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IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH, KOLKATA

CA(IB) No. 1171/KB/2019
CA(IB) No.1748/KB/2019
CA(IB) No.1740/KB/2019
CA(IB) No.1519/KB/2020
CA(IB) No.46/KB/2020
CA(IB) No.56/KB/2020
CA(IB) No.57/KB/2020
Connected with
CP(IB) No. 1684/KB/2018

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of The Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

- And -

In the matter of:

Jayanta Banerjee, having its address for correspondence Ambika Mukherjee Road, Natagarh, Ghola, North 24 Parganas, Pin-700 113

... ... **Operational Creditor/Applicant in CA(IB) No. 57/KB/2020**

- versus -

Incab Industries Limited, having its registered office at 9, Hare Street Kolkata-700001; (CIN: U27108WB1920PLC003641

... ... **Corporate Debtor**

And

In the matter of:

Pegasus Asset Reconstruction Private Limited, having its registered office at 55-56, 5th Floor, Free Press House, Nariman Point, Mumbai-400 021 and also office at 54, Ekdalia Road, 1st Floor, Kolkata-700 019

... ... **Applicant in CA(IB) No. 1740/KB/2019 & CA(IB) No. 56/KB/2020**

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And

In the matter of:

Bhagawati Singh, authorised representative of 200 workers of M/s. Incab Industries Limited, Jamshedpur.

... ... **Applicants in CA(IB) No.46/KB/2020 & CA(IB) No.1171/KB/2019**

And

In the matter of:

Saheli Ghosh Biswas representing Employees and Workers of M/s. Incab Industries Limited, Kolkata

... ... **Applicants in CA(IB) No.1519/KB/2020**

- Versus -

In the matter of:

Sashi Agarwal, Resolution Professional of the Corporate Debtor (under CIRP), having its place of business at Subama Apartment, (Opposite Udayan Club), 21 N, Block A, New Alipore, Kolkata-700 053.

... ... **Respondent/Applicant in CA(IB) No.1748/KB/2019**

And

In the matter of:

1. **Tata Steel Limited**, having its registered office at Bombay House, 24, Homi Mody Street, Fort, Mumbai-400 001.

... ... **Intervenor in CA(IB) No. 1171/KB/2019**

2. **Kamala Mills Limited**, having its registered office at Kamala House, Kamala City, Senapati Bapat Marg, Lower Parel, Mumbai-400 013

... ... **Intervenor in CA(IB) No. 46/KB/2020 & CA(IB) No. 57/KB/2020**

3. **Fasqua Investment Pvt. Ltd.**, having its registered office at Kamala House, Kamala Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai-400 013

... ... **Intervenor in CA(IB) No. 46/KB/2020 & CA(IB) No. 57/KB/2020**

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Coram:

Madan B. Gosavi, Hon'ble Member (Judicial)

Virendra Kumar Gupta, Hon'ble Member (Technical)

Counsel appeared:

1. Mr. Rishav Banerjee, Advocate 2. Mr. Avishek Das, Advocate 3. Mr. Ritoban Sarkar, Advocate 4. Mr. Kumardeep Majumder, Advocate	}	For Operational Creditor
1. Mr. Joy Saha, Sr. Advocate 2. Mr. Kuldip Mullick, Advocate 3. Mr. Shashi Agarwal, FCA	}	For R.P.
1. Mr. A.K. Srivastava, Advocate 2. Mr. Akash Sharma, Advocate	}	For workers of Jamshedpur, in CA No. 1711/KB/2019 & CA No.46/KB/2020
1. Mr. Satyendra Agarwal, Advocate 2. Mr. Bijoy Bag, Advocate	}	For EPF Office, Salt Lake
1. Mr. Ratnanko Banerjee, Sr. Advocate 2. Mr. Lokenath Chatterjee, Advocate 3. Mr. Jaydeb Ghorai, Advocate 4. Mr. Saugata Banerjee, Advocate	}	For Tata Steel Ltd.
1. Mr. Vikram Wadehra, Advocate 2. Ms. Vidushi Chokhani, Advocate	}	For Pegasus Asset Reconstruction P. Ltd.
1. Ms. Urmila Chakraborty, Advocate 2. Ms. Sweta Mohanty, Advocate	}	For Petitioner, in CA No.1519/KB/2019

Dates of Hearing: 09.01.2020, 17.01.2020, 22.01.2020, 23.01.2020 & 24.01.2020

Date of Pronouncement of Order: 02. 2020

ORDER

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Per Virendra Kumar Gupta, Member (T)

These applications are in respect of same Corporate Debtor and common issues/ pleadings are involved. Therefore, these are disposed of for the sake of convenience through a consolidated order.

CA(IB) No. 1171/KB/2019

1. Through this CA the applicant has prayed that government of Jharkhand be impleaded as a party in the CIRP proceedings.

2. The facts, in brief, are that the corporate debtor was put under CIRP vide order dated 7th August, 2019 in CP(IB) No. 1684/KB/2018. The representative on behalf of 227 workers has stated that to protect the interest of the workers, it was desired that workers be allowed to take over the corporate debtor and for that purpose they had submitted a proposal which is being adjudicated upon in separate C.A. However, without land, no successful resolution of the insolvency of corporate debtor was possible, hence, issue of ownership of land at Jamshedpur was central to such resolution. With this opening words, the Ld. Counsel appearing on behalf of the workers initiated his arguments by stating that such land in fact belonged to the Government of Jharkhand as this land had been given to Tata Steel Ltd. under the Government Grants Act, 1895. The Ld. Counsel submitted copy of the said Act and drew our attention to the fact that as per this Act, provisions of Transfer of Property Act, 1882 were not applicable to the Government grants and also terms and conditions relating to such grants were given an overriding effect to any other law for the time being in force. Thereafter, he contended that only one prayer was made and no order has been sought against Tata Steel Ltd., hence locus of Tata Steel Ltd. in the petition did not exist. Thereafter, he drew our attention to page nos. 161 to 164 of the Paper Book containing an agreement between Tata Steel Company Limited and the Secretary of State for India in Council dated 18th October, 1919. Thereafter, he drew our attention to clause 3 of the agreement to show that said land was vested absolutely in the Tata Steel Ltd. subject to conditions mentioned in such agreement and, as per such conditions, such land could be used only for the purposes mentioned in the preamble thereto. It was also submitted that if the land was not directly utilised for the purposes of manufacturing or works of the

