IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.04.2022

CORAM :

THE HON'BLE MR. JUSTICE M.DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

C.R.P.(PD).No.1480 of 2022

and C.M.P.No.7596 of 2022

G.Rathinavelu .. Petitioner

v.

Indian Overseas Bank,
Rep. By its Assistant General Manager,
Cathedral Branch,
No.762, Anna Salai,
Chennai – 600 002.
Through Mr.L.Prabakar,
Assistant General Manager. .. Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the order passed by the National Company Law Tribunal, Chennai Bench II, dated 13.04.2022 in IBA/49/2019.

For Petitioner : Mr.AR.L. Sundaresan,
Senior Counsel

O R D E R

(Order of the Court made by M.DURAISWAMY,J.)

Challenging the order passed in IBA/49/2019 on the file of the National Company Law Tribunal, Division Bench-II, Chennai, the petitioner-Corporate Debtor has filed the above Civil Revision Petition under Article 227 of the Constitution of India.

2. This Court raised a query as to the maintainability of the Civil Revision Petition under Article 227 of the Constitution for the reason that as per Section 61 of the Insolvency and Bankruptcy Code, 2016, the petitioner has got remedy before the National Company Law Appellate Tribunal.

3. This Court, while dismissing the similar Civil Revision Petition in **C.R.P.(PD).No.525 of 2022 [L & T Infra Investments Partners, Mumbai v. Ebenezar Inbaraj and the Deputy Registrar, National Company Law Tribunal, Chennai Bench]** filed under Article 227 of the Constitution as not maintainable, followed the following judgments:-

(i) (2020) 13 Supreme Court Cases 308 [Embassy Property

Developments Private Limited Vs. State of Karnataka and others]

wherein the Hon'ble Supreme Court held as follows:

> "...
>
> 10.In the backdrop of the facts narrated and in the light of the rival contentions extracted above, the first question that arises for consideration is as to whether the High Court ought to interfere, under Articles 226/227 of the Constitution, with an order [*Vasudevan* v. *State of Karnataka*, 2019 SCC OnLine NCLT 681] passed by NCLT in a proceeding under the IBC, 2016, despite the availability of a statutory alternative remedy of appeal to NCLAT.
>
> 11.It is beyond any pale of doubt that the IBC, 2016 is a complete code in itself. As observed by this Court in *Innoventive Industries Ltd.* v. *ICICI Bank* [*Innoventive Industries Ltd.* v. *ICICI Bank*, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356 : AIR 2017 SC 4084] it is an exhaustive code on the subject-matter of insolvency in relation to corporate entities and others. It is also true that the IBC, 2016 is a single Unified Umbrella Code, covering the entire gamut of the law relating to insolvency resolution of corporate persons and others in a time-bound manner. The Code provides a three-tier mechanism, namely, (*i*) the NCLT, which is the adjudicating authority, (*ii*) the NCLAT, which is the appellate authority, and (*iii*) this Court as the final authority, for

dealing with all issues that may arise in relation to the reorganisation and insolvency resolution of corporate persons. Insofar as insolvency resolution of corporate debtors and personal guarantors are concerned, any order passed by the NCLT is appealable to NCLAT under Section 61 of the IBC, 2016 and the orders of the NCLAT are amenable to the appellate jurisdiction of this Court under Section 62. It is in this context that the action of the State of Karnataka in bypassing the remedy of appeal to NCLAT and the act of the High Court in entertaining the writ petition against the order [*Vasudevan* v. *State of Karnataka*, 2019 SCC OnLine NCLT 681] of the NCLT are being questioned.

12.For finding an answer to the question on hand, the scope of the jurisdiction and the nature of the powers exercised by — (*i*) the High Court under Article 226 of the Constitution, and (*ii*) the NCLT and NCLAT under the provisions of the IBC, 2016 are to be seen.

Jurisdiction and the powers of the High Court under Article 226

13.What is recognised by Article 226(1) is the power of every High Court to issue (*i*) directions, (*ii*) orders, or (*iii*) writs. They can be issued to (*i*) any person, or (*ii*) authority including the Government. They may be issued (*i*) for the enforcement of any of the rights conferred by Part III, and

(*ii*) for any other purpose. But the exercise of the power recognised by clause (1) of Article 226, is restricted by the territorial jurisdiction of the High Court, determined either by its geographical location or by the place where the cause of action, in whole or in part, arose. While the nature of the power exercised by the High Court is delineated in clause (1) of Article 226, the jurisdiction of the High Court for the exercise of such power, is spelt out in both clauses (1) and (2) of Article 226.

