

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(Insolvency) No.849/2021

(Arising out of judgement and order dated 31.08.2021 passed by the National Company Law Tribunal, Guwahati Bench, Guwahati in IA No.47/2020 in IA No.73/2018 of 2020 in CP(IB) No.02/GB/2018)

IN THE MATTER OF:

1. SICOM Ltd.
Having its registered address at:
Solitaire Corporate Park,
Building No. 4, Guru Hargovindji Road,
Andheri (East), Mumbai- 400093
Email: vtambe@sicomindia.com
2. SICOM Asset Reconstruction Company Ltd.
(SICOM ARC Ltd)
Having its registered address at:
Solitaire Corporate Park,
Building No. 4, Guru Hargovindji Road,
Andheri (East), Mumbai- 400093
Email: vtambe@sicomindia.com

...Appellants

Versus

1. Kitply Industries Ltd.
having its registered address at
Makum Pathar A.T. Road Margherita
Tinsukia Assam 786181
Email: corporate@kitply.com
2. Deba Prasad Roy, Director of SICOM Ltd.
Resident of: Apartment No. 505, Nestle 1,
B- Wing, Pandurang, Budhkar Marg,
Mumbai, Maharashtra – 400013
Email: secretarial@sicomindia.com

- 3.** Suneet Shriniwas Maheshwari
Director of SICOM Ltd.
Resident of : 193A, Kalpataru Habitat,
Dr. Rao Marg Parel, Mumbai 400012
Email: secretarial@sicomindia.com
- 4.** Satish Madhukar Gavai
Director of SICOM Ltd.
Resident of: 2, Yashodhan Dinshaw
Wachha Road, Churchgate,
Marine Lines, Mumbai 400020
Email: secretarial@sicomindia.com
- 5.** Rahul Gupta
Director of SICOM Ltd.
Resident of: 602, Signia Pearl,
G Block, Bandra Kurla Complex,
Bandra East, Mumbai 400051
Email: secretarial@sicomindia.com
- 6.** Anbalagan Ponnusamy
Director of SICOM Ltd.
Resident of: 602, Nilambari Apartment,
Maharshi Karve Road,
Near Cooperage Telephone Exchange,
Nariman Point, Mumbai 400021
Email: secretarial@sicomindia.com
- 7.** Harshadeep Shriram Kample
Director of SICOM Ltd.
Resident of: 602, Nilambari Apartment,
Maharshi Karve Road,
Near Cooperage Telephone Exchange,
Nariman Point, Mumbai 400021
Email: secretarial@sicomindia.com
- 8.** Bhavana Alankar Shinde
Company Secretary, SICOM Ltd.
Resident of: A/8, Shree Sai Kripa CHS
Natwar Nagar Road No. 5,
Jogeshwari East, Mumbai 400060
Email: secretarial@sicomindia.com
- 9.** Swagat Subhash Sawant,
Chief Financial Officer (KMP), SICOM
Ltd.
Resident of: A-003, B-33, Nilgiri RMG
Unit- 3,

CHS, Gokuldharm, Gen AKV Marg,
Near Kirshnavatika Temple,
Goregaon, Mumbai 400063
Email: ssawant@sicomindia.com

10. Kavita Gupta
Managing Director, SICOM Ltd.
And Director of SICOM ARC Ltd.
Belvedere, Bhulabhai Desai Road,
Breach Candy, Mumbai 400026
Email: secretarial@sicomindia.com
11. Rajendra Sampat Bhosale
Director, SICOM ARC Ltd.
Resident of : 76/B, 43, Vrindavan
Society,
Thane, Mumbai 400601
Email: rbhosale@sicomindia.com
12. Pradnya Tanksale Sunil
Director, SICOM ARC Ltd.
Resident of: 603, 6th Floor, Radha-
Krishna Niwas, Tejpal Scheme Road No.
4,
Vile Parle East, Mumbai- 400057
Email: ptanksale@sicomindia.com

...Respondents

For Appellant: Mr. Jay Savla, Sr Advocate with Mr Prabhat Chaurisia, Ms Mohina Anand, Advocates.

For Respondent: Mr Ramji Srinivasan, Sr Advocate with Mr Saikat Sarkar, Mr Sanjay Bhatt, Ms Apoorva Chowdhury, Advocates for R1.

JUDGEMENT

(10th April, 2023)

JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)

The present appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as

I&B Code) against an order dated 31.08.2021 passed by the Learned Adjudicating Authority, National Company Law Tribunal, Guwahati Bench, Guwahati in IA No.47/2020 in IA No.73/2018 of 2020 in CP(IB) No.02/GB/2018. By the said order the Adjudicating Authority was pleased to allow the application filed by Kitply Industries Ltd, Corporate Debtor, which was filed under Section 60(5) read with Section 74(3) of IBC, 2016 and read with Rule 11 of the National Company Law Tribunal Rules, 2016. By the impugned order, in sum and substance, the appellant herein i.e. Sicom Ltd was directed to transfer Igatpuri Unit to the nominee of the Resolution Applicant M/s Kitply Industries Ltd within 45 (forty five) days. We think it appropriate to reproduce the relevant order passed by the Adjudicating Authority as follows:-

9. Heard the learned Counsels appearing for both the sides at length, perused the documents, submissions made available. We are of the considered view that the Respondent No.1 has erred in not transferring the Igatpuri Unit to the Applicant / CD which are evident from the following:

9.1 The Respondent No.1 had sanctioned a loan of Rs.1.95 Crores to one Company named M/S Crystal Laminates Ltd, and the said Company had mortgaged its property to the Respondent no 1. On failure of repayment of loan by the Crystal Laminates Ltd., the Respondent No.1 took over the possession of the mortgaged property of Crystal Laminates Ltd and thereafter advertised for sale of the said properties by inviting offers for the purchase of the same on "as is where is and what is basis" In response to the said advertisement, the CD offered to purchase the said properties at or for the price of Rs.2,25,00,000.00 (Rupees Two Crores Twenty- Five Lakhs Only) with certain conditions.

9.2 Thereafter, the Applicant/ CD had entered into an agreement with the Respondent on 03.09.1998 for purchase of the Unit located at Village Takeghati, Igatpuri, District Nashik from the Respondent No.1 for a consideration of Rs.2.25,00,000.00 (Rupees Two Crores Twenty-Five Lakhs Only) only. The Respondent No.1, on receipt of the earnest money of Rs.10.00 lacs (Rupees Ten Lacs only) and a further sum of Rs.56,25,000/- (Rupees Fifty Six lacs Twenty Five thousand only) from the CD, had put the CD into possession of the said unit at Igatpuri in 1998. The CD since then has been in uninterrupted possession of the unit together with the building and structures, plant and machinery, electrical and other installation, equipment etc. standing thereon. The CD had reportedly made investments on plant and machinery aggregating to more than Rs.3,00,00,000.00 (Rupees Three Crores only) in creating the infrastructure and maintaining the unit since 1998.

9.3 In terms of the Agreement, the balance purchase consideration amount of Rs.1,58,75,000.00 (Rupees One Crore Fifty-Eight Lakhs Seventy-Five Thousand Only) for the said unit was to be paid in 31 monthly instalments under a Deferred Payment Facility (DPF) which was to culminate on 15.08.2001. However, due to the financial hardships faced by the CD at that time, it could not pay some of the instalments, but had assured the Respondent No.1 that it would pay the same.

9.4 In the meantime, the CD availed a financial assistance of Rs.8.90 Crores from the Respondent No.1 in the form of Inter Corporate Deposit (ICD) and was issued a Deal Confirmation Slip (DCS) by the Respondent No.1 which was accepted by the CD on 10.05.1999.

9.5 Subsequently, the CD made a proposal to the Respondent No.1 for one-time settlement (OTS) of the dues under the ICD as well as the balance outstanding under the DPF for purchase of the Igatpuri Unit. The Respondent No.1 accepted the OTS proposal of the CD vide letter dated 20.02.2008 wherein it had agreed to accept an amount of Rs.231.00 Lakhs from the CD towards full and final settlement of all outstanding dues. In terms of the OTS, the CD was required to pay Rs.200.00 Lakhs in cash and Rs.31.00 Lakhs by way of Allotment of Non-Convertible Debentures by 29.02.2008. The deadline for payment was extended to 19.03.2008 vide letter dated 04.03.2008 by the Respondent No.1. The CD in compliance of the said OTS dated 20.02.2008 paid an amount of Rs.200.00 Lakhs vide Pay Order No.529886 dated 17.03.2008 and also issued and forwarded the Non-Convertible Debentures of Rs.31.00 Lakhs in favour of the Respondent No.1 on 18.03.2008. Thus the CD fully complied and honoured the OTS well in time as stipulated by the Respondent No.1. The Respondent No.1 as stated in clause No.2 (vi) of the OTS dated 20.02.2008 had unequivocally and unconditionally agreed to convey/transfer the Igatpuri Unit to the CD on receipt of the aforesaid amount.

9.6 This transaction of transfer of the Igatpuri Unit was complete and the Respondent 1 was required to transfer the Igatpuri Unit to the CD on that day itself but it has not been done till date. Hence the Respondent 1 has erred here in not transferring the Unit to the CD.

9.7 Pursuant to having complied with the terms of the OTS, the CD vide letter dated 18.03.2008 requested the Respondent No.1 to issue a No Dues Certificate in favour of the CD. The Respondent No.1, however despite receiving the said payment of Rs.200.00 Lakhs and the Debentures of Rs.31.00 Lakhs as per the said OTS, did not issue the No Dues Certificate to the CD. On the other hand, instead of issuing a No Dues Certificate or conveying the Igatpuri Unit to the CD, the Respondent No.1 issued a letter after one year dated 25.03.2009 cancelling / revoking the OTS dated 20.02.2008 on account of alleged default in another OTS dated 19.02.2008 entered into between the Respondent No.1 and one M/S P. K. Commercial Co., which happened to be one of the erstwhile Promoters of the CD. It is however clearly observed from the OTS letter dated 20.02.2008 that no such condition was stipulated. The Respondent No.1 failed to clarify as to how the non- performance/non-fulfilment of OTS terms by the Erstwhile Promoter of the Corporate Debtor namely M/s. P. K. Commercial can in any manner affect the OTS entered into between the Corporate Debtor and the Respondent No.1. The Corporate Debtor and its Erstwhile Promoter are two distinct and separate legal entities. Since the Corporate Debtor in compliance of the OTS dated 20.02.2008 has paid the entire amount of Rs.2.31 Crores (including the issue of Debentures), the Respondent No.1- SICOM was not in order not to transfer the Unit to the CD just by revoking/cancelling, after so many months of the receipt of the agreed amount, the said OTS dated 20.02.2008 entered into by it with the CD.

Even the Non-Convertible Debentures of Rs.31.00 Lakhs issued in favour of the Respondent No.1 by the CD has been dealt in the Resolution Plan approved by this Bench. In terms of the Resolution Plan, the Applicant has already paid the amount as provided in the Resolution Plan to the Respondent and the Respondent has accepted that amount and accounted for. The Respondent has not preferred appeal against the order of the Resolution Plan approved. The Resolution Plan as approved by this Bench has attained finality. Hence the Respondent has committed further mistake at this stage also in not transferring the Unit to the CD.

10. The Respondent had lodged total claim of Rs.40,86,47,641.00 which included the amount of ICD of Rs. 8.90 Crores, OTS & interest and the same has been rejected / declined by the IRP/RP and the only provision of settlement towards the Non-Convertible Debentures of Rs.31.00 Lakhs issued by the CD Kitply Industries Ltd was made in the Resolution plan approved. The Respondent accepted the amount of provision made in the Resolution Plan and accounted for which shows that the Respondent had accepted the rejection of its claim filed by the IRP/RP which is also further clear from the fact that the Respondent had not filed any appeal against

the rejection of the amount claimed or approval of Resolution Plan submitted.

10.1 The issue of claim not admitted during CIRP / not filed during the CIRP / before the approval of the Resolution Plan, is well settled.

10.2 The Hon'ble Supreme Court in the case of 'Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and others' (2020) 8 SCC 531 (famously known as Essar Judgment) settled the position of law and held in para 105 & 107 as under:

"105. Section 31 (1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were...."

"107 For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60 (6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count...."