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company, then, such land (part or parts of land) had to be transferred back to the Government. He specifically drew our attention to clause 6 of the said agreement to show that company was entitled to sell or assign its interest subject to the condition that first right, in this regard, was with the local government i.e. right of first renewal had been kept by the government. This clause did not contain any right with Tata Steel Ltd. to lease it out and therefore, such action of Tata Steel Ltd. was against the provisions of such agreement. He also drew our attention to para 10 of the reply by the Tata Steel Ltd. to show that even Tata Steel Ltd. had stated that as a result of promulgation of Bihar Land Reforms Act, 1950 and other Acts related thereto, it was a case of deemed lease between the State government and Tata Steel Ltd., hence, Tata Steel Ltd. was not authorised to give land to the corporate debtor on lease.

3. As regards the question of jurisdiction of this Authority to implead the Government of Jharkhand, the Ld. Counsel drew our attention to the daily order in the case of CP No. 701/KB/2017 dated 27th November 2018 wherein Bench-I of NCLT Kolkata had issued notice to the Government of Jharkhand in the similar circumstances and also to the Department of Industries and Industrial Area Development Authority. Hence, this Bench had a precedence in the similar sets of facts.

4. The Ld. Sr. Counsel for the Tata Steel Ltd. appeared and submitted that since subject land belonged to it and any decision concerning the matter would affect it adversely, hence it was imperative for this authority to hear its version / pleadings, although, in the petition the applicant had not made it a party. It was further contended that Tata Steel Ltd. should have been made a party as its rights were going to be affected and therefore, without such opportunity of making a party the petition suffered from violation of principles of natural justice. Thereafter, the Ld. Senior Counsel submitted that the issue before this Adjudicating Authority was insolvency resolution or liquidation, hence, this aspect was not at all within its jurisdiction nor this Authority had any statutory power to adjudicate upon this aspect. In this regard, he placed strong reliance on the order of the *Hon'ble Supreme Court in the case of Embassy Property Developments Pvt. Ltd. v. State of Karnataka and Others (in Civil Appeal No. 9170 of 2019, 2019 SCC OnLine SC 1542*) and drew our attention to para 42 of the said order wherein the Hon'ble Supreme Court had clearly demarcated the boundary lines in

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respect of role and power of the Adjudicating Authority. On the basis of such observations, it was pleaded that the issue related to the civil rights and were to be dealt by public authorities and, therefore, in the present case, NCLT had no jurisdiction.

5. The Ld. Sr. Counsel further contended that it was not a case of allotment under Government Grants Act 1895, rather it was a case where the land had been given through an agreement after acquisition as per the provisions of Land Acquisition Act, 1894. He drew our attention to the agreement dated 18th October, 1919 and submitted that from the preamble of the said agreement, it was clear and nowhere there was any reference to Government Grants Act, 1895, hence, reliance thereon was wrongly placed. Thereafter, he drew our attention to various clauses of the said agreement and in particular, clause 4 wherein it had been stated that land could be utilised by the company or **any of the other companies as aforesaid** for the purposes as specified in the preamble to the memorandum of agreement. It was also contended that land comprises of different parcels of lands and different uses were prescribed. It was also contended that this was a case of perpetual lease renewable by every 30 years; the lease renewal had been done on 20th August, 2005, effective from 1st January 1996 which was valid till 2026. In support of his various contentions, the Ld. Sr. Counsel drew our attention to page nos. 30 to 44 of his reply dated 14.11.2019. He specifically drew our attention to the nomenclature of this agreement which was termed and styled as "**Indenture of Lease**" and Tata Steel Ltd. had been referred to as '**the Lessee**". He thereafter drew our attention to the clauses at page nos. 33 and 34 wherein it had been mentioned that to protect and preserve the interest of the sub-lessees, the erstwhile State of Bihar and the lessee entered into an agreement for lease on 4th August 1984, which was to give effect to the amendments carried out in Bihar Land Reforms Act, 1983. The Ld. Sr. Counsel, thereafter, drew our attention to another clause wherein the lands utilised by lessee i.e. Tata Steel Ltd. for different purposes were bifurcated into five separate schedules. He in particular referred to schedule 4 which contained details of lands given to other undertakings, societies, individuals, charitable institutions, clubs etc. The Ld. Sr. Counsel submitted that 177 Acres of land given to corporate debtor was classified under this schedule. He also drew our attention to the renewal clause and validity of lease till 2026. He also drew our attention to clause 5 at page 42 to show that lease of land comprised in

schedule 4 had also been renewed simultaneously and was also valid upto 2026. The Ld. Sr. Counsel further submitted that in case of increase in lease rent, even for these lands, the lessee i.e. Tata Steel Ltd., was entitled to renew the rent to be received from sub-lessees. He after making out his case on the basis of the above facts, contended that daily order in C.P. No. 701/KB/2017 was given in the background of altogether different facts i.e., in that case, the land was given by an industrial authority and which was not the case here nor the terms and conditions of such lease agreement had been produced, hence such case could not be considered as binding. It was also submitted that issue of jurisdiction of this Authority had been kept open.