14.Traditionally, the jurisdiction under Article 226 was considered as limited to ensuring that the judicial or quasi-judicial tribunals or administrative bodies do not exercise their powers in excess of their statutory limits. But in view of the use of the expression "*any person*" in Article 226(1), courts recognised that the jurisdiction of the High Court extended even over private individuals, provided the nature of the duties performed by such private individuals, are public in nature. Therefore, the remedies provided under Article 226 are public law remedies, which stand in contrast to the remedies available in private law. As observed by this Court in *Nilabati Behera* v. *State of Orissa* [*Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527] public law proceedings serve a different purpose than private

law proceedings.

15.One of the well-recognised exceptions to the self-imposed restraint of the High Courts, in cases where a statutory alternative remedy of appeal is available, is the lack of jurisdiction on the part of the statutory/quasi-judicial authority, against whose order a judicial review is sought. Traditionally, English courts maintained a distinction between cases where a statutory/quasi-judicial authority exercised a jurisdiction not vested in it in law and cases where there was a wrongful exercise of the available jurisdiction. An "error of jurisdiction" was always distinguished from "in excess of jurisdiction", until the advent of the decision rendered by the House of Lords, by a majority of 3 : 2 in *Anisminic Ltd.* v. *Foreign Compensation Commission* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] . After acknowledging that a confusion had been created by the observations made in *R.* v. *Governor of Brixton Prison, ex p Armah* [*R.* v. *Governor of Brixton Prison, ex p Armah*, 1968 AC 192 : (1966) 3 WLR 828 (HL)] to the effect that *if a Tribunal has jurisdiction to go right, it has jurisdiction to go wrong*, it was held in *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] that the real question was not

whether an authority made a wrong decision but whether they enquired into and decided a matter which they had no right to consider.

16.*Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] , hailed as a breakthrough and a legal landmark (see *Racal Communications Ltd., In re* [*Racal Communications Ltd., In re*, 1981 AC 374 : (1980) 3 WLR 181 (HL)]) abolished the old distinction between errors of law that went to jurisdiction and errors of law that did not. *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] was hailed in *O'Reilly* v. *Mackman* [*O'Reilly* v. *Mackman*, (1983) 2 AC 237 : (1982) 3 WLR 1096 (HL)] to have liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction.

17.But *Racal, In re* [*Racal Communications Ltd., In re*, 1981 AC 374 : (1980) 3 WLR 181 (HL)] made a distinction between courts of law on the one hand and

administrative tribunal/administrative authority on the other and held that insofar as (inferior) courts of law are concerned, the subtle distinction between errors of law that went to jurisdiction and errors of law that did not, would still survive, if the decisions of such courts are declared by the statute to be final and conclusive. Thus one distinction was gone with *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] , but another was born with *Racal, In re* [*Racal Communications Ltd., In re*, 1981 AC 374 : (1980) 3 WLR 181 (HL)] . This could be seen from the after-effects of *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)]. [*Anisminic*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL) had its own quota of problems. Prof. Wade, as pointed out in *R.* v. *Lord President of the Privy Council, ex p Page*, 1993 AC 682 : (1992) 3 WLR 1112 (HL), seems to have opined that the true effect of *Anisminic* was still in doubt. People like Sir John Laws, quoted by Prof. Paul Craig, and which was extracted in the decision in *R. (Privacy International)* v. *Investigatory Powers Tribunal*, 2019 UKSC 22 : (2019) 2 WLR 1219, seems to have opined that once the distinction between jurisdictional and non-jurisdictional errors was discarded, there was no longer any need for the ultra vires

principle and that ultra vires is, in truth, a fig leaf which has enabled the courts to intervene in decisions without an assertion of judicial power which too nakedly confronts the established authority of the Executive or other public bodies. According to Sir John Laws, *Anisminic*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL) has produced the historical irony that with all its emphasis on nullity, it nevertheless erected the legal milestone which pointed towards a public law jurisprudence in which the concept of voidness and the ultra vires doctrine have become redundant. In *R. (Privacy International)*, 2019 UKSC 22 : (2019) 2 WLR 1219 the UK Supreme Court also quoted the editors of *De Smith's Judicial Review* to the effect: "*84*.… 'The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative action should be simply, lawful, whether or not jurisdictionally lawful.'" (WLR p. 1251, para 84)]