10.3 Further, the Hon'ble Supreme Court in the case titled as Ghanashyam Mishra and Sons Private Limited through the Authorised Signatory vs. Edelweiss Asset Reconstruction Company Limited through the Director & Ors. Civil Appeal No.8129 of 2019 (delivered on 13.04.2021) reaffirmed the settled position of law that once the Resolution Plan is approved by this Hon'ble Adjudicating Authority under Section 31 of the Insolvency & Bankruptcy Code (hereinafter I & B Code) in respect of the corporate debtor, it becomes binding on all the stakeholders (in this case the Operational Creditor/Petitioner, hereinafter

'OC'). The Hon'ble Supreme Court in Para 95 of the said judgment held as under:

".... That once a resolution plan is duly approved by the Adjudicating Authority under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan...."

10.4 In view of the above decision of the Hon'ble Supreme Court, the demand of OTS amount/claim amount of Rs.40,86,47,641.00 (Rupees Forty Crores Eighty-Six Lakhs Forty-Seven Thousand Six Hundred and Forty-One Only) [(-) Rs.31.00 lacs] by the Respondent for transfer of the Igatpuri Unit to the RA/CD is irrelevant and illogical after the approval and implementation of the Resolution Plan on 07/12/2018. The Respondents' approach of not transferring the Unit to the CD and even after the approval of the Resolution Plan is bad and not appreciated. They have erred here also.

11. Proceedings before Ld. BIFR & Hon'ble AAIFR

Based on its Audited Balance Sheet (ABS) as on 31.03.2012 the Applicant/ Corporate Debtor herein filed a Reference with BIFR u/s 15 (1) of the SICA. The reference was registered as case No.23/2012 and the case was then taken up for consideration so as to determine the status of company's sickness on 27.06.2012. All the stakeholders/creditors were served with the notice of the reference and they participated in the proceedings also.

11.1 That the Ld. AAIFR finally after hearing the Applicant/Corporate Debtor and the Non-Applicant/Respondent No.1 vide order dated 09.10.2015 passed in Appeal No.170/2014 held as under:

"...The Respondent sought declaration of its title over the said Igatpuri Unit in proceedings before Ld. BIFR and Hon'ble AAIFR. There is a dispute between the parties as to the fulfilment of obligation in terms of the aforesaid agreement (03.09.1998). Neither BIFR nor AAIFR is the appropriate forum to adjudicate such disputes between the parties. As such this dispute is outside the scope of our consideration and should be appropriately perused before and adjudicated/decided by the concerned Civil Court. Since the agreement between the parties which is the subject matter of the dispute has not been declared, by BIFR/AAIFR under

Section 22(3) of SICA, to be suspended, the parties are at liberty to pursue appropriate legal remedies, as they may be so advised, to assert their rights and obligation in the concerned Civil Court..."

11.2 The Hon'ble BIFR/AIFR has not dealt this matter/dispute but has opined that neither BIFR nor AAIFR is the appropriate forum to adjudicate such disputes and the parties are at liberty to pursue appropriate legal remedies to assert their rights before the Civil Court.

11.3 It has been more than 5 years since the said liberty was granted to the Respondent No.1 and no proceedings of any nature for cancellation of the Agreement dated 03.09.1998 or for declaration of its title/ownership over the said Igatpuri unit/property has been filed by the Respondent. The possession of the Igatpuri unit remained uninterruptedly with the Applicant/Corporate Debtor from the date of the Agreement dated 03.09.1998 till date.

11.4 At this stage, it is appropriate to bring the following sections of IBC 2016 and the Companies Act 2013 with regard to the views of the Hon'ble BIFR/AIFR:

Section 63: Civil court not to have jurisdiction

63. No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction.

Section 231-Bar Jurisdiction

231. No civil court shall have jurisdiction in respect of any matter in which the [Adjudicating Authority or the Board] is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such [Adjudicating Authority or the Board] under this Code

Section 238: Provisions of this Code to override other laws

238. The provisions of this Code 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.

Section 430 of the Companies Act 2013 reads as under:

430 Civil court not to have jurisdiction.- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any

matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

12. After the judgement of the Hon'ble BIFR/AAFIR, the IBC CODE 2016 is introduced and NCLT has been set up, Applications relating to the Company matters/ affairs/ Insolvency are filed before NCLT.

13. In view of the failure of the Respondents to comply with the terms of the approved Resolution Plan, the present application has been preferred by the applicant U/s 60 (5) read with Section 74 (3) of IBC, 2016 and read with Rule 11 of the National Company Law Tribunals Rules, 2016 and it is submitted that the Applicant Kitply Industries Ltd. was admitted to CIRP in CP (IB) No.02/G8/2018 and the Hon'ble Adjudicating Authority vide order dated 07.12.2018 was pleased to approve a Resolution Plan, approved by the Committee of Creditors by 92.74%, which was put forth by SREI Multiple Asset Investment Trust for the purpose of Insolvency resolution of the Applicant Company. The Resolution Plan as approved by the Hon'ble Adjudicating Authority has now attained finality, as except two creditors, namely "Kotak Mahindra Prime Limited" and "Kotak Mahindra Investment Ltd.", no other creditors or stakeholders of Kitply Industries Ltd. including Respondent herein has challenged the same before the Hon'ble National Company Law Appellate Tribunal. The challenge so raised by Kotak Mahindra Prime Limited and Kotak Mahindra Investment Ltd. has also been rejected by the Hon'ble NCLAT vide order dated 13.11.2019.

That in terms of clause 3.8 of the Resolution Plan, on payment of Rs.31,000.00 (Rupees Thirty-One Thousand Only) as one-time settlement of the loan, the Respondent is/was obligated a duty bound to transfer the Igatpuri unit in the name of the Resolution Applicant or its nominee. In terms of the Resolution Plan the successful Resolution Applicant, vide its letter dated 10.01.2019, nominated the Corporate Debtor (Applicant herein) as the beneficiary for effecting the transfer in its name, in respect of Igatpuri Unit. However, even after receiving the payment as proposed under the Resolution Plan and despite several communications and requests for transferring the Igatpuri Unit of the Corporate Debtor in the name of the Resolution Applicant or its nominee, the Respondents have failed to transfer the same in complete disregard of the provisions of the Resolution Plan approved by this Hon'ble Adjudicating Authority.

14. Hence, the issues raised by the Respondents and the Applicant have been heard and considering the arguments advanced by the learned Lawyers of both the sides and perusal of the documents, written submissions and the settled position of law, the Respondent SICOM is hereby directed to transfer the Igatpuri Unit to the nominee of the

Resolution Applicant M/s. Kitply Industries Ltd. within 45 (forty-five) days from today.

14.1 The entire expenses towards the stamp duty etc., if any, for transferring the Unit in the name of the CD shall be borne by the Applicant / CD only.

14.2 The Respondents No.3 to 13, which include Directors, ex- Directors shall be relieved automatically from this case only on transfer of the Igatpuri Unit to the CD-Kitply Industries Ltd. and filing of the compliance report to such transfer with the Registry by the Respondent Company within 15 (fifteen) days from the date of transfer of the Unit to the CD or within 60 (sixty) days from today whichever is earlier.

15. IA No.47 of 2020 is allowed to the extent of Prayer (a) only and stands disposed of with the above Observations and Directions.”

Before proceeding it is appropriate to delineate certain facts which are relevant for adjudication in the present appeal.

In the year 1998 an agreement for sale was entered in between the SICOM Ltd (Appellant No.1) with Kitply Industries Ltd (Respondent No.1) for sale of a plot of land described in the First Schedule to the said Agreement for sale as well as for transfer of the plant, machineries, etc described in Second Schedule to the said Agreement for sale. In terms of the agreement for sale the total consideration was Rs.2,25,00,000/- in a manner to be paid in terms with Clause 2 of the said Agreement for sale. Clause 3 of the said Agreement for Sale stipulated that on payment of the full purchased money and upon the Respondent No.1 carrying out all its obligations and performing all terms, covenants, conditions and

stipulations, the Appellant No.1 shall put the purchaser in possession of the said premise execute conveyance in respect of premises described in 1st schedule and plants and machineries described in the second schedule. As per Clause 5 of the agreement it was stipulated that in the event of Respondent No.1 failed to make the payment and/or failed to comply with the terms of the agreement appellant shall have the right to cancel the arrangement and terminate the agreement and enter upon and take possession of the said property and also forfeit the amount paid by Respondent No.1/Kitply Industries Ltd to Appellant No.1/SICOM Ltd. This agreement was entered between the parties on 03.09.1998. Further, it is the case of the appellant that appellant on 7.5.1999 provided financial assistance to the Respondent No.1 by way of Inter Corporate Deposit to the tune of Rs.8.90 crores. It was duly acknowledged by Respondent No.1 by way of issuance of Deal Confirmation Slip. The Respondent accepted the terms and conditions in respect of Inter Corporate Deposit of Rs.8.9 crores.

It is further case of the appellant that since Respondent No.1/Kitply Industries Ltd failed to pay the instalment as stipulated in the agreement as well as had also failed to pay the

Inter Corporate Deposit the Managing Director of Respondent No.1 approached the appellant for settlement and wrote two separate letters to appellant for one time settlement, one on behalf of M/s PK Commercial and another on behalf of the Respondent No.1 herein. In response to the request of Mr. P.K. Goenka the Managing Director of Respondent No.1 on 19.02.2008, the appellant No.1 issued letter to M/s P.K. Commercial Co (also promoted by Mr. P.K. Goenka, Managing Director of Respondent No.1) whereby appellant agreed to accept the payment of Rs.8.52 crores towards costs and other charges subject to various terms and conditions. In terms of Clause (i) it was agreed that Rs.852 lakhs has to paid on or before 27.02.2009 and out of amount of Rs.852 lakhs, Rs.31 lakhs was to be paid by way of repurchase of Non-convertible debentures (NCD) proposed to be issued by Respondent No.1. In the said communication it was stated that any settlement scheme entered shall become effective only on receipt of payment of Rs.300 lakhs and post dated cheques for the balance amount of Rs.552 lakhs on or before 29.02.2008. By another proposal dated 25.01.2008 the Managing Director of Respondent No.1 proposed for one time settlement of Rs.231 lakhs. The appellant vide its letter 20.02.2008 accepted the same

subject to the terms mentioned in the said communication. While Clause (i) stipulated the manner of payment of OTS amount, Clause (ii) stipulated that cost and other charges were to be paid in terms with the letter dated 19.02.2008. Clause (vi) of the communication dated 19.02.2008 stipulated that “on receipt of the entire OTS amount and cost and other charges as per (i) and (ii) above on or before the due date, it was agreeable to convey the property at Igatpuri (which was at the relevant time was given to the R1 as licensee) in favour of R1 and release all securities including guarantee obligation. Clause (vii) stipulated that in case of failure to make payment, the OTS so granted was to be automatically withdrawn and amounts so paid was to be appropriated towards the dues of the appellant No.1 and the appellant No.1 can proceed with appropriate action to recover the entire outstanding dues in respect of credit facilities of Rs.986.75 lakhs alongwith interest. Respondent No.1 vide communication dated 03.03.2008 requested appellant No.1 to extend the due date for payment of the 1st instalment of Rs.300 lakhs from 29.02.2008 to 31.03.2008 and the date of 1st instalment of Rs.300 lakhs was extended to 19.03.2008 retaining other communication as mentioned in communication dated 19.02.2008. Vide another

letter dated 04.03.2008 which was issued in context of communication dated 20.02.2008 Respondent No.1 requested the appellant to extend the due date for payment of the OTS amount from 29.02.2008 to 31.03.2008, the date of OTS thereafter was extended to 19.03.2008 retaining other conditions as stipulated in communication dated 20.02.20058.

It is further case of the appellant that after the extension on 18.03.2008 the Respondent No.1, Kitply Inds, through its Managing Director Mr. P.K. Goenka paid an amount of Rs.2 crores by the pay order dated 17.03.2008 and also issued a letter of allotment of NCD with a face value of Rs.31 lakhs. It is further case of the appellant that though Rs. 2 crore and NCD for Rs.31 lakhs was paid, the Respondent No.1, however, failed to make payments in terms with the communication dated 19.02.2008 and 20.02.2008 which was extended vide communications dated 03.03.2008 and 04.03.2008 respectively. Thereafter various reminders were made by the appellant No.1.