6. Before we decide the issue on merits for the sake of giving a finality to the issue so that proceedings under section 9 can be culminated in a timely manner, we consider it pertinent to decide the issue of jurisdiction of this Authority at the first instance. The jurisdiction of this Tribunal is in relation to proceedings of Insolvency Resolution or in case of failure of CIRP, liquidation. This issue is not at all connected therewith as this is a case of leased asset which does not belong to the corporate debtor in any situation although it had leasehold right which has already expired. Thus, on the face of it, the issue of ownership or nature of agreement between Tata Steel Ltd. and the Government is not within our jurisdiction, even in the case of *Suresh Narayan Singh Vs. Tayo Rolls Ltd.*, the question of jurisdiction was left open in spite of issue of notice. In our view, we do not find any necessity to issue notice even. Thus, considering overall facts of the case and applicable legal position, it is concluded that the corporate debtor is not a going concern, particularly when vast technological changes have taken place over a period of last 25 years and the plant and technology in possession of the corporate debtor are obsolete, out-dated and beyond repair/ renovations due to depletion thereof.

7. Our view is further supported by the decision of the *Hon'ble Supreme Court in the case of Embassy Property ..... (supra)*, wherein the boundary lines of jurisdiction of NCLT under section ~~61(5)~~ 60(5) of IBC, 2016 have been clearly defined. Further, having regard to the provisions of section 238 read with other provisions of the Code, we are further of the view that for the present purpose, there is no scope for us to intervene. Accordingly, we reject this contention of the applicant.

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8. Having decided so, now, we proceed to discuss the matter on merits as well. For this purpose, we consider it necessary to reproduce the relevant portions of the agreement dated 18th October, 1919 as under:-

*"**Memorandum of Agreement** made the eighteenth day of October One thousand nine hundred and nineteen Between THE TATA IRON AND STEEL COMPANY, LIMITED, a Company incorporated under the Indian Companies Act, 1882, and having its Registered Office at Bombay (hereinafter called "the Company") of the one part and THE SECRETARY OF STATE OF INDIA IN COUNCIL (hereinafter called "the Secretary of State") of the other part WHEREAS under the Agreement dated the eighth day of July One thousand nine hundred and nine between the Company and the Secretary of State, published under Notification No.2150 L.A. of the twelfth day of July One thousand nine hundred and nine, at pages 947 to 949 of Part 1 of the Calcutta Gazette of the fourteenth Idem, certain lands situated in Pargana Dhalbhum in the District of Singhbhum were acquired for the Company for the purpose of the construction of works of the Company and other works in connection with the Company's undertaking or business AND WHEREAS the Company now intend to extend the said works and to form or take part in the formation of subsidiary Companies for the promotion and development of industrial undertakings or businesses subsidiary to the undertaking or business of the Company or capable of being conducted so as directly or indirectly to benefit the Company (hereinafter called "other Companies") and the Company have applied to the Lieutenant Governor of Bihar and Orissa in Council (hereinafter called the "Local Government") for the acquisition under the provision of the Land Acquisition Act 1894 (hereinafter referred to as "the said Act") of the additional land described in the Schedule hereunder written and delineated in the map hereunto annexed for works and purposes in connection with the undertaking or business of the Company and the establishment, by the Company or by other Companies formed or hereafter to be formed, of industrial undertakings or business subsidiary to the undertaking or business of the Company, including the construction of residences, and the improvement of sanitary conditions by the Company or other Companies as aforesaid and also the establishment of experimental agricultural farms AND WHEREAS the Local Government being satisfied by an enquiry held under their order under Section 40 of the said Act that the said acquisition is necessary for the construction of the said works and that such works are likely to prove useful to the public have consented to the said acquisition pursuant to the provisions of the said Act on condition of the*

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Company entering into such Agreement as is hereinafter contained NOW THESE PRESENTS WITNESS and it is hereby agreed and declared as follows:-

1. *..... (not relevant)*
2. *..... (not relevant)*
3. *The said land shall be transferred by the Secretary of State so as to vest absolutely in the Company subject to the conditions hereinafter contained.*
4. *The said land shall not be used by the company or any of the other companies as aforesaid for any purposes other than those specified in the preamble.*
5. *If at any time or times any part or parts of the said land not directly utilized for the purposes of the manufacturing or works of the company or of the other companies as aforesaid shall be necessary to be possessed by Government for purposes of revenue administration or for purposes connected with public health safety or necessity (of which matters the Local Government shall be sole judge) the company shall on being thereunto required by the Local Government transfer to the Secretary of State such part or parts of the said land as the Local Government shall specify to be necessary for the purposes aforesaid and in consideration of such transfer the Secretary of State shall pay to the Company a sum equal to the amount of the compensation awarded under the said Act and paid by the Company in respect of the land the subject of the transfer upon the acquisition thereof for the company including the amount awarded in respect thereof under Section 23(2) of the said Act. The Local Government shall be sole judge of whether any part of the said land is directly utilised for the manufacturing or works of the company or of the other companies as aforesaid, and no demise which may be made hereafter by the company shall in any way affect the obligation of the company under this clause.*
6. *If at any time the said land or any part or parts thereof shall no longer be required by the company for the works and purposes set forth in the preamble the company shall not be entitled to sell or assign its interest in such part or parts until it shall have first offered the same to the Local Government at a price equal to the amount of compensation awarded under the said Act and paid by the company in respect of the land the subject of the transfer upon the acquisition thereof for the company including the amount awarded in respect thereof under section 23(2) of the said Act and until such offer shall have been declined by the Local Government.*

   When such offer has been made by the company the Local Government may accept it in respect of such part or parts or of any portion or portions of such part or parts of the said land as it may deem fit and decline it as to the remainder.