18.Interestingly just four days before the House of Lords delivered the judgment in *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] (on 17-12-1968), an identical view

was taken by a three-member Bench of this Court (delivered on 13-12-1968) in *Official Trustee* v. *Sachindra Nath Chatterjee* [*Official Trustee* v. *Sachindra Nath Chatterjee*, (1969) 3 SCR 92 : AIR 1969 SC 823] approving the view taken by the Full Bench of the Calcutta High Court in *Hriday Nath Roy* v. *Ram Chandra Barna Sarma* [*Hriday Nath Roy* v. *Ram Chandra Barna Sarma*, 1920 SCC OnLine Cal 85 : ILR (1921) 48 Cal 138] . It was held therein that : (*Sachindra Nath Chatterjee case* [*Official Trustee* v. *Sachindra Nath Chatterjee*, (1969) 3 SCR 92 : AIR 1969 SC 823] , AIR p. 828, para 15)

> "*15. …before a court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought, but must also have the authority to pass the orders sought for*".
>
> (emphasis supplied)

This Court also pointed out that it is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit, but its jurisdiction must include (*1*) the power to hear and decide the questions at issue, and (*2*) the power to grant the relief asked for. This decision in *Official Trustee* [*Official Trustee* v. *Sachindra Nath Chatterjee*, (1969) 3 SCR 92 : AIR 1969 SC 823] was followed in a recent decision in *IFFCO Ltd.* v. *Bhadra Products* [*IFFCO Ltd.* v. *Bhadra Products*,

(2018) 2 SCC 534 : (2018) 2 SCC (Civ) 208] , quite independent of *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] and its followers.

19.Though the decision in *Official Trustee* [*Official Trustee* v. *Sachindra Nath Chatterjee*, (1969) 3 SCR 92 : AIR 1969 SC 823] preceded *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] and can proudly be claimed as the Indian precursor to an English legal landmark, several subsequent decisions of this Court considered *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] alone to have provided the breakthrough. In *Mafatlal Industries Ltd.* v. *Union of India* [*Mafatlal Industries Ltd.* v. *Union of India*, (1997) 5 SCC 536] , Paripoornan, J. provided the list of Indian cases which cited *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] with approval. They are:

(1) *Union of India* v. *Tarachand Gupta & Bros.* [*Union of India* v. *Tarachand Gupta & Bros.*, (1971) 1 SCC 486] ,

(2) *A.R. Antulay* v. *R.S. Nayak* [*A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602 : 1988 SCC (Cri) 372] ,

(3)*R.B. Shreeram Durga Prasad & Fatehchand Nursing Das* v. *Settlement Commission* [*R.B. Shreeram Durga Prasad & Fatehchand Nursing Das* v. *Settlement Commission*, (1989) 1 SCC 628 : 1989 SCC (Tax) 124] ,

(4) *Associated Engg. Co.* v. *State of A.P.* [*Associated Engg. Co.* v. *State of A.P.*, (1991) 4 SCC 93] , and

(5) *Shiv Kumar Chadha* v. *MCD* [*Shiv Kumar Chadha* v. *MCD*, (1993) 3 SCC 161].

20.But in *M.L. Sethi* v. *R.P. Kapur* [*M.L. Sethi* v. *R.P. Kapur*, (1972) 2 SCC 427] , K.K. Mathew, J., made certain interesting observations about *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] . The learned Judge observed that the effect of the dicta in *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point and that it came perilously close to saying that there is jurisdiction if the decision is right in law, but none if it is wrong. *Anisminic* [*Anisminic Ltd.* v. *Foreign*

Compensation Commission, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] , according to him virtually left a court or tribunal with no margin of legal error.

21.Again in *Hari Prasad Mulshanker Trivedi* v. *V.B. Raju* [*Hari Prasad Mulshanker Trivedi* v. *V.B. Raju*, (1974) 3 SCC 415] K.K. Mathew, J., speaking for the Constitution Bench, pointed out that though the dividing line between lack of jurisdiction or power and the erroneous exercise of it has become thin with *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] , the distinction had not been wiped out completely.

22.But it is relevant to note that *Official Trustee* [*Official Trustee* v. *Sachindra Nath Chatterjee*, (1969) 3 SCR 92 : AIR 1969 SC 823] /*Anisminic* [*Anisminic Ltd* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] and what followed both, were mostly in the context of the power of the superior court to interfere with the decisions of subordinate courts/tribunals or administrative authorities. Most of these decisions were not in the context of the exercise of jurisdiction despite the availability of alternative remedy. That there exists such a

distinction between (*i*) cases where the jurisdiction of a superior court is questioned on the basis of ouster clauses and (*ii*) cases where the exercise of jurisdiction by a superior court is questioned on the ground of availability of alternative remedy, was recognised even in *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] , when Lord Reid referred to the decision in *Smith* v. *East Elloe Rural District Council* [*Smith* v. *East Elloe Rural District Council*, 1956 AC 736 : (1956) 2 WLR 888 (HL)] as posing some difficulty. As a result, the Court of Appeal held in *R.* v. *Secy. of State for the Environment, ex p Ostler* [*R.* v. *Secy. of State for the Environment, ex p Ostler*, 1977 QB 122 : (1976) 3 WLR 288 (CA)] that the availability of a statutory right to challenge within a specified time-limit, among other points, provided a sufficient basis for distinguishing *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] . This was taken note of by the UK Supreme Court in *Regina (Privacy International)* [*R. (Privacy International)* v. *Investigatory Powers Tribunal*, 2019 UKSC 22 : (2019) 2 WLR 1219] . Therefore the question whether the error committed by an administrative authority/tribunal or a court of law went to jurisdiction or whether it was within jurisdiction may still be

relevant to test whether a statutory alternative remedy should be allowed to be bypassed or not.

23.In several cases, both in England and India, the ancient rule stated by Willes, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford* [*Wolverhampton New Waterworks Co.* v. *Hawkesford*, (1859) 6 CBNS 336 : 141 ER 486] to the effect that where a liability not existing at Common Law is created by a statute, which also gives a special and particular remedy for enforcing it, the remedy provided by the statute must be followed, has been quoted with approval. For instance, *United Bank of India* v. *Satyawati Tondon* [*United Bank of India* v. *Satyawati Tondon*, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260] held that the availability of a remedy of appeal under the DRT Act, 1993 and SARFAESI Act, 2002 should deter the High Courts from exercising the jurisdiction under Article 226. Similarly, the availability of remedy of appeal under Section 173 of the Motor Vehicles Act, 1988 as against an award of the Accidents Claims Tribunal was held in *Sadhana Lodh* v. *National Insurance Co. Ltd.* [*Sadhana Lodh* v. *National Insurance Co. Ltd.*, (2003) 3 SCC 524 : 2003 SCC (Cri) 762] as sufficient for the High Court to refuse to exercise its supervisory jurisdiction. The same principle was applied in

(*1*) *Nivedita Sharma* v. *COAI* [*Nivedita Sharma* v. *COAI*, (2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] , and (*2*) *Cicily Kallarackal* v. *Vehicle Factory* [*Cicily Kallarackal* v. *Vehicle Factory*, (2012) 8 SCC 524 : (2012) 4 SCC (Civ) 540] in relation to the awards passed by the special fora constituted under the Consumer Protection Act, 1986.

24.Therefore insofar as the question of exercise of the power conferred by Article 226, despite the availability of a statutory alternative remedy, is concerned, *Anisminic* [*Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163 (HL)] cannot be relied upon. The distinction between the lack of jurisdiction and the wrongful exercise of the available jurisdiction, should certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute."

(ii) In an unreported judgment of the Division Bench of the Kerala High Court dated ***09.09.2020*** made in ***W.A.No.1083 of 2020 [Sulochana Gupta Vs. RBG Enterprises Private Limited]*** it has been held as follows:

"...

48. Issues raised for consideration in this appeal are:-

1. On the facts and circumstances of the case, when an order of the NCLT is challenged, writ petition has to be filed under Article 226 or 227 of the Constitution of India.