Subsequently on 02.05.2008 the appellant No.1 issued a communication to Respondent No.1 informing that the Respondent No.1 had failed to make payments in terms of OTS and Respondent No.1 was asked to pay Rs.2,95,95518/- with further

interest thereon @ 14% per annum from 01.12.2008 to 18.12.2008 failing which OTS shall stand cancelled and appellant No.1 may enforce his right in terms with Clause 5 of the Agreement for Sale and proceed with re-possession of the property. Thereafter reminders were issued to hand over peaceful possession of the property mentioned in the Agreement for Sale dated 03.09.1998. Finally on 25.03.2009 the appellant No.1 withdrew the OTS and enforced their right in terms of Clause 5 of the Agreement dated 03.09.2008 by cancelling the agreement and terminating the said agreement with immediate effect. By the said communication dated 25.03.2009 it was intimated that in view of cancellation of OTS the amounts which was paid till then were forfeited towards the dues. It is further case of the Appellant that the communicated dated 25.03.2009 to which agreement for sale dated 03.09.1998 was cancelled was never assailed by Respondent No.1 and as such the cancellation of sale to agreement dated 03.09.1998 has attained its finality. The Appellant No.1 also got legal notice dated 06.03.2010 issued to the Respondent No.1 demanding payment of Rs.29,71,28,927/-. The appellant No.1 in the year 2011 filed winding up petition before Hon'ble High Calcutta High Court against Respondent No.1. However, since registered office was

situated in Assam the said application was withdrawn. Subsequently Respondent No.1 filed reference under the provisions of the SICA and the Reference was registered as Case No.23/2012 whereas on 01.10.2012 the appellant No.1 by its communication requested Respondent No.1 to hand over possession of property described in the 1st schedule particularly in respect of Igatpuri property otherwise authorised representative of Appellant No.1 shall take over possession of the entire premises. Thereafter, Respondent No.1 filed an application vide MA No.380/2012 to restrain the appellant from acting in furtherance to the Notice dated 01.10.2012 and thereafter vide order dated 15.11.2012 the Board for Industrial and Financial Reconstruction (BIFR) restrained the appellant No.1 from acting in furtherance of the Notice dated 01.10.2012. However, the Application i.e. MA No.380/2012 filed by the Respondent NO.1 was disposed off on 14.03.2014 by the BIFR recording therein that no protection under Section 22(1) of SICA will be available to the company till determination of sickness of the company and MA No.380/2012 was disposed off. The said order i.e. order dated 14.03.2014 was again assailed/challenged by Respondent No.1 before the Appellate Authority for Industrial and Financial Reconstruction

(AAIFR). However, the AAIFR vide its order dated 28.03.2014 set aside the order of BIFR dated 14.03.2014. The Appellant No.1 assailed the order of AAIFR dated 28.03.2014 before the Hon'ble Delhi High Court in WP(C) No.3289/2014 and Hon'ble Delhi High Court vide its order 04.08.2014 set aside the order dated 28.03.2014 passed by AAIFR and directed the AAIFR to decide the appeal on merit. Finally on 09.10.2014 AAIFR disposed off the appeal which directed the BIFR to hear afresh without being influenced by the order dated 14.03.2014. It is the stand of the Appellant that he was not aware about the outcome of the BIFR proceedings pursuant thereto. In the meanwhile on 01.05.2018 the NCLT vide order dated 01.05.2018 initiated Corporate Insolvency Resolution Process (CIRP) filed by one of the financial creditor of Respondent No.1 and declared moratorium. CIRP was initiated by IDBI, one of the financial creditors on 01.05.2018, as per order of NCLT against Respondent No.1 and one Mr. Bijoy Murmuria was appointed as Interim Resolution Professional. In the CIRP pursuant to the publication of Form A under Regulation 6, the appellant No.1 filed a claim as financial creditor to Kitply Industries Ltd. This claim was filed on 18.07.2018. It is the stand of the appellant that on the same date another email was sent by

the appellant to the Corporate Debtor indicating therein that Corporate Debtor does not have ownership over the land bearing Gat No.260/B/261 situated at Igatpuri, District Nashik together with building and structures thereon and plan and machinery and other instalments/equipment. It was clarified that CD/Respondent No.1 had approached for purchase of the property but failed to pay the purchase/sale consideration and as such a request was made to hand over back the property to Appellant No.1. On 17.08.2018 the RP sent an email dated 27.08.2018 to the appellant No.1 to re-submit the claim form and thereafter on the same date i.e. 27.08.2018 the Appellant No.1 submitted the Form C in conformity with the email dated 27.08.2018. The Form C submitted by the appellant No.1 before the RP has been placed on record in Form C and it starts from Page 256 to 258. For proper adjudication in the present matter it is appropriate to reproduce the same as follows:

“FORM C

*PROOF OF CLAIM BY FINANCIAL CREDITORS
(Under Regulation 8 of the Insolvency and Bankruptcy Board of
India (Insolvency Resolution Process for Corporate Persons)
Regulations 2016)*

*To
Bijay Murmuria, Interim Resolution Professional
C/o Sumedha Management Solutions Pvt
Trinity Tower, Suit No.3G, 226/ 1 AJC Bose Road
Kolkata 700020*

From
SICOM LIMITED
 Solitaire Corporate Park, Bldng No.4,
 4th Floor, Guru Hargovindji Road,
 Andheri-Ghatkopar Link Road
 Chakala, Andheri (East)
 Mumbai 400093

Subject: Submission of proof of claim-Kitply Industries Ltd.

Sir,

SICOM Limited, Financial Creditor, hereby submits this proof of claim in respect of the Corporate Insolvency Resolution Process in the case of Kitply Industries Limited. The details for the same are set out below:

PARTICULARS		
1.	NAME OF FINANCIAL CREDITOR:	SICOM LTD.
2 .	IDENTIFICATION NUMBER OF FINANCIAL CREDITOR (IF AN INCORPORATED BODY PROVIDE IDENTIFICATION NUMBER AND PROOF OF INCORPORATIO N. IF A PARTNERSHIP OR INDIVIDUAL PROVIDE IDENTIFICATION RECORDS OF ALL THE PARTNERS OR THE INDIVIDUAL)	U65990MH1966PLC013459
3 .	ADDRESS AND EMAIL ADDRESS OF FINANCIAL	Address: SICOM Ltd., Solitaire Corporate Park, Building No.4, 6 th Floor, Guru

	CREDITOR FOR CORRESPONDENCE.	Hargovindji Road, Chakala, Andheri (East), Mumbai 400093. Email shatru@sicomindia.com Address:											
4.	TOTAL AMOUNT OF CLAIM (INCLUDING ANY INTEREST AS AT THE INSOLVENCY COMMENCEMENT DATE)	<table><tr><td colspan="2">(In Rs.)</td></tr><tr><td>Principal</td><td>8,90,00,000</td></tr><tr><td>Interest (as on 1/5/2018)</td><td>31,96,32,249</td></tr><tr><td>Expenses</td><td>15,392</td></tr><tr><td>Total</td><td>40,86,47,641</td></tr></table>		(In Rs.)		Principal	8,90,00,000	Interest (as on 1/5/2018)	31,96,32,249	Expenses	15,392	Total	40,86,47,641
(In Rs.)													
Principal	8,90,00,000												
Interest (as on 1/5/2018)	31,96,32,249												
Expenses	15,392												
Total	40,86,47,641												
5.	DETAILS OF DOCUMENTS BY REFERENCE TO WHICH THE DEBT CAN BE SUBSTANTIATED:	Annexure B											
6.	DETAILS OF HOW AND WHEN DEBT INCURRED:	Annexure C											
7.	DETAILS OF ANY MUTUAL CREDIT, MUTUAL DEBTS, OR OTHER MUTUAL DEALINGS BETWEEN THE CORPORATE DEBTOR AND THE CREDITOR WHICH MAY BE SET-OFF AGAINST THE CLAIM:	None											
8.	DETAILS OF ANY SECURITY HELD, THE VALUE OF THE SECURITY, AND THE DATE IT WAS GIVEN	Second charge on Land and Building, Plan & Machinery and all other Assets of the Company situated at (1) Rungagora Road, Tinsukia Assam (commonly referred to as Tinsukia Property) (2) Makum Pathargaon, Mouza Makum, P.S. – Margherita, Dibrugarh, Assam (Commonly referred to as Margherita Property), (3) Plot No. C-3, Gondia Industrial Area, Dist. Bhandara, Maharashtra (commonly referred to as Art Gondia											

		Property), (4) Margherita Town, MouzaMakum, Dist Tinsukia, Assam (commonly referred to as Art Margherita Property), (5) situated at Village Long Islands, Rangat Tehsil, Middle Andaman, (commonly referred to as Andaman Property). Including any fixture and /or addition to Plant and Machinery constructed/erected/Installed or to be installed thereon.- As per Annexure D-Form 8 & 13 @Schedule of Properties													
9 .	DETAILS OF THE BANK ACCOUNT TO WHICH THE AMOUNT OF THE CLAIM OR ANY PART THEREOF CAN BE TRANSFERRED PURSUANT TO A RESOLUTION PLAN:	Bank details of SICOM Ltd are under: <table><tr><td>Name of the Bank</td><td>HDFC BANK LTD</td></tr><tr><td>Branch address of the Bank</td><td>101-104, Tulsiani Chambers, Free Press Journal Marg, Nariman Point, Mumbai 4000021</td></tr><tr><td>Beneficiary Account Number</td><td>00010350003084</td></tr><tr><td>Name of the Beneficiary</td><td>SICOM LIMITED</td></tr><tr><td>IFSC Code of the Bank</td><td>HDFC0000001</td></tr><tr><td>Account type</td><td>Current</td></tr></table>		Name of the Bank	HDFC BANK LTD	Branch address of the Bank	101-104, Tulsiani Chambers, Free Press Journal Marg, Nariman Point, Mumbai 4000021	Beneficiary Account Number	00010350003084	Name of the Beneficiary	SICOM LIMITED	IFSC Code of the Bank	HDFC0000001	Account type	Current
Name of the Bank	HDFC BANK LTD														
Branch address of the Bank	101-104, Tulsiani Chambers, Free Press Journal Marg, Nariman Point, Mumbai 4000021														
Beneficiary Account Number	00010350003084														
Name of the Beneficiary	SICOM LIMITED														
IFSC Code of the Bank	HDFC0000001														
Account type	Current														
10 .	LIST OF DOCUMENTS ATTACHED TO THIS PROOF OF CLAIM IN ORDER TO PROVE THE EXISTENCE AND NON-PAYMENT OF CLAIM DUE TO THE	Not Applicable													

	OPERATIONAL CREDITOR	
--	-------------------------	--

After filing of Form C, certain queries were sought for by the IRP and thereafter vide email dated 28.08.2018 the appellant clarified the queries and it was communicated that Form C was in respect of Inter Corporate Deposit for an amount of Rs.8,90,00,000/- alongwith interest of Rs.31,96,32,249/-and expenses of Rs.15,392/- aggregating to Rs.40,86,47,641/-. It was also clarified that the Appellant No.1 had not filed any claim for the amount of Rs.1,21,78,169/- which was outstanding in respect to the agreement for sale as the Appellant No.1 was asking for handing over the property in as much as the agreement for sale was terminated. It was also clarified that OTS which was given on 20.02.2008 was cancelled as Respondent No.1 had failed to honour its commitment for which under Clause 2(vii) the appellant No.1 withdrew/cancelled the OTS. The Appellant No.1 reiterated its stand to the RP in respect of property of Igatpuri. Further by communication dated 27.09.2018 RP was informed by the Appellant that title of land alongwith rights of property continue to vests with the Appellant No.1 and said property should not be made part of Resolution Plan. The said email was acknowledged by the RP. The Adjudicating Authority on 07.12.2008 approved

the Resolution Plan submitted by SREI Multi Asset Investment Trust Vision India Fund. It is further stand of the appellant that though appellant No.1 had claimed to be included as financial creditor it was not included within the same fold and was not made a part of Committee of Creditors and also resolution plan was not shared with the appellant. However, subsequently in the month of December, 2018 an amount of Rs.31,000/- was directly deposited in the Bank account of Appellant No.1. On 10.01.2019 RP was nominated for transfer of Igatpuri unit. It is the case of the appellant that on 25.01.2019 he had requested for copy of the resolution plan as approved by NCLT and thereafter on 05.02.2019 the IRP forwarded a portion of resolution plan submitted by SREI Multiple Asset Investment Trust Vision India Fund which related to proposal for other liabilities. On 06.02.2019 an email was sent to the appellant wherein portion of resolution plan was quoted. The said communication dated 02.06.2019 has been brought on record and is at running Volume II Page 265 to 267. It is appropriate to reproduce the same as follows:

*“Approval of resolution plan in respect of Kitply Industries Ltd.
under the Insolvency & Bankruptcy Code, 2016*

Shikha Sarawgi

to.

sware

02/06/2019 04:25 PM

Cc

rbhosale, gkhutal

Hide Details

From: "Shikha Sarawgi" <shikha.sarawe@kitply.com>

To <sware@sicomindia.com>

Ce <rbhosale@sicomindia.com>, <gkhutal@sicomindia.com>

Please respond to <shikha.sarawgi@kitply.com>

History: This message has been forwarded.