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7. *A public right of way shall be recognised by the company over such road or paths as the Local Government may prescribe and no demise which may be made hereafter by the company shall in any way affect such public right of way."*

9. As far as the claim of applicant/petitioner that the said land had been given to Tata Steel Ltd. under Government's Grants Act, 1895 is concerned, from the perusal of memorandum of agreement dated 18th October, 1919, as reproduced herein above, it is noted that no single reference exists as regards the vesting of such land under the provisions of the Government Grants Act, 1895 as claimed by the applicant / petitioner. Accordingly, at the very outset, we reject this plea of the applicant. As per clause 3, this land has been vested in Tata Steel Ltd. absolutely subject to the terms and conditions contained therein. In the preamble, it has been mentioned that the lands were given for works and purposes in connection with the undertaking or business of the company and the establishment by the company or by other companies formed or hereafter to be formed, of industrial undertakings or business subsidiary to the undertaking or business of the company. The said preamble has been referred to in clause 3 wherein reference to other companies is also mentioned. Similarly, in clause 5, reference to other companies has been given. Thus, on the basis of conjoint reading of these two clauses with the preamble, it is absolutely clear that Tata Steel Ltd. is in full control with all rights subject to the specified uses by it or any other entity. Thus, the plea of the applicant that it could not be leased out to other company is also rejected when such other company i.e. corporate debtor also had an industrial undertaking/activities. It has been pleaded that clause 6 did not indicate any right of Tata Steel Ltd. to lease it out. In our humble view, such contention of the applicant/petitioner is misplaced as this clause merely refers to the right of first refusal of the Government, in case Tata Steel Ltd. did not require the land given for works and purposes set forth in the preamble and if Tata Steel Ltd. in that situation wished to sell or assign. It is not in dispute that the corporate debtor's activities fall in the purposes set forth in the preamble, hence, this clause is not applicable at the very outset. Further, this clause provides a bar only to the extent that first right on the land, if it was to be disposed of, existed with the Government and if the Government refuses, then, it could be sold or assigned to anybody else. It is further to be noted that such clause does not in any way bar Tata Steel Ltd. to give it on lease to corporate debtor or any other entity so long it fulfills

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and meets the objectives of the preamble of the agreement. It is also noted that till 1999, corporate debtor has paid rent to Tata Steel Ltd. and Tata Steel Ltd. has also paid rent all along to the State government. Further, having regard to this fact and the Indenture of lease dated 20th August, 2005, there remains no doubt that Tata Steel Ltd. is competent to give it on lease as the Government would have either not renewed the lease or would have taken back the possession, in case there was a violation of any of the terms and conditions of the original agreement or any other subsequent law.

10. It is also noted that there was litigation between the State of Bihar and Tata Steel Ltd. and thereafter the estate of the lessee has vested in the State of Bihar under the Bihar Land Reforms Act, 1950 as amended upto date as mentioned at page 32 of the Indenture of Lease and thereafter in subsequent parts of this Indenture of Lease that by deed of agreement dated 4th August, 1984 executed between the State of Bihar and the lessee which was registered on 9th November, 1984 to execute a deed of lease in respect of lands which are deemed to have been leased out to the lessee by virtue of section 7D and 7E of the Bihar Land Reforms Act, 1950 as amended from time to time. Thus, there remains no doubt as to the current status of the Tata Steel Ltd. that it is holding land as lessee and this fact also proves the bona fide of the claim made by Tata Steel Ltd..

11. In the result, this application stands rejected and dismissed in terms indicated above.

CA(IB) No.1740/KB/2019

12. In this appeal, the appellant/petitioner sought following reliefs:-

(a) The Resolution Professional be directed to act in accordance with the Insolvency and Bankruptcy Code, 2016 read with the Rule and Regulations laid down thereunder;

(b) Stay of operation of the purported Resolution that may have been passed pursuant to e-voting being conducted arbitrarily by the Resolution Professional pursuant to the Fifth Meeting of the Committee of Creditors dated 5th December 2019;

(c) The Resolution Professional be directed to amend the minutes of the meeting of the Fifth Meeting of the Committee of Creditors dated 5th December 2019 in as much

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since it gives an impression that it is the members of the Committee of Creditors who are the ones suggesting liquidation, which, in essence is incorrect;

(d) Pass such further order or orders, direction or directions as this Hon'ble Bench may deem fit and proper.

CA(IB) No.56/KB/2020

13. In this application, the applicant/petitioner sought following reliefs:-

(a) To pass an order for removal of the respondent as the resolution professional in respect of the corporate debtor i.e. Incab Industries Limited in as much since the Corporate Insolvency Resolution Process ("CIRP") initiated is in gross violation of the Code and contrary to the rules and regulations laid down thereunder;

(b) To pass an order setting aside the CIRP process in respect of the corporate debtor i.e. Incab Industries Limited and the same be adjudged null and void in as much since the process is in gross violation of the Code and contrary to the rules and regulations laid down thereunder;

(c) Ad-interim orders in terms of prayers above;

(d) Costs;

(e) Such further order or orders, direction or directions as this Hon'ble Bench may deem fit and proper.

14. Initially, the applicant/petitioner had made detailed arguments in respect of these petitions; however, subsequently the applicant/petitioner stated that they were not pressing these applications, hence, sought to withdraw the same. Accordingly, we grant permission to applicant/petitioner to withdraw the applications and these are **disposed of** as not pressed.

CA(IB) No. 1748/KB/2019

15. In this application, the Resolution Professional is seeking directions from this authority for liquidation of the Corporate Debtor as per section 33 of Insolvency and Bankruptcy Code,

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2016 ("IBC, 2016") read with relevant regulations made thereunder and appointment of Resolution Professional ("RP") as Liquidator.

