NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 546 of 2021

AND

Company Appeal (AT) (Insolvency) No. 552 of 2021

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Company Appeal (AT) (Insolvency) No. 546 & 552 of 2021

[Arising out of Order dated June 7, 2021, in IA No. 449 of 2021 in Company Petition No. 4258 of 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai]

1. Company Appeal (AT) (Insolvency) No. 546 of 2021

IN THE MATTER OF:

Air Force Group Insurance Society
A society registered under Societies Registration Act, 1860 having its office at AFGIS Bhavan Subroto Park, New Delhi – 110010 — **Appellant/ Financial Creditor**

Versus

1. Mr R. Subramaniakumar
Administrator of Dewan Housing Finance Corporation Limited
O/at Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai – 400001 — **Respondent No.1**

2. Committee of Creditors
Through Union Bank of India
Union Bank Bhawan,
239, Vidhan Bhawan Marg,
Nariman Point, Mumbai – 400021 — **Respondent No.2**

3. Piramal Capital & Housing Finance Limited
4th Floor, Piramal Towers
Peninsula Corporate Park
Ganapatrao Kadam Marg,
Lower Parel (West), Mumbai
Maharashtra – 400013 — **Respondent No.3**

Present:

For Appellant : Mr Umang Thakar, Advocate

For Respondent : Mr Ashish Bhan, Mr Ketan Gaur, Ms Chitra Rentala, Mr Aayush Mitruka, Mr Kaustub Narendran, Ms Samriddhi Shukla, Ms Lisa Mishra

and Mr Vishal Hablani, Advocates for Intervenor (Piramal Capital & Housing Finance Ltd., SRA). Mr Raunak Dhillon, Mr Animesh Bisht, Ms Saloni Kapadia, Ms Madhavi Khanna, Mr Shubhankar Jain, Mr Aniruddh Gambhir, Advocates for COC.

With

2. Company Appeal (AT) (Insolvency) No. 552 of 2021

IN THE MATTER OF:

1. Mr Anup Kumar Shrivastava
Aged 65 years
Residing at 44/26 Lowther Road
George Town, Pragyaraj, UP
Presently in Gurgaon Haryana
Having Customer ID - 1485678 **Appellant No.1**

2. Mrs Vibha Srivastav
Aged 60 years
Residing at 44/26 Lowther Road
George Town, Pragyaraj, UP
Presently in Gurgaon Haryana
Having Customer ID - 10101245 **Appellant No.2**

Versus

1. Mr R. Subramaniakumar
Administrator of Dewan Housing Finance Corporation Limited
Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai
Maharashtra – 400001 **Respondent No.1**

2. Committee of Creditors of
Dewan Housing Finance Corporation Ltd
Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai
Maharashtra – 400001 **Respondent No.2**

3. Piramal Capital & Housing Finance Limited
4th Floor, Piramal Tower
Peninsula Corporate Park
Lower Parel, Mumbai,
Maharashtra – 400013 **Respondent No.3**

Present:

For Appellant : Mr Dhruv Gupta, Advocate

For Respondent : Mr Ashish Bhan, Mr Ketan Gaur, Ms Chitra Rentala, Mr Aayush Mitruka, Mr Kaustub Narendran, Ms Samriddhi Shukla, Ms Lisa Mishra and Mr Vishal Hablani, Advocates for Intervenor (Piramal Capital & Housing Finance Ltd., SRA). Mr Raunak Dhillon, Mr Animesh Bisht, Ms Saloni Kapadia, Ms Madhavi Khanna, Mr Shubhankar Jain, Mr Aniruddh Gambhir, Advocates for COC.

Glossary

FSP Rules	Financial Service Providers
NCLT	National company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
I&B Code/ Code	Insolvency and Bankruptcy Code
CIRP	Corporate Insolvency Resolution Process
CoC	Committee of Creditors
NHB	National Housing Bank
MCGM	Municipal Corporation of Greater Mumbai
DHFL	Diwan Housing Finance Corporation Ltd
BUDSA	Banning of Unregulated Deposit Schemes Act 2019
AR	Authorized Representatives
ILC	Insolvency Law Committee

CORAM:

Hon'ble Mr Justice M. Venugopal, Member (J)
Hon'ble Mr V. P. Singh, Member (T)
Hon'ble Dr Ashok Kumar Mishra, Member (T)

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. The present Appeal has been preferred by Air Force Group Insurance Society (**Appellant**) for the limited purpose of challenging the Resolution Plan approved by the Adjudicating Authority by Order dated June 7, 2021, (**Impugned Order)** in Interlocutory Application No. 449 of 2021 in Company Petition No. 4258 of 2019.

2. **Facts of the Case:**

2.1 The Appellant has created fixed deposits with the Corporate Debtor to manage their funds.

2.2 On November 29, 2019, the Corporate Insolvency Resolution Process was initiated against the Corporate Debtor by RBI under Rule 5 of Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 **("FSP Rules")** through Company Petition No. 4258 of 2019.

2.3 The Adjudicating Authority vide its Order Dt. December 3, 2019, admitted the said petition against the Corporate Debtor. Accordingly, Respondent No. 1, Mr R. Submramaniakumar, was confirmed as the Administrator and was further directed to perform all functions of Resolution Professional and complete the Corporate Insolvency Resolution Process of the Corporate Debtor according to IBC.

2.4 In the resolution process, a Resolution Plan was submitted by Respondent No.3, Piramal Capital & Housing Finance Limited and was subsequently approved by Respondent No.2 (CoC). Accordingly, Respondent No.1 filed an Interlocutory Application No. 449 of 2021, among other things, under Section 30(6) and Section 31 of IBC for approval of the Resolution Plan. Subsequently, Adjudicating Authority approved the Resolution Plan.

2.5 By the Impugned Order, Adjudicating Authority suggested Respondent No.2 reconsider enhancing the percentage of the Payment made to the small investors under the Resolution Plan by approximately 40%, the same as secured Financial Creditors. Adjudicating Authority further requested Respondent No.2 to reconsider and repay the entire admitted claim of Army Group Insurance Fund without any haircut and consider them as a separate class or sub-class of creditors considering the nature of duties performed by them.

2.6 The NCLT reasoned its observation by stressing that the lakhs of small investors, including senior citizens who had deposited their savings and had to meet various expenses, especially in this Covid 19 pandemic. Further, it was realised by NCLT that a corporate debtor is a financial service provider, which is different nature of Company than any other company under the Corporate Insolvency Resolution Process under IBC.

2.7 The Learned AA/NCLT, in its Order, also suggested making full Payment of the claim of the Army group insurance fund. The reasoned

observation considers the nature of their duties, which includes protecting the nation, sacrificing their lives, living in difficult working conditions and providing human service to keep the country's peace.

2.8 The NCLT found it appropriate for the committee of creditors to reconsider and repay the entire admitted claim without any haircut, thereby expressing its deep concern, gratitude, and respect to the army personnel and thousands of families, widows, children that can be saved from making such Payment.

2.9 The Appellant contended that it would also fall into the same class of creditors as the Army Group Insurance Fund to provide the air warriors insurance cover primarily because the civil insurance companies were not providing insurance cover for the defence personnel due to potential war risks.

2.10 The Appellant then sent two emails to the Authorised Representative of the Fixed Deposit Holders of the Corporate Debtor to seek reconsideration of Resolution Plan of Respondent No.2 based on the Adjudicating Authority request. However, the Appellant received news that Respondent No.2 had rejected the suggested revision by a majority of 89.19% votes.

2.11 The Resolution Plan is in contravention of the National Housing Bank Act, 1987, as it fails to make full Payment of the admitted claim of the Appellant.

3. **Grounds of Appeal**

The Appellant filed the present Appeal before the Appellate Tribunal against the impugned Order passed by the Adjudicating Authority and the subsequent conduct of Respondent No.2, failing to secure the interest of the Appellant as a deposit holder and secured financial creditor of the Corporate Debtor. The grounds of challenge are as follows:

a) That the Resolution Plan is in contravention of the NHB Act as it fails to make full Payment of the admitted claim of the Appellant.

b) The Adjudicating Authority ought to have rejected the Resolution Plan as it contravenes Section 29A (4) (a) of the NHB Act.

c) That Adjudicating Authority ought to have rejected the Resolution Plan as it a contravention of Section 36(A) of the NHB Act.

d) That Adjudicating Authority ought to have rejected the Resolution Plan as it a contravention of Section 12 (vi) and Section 18 of NHB Directions 2010.

e) That Adjudicating Authority did not consider Section 36 of the NHB Act, which provided that Chapter V of the NHB Act will override other inconsistent laws or any instrument affected by such law.

f) The Adjudicating Authority did not consider the terms and conditions of the deposits.

g) The Adjudicating Authority did not consider the full Payment of the Appellant's admitted claim under the Resolution Plan. The

Appellant had made substantial investments with the Corporate Debtor through fixed deposits. These investments were made considering the deposits with the Corporate Debtor were safe and regulated by the NHB. Further, it was subject to several statutory measures designed to protect public depositors and secure repayment of deposits.

h) The Adjudicating Authority did not consider that the relevant statutory provisions under the NHB Act read with regulations and directions, mandate creation of a floating charge over the assets of the Housing Finance Companies such as the Corporate Debtor, to secure deposits received.

i) The Adjudicating Authority did not consider that the Corporate Debtor is statutorily obligated to make Payment of the deposits prematurely in case of the death of the insured person.

j) The Adjudicating Authority did not consider that the Appellant also had the option of an early withdrawal (as in the case of fixed deposits), subject to the Payment of the requisite breakage charges. The Appellant was entitled to premature withdrawal of the deposits upon death or serious Illness of its insured personnel. As a result of the various death claims made to the Appellant and due to the lack of ready funds, the Appellant was constrained to ask the Corporate Debtor for premature Payment of the deposits made with it by the Appellant, without which it would be impossible for the Appellant to make

Payment to its personnel. This was before the Corporate Insolvency Resolution Process of the Corporate Debtor.

k) That the Adjudicating Authority did not consider that a series of directions were also issued from the National Housing Bank ,(which has jurisdiction over Corporate Debtor in terms of the NHB Act), to the Corporate Debtor to the effect that all public depositors to be paid, irrespective of the decision that was taken by the lender's forum.

l) The Adjudicating Authority ought to have considered that the All-Air Force personnel upon joining contribute an amount to the Appellant from their monthly salary.

m) The Adjudicating Authority ought to have considered that the average age of an officer from the flying branch at the time of commission is 21 years. Officers undergo rigorous training and sacrifice the comforts of civilian life due to their postings far from home, away from the comforts and conveniences of city life, whilst exposing themselves to high risk at a young age. Every Air Warrior, irrespective of his rank, is ready to make the ultimate sacrifice for the defence of the Indian skies. This sacrifice alone ensures that the Indian Air Force lives up to its motto, 'Nabha Sparsham Deeptham'; in Sanskrit, it means 'Touch the Sky with Glory.'

n) The Adjudicating Authority did not consider that in the case of loss of life of the Air Force Warriors, it is of utmost importance that the

financial support is provided to the deceased's family. Payment of death claims must therefore be made quickly without delay. Consequently, it is imperative that deposits placed by the Appellant with the Corporate Debtor be repaid promptly on the death of air force personnel and maturity of deposits. As a result, the families of deceased air force personnel will face financial ruin, apart from a complete demoralisation of the armed forces.

o) The amount deposited by the Appellant was for the sacred cause of providing security to the kith and kin of martyred air warriors while they were selflessly defending the nation. Therefore, they should be repaid for the same.