3 Attachments

: 𑂔𑂗𑂢𑂰

SICOM Letter pdf SICOM payment detail.pdf Sicom.pdf

Dear Sir/Madam,

With respect to the Order passed by the Hon'ble National Company Law Tribunal, Guwahati Bench, dated 07th December, 2018, please find enclosed the relevant extracts of the Resolution Plan in respect to SICOM Limited/ SICOM ARC Limited:

"Clause 3.8: Proposal for Other Liabilities

Rs. 0.31 Cr held by SICOM/SICOM ARC Ltd. (As provided in the IM)	• Resolution Applicant proposed to settle the liability by was of a payment of following amounts as a one-time settlement of the loan. • Rs. 0.0031 Cr (Indian Rupees Thirty One Thousand) to SICOM/ SICOM ARC Ltd. • The said debenture holders shall not invoke, exercise or enforce any security interest and/ or guarantees, in whatsoever and whatever manner, in so
--	---

	far as it relates to the Corporate Debtor and shall immediately relinquish and release their rights on all the assets of the Corporate Debtor held by them, in favour of the Resolution Applicant/ SPV/ its nominee upon approval of the Resolution Plan by the Honorable Adjudicating Authority and receipt of the certified copy of such approval order: • It is hereby clarified that the unit of the Corporate Debtor located at Igatpuri is in dispute between the Corporate Debtor and SICOM/SICOM ARC Ltd. Post approval of the Resolution Plan and settlement of all dues of SICOM/SICOM ARC Ltd., to transfer the Igatpuri unit in the name of the Resolution Applicant or its nominee.
--	--

You may also note that, while approving the said plan, the Hon'ble NCLT has inter alia has passed the following directions:

(a) Para 50[b]-*"The Approved Resolution Plan shall come into force with immediate effect"*

(b) Para 50(d) *"All relevant parties in relation to the Final Resolution Plan are bound by the terms and conditions mentioned therein in accordance with Section 31(1) of the IBC 2016":*

© Para 50(e): *"All relevant parties are directed to extend full cooperation to SREI Multiple Asset Investment Trust (Vision India Fund) to carry out the terms and conditions of the Final Resolution*

Plan, the concerned parties/ entities will be liable for punishment as per Chapter 7 (Offences and Penalties) of the IBC, 2016; and

d) Para 500) All the concerned parties are hereby directed to strictly comply with the resolution plan approved by the Adjudicating Authority. If any deviation in implementing the resolution plan the concerned parties/entity will be liable for punishment as per Chapter 7 (Offences and Penalties).

We also draw your attention to section 31 (1) which states that the approved Resolution Plan "shall be binding on the corporate debtors and its employees, members, creditors, guarantors and other stakeholders.

Your attention is also drawn to Section 238 of the Code which states that "the provisions of this code 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. Thus, the approved Resolution plan is an order and is binding on all the stakeholders of the company.

Thus, as per the said plan so approved an amount of Rs. 31, 000 (Rupees Thirty One Thousand) has re be paid to you towards full and final settlement of the claim, which is being already paid as per the details attached Post receiving the above amount all the dues of the Company remains settled and extinguished.

Further, in view of the aforesaid, kindly let us know a convenient date and the contact details of the relevant officials, for the execution of the requisite documentations for the transfer of the immovable property located at Igatpuri, as per the approved Plan.

Kindly ensure that the requisite documentations and transfer of the property is completed within a time span of 10 days from the receipt of this letter, for appropriate and timely implementation of the sail Plan as approved by the Hon'ble Adjudicating Authority, National Company Law Tribunal

The relevant extracts of the Resolution Plan are also enclosed with this letter for your reference.

A hard copy of this letter dated 06.02-2019 has also been sent to you at your registered address, as enclosed

Thanks & Regards

Shikha Sarawgi

Company Secretary."

It has been pleaded that the appellant despite his best efforts was not provided with the entire resolution plan as approved by the NCLT rather vide mail dated 06.05.2019 the Respondent No.1 informed the appellant that resolution plan so approved by the NCLT is a confidential document and cannot be shared with the appellant since it was not a part of CoC. Much after the approval of the Resolution Plan by the Adjudicating Authority, on 29.02.2020 the Respondent No.1 filed IA 47/2020 in IA 73/18 of 2020 in CP (IB) 2/GB/2018 under Section 60(5) read with Section 74(3) of IBC, 2016 and read with Rule 11 of the National Company Law Tribunals Rules, 2016 before the NCLT, Guwahati Bench against the appellant on allegation of non compliance of order dated 07.12.2018 passed by NCLT. The appellant appeared and filed its detailed reply and thereafter finally by the impugned order the Adjudicating Authority allowed the application filed by Respondent No.1 and directed the appellant to transfer the property/land of Igatpuri to the Respondent No.1.

Mr Jay Savla, learned senior counsel for the appellants while assailing the impugned order has argued that once the agreement to sell which was entered in between the appellant and corporate debtor, was terminated long back, due default in payment by the

Respondent, the title of the property at Igatpuri was lying with the appellant and as such the Adjudicating Authority in the IBC proceeding was not competent to direct the appellant to convey the property to the respondent. He emphasized that an agreement to sale which had already been terminated and come to end long back was beyond the jurisdiction of Learned NCLT to issue a direction for its revival.

Mr Savla, learned senior counsel while referring to Page 171 and onwards of the Memo of appeal i.e. copy of agreement for sale has referred to Clause 5 of the Agreement and submitted that in case of default in payment of the balance amount of the purchase price the vendor i.e. appellant was having right to cancel the agreement and terminate the same and take possession over the property in question. He submits that though agreement, in view of non-payment of instalment, was cancelled and terminated by the appellant, despite his best efforts he could not take back possession of the property in question. He explained certain reasons for delay in not taking such steps. He highlights that repeatedly after cancellation of the agreement the appellant approached the Respondent/corporate debtor to deliver the possession but all efforts went in vain. However, in the meanwhile

certain proceedings were initiated under the SICA which were pending for several years. After the initiation of CIRP in the present case and publication, the appellant as financial creditor filed its claim in Form C showing his outstanding debt to the tune of Rs.14,86,47,641/-. The principal amount was Rs.8,90,00,000/-. He submits that since the property of Igatpuri was never conveyed by executing sale deed to the Respondent/corporate debtor, the appellant preferred not to mention anything in respect of Igatpuri property in Form 'C' submitted before the IRP.

Mr Savla, learned senior counsel by way of referring to Section 18(1)(f) and also Explanation (a) has argued that RP was not having any authority to include the Igatpuri property in the resolution plan. He further submits that though despite vigorous request made by the appellant he could not lay his hand on the entire resolution plan, he was only communicated certain few paragraphs of the resolution plan showing as if claim of the appellant alongwith other two financial creditors was settled. He submits that in any event without execution of sale deed and conveying the Igatpuri property to the Respondent/Corporate Debtor, though he was continuing in the capacity of licensee, the

IRP/RP was not entitled to take control over Igatpuri property. Only after the application filed by the Respondent under Section 60(5) of the IB Code and direction issued by the NCLT for conveying the property of Igatpuri the cause of action arose to the appellant and immediately thereafter he has approached this Appellate Tribunal assailing the impugned order. He further by way of referring to certain portion of the resolution plan, which was transmitted to the appellant, has argued that even in the said resolution plan it was noticed that in respect of Igatpuri property dispute were there in between the parties. Taking clue from the observation in the resolution plan regarding dispute in respect of Igatpuri property, he submits that the Learned NCLT has failed to notice the dispute as well as the fact that Corporate Debtor was never title holder of the Igatpuri property, even then the NCLT has directed the appellant to virtually execute sale deed and convey the property of Igatpuri to the Corporate Debtor. To highlight that dispute in relation to Igatpuri property was per se beyond the jurisdiction of the NCLT, however, the Learned NCLT exceeding its jurisdiction has passed the impugned order. While elaborating his submission, he has placed reliance on a case reported in (2020) 2 SCC 538 ***Tata Consultancy Services Ltd Vs SK Wheels Private***

Ltd para 16, 24, 28 to 31 and also on a case reported in (2020) 13 SCC 308 **Embassy Property Developments Pvt Ltd VGs State of Karnataka and ors** paras 39 and 40. By way of referring to para 11, 15 to 17 the judgement reported in (2012) 1 SCC 656 **Suraj Lamp and Industries Pvt Ltd Vs Sate of Haryana and ors**, in para 8 to 13 of case reported in (2004) 8 SCC 614 **Rambhau Namdeo Gajre Vs Narayan Bapuji Dhotra (Dead) through LRs** it has been argued that law is settled on the point that an agreement to sell immovable property, without being finally registered does not create title in the name of so called vendee.

Taking clue from the afore referred judgements, Mr. Savla, learned senior counsel has argued that admittedly till date sale deed has not been executed by the appellant in favour of the Corporate Debtor and as such Corporate Debtor was not having any title over the property in question and also in a situation where due to non-fulfilment of the conditions imposed in the agreement to sell the said agreement was already cancelled and terminated much before initiation of the CIRP in the present. Learned NCLT has committed serious error in directing the appellant to convey and execute the sale deed in favour of Corporate Debtor. According to learned senior counsel the impugned order is contrary to the

settled proposition of law and it was beyond the jurisdiction of the NCLT. The impugned order according to learned senior counsel for the appellant is liable to be set aside.

Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of the only contesting respondent i.e. Respondent No.1/corporate debtor namely Kitply Industries Ltd at the very outset submitted that in respect of the Corporate Debtor, CIRP was initiated by its admission on 1.5.2018. On 22.7.2018 the Resolution Profession had rejected the claim of the appellant in respect of payment of rent amount consisting the Igatpuri property. On 22.10.2018 Committee of Creditors approved the resolution plan which subsequently on 7.12.2018 was finally approved by the NCLT. He further submits that while approving the resolution plan, the claim of Kotak Mahindra Bank, one of the financial creditor alongwith appellant and one another was also settled. However, Kotak Mahindra Bank aggrieved with the approval of resolution plan by NCLT had filed an appeal before this Appellate Tribunal which was rejected on 13.11.2019. Mr Ramji Srinivasan, learned senior counsel submits that despite number of such events and also final approval of the resolution plan by the NCLT the appellant never raised any objection. However, despite

order of approval by the NCLT the appellant one way or the other was not conveying the property of Igatpuri to the Corporate Debtor and as such Corporate Debtor was having no option but to move NCLT by filing an application under Section 60(5) of the IBC. He submits that Learned NCLT by a detailed order has directed the appellant to convey the Igatpuri property. According to him the learned NCLT has passed just and reasonable order which need no interference. Mr. Ramji Srinivasan, learned senior counsel has also raised question of locus of the applicant to maintain the present appeal. While raising the locus issue he has specifically referred to Page 16 and 17 of reply filed on behalf of Respondent No.1 and referred to para 6 and 7, 7a and 7b which reproduced hereinbelow:

“6. It is submitted that as rightly held by the Learned Adjudicating Authority, the Appellants at this stage cannot raise any objection with respect to the transfer of Igatpuri Unit in favour of the Corporate Debtor as the Appellant has already given up its right/title/interest in the said Igatpuri Unit in terms of OTS dated 20.02.2008 entered between the Corporate Debtor and the Appellants.

