thus, we are left with no doubt that the assets of Educomp Asia Pacific Pte Limited cannot be treated as part of assets of Educomp Solutions Limited i.e., the CD in the present proceedings. To amplify, it is made clear that though buying the shares in a company does not entitle the investor/purchaser of the share to assets/ portion of asset of a company, but the shares/stocks in itself constitute part of financial assets of the shareholder. A financial asset is a liquid asset that gets its value from a contractual right or ownership claim. Though the shares held by Educomp Solutions Ltd. i.e.,

CD qua Educomp Asia Pacific Pte Limited could form part of the financial asset of the CD but the shares held by Educomp Asia Pacific Pte Limited in The Learning Internet Inc. could not have formed part of assets or property of the CD in any manner. Once the holding and subsidiary company are different and distinct legal persons and the shareholder is not entitled to claim any right or interest qua the assets of a company, the percentage of shareholding would not make any difference in this regard. Thus, even the 100% shareholding by the Educomp Solutions Ltd. in Educomp Asia Pacific Pte Limited would not entitle the Educomp Solutions Limited i.e., the CD herein to claim the assets of Educomp Asia Pacific Pte Limited as that of its own. Maybe Mr. Saurabh Kripal Ld. Sr. Counsel for the Applicant is right in espousing that the explanation below clause (g) of Section 18 of IBC, 2016 restricts the exclusion of assets of a subsidiary of a corporate debtor only to said section (Section 18) i.e., for the purpose of taking the control and custody of any asset over which the corporate debtor has ownership right, but when in terms of the view taken by Hon'ble Supreme Court (ibid), the asset of subsidiary cannot be treated as that of holding company, it cannot be viewed that the IRP or RP was under obligation to preserve the value of the shares held by Educomp Asia Pacific Pte Limited in The Learning Internet Inc., in terms of the provisions of Section 20(1) or Section 25(1) of IBC, 2016. The contention put forth by the Ld. Senior Counsel could also give rise to the proposition that whether the expression 'asset' referred to in Section 18(f) and (g)(a) of the IBC, 2016, is distinct from the expression 'property' referred to in Section 20(1) and Section 25(1) of the Code. To give a verdict on such a proposition, we need to refer to the definition of the terms 'property' (**as**

defined under Section 2(27) of the Code) and ‘asset’. As can be seen from the definitions/meanings given in College Law Dictionary, the “property” has been defined as the right and interest which a person has in lands and chattels to the exclusion of others. The term ‘property’ is a generic term of extensive application which means the right which a person has in relation to something or a dominion or indefinite right to use and disposition which one may lawfully exercise over particular things or objects. The expression ‘property’ has been defined in **R.C. Cooper V. Union of India**, AIR 1970 SC 564 at 591, 592. The relevant excerpt of the judgment reads thus: -

*“38. Before the Constitution (Seventh Amendment) Act, Entry 33, List I invested the Parliament with power to enact laws with respect to acquisition or requisitioning for the purpose of the Union, and Entry 36, List II conferred upon the State Legislature the power to legislate with respect to acquisition or requisitioning for the remaining purposes. Those entries are now deleted, and a single Entry 42, List III invests the Parliament and the State Legislatures with power to legislate with respect to “acquisition and requisitioning” of property. By Entry 42 in the Concurrent List power was conferred upon the Parliament and the State Legislatures to legislate with respect to “Principles on which compensation for property acquired or requisitioned for the purpose of the Union or for any other public purpose is to be determined, and the form in which such compensation is to be given”. Power to legislate for acquisition of property is exercisable only under Entry 42 of List III, and not as an incident of the power to legislate in respect of a specific head of legislation in any of the three lists; Rajahmundry Electric Supply Corporation Ltd. v. the State of Andhra. Under that entry “property” can be compulsorily acquired. In its normal connotation **“property” means the “highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which***

does not depend on another's courtesy : it includes ownership, estates and interests in corporeal things, and also rights such as trade-marks, copyrights, patents and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured". The expression "undertaking" in Section 4 of Act 22 of 1969 clearly means a going concern with all its rights, liabilities and assets-as distinct from the various rights and assets which compose it. In Halsbury's Laws of England, 3rd Edn., Vol. 6, Art. 75 at p.43, it is stated that "Although various ingredients go to make up an undertaking, the term describes not the ingredients but the completed work from which the earnings arise".

39. *Transfer of and vesting in the State Corporations of the entire undertaking of a going concern is contemplated in many Indian Statutes: e.g., Indian Electricity Act, 1910, Sections 6, 7 & 7-A; Air Corporation Act, 1953, Sections 16 and 17; Imperial Bank of India Act, 1920, Sections 3 and 4; State Bank of India Act, 1955, Section 6(2), (3) and (4); State Bank of India (Subsidiary Banks) Act, 1959; Banking Regulation Act, 1949, Section 14-A, 36-AE; and Cotton Textile Companies Act, 1967, Sections 4(1) and 5(1). Power to legislate for acquisition of "property" in Entry 42, List III therefore includes the power to legislate for acquisition of an undertaking. **But, says Mr. Palkhivala, liabilities of the banks which are included in the connotation of the expression "undertaking" cannot be treated as "property". It is however the assets, rights and obligations of a going concern which constitute the undertaking: the obligations and liabilities of the business form an integral part of the undertaking, and for compulsory acquisition cannot be divorced from the assets, rights and privileges. The expression "property" in Entry 42, List III has a wide connotation and it includes not only assets, but the organisation, liabilities and obligations of a going concern***

as a unit. A law may, therefore, be enacted for compulsory acquisition of an undertaking as defined in Section 5 of Act 22 of 1969.

40. The contention raised by Mr. Palkhivala that the Parliament is incompetent to legislate for acquisition of the named banks in so far as it relates to assets of the non-banking business fails for two reasons: (i) that there is no evidence that the named banks held any assets for any distinct non-banking business; and (ii) that the acquisition is not shown to fall within an entry in List II of the Seventh Schedule.

III. Infringement of the Fundamental Rights of the petitioner:

40-A. Clauses (1) and (2) of Article 31 subordinate the exercise of the power of the State to the basic concept of the rule of law. Deprivation of a person of his property and compulsory acquisition may be effectuated by the authority of law. It is superfluous to add that the law limiting the authority of the State must be within the competence of the Legislature enacting it, and not violative of a constitutional prohibition, nor impairing the guarantee of a fundamental right. This Court held in *Kavalappara Kottarathil Kochuni & Others v. The State of Madras and Others*; *v. Swami Motor Transport Company (P) Ltd. v. Sri Sankaraswamigal Mutt and Maharana Shri Jayavantsingji v. The State of Gujarat* that a person may be deprived of his property by authority of a statute only if it does not impair the fundamental rights guaranteed to him. It is again not contested on behalf of the Union that the law authorising acquisition of property must be within the competence of the law-making authority and must not violate a constitutional prohibition or impair the guarantee of any of the fundamental rights in Part III. But it is claimed that since Article 31(2) and Article 19(1)(f) while operating on the same field of the right to property are mutually exclusive, a law directly providing for acquisition of property for a public purpose cannot be tested for its validity on the plea that it imposes limitations on the right to property which are not reasonable.

41. *By Article 31(1) and (2) the right to property of individuals is protected against specific invasions by State action. The function of the two clauses-clauses (1) and (2) of Article-31 is to impose limitations on the power of the State and to declare the corresponding guarantee of the individual to his right to property. Limitation on the power of the State and the guarantee of right are plainly complementary. Protection of the guarantee is ensured by declaring that a person may be deprived of his property by “authority of law”: Article 31 (1); and that private property may be compulsorily acquired for a public purpose and by the “authority of a law” containing provisions fixing or providing for determination and payment of compensation: Art. 31(2). Exercise of either power by State action results in abridgement-total or partial-of the right to property of the individual. Article 19 (1) (f) is a positive declaration in the widest terms of the right to acquire, hold and dispose of property, subject to restrictions (which may assume the form of limitations or complete prohibition) imposed by law in the interests of the general public. The guarantee under Article 19(1)(f) does not protect merely an abstract right to property: it extends to concrete rights to property as well : Swami Motor Transport Co. (P) Ltd’s case (supra).”*

18. From the aforementioned, it is clear that the expression ‘property’ has a wider connotation and it includes the asset and liability both. Property in a way is a legal right qua lands or tenements, goods or chattels etc. In a way the expression property defines right qua asset such as land, building, part of building, machinery, plant, furniture, fitting, or other things such as machinery, plant, furniture, fitting, etc. Property includes both right and liability qua an asset. In the present case, the shares bought by Educomp Asia Pacific Pte Limited qua The Learning Internet Inc. (TLI) was beneficial interest of the subsidiary of the CD i.e., Educomp Solutions Limited. Though as defined in Sales of Goods Act, 1930, the shares are goods, but are goods of

special kind which are capable of being transferred only in accordance with a special mode prescribed in the Companies Act, 2013. As has been viewed in **Vasudev Ram Chandra Shelat Vs. Pranjal Jayanand Thakar and Ors.** 1974 AIR page 1728, the shares are movable property. The relevant excerpt of the judgment reads thus:

“Shares in a company are certainly a form of property. Section 28 of the Companies Act, 1913, says that they “shall be moveable property, transferable in the manner provided by the articles of the company”. Both sides accept as correct the view of the Division Bench of the High Court that the shares are “goods” within the meaning of the Sale of Goods Act. The point which, however, deserves to be noted here is that the wide definition of “property” in Section 6 of the Transfer of Property Act includes not merely shares as transferable, moveable property, but would cover, as a separable form of property, a right to obtain shares which may be antecedent to the accrual of rights of a shareholder upon the grant of a share certificate in accordance with the articles of association of a company.”

19. Apparently, the shares of The Learning Internet Inc. (TLI) is an asset/property of the subsidiary of the CD, thus, we are unable to countenance the plea espoused on behalf of the Applicant that the Respondent Nos. 1 & 2 failed to discharge their legal obligations, in not taking steps to prevent the Respondent No. 4 from disposing off the shares held by Educomp Asia Pacific Pte Limited qua The Learning Internet Inc. (TLI) kept as a security with Respondent No. 4.

20. As far as the plea of the under-valued transaction is concerned, no doubt where an under-valued transaction is found to have taken place and the Liquidator or the Resolution Applicant as the case may be, has not

reported to the Adjudicating Authority, a creditor, member or a partner of a Corporate Debtor as the case may be, may make an application to the Adjudicating Authority to declare such transaction as void and reverse its effect. Nevertheless, the under-valued transaction has been defined in Section 45 of IBC, 2016. As can be seen from the said provision, the transaction which can be termed as under-valued needs to be that qua the CD. A plain reading of sub-Section 2 of Section 45 (ibid) reveals that a transaction shall be considered under-valued where Corporate Debtor makes a gift to a person or enters into a transaction with a person which involves the transfer of one or more assets by the Corporate Debtor for consideration of the value which is significantly less than the value of the consideration provided by the Corporate Debtor, and such transaction has not taken place in the ordinary course of business of the Corporate Debtor. Section 45 of IBC, 2016, reads thus: -

“45. Avoidance of undervalued transactions.

*(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) [***] determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.*

(2) A transaction shall be considered undervalued where the corporate debtor-

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of

the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

It is apparent from above that an under-valued transaction can be alleged only against the Corporate Debtor. The sale of shares owned by a subsidiary of CD, by the lender/financial creditor of the subsidiary of CD, with whom the same stood pledged as security for repayment of debt cannot be termed as a transaction by the CD (Corporate Debtor), thus there is no question of treating the same as an under-valued transaction. Thus, the plea raised on behalf of the Applicant for declaring the sale of the shares of The Learning Internet Inc. (TLI), owned by Educomp Asia Pacific Pte Limited, by the Respondent No. 4 with whom the shares were pledged as security for repayment of loan is not tenable and is nixed.

21. The further plea, raised on behalf of the Applicant is that there being a Moratorium declared under Section 14 of IBC, 2016, qua the CD (Corporate Debtor), the shares of The Learning Internet Inc. (TIL) held by the subsidiary of Educomp Solutions Limited (CD) by State Bank of India (Singapore) (Respondent No. 4) with whom the shares were pledged as security, could not have been sold. The submission put forth by Mr. Saurabh Kripal Id. Senior Counsel, in this regard, was that the CD (Educomp Solutions Limited) has a beneficial interest in the shares in question. Black's Law Dictionary (9th Edition, Page 913) defines 'beneficial interest' as a right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. A beneficial interest is also distinguished from the right of someone like a trustee or official who has a responsibility to perform and/or to stake title to

the assets but does not share the benefit of the same. Section 89 of the Companies Act, 2013 identifies two types of interest qua the shares of a company. One is legal interest vested with the registered holder of the shares who is also referred to as registered or ostensible member. Another is a beneficial interest vested with the beneficial owner or the beneficial member. A beneficial interest is the right to receive benefits of shares held by another party. As has been provided in sub-section 10 of Section 89 of the Companies Act, 2013 inserted by Companies (Amendment Act, 2017) w.e.f. 13.06.2018, for the purpose of Section 89 and 90 of the Companies Act, beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise the right or entitlement of a person alone or together with any person. The Section 89 (10) reads thus:-

“(10) For the purpose of this section and section 90, beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to –

- (i) exercise or cause to be exercised any or all of the rights attached to such share; or*
- (ii) receive or participate in any dividend or other distribution in respect of such share.”*

The Applicant is unable to show any contract, arrangement or any other instrument to establish that the CD had any entitlement either alone or together with any other person to exercise or cause to be exercised any or all of the rights or to receive or participate in any dividend or other distribution attached to/in respect of the shares of The Learning Internet Inc. owned by Educomp Asia Pacific Pte Limited.

23. In terms of the Rule 9 of Companies (Management and Administration) Rules 2014, a person whose name is entered in the register of members of the company as the holder of shares in that company but who does not hold the beneficial interest in such shares should file with the company a declaration to that effect in Form No. MGT-4 within a period of 30 days from the date on which his name is entered in the register of members in such company. Similarly, every person acquiring a beneficiary interest in shares of a company not registered in his name shall file with the company a declaration disclosing such interest in Form No. MGT-5 within 30 days after acquiring such beneficial interest in the shares of the company. As the Applicant herein is unable to show that either the CD or Educomp Asia Pacific Pte Limited filed Form No. MGT-5 or MGT-4, we are unable to accept the plea espoused by the Ld. Sr. Counsel that there being a beneficial interest of the CD qua the shares of The Learning Internet Inc. owned by Educomp Asia Pacific Pte Limited, by operation of Section 14 of IBC, 2016, Moratorium in respect of the shares could apply with the commencement of CIRP for the CD.

24. The crucial and pertinent proposition cropped up in the wake of submissions put-forth by the Counsels for the parties is, “*locus standie*” of the Guarantor to question the valuation of security pledged by the borrower with the creditor, when the same is sold/disposed of by the Guarantor to recover the loan amount. Loans are generally secured or collateralized by assets which include floating and fixed assets, shares of the company, cash in the bank and in some cases corporate or personal guarantee. In certain circumstances, the borrower might not have enough assets or any collateral to secure the loan

and in such situations, the borrower is compelled to bring in a third party, who can stand or use his asset to facilitate the borrower to secure loan. Such persons are referred to as, “Third Party Guarantor”. The contract binding the borrower, lender and the guarantor is generally called, “Contract of Guarantee” or unconditional personal guarantee and indemnity. A proper definition of Guarantee is an undertaking to answer for the payment of performance of another person’s debt or obligation. According to the Black’s Law Dictionary 7th Edition page 711, a guarantor is defined as “one who gives security for a debt”. A guarantor’s liability does not begin until the principal debtor is in default. Furthermore, a guarantor is a term used to describe an individual who promises to pay a borrower’s debt in the event that the borrower defaults on his loan obligation by pledging his assets as collateral against the loan.

25. As can be seen from Regulation 21A of IBBI (Liquidation Process) Regulations, 2016, a secured creditor should inform the Liquidator of its decision to relinquish a security interest to the liquidation estate or realize its security interest as the case may be. But the moot question which arises is that “whether it is incumbent upon the secured creditor to apprise the CD or RP of CD about such a decision”. A contract of guarantee creates some rights and liabilities between the lender and the guarantor. A Guarantor is technically a debtor because when the principal debtor fails to pay his debt, the Guarantor is called upon to pay the money owed. The liability of the guarantor crystallizes the moment a default occurs on the part of the borrower.

26. Upon the execution of a contract of guarantee, there exists a separate contract between the Creditor and the Guarantor, which can be enforced by the Creditor, when there is a breach without recourse to the borrower, who is the Principal Debtor. Once a debt has accrued and the Guarantor is called upon by the Creditor, the Guarantor is directly liable to the Creditor independent of the borrower's liability to the Creditor. Similarly, the Guarantor is directly liable to the Principal Borrower, in the event, the Principal Borrower defaults or refuses to honour his repayment obligations. In such situations, definitely a question would arise that what steps a Guarantor must take to protect his right in a contract of guarantee. It would not be inappropriate for every Guarantor to take certain steps so as to protect himself to reduce the risk of standing as a Guarantor. One of such steps, the Guarantor may take is to diligently identify the assets which the borrower intends to nominate as security/collateral for the borrower's loan. Similarly, it would not be impermissible or improper for a Guarantor to be vigilant about the valuation of the securities/collateral pledged by the debtor to secure loan sought to be disposed of by the secured creditor, as the same would have direct bearing on the liability of debtor to discharge the loan. Section 128 of the Indian Contract Act 1872, clearly provides that the liability of the surety is co-extensive with that principal debtor unless it is otherwise provided by the contract. It would not be gain said that the liability of the borrower and the guarantor to discharge the debt is almost a joint liability. In terms of the provisions of Section 141 of the Act (Indian Contract Act, 1872) 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 knows the existence of each security or not and if the Creditor loses or without the consent of the surety, part with such surety, the surety is discharged to the extent of the value of the security. Section 2(f) of the SARFAESI Act treats the Guarantor as Borrower. Section 13(11) of SARFAESI Act give option to creditor either to proceeds against the Guarantor or pledged asset. In the wake, particularly the provisions of Section 141 of the Indian Contract Act (ibid), which entitle a surety to benefit of every security, the creditor has against the principal debtor, we have no hesitation in taking a view that the Guarantor/Surety can raise the question about the valuation of the security pledged by the Principal Debtor/Borrower with the secured creditor.

27. In view of the aforementioned, the present application is disposed of with the following directions: -

a) On deposit of the fees of valuation to be determined by the IBBI, by the Applicant herein, the RP shall approach IBBI within one week from today for the appointment of two Registered Valuers to do the valuation of shares of The Learning Internet Inc. owned by the Educomp Asia Pacific Pte Limited and pledged with State Bank of India, Singapore as on 03.09.2021. The Valuers so appointed shall submit to the IBBI and Resolution Professional valuation of the shares (ibid) computed in accordance with internationally accepted valuation standards within a period of 01 (one) month of their appointment.

b) If the average of the two estimates of the valuations of the shares as on 03.09.2021 to be done by the Registered Valuers to be appointed

as above are significantly different (the difference being 10% or more), the Resolution Professional may, in consultation with IBBI, appoint a third registered valuer to do the valuation of shares (ibid) as on 03.09.2021. If the valuation done by the two valuers or third valuator so appointed, as the case may be is found more than the value of USD 7.1 million for which the shares were sold on 03.09.2021, the claim of SBI Singapore against the Corporate Debtor would stand reduced to the equal or that extent.

c) The CIRP qua the Educomp Solution Limited (CD) would continue unhindered and uninfluenced by the aforementioned direction (a & b) The secured financial claim of the State Bank of India (Singapore) qua the CD would be subject to the outcome of the valuation result/report. No costs.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)