4. **WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANTS**

4.1 The present Appeal impugns Order dated 07.06.2021 passed by Hon'ble NCLT, Mumbai Bench, disposing of IA No. 449/2021, on the following grounds:

(a) Resolution Plan does not pass muster under Section 30(2)(e) of the Code being in contravention of the provisions of NHB Act, read with the NHB Directions.

i) A perusal of the provisions of Section 36A of the NHB Act makes it amply clear that the deposits have to be repaid strictly in accordance with the terms of such deposit. The entire scheme of the NHB Act is aimed at securing the interests of depositors, as evidenced by a perusal

of the provisions of Sections 29 B, 29 C, 30 A, 31, and 33 A. [Relevant excerpts of NHB Act, 1987)

ii) Further, the NHB Directions make it incumbent upon every housing finance company to secure repayment of the total amount of public deposits. A reference may be had to the provisions contained in Directions nos. 3, 6, 14, 15, and specifically, Directions 18 and 39, which mandated full cover for public deposits. (NHB Directions, 2010)

iii) A perusal of the statement of objects of the NHB Act makes it amply clear that it is aimed at regulating and promoting housing finance institutions. Whereas the IB Code is aimed at insolvency resolution of corporate persons. It is one thing to suggest that the Insolvency of the Corporate Debtor will be governed under the provisions of the I&B Code. Still, necessary to indicate that in the exercise of such powers, the CoC constituted under the I&B Code will also usurp the regulatory functions and powers of statutory Authority by resorting to Section 238 of the Code. A ready resort to Section 238 should not render Section 30(2)(e) nugatory. Section 238 covers cases of inconsistency, whereas the present case is one where the two legislations can be construed harmoniously. Since NHB Act provides for the regulation of public deposits in a housing finance company, it must be done strictly, under the terms thereof or not at all.

iv) Section 36 of the NHB Act provides that the provisions thereof shall have effect notwithstanding anything inconsistent contained in any other law. It is trite law that where two legislations contain non-obstante clauses. Still, they operate in different fields. Therefore, earlier legislation yielded to the latter one.

(b) The Resolution Plan, as well as the distribution mechanism, are discriminatory and arbitrary.

i) Under Clause 2.5.5 of the resolution plan, the Resolution Applicant had provided an additional amount to be paid to the Fixed Deposit holders, over and above the amount allocated to them by the CoC. However, this clause was rendered otiose by the CoC in as much as; the COC has arbitrarily and whimsically withdrawn the alleged benefit to the Appellants as is evident from a perusal of the minutes of 18th CoC, wherein it has been recorded that this additional amount shall not be over and above the resolution plan amount.

ii) Further, the CoC has created an artificial and arbitrary distinction between similarly placed fixed deposit holders by categorising them into different groups and allocating discriminatory payments amongst these fixed deposit holders. A perusal of pages 183 and 184 of the Appeal clarifies the position. There cannot be discrimination between similarly placed creditors.

iii) Vide the Impugned Order, the Tribunal has erred in equating the risk appetite of the Appellants with banks and financial institutions. The Hon'ble Tribunal proceeded to accord approval to the discriminatory treatment of the FD holders despite suggesting that the FD holders have not been given their fair share of money under the Resolution Plan. [impugned Order Observations Paras 4-7)

iv) The treatment of the Appellants under the Resolution Plan runs afoul of Explanation-1 to Section 30 of the IB Code, wherein the legislature's intention has been codified explicitly to state that the distribution should be fair and equitable. The Appellants include ailing, senior citizens who have invested their life savings on the strength of AAA ratings provided by the credit rating agencies.

v) Finally, treatment of the Appellants, under the provisions of the NHB Act, read with the Directions, shall also be consistent with the observations of the Hon'ble Supreme Court in the case of Vinay Kumar Mittal v. Dewan Housing Finance (Civil Appeal No. 654-660 of 2020), wherein the Hon'ble Apex Court expressed hopes of redressal of the concerns of the depositors and their rights under the law. In terms of the same, the present claims must be considered under the provisions of the NHB Act read with the Directions.

(c) The discriminatory treatment to the Appellants would have been inflicted even if the Appellants had voted in favour of the plan.

i) The Payment to the Appellants of the liquidation value of their SLRs in the event of dissent is only a consideration in quantifying the amount payable to them in the event of dissent. The Hon'ble Supreme Court has clarified that the security interest is only one of the considerations to determine the amount payable to a creditor and not the only consideration. [India Resurgence Arc Private Limited vs M/s Amit Metaliks Limited & Anr. 2021 SCC Online SC Amit Metaliks]

ii) Without prejudice, it is submitted that as per the Respondents' admission, had the Appellants voted in favour of the Resolution Plan, the payout to them would not have been any different. [Admission – 20th CoC minutes @Para (iii) - Page 213 of the Appeal]

(d) The Corporate Debtor being an FSP must be treated on a footing different from a regular Corporate Debtor.

i) The legislature, in its wisdom, notified the provisions for insolvency resolution of FSPs separately and distinctly from the Insolvency of a regular Corporate Debtor. The Report of the sub-committee on the Insolvency of FSPs provides that the rationale for excluding FSPs from the purview of IBC is that the financial firms differ from other firms, inter -alia, for the reason that they handle large amounts of consumers money. Therefore, they are considered systemically important as their failure might disrupt the financial system. The sub-committee also noted that the Housing Finance

Companies must comply with the directions and instructions issued by the National Housing Bank. (Report of the Sub-Committee of the Insolvency Law Committee for Notification of Financial Service Providers under Section 227 of the IBC, 2016.)

ii) Therefore, because the Corporate Debtor is an FSP, the Insolvency of which poses systemic risks to the market, the scrutiny entailed in appreciation of the Resolution Plan must be stricter. The commercial wisdom of the CoC cannot stretch to cover regulatory aspects expressly provided for under the NHB Act read with the Directions.

5. **Respondent No 1's submission**

5.1 Respondent submits that the Appellant does not have any locus to challenge the impugned Order. However, being a fixed deposit holder of Dewan Housing Finance Corporation Ltd (DHFL/CD), the Appellant is a financial creditor. Moreover, along with other depositors, the Appellant was represented on the CoC through an authorised representative. As such, after approval of the Resolution Plan by the majority of the CoC, wherein the Appellant's Authorised Representative participated in the voting process, the Appellant cannot now maintain an independent challenge to the resolution plan, nor could it be treated as carrying any legal grievance.

5.2 Respondent submits that the present case does not warrant any interference from this Appellate Tribunal because the tribunal does not have

the power to modify the terms of the Resolution Plan on its own but can only direct the CoC to reconsider altering the terms of the resolution plan. Consequent to the said directions of the NCLT, the Appellant made a representation before the COC to reconsider paying the Appellant's dues in their entirety as it is placed on a similar footing as that of the Army group. Under the said representation, the COC, in its 20th meeting dated June 17 2021, put to the vote the resolution to inter-alia consider the full Payment of the dues of the Army group and the Appellant. However, the above resolution was rejected by approximately 89% of the voting members of the CoC.

5.3 Given the above, this Appellate Tribunal ought to adopt a "hands-off approach" and cannot act as a court of equity or exercise plenary powers while dealing with objections to the impugned Order approving the resolution plan.

5.4 The respondent further contends that the Appellant does not have the right to demand full Payment of the deposits under the National Housing Bank Act, 1987 and the National Housing Bank Directions, 2010. When the corporate insolvency resolution process is initiated under the Code, the rights of all creditors, including the Appellant (i.e. dissenting financial creditors), to receive payments will be governed by section 30 (2)(b) of the provisions of the Code. They cannot claim any priority/special treatment under any other law in force. It has clarified that neither the NHB Act nor the NHB directions contain any provision that would entitle the Appellant to any priority in Payment. The purported rights of the Appellant to receive payments in lieu of the deposits under the pre-dated NHB Act and the NHB Directions will have

to yield to the distribution mechanism for Payment to creditors under the Code due to the overriding effect of section 238 of the Code.

5.5 The respondent further submits that the resolution plan is under the Code and the Allied regulations. Therefore, the Appellant cannot bypass the distribution mechanism under the Code and see preferential treatment. In any event, the primary grievance of the Appellant is not against the resolution plan but again, the distribution mechanism

6. **Written submissions on behalf of Respondent No.2**

The Appellants have filed the present Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("Code / IBC") aggrieved by the impugned Order dated June 07, 2021 ("Impugned Order") passed by the Learned AA/ NCLT in IA. No. 449 of 2021 in Company Petition (IB) No. 4258 of 2019 approving the Resolution Plan submitted by 'Piramal Capital and Housing Finance Limited' ("Successful Resolution Applicant") for 'Dewan Housing Finance Corporation Limited' ("DHFL"). The Appellants' main grievance is that the approved resolution plan ("Resolution Plan") has equated the Appellants who are fixed deposit holders ("FD Holders") with other financial institutions/creditors and in contravention of the National Housing Bank Act ("NHB Act") and Reserve Bank of India Act ("RBI Act") have been given the biggest haircut under the Resolution Plan.

7. **SUBMISSIONS ON BEHALF OF COMMITTEE OF CREDITORS OF DHFL**

A) Only the RBI can decide whether to initiate proceedings under the Code or the RBI Act.

(i) The RBI had the discretion to invoke the mechanism under the Code or the RBI Act (Section 45 MBA) for inter-alia the insolvency resolution of DHFL and chose the former in its wisdom. Vide notification dated November 20, 2019, the RBI as the expert Regulator of Housing Finance Companies ("HFCs") and Non-banking Financial Companies ("NBFCs") chose to supersede the board of DHFL in the exercise of its powers under Section 45-IE of the RBI Act and appoint an Administrator. Further, vide Notification dated November 22, 2019, the RBI appointed an Advisory Committee to assist the Administrator.