7. It is germane herein to note the facts leading to the issuance of OTS dated 20.02.2008 by the Appellants in favour of the Corporate Debtor which are as follows:0

a) That an Agreement to Sell dated 03.09.2008 (Agreement) was entered into between the Corporate Debtor and the Appellant for purchase of the Igatpuri Unit. The Corporate Debtor being the purchaser had to pay Rs.2,25,00,000.00 (Rupees Two Crores Twenty five lakhs only) as consideration for the Igatpuri Unit. That out of Rs.2,25,00,000.00 (Rupees Two Crores Twenty Five lkahs only) the Corporate Debtor initially paid an amount of Rs.10 lakhs as earnest money and subsequently paid a sum of Rs.56,25,000.00 (Rupees Fifty six lakhs twenty five thousand only). The Corporate Debtor on payment of the aforesaid consideration was put in possession of the Igatpuri Unit by the Appellant in 1998 accordingly.

b) The remaining consideration of Rs.1,58,75,000.00 (One Crore fifty eight lakhs seventy five thousand only) was to be paid in 31 monthly instalments under the “Deferred Payment Facility) (DPF) till 15.08.2021. True copy of the Agreement to Sell dated 03.09.1998 is annexed herewith and marked as Annexure R-5.”

The learned counsel for the Respondent tried to convey that the entire consideration amount in respect of Igatpuri property was

already paid to the appellant in terms of agreement to sale dated 3.9.1998. According to him once entire payment was made, directing the appellant save and except to convey/transfer the land to the Corporate Debtor there was no option left for the NCLT. He submits that in such situation the learned NCLT has rightly directed for transferring the property of Igatpuri Unit. Mr. Ramji Srinivasan, learned senior counsel has also referred to two communications i.e. mail dated 19.02.2008 and 20.02.20078 which are at page 196 to 199 and 200 to 201 respectively. He particularly referring to communication dated 20.02.2008 submits that the appellant accepted the OTS offered by the Respondent and this was the reason that in Clause 2 (vi) it was indicated that “on receipt of entire OTS amount and cost and other charges as per (i) and (ii) above on or before the due date they were agreeable to convey the property at Igatpuri (presently given to you as Licensee) in Corporate Debtor favour and release all securities including the guarantor from his guarantee obligations which is quoted hereinbelow:

“On receipt of the entire OTS amount and Cost and other charges as per (i) and (ii) above on or before the due date, we are agreeable to convey the property at Igatpuri (presently given to you on

Licensee basis) in your favour and release all our securities including the guarantor from his guarantee obligations.”

He further submits that subsequently as per OTS communication dated 18th March, 2008 pay order of Rs. 2 crore and letter of allotment of Non-convertible debenture for value of Rs.31 lakh was transmitted to the appellant by the Corporate Debtor. According to learned senior counsel since the Corporate Debtor pursuant to the acceptance of OTS by the appellant had transmitted the aforesaid amount, it can be inferred that the OTS in respect of Rs.8,52,00,000/- and Rs.231 lakhs was finally settled after acceptance of aforesaid amount of Rs.2 crore and NCD of Rs. 31 lakhs. He has highlighted that the payment of aforesaid amount cannot be segregated on the basis of communications dated 19.2.2008 and 20.2.2008. It was argued by learned senior counsel that (vi) of Clause 2 of letter dated 20.02.2008 which has been quoted hereinabove makes it clear that the entire consideration amount for executing the sale deed as per agreement to sell was paid to the appellant. He submits both communication i.e. 19.2.2008 and 20.2.2008 cannot be segregated; rather both the letter can be considered jointly in similar manner and once on the basis of aforesaid so called two OTS payment was made by the

Corporate Debtor, the appellant may not be permitted to take a plea that OTS dated 19.02.2008 was for the different purpose. On this issue he has placed heavy reliance on a judgement of Hon'ble Supreme Court to elaborate principle of *reddendo singulo singulis* and he referred to para 56 of the judgement of the Hon'ble Supreme Court reported in (2018) 11 SCC 508 ***Nabha Power Limited (NPL) Vs Punjab State Power Corporation Limited (PSPCL) and another.*** Para 56 of the said judgement is reproduced hereinbelow:-

"56. In 'Principles of Statutory Interpretation' by Justice G.P. Singh (former Chief Justice, Madhya Pradesh High Court), it has been expressed as under:

"(e) Reddendo Singula Singulis

The rule may be stated from an Irish case in the following words Where there are general words of description, following an enumeration of particular things such general words are to be construed distributively, reddendo singula singulis; and if the general words will apply to some things and not to others, the general words are to be applied to those things to which they will, and not to those to which they will not apply; that rule is beyond all controversy¹⁶". Thus, 'I devise and 'bequeath' all my real and personal property to A' will be construed, reddendo singula

singulis by applying 'devise' to 'real' property and 'bequeath' to 'personal' property¹⁷ and in the sentence: 'If any one shall draw or load ant sword or gun' the word 'draw' is applied to 'sword' only and the word 'load' to gun only, because it is impossible to load a sword or draw a gun."

Taking aid from the aforesaid principle it has been argued on behalf of Respondent No.1 that by accepting of the amount i.e. Rs 2 crores and NCD of Rs.31 lakhs, the appellant had settled all the claims and thereafter there was no reason not to direct the appellant to execute the sale deed in favour of Corporate Debtor. Learned counsel for Respondent No.1 has further argued that it is admitted case of the appellant that after the agreement to sale, possession of the property in respect of Igatpuri was already given to the Corporate Debtor and since 1998 the Corporate Debtor is in possession of the said property wherein several investment has been done by the Corporate Debtor. According to learned senior counsel after lapse of such a long period the appellant may not be permitted to deny the execution/actual transfer of the property of the Igatpuri Unit to the Corporate Debtor. On behalf of Respondent No.1 a reference has been given to the Form C submitted by the appellant before the RP. In CIRP proceeding, by way of referring to Volume II of Memo of appeal starting from Page

256, he submits that the appellant has referred number of properties in the Form C but since the appellant was aware that the actual owner and title holder of the Igatpuri property was Corporate Debtor, the appellant purposely had not referred any fact in relation to property of Igatpuri unit. In view of the aforesaid facts and circumstances it has been argued that at once OTS was accepted and in acceptance payment was also received by the appellant the appellant, was having no option but to transfer the property of Igatpuri to the Corporate Debtor. It has been concluded that despite approval of the resolution plan since appellant was not proceeding for execution the Corporate Debtor was having no option but to approach the NCLT by way of filing an application under Section 60(5) of IBC which has been allowed and there is no error in the impugned order.

Other respondents in the present appeal are the official of the appellant and they are formal in nature.

Besides hearing learned counsel for the parties we have minutely examined materials available on record. Admittedly the property of Igatpuri Unit is in relation to agreement to sale which was entered in between the appellant and Corporate Debtor long back in the year 1998. In terms of the agreement after payment of

certain amount within a specified time, possession of land property of Igatpuri Unit was to be handed over to the Corporate Debtor i.e. Kitply Inds Ltd. It was clarified in the agreement as to how rest of amount was to be paid; in which manner and within what time. Time was also prescribed in the agreement to sale. Since in the present appeal citus of the dispute revolves around the agreement dated 3rd September, 1998 it would be appropriate to reproduce relevant portion of agreement as follows:-

“ARTICLES OF AGREEMENT made at Mumbai this 3 day of September One Thousand Nine Hundred Ninety Eight BETWEEN SICOM LIMITED, formerly known as THE STATE INDUSTRIAL AND INVESTMENT CORPORATION OF MAHARASHTRA LIMITED, a Company Incorporated and registered under the Companies Act, 1956 and having its Registered Office at Nirmal, 1st Floor, Nraiman Point, Mumbai 400 021, hereinafter called "the Vendor" (which expression shall unless it be repugnant to the context or meaning thereof be deemed to mean and include its successor or successors and assigns) of the One Part AND KITPLY INDUSTRIES LIMITED, also a Company incorporated and registered under the Companies Act, 1956 and having its Registered Office at Rungagora Raod, Tinsukia 786 125 (Assam) and also its Corporate Office or a place of business at White House, 'A' Block, 4 Floor, 119, Park Street, Calcutta- 700 016, hereinafter called "the Purchaser" (which expression shall unless it be repugnant to the context or meaning thereof be deemed to mean and include its successors and assigns) of the Other Part;

WHEREAS:

(1) CRYSTAL LAMINATES LIMITED, a Company incorporated and registered under the Companies Act, 1956 and having its Registered Office at 2, Anoto Industrial Estate, Nityanand Nagar, L.B. Shastri Mrag, Ghatkopar (West), Mumba 400 086 (hereinafter called "the Mortgagor Company") was seized and possessed of and otherwise well and sufficiently entitled to ALL THOSE pieces or parcel of Non-Agricultural (N.A.) lands bearing

- (i) Gat No.260-B, admeasuring 1H-03R-90Sq.Mtrs equivalent to 10390 Sq.Mtrs or thereabouts and
- (ii) Gat No.261, admeasuring OH-46R, equivalent to 4600 Sq. Mts or thereabouts ;

both together admeasuring 1H-49R-90 Sq. Mtrs equivalent to 14990 Sq. Mtrs or thereabouts, situate, lying and being at Village Take Ghoti, Taluka and Registration Sub District: Igatpuri, District and Registration District: Nashik and more particularly respectively described in PART-A and PART-B of the First Schedule hereunder written Together with the factory building and other buildings and structures thereon.

(2) By an Indenture of Mortgage dated the 22nd day of February 1993, executed by the Mortgagor Company in favour of the Vendor land Lodged for registration in the Office of the Sub- Registrar of Assurances at Mumbai under Serial No.BBM-2592 of 1993 on the same day (hereinafter referred to as "the said First Mortgage") in consideration of the sum of Rs.1,45,00,000/- (Rupees One Crore Forty-Five Lacs Only) lent and advanced/ agreed to be lent and advanced by the Vendor to the Mortgagor Company, the Mortgagor covenanted to repay to the Vendor the said sum of Rs.1,45,00,000/- (Rupees One Crore Forty-Five Lacs Only) (hereinafter referred to as "the said loan") by quarterly instalments mentioned and as security for the repayment of the said loan Together with interest, additional interest, compound interest and all costs, charges and expenses and all other moneys payable by his Mortgagor Company to the Vendor under the said First Mortgage, the Mortgagor Company interalia

(a) granted, conveyed, assigned, transferred and assured unto the Vendor ALL THOSE piece or parcel of Non-Agricultural (N.A.) land, bearing

- (i) Gat No.260-B admeasuring 1H-03R-90 Sq.Mtrs equivalent to 10390 Sq. Mtrs or thereabouts and
- (ii) Gat No.261, admeasuring OH-46R, equivalent to 4600 Sq. Mtrs or thereabouts;

both together admeasuring 1H-49R-90 Sq.Mtrs equivalent to 14990 Sq. Mtrs or thereabouts, situate, lying and being at Village : Take Gholi, Taluka and Registration Sub-District: Igatpuri, District and Registration District: Nashik and more particularly respectively described at PART-A and PART-B of the First Schedule thereunder and hereunder written and the factory building and other buildings and structures constructed and to be thereafter constructed

thereon TOGETHER WITH all appurtenances thereto (all the said premises thereby granted, conveyed, assigned, transferred and assured or thereby granted, conveyed, assigned, transferred and assured or Intended so be are therein and hereinafter for brevity's sake collectively referred to as "the First Mortgaged Premises") and

(b) Assigned, transferred and assured unto the Vendor All and Singular the plant, engines, boilers, motors, machine (whether fixed or movable and whether attached to the First Mortgaged Premises of not), spare parts, electric and other installations, implements, equipments, tools, utensils, appliances, fixtures, fittings furniture, vehicles, accessories and stores relating to the said plant and machinery and other articles and things, short particulars of the main items whereof are set out in the Second Schedule thereunder written, both present and future, fixed, installed, erected or placed upon the First Mortgaged Premises (all which plant, machinery etc are therein and hereinafter referred to as "the Second Mortgaged Premises)

TO HAVE AND TO HOLD the First Mortgaged premises and the Second Mortgaged Premises unto and to the use of the Vendor absolutely for ever, subject to the proviso for redemption therein contained.