16. The facts, in brief, are that the Corporate Debtor was admitted under Corporate Insolvency Resolution Process ("CIRP") on 7th August 2019 and moratorium under section 14 of IBC, 2016 was declared. The applicant was appointed as Interim Resolution Professional ("IRP") whose appointment as RP was confirmed thereafter. The RP published public announcement and visited the registered office as well as other offices / industrial locations at Kolkata, Jamshedpur and Pune respectively. It was observed by RP that statutory records including list of assets were not available. List of immovable properties were also not available.

17. The Ld. Senior Counsel appearing on behalf of the RP/CoC after apprising the above facts, submitted that the accounts of the Corporate Debtor were last audited way back in financial year 31st December 1999 and no books of account were available. The applicant tried to get the information and records from the suspended directors. It was submitted that the application under section 19(2) of IBC, 2016 had also been filed before this Authority wherein one of the alleged directors Mr. Ramesh G. Govani pleaded that he was not a director of the company and had narrated basic facts in relation thereto and the Tribunal also agreed to that vide its order dated 19.11.2019. It was further contended that five CoC meetings were held on different dates, the details of which are as under:-

1st CoC meeting	6th September 2019
2nd CoC meeting	26th September 2019
3rd CoC meeting	18th October 2019
4th CoC meeting	11th November 2019
5th CoC meeting	5th December 2019

18. It was submitted that whatever information was available, the Information Memorandum was prepared to that extent, though it was incomplete, which could be provided to the applicant, if any, on execution of a non-disclosure agreement. In the 4th CoC meeting, this was provided to CoC and proposal for appointment of valuer was also made. Three quotations were received from the registered valuers; however, no valuer was appointed by CoC. In 5th CoC meeting, CoC members discussed the progress and considering

all facts and circumstances of the case, CoC suo motu took the issue of liquidation of the Corporate Debtor and none of the members present either physically or through video conferencing opposed the decision regarding liquidation of the Corporate Debtor or proposal to liquidate the Corporate Debtor. The proposal for liquidation and appointment of Mr Sashi Agarwal as Liquidator along with his fees and estimated liquidation costs were put to e-voting and as per the results of such e-voting, 90.83% were in favour of liquidation and only Pegasus Assets Reconstruction Pvt. Ltd. having voting right of 7.90% voted against the said proposal. 1.27% did not vote. As stated earlier that Pegasus Asset Reconstruction Private Limited did not press its interlocutory application vide CA No. 1740/KB/2019 / CA No. 56/KB/2020, hence, the Ld. Sr. Counsel contended that now the percentage of voting in favour of liquidation stood at 98.83% which included institutional financial lenders and no vote was polled against such proposal. The Ld. Sr. Counsel further emphasized on the fact that though Pegasus Asset Reconstruction Private Limited had now withdrawn but, even otherwise, in all the four CoC meetings, it was part of the process and never raised any objection which were raised in their application and hence, on the merits also, they had no case. To substantiate these contentions and other factual facts, the Ld. Sr. Counsel drew our attention to the relevant pages of the Paper Book containing details of photographs of Pune and Jamshedpur locations to show the pathetic condition of the plant and machinery as well as efforts made by RP to bring all facts to the notice of CoC in compliance to the provisions of IBC Code in letter and spirit. The Ld. Sr. Counsel in particular drew our attention to the following reasons for liquidation instead of going through the whole process of CIRP.

> ***"Member of COC discussed and concluded that the corporate debtor should be liquidated due to the following reasons (I) no business operation since many years (ii) plants & machineries are in bad condition (iii) technology is outdated (iv) last audited accounts available upto the year ended 31/12/1999 (v) no books of accounts being maintained & available (vi) lease of land at Jamshedpur has expired as per the letter given by TISCO (vii) application filed by around 200 workers relating to Jamshedpur land with a prayer that land to belong to Government of Jharkhand not TISCO (viii) due to absence of records whereas the corporate debtor is not a going concern as there is no production from a long time and (ix) directors of suspended boards are not available to co-operate in CIRP (x) Corporate debtor was sick company and was referred to BIFR and the said was pending before BIFR from very long time."***

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19. The Ld. Counsel for the Pegasus Asset Reconstruction Private Limited after not pressing the appeals did not oppose the contentions made on behalf of CoC/Resolution Professional.

20. The Ld. Sr. Counsel concluded his arguments by stating that as per the provisions of IBC, 2016, early liquidation was possible and during the course of liquidation, a corporate debtor could be sold as a going concern also though, in the facts and circumstances of the present case, it did not appear to be a possibility, hence, any opposition to the proposal was not having substance both in law and in facts.

CA(IB) No.46/KB/2020

21. In opposition to Application CA(IB) No. 1748/KB/2019, CA(IB) No.46/KB/2020 has been filed on behalf of the workmen at Jamshedpur wherein prayer for making workmen as resolution applicant to take over the company has been made as an alternate to the proposal by CoC through RP to liquidate the corporate debtor. It has also been alleged that RP was working in tandem with CoC. Similarly, CA(IB) No. 57/KB/2020 has been filed on behalf of the Operational Creditor along with 13 other OC for the removal of RP and a request has been made that till the disposal of this application, RP be restrained from taking any further steps in CIRP process. Since these applications in essence, object to the proposal of liquidation and removal of RP, hence, these will be considered in reply to CA(IB) No. 1748/KB/2019.