(ii) The RBI exercised its administrative discretion reasonably and filed the Company Petition (IB) No. 4258 of 2019 to resolve the issues of non-payment and governance concerns of DHFL under the Code, which would ensure maximisation of assets in a time-bound manner.

(iii) The mechanism under the Code was chosen instead of the untested mechanism under the RBI Act in the interest of timely and proper resolution of DHFL. The Report dated October 4, 2019, of the Sub-Committee of the Insolvency Law Committee for Notification of Financial Service Providers under Section 227 of the Code ("ILC Report") also finds that under the RBI Act, the resolution framework for FSPs, in general, remains uncomprehensive and untested. In contrast, the

resolution framework for non-FSPs under the Code is working reasonably well. The Report recommended, as an interim arrangement, enabling a framework with appropriate modifications to the Code for some FSPs/categories of FSPs.

B. <u>There is no provision in either the RBI Act or the NHB Act which mandates that the depositors have to be paid in full</u>

(i) There is no guarantee of full Payment, especially when the NBFC or HFC is under Insolvency, to FD Holders under the NHB Act, NHB Directions or the RBI Act. The RBI has also acknowledged this stand in its replies filed before the Hon'ble Delhi High Court and Hon'ble Bombay High Court under writ petitions filed by FD Holders.

(ii) The RBI Act and NHB Act merely provide that the license of an HFC or NBFC may be cancelled if the deposit holders are not paid, or the company court may be approached. However, even in such cases, decisions are taken only after giving the HFC or NBFC a chance of being heard.

(iii) Further, even the 'Banning of Unregulated Deposit Schemes Act', 2019 ("BUDSA") enacted on July 19, 2019, inter-alia to protect the interest of depositors under Chapter V dealing with "Restitution of Depositors" provides as under:

"12. Save as otherwise provided in the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or the Insolvency and Bankruptcy Code! 2016, any amount due to depositors from a deposit taker shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the appropriate Government or the local Authority...."

The legislation, which has been made to protect the rights of the FD Holders, in unambiguous terms makes it clear that the rights of FD Holders will have priority, save and otherwise, as provided under the Code. Primacy has been given to the Code despite the BUDSA (welfare legislation for the protection of deposit holders) being later legislation. Therefore, it is not open for the Appellants to contend that the RBI Act and NHB Act will prevail over the IBC.

C. The Code being a subsequent enactment, will override the provisions of the NBH Act and RBI Act

(iv) The provisions of the Code (which is a later enactment) will override the NHB Act and the RBI Act by the non-obstante clause in Section 238 of the Code. It is also well settled that when two special statutes contain non-obstante clauses, the later statute will prevail over the earlier one. [Refer: Innoventive Industries Ltd v. ICICI Bank and Ors. [(2018) 1 SCC 407] (Paragraphs 13, 59 - 61); Rajendra K. Bhulla v. Maharashtra Housing and Development Authority & Ors. [(2020) 13

SCC 208J (paragraphs 25, 27); Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited, [(2018) 18 SCC 786] (paragraph 2)]

(v) The submission of the Appellant, therefore that the Impugned Order is in contravention of Section 30(2)(e) of the Code, is wholly erroneous as the Resolution Plan is compliant with the provisions of the Code. Consequently, the Appellants cannot rely on the NHB Act or the RBI Act to claim any preferential treatment in the CIRP of DHFL, conducted under the purview of the Code.

D. FD Holders, including the Appellants in the present Appeal, are Financial Creditors of DHFL and have been treated accordingly under the provisions of the Code.

(i) The Appellants as FD Holders have been recognised as Financial Creditors under the Code in the CIRP of DHFL. The Appellants have themselves submitted to and availed rights as Financial Creditors by filing their claims with the Administrator in 'Form C'. As a consequence of admission of such claims, they have been exercising all rights as members of the CoC of DHFL.

(ii) The FD Holders in the CoC was represented as a class of Financial Creditors through a duly appointed Authorized Representative ("AR") of their choice as per the express provisions of

Section 21(6A) of the Code. The FD Holders through the AR have participated and voted in the entire CIRP.

(iii) The Insolvency Law Committee Report in this regard has also highlighted that;

> *"The FSP Sub - Committee has also clarified that the amounts deposited by the depositors with an FSP would be treated as financial debt, and such depositors would be classified as financial creditors and be treated accordingly."*

(iv) It is evident from the legislative intent that the Appellants as FD Holders are to be treated as Financial Creditors and, therefore, cannot claim any preferential treatment under the Code or any other legislation.

E. There is no provision under the Code providing any preferential treatment to the Appellants.

(v) The Appellants are Financial Creditors of DHFL; any right to recovery from DHFL must be as per the framework and mechanism provided under the Code. Once the Resolution Plan has been approved, Payment to the Appellants who are FD Holders will be made per the approved Resolution Plan.

(vi) The AR being aware of the same addressed a letter dated January 17, 2020, to IBBI and RBI requesting that the relevant regulations be suitably amended so that FD Holders can be paid and urged that a

compassionate view be taken concerning their payments. [Refer: Page133 of the CoC's Reply]

(vii) In the Second CoC meeting, the Administrator maintained that claims of the FD Holders could only be under the provisions of law and in the Third CoC Meeting, the AR requested that the payments to the FD Holders for matured deposits and medical emergencies be made a voting item. However, the Administrator's legal counsel stated that the same might be viewed as preferential treatment of a specific class. [Refer: Pages; 143-144 and 147-171 respectively of CoC's Reply]

(viii) In the Sixth CoC Meeting, the AR had requested that FD Holders be paid their dues. The Administrator expressed his inability to do so as "no such amendments by the IBBI have come concerning the regulations, and hence, such deviation from the applicable rules and regulations of the Code would result in non-compliance." [Refer: Page 184 of CoC's Reply]

(ix) It has been the Administrator's consistent stand that FD Holders claims can only be under the Code's provisions and has reiterated in his letter dated February 13, 2020. [Refer Pg. 194-196 of CoC's Reply]

(x) By its Order dated January 31, 2020, the Hon'ble Supreme Court has also categorically held that the rights of FD Holders must be decided in accordance with the law. [Refer Pg. 206 of CoC's Reply]

(xi) Preferential treatment is prohibited under the Code; the petitioner's claim is wholly misplaced as Payment to one class or sub-class of creditors would amount to preferential disbursement and against the law.

(xii) The recovery of amounts will happen within the Code's framework, not the RBI Act or NHB Act. Under the Code, the FD Holders, dissenting Financial Creditors, have been assigned the liquidation value.

F. <u>The Appellants cannot be treated as a sub-class of creditors;</u>

(i) The Hon'b1e Supreme Court has, time and again, recognised only secured or unsecured, financial or operational, as classes of creditors. The law does not recognise a sub-class. There are no legal grounds available to the Appellants to seek treatment as a sub-class inter-se amongst other Financial Creditors to seek preferential treatment.

(ii) It is well established that for payments to creditors under the Code, what is fair and equitable must be determined within the Code's framework, under the CoC's commercial wisdom, subject to certain minimum guidelines to be observed, i.e. minimum liquidation value must be given to creditors. [Refer: CoC of Essar Steel v Satish Kumar (2020) 8 SCC 531].

(iii) All dissenting Financial Creditors are entitled to the liquidation value, and the Resolution Plan provides them with the liquidation value. Accordingly, the Resolution Plan is fully compliant with the Code, and hence the Impugned Order deserves no interference.

(iv) It is also well established that the commercial wisdom of the CoC is not amenable to judicial review on any ground. [Refer; K. Shashidhar v. Indian Overseas Bank [(2019) 12 SCC 150] Paragraph 52), Kalparaj Dharamshi & Anr v. Kotak Investment Advisors Ltd [Civil Appeal No. 2943-2944 of 2020] (paragraphs 154, 155); Jaypee Kensington Boulevard Apartments Welfare Association & Ore. vs NBCC (India) Ltd & Ors. [Civil Appeal No. 3395 of 2020] order dated March 24, 2021]

(v) In the present CIRP, the CoC has approved the Resolution Plan with a 93.65% majority. Accordingly, the distribution mechanism by 86.95% majority and the FD Holders charge has been taken into account for the purpose of calculating their liquidation value. Therefore, while other dissenting financial creditors recover 1.25%, the FD Holders are recovering 23.08% of their admitted claim.

G. <u>The Appellants' case is based purely on equity;</u>

(i) The Appellants have not pointed out any legal provisions to establish their right to get priority payment of dues.

(ii) The CoC has approved the Resolution Plan and the distribution mechanism and the Learned AA/ NCLT, Mumbai, by the Impugned Order.

(iii) The only grounds which the Appellants seek to agitate are equitable regarding the fact that the monies of FD Holders include that of senior citizens and ailing people. However, it is well settled that equity, no matter how well-founded, cannot override the express provisions of law.[Nasiruddin v. Sita Ram Agarwal [(2003) 2 SCC 577] (paragraph 35, p. 588), Raghunath Rat Bareja v. Punjab National Bank [(2007) 2 SCC 230] (paragraphs 29 to 36), B. Premanand v. Mohan Koikal [(2011) 4 SCC 266] (paragraphs 4, 7), Indian School Certificate Examination v. Isha Mittal and Anr. [(2000) 7 SCC 521] (paragraph 4), P.M. Latha v. State of Kerala [(2003) 3 SCC 541] (paragraph 73), Laxminarayan R. Bhaitad v. State of Maharashtra [(2003) 5 SCC 413] (paragraph 73)].

(iv) As stated above, the concept of fairness and equity has been incorporated into the Code itself under Explanation I of Section 30 of the Code. Therefore, as long as the creditor gets the minimum liquidation value, the same would be equitable.

(v) If priority treatment is given to the Appellants on the ground of equity alone, similar treatment would have to be given to other creditors of DHFL, including NCD Holders, public sector banks etc. which would

result in the depletion of assets of the Corporate Debtor and a breakdown of the entire CIRP.

H. Vide the Impugned Order, the Hon'ble NCLT directed the CoC to reconsider the distribution mechanism to bring the payout of FD Holders at par with that of assenting financial creditors, the CoC has rejected the same.