2. Whether a writ petition filed under Article 226 of the Constitution of India is maintainable, when an alternate remedy is available.

3. Whether a writ petition is maintainable under Article 226 of the Constitution, when a party pursues multiple remedies.

4. Whether a writ petition is maintainable under Article 226 of the Constitution, in a dispute between private parties.

5. Whether a relief available under Article 226 of the Constitution, when the respondents/writ petitioners are guilty of suppression of crucial material.

6. Whether NCLT should be made a party, in a petition filed under Articles 226 or 227 of the Constitution, as the case may be.

7. Whether the judgment in W.P.(C) No. 14341/2020 dated 22.07.2020 can be treated as a binding precedent, so as to enable the respondents to file a writ petition under Article 226 of the Constitution of India.

8. Whether the appellants have been given adequate opportunity to file a counter affidavit before the writ court.

9. Whether the writ appeal has become infructuous.

49. Heard learned counsel for the respective parties and perused the materials available on record.

50. Though rival contentions have been made on the merits of the disputes, in the company petition, we are not inclined to delve into the same, and deem it fit to address issues stated above.

51. Admittedly, challenging the interim order of the NCLT, Kochi in I.A. No. 83/2020 in C.P. No. 114/KOB/ 2019 dated 09.07.2020, writ petition has been filed under Article 226 of the Constitution of India for the reliefs, stated above.

...

116. Material on record discloses that the dispute between the first respondent company and its shareholders, under challenge, is purely a civil dispute. The remedy under Article 226 of the Constitution of India is available against a State or authority or instrumentality of the State, falling within the ambit of the definition "State" under Article 12 of the Constitution of India.

117. Writ petition filed under Article 226 of the Constitution of India, can be for the enforcement of fundamental rights or for any other purpose, as envisaged under Article 226 of the Constitution. There is no pleadings or materials to substantiate that the appellants are discharging public duties or public functions, and thus, amenable to writ jurisdiction under Article 226 of the Constitution of India.

118. On a scrutiny of the decisions extracted above, it is clear that insofar as challenge to the judicial acts of the Courts or the Tribunals, in exercise of the powers under Article 227 of the Constitution of India, the High Court exercises overall superintendence on such Tribunals under Article 227. Orders by Courts or Tribunals, as the case may be, can be challenged by way of filing a writ petition under Article 227 of the Constitution of India, and the administrative orders passed by the Courts, or the Tribunals, as the case may be, can be challenged under Article 226 of the Constitution. Administrative orders passed by the State, authority or instrumentality of the State, can be challenged by way of a writ petition under Article 226 of the Constitution of India, as they do not fall under the ambit of superintendence and control, in exercise of Article 227 of the Constitution of India.

119. Difference between the exercise of powers under Articles 226 and 227 of the Constitution of India has been explained in the foregoing paragraphs. Thus, in the case on hand, when none of the parties, State or authority or instrumentality of the State, or any private body, discharging public functions, have been arrayed as respondents, when the writ petition has been filed under Article 226 of the Constitution of India, having regard to the roster followed in listing the cases, writ court ought to have directed the respondents/writ petitioners to make necessary amendments, to the provisions under which the writ petition ought to have been filed, or in the alternative, directed that the writ petition be placed before the concerned court, dealing with the challenges made to the orders passed by Courts, or Tribunals, as the case may be. Admittedly, the order impugned in the writ petition (Exhibit-P1) is not an administrative order, passed by the National Company Law Tribunal.

120. Writ court, without drawing a distinction between a writ petition filed under Articles 226 and 227 of the Constitutions of India, has erroneously proceeded to entertain the writ petition under Article 226 against an interim order passed by the NCLT, Kochi Bench, in I.A. No. 83/2020 in C.P. No. 114/KOB/2019 dated

9.7.2020. In Maharashtra Chess Association v. Union of India & Ors. the Hon'ble Supreme Court has considered, as to what the High Court should consider before entertaining a writ petition under Article 226 of the Constitution of India, and held as under:

"22. This brings us to the question of whether Clause 21 itself creates a legal bar on the Bombay High Court exercising its writ jurisdiction. As discussed above, the writ jurisdiction of the High Court is fundamentally discretionary. Even the existence of an alternate adequate remedy is merely an additional factor to be taken into consideration by the High Court in deciding whether or not to exercise its writ jurisdiction. This is in marked contradistinction to the jurisdiction of a civil court which is governed by statute. [Section 9. Courts to try all civil suits unless barred - The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred]. In exercising its discretion to entertain a particular case under Article 226, a High Court may take into consideration various factors including the nature of the injustice that is alleged by the petitioner, whether or not an alternate remedy exists, or whether the facts raise a question of

constitutional interpretation. These factors are not exhaustive and we do not propose to enumerate what factors should or should not be taken into consideration. It is sufficient for the present purposes to say that the High Court must take a holistic view of the facts as submitted in the writ petition and make a determination on the facts and circumstances of each unique case.

23. At this juncture, it is worth discussing the decision of this Court in Aligarh Muslim University v. Vinay Engineering [MANU/SC/1043/1993 : (1994) 4 SCC 710]. In that case, the contract between the parties contained a clause conferring jurisdiction on the courts at Aligarh. When the High Court of Calcutta exercised its writ jurisdiction over the matter, this Court held:

"2. We are surprised, not a little, that the High Court of Calcutta should have exercised jurisdiction in a case where it had absolutely no jurisdiction. The contracts in question were executed at Aligarh, the construction work was to be carried out at Aligarh, even the contracts provided that in the event of dispute the Aligarh Court alone will have jurisdiction. The arbitrator was from Aligarh and was to function there. Merely because the respondent was a Calcutta-based firm, the High Court of Calcutta seems to have exercised jurisdiction where it had none by adopting a

queer line of reasoning. We are constrained to say that this is a case of abuse of jurisdiction and we feel that the respondent deliberately moved the Calcutta High Court ignoring the fact that no part of the cause of action had arisen within the jurisdiction of that Court. It clearly shows that the litigation filed in the Calcutta High Court was thoroughly unsustainable."

24. The court examined the facts holistically, noting that the contract was executed and to be performed in Aligarh, and the arbitrator was to function at Aligarh. It did consider that the contract conferred jurisdiction on the courts at Aligarh, but this was one factor amongst several considered by the court in determining that the High Court of Calcutta did not have jurisdiction.

25. In the present case, the Bombay High Court has relied solely on Clause 21 of the Constitution and Bye Laws to hold that its own writ jurisdiction is ousted. The Bombay High Court has failed to examine the case holistically and make a considered determination as to whether or not it should, in its discretion, exercise its powers under Article 226. The scrutiny to be applied to every writ petition under Article 226 by the High Court is a crucial safeguard of the rule of law under the Constitution in the relevant

territorial jurisdiction. It is not open to a High Court to abdicate this responsibility merely due to the existence of a privately negotiated document ousting its jurisdiction.

26. It is certainly open to the High Court to take into consideration the fact that the Appellant and the second Respondent consented to resolve all their legal disputes before the courts at Chennai. However, this can be a factor within the broader factual matrix of the case. The High Court may decline to exercise jurisdiction under Article 226 invoking the principle of forum non conveniens in an appropriate case. The High Court must look at the case of the Appellant holistically and make a determination as to whether it would be proper to exercise its writ jurisdiction. We do not express an opinion as to what factors should be considered by the High Court in the present case, nor the corresponding gravity that should be accorded to such factors. Such principles are well known to the High Court and it is not for this Court to interfere in the discretion of the High Court in determining when to engage its writ jurisdiction unless exercised arbitrarily or erroneously. The sole and absolute reliance by the Bombay High Court on Clause 21 of the Constitution and Bye Laws to determine that its jurisdiction under

Article 226 is ousted is however one such instance.

27. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 25 September 2018. Writ Petition No. 7770 of 2017 is accordingly restored to the file of the High Court for being considered afresh. No costs."

...

126. On the facts and circumstances of the case, the issues raised for consideration are answered in favour of the appellants. In the result, this Writ Appeal is allowed. Impugned judgment in W.P.(C) No. 14341 of 2020 dated 22.07.2020 is set aside.

...

121. Applying the above said decision to the case on hand, we are of the view that the writ court, while entertaining the writ petition, has not considered or examined the facts holistically.

122. Giving due consideration to the decisions on jurisdiction, we are of the view that there is an error in exercising the jurisdiction under Article 226 of the Constitution of India."

(iii) (2021) 225 Comp. Cas 442 (Mad) [Hero Exports Vs. K.Vasudevan, Resolution Professional and others], wherein the

Division Bench of this Court held as follows:

"...

12.Learned counsel also placed reliance upon the judgment reported in [2019] 17 Scale 37 : [2020] 9 Comp. Case-OL 609 (SC) (Embassy Property Developments P. Ltd., Vs. State of Karnataka).

13.This Court has carefully considered the arguments advanced by the learned counsel for the petitioner and also perused the materials placed before it.

14.It is relevant to extract Rule 11 of the NCLT Rules, 2016:

"11: Inherent Powers:- Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."

15.The first respondent/IRP, in the e-mail communication dated April 12, 2019, had given reasons and the revision petitioner/applicant filed two miscellaneous applications with the following prayer:

"In the light of the above and in the interest of justice and in furtherance of the object of the Code, it is therefore, prayed that this Hon'ble Tribunal may be pleased to set aside the order in IND/811/2019 dated August 30, 2019 of

the learned Assistant Registrar of National Company Law Tribunal, Chennai and direct the Registry to number the Miscellaneous Application and pass such further or other orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case and thus render justice."

16. The National Company Law Tribunal/Tribunal, in the impugned order held that the said prayer virtually amounts to reversal/recall of the resolution plan and the same cause could be taken as a ground for filing an appeal under Section 32 of Insolvency and Bankruptcy Code and not by way of this application which is impermissible in law. As regards exercise of inherent power, the Tribunal has observed that assuming the power of recall is in-built in Insolvency and Bankruptcy Code and it can be exercised only in cases where the order is passed without jurisdiction or fraudulently obtained and that is not the case here and the Tribunal, further observed that in the absence of specific conferment of review jurisdiction, it cannot exercise the power to review.

17.In the decision of Embassy Property Developments P. Ltd. Vs. State of Karnataka reported in [2019] 17 Scale 37 : [2020] 9 Comp. Case-OL 609 (SC), the Hon'ble Supreme Court of India has considered the interplay between Insolvency and Bankruptcy Code, certain

provisions of the Companies Act and Mines and Minerals [Development and Regulation] Act and Mines and Mineral Concession Rules and other related Rules as well as the power of the High Court under Articles 226 and 227 of the Constitution of India.

18. The Hon'ble Apex Court, in paragraph No. 24 has observed that (page 628 of 9 Comp. Case-OL) "the distinction between lack of jurisdiction and wrongful exercise of available jurisdiction should certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute.' In paragraph No. 30 of the said judgment, the Hon'ble Apex Court of India had dealt with the jurisdiction and the powers of National Company Law Tribunal. There cannot be any difficulty in accepting the proposition laid down by the Apex Court in the above cited decision for the reason that it is also a well settled position of law.

19. The revision petitioner, under the guise of filing a revision, under Article 227 of the Constitution of India, wants this Court to issue a positive direction to National Company Law Tribunal, Chennai Bench, to exercise its inherent power in a particular manner. In the considered opinion of the Court, it cannot issue a positive direction to National Company Law Tribunal, Chennai Bench, as to

how it should exercise its inherent power. The National Company Law Tribunal/Tribunal also found that in real sense, the revision petitioner wants to recall of the Resolution Plan and the said cause could be taken as a ground for filing an appeal under Section 32 of the Insolvency and Bankruptcy Code. Thus, there is an effective alternate remedy provided to the revision petitioner who also claimed to be an Operational Creditor.

20. If this Court starts entertaining revision petitions like this, there is a likelihood of opening of flood gates where the alleged aggrieved person, without resorting to the alternate remedy of appeal, would often approach this Court and that is not the object of the Insolvency and Bankruptcy Code.

21. This Court, on an independent appraisal of the entire materials as well as the contents of the impugned order passed by National Company Law Tribunal, Chennai Bench, is of the considered view that there is no error apparent or infirmity in the reasons assigned and finds no merit in this Civil Revision Petition.

22. At this juncture, the learned counsel for the petitioner would submit that the revision petition was filed on December 6, 2019 and it was returned for production of the approval of the Resolution Plan and vide endorsement dated January 22, 2020, the papers were represented and

the revision itself came to be numbered on February 5, 2020. The learned counsel has also drawn the attention of this Court to the proviso to Section 61[2] of the Insolvency and Bankruptcy Code and would submit that since the period of limitation is self contained one and that the impugned order came to be passed as early as on November 4, 2019, the petitioner may not be in a position to avail the appeal remedy.

23. This Court has considered the said submission. From the perusal of the papers, it is prima facie disclosed that the petitioner was diligently prosecuting the proceedings by filing Civil Revision Petition and though it was presented on December 6, 2019, it came to be numbered on February 5, 2020 after compliance of certain returns. Therefore, it is for the revision petition to convince the National Company Law Appellate Tribunal as to how the appeal petition is within the limitation period.

24. In the result, the Civil Revision Petition stands dismissed. No costs. Consequently, the connected miscellaneous petition is closed."

4.1 Mr.AR.L. Sundaresan, learned senior counsel appearing for the petitioner submitted that in spite of the provisions of Section 61 of the Insolvency and Bankruptcy Code, 2016, this Court can entertain the Civil

Revision Petition filed under Article 227 of the Constitution. Further, the learned Senior Counsel submitted that the jurisdiction of the High Courts under Article 226/227 cannot be wholly excluded and that the decisions of the Tribunal will be subject to the jurisdiction of the High Courts under Articles 226/227.

4.2. The learned Senior Counsel appearing for the appellant, in support of his contention, has relied upon a judgment reported in ***(2021) 10 Supreme Court Cases 401*** **[Kalpraj Dharamshi & anr. v.Kotak Investment Advisors Ltd. And anr.]** wherein the Hon'ble Supreme Court held as follows:

> "...
>
> 97. In the present case, the facts are totally contrary. KIAL had approached the High Court of Bombay making a specific grievance, that NCLT had adopted a procedure which was in breach of the principles of natural justice. It is specifically mentioned in the writ petition, that though an alternate remedy was available to it, it was approaching the High Court since the issue with regard to functioning of NCLT also fell for consideration. The proceedings before the High Court were hotly contested and by an elaborate

judgment, the High Court dismissed [*Kotak Investment Advisors Ltd.* v. *Krishna Chamadia*, 2020 SCC OnLine Bom 197] the writ petition relegating the petitioner therein i.e. KIAL to an alternate remedy available in law. It is thus apparently clear, that KIAL was bona fide prosecuting a remedy before the High Court in good faith and with due diligence. In a given case, the High Court could have exercised jurisdiction under Article 226 of the Constitution inasmuch as, the grievance was regarding procedure followed by NCLT to be in breach of principles of natural justice. That would come within the limited area earmarked by this Court for exercise of extraordinary jurisdiction under Article 226 despite availability of an alternate remedy.

....."

5. On a perusal of the recent judgments of the Apex Court, it is clear that when an appeal remedy is provided under the Act, the aggrieved party should exhaust the said remedy by filing an appeal before the Appellate Forum and the Writ Petition/Civil Revision Petition filed by them under Articles 226/227 of the Constitution is not maintainable. When the petitioner can raise all the grounds available to them under law before the Appellate Forum, the filing of the Civil Revision Petition under

Article 227 cannot be entertained.

6. In such view of the matter, we are of the considered view that the Civil Revision Petition filed under Article 227 of the Constitution challenging the order passed by the National Company Law Tribunal is not maintainable. Accordingly, the Civil Revision Petition is dismissed as not maintainable. No costs. Consequently, the connected miscellaneous petition is closed.

[M.D., J.] [T.V.T.S., J.]
22.04.2022

Index : Yes/No

Speaking Order/Non Speaking Order

Note : Registry is directed to return the original impugned order to the learned counsel for the petitioner

To

Mr.L.Prabakar,
Assistant General Manager,
Indian Overseas Bank,
Cathedral Branch,
No.762, Anna Salai,
Chennai – 600 002.

M. DURAISWAMY, J.
and
T.V. THAMILSELVI, J.

Rj

C.R.P.(PD).No.1480 of 2022 and
C.M.P.No.7596 of 2022

22.04.2022