(3) By an Indenture of Mortgage dated the 9th day of March 1995, executed by the Mortgagor Company in favour of the vendor and lodged for registration in the Office of the Sub-Registrar of Assurances at Mumbai under Serial No.BBM-951 of 1995 on the same day (hereinafter referred to as "the said Second Mortgage") in consideration of the sum of Rs.50,00,000/- (Rupees Fifty Lacs Only) lent and advanced/agreed to be lent and advanced by the Vendor to the Mortgagor Company, the Mortgagor Company covenanted to repay to the Vendor the said sum of Rs.50,00,000/- (Rupees Fifty Lacs Only) (hereinafter referred to as "the said additional loan) by quarterly instalments Together with Interest, additional interest and compound interest as therein mentioned and as security for the repayment of the said additional loan Together with interest, additional interest and compound interest as therein mentioned and as security for the repayment of the said additional loan Together with interest, additional interest, compound interest and all costs, charges and expenses and all other moneys payable by the Mortgagor Company to the vendor under the said Second Mortgage, the Mortgagor Company interalia further granted, conveyed, assigned, transferred and assured unto the

Vendor, the First Mortgaged Premises described in PART-A and PART-B of the First Schedule thereunder and hereunder written and the Second Mortgaged Premises, the short particulars of the main items whereof are set out in the Second Schedule thereunder written TO HAVE AND TO HOLD the First Mortgaged premises and the Second Mortgaged premises unto and to the use of the vendor forever, subject to the proviso for redemption therein contained.

(4) By and under the said First Mortgage and the second Mortgage (hereinafter collectively referred to as "the said Mortgages") the Mortgagor Company inter alia agreed that in the event of the Mortgagor Company committing default in payment of any instalment of the said loan of Rs.1,45,00,000/- (Rupees One Crore Forty Five Lacs Only) and the said additional loan of Rs.50,00,000/- (Rupees Fifty Lacs Only) (hereinafter collectively referred to as "the said loans) or any part thereof or of the interest thereon on their respective due dates as mentioned in the said First Mortgage and the said Second Mortgage, the Vendor has the power to take over the possession of the First Mortgaged premises and the Second Mortgaged Premises and to sell, transfer, assign, deal with and dispose off the same and to appropriate the sale proceeds thereof towards the outstanding amounts of the said loans and all interests due thereon and all costs, charges and expenses and all other moneys payable by the Mortgagor Company to the Vendor under the said Mortgages.

(5) The Mortgagor Company defaulted in payment of the instalments of the principal amounts of the said loans as well as interests thereon due and payable by it to the Vendor under the said Mortgages and failed and neglected to pay the same to the Vendor in spite of repeated requests made by the Vendor to the Mortgagor Company and therefore the Vendor by its Letter dated 30th May 1996, recalled the entire amounts of the said loans and called upon the Mortgagor Company to repay to the Vendor the entire amounts of said loans Together with all interests thereon due and payable by it to the Vendor under the said Mortgages. The Mortgagor Company however, in spite of sufficient time and opportunities given to it failed and neglected to pay the same and to comply with and discharge its liabilities to the Vendor as per the terms of the said Mortgages.

(6) In the circumstances aforesaid, the Vendor in exercise of the powers reserved/vested unto it under the said

Mortgages and under the provisions of Section 29(1) of the State Financial Corporations Act, 1951, read with the Notification bearing No.F.N.5(9)/86-IV-II dated 11th December 1986, issued by the Government of India, Ministry of Finance, Department of Economics Affairs (Banking Divisions), after giving due Notice, to the Mortgagor Company entered into and/or took over possession of the First Mortgaged Premises described in the First Schedule hereunder written and the plant, machinery, etc particulars whereof are set out in the Second Schedule hereunder written (hereinafter collectively referred to as "the said properties") on the 24th day of January, 1998 and since then the Vendor is in possession of the said properties.

(7) Further in exercise of the power of sale reserved/vested unto it under the said Mortgages and under the provisions of Section 29(1) of the State Financial Corporation Act, 1951, read with the said Notification of the Government of India, dated 11th December 1986, the Vendor advertised the sale of the said properties by inviting offers for the purchase of the same on "as is where is and what is" basis on the General Conditions of Sale mentioned therein, a copy of which was given to the Purchaser.

(8) In response to the said advertisement, the Purchaser by its Letter dated 22nd June 1998, addressed to the Vendor, offered to purchase the said properties at or for the price of Rs.2,25,00,000/- (Rupees Two Crores Twenty Five Lacs Only) in accordance with the said General Conditions of Sale, which the Vendor accepted and agreed to sell the said properties to the Purchaser in "as is where is and what is" basis on the said General Conditions of Sale and on the terms and conditions recorded in its Letter dated 14th August 1998 and on the terms and conditions hereinafter recorded.

(9) The parties hereto are now desirous of recording the terms and conditions of sale and to enter into and execute an Agreement for Sale herein, which the Vendor has agreed to do in the manner hereinafter appearing.

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. The Vendor shall sell to the Purchaser and the Purchaser shall purchase from the Vendor, the said properties being

(a) *ALL THOSE pieces or parcel of Non-Agricultural (N.A. land, bearing*

- (i) *Gat No.260-B, admeasuring 1H-03R-90Sq.Mtrs equivalent to 10390 Sq.Mtrs or thereabouts and*
- (ii) *Gat No.261, admeasuring OH-46R, equivalent to 4600 Sq. Mts or thereabouts;*

both together admeasuring 1H-49R-90 Sq. Mtrs equivalent to 14990 Sq. Mtrs or thereabouts, situate, lying and being at Village : Take Ghoti, Taluka and Registration Sub District: Igatpuri, District and Registration District: Nashik and more particularly respectively described in PART-A and PART-B of the First Schedule hereunder written Together with the factory building and other buildings and structures thereon Together with all appurtenances thereto.

(b) And all and Singular the plant and machinery, etc described in the Second Schedule hereunder written on "as is where is and what is" at or for the price of Rs.2,25,00,000/-(Rupees Two Crores Twenty Lacs Only) (hereinafter referred to as "the said purchase price") to be paid by the Purchaser to the Vendor as hereinafter mentioned.

2. Out of the said purchase price the Purchaser has paid to the Vendor the sum of Rs.10,00,000/- (Rupees Ten Lacs Only)as earnest Money which is adjusted by the Vendor towards the said purchase price and it is agreed that a further sum of Rs.56,25,200/- (Rupees Fifty Six Lacs Twenty Five Thousand Only) shall be paid by the Purchaser to the Vendor within 30 days on acceptance of the offer, i.e. from 14th August 1998 and the balance amount of Rs.1,58,75,000/- (Rupees One Crores Fifty Eight Lacs Seventy Five Thousand Only) shall be paid by the Purchaser to the Vendor in 31 (Thirty One) monthly instalments as follows:

<i>No. of Installments</i>	<i>Amount</i>	<i>Due Date</i>
1. Rs.5,75,000		<i>on or before 15/02/1999</i>
2. Rs.5,00,000		<i>on or before 15/03/1999</i>
3. Rs.5,00,000		<i>on or before 15/04/1999</i>
4. Rs.5,00,000		<i>on or before 15/05/1999</i>
5. Rs.5,00,000		<i>on or before 15/06/1999</i>
6. Rs.5,00,000		<i>on or before 15/07/1999</i>
7. Rs.5,00,000		<i>on or before 15/08/1999</i>
8. Rs.5,00,000		<i>on or before 15/09/1999</i>

9.	Rs.5,00,000	on or before 15/10/1999
10.	Rs.5,00,000	on or before 15/11/1999
11.	Rs.5,00,000	on or before 15/12/1999
12.	Rs.5,00,000	on or before 15/01/2000
13.	Rs.5,00,000	on or before 15/02/2000
14.	Rs.5,00,000	on or before 15/03/2000
15.	Rs.5,00,000	on or before 15/04/2000
16.	Rs.5,00,000	on or before 15/05/2000
17.	Rs.5,00,000	on or before 15/06/2000
18.	Rs.5,00,000	on or before 15/07/2000
19.	Rs.5,00,000	on or before 15/08/2000
20.	Rs.5,00,000	on or before 15/09/2000
21.	Rs.5,00,000	on or before 15/10/2000
22.	Rs.5,00,000	on or before 15/11/2000
23.	Rs.5,00,000	on or before 15/12/2000
24.	Rs.5,00,000	on or before 15/01/2001
25.	Rs.5,00,000	on or before 15/02/2001
26.	Rs.5,00,000	on or before 15/03/2001
27.	Rs.5,00,000	on or before 15/04/2001
28.	Rs.5,00,000	on or before 15/05/2001
29.	Rs.5,00,000	on or before 15/06/2001
30.	Rs.5,00,000	on or before 15/07/2001
31.	Rs.5,00,000	on or before 15/08/2001

=====

Total Rs.1,58,85,000

=====

Together with interest on the said balance sum of Rs.1,58,75,000/- (Rupees One Crore Fifty Eight Lacs Seventy Five Thousand Only) or the balance hereof remaining unpaid or outstanding for the time being at rate of 5.5% per annum above the Vendor's reference rate (which at present is 16% per annum), with effect from 14th August 1998, due and payable quarterly on the 28th day of February, the 31 day of May, the 31 day of August and the 30th day of November, every year for the respective periods ending on these dates and the balance at the time of payment of the last instalment of the said balance purchase price, commencing from the 31* day of August, 1998 PROVIDED that in case there is any revision in the Vendor's reference rate during the currency of this Agreement, the rate of interest payable by the Purchaser shall stand revised automatically and the Purchaser shall agree to the same without raising any objections to the revision in the rate of interest PROVIDED FURTHER that a rebate of 2% shall be allowed in the rate of interest for a particular quarter, if the Purchaser is punctual in payment of interest on or before the due date for that quarter and if the Purchaser was also punctual in payment of interest and the instalments of the said balance purchase price on or before their respective due dates during that quarter PROVIDED FURTHER that in the event of the Purchaser failing to pay by their respective due dates any

instalment of the said balance purchase price and/or interest, interest shall be charged at the rate of 8% over and above the Vendor's reference rate mentioned above on the total amount in default, during the period of such default i.e. from the date of such default to the date on which the instalment of the said balance purchase price/interest in default is paid PROVIDED FURTHER that in case the due dates for payment of the said balance purchase price and/or interest falls on Saturday, Sunday or Public Holiday under the Negotiable Instrument Act, the immediately next preceding working day shall be taken as the due date PROVIDED FURTHER that the payment of such instalment of interest/ the said balance purchase price shall be made by cheque/draft drawn on the Mumbai Branch of any Bank, which shall either be handed over at the Registered Office of the Vendor atleast two days before the due date for the payment of such instalment or sent to the Vendor by Registered Post with Acknowledgment due atleast six days before such due date for the payment of instalment.

3. On payment of the full purchase price by the Purchaser to the Vendor as aforesaid and upon the purchaser carrying out all its obligations and of serving and performing all terms, covenants, conditions and stipulations herein contained, the Vendor shall put the purchaser in possession of the said premises described in the First Schedule hereunder written and hand over the plant, machinery etc described in the Second Schedule hereunder written and execute a conveyance in respect of the said premises described in the First Schedule hereunder written and the plant, machinery etc described in the Second Schedule hereunder written in favour of the Purchaser or its nominee or nominees and if required shall execute any other documents/ agreements, writings etc for the same at the costs and expenses of the Purchaser including the stamp duty and registration charges payable in respect thereof.

4. It has been clearly agreed, confirmed, understood and accepted by the Purchaser that :-

(a) The Purchaser has prior to the submission of the offer for purchase of the said properties, taken inspection of the same and have fully and completely satisfied itself about the state of the same. The Purchaser has taken inventory of the said plant, machinery etc described in the Second Schedule hereunder written and have fully and completely satisfied itself about the state of the same. The Purchaser shall not raise any dispute or objection of any nature whatsoever as to the right, title and interest of the Mortgagor Company to the same and/or the right of the Vendor to deal with and dispose off the same. The said

properties are sold to the Purchaser in the condition in which they are on "as is where is and what is" basis WITHOUT any guarantee or warranties whatsoever as to the condition of the same.

(b) The Purchaser shall accept the documents available with the Vendor as root of title and shall not make any requisitions on title prior thereto. The Purchaser has satisfied itself about the nature of the right title and Interest of the Mortgagor Company in respect of the said properties and that the Purchaser accepted the title of the Mortgagor Company and right of the Vendor to sell the same.

(c) The Vendor is selling the said properties in exercise of the powers available to it as the Mortgagee under the said Mortgages and under the provisions of the State Financial Corporations Act, 1951.

(d) The Purchaser has also perused the terms and conditions mentioned in the said General Conditions of Sale prior to making an offer for purchase of the said properties and it accepts the same and agrees that the aforesaid sale by the Vendor is subject to the said terms and conditions mentioned in the said General Conditions of Sale, the terms and conditions on the basis of which the Purchaser offered to purchase the said properties on the terms and conditions contained in the Vendor's Letter of Acceptance dated 14th August, 1998 and the terms and conditions contained in this Agreement.

(e) The Purchaser has agreed to purchase the said properties with specific agreement and understanding that with effect from 14th August 1998, the said properties and their safety and security shall be at the risk of the Purchaser and the Purchaser shall not be entitled to claim any loss or damage that may be done or suffered for any reason whatsoever to the said properties after 14th August 1998. The Purchaser may, however with the permission of the Vendor appoint its own security for safeguarding the said properties over and above the security appointed by the Vendor. The Purchaser shall get the said properties - insured at its costs.

5. It is agreed that in the event of default being committed by the Purchaser in payment of the balance of the said purchase price and/or interest thereon on their respective due dates (time being the essence of the contract) and/or failing to comply with any of the terms and conditions of this Agreement or if the sale is not completed by reason of

any default of the Purchaser, the Vendor shall have the right to cancel the arrangement and to terminate this Agreement and enter upon and take possession of the said properties and forfeit the amount till then paid by the Purchaser to the Vendor and to put up the said properties for resale/ disposal in its absolute discretion and in such case the Purchaser shall hand back the peaceful possession of the said properties to the Vendor and all costs, charges and expenses incurred by the Vendor due to such default shall be borne and paid by the Purchaser. Without prejudice to the rights of the Vendor to claim damages in case of any short fall that may arise by reason of resale of the said properties and the damage suffered consequently, the Purchaser shall be bound to make good any deficiency arising on such resale by the Vendor and the Purchaser shall not be entitled to make any claim in respect of any amount in the event of the said properties on resale realising a higher price than that offered by the defaulting Purchaser.

6. It is expressly agreed and declared that notwithstanding Section 55 of the Transfer of Property Act, 1882 or any other enactment for the time being in force in that behalf, the Vendor shall not be bound to disclose to the Purchaser any defect whether material or otherwise in the said properties, whether or not the Vendor may be or the Purchaser may not be aware of such defect and whether or not the Purchaser could not with ordinary care and diligence discover such defect. The said properties are being sold in the conditions in which they are on "as is where is and what is" basis without any guarantee or warrantee whatsoever as to the conditions thereof and subject to the existing rights, covenants, easements etc if any, in particular and without prejudice to the generality of the foregoing.

7. It is agreed that all the rates, taxes, assessments including Municipal/ Gram Panchayat and Local Government rates, taxes, dues and duties and all other outgoings by whatever name in respect of the said properties from the day the offer to purchase is accepted by the Vendor I.e. from 14 August 1998, shall be borne and paid by the Purchaser.

8. The Purchaser shall be solely responsible for getting all the requisite licenses/ permissions / approvals/ registrations/ clearances etc for the said properties to be transferred in its name at its own costs.

9. The Purchaser shall not be entitled to look into whether the power of sale is being validity exercised and/or whether there are

any arrears due or not and also shall not be liable or entitled to look into the application of the proceeds of sale by the Vendor.

10. The Vendor will execute the documents as seller and will give only a covenant against encumbrances by the Vendor as the first Mortgagee and purchaser shall accept the same.

11. The Vendor shall obtain the necessary consent in writing from Maharashtra State Financial Corporation who is the pari-passu charge holder for the sale of the said properties to the Purchaser or its nominee or nominees.

12. (a) The Vendor shall not be liable to answer any requisition in respect of which it does not have any information, audited accounts or documents etc and the Purchaser shall not be entitled to revoke the sale or set off any amount against the purchase price or reduce the amount of offer on that or any other ground whatsoever.

(b) No requisition or objection whatsoever shall be made or taken in respect of title to the said properties or on account of any document being unregistered, unstamped or insufficiently stamped or on account of absence of any covenant for production of title deeds, etc in respect of the documents of the said properties or on account of any covenant for production of title deeds is defective or insufficient.

13. The Purchaser shall make its own arrangements for getting required power connection, water and other facilities and shall pay arrears of rates and taxes of the said properties and shall meet all the costs of whatsoever nature to be incurred in that behalf. The Vendor accepts no liability in this behalf and the Vendor shall not be responsible for the loss, if any, incurred by the Purchaser on account of not being able to get the necessary, water, power and other Infrastructure. The Purchaser shall make its own inquiries about the arrears of dues for supply of power, water and other facilities, if any and the same shall be borne and paid by the Purchaser.

14. The Purchaser hereby agrees and declares that it has expressly waived all rights under the Transfer of Property Act, 1882 and more particularly the rights under Section 55 of the said Act.

15. Any notice required to be served on the Purchaser shall for the purpose of this Agreement be deemed to be sufficiently served, if it is left at the Registered Office of the Purchaser or at the place of business of the Purchaser or left or affixed to any part of the said properties and such notice shall also be deemed to be properly

and duly effected if it is sent by post in a registered letter addressed to the Purchaser at its Registered Office or at the place of its business and such service shall be deemed to have been made at the time at which such registered letter would in the ordinary course of the post be delivered even though returned unserved on account of refusal or otherwise howsoever.

16. IT IS HEREBY AGREED AND DECLARED BY AND BETWEEN THE PARTIES HERETO that for enforcing this Agreement by the Vendor against the Purchaser the courts at Mumbai only shall have exclusive jurisdiction and the Purchaser submits to the same.

17. All costs, charges and expenses including the Stamp Duty, Registration Charges, legal charges to be paid to the Advocates for Solicitors etc of and incidental to the sale herein and of this Agreement shall be borne and paid by the Purchaser.

IN WITNESS WHEREOF the parties hereto have executed this Agreement for Sale in duplicate by the hands of their respective Constituted Attorneys the day and year first hereinabove written.

*THE FIRST SCHEDULE ABOVE REFERRED TO
(Description of Land and Buildings)*

PART-A

ALL THAT piece or parcel of Non-Agricultural (N.A.) Land bearing Gat No.260-B, admeasuring 1H-03R-90Sq.Mtrs equivalent to 10390 Sq. Mtrs or thereabouts, situate, lying and being at Village: Take Ghoti, Taluka, Panchayat Samiti and Registration Sub-District: Igatpuri, District, Zilla Parishad and Registration District: Nashik and bounded as follows:

*On or to-wards the NORTH by land bearing Gat No.263(part) and
Agra-Road;*

On or to-wards the SOUTH by land bearing Gat No.261;

On or to-wards the EAST by land bearing Gat No.262; and

On or to-wards the WEST by land bearing Gat No.260-A

On examination of the agreement it is evident that schedule for payment was incorporated in the agreement. Clause 5 of the agreement stipulates that the parties had agreed that in the event of default of the purchaser in payment of the balance of said purchase price the vendor was having right to cancel the

arrangement and to terminate this agreement and enter upon and take possession of the said property and forfeiting the amount till then paid by the purchaser. It is specific case of the appellant that the respondent failed to honour agreement and as such number of communications were made to the respondent/corporate debtor either to make payment or the appellant will take back possession of the property in question. The record reflects that several opportunities were given for payment of the consideration amount failing which the appellant had communicated that it will terminate the agreement and take back possession of the property in question. However, it continued for several years. Even OTS was also offered. The appellant claims that as per OTS the entire consideration amount was not paid whereas the respondent has taken a plea that though there were two OTS i.e. dated 19.02.2008 and 20.02.2008, the respondent settled the dispute by making payment of Rs. 2 crore and by issuance of NCD of Rs.31 lakhs. Learned counsel for the respondent on the one hand has argued that the aforesaid two OTS were settled by payment of Rs.2 crores and NCD of Rs.31 lakhs. However, it is stand of the appellant that as per OTS entire due was not paid. On behalf of appellant it has been asserted that OTS dated 19.02.2008 was in relation to debt

of Rs.852 lakhs whereas OTS dated 20.02.2008 was in relation to Rs.2 crore and debenture of Rs.31 lakhs. As per appellant since payment was not made in terms of the agreement to sale dated 3rd September, 1998 at much belated stage vide letter dated 5.12.2008 which is at running page 207 to 208 volume II of the memo of appeal the appellant reminded CD/Respondent/Kitply Inds Ltd that in case of default in terms of the instalment on or before due date, acceptance of the terms of the OTS was to be cancelled automatically and withdrawn and amount till then paid was to be appropriated towards other dues and proceed with appropriate action to recover dues. It was further intimated that considering the problems of the Corporate Debtor the CD was given once again a call to pay the amount of Rs.29,05,95,518/- with further interest on or before 18.12.2018 failing which the appellant would be left with no alternative but to cancel the acceptance of OTS and in terms of Clause 5 of the agreement (agreement to sale dated 3rd September, 1998) by terminating the said agreement and proceed with possession of the property. Finally by communication dated 30th December, 2008 which is in Volume II of the memo of appeal starts from Page 210 to 211 it is evident that in view of failure on the part of the respondent the appellant by letter dated 30th

December, 2008 enforced its right in terms of Clause 5 of the agreement and terminated the said agreement and withdrawn the OTS with immediate effect. The respondent was further intimated regarding forfeiture of amount paid by it till date and he was called upon to hand back peaceful possession of the aforesaid assets. It is admitted case that the Respondent has never assailed termination of the agreement. However, we are of the opinion that in an appeal filed against the impugned order we may not record any finding in respect of either validity of the agreement to sale or payment of amount by the CD to the appellant in terms of the OTS. Such issue can be examined or dealt with in appropriate proceeding. In the present case there is no dispute that till date in view of agreement to sale of 1998, the appellant has not executed sale deed and conveyed the property of Igatpuri to the CD. Meaning thereby that in respect of the property in question title deed is still with the appellant. Once it is noticed that title holder of the property in dispute is the appellant, in such situation even after initiation of CIRP neither IRP or RP was competent to control the said property in view of rider as incorporated in Section 18(f) Explanation (a). It is appropriate to quote the said provision as follows:

“18. The interim resolution professional shall perform the following duties, namely:—

(a) xxxx

(b) xxxx

(c) xxxx

(d)xxxx

(e)xxxx

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) xxxx.

Explanation.—For the purposes of this section, the term "assets" shall not include the following, namely:—

(a) **assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;**

Admittedly till date the CD is not title holder of the property in question and dispute comes around the execution of the sale deed. It is admitted that dispute regarding either payment of remaining consideration amount as per sale agreement or non-execution of sale deed arose much much before initiation of CIRP in the present proceeding and as such neither RP nor NCLT was having any jurisdiction to deal with such property. We may observe that even in the resolution plan it was indicated that dispute in respect of the property in question was existing which is evident from communication dated 02.06.2019 which is at running page 265 to 267 of Volume II of the Memo of Appeal i.e. part of the

approval plan which was communicated to the appellant. At Page 266 it has been indicated in the resolution plan

“It is hereby clarified that the unit of the Corporate Debtor located at Igatpuri is in dispute between the Corporate Debtor and SICOM/SICOM ARC Limited. Post approval of the Resolution Plan and settlement of all dues of SICOM/SICOM ARC Ltd, SICOM/SICOM ARC Ltd to transfer the Igatpuri unit in the name of the Resolution Applicant or its nominee.”

On perusal of the aforesaid communication which is part approval of the resolution plan in respect of Kitply Industries Ltd it is evident that transfer of Igatpuri was to be effected only after settlement of the dispute. If there was still dispute in between parties it was not permissible for the NCLT to direct the appellant for transferring the property of Igatpuri in favour of CD or its nominee. Though it is not necessary to reiterate but it is established that unless in terms of agreement to sale, sale deed is finally executed after accepting full consideration amount, title always lies with the vendor. This issue has already been noticed and settled by Hon’ble Supreme Court Judgements on which reliance was placed by learned counsel for the appellant. We may reproduce paras 11, 15 to 17 the judgement reported in (2012) 1

SCC 656 **Suraj Lamp and Industries Pvt Ltd Vs Sate of Haryana and ors:-**

"11. Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas V. S.A. Kamtamk and Anr (1977) 3 SCC 247, observed:

A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. See Rambaran Prosad V. Ram Mohit Hazra MANU/SC/0212/1966: 1967 1 SCR 293. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein."

In India, the word 'transfer' is defined with reference to the word 'convey'. The word 'conveys' in Section 5 of Transfer of Property Act is used in the wider sense of conveying ownership.....that only on execution of conveyance ownership passes from one party to another....."

In Rambhau Namdeo Gajre V Narayan Bapuji Dhotra MANU/SC/0680/2004:[2004 (8) SCC 614] this Court held:

"Protection provided under Sectuib 53A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party."

It is thus clear that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred.

15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in *Asha M Jain V Canara Bank – MANU/DE/1304/2001: 94 (2001) DLT 841*, that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintended misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.

17. It has been submitted that making declaration that GPA sales and SA/GPA/WILL transfers are not legally valid modes of transfer is likely to create hardship to a large number of persons who have entered into such transactions and they should be given sufficient time to regularize the transactions by obtaining deeds of conveyance. It is also submitted that this decision should be made applicable prospectively to avoid hardship."

Similarly in ***Rambhau Namdeo Garje Vs Narayan Bapuji***

Dhotra (Dead) through LRs (2004) 8 SCC 614 in paras 8 to 13

the point has been settled which has been quoted below:-

"8.It is seen that many a times a transferee takes possession of the property in part performance of the contract and he is willing

to perform his part of the contract. However, the transferor somehow or the other does not complete the transaction by executing a registered deed in favour of the transferee, which is required under the law. At times, he tries to get back the possession of the property. In equity the Courts in England held that it would be unfair to allow the transferor to take advantage of his own fault and evict the transferee from the property. The doctrine of part performance aims at protecting the possession of such transferee provided certain conditions contemplated by Section 53-A are fulfilled. The essential conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under [Section 53-A](#) of the Act have been culled out of this Court in *Shrimant Shamrao Suryavanshi & Anr. Vs. Pralhad Bhairoba Suryavanshi*, MANU/SC/0093/2002: 2002 (3) SCC 676, are:

- "(1) There must be a contract to transfer for consideration of any immovable property;
- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract."

9.If these conditions are fulfilled then in a given case there is an equity in favour of the proposed transferee who can protect his possession against the proposed transferor even though a registered deed conveying the title is not executed by the proposed transferor. In such a situation equitable doctrine of part performance provided under Section 53-A comes into play and provides that "the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract."

10.Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such

an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party.

11.The question which falls for our consideration is: "Whether the doctrine of part performance could be availed of by the defendant with whom the respondent had never entered into an agreement of sale?" It is an admitted case of the parties that the plaintiff/respondent had entered into an agreement of sale with Pishorrilal on 16.6.1961 and who had taken possession of the suit land in part performance thereof. Sale deed had not been executed and registered in his favour. Pishorrilal did not take any steps for getting the agreement of sale specifically enforced and obtain a registered sale deed in respect of the suit land. Within a period of 2- 1/2 months Pishorrilal executed a similar agreement of sale dated 1.9.1961 in favour of the appellant and put him in possession of the suit land. Pishorrilal did not have any right to enter into an agreement of sale with the appellant as he was not the owner of the suit land. The appellant did not care to ascertain the title of Pishorrilal to the suit land before entering into the transaction with him.

12.There was no agreement between the respondent and the appellant in connection with the suit land. The doctrine of part performance enshrined in Section 53-A of the Act could have been availed of by Pishorrilal against the plaintiff/respondent subject to the fulfillment of certain conditions but the same could not be availed of by the appellant against the plaintiff/respondent with whom he has no privity of contract. The doctrine of part performance as contemplated by Section 53-A can be availed of by the transferee or any person claiming under him. The appellant not being the transferee within the meaning of Section 53-A of the Act could not invoke the equitable doctrine of part performance to protect his possession as against the plaintiff/respondent.1

13.The agreement to sell does not create an interest of the proposed vendee in the suit property. As per Section 54 of the Act, the title in immovable property valued at more than Rs. 100/- can be conveyed only by executing a registered sale deed. Section 54 specifically provides that a contract for sale of immovable property is a contract evidencing the fact that the sale of such property shall take place on the terms settled between the parties, but does not, of itself, create any interest in or charge on such property. It is not disputed before us that the suit land sought to be conveyed is of the value of more than Rs. 100. Therefore, unless there was a registered document of sale in favour of the Pishorrilal

(proposed transferee) the title of the suit land continued to vest in Narayan Bapuji Dhotra (original plaintiff) and remain in his ownership. This point was examined in detail by this Court in State of U.P. Vs. District Judge & Ors., MANU/SC/0020/1997: air 1997 SC 53, and it was held thus:

"Having given our anxious consideration to the rival contentions we find that the High Court with respect had patently erred in taking the view that because of Section 53-A of the Transfer of Property Act the proposed transferees of the land had acquired an interest in the lands which would result in exclusion of these lands from the computation of the holding of the tenure-holder transferor on the appointed day. It is obvious that an agreement to sell creates no interest in land. As per Section 54 of the Transfer of Property Act, the property in the land gets conveyed only by registered sale deed. It is not in dispute that the lands sought to be covered were having value of more than Rs. 100. Therefore, unless there was a registered document of sale in favour of the proposed transferee agreement-holders, the title of the land would not get divested from the vendor and would remain in his ownership. There is no dispute on this aspect. However, strong reliance was placed by learned counsel for Respondent 3 on Section 53-A of the Transfer of Property Act. We fail to appreciate how that section can at all be relevant against the third party like the appellant-State. That section provides for a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell these lands to the transferee if the proposed transferee satisfies other conditions of Section 53-A. That protection is available as a shield only against the transferor, the proposed vendor, and would disentitle him from disturbing the possession of the proposed transferees who are put in possession pursuant to such an agreement. But that has nothing to do with the ownership of the proposed transferor who remains full owner of the said lands till they are legally conveyed by sale deed to the proposed transferees. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party like the appellant-State when it seeks to enforce the provisions of the Act against the tenure-holder, proposed transferor of these lands."

[Emphasis supplied]

There was no agreement between the appellant and the respondent in connection with the suit land. The doctrine of part performance could have been availed of by Pishorlil against his proposed vendor subject, of course, to the fulfillment of the

conditions mentioned above. It could not be availed of by the appellant against the respondent with whom he has no privity of contract. Appellant has been put in possession of the suit land on the basis of an agreement of sale not by the respondent but by Pishorrilal, therefore, the privity of contract is between Pishorrilal and the appellant and not between the appellant and the respondent. The doctrine of part performance as contemplated in Section 53-A can be availed of by the proposed transferee against his transferor or any person claiming under him and not against a third person with whom he does not have a privity of contract.”

On the point of jurisdiction of NCLT or NCLAT in respect of interpretation of agreement/contract which had already occurred prior to initiation of CIRP it has been held that neither NCLT nor NCLAT is having jurisdiction to adjudicate. In this context it would be profitable to reproduce paras 16, 24, 28 to 31 of judgement of Hon’ble Supreme Court reported in (2022) 2 SCC 583 **Tata Consultancy Services Ltd Vs. Vishal Ghisulal Jain** which are quoted herebelow:

“16. Based on the appeal, two issues have arisen for consideration before this Court:

16.1 Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties; and

16.2 Whether in the exercise of such a residuary jurisdiction, it can impose an ad-interim stay on the termination of the Facilities Agreement.

24. *It was also urged on behalf of the appellant that the NCLT and NCLAT have re-written the agreement changing its nature from a determinable contract to a non-terminable contract overlooking the mandate of Section 1412 of the Specific Relief Act 1963. It is a settled position of law that IBC is a complete code and Section 238 overrides all other laws. The NCLT in its residuary jurisdiction is empowered to stay the termination of the agreement if it satisfies the criteria laid down by this Court in Gujarat Urja (supra). In any event, the intervention by the NCLT and NCLAT cannot be characterized as the re-writing of the contract between the parties. The NCLT and NCLAT are vested with the responsibility of preserving corporate debtor's survival and can intervene if an action by a third party can cut the legs out from under CIRP.*

28. *In Gujarat Urja (supra), the contract in question was terminated by a third party based on an ipso facto clause, i.e., the fact of insolvency itself constituted an event of default. It was in that context, this Court held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under Section 60(5)(c). This Court observed that (SCC pp. 262-63, para 69)*

“69....NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the

insolvency of the corporate debtor... The nexus with the insolvency of the corporate debtor must 22 exist”

(emphasis supplied)

Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor.

29. It is evident that the appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the Corporate Debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10 June 2019 were not a smokescreen to terminate the agreement because of the insolvency of the Corporate Debtor. Thus, we are of the view that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT.

30. While in the present case, the second issue formulated by this Court has no bearing, we would like to issue a note of caution to

the NCLT and NCLAT regarding interference with a party's contractual right to terminate a contract. Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor. In Gujarat Urja (supra), this Court held thus: (SCC pp.309-10, paras 176-177)

“176. Given that the terms used in Section 60(5)(c) are of wide import, as recognised in a consistent line of authority, we hold that NCLT was empowered to restrain the appellant from terminating PPA. However, our decision is premised upon a recognition of the centrality of PPA in the present case to the success of CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the corporate debtor. In doing so, we reiterate that NCLT would have been empowered to set aside the termination of PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of NCLT under Section 60(5)(c) of IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract

based on an ipso facto clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix). 177. The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile ground for the revival of the regime under Section 22 of SICA which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of PPA which is the sole contract of the corporate debtor, governing the supply of electricity which it generates, it will pull the rug out from under CIRP, making the corporate death of the corporate debtor a foregone conclusion.”

(Emphasis supplied)

31. The narrow exception crafted by this Court in Gujarat Urja (supra) must be borne in mind by the NCLT and NCLAT even while examining prayers for interim relief. The order of the NCLT dated 18 December 2019 does not indicate that the NCLT has applied

its mind to the centrality of the Facilities Agreement to the success of the CIRP and Corporate Debtor's survival as a going concern. The NCLT has merely relied upon the procedural infirmity on part of the appellant in the issuance of the termination notice, i.e., it did not give thirty days' notice period to the Corporate Debtor to cure the deficiency in service. The NCLAT, in its impugned judgment, has averred that the decision of the NCLT preserves the 'going concern' status of the Corporate Debtor but there is no factual analysis on how the termination of the Facilities Agreement would put the survival of the Corporate Debtor in jeopardy."

Similarly this issue was considered by Hon'ble Supreme court in case reported in (2020) 13 SCC 308 ***Embassy Property Developments Pvt Ltd Vs Stte of Karnataka and Ors.***

In view of law settled by Hon'ble Supreme Court as incorporated hereinabove we are of the opinion that by order impugned the Learned NCLT has exceeded its jurisdiction in directing the appellant to transfer the property in question in favour of Corporate Debtor. The dispute whether agreement to sale which was entered in between the parties in the year 1998 was breached by the appellant or the respondent breached the agreement, may not be examined in a proceeding under the IBC.

Such disputes are required to be examined by the court of competent jurisdiction. In view of admitted position that title of the property in respect of Igatpuri Unit still lies with the appellant, the Learned NCLT has committed error in allowing the application filed on behalf of the Respondent in directing for transferring the land in question and as such there is no option but to set aside the impugned order.

Accordingly the order dated 31.08.2021 passed by the Adjudicating Authority in IA No.47/2020 in IA No.73/2018 of 2020 in CP(IB) No.02/GB/2018 is hereby set aside and the appeal is allowed without any cost.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

bm