(i) As per the request in the Impugned Order, on June 22, 2021, the CoC considered and rejected the reconsideration of the distribution under the Resolution Plan to increase the FD Holders' payout to that which is being granted to assenting Financial Creditors. The FD Holders themselves voted against the resolution, and 89.19% votes of the CoC rejected the same.

(ii) Appellants cannot now seek to challenge the approved Resolution Plan, which has been passed by the CoC of which the FD Holders are a part.

(iii) The Hon'b1e Supreme Court in Pratap Technocrats (P) Ltd & Ors. v. Monitoring Committee of Reliance Infratel Limited & Anr.,2021 SCC Online SC 569 @ Para 31, 39 has held that the Adjudicating Authority and the Appellate Tribunal have been endowed with limited jurisdiction as specified in the Code and not to act as a court of equity or exercise plenary powers and that there is no residual equity-based jurisdiction with the Adjudicating Authority or this Appellate Tribunal. The Code

itself circumscribes the jurisdiction of this Appellate Tribunal to review the resolution plan.

(iv) In the present case, the Learned Adjudicating Authority has already found that the Resolution Plan is compliant with the Code. The Appellant has made no case that the Resolution Plan is not compliant with the Code. That being the case, there is no ground that the Appellant has demonstrated which would merit interference with the Impugned Order by this Hon'ble Appellate Tribunal.

COMPANY APPEAL (AT) (INSOLVENCY) NO. 552 OF 2021

1. Anup Kumar Shrivastava and Vibha Shrivastava have preferred the present Appeal **('FD Holders')** against the common impugned Order dated June 7, 2021, passed by the National Company Law Tribunal, Mumbai Bench ('**Adjudicating Authority**), whereby the Adjudicating Authority approved the Resolution Plan in IA. No. 449/2021 in CP (IB) No. 4258/MB/C-II/2019 and disposed of the IA. No. 625/2021 filed by the Appellants.

2. **Brief Facts:-**

2.1 The Appellants had preferred an IA. No. 625/2021 before the Adjudicating Authority challenging the Resolution Plan as illegal and void. However, the Adjudicating Authority disposed of the said IA under the aforementioned impugned Order. Accordingly, CoC requested to consider and increase their recoveries to the level of the Secured Financial Creditors, i.e. approximately 40%.

2.2 The Appellants herein have alleged that the treatment meted out to them under the Resolution Plan submitted by the Successful Resolution Applicant. The distribution mechanism approved by the CoC in the 18th meeting of members of CoC gave them the biggest haircut despite being the most vulnerable class. As a result, the Appellants have been recognised as Financial Creditors and equated on their risk appetite with Financial Institutions and Banks.

2.3 Respondent No. 1 is the Administrator of DHFL, i.e. the Corporate Debtor. Respondent No. 2 is the Committee of Creditors of the Corporate Debtor, and Respondent no. 3 is Piramal Capital, i.e., the Successful Resolution Applicant.

3. **Grounds raised by the Appellants: -**

3.1 The Appellants have been recognised as Financial Creditors and equated on their risk appetite with Financial Institutions and Banks arbitrarily.

3.2 The fixed deposit holders have not been given a fair share of the money. Instead, the Adjudicating Authority equated them with secured Financial Creditors to increase their allocation to 40% of admitted claims, on par with the secured Financial Creditors.

3.3 That, FD holders were duly secured by the provisions of the RBI Act and NHB Act, and FD holders ought to be considered fully secured creditors as per the provisions of NHB Act, which was applicable at that time. FD

holders relied upon the AAA credit rating from CARE and made the fixed deposits with DHFL.

3.4 The reliance placed on Section 238 of the I&B Code to prevail over the NHB Act was misplaced. The provision of the I&B Code has been given overriding effect only in case of any inconsistency between the provisions I&B Code and any other legislation. However, it cannot be pressed into service in the present case where the provisions of two legislations can be harmoniously construed.

3.5 On perusal of the minutes of the 18th meeting of CoC, it appears that by the distribution mechanism envisaged, the FD Holders are given the biggest haircut. Out of the admitted claims amount of Rs. Five thousand three hundred seventy-five crores, only Rs. 1243 Crores (i.e. 23.08%) has been directed to be paid to the fixed deposit holders. This is against the 40% (minimum) of the admitted claims agreed to be paid to the secured financial creditors with a tremendously huge risk appetite.

4. **Submission on behalf of the Appellants:-**

4.1 Appellants contended that Resolution Plan does not pass muster under Section 30(2)(e) being in contravention of the provisions of the NHB Act, read with the NHB directions. The entire scheme of the NHB Act is aimed at securing the interest of depositors, as evidenced by a perusal of the provisions of Section 29 B, 29 C, 30 A, 31, and 33 A of the Act.

4.2 The Appellants further contended that the Resolution Plan and the distribution mechanism are discriminatory and arbitrary. The CoC has created an artificial and arbitrary distinction between similarly placed fixed deposit holders by categorising them into different groups and allocated discriminatory payments. The Treatment of the Appellants under the Resolution Plan runs afoul of explanation-1 to section 30 of the I&B Code, wherein the legislature's intention has been specifically codified to state that the distribution should be fair and equitable.

4.3 It is further argued on behalf of the Appellants that the treatment of the Appellants, in accordance with the provisions of the NHB Act, read with the NHB directions, shall also be consistent with the observations of the Hon'ble Supreme Court in the case of Vinay Kumar Mittal vs Dewan Housing Finance, wherein the Hon'ble Apex court expressed hopes of redressal of the concerns of the depositors and their rights in accordance with the law. Therefore, the present claims must be considered under the provisions of the NHB Act.

4.4 It is further submitted on behalf of the Appellants that the discriminatory treatment of the Appellants would have been inflicted even if the Appellants had voted in favour of the plan.

4.5 The Appellants also submitted that the Corporate Debtor being an FSP, must be treated differently from a regular Corporate Debtor. In view of the fact that the corporate debtor is an FSP, the Insolvency of which poses systematic risks to the market, the scrutiny entailed in appreciation of the

Resolution Plan must be stricter. The commercial wisdom of the COC cannot stretch to cover Regulatory aspects expressly provided under NHB Act.

5. **Submission on behalf of Respondent no. 2 (CoC):-**

5.1 Respondent No. 2 submitted that the RBI had the discretion to invoke the mechanism under the Code of the RBI Act or inter alia the insolvency resolution of DHFL. The RBI exercised its administrative discretion reasonably and filed the CP (IB) No. 4258 of 2019 in order to resolve the issue of non-payment and governance concerns of DHFL under the Code, which would ensure maximisation of assets in a time-bound manner. Only the RBI can decide whether to initiate proceedings under the Code or the RBI Act.

5.2 It is further submitted that there is no guarantee of full Payment, especially when the NBFC or HFC is under Insolvency, to FD Holders under the NHB Act, NHB Directions or the RBI Act. So, there is no provision in either the RBI Act or the NHB Act, which mandates that the depositors have to be paid in full.

5.3 It is also submitted by Respondent No. 2 that the provisions of the Code will override the NHB Act and the RBI Act under the non-obstante clause in Section 238 of the Code. It is also well settled that when two special statutes contain non-obstante clauses, the later statute will prevail over the earlier one.

5.4 Respondent No.2 also contended that the FD Holders, including the Appellants in the present Appeal, are Financial Creditors of DHFL and have

been treated accordingly under the provisions of the Code. The Appellants are Financial Creditors of DHFL, and therefore, any right to recovery from DHFL must be as per the framework and mechanism provided under I&B Code. Once the Resolution Plan has been approved, Payment to the Appellants who are FD Holders will be made per the approved Resolution plan. Therefore, the Appellants cannot be treated as a sub-class of creditors, and the Appellants case is based purely on equity.

6. **Submission on behalf of Respondent no. 3 (Piramal):-**

6.1 Respondent No. 3 submitted that the Appellants participated in the Corporate Insolvency Resolution Process in the capacity of Financial Creditors and were treated as such. Accordingly, the Appellants' claims are governed by the I&B Code alone. While the I&B Code is a self-contained Code exclusively dealing with Insolvency, the NHB Act and the RBI Act operate in ordinary circumstances when a company is not undergoing Insolvency.

6.2 It is further submitted that the Appellants were not entitled to Payment of matured FDs during CIRP. The FDs formed part of the erstwhile Corporate Debtor's assets and, therefore, could not be alienated throughout CIRP.

6.3 It is also submitted that the supposed terms of the license under the NHB Act and RBI Act do not, and cannot, govern the functioning of the Erstwhile Corporate Debtor during CIRP.

7. **Analysis**

7.1 We have heard the argument of the learned counsel for the parties and perused the record. Accordingly, the Company Appeal CA(AT)(INS) 552 of 2021 is filed by the Air Force group insurance Society for the limited purpose of challenging the Resolution Plan approved by the Adjudicating Authority.

7.2 The Appellant Air Force group insurance Society contends that while approving the Resolution Plan, the Adjudicating Authority had suggested Respondent No. 2 reconsider enhancing the percentage of the Payment made to the small investors under the Resolution Plan by approximately 40%, the same as secured Financial Creditors. The Adjudicating Authority further requested respondent number 2 to reconsider and repay the entire admitted claim of the Army Group Insurance fund without any haircut and consider them as a separate class or subclass of creditors considering the nature of duties performed by them. It is stated that the depositors are small investors, including senior citizens who had deposited their savings and had to meet various expenses, especially in this Covid 19 pandemic. But ignoring the directions of the adjudicating CoC rejected the suggested revision of allocation of funds to the Appellant by a majority of 89.49% vote share.

7.3 The Appellant Air Force group insurance Society further pleaded that the Appellant, unlike the other civil insurance companies, provides insurance cover to provide insurance, to Air Force Personnel through individual contributions by all Air Force personnel, past and present and their dependents by giving pre-and post retirement insurance cover and lump-sum benefits on retirement/release/ on the disability from the Indian Air Force.

However, the Adjudicating Authority failed to consider that in the case of loss of life of the Air Force warriors, it is of utmost importance that the financial support is provided to the deceased family.

7.4 Learned Counsel for the Appellant submits that Rule 5(d) of Financial Service Providers Rules, 2019 mandates that the Resolution Plan include a statement explaining how the Resolution Plan satisfies or intends to satisfy the requirements of engaging in the business of the FSP. Resolution Plan fails to include a message explaining how it plans to meet the needs of engaging in the business of an FSP, especially concerning the repayment of deposits. Further, the plan should comply with existing laws governing the entity's actions —further, the interest as per the terms of the deposit made by the FD holders.