22. Mr. A.K. Srivastava, Ld. Counsel appearing on behalf of the workmen at Jamshedpur initiated his argument by drawing our attention to the preamble of IBC, 2016 and stated that the object and aim of the Code was to revive the company and not to liquidate; hence, for this primary reason itself, the action of CoC being in contravention to the scheme and objects of the Code and, therefore, liable to be dismissed. It was also pleaded that liquidation will not result in any amount of relief to the workers or will not maximise the value which is also one of the objects. Thereafter, he raised two questions - first question was, who was in the management and their locus; secondly, none of the members of CoC

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were actual creditors / lenders. After making these pleas, the Ld. Counsel submitted that the line of arguments was that:-

(i) The assignment of debt was illegal, hence, void;

(ii) Kamala Mills Ltd. and Fasqua Investment P Ltd could not be made members of CoC and they could not have any voting rights as they were a related party;

(iii) Decision of the CoC for liquidation was against the provisions of Code, hence, liable to be quashed;

(iv) Who was in the management and control and how the rental income from operations at Pune Plant was consumed.

23. As regards assignment, the Ld. Counsel submitted that as per section 5(7) of IBC, 2016, a financial creditor included a person to whom such debt had been legally assigned or transferred to. He emphasized the word of 'legally' and contended that Kamala Mills Ltd. was not a ARC or a financial institution, hence, debt assigned to them by original lenders could not be considered legally assigned and, therefore, they could not be member of CoC or have any voting rights. Thereafter, he referred to provisions of section 21(5) to contend that only an operational creditor could assign the debt and not a financial creditor. Hence, in the present case, assignment of debt by financial creditor was against the provisions of law. He further contended that even otherwise, as per RBI guidelines, vide circular dated 13th July 2005, in respect of purchase/sale of non-performing assets, authorised banks to purchase and sell non-performing financial assets from/to other banks only. In this case, Kamala Mills Ltd. was neither a NBFC which was included in the definition of banks as per the circular, nor a bank, hence, for this reason also, the assignment of debt was not legally tenable. He also emphasised on the fact that RBI was a sectoral regulator and its directions were mandatorily to be applied by banks. In this regard, he placed strong reliance on the decision of the Hon'ble Supreme Court in the case of *ICICI Bank Ltd. versus Official Liquidator of APS Star Industries Ltd. & Ors. as reported in (2010) 10 SCC 1*, wherein it had been held that RBI guidelines dated 13.07.2005 issued under Section 35-A authorising banks to deal inter se non-performing assets (NPAs), had statutory force. He also placed reliance on the Factoring Regulation Act, 2011 which identified who could be an assignee and what could be assigned. It was vehemently argued that it was an Act to regulate assignment of

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receivables by making provisions for registration therefor and rights and obligations and consolidating Act in a sense, hence, such assignment not being in consonance with the provisions of such Act was bad in law. He further contended that assignee had got limited rights of recovery and no other rights and tried to distinguish between novation and assignment. According to his contention, in case it was held that assignment was valid in law, only assignor could be a part of COC and in the present case, original lenders would be inducted as members of COC instead of Pegasus Asset Reconstruction Pvt. Ltd. and Kamala Mills Ltd. In this regard, he also drew our attention to the decision of the *Hon'ble Supreme Court* in the case of *Khardah Company Ltd. versus Raymon & Co. (India) Pvt. Ltd. as reported in (1963) 3 SCR 183* and drew our attention to the observations of the Hon'ble Supreme Court in para 7.

24. It was also argued that R R Kabel Ltd. was one of the competitors and in its interest this company should not be revived and all efforts were made since beginning in last 20 years in that direction. It was also argued that the only aim was to usurp the land and develop the same as real estate. The Ld. Counsel in support of this plea relied on the decision of the *Hon'ble Supreme Court in the case of S.R.F. Ltd. versus Garware Plastics and Polyesters Ltd. & ors. as reported in (1995) 3 SCC 465.* He drew our attention to the observation of the Hon'ble Supreme Court in para 15 of the said order. He also drew our attention to acquaint us with the history of proceedings before BIFR, AIFR and Hon'ble Delhi High Court in regard to the revival efforts and chequered history of litigation to show that all the parties involved were working against the interest of the workers and were not really keen to get the company revived. He also referred to the claims/offers made by Tata Steel Ltd. and other bidders in those proceedings and based upon that, he stated the offer of Tata Steel Ltd. to pay the financial creditors, namely lenders, was Rs. 24 crores and now which had become Rs.1800 crores; hence, proper verification was required and further it reflected on the manner in which RP was conducting the CIRP proceedings, though, simultaneously he submitted that he was not pleading for change in RP as that will further delay in the process of resolution.

25. As regards the management of the corporate debtor and issues related to director, he contended that four additional directors including Mr. Ramesh G. Govani were appointed at

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the instance of BIFR. He further contended that Companies Act did not discriminate any director so appointed and directors appointed by the shareholders / directors as per the provisions of MOU/AOA read with relevant provisions of Companies Act, 1956. He contended that as per provisions of section 260 of the Companies Act 1956, such directors could hold office only till the conclusion of AGM which would have been held upto 30th September 1999 and in case no meeting was held on that date or thereafter, such directors would deemed to have vacated the office thereafter. He also drew our attention to the clarification issued by MCA in regard to the provisions of section 260 of the Companies Act, 1956. In this regard, he also placed reliance on the decision of the *Hon'ble Bombay High Court* in the case of *Dushyant D. Anjaria versus M/s. Wall Finance Ltd. & Anr. as reported in 2001(1) Mh.L.J.* In this regard, he emphasised on the fact that they were operating the bank accounts and misappropriating income earned by way of rental and periodic industrial activity at the Pune Plant at least till 2016, as itself admitted by the RP, hence, they were accountable for such income. In this regard, he also contended that in spite of not being a director, all the four additional directors occupied such position illegally and therefore, they were also liable for action under section 43, 45 or 66 or IBC, 2016. It was also contended that they were officer in default and also liable for action under the provisions of Companies Act, 2013. The Ld. Counsel submitted that the workers were working to get the company revived and in that regard had prepared a proposal which was feasible and viable, hence, an alternate to liquidation. He concluded his arguments by stating that RP should be directed to initiate the process of revival of the company afresh and proposal of the workers may be considered.

26. In the rejoinder, Ld. Sr. Counsel contended that there were 3 categories of petitioners, (I) financial creditor, (2) workmen and employees, and (3) operational creditor. It was contended that financial creditor had already withdrawn from the proceedings by withdrawing its petition; hence, no relevance anymore. The other categories of petitioners could be classified as workers and employees. Two grounds were raised by them viz., the liquidation proceeding was not valid and RP should be replaced. As far as workers and employees were concerned, they had no locus because they were at best operational creditor with no voting rights. Further, even on the ground of legal identity and legality, they

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had no right to file these petitions and these petitions were liable to be dismissed at the very outset because, as per the provisions of Power of Attorney Act 1882, no written instrument of power of attorney of so called 200-220 workmen existed.

27. In this regard, the petitioners placed reliance on certain decisions to support their claim and it was also claimed that petition under section 9 had also been accepted. It was claimed that it was not necessary that all people should file and any representative duly authorised by them could file the petition and authorise the counsel to appear on behalf of all of them.

28. The Ld. Senior Counsel for the RP/CoC submitted that Factoring Regulation Act came into operation in 2011 and had no retrospective application and for this reason, this Act could not be any hold to the cause of the petitioners. He vehemently argued that deed of assignment derived its source from the provisions of section 130 of the Transfer of Property Act, 1882 and deed of assignments in the present case were executed in compliance to such provisions. In this regard, he further submitted that there was no violation of provisions of section 5(7) of IBC, 2016, hence, such assignment was valid. He also submitted that the parties to the assignment had no claim against each other i.e. the assignors had not challenged this on any ground of fraud or other illegality committed by assignees under provisions of any law; hence, the petitioners could not have any locus. It was also contended that as per provisions of section 27 of Factoring Regulation Act 2011, provisions of Transfer of Property Act, 1882 would remain in operation in spite of provisions of Factoring Regulation, hence, for this reason also, such Act was not applicable. As far as the Factoring Regulation Act, 2011 was concerned, as per statement of objects and reasons, this was promulgated with the reference to provide the liquidity to micro, small and medium enterprises sector by devising a mechanism for assignment of receivables of the industries so that their working capital needs could be managed.

29. As regards the validity of circular issued by RBI dated 13.07.2005 and decision of the Hon'ble Supreme Court relied on by the petitioner, the Ld. Sr. Counsel submitted that there was no dispute or quarrel with the proposition that such guidelines were having statutory force but the moot question was, whether such guidelines came in way against such

assignment because such guidelines operated only in the sphere of sale and purchase of NPAs between banks and financial institutions and it did not prohibit banks and financial institutions to deal with NPAs with non-banks. As regards the aspect of nature of assignment, the Ld. Sr. Counsel again drew our attention to para 7 of the order of the *Hon'ble Supreme Court, Khardah Company Ltd.....(supra)*, and contended that this observation in fact supported his claim that rights under a contract could be assigned. It was further contended that the officer and officer in default as contained in section 2(59) and 2(60) of the Companies Act 2013 had no relevance. It was also contended that the decision of the *Hon'ble Supreme Court in S.R.F. case* was only a finding of facts and no question of law was decided, hence, not of any hold to the cause of the petitioner. It was also contended that in that case there was attempt by a competitor not to allow company revival whereas in the present case the company was not in operation for last 20 years, no records were available, plants were practically in scrap condition. Hence, on the basis of facts, both these cases are altogether different and for this reason also, the findings therein could not be of any use.

30. As regards the decision of the CoC for going for liquidation, it was contended that the commercial wisdom of CoC was supreme as held by the *Hon'ble Supreme Court in the case of K. Sashidhar Vs. Indian Overseas Bank and others, as reported in (2019) 12 SCC 150*, and reiterated by the Hon'ble Supreme Court in the case of Committee of Creditros of Essar Steel India Ltd. through Authorised Signatory Vs. Satish Kumar Gupta and Ors.

31. As far as validity of proposal of liquidation was concerned, that was in accordance with the provisions of law and in particular, explanation of section 33(2) of IBC, 2016. It was further contended that apart from assignees being part of CoC, other lenders like ICICI Bank and other banks had also approved this proposal, hence, no malafide could be attributed to the conduct of RP. It was further contended that as per provisions of section 53 of IBC, 2016, the interest of the workers for outstanding dues were secured and therefore, contention of the petitioners that in liquidation they will not get anything was without any legal basis and purely based on own imagination.

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CA(IB) No.57/KB/2020

32. Now, we shall proceed with the arguments made by applicant / petitioner in CA(IB) No. 57/KB/2020. The Ld. Counsel appearing on behalf of the workers submitted that in the present case the relevant question to be asked was whether RP could prepare Information Memorandum, constitute CoC and determine who were the related parties. As regards the preparation of Information Memorandum was concerned, it was pleaded that for that purpose no permission of CoC was required as it was an obligation on the part of RP under the provisions of IBC, 2016. It was also argued that in these circumstances, RP should have taken independent view as regards preparation of Information Memorandum as CoC was an interested party. He also drew our attention to provisions of section 25(2)(g) to show that what were the duty of RP in this regard. He also drew our attention to provisions of section 28 of IBC 2016 which specifically provided for prior approval of CoC in respect of certain actions to be taken by RP and in such section the duty of preparation of Information Memorandum was not mentioned. Thereafter, our attention was drawn to regulation 36 of CIRP Regulation as regards the contents of Information Memorandum and based upon this, it was contended that list of assets was available and last balance sheet was also available for financial year ended on 31st March 1999, hence, on that basis the Information Memorandum could have been prepared. The Ld. Counsel, thereafter, contended that Kamala Mills Ltd. and Fasqua Investment P Ltd. were a related party as Mr. R.G. Govani had substantial shareholdings therein and was a director also in these companies. Simultaneously, he was a director of corporate debtor as well. It is for this reason they could not be part of CoC. It was further contended that Mr. Govani resigned from such position after commencement of the CIRP and findings given by the Tribunal in its order dated 19.11.2019, though he could have resigned earlier if he considered himself not to be a director. In this regard he referred to provisions of section 5(24) of IBC, 2016 and various clauses thereof. He also placed reliance on the decision of the *Hon'ble Supreme Court in the case of Arcelormittal India Pvt. Ltd. Vs. Satish Kumar Mittal & ors. as reported in 2019(2) SCC 1* and referred to paras 48 to 51 of the said order. The Ld. Counsel also challenged the validity of assignment of debt by original financial creditors in favour of Kamala Mills Ltd. because Kamala Mills Ltd. was neither a financial institution nor a reconstruction company,

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hence, not eligible. In this regard, he placed reliance on the provisions of section 5 of SARFAESI Act, 2002. Thus, based upon these submissions, the Ld. Counsel submitted that the conduct of RP could not be said to be above board and circumstances of the case required that judicial intervention was necessitated. The Ld. Counsel further placed reliance on the decision of this *Tribunal in the case of Esspee Sarees Pvt. Ltd. vs. Skipper Textiles Pvt. Ltd. in CP(IB) No. 1702/KB/2018 order dated 28th June 2019* for the proposition that in case the RP was found to be biased or negligent, he could be replaced. In this regard, he further submitted that although it was more or less a settled decision that commercial wisdom of CoC was supreme but there could be a situation where such judicial discretion / intervention could be made particularly when the decision of the CoC was to go for liquidation instead of keeping the corporate debtor as a going concern and also to dispose of it as a going concern. For this proposition, he strongly placed reliance on the decision of the *Hon'ble Supreme Court in the case of Committee of Creditros of Essar Steel India Ltd. Vs. Satish Kumar Gupta and Ors. Reported in MANU/SC/1577/2019 order dated 15.11.2019* and drew our attention to para 46 of the said order. As regards the validity of assignment, he also placed reliance on Factoring Regulation Act 2011 and contended that this Act was to govern the assignment of debt and as per the provisions of this Act, Kamala Mills Ltd. was not an eligible party, hence, the assignment in their favour was illegal and did not meet the conditions of section 57 of IBC 2016. Hence, Kamala Mills Ltd. could not be a part of CoC nor it could have any voting rights. In this regard, the Ld. Counsel drew our attention to the order of the *Hon'ble Supreme Court dated 14th May 2009* that question of assignment had been kept open and the Hon'ble Supreme Court again in its order dated 11th September 2017 reiterated the same. Hence, the plea of the other party that question of assignment had been closed was not a valid proposition in the facts and circumstances of the case. As regards the status of Mr Govani, Ld. Counsel for the operational creditor contended that he was a related party and was functioning as director and, to support this contention, he also produced copy of notice of AGM for financial year ending 31st December 1999 to be held on 3.3.2018 wherein it was mentioned that he was a director. He also submitted that the director was to be appointed and removed as per the provisions of Companies Act 1956 or 2013, as the case may be.

33. Mr. A.K. Srivastava, Ld. Counsel appearing on behalf of the workmen at Jamshedpur also supported the contentions raised on behalf of the workers of Kolkata office and further claimed that in the 4th CoC meeting, RP stated that Information Memorandum shall be prepared but RP took a U-turn in 5th CoC meeting.

34. The Ld. Counsel for operational creditor distanced himself from the pleadings of Ld. Counsel appearing on behalf of workmen at Jamshedpur, regarding vacation of office by additional directors in terms of provisions of section 260 of the Companies Act 1956.

35. The Ld. Senior Counsel for CoC/RP again initiated his arguments by stating that there was no locus of the aforesaid parties to file these petitions, hence, such petitions were not maintainable at all. As regards the aspect of Kamala Mills Ltd. being a related party, the Ld. Sr. Counsel submitted that by virtue of order dated 19.11.2019, it had been established that Mr. R.G. Govani was not a director from very beginning. Further, even if it is assumed that he was a director, then, by the pleadings made by Mr. Srivastava himself, he deemed to have vacated the office with effect from 30th September 1999 and therefore, he was grateful to Mr Srivastava for bringing out this provision of law which, in fact, supported its case and established the fact that Mr. Govani was not a related party beyond doubt. As regards the applicability of Factoring Regulation Act 2011, he reiterated his earlier submissions and also submitted that the substantive provisions of section 130 of Transfer of Property Act 1882 were to be taken into consideration. It was also argued that the CoC was correctly formed and decided for liquidation in accordance with the provisions of IBC, 2016, considering the ground realities and therefore, no malafide could be attributed either to CoC or to RP. He placed reliance on the decision of *Hon'ble Supreme Court in the cases of K. Sashidhar Vs. Indian Overseas Bank and ors. and Committee of Creditros of Essar Steel .... supra*, for the proposition that commercial wisdom of CoC was supreme and was to be respected. It was also pleaded that no circumstances existed for use of judicial intervention as observed by Hon'ble Supreme Court in para 46 of its order in the case of CoC of Essar Steel case.

36. As regards the status of Mr. Govani, it was contended that it was more or less stood on the footing of a special officer appointed by BIFR and he resigned in 2019 as a precautionary

measure and to correct the MCA records which were not updated in view of no AGM or EGM being held for last 20 years and therefore, such resignation was a corrective measure and could not be interpreted as continuation of a director which, in fact, he never was.

37. The Ld. Sr. Counsel representing Kamala Mills Ltd. and Fasqua Investment Pvt. Ltd. submitted a synