IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH (COURT NO.-II)

KOLKATA

IA No. 1511/KB/2025

In

CP No. 1684/KB/2018

IN THE MATTER OF:

JAYANTA BENERJEE

……Financial Creditor

VERSUS

INCAB INDUSTRIES PRIVATE LIMITED

……Corporate Debtor

AND

IN THE MATTER OF:

PEGASUS ASSETS RECONSTRUCTION PRIVATE LIMITED, having its registered office at 507 Dalamal House Jamnalal Bajaj Marg, Nariman Point, Mumbai – 400021 and a branch office at 54, Ekdalia Road, 1st Floor, Kolkata - 700 019.

VERSUS

1. **MR. PANKAJ KUMAR TIBREWAL**, Resolution Professional of the Corporate Debtor (under CIRP), having his place of business at AAA Insolvency Professionals LLP, Mousumi Apartments, Ground Floor, 1513 Ballygunge Circular Road, Kolkata-

700019. Email id: incabindustries@aaainsolvency.com & pankaj.tibrewal@aaainsolvency.com

2. Tropical Ventures Company Limited, a company incorporated under the laws of Mauritius having its office at 3 a Floor, Rogers House, No. 5 President John Kennedy Street, Port Louis Mauritius. Email id: sanjay.ramchandani@rediffmail.com, dhruv.malik@jclex.com, sharmistha@jclex.com and adv.sreejoyee001@gmail.com

.....Respondents

Coram:

Shri. Labh Singh, Member (Judicial)

Ms. Rekha Kantilal Shah, Member (Technical)

Appearances (via Physical/Hybrid Mode):

Mr. D.N Sharma, Adv	]
Mr. Orijit Chatterjee, Adv	] For the SRA
Ms. Safura Ahmed, Adv	]
Mr. Aishi Tewary, Adv	]
Mr. Shaunak Mitra, Adv	] For the RP
Mr. Siddharth Makkar, Adv	]
Mr. Pankaj Tibrewal, RP	]
Mr. Sudho Satra Banerjee, Adv	] For Tropical Venture
Mr. Prantik Garai, Adv	]

Mr. A. Chakraborty, Adv]

Ms. Sreyoyee Bose, Adv]

Date of Pronouncement: 03.12.2025

O R D E R

Per: Rekha Kantilal Shah, Member (Technical)

1. The present interlocutory application has been filed by the petitioner with following prayers:

   a) Pass an order quashing and setting aside the decision of the Respondent No. 1 whereby he has incorrectly admitted the revised claim of the Respondent No. 2;

   b) Pass an order rejecting the claim of the Respondent No. 2 against the Corporate Debtor as admitted; and

   c) Pass such further and other orders and directions as the nature and circumstances of the case may require and as this Hon'ble Tribunal may deem fit and proper.

2. Briefly stated the facts of the case are that Incab Industries Limited (hereinafter referred as "Corporate Debtor), was admitted into Corporate Insolvency Resolution Process (for short 'CIRP') vide order dated 7th August 2019. However, later on, the Corporate Debtor was ordered to be liquidated vide order dated 7th February 2020. The order of liquidation was challenged before Hon'ble NCLAT, New Delhi. Hon'ble NCLAT vide its order dated 4th June 2021

set aside the order of liquidation passed by this Tribunal and reinstated the CIRP process of the Corporate Debtor and removed the erstwhile Resolution Professional and directed for appointment of Resolution Professional be appointed. Accordingly, this Tribunal vide order dated 16th June 2021, appointed Mr. Pankaj Kumar Tibrewal, the Respondent No. 1 as the IRP/RP of the Corporate Debtor.

3. The case of the applicant is that it has filed its claim with the respondent no. 1 who verified the claim and after verification, it was admitted. The applicant is one of member of the Committee of Creditors (for short ('COC'). During the CIRP process, it came to the knowledge of the applicant that respondent No. 2 had filed its claim with the respondent No. 1 as a financial creditor of the Corporate Debtor.

4. The Corporate Debtor has been a sick Company since long and during the year 1999, it was referred to Board for Industrial and Financial Reconstruction (for short 'BIFR') under The Sick Industrial Companies (Special Provisions) Act, 1985. The claim of the Respondent No. 2 had never been adjudicated upon by the BIFR and Delhi High Court as the issue of assignment of debt in favour of the respondent No. 2 was never decided for the want of submission of the assignment deeds.

5. The applicant desired to inspect the documents filed by the respondent No. 2 in support of its claim and upon request, allowed

to inspect the same. After inspection, the applicant vide letter dated 9th December 2021 sent through its Advocate requested the respondent No. 1 to reject the claim of respondent No. 2. However, respondent No. 1, vide e-mail dated 10th December 2021 indicated his opinion to admit the claim of the Respondent No. 2 considering it as a related party to the Corporate Debtor and admitted the claim of the Respondent No. 2 for a sum of Rs. 19,90,63,12,342.00 (Rupees Nineteen Hundred and Ninety Crore Sixty-Three Lakh Twelve Thousand Three Hundred and Forty Two only).

6. The Applicant, being aggrieved from the decision of respondent no. 1, preferred application being I.A. No. 140 of 2022 before this Tribunal to quash and set aside the decision of the Respondent No. 1 whereby he has incorrectly admitted the claim of the Respondent No. 2 and reject the claim of the Respondent No. 2 against the Corporate Debtor.

7. Respondent No. 2, being dissatisfied with the decision of the respondent no. 1 to admit claim partly, also filed an application being I.A. No. 84 of 2022 against the said decision of the Respondent No. 1 and prayed for admission of its entire claim and to be treated as a secured Financial Creditor claiming not a related party. The said application was dismissed by this Tribunal vide order dated 8th January 2025.

8. Respondent no. 2 has filed its claim for a sum of Rs. 21,52,84,33,946.87/- (Rupees Twenty-One Hundred & Fifty-Two Crore

Eighty-Four Lakh Thirty-Three Thousand Nine hundred forty-Six and Paise Eighty-Seven only) which consists of principal sum of Rs. 1,12,31,26,944.90/- and Rs. 20,40,53,07,002.07/- interest thereon.

9. It appears from the application filed by the Respondent No. 2 and claim filed by it before the Respondent No.1 that it has claimed itself as secured financial creditor based on alleged deed of Assignment dated 8th March 2007 executed by one Leader Universal Holdings Berhad (hereinafter referred to as "the alleged Assignor") in its favour.

10. It has further been submitted that consequent upon decision on I.A. No. 140 of 2022 filed by the applicant and I.A. No. 2429 of 2024 filed by Respondent No. 2, this Tribunal vide order dated 08th January 2025 directed Respondent No. 1 to re-verify the claim of the Respondent No. 2. The applicant came to know that the Respondent No. 1 has admitted the claim of Respondent No. 2 to the tune of Rs. 17,31,40,02,705/- as a secured Creditor of the Corporate Debtor. The applicant vide letter dated 31.03.2025 objected to the Claim of Respondent No. 2 admitted by the Respondent No. 1 herein.

11. The aforesaid claim includes the principal amount allegedly discharged by the alleged assignor pursuant to the purported invocation of guarantees, and interest thereon amounting to Rs. 21,531 Crores on the said amount, an alleged hypothecation over

the Corporate Debtor's movable assets, and mortgage rights over immovable properties situated at 9 Hare Street (Kolkata), Hadapsar (Pune), and Jamshedpur.

12. Respondent No. 1, while admitting the claim of respondent no. 2, has not applied his mind to the documents and legal framework relevant to the claim and his decisions suffers from patent legal infirmities. Respondent No. 1 has blindly followed the opinion given by the Advocate for Respondent No. 2 without undertaking any independent legal analysis, and without proper scrutiny of the documents submitted by the respondent no. 2. There is a complete absence of reasoning or application of mind from legal prospect. Respondent No. 1 has erred in treating Respondent No. 2 as a secured creditor of the Corporate Debtor solely on basis of assignment deed dated 08th March 2007. Respondent No. 1 has failed to appreciate the fact that the deed of assignment only transfers rights, title and interest in the debt and makes no reference to any hypothecation or mortgage.

13. Respondent No. 1 has failed to consider and apply binding statutory restrictions under the extant applicable laws. Respondent No. 1 has failed to discharge his bounden duty to examine law applicable on foreign guarantors and has instead blindly relied on the opinion furnished by the Respondent No. 2 without any independent verification or analysis of the legal provisions.

14. It is further submitted that the deeds of guarantees were executed on 03.03.1997, 12.09.1997 and 26.02.1999 in favour of Citi Bank, HSBC and ICICI respectively. The Corporate Debtor registered various charges and modification of charges in favour of ICICI, HSBC and Citi Bank in or about 1998. At the time, when the deeds of guarantees were purportedly executed, the applicable law governing foreign transactions was the Foreign Exchange Regulation Act, 1973 (for short "FERA Act 1973"). Section 31 of the FERA Act 1973 put restrictions on acquisition of an immoveable property by a foreign company by way of a mortgage or otherwise, except with the previous permission of the Reserve Bank of India.

15. Respondent No. 1 has deliberately overlooked the said provision and has instead upheld the contention of the Respondent No. 2 that it is a secured creditor, without calling upon them to furnish a copy of the previous permission, if any obtained by them or its predecessor from the Reserve Bank of India. The Respondent No. 1 has by his action, has shown complete dis-regard for the extant applicable law.

16. It has further been stated that upon the invocation of the guarantees by the lenders, the alleged assignor made payments under the said guarantees to the respective lenders between April 2000 and June 2001. Respondent No. 1 has failed to examine whether at the time when the alleged assignor paid the amounts under the guarantees, it could have stepped into the shoes of the original

lenders and acquired rights to the securities under subrogation under the Contract Act by completely ignoring the provisions of the special statute governing foreign exchange at that relevant time. i. Foreign Exchange Management Act, 1999(for short "FEMA Act 1999") which replaced FERA and had come into force on 1st June 2000.

17. Respondent no. 1 ought to have appreciated that Leader Berhad would have had to obtain prior permission from the Reserve Bank of India if it were to acquire the immovable property of the Corporate Debtor via mortgage under the FERA Act 1973. Respondent no. 2 has submitted expert opinion to Respondent No. 2 to substantiate its claim. The expert has merely opined that upon payment of monies to the lenders, Leader Berhad, the alleged assignor stepped into the shoes of the creditors.

18. Respondent no. 1 should have considered the provision of RBI Notification No. FEMA 29/RB-2000 dated 26.09.2000 ("FEMA 29 RB") as payments were made by alleged assignor to lenders of Corporate Debtor post 01st June 2000. The said notification was applicable since some of the payments were made by the alleged assignor after the FEMA Act 1999 came into force. Respondent No. 2 has claimed an additional amount of Rs. 21,531 Crores by way of interest, more than the actual amount paid by the alleged assignor, the predecessor of the respondent no. 2 and such a claim is not permissible in law, and as such, the respondent No. 1, by admitting

such a claim has acted in complete disregard for the legal provisions.