7.5 Further, the Resolution Plan must contain provisions for complete repayment to poor and helpless depositors; otherwise, it would be held for any oblique purpose, which cannot be countenanced in law. The Hon'ble Supreme Court has held that the provisions of the RBI Act requiring payments to be made to depositors in total are a mandatory provision of law, which cannot be contracted out. The Ld. Counsel refers to the case of *Integrated Finance Co. Ltd. v. RBI*, reported in (2015) 13 SCC 772 wherein at para 52 and 56 Hon'ble Supreme Court has observed that;

> ***"52.*** *We, therefore, endorse the opinion expressed by the High Court that the Scheme has been introduced only with a view to avoid repayment to the small depositors as it contemplates that instead of repaying of amount in accordance with the terms and*

conditions of the deposit, such amount shall be considered as convertible debentures with interest @ 6%, which would be converted into equity shares within a period of one year. Such a provision is clearly contrary to the mandatory requirements under Section 45-QA(1) which requires that:

> *"**45-QA. (1)** Every deposit accepted by a non-banking financial company, unless renewed, shall be repaid in accordance with the terms and conditions of such deposit."*

This ingenious effort by the appellants in fact justifies the insertion of the amendment, which has been obviously incorporated with a view to protect the depositors and to avoid exploitation of these hapless and poor depositors from exploitation by the non-banking financial institutions, such as the Appellant. It is for this reason that Chapter III-B clearly provides that the provisions contained therein shall override all other laws, which are inconsistent with the same. This will also be applicable to Sections 391-394 of the Companies Act.

56. *We are unable to accept the aforesaid submission. The aforesaid observations reiterate the settled position of law that a scheme duly sanctioned after fulfilling all the legal formalities would be binding on all the shareholders. In the present case, the Scheme is in the teeth of Section 45-Q and it has rightly not been approved by the High Court. This apart, the Scheme has been rightly held to be lacking bona fides, as well as being contrary to public policy. It has been proposed with the oblique purpose of avoiding the mandate of Section 45-QA(1) of the RBI Act."*

7.6 The Appellants contended that the Hon'ble Supreme Court in the case mentioned above has held that Sections 45Q and 45QA, Reserve Bank of India Act, 1934, overrides Sections 391 and 394 of the Companies Act, 1956. Hon'ble Supreme Court has held that Chapter III-B of RBI Act inserted by Act No. 55 of 1963 w.e.f. December 1 1964, being a later enactment, clearly has to prevail over the Companies Act, 1956. Hon'ble Supreme Court has further held that there is no justification for lessening the scope of the applicability of the non-obstante clause in Section 45Q of the RBI Act.

7.7 The overriding effect extends to any other law for the time being in force and to any instrument having effect by such law. The reasons for giving such categorical overriding effect are evident from the objects and reasons given in the amendment Act viz. the magnitude of the exploitations of the poor sections of the society, leading to utter destruction of innumerable families was the underlying impetus to bring NBFC under strict control of Companies Act, 1956. Accordingly, Hon'ble Supreme Court has held that Chapter III-B of the RBI Act is a self-contained Code.

7.8 Hon'ble Supreme Court has further held that submissions of the Appellant that Section 45QA of the RBI Act is in pari materia if not identical with Section 58A of the Companies Act cannot be accepted. Further, suppose a scheme of arrangement is not prohibited under the latter Section in that case; it cannot be prohibited under the former, i.e. Section 45QA of the RBI Act cannot be accepted.

7.9 The allocation of the Resolution Amount is contrary to law, and the Resolution Plan/resolutions passed by the CoC to the extent that the FD Holders are not required to be paid by the terms of their deposit are illegal. Any stipulation under the Resolution Plan or as per the approved minutes of the CoC provides that the claims of FD Holders shall be extinguished upon Payment as per the Resolution Plan, are entirely illegal, violative of law, and cannot be sustained.

7.10 Appellants submit that the relevant parts of the Resolution Plan that extinguishes the Resolution Applicant's liability to repay the depositors in full are illegal and liable to be set aside. It was the statutory obligation of the RBI and the NHB to ensure that the deposits of the Appellants were protected. The newly inserted Sections 45-ID, 45-IE and 45-MBA of the RBI Act empowers the RBI to secure the general public interest and take action in the public interest'. Importantly, to secure the public interest, by virtue of Section 45-MBA of RBI Act, the RBI was also empowered to resolve an NBFC, without prejudice to the powers already existing under other laws, including but not limited to the IBC. This power of the RBI under the Finance Act, 2019 was included after the enactment of the IBC in part II-B of the RBI Act, which contains a non-obstante clause. Thus, the statutory power of the RBI was coupled with a duty to protect the small investors, being the Appellants herein, overriding anything to the contrary in IBC.

7.11 Relevant provisions of the RBI Act is given here for ready reference;

*"**45-Q. Chapter III-B to override other laws**[1].—The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*

*[**45-QA. Power of Company Law Board to order repayment of deposit**.—(1) Every deposit accepted by a non-banking financial company, unless renewed, shall be repaid in accordance with the terms and conditions of such deposit.*

(2) Where a non-banking financial company has failed to repay any deposit or part thereof in accordance with the terms and conditions of such deposit, the Company Law Board constituted under Section 10-E of the Companies Act, 1956 (1 of 1956) may, if it is satisfied, either on its own motion or on an application of the depositor, that it is necessary so to do to safeguard the interests of the Company, the depositors or in the public interest, direct, by Order, the non-banking financial Company to make repayment of such deposit or part thereof forthwith or within such time and subject to such conditions as may be specified in the Order:

Provided that the Company Law Board may, before making any order under this sub-section, give a reasonable opportunity of being heard to the non-banking financial Company and the other persons interested in the matter.

*[**45-MB. Power of Bank to prohibit acceptance of deposit and alienation of assets**.—(1) If any non-banking financial company violates the provisions of any section or fails to comply*

[1] 45QA and 45QB inserted by Act No.23 of 1997 w.e.f. 09.01.1997

with any direction or Order given by the Bank under any of the provisions of this Chapter, the Bank may prohibit the non-banking financial Company from accepting any deposit.

(2) Notwithstanding anything to the contrary contained in any agreement or instrument or any law for the time being in force, the Bank, on being satisfied that it is necessary so to do in the public interest or in the interest of the depositors, may direct, the non-banking financial Company against which an order prohibiting from accepting deposit has been issued, not to sell, transfer, create charge or mortgage or deal in any manner with its property and assets without prior written permission of the Bank for such period not exceeding six months from the date of the Order.]

*[**45-MBA. Resolution of non-banking financial Company**.—(1) Without prejudice to any other provision of this Act or any other law for the time being in force, the Bank may, if it is satisfied, upon an inspection of the Books of a non-banking financial company that it is in the public interest or in the interest of financial stability so to do for enabling the continuance of the activities critical to the functioning of the financial system, frame schemes which may provide for any one or more of the following, namely—*

(a) amalgamation with any other non-banking institution;

(b) reconstruction of the non-banking financial Company;

(c) splitting the non-banking financial Company into different units or institutions and vesting viable and non-viable businesses in separate units or institutions to

preserve the continuity of the activities of that non-banking financial company that are critical to the functioning of the financial system and for such purpose establish institutions called "Bridge Institutions".

Explanation.—For the purposes of this sub-section, "Bridge Institutions" mean temporary institutional arrangement made under the Scheme referred to in this sub-section, to preserve the continuity of the activities of a non-banking financial company that are critical to the functioning of the financial system.

(2) Without prejudice to the generality of the foregoing provisions, the Scheme referred to in sub-section (1) may provide for—

(a) reduction of the pay and allowances of the chief executive officer, managing director, chairman or any officer in the senior management of the non-banking financial Company;

(b) cancellation of all or some of the shares of the non-banking financial Company held by the chief executive officer, managing director, chairman or any officer in the senior management of the non-banking financial Company or their relatives;

(c) sale of any of the assets of the non-banking financial Company.

(3) The chief executive officer, managing director, chairman or any officer in the senior management of the non-banking financial Company whose pay and allowances are reduced or the shareholders whose shares are cancelled under the Scheme shall not be entitled to any compensation.]

*[**45-MC. Power of Bank to file winding-up petition**.—(1) The Bank, on being satisfied that a non-banking financial company—*

(a) is unable to pay its debt; or

(b) has by virtue of the provisions of Section 45-IA become disqualified to carry on the business of a non-banking financial institution; or

(c) has been prohibited by the Bank from receiving deposit by an order and such Order has been in force for a period of not less than three months; or

(d) the continuance of the non-banking financial Company is detrimental to the public interest or to the interest of depositors of the Company, may file an application for winding up of such non-banking financial Company under the Companies Act, 1956 (1 of 1956).

(2) A non-banking financial company shall be deemed to be unable to pay its debt if it has refused or has failed to meet within five working days any lawful demand made at any of its offices or branches and the Bank certifies in writing that such Company is unable to pay its debt.

(3) A copy of every application made by the Bank under sub-section (1) shall be sent to the Registrar of Companies.

(4) All the provisions of the Companies Act, 1956 (1 of 1956) relating to winding-up of a company shall apply to a winding-up proceeding initiated on the application made by the Bank under this provision.]

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7.12 According to the Appellant stand of the RBI in other proceedings is not relevant before this Appellate Tribunal. The RBI's stand in washing away its

obligation to repay the depositors in full and follow its mandate under the RBI Act to protect depositors is contrary to law. The RBI is obligated by its duty coupled with its power to ensure that the depositors are protected.

7.13 The Appellants contends that Section 238 of the Code does not override any requirement that the law governing the actions of FSP must be followed. The CoC seeks to evade repayment to FD Holders, are claiming exemption under the IBC and claiming that in terms of Section 238 of the IBC, the provisions of IBC will override the other provisions of law. However, there is no provision in the IBC that FD Holders are not required to be paid as per the terms complying with the provisions of law. Therefore, there is no inconsistency between the provisions of the IBC and other provisions of law requiring repayment to deposit holders as per the terms and conditions of their deposit.

7.14 As such, the provisions of the NHB Act, 1987 and the RBI Act, 1935 expressly stipulate that every deposit taken by a housing finance institution or a non-banking financial institution has to be repaid according to the terms and conditions of the deposit. There is no provision in the IBC that provides to the contrary, and therefore, there is no overlap in the requirements for Section 238 of the IBC to kick in. In any case, the Court would first endeavour to give a harmonious construction to the seemingly inconsistent provisions (MCGM v. Abhilash Lal, Civil Appeal No. 6530 of 2019 dated 15.11.2019 (p. 838, para 45 at p.892)]

7.15 The Appellant contended that **the Money of the Appellants was deposited in trust with the Respondent**. The FD. Holders have entrusted their money with DHFL, which belongs to the FD Holders, which are in the custody and possession of DHFL. The amounts held in trust for the benefit of the Appellants cannot be illegally misappropriated. They cannot be subjected to the moratorium or the resolution process (Rule 10, FSP Rules). A deposit by the depositor is not a sum lent to the Company but is a sum deposited with the Company to be held in trust until maturity. Therefore, it is not a loan in the strict sense of the term. (Deepak Insulated Cable v. UOI, 2000 SCC Online Kar 831 (at p. 1288, para 9 at p. 1289 of compilation); Vijay Mills Co v. State of Gujarat, 1989 SCC OnLine Guj 122.

7.16 In response to the argument of the Appellant, the Learned Senior Counsel for Respondent CoC submits that there is no provision in the RBI Act, the NHB Act, or any other law that mandates that depositors have to be paid in full.

7.17 A plain reading of Sections 29 A(6), Section 29 A(4)a), 36 and 36 A of the National Housing Bank Act, 1987 ("NHB Act"), read with para 39 of the Housing Finance Companies (NHB) Directions, 2010 ("NHB Directions"), as well as sections 45 Q and 45 QA of the RBI Act read with para 39 of RBI Master Direction on Non- Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 2016 ("RBI Directions") makes it amply clear that none of the enactments guarantees full payment to the FD. Holders.

7.18 RBI also acknowledged the same in its replies to the Writ Petitions filed by FD. Holders before the Hon'ble Delhi High Court and the Hon'ble Bombay High Court.

7.19 The RBI Act and the NHB Act merely provide that the license of an HFC[2] or NBFC[3] may be cancelled if the deposit holders are not paid, and such a decision can be taken only after allowing the concerned HFC or NBFC to present its case. None of the legislation provides that the FD. Holders are required to be paid in full, and hence the Appeals proceed on an incorrect interpretation of law with a view to mislead this Hon'ble Tribunal.

7.20 Further, the Banning of Unregulated Deposit Schemes Act, 2019 ("BUDSA") enacted on July 19, 2019, to protect the interests of the depositors also gives primacy to the Code and clearly states that that the rights of the FD Holders will have priority save otherwise as provided under the Code.

7.21 The Learned Senior Counsel for Respondent No. 3 submits that amounts deposited by the F D Holders were not held in trust by DHFL. The F D Holders' legal position with DHFL is not akin to the National Housing Bank. The FD Holders has not taken the said argument before the NCLT. They are agitating an entirely new argument that ought not to be permitted by this Hon'ble Tribunal.

[2] Housing Finance Compaany
[3] Non Banking Finance Company

7.22 Rule 10 of the FSP Rules[4] is only applicable in situations where the assets of third parties are held in trust by the Corporate Debtor. The Holders of FD have failed to produce any documentation or law which shows that the funds were deposited by FD. Holders are assets held in trust. Consequently, there is no legal justification whatsoever given by the Appellants / FD Holders. Instead, FD holders failed to show that the money deposited by them was held in trust by DHFL or that the amounts held by DHFL were not assets of DHFL. Thus Rule 10 of the 'FSP Rules' is inapplicable about the amounts deposited by FD Holders.

7.23 Further, the Appellants' reliance on the Orders passed by the NCLT in the IA 1104/2020 filed by the National Housing Bank ("NHB") is misplaced. The Appellant contends that Section 16B of the NHB Act creates a statutory trust favouring the NHB for the amount advanced by NHB to FSP,i.e.DHFL, as Section 16B states that the amounts are being held in trust.

7.24 Further, Section 16B of the NHB Act is completely inapplicable to FD holders. Therefore, the Appellants have made a baseless claim.

7.25 Respondent No.3 represented the amounts deposited by the FD Holders in DHFL are shown as liabilities in the balance sheet of DHFL, and the FD Holders are Financial Creditors of DHFL and have been treated accordingly. Thus, the bald, unsupported and misleading contention of the

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Appellants that the amount payable to FD Holders are held in trust by DHFL is entirely fictional and ought not to be entertained.

7.26 **It is pertinent to mention that there is no provision in either the RBI Act, the NHB Act, or any other law that mandates that depositors have to be paid in full.** Sections 29 A(6), 29 A(4)(a), 36 and 36 A of National Housing Bank Act, 1987 is given below for ready reference:

> *"[**29-A. Requirement of registration and net owned fund**.—*
> *[(1) Notwithstanding anything contained in this Chapter or in any other law for the time being in force, no housing finance institution which is a company shall commence housing finance as its principal business or carry on the business of housing finance as its principal business without—*
>
> *(a) obtaining a certificate of registration issued under this Chapter; and*
>
> *(b) having the net owned fund of ten crore rupees or such other higher amount, as the Reserve Bank may, by notification, specify.*
>
> *(2) Every housing finance institution which is a company shall make an application for registration to the Reserve Bank in such form as may be specified by the Reserve Bank:*
>
> *Provided that an application made by a housing finance institution which is a company to the National Housing Bank and pending for consideration with the National Housing Bank as on the date of commencement of the provisions of Part VII of Chapter VI of the Finance (No. 2) Act, 2019, shall stand transferred to the Reserve Bank and thereupon the application shall be deemed to have been made under the provisions of this sub-section and shall be dealt with accordingly:*

Provided further that the provisions of this sub-section shall not apply to the housing finance institution which is a company and having a valid registration certificate granted under sub-section (5) on the date of commencement of the provisions of Part VII of Chapter VI of the Finance (No. 2) Act, 2019, and such housing finance institution shall be deemed to have been granted a certificate of registration under the provision of this Act.]

[* *]*

(4) The [Reserve Bank], for the purpose of considering the application for registration, may require to be satisfied by an inspection of the books of such housing finance institution or otherwise that the following conditions are fulfilled:—

(a) that housing finance institution is or shall be in a position to pay its present or future depositors in full as and when their claims accrue;

(b) that the affairs of the housing finance institution are not being or are not likely to be conducted in a manner detrimental to the interest of its present or future depositors;

(c) that the general character of the management or the proposed management of the housing finance institution shall not be prejudicial to the public interest or the interests of its depositors;

(d) that the housing finance institution has adequate capital structure and earning prospects;

(e) that the public interest shall be served by the grant of certificate of registration to the housing finance

institution to commence or to carry on the business in India;

(f) that the grant of certificate of registration shall not be prejudicial to the operation and growth of the housing finance sector of the country; and

(g) any other condition, fulfilment of which in the opinion of the [Reserve Bank], shall be necessary to ensure that the commencement of or carrying on the business in India by a housing finance institution shall not be prejudicial to the public interest or in the interests of the depositors:

[Provided that the Reserve Bank may, wherever it considers necessary so to do, require the National Housing Bank to inspect the books of such housing finance institution and submit a report to the Reserve Bank for the purpose of considering the application.]

(5) The [Reserve Bank] may, after being satisfied that the conditions specified in sub-section (4) are fulfilled, grant a certificate of registration subject to such conditions which it may consider fit to impose.

(6) The [Reserve Bank] may cancel a certificate of registration granted to a housing finance institution under this Section if such institution—

(i) ceases to carry on the business of a housing finance institution in India; or

(ii) has failed to comply with any condition subject to which the certificate of registration had been issued to it; or

(iii) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (4); or

(iv)

(a) fails to comply with any direction issued by the [Reserve Bank or the National Housing Bank] under the provisions of this Chapter; or

(b) to maintain accounts in accordance with the requirement of any law or any direction or Order issued by the [Reserve Bank or the National Housing Bank] under the provisions of this Chapter; or

(c) to submit or offer for inspection its books of account and other relevant documents when so demanded by an inspecting authority of the [Reserve Bank or the National Housing Bank]; or

(v) has been prohibited from accepting deposit by an order made by the National Housing Bank under the provisions of this Chapter and such Order has been in force for a period of not less than three months:

Provided that before cancelling a certificate of registration on the ground that the [housing finance institution which is a company] has failed to comply with the provisions of clause (ii) or has failed to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (4), the [Reserve Bank], unless it is of the opinion

that the delay in cancelling the certificate of registration shall be prejudicial to public interest or the interest of the depositors or the [housing finance institution which is a company], shall give an opportunity to such institution on such terms as the [Reserve Bank] may specify for taking necessary steps to comply with such provision or fulfilment of such condition:

Provided further that before making any order of cancellation of certificate of registration, such institution shall be given a reasonable opportunity of being heard.

(7) A housing finance institution aggrieved by the Order or rejection of application for registration or cancellation of certificate of registration may prefer an appeal, within a period of thirty days from the date on which such Order of rejection or cancellation is communicated to it, to the Central Government and the decision of the Central Government where an appeal has been preferred to it, or of the [Reserve Bank] where no appeal has been preferred, shall be final:

Provided that before making any order of rejection of Appeal, such institution shall be given a reasonable opportunity of being heard.

Explanation.—For the purposes of this Section,—

(I) "net owned fund" means—

(a) the aggregate of the paid-up equity capital and free reserves as disclosed in the latest balance sheet of the housing finance institution after deducting therefrom—

(i) accumulated balance of loss;

(ii) deferred revenue expenditure; and

(iii) other intangible assets; and

(b) further reduced by the amounts representing—

(1) investments of such institution in shares of—

(i) its subsidiaries;

(ii) companies in the same group;

[(iii) all other housing finance companies; and]

(2) the book value of debentures, bonds, outstanding loans and advances (including hire-purchase and lease finance) made to, and deposits with,—

(i) subsidiaries of such Company; and

(ii) companies in the same group, to the extent such amount exceeds ten per cent of (a) above;

[(II) the expressions "subsidiaries" and "companies in the same group" shall have the meanings respectively assigned to them in the Companies Act, 2013 (18 of 2013):
Provided that the National Housing Bank shall, in consultation with the Reserve Bank, specify the companies to be deemed to be in the same group.]

29(4) The [Reserve Bank], for the purpose of considering the application for registration, may require to be satisfied by an inspection of the books of such housing finance institution or otherwise that the following conditions are fulfilled:—

(a) that housing finance institution is or shall be in a position to pay its present or future depositors in full as and when their claims accrue;

***36. Chapter V to override other laws**.—The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time*

being in force or any instrument having effect by virtue of any such law.

*[**36-A. Power to order repayment of deposit**.—(1) Every deposit accepted by a housing finance institution which is a company unless renewed, shall be repaid in accordance with the terms and conditions of such deposit.*

(2) Where a housing finance institution which is a company has failed to repay any deposit or part thereof in accordance with the terms and conditions of such deposit, such officer of the National Housing Bank, as may be authorised by the Central Government for the purpose of this Section (hereinafter referred to as the "authorised officer") may, if he is satisfied, either on his own motion or on any application of the depositor, that it is necessary so to do to safeguard the interests of the housing finance institution, the depositors or in the public interest, direct, by order, such housing finance institution to make repayment of such deposit or part thereof forthwith or within such time and subject to such conditions as may be specified in the Order:

Provided that the authorised officer may, before making any order under this sub-section, give a reasonable opportunity of being heard to the housing finance institution and the other persons interested in the matter."

7.27 Further, it is necessary to point out that RBI Act and the NHB Act merely provide that the licence of a Housing Finance Corporation and Non-Banking Finance Company may be cancelled if the deposit holders are not paid. Such a decision can be taken only after giving the concern HFC or NBFC and the opportunity to present its case. None of the legislation provides that

FD. Holders are required to be paid in full. Hence the Appellant's contention is based on an incorrect interpretation of the law.

7.28 The Learned Senior Counsel for the Appellant represented that the amount deposited by FD Holders were held in trust by DHFL. In response to the above contentions, the Ld. Sr. Counsel for CoC submits that Rule 10 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of FSPs and Application to Adjudicating Authority) Rules, 2019[5] only applicable in situations where assets of third parties are held in trust by the Corporate Debtor.

7.29 FD Holders have not filed any documents to show that amount deposited by the FD Holder was assets held in trust. Therefore, there is no legal justification whatsoever given by the Appellant/F.D. Holder to show that the money deposited by them was held in trust by DHFL and the amount held by DHFL were not assets of DHFL. Thus, Rule 10 of FSP Rules is inapplicable about the amount deposited by FD Holders.

7.30 The Learned Senior Counsel representing CoC submits that no full payment right exists under the NHB Act, the RBI Act, or any other subordinate legislation. Moreover, even if it exists, any such request would be wholly repugnant to provisions of the Code, which provide for a specific manner and priority of Payment; hence will not be applicable in terms of S.

[5] FSP Rules

238 of the Code. The minimum amount a creditor is mandatorily required to be paid in a Resolution Plan, i.e. liquidation value.

7.31 Further, it is well-established law that when two special statutes contain a non-obstante clause, the latter will prevail over the earlier statute. In case of any inconsistency between the provision of the Code and any other enactment, the provision of the Code will prevail. Therefore, provisions of the Insolvency and Bankruptcy Code enacted later will have overriding effect over the NHB Act and the RBI Act by the non-obstante clause.

7.32 In the case of Innoventive Industries Limited vs ICICI Bank (2018) 1 SCC 407, the Hon'ble Supreme Court has held that in case of any inconsistency between the provisions of Code and any other law, the provisions of the Code shall prevail. Therefore, Insolvency & Bankruptcy Code which was enacted later, will override the NHB Act and RBI Act by the non-obstante clause of Section 238 of the Code.

7.33 The Learned Counsel for the Appellant refers to the case of Integrated Finance Company Vs Reserve Bank of India (2015) 13 SCC 772 wherein at para 49,50 Hon'ble Supreme Court has observed that;

> *"**49.** In our opinion, Chapter III-B has been given an overriding effect over all other laws including the Companies Act by incorporating Section 45-Q with a clear intention to ensure that in a case of NBFC, a Scheme under Section 391 of the Companies Act cannot be entertained unless it is in conformity with the provisions of Section 45-QA of the RBI Act.*

50. *We may briefly notice here the judgments relied on by the learned counsel for the Appellant in support of the submission that the non obstante clause in Section 45-Q of the RBI Act will not have an overriding effect over Sections 391-394 of the Companies Act. Reliance was placed on Aswini Kumar Ghose [AIR 1952 SC 369] ; Madhav Rao Jivaji Rao Scindia [(1971) 1 SCC 85] ; A.G. Varadarajulu [(1998) 4 SCC 231] ; Icici Bank Ltd. [(2006) 10 SCC 452] ; RS Raghunath [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507] and JIK Industries Ltd. [(2012) 3 SCC 255 : (2012) 2 SCC (Civ) 82 : (2012) 2 SCC (Cri) 125] The said cases undoubtedly reiterate the settled law on the manner in which a particular non obstante clause ought to be interpreted. In Aswini Kumar Ghose [AIR 1952 SC 369] , this Court held that:*

> *"16. … a non obstante clause [must be construed strictly and] the Court must try to find the extent to which the legislature had intended to give one provision overriding effect over another provision." (A.G. Varadarajulu case [(1998) 4 SCC 231], SCC p. 236, para 16).”*

7.34 The above case relates to the period before the I & B Code's enactment and pertains to the Scheme and arrangements under the Companies Act, 2013; hence not applicable to the present case.

7.35 Appellants case that **the amount of fixed deposit held by the Bank as a trustee is the property of the customer held by the Bank as a trustee** is negated by the recent observation in para 44 of the Judgment of the Hon'ble Supreme Court in the case of N. Raghavender v state of Andhra Pradesh, CBI reported in 2021 SCC online SC 1232.

7.36 In this case, Hon'ble Supreme Court has observed that;

*"As already clarified by us, to prove the charge under Section 409 IPC, the prosecution need not prove the exact manner of misappropriation. Once the 'entrustment' is admitted or proved, as has been done in the present case, the onus lies on the Accused to prove that the entrusted property was dealt by him in an acceptable manner. Thus, misappropriation with this dishonest intention is one of the most important ingredients of proof of 'criminal breach of trust'. The offence under Section 409 IPC can be committed in varied manners, and as we are concerned with its applicability in the case of a bank officer, it is fruitful to point out that the banker is one who receives money to be drawn out again when the owner has occasion for it. Since the present case involves a conventional bank transaction**, **it may be further noted that in such situations, the customer is the lender and the Bank is the borrower, the latter being under a super added obligation of honouring the customer's cheques up to the amount of the money received and still in the banker's hands. The money that a customer deposits in a bank is not held by the latter on trust for him. It becomes a part of the banker's funds who is under a contractual obligation to pay the sum deposited by a customer to him on demand with the agreed rate of interest. Such a relationship between the customer and the Bank is one of a creditor and a debtor. The Bank is liable to pay money back to the customers when called upon, but until it's called upon to pay it, the Bank is entitled to utilise the money in any manner for earning profit."***

(emphasis supplied)

7.37 Further, in the case of Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Ltd ..., 2021 SCC OnLine SC 253 in Paragraphs 56 to 59 Hon'ble Supreme Court has observed that;

> *"56. ICICI Bank Counsel has argued that money is fungible therefore unless money has gone out from JAL for repayment, it can't be said as money deposited by JIL is the money payable to JIL homebuyers.*
>
> *57. No doubt money is fungible, but obligation to repay is not fungible, therefore* ***when money is deposited or clawed back to repay it to the creditor, the money being fungible and there being an obligation for repayment,*** *it can no more be considered as money owned by the debtor. Though JAL is per se not a debtor to the Homebuyers, when money has come on behalf of the debtor in relation to a debt obligation or for discharge of an obligation, the person deposited it towards that obligation cannot subsequently say that he is the owner of the money, therefore entitled for return of it.*
>
> *58. If trust concept is examined, we will know that trust is a relationship where property/money held by one party for the benefit of another party. Trustee holds the property/money for the benefit of the trust beneficiaries. Trustee is under fiduciary duty to ensure that the property of the owner is maintained and the benefit thereof is reached to the persons to whom it is intended to. In the case of trust, the owner is under no obligation to pass on the benefit to the beneficiary, therefore, the owner/settler being the owner of the property, he is entitled to take it back in the event it is not utilised for the purpose the owner intended to.* ***But that is not the case when money from the debtor or on behalf of the debtor has gone out***

towards discharge of an obligation. *In the case of trust, ownership of that property or money remains with the owner as long as it is not utilised for the purpose intended to*. *That owner has no obligation to part with his property/ money*.

59. ***In case of homebuyers' issue, once homebuyers entered into an agreement with a developer and when their relations entered into turbulence and not in a position to become normal, the relation in between them will become creditor and debtor and the person under obligation shall refund the money of the homebuyers***. *In the given case, JAL deposited money on behalf of JIL for utilisation of the same to the homebuyers of the Corporate Debtor. Therefore, it is evident that this deposit is made towards an obligation.* ***When any money is received towards an obligation, it can neither be construed as trust money nor construed as governed by constructive trust, therefore we have not found any merit to say that this money is governed by trust concept.***"

7.38 **Therefore, it is clear that the relationship between the customer and the Bank is the creditor and debtor and not a trustee. The Bank is not a trustee of money deposited by customers. In this case, the Corporate Debtor, i.e. DHFL, took a fixed deposit from their customers on the agreed interest on the amount invested in fixed deposits. Therefore, the relationship of the DHFL with the fixed deposit holders is that of a creditor and debtor and not of a trustee. The money so deposited becomes a part of the DHFL's funds which is under a contractual obligation to pay the sum deposited by a customer to him**

and on maturity or as per the terms of the contract they were getting agreed rate of interest. Such a relationship between the DHFL & the fixed deposit holders is one of the creditor and debtor and not of a trustee."

7.39 Hon'ble Supreme Court in the Committee of Creditors of Essar steel v Satish Kumar Gupta and others reported in (2020) 8 SCC 531 has reinforced the position that the COC is the key decision-maker in the rehabilitation of Corporate Debtors. For the approval of the Resolution Plan, the Committee of Creditors is to take a business decision based on ground realities by a majority, which binds all the stakeholders, including dissenting creditors. The Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors. The limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the Corporate Debtor needs to keep going as a going concern during the Insolvency Resolution Process; it needs to maximise the value of its assets; and that the interest of all stakeholders including Operational Creditors has been taken care of.

7.40 Therefore, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept the Resolution Plan, which may involve differential Payment in different classes of creditors, together with negotiating with the prospective Resolution Applicant for better or different terms which may also involve differences in the distribution of amounts between the different classes of creditors.

7.41 **Having participated in the CIRP, the Appellant's cannot challenge the action of the COC to approve the Resolution Plan, which is otherwise in compliance with the provisions of the IBC. In the light of the Hon'ble Supreme Court decision in Essar Steel (supra), it is unequivocally clear that the CoC members have the critical task of not only running the resolution process but also working towards maximisation of value of the Corporate Debtor for all the stakeholders, not fixed deposit holders alone, and providing for the manner of distribution of funds as obtained by way of a resolution plan. By seeking Payment outside the resolution process, the appellants who are also CoC members (other CoC members being banks, etc. are acting in a silo for obtaining funds at the outset, which is not only against the interest of all the stakeholders but also against a holistic resolution for maximisation of value & distribution of funds between different classes of creditors.**

7.42 As per the decision of the Hon'ble Supreme Court in Rajendra K Bhutta v Maharashtra Housing and Area Development Authority and others reported in 2020 SCC online SC 292 (para 26), it is settled that provisions of section 14 of the IBC must be strictly observed. Section 14 of IBC inter alia prohibits alienation, transfer, disposal of any asset of the Corporate Debtor. Since IBC is a time-bound process, every delay is the death knell for the Corporate Debtor. The object behind imposing moratorium under Section 14 is to maintain the status quo for the Corporate Debtor so maximisation of value of assets and laws of recovery to the creditors of the Corporate Debtor.

Therefore, any payment to the Appellant during the moratorium regarding fixed deposits or interest would violate Section 14 of IBC.

7.43 Further, there is no rationale for treating the deposit holders as separate classes and providing them preferential treatment. IBC already contains various safeguards for the public deposit holders, including an Authorised Representative who can effectively represent that class of creditors. The Hon'ble Supreme Court has already examined the validity of the provisions relating to the Authorised Representative and upheld the same. The ILC report dated October 4 2019 (para 17) contains that the depositors in an FSP are to "be classified as Financial Creditors and be treated accordingly".

7.44 The Public Deposit Holders stand on an equal footing with other Financial Creditors of DHFL. Suppose relief, as sought by the Appellant, seeking a refund in repayment of fixed deposits, are granted; in that case, similar claims regarding repayment of dues will be made on behalf of NCD holders and other creditors, which would be detrimental to the corporate insolvency process of DHFL. Even otherwise, any monies raised during the Resolution Process is towards keeping the business alive as a going concern and not for out of turn or pre-resolution process claims, that too outside the Scheme of the IBC. Moreover, if payments were to be made to fixed deposit holders whose fixed deposits have matured, it would result in a situation where matured fixed deposit holders would obtain a preference as a special dispensation, as opposed to fixed deposit holders, whose fixed deposits have

not matured, thereby resulting in the differential an unequivocal treatment within similarly situated creditors. Therefore no special dispensation ought to be granted outside the mechanism/process envisaged under the IBC, which provides for the commercial wisdom of the COC to reign supreme for the distribution of funds.

7.45 Further, Hon'ble Supreme Court in case of Jaypee Kensington Boulevard Apartments Welfare Association v NBCC(India) Ltd ..., 2021 SCC OnLine SC 253 has observed that;

> *"**210.** To put in a nutshell, **the Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code read with the parameters delineated by this Court in the decisions above-referred. The jurisdiction of the Appellate Authority is also circumscribed by the limited grounds of Appeal provided in Section 61 of the Code.** In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the Adjudicating Authority or the Appellate Authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by Code and exposited by this Court.*

7.46 Further, in the case of Ebix Singapore (P) Ltd. v. Committee of Creditors of Educomp, 2021 SCC OnLine SC 707 Hon'ble Supreme Court has observed that;

> ***115.*** *A reading together of the UNCITRAL Guide and the BLRC Report clarifies, in no uncertain terms, that the procedure designed for the insolvency process is critical for allocating economic coordination between the parties who partake in, or are bound by the process. This procedure produces substantive rights and obligations.* ***For instance, the composition of the CoC, the method and percentage of its voting, the timelines for CIRP, the obligation on the RP to file specific forms after every stage of the process and the obligation to explain to the Adjudicating Authority reasons for any deviations from the timeline while submitting a Resolution Plan, and other such procedural requirements create a mechanism which tightly structures the conduct of all participants in the insolvency process. This process invariably has an impact on the conduct of the Resolution Applicant who participates in the process and consents to be bound by the RFRP and the broader insolvency framework****. An analysis of the framework of the statute and regulations provides an insight into the dynamic and comprehensive nature of the statute. Upholding the procedural design and sanctity of the process is critical to its functioning. The interpretative task of the Adjudicating Authority, Appellate Authority, and even this Court, must be cognizant of, and allied with that objective.* *The UNCITRAL Guide has echoed this position by noting the interplay between the procedural design of the insolvency law*

and the corresponding institutional infrastructure by observing:

> *"27. While the institutional framework is not discussed in any detail in the Legislative Guide, some of the issues are touched upon below. Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature.* ***The design of the procedural rules plays a critical role in determining how roles are to be allocated between the various participants, in particular in terms of decision-making. To the extent that the insolvency law places considerable responsibility upon the institutional infrastructure to make key decisions, it is essential that that infrastructure be sufficiently developed to enable the required decisions to be made****."*
>
> ***116. Any claim seeking an exercise of the Adjudicating Authority's residuary powers under Section 60(5)(c) of the IBC, the NCLT's inherent powers under Rule 11 of the NCLT Rules 2016 or even the powers of this Court under Article 142 of the Constitution must be closely scrutinised for broader compliance with the insolvency framework and its underlying objective. The adjudicating mechanisms which have been specifically created by the statute, have a narrowly defined role in the process and must be circumspect in granting reliefs that may run counter to the timeliness and predictability that is central to the IBC. Any judicial creation of a procedural or substantive***

remedy that is not envisaged by the statute would not only violate the principle of separation of powers, but also run the risk of altering the delicate coordination that is designed by the IBC framework and have grave implications on the outcome of the CIRP, the economy of the country and the lives of the workers and other allied parties who are statutorily bound by the impact of a resolution or liquidation of a Corporate Debtor.

7.47 Hon'ble Supreme Court has observed that while exercising the interpretative task by the Adjudicating Authority and the Appellate Authority, **the powers are limited, to the extent that infrastructure under the Code is sufficiently developed to enable to take critical decisions for maximisation of the value of the Corporate Debtor and to keep it as a going concern**.

7.48 The Hon'ble Supreme Court has further crystallised the powers of the NCLT/NCLAT by specifying that under Section 60 (5) (c) of the IBC or Rule 11 of NCLT Rules, powers are limited to the extent relating to the border compliance with the insolvency framework and its underlying objective. The adjudicating mechanisms that have and must be cautious in granting reliefs may run counter to the timelines and centre to the IBC. Any judicial creation of a procedural or substantive remedy that is not envisaged raised by the statute would violate the principles of separation of powers and run the risk of altering the delicate coon designed by the IBC framework.

7.49 It is important to mention that the RBI Act and the NHB Act merely provides that the license of an HFC or NBFC may be cancelled if the deposit holders are not paid. Such a decision can be taken only after allowing the concerned HFC or NBFC to present its case. None of the legislation provides that FD holders are required to be paid in full. Therefore, it is not the case of the Appellant's that RBI is not empowered to act under the RBI Act or the FSP Rules. The Appellants acknowledges that statutory mandate made available to the RBI under the RBI Act and the FSP Rules. However, the Appellant wishes to advise the Regulator as to the course of action that ought to have been followed by the Regulator. This is legally impermissible, misconceived and untenable.

7.50 In the instant case, the RBI, in the exercise of its administrative discretion under Section 45-IE of the RBI Act, superseded the board of DHFL and appointed administrator. Accordingly, it decided to initiate the resolution proceedings with respect to DHFL under the IBC and not the RBI Act. Appellant's contention is mainly about the obligation of the administrator and the successor in the interest of the DHFL to ensure full repayment of deposit to have FD holders under the RBI and NHB act. It is further contended that there is no inconsistency between the provisions of the IBC and other provisions of law requiring repayment to deposit holders as per the terms and conditions of the deposit.

7.51 The RBI Act and the NHB Act merely provides that the license of an HFC or NBFC may be cancelled if the deposit holders are not paid. Such a decision can be taken only after allowing the concerned Housing Finance Company or NBFC to present its case. None of the legislation provides that FD holders are required to be paid in full. Therefore, it is not the case of the Appellant's that RBI is not empowered to act under the RBI Act or the FSP Rules.

7.52 Further, in the case of Pratap Technocrats Private Limited reported in 2021 SCC Online SC 569 Hon'ble Supreme Court has held;

> *"58. Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating Authority (NCLT) under Section 31(2) read with Section 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate Authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors.* ***Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers****."*

7.53 Based on the above discussion, it is clear that NCLT or NCLAT have been endowed with limited jurisdiction as specified under the Code and

cannot act as a court of equity or exercise plenary powers. Therefore, the fixed deposits of the Appellant's made from the lifetime earnings of the employees invested by the Provident Fund Trust with the Corporate Debtor, i.e. Financial Service Providers, is of no consequence. Accordingly, it can not be a condition authorising interference with the commercial wisdom of the CoC.

7.54 Therefore, even if the contribution of hard-earned money by Employees of Air Force is invested in FD's of FSP, i.e. DHFL, and RBI as Regulator had initiated CIRP under the I& B Code, then the allocation of recoveries to the creditors shall be as per approved Resolution Plan only. Accordingly, NCLT or NCLAT cannot exercise equity jurisdiction to prevail over the commercial wisdom exercised by the creditors' committee.

7.55 Undisputedly the corporate debtor DHFL defaulted in making its payment obligations; therefore, RBI as a regulator itself stepped in and initiated insolvency proceedings of the erstwhile corporate debtor under the IBC read with FSP rules. It is a settled position of law that once a company is admitted into Insolvency, the IBC is a complete and exhaustive code that governs the entire process. Despite such a statutory mandate under IBC, the Appellant contends that the manner of distribution towards F D holders must uniquely be handled according to the National Housing Bank Act, 1987 and Reserve Bank of India Act 1934. The NHB and RBI Act operate in ordinary circumstances when a company is not undergoing Insolvency. As such, creditors of the Company under Insolvency cannot seek to enforce the NHB Act and RBI act provisions. In any event, it is amply clear that neither the

provisions of the NHB Act nor the RBI act guarantees full repayment of deposits.

7.56 Based on the above discussion, we have unanimously concluded that impugned Order regarding the Payment to the Appellants against their FD's as per the approved resolution plan with the requisite majority as required under law needs no interference and both the appeals deserve to be dismissed.

ORDER

The impugned Order dated June 7, 2021, passed by the National Company Law Tribunal, needs no interference. Accordingly, Company Appeals CA (AT) (Ins.) No. 546 of 2021 and CA (AT) (Ins.) No. 552 of 2021 is disposed of accordingly—no Order as to costs.

[Justice M. Venugopal]
Member (Judicial)

[Mr. V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
27th January 2022

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