19. Respondent no. 1 has also failed to examine applicability of RBI Circular No. 28 dated 30th March 2001, which provides that the borrowing and lending of Indian rupees between two residents does not attract any provisions of the FEMA Act 1999. In cases where a rupee loan is granted against the guarantee provided by a non-resident, there is no transaction involving foreign exchange until the guarantee is to meet the liability under the guarantee.

20. Thus, in view of the above, the relevant time for applicability of relevant law is the time when the guarantee is invoked, and payments are discharged under such guarantee and not the time when the guarantee were issued. Respondent No. 1, without application of mind, has accepted the submissions by Respondent No. 2 that the relevant time of issuance of a guarantee should be considered and not the time of invocation of guarantee.

21. It is further submitted that admitting respondent No. 2 as a secured creditor is also violative of the provisions of the FERA Act 1973 and the FEMA Act 1999. It is mandatory to seek prior approval of RBI in terms of the FERA Act 1973 and the FEMA Act 1999 for creation of a security in favour of a foreign company in the case of an External Commercial Borrowing (ECB).

22. Though both the Corporate Debtor(borrower) and Lenders (the Guaranteeing Banks) were Indian residents, and there was no cross-

border movement of funds for approval under the FERA Act 1973 and were treated as permissible resident to resident transactions; however, the legal character of the transaction changed materially in 2020 and 2021 when the alleged assignor, a non-resident entity, discharged its liability under the guarantees by making payments to the Indian lenders. This created a foreign currency debt between the Corporate Debtor and the alleged Assignor, thereby attracting the provisions of the FEMA Act 1999.

23. Under Regulation 3 of RBI FEMA Notification No. 3/2000-RB (and its successor Notification FEMA 3(R)/2018), a resident borrower cannot accept loans or financial debts from a non-resident without prior permission of the Reserve Bank of India. Respondent No. 2 has provided no evidence of such permissions under FEMA 3/2000 or under its successor FEMA 3(R)/2018. Consequently, the resulting debt is statutorily unsecured under the FEMA Act 1999, which overrides any contractual subrogated claims.

24. The interest component of Rs. 81,531 Crores in the claim of Respondent No. 2 directly violates the proviso to Para 2A of FEMA 29/2000, which caps recovery at rupee equivalent of amount paid under guarantee. RBI Circular No. 28 (2001) reaffirms this restriction, permitting only principal reimbursement. The attempt of Respondent No. 2 to claim interest contradicts the fundamental design of FEMA 29 as an exchange-neutral settlement mechanism.

25. It has further been submitted that this Tribunal conclusive finding in its order dated 08th January 2025 on IA No. 84/2022 established Respondent No. 2 as a related party under IBC due to its acquisition of Leader Hong Kong, the ultimate holding company of Corporate Debtor. The Regulation 21(3) of the CIRP Regulations expressly prohibits related parties from treating as secured creditor or voting parity in the CoC. Even if security rights existed, which is denied, this status alone voids Respondent No. 2's secured classification.

26. It has been submitted that the admission of the claim of Respondent No. 2 by the Respondent No. 1 as a secured financial creditor, as recorded in the said affidavit dated 19th May 2025, is contrary to Indian law i.e the provisions of the FEMA Act 1999 and RBI regulations. It is further contrary to the public policy of India, and gravely prejudicial to the interests of other legitimate creditors.

27. Therefore, present application deserves to be allowed and claim of respondent no. 2 requires to be rejected.

28. Respondents no. 1 appeared in pursuance of notice issued by this Tribunal and filed reply opposing the present application. It has been replied that answering respondent, being resolution professional, verified the claim filed by respondent no. 2 and considered the original registered deed of assignment dated 08.03.2007 executed between Leader Berhad and respondent no. 2 to

be valid in nature. Accordingly, respondent no. 2 was considered as a secured financial creditor of the Corporate Debtor. It was found that during its business, the Corporate Debtor had availed various credit and overdraft facilities from Citi Bank, ICICI as well as HSBC to the tune of Rs.93.35 Crore.

29. The part claim of Respondent No.2 pertaining to liabilities originally owed to HSBC, which was earlier provisionally admitted as claim of unsecured financial creditor by the Resolution Professional to the extent of Rs 2,59,23,09,637/- have already been rejected as per the direction of the Adjudicating Authority vide order dated 08.01.2025.

30. It has further been replied that on account of the financial position of the Corporate Debtor, Leader Berhad was brought in as a sponsor by one of the lenders of the Corporate Debtor, the ICICI. A Memorandum of Understanding (MOU) dated 04.12.1996 was executed between Leader Berhad, ICICI Limited as the lead Institution, ANZ Grindlays Bank Limited as the lead Bank and the Corporate Debtor. The Leader Berhad undertook to revive the Corporate Debtor by restructuring and/or partially waiving the liabilities of the Corporate Debtor to various lenders. Consequently, during the year 1997 and 1999, Leader Berhad executed various Deed of Guarantee in favour of Citi Bank and ICICI respectively, the lenders of the Corporate Debtor and a Hold

Cover Guarantee was executed in favour of HSBC for Overdraft Facility availed by the Corporate Debtor.

31. It is inferred from the deed of assignment dated 08.03.2007 executed between Leader Berhad and respondent no. 2 that the liabilities of the Corporate Debtor as safeguarded by Leader Berhad by way of 'Deed of Guarantees' and the 'Hold Cover Guarantee' were assigned by Leader Berhad to respondent no. 2 for a consideration of USD 1.00 on 'as-is where-is basis'. Thus, respondent no. 2 stepped in shoe of the Leader Berhad and claimed to recover the dues from the Corporate Debtor as a Financial Creditor.

32. It has further been replied that with respect to the directions passed by the Adjudicating Authority in para no. 69(c) of its final order dated 08.01.2025, the answering respondent submits that the Foreign Exchange Regulatory Framework was governed by the FERA Act 1973 which was prevailing statute upto 31.05.2000.

33. The provisions of Section 26 of the FERA Act 1973, which put restrictions, are not attracted to those entities incorporated or situated outside India like that of Leader Berhad, who is a non-resident within the meaning of the FERA Act 1973, being a company incorporated in Malaysia, having its principal place of business outside India. Therefore, it cannot be applicable to the guarantees issued by Leader Berhad. The Guarantees issued by Leader Berhad, did not involve acquisition of any Indian assets

whether immovable property, or securities nor did it involve outward remittance of any foreign exchange at the time of execution.

34. The said actions of Leader Berhad did not attract the regulatory provisions of the FERA Act 1973. Therefore, Leader Berhad was not obligated to obtain prior approval from Reserve Bank of India or the Central Government under the provisions of the FERA Act 1973 to issue guarantees in favor of ICICI Bank Limited, and Citi Bank.

35. It has further been replied that the FERA Act 1973 was repealed in the year 2000 with Regulation 3 of Foreign Exchange Management (Guarantees), Regulations, 2000 which expressly stipulates that, unless otherwise provided within the regulation as specifically permitted by the Reserve Bank of India (RBI), a person resident in India is prohibited from issuing any guarantee or surety in relation to a debt or liability owed by another Indian resident to a person resident outside India. Thus, like Section 26 of the FERA Act 1999, Regulation 3 under FEMA(Regulation) 2000 is limited in its scope to guarantees issued by Indian residents that could give rise to external liabilities or foreign exchange obligations. It does not apply to one who is non-resident.

36. It has further been submitted that the alleged claims are compliant with the notification issued under FEMA 29/RB/2000 dated 26th September 2000. The FEMA Act 1999 came into force on 01.06.2000, whereas the transaction in question is of a much prior

date. It is understood that the provision of the FEMA Act 1999 does not and cannot retrospectively invalidate any transactions lawfully initiated under the FERA regime. Accordingly, the issue of any violation under FEMA does not arise. The above stated notification is an amendment to the earlier RBI Notification dated 3rd May 2000 (FEMA 16/RB-2000), titled "Receipt from, and payment to, a person resident outside India," by which Paragraph 2A was inserted.

37. It is pertinent to note that the Reserve Bank of India (RBI), vide Notification No. FEMA 29/2000-RB dated September 26, 2000, has granted general permission to a person resident in India, being the principal debtor, to make payment, by way of reimbursement, to a person resident outside India who has discharged liability under a guarantee.

38. In the present case, Leader Berhad, a company incorporated in Malaysia and classified as a non-resident under the FEMA Act 1999, acted as a guarantor on behalf of the Corporate Debtor, an Indian entity, in respect of financial assistance extended by financial institutions, namely Citi Bank and ICICI Bank. Upon default by Corporate Debtor in meeting its repayment obligations, the said financial institutions invoked the guarantees furnished by Leader Berhad. Consequently, Leader Berhad made payments to the financial institutions on behalf of Corporate Debtor in fulfilment of their respective guaranteed obligations.

39. It is also pertinent that Leader Berhad executed the guarantees, admittedly in 1997 and 1999, and the governing law was the FERA Act 1973. Section 26 of the FERA Act 1973 imposed restrictions on persons resident in India from issuing guarantees in favour of or on behalf of non-resident without prior approval from the RBI or the Central Government. However, Leader Berhad, being a non-resident entity under Section 2(p) of the FERA Act 1973, does not fall within the scope of Section 26 of FERA 1973.

40. The actual invocation of the guarantees and corresponding payments by Leader Berhad occurred after FEMA came into force and FEMA does not impose any restriction on non-resident entities issuing guarantees for Indian companies. The question remains whether Corporate Debtor can lawfully reimburse Leader Berhad or its assignee. In this regard, Notification No. FEMA 29/2000-RB clearly permits reimbursement by a resident principal debtor to a non-resident guarantor, subject to the cap on reimbursement amount. Therefore, the Corporate Debtor is legally permitted under the FEMA Act 1973 to reimburse Leader Berhad or its successors for the amount actually paid under the guarantees.

41. In the present case, the guarantees were furnished by the non-resident guarantor to the resident creditors on behalf of the resident principal debtor at the time when the FERA Act 1973 was operative i.e. on 26.02.1999 to ICICI, and on 03.03.1997 to Citi Bank.

42. That, since the FEMA Act 1999 was not in force at the time of issuance of guarantees by non-resident guarantors to the resident creditors; and therefore, it cannot be said that the provisions of FEMA Act 1999 and the notification bearing no. FEMA 29/RB/2000 dated 26.09.2000 amending the FEMA/16/RB-200 Notification dated 03.05.2000 will be applicable in the present case especially when neither the notification, nor the Section under which it is purported to have been issued, either expressly or by necessary implication intend any retrospective application of the restrictions.

43. The RBI Notification No. FEMA/29/2000-RB dated 26 September 2000 specifically addresses situations involving reimbursement of payment by a resident principal debtor to a non-resident guarantor. It provides that such reimbursement shall not exceed the rupee equivalent of the amount actually paid by the non-resident guarantor under the guarantee to the resident creditors. In the present case, this provision is not applicable. The transaction in question does not involve reimbursement by the principal debtor to the non-resident guarantor (Leader Berhad), instead, upon principal debtor's default in meeting its repayment obligations, Leader Berhad, a non-resident entity, discharged the liabilities owed to principal debtor's resident creditors, namely ICICI Bank and Citi Bank by making direct payments to them under the terms of the invoked guarantees.

44. Following such payments, Leader Berhad subrogated to the rights of the original creditors by operation of Section 140 of the Indian Contract Act, 1872, which embodies the principle of subrogation. In effect, Leader Berhad stepped into the shoes of ICICI and Citi Bank, and acquired all rights they had against the principal debtor, Incab Industries Ltd. Subsequently, Leader Berhad further assigned its rights and interests to respondent no. 2 by way of an assignment deed dated 08th March 2007 and as a result, respondent no. 2 filed its claim before the Resolution Professional under the IBC Code 2016 and the claim was admitted in due course.

45. Therefore, it is evident that the RBI Notification dated 26.09.2000 does not govern this case. The transaction does not involve a situation where the Corporate Debtor, a resident principal debtor, made or was expected to make any direct reimbursement to the non-resident guarantor, Leader Berhad or its assignee respondent no. 2 post invocation of the guarantees.

46. Respondent no. 2, as a subrogated and assigned secured financial creditor, pursued its rights through the legal remedy available under the IBC Code 2016 by submitting its claim and participating in the CIRP process. That, similarly, in terms of the directions issued by this Adjudicating Authority vide final order dated 08.01.2025 in Para 69 (d) as stated above, the Resolution Professional is of the opinion that the claim of respondent no. 2

is not time barred. The claim filed by respondent no. 2 was not barred by law of limitation and was required to be admitted, in terms of the provisions of the IBC Code 2016 and Regulations made thereunder.

47. Therefore, in view of the above, respondent no. 1 admitted the claims of respondent no. 2 as secured creditor to the tune of Rs 17,31,40,02,705/- during the CIRP process of the Corporate Debtor. It is pertinent to mention that entire claim of Rs 17,31,40,02,705/- by respondent no.2 is admitted as a related party claim of the Corporate Debtor.

48. Therefore, the prayers made in the present application are contrary to law, baseless, unfounded and made with malicious intent and hence the present application deserves to be dismissed.

49. Heard Learned Counsel for the parties at length for purpose of interim relief. We have gone through pleading and documentary evidence available on record. We have duly considered the law relied upon by Learned Counsel for the parties and law applicable on the facts and circumstances of this case.

50. This Tribunal, vide order dated 08.01.2025, granted an opportunity to respondent no. 2 to place original document before the respondent no. 1, the Resolution Professional for reverification of its claim to achieve the objective of the Code as enshrined in the Preamble i.e., "balance the interests of all the stakeholders". The Resolution Professional was directed to verify

the claim with the original assignment deed duly registered and executed and whether respondent no. 2 could be treated as secured financial creditor.

51. It was further directed by this Tribunal vide order dated 08.01.2025 that the respondent no. 1 to see whether the admission of claim and allocation made to the respondent No. 2 is in compliance with the notification issued under FEMA 29/RB/2000 dated September 26, 2000 and whether the claim made by respondent no.2 is time barred as the documents attached thereunder indicates that the respondent no. 2 has written to all the Banks in the year 2017 as well as in the year 2021 asking for NoC to formally register their claim or change with the concerned. It was further observed that the respondent No. 2 has again requested long after 14 years in the year 2021, NOC from banks to replace the 'Leader Berhad' by them as secured Financial Creditor.

52. Section 18 and 25 of IBC Code 2016 read with Regulation 13 of the IBBI (CIRP) Regulation 2016 provides the duties of Resolution Professional and his duties is limited to verification and collation of claims and does not extend to adjudication of merits or validity of underlying contracts. Respondent no.1, while discharging his duties as per Section 18 and 25 of IBC Code 2016 read with Regulation 13 of the IBBI(CIRP) Regulation, 2016 and in compliance of order dated 08.01.2025 issued by this Tribunal, has verified the claim of respondent no. 2, the Tropical Ventures

Company Limited, as stated in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 and Regulations made thereunder.

53. The Corporate Debtor had obtained financial assistance from landers namely ICICI Bank, Citibank and HSBC during the year 1997 to 1999. Leader Berhad provided corporate guarantees to these banks for loans advanced to the corporate debtor. Upon default by the Corporate Debtor, the guarantees were invoked and Leader Berhad, through its subsidiary Leader Cable Industry Berhad, made payment of Rs. 10,00,00,000/- and Rs. 7,30,00,000/- to ICICI; Rs. 43,53,00,000/- and Rs. 33,96,26,944.80 to Citi Bank; and USD 3,960,000/- to HSBC. 7. Upon making these payments, Leader Berhad claimed subrogated to the rights of the original creditors by operation of Section 140 of the Indian Contract Act, 1872. Thus, Leader Berhad stepped into the shoes of ICICI Bank, Citi Bank and HSBC, and acquired al rights they had against the Corporate Debtor.

54. Thereafter, Leader Berhad assigned its rights and interests to respondent no. 2 by executing deed of assignment dated 08.03.2007. Consequently, respondent no. 2 claiming its right under the deed of assignment, has filed its claim before the respondent no. 1, the Resolution Professional. Respondent no. 1 has considered the claim of Respondent no. 2 as secured based on charge created in the original transaction. Thus, respondent no. 2 has claimed its

right of subrogation having stepped in shoe of the Leader Berhad and claimed to recover the dues from the Corporate Debtor as a Financial Creditor.

55. Therefore, in view of right of subrogation claimed by the respondent no. 2 based on the deed of assignment dated 08.03.2007, it is relevant to refer provision of Section 140 of the Indian Contract Act 1872 which read as under:

> *"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."*

56. The relevant words used in Section 140 are "upon payment or performance of all that he is liable for". When the principal debtor commits a default and when the liability under the deed of guarantee of the surety is not limited to a particular amount, its liability is in respect of the entire amount repayable by the principal debtor to the creditor. The principal borrower is legally bound to indemnify the guarantor.

57. Hon'ble Apex Court in case of Economic Trasport Corporation Delhi Versus M/s Charan Spinning Mills Pvt Ltd (2010) 4 Supreme Court Cases 114 in para no. 16 while dealing with right of the parties

for subrogation consequent upon assignment of right and liabilities, has held that:

> *"16. If a letter of subrogation containing terms of assignment is to be treated only as an assignment by ignoring the subrogation, there may be the danger of document itself becoming invalid and unenforceable, having regard to the bar contained in Section 6 of the Transfer of Property Act, 1882 (for short "TP Act"). Section 6 of Transport of Property Act, 1882, provides that property of any kind may be transferred except as otherwise provided by that Act or by any other law for the time being in force. Clause (e) of the said section provides that mere right to sue cannot be transferred. Section 130 provides the manner of transfer of actionable claims. Section 3 defines an `actionable claim' as: (i) any debt (other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property) or (ii) any beneficial interest is movable property not in the possession, either actual or constructive of the claimant, which the civil courts recognizes as affording grounds for relief. A `debt' refers to an ascertained sum due from one person to another, as contrasted from unliquidated damages and*

claims for compensation which requires ascertainment/assessment by a Court or Tribunal before it becomes due and payable. A transfer or assignment of a mere right to sue for compensation will be invalid having regard to Section 6(e) of the TP Act. But when a letter of subrogation-cum-assignment is executed, the assignment is interlinked with subrogation, and not being an assignment of a mere right to sue, will be valid and enforceable."

58. Therefore, Section 140 must be interpreted with regard to the equitable principles. If the surety pays in entirety the amount payable under guarantee to the creditor, Section 140 provides a remedy to the surety to recover the entire amount paid by him in the discharge of his obligations and if only a part of the amount is payable to the creditor, the equitable right the guarantor gets under Section 140 will be confined to the debt he pay and discharge the liability. Therefore, the guarantor gets subrogated with the rights of the creditor to recover from the principal debtor the amount which was paid as per the guarantee.

59. Insofar as violation of provision of the FEMA Act 1999 as claimed by the applicant, Learned Counsel appearing for Resolution Professional argued that assuming but not admitting the FEMA Act 1999 imposes any restriction on non-residents, even then it cannot apply retrospectively. These restrictions involve quasi-

criminal consequences. He further submitted that on this aspect, Hon'ble Supreme Court clearly held in State of Bombay vs Vishnu Ramchandra AIR 1965 SC 307 that:

> *"The cardinal principle is that statutes must always be interpreted prospectively, unless the language of the statutes makes the retrospective, either expressly or by necessary implication. Penal statutes which create new offences are always prospective, but penal statutes which create disabilities, though ordinarily interpreted prospectively, are sometimes interpreted retrospectively when there is a clear intendment that they are to be applied to past events."*

60. Hon'ble Supreme Court, while relying on the principles laid down by Erle, C. J., in Midland Rly. Co. v. Pye (1861) 10 C. B. NS 179 further held in case of State of Bombay(Supra) that:

> *"Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, pain and unambiguous language; because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment."*

61. In view of this, it is appropriate to refer relevant provision of Section 26 and 47 of Foreign Exchange Regulation Act 1973; Section 3 of Foreign Exchange Management Act 1999; Regulation 3 of the Foreign Exchange Management (Guarantee) Regulation 2000 and RBI Notification No. 29/RB/2000 dated September 26, 2020.

62. RBI Notification No. FEMA.29/RB-200 dated September 26, 2000 provides that In pursuance of the provisions of Section 3 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in partial modification of its Notification No. FEMA/16/RB-2000 dated 03rd May 2000, (hereinafter referred to as 'the said Notification'), the Reserve Bank hereby directs that the said Notification shall with immediate effect be amended as under, namely after paragraph (2) of the said Notification, the following paragraph shall be added, namely :-

"(2A) a person resident in India being the principal debtor, to make payment to a person resident outside India being a guarantor, such payment being by way of reimbursement of the payment made to the resident creditor by the non-resident guarantor under the guarantee furnished by him on behalf of the principal debtor;

Provided that the amount payable by way of reimbursement by the resident principal debtor shall not exceed the rupee equivalent of the amount paid by the non-resident guarantor under the guarantee;

Provided further that where the payment of the amount is made by the guarantor out of funds held in NRNR/NRO /NRSR account/s maintained with an authorised dealer in India, the amount paid by way of reimbursement shall not be remitted outside India or credited to NRE/FCNR account of the non-resident."

63. Section 26 of Foreign Exchange Regulation Act 1973('the FERA Act 1973') provides with respect to guarantee of a debt or other obligation and the same is reproduced verbatim as under:

"26. Certain provisions as to guarantee in respect of debt or other obligation:-

Except with the general or special permission of the Central Government or the Reserve Bank, no person resident in India shall give a guarantee in respect of any debt or other obligation or liability-

(i) of a person resident in India, and due or owing to a person resident outside India, or

(ii) of a person resident outside India."

64. Section 47 of Foreign Exchange Regulation Act 1973('the FERA Act 1973') provides about - Contracts in evasion of the Act and the same is as under: -

"(1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision

of this Act or of any rule, direction or order made thereunder.

(2) Any provision of, or having effect under, this Act that a thing shall not be done without the permission of the Central Government or the Reserve Bank, shall not render invalid any agreement by any person to do that thing, if it is a term of the agreement that that thing shall not be done unless permission is granted by the Central Government or the Reserve Bank, as the case may be; and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except with the permission of the Central Government or the Reserve Bank, shall not be done unless such permission is granted.

(3) Neither the provisions of this Act nor any term (whether express or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum

which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise, but-

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any court as they apply in relation to other sums;

(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requisition.

(4) Notwithstanding anything contained in the Negotiable Instruments Act, 1881 (26 of 1881) neither the provisions of this Act or of any rule, direction or order made thereunder, nor any condition, whether expressed or to be implied, having regard to those

provisions that any payment shall not be made without permission under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note".

65. Section 3 of Foreign Exchange Management Act 1999('the FEMA Act 1999'), provides restriction on investment in India by a person resident outside India and the same is as under:

"3. Dealing in foreign exchange, etc.—Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall—

(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;

(b) make any payment to or for the credit of any person resident outside India in any manner;

(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation.—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward

remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation.—For the purpose of this clause, "financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt".

66. Regulation 3 of Foreign Exchange Management (Guarantee) Regulation 2002 provides as under:-

"3. Save as otherwise provided in these regulations, or with the general or special permission of the Reserve Bank, no person resident in India shall give a guarantee or surety in respect of, or undertake a transaction, by whatever name called, which has the effect of guaranteeing, a debt, obligation or other liability owed by a person resident in India to, or incurred by, a person resident outside India".

67. Thus, as per Section 26 of the FERA Act 1973, a person resident in India is debarred to give a guarantee in respect of any debt or other obligation or liability of a person resident in India, and due or owing to a person resident outside India, or of a person resident outside India. Thus, this section debars resident of India to give guarantee or other obligations of liability for a person resident outside India either directly or indirectly but does not speak about incurring such liability by non-resident.

68. Though the provision of Section 47 of the FERA Act 1973, as it was before repeal of the Act, prohibited entering into any contract or agreement directly or indirectly evading or avoiding any operation of the said Act or any provision thereof; however Sub Section (3) thereof also provided that such prohibition shall not prevent legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due would be due, whether as debt, damages or otherwise.

69. Section 3 of the Foreign Exchange Management Act 1999 prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein or under the Rules & Regulations framed thereunder without general or special permission of RBI. The provision of Section 3 shows a legislative intent to not void the transaction even if in violation of the said Act.

70. Moreover, the provision of relevant Regulation 3 of Foreign Exchange Management (Guarantee) Regulation 2002 also provides with

respect to restrictions imposed on a person resident of India to give guarantee or surety in respect of a transaction which has effect of guaranteeing a debt or obligation or other liability owed by a person resident in India to or incurred by person resident out of India. Thus, this provision also does not put any such bar for guaranteeing of debt or liability by non-resident.

71. On this aspect, Hon'ble High Court of Delhi in case of SRM Exploration Pvt. Ltd. v. N&S&N Consultants S.R.O., reported in (2011) SCC Online Del. 1161, in paragraph 12, has observed as under:

> *"12. We have perused the provisions of FEMA, 1999, Section 3 thereof prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein or under the Rules & Regulations framed thereunder without general or special permission of RBI. We are unable to find any provision therein voiding the transactions in contravention thereof. We may mention that the predecessor legislation to FEMA namely FERA 1973 vide Section 47 prohibited entering into any contract or agreement directly or indirectly evading or avoiding any operation of the said Act or any provision thereof. However, Sub Section (3) thereof also provided that such prohibition shall not prevent*

legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due. However the legislature while re-enacting the law on the subject has chosen to do away with such a provision. We are of the view that the same shows a legislative intent to not void the transaction even if in violation of the said Act. Thus we are of the opinion that the plea of the appellant Company in this regard is without any force."

72. Hon'ble Supreme Court in case of Vijay Karia Versus Prysmian Cavi E Sistermi Sri AIR 2020 SC 1807 placed reliance on judgment of Hon'ble High Court of Delhi in case of CRUZ and held as under:

"82. Before answering this question, it is important to first advert to the decision of the Delhi High Court in Cruz (supra). The learned Single Judge was faced with a similar problem of a foreign award violating the provisions of FEMA. In an exhaustive analysis, the learned Single Judge referred to Renusagar (supra) and then held:

***"97**. It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to*

contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.

***98**. It is necessary to bear in mind that a foreign award may be based on foreign law, which may be at variance with a corresponding Indian statute. And, if the expression "fundamental policy of Indian law" is considered as a reference to a provision of the Indian statue, as is sought to be contended on behalf of Unitech, the basic purpose of the New York Convention to enforce foreign awards would stand frustrated. One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression "fundamental policy of law" must be interpreted in that*

perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment. xxx xxx xxx

102. *Although, this contention appears attractive, however, fails to take into account that there has been a material change in the fundamental policy of exchange control as enacted under FERA and as now contemplated under FEMA. FERA was enacted at the time when the India's economy was a closed economy and the accent was to conserve foreign exchange by effectively prohibiting transactions in foreign exchange unless permitted. As pointed out by the Supreme Court in Life Insurance Corporation of India v. Escorts Ltd. (supra), the object of FERA was to ensure that the nation does not lose foreign exchange essential for economic survival of the nation. With the liberalization and opening of India's economy it was felt that FERA must be repealed. FERA was enacted to replace the Foreign Exchange Regulation Act, 1947 which was originally enacted as a temporary measure. The Statement of Objects and Reasons of FERA indicate that FERA was enacted as the RBI had suggested and Government had agreed on the need for regulating, among other matters, the entry of foreign capital in*

the form of branches and concerns with substantial non- resident interest in them, the employment of foreigners in India etc. xxx xxx xxx

110. *The contention that enforcement of the Award against Unitech must be refused on the ground that it violates any one or the other provision of FEMA, cannot be accepted; but, any remittance of the money recovered from Unitech in enforcement of the Award would necessarily require compliance of regulatory provisions and/or permissions."*

83. *This reasoning commends itself to us. First and foremost, FEMA - unlike FERA - refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being the Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of the Reserve Bank of India may be obtained post-facto if such violation can be condoned. Neither the award, nor the agreement being enforced by the award, can, therefore, be held to be of no effect in law. This being the case, a*

rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the market value, the Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach. Further, even if the Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or Rule would not arise as the award does not become void on that count. The fundamental policy of Indian law, as has been held in Renusagar (supra), must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are

followed by the Courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground".

73. It is also clear from the Reserve Bank of India (RBI), Notification No. FEMA 29/2000-RB dated September 26, 2000, that by this notification, Reserve Bank of India has granted general permission to a person resident in India, being the principal debtor, to make payment, by way of reimbursement, to a person resident outside India i.e non-resident guarantor, who has discharged liability under a guarantee. It further provides that such reimbursement shall not exceed the rupee equivalent of the amount actually paid by the non-resident guarantor under the guarantee to the resident creditors.

74. In the instant case, this provision is not applicable. The transaction in question does not involve reimbursement by the principal debtor to the non-resident guarantor (Leader Berhad), instead, upon principal debtor's default in meeting its repayment obligations, Leader Berhad, a non-resident entity, discharged the liabilities owed to principal debtor's resident creditors, namely ICICI Bank and Citi Bank by making direct payments to them under the terms of the invoked guarantees.

75. Therefore, from perusal of provision of Section 26 and 47 of Foreign Exchange Regulation Act 1973 and Section 3 of Foreign Exchange Management Act 1999 read with Regulation 3 of the

Foreign Exchange Management (Guarantee) Regulation 2000 and RBI Notification No. 29/RB/2000 dated September 26, 2020, and decision thereon, it is an admitted position that there was no bar for admitting the claim of the respondent.

76. Insofar as issue of claim being time barred is concerned, the Corporate Debtor had no operation for the last 25 years and its last available financial statements are as of 31.12.1999. The Corporate Debtor was referred to BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 in the year 1999 and the reference was registered under SICA in the year 2000. By virtue of Section 22(5) of SICA, there was a moratorium and limitation stopped running from the date of reference before BIFR. The reference was pending till 01.12.2016, till the SICA Act was repealed. During the period of reference before BIFR, as per provisions of Section 22(5) of SICA, the rights of the assignor and respondent no. 2 remained suspended. Therefore, the period between 04.04.2000 to 01.12.2016 requires to be excluded for the purpose of computing limitation under Section 22(5) of SICA, and consequently, the period of limitation would begin to run only after 01.12.2016.

77. Hon'ble Apex Court in case of Sabarmati Gas Ltd. vs. Shah Alloys Ltd. (2023) 3 SCC 229 has held that when a party is legally disabled from resorting to legal proceedings due to Section 22(1) of SICA, the period of suspension of legal proceedings is

excludable in computing the period of limitation. The period covered by suspension under SICA constitutes sufficient cause for condoning delay.

78. Thereafter, the CIRP process of the Corporate Debtor commenced against the Corporate Debtor on 07.08.2019. Respondent no. 2 lodged its claim on 15.07.2021 after the CIRP process was rebooted as per order dated 04.6.2021 passed by Hon'ble NCLAT. Therefore, the claim of respondent no. 2 could not be said to be barred by law of limitation.

79. Respondent no. 1, being the Resolution Professional of the Corporate Debtor, while considering the claim of the respondent no. 2 has relied upon documents available on record including Form-8 filed with RoC, copy of registered deed of assignment dated 08.03.2007, records of proceeding of BIFR, opinion given by expert and after verification of the claim, the entire claim of respondent no. 2 has been admitted as a related party claim.

80. In view of the facts and circumstance of this case and law applicable thereon, respondent no. 1 has rightly admitted the entire claim of the respondent no. 2 being a secured financial creditor.

81. Consequently, the present application **IA No.1511/KB/2025** stands **dismissed** being devoid of merits.

82. The Registry is directed to send E-mail copies of the order forthwith to all the parties and their counsel for information and for taking necessary steps.

83. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Rekha Kantilal Shah **Labh Singh**

Member(Technical) **Member(Judicial)**

Order Signed on the 3rd day of December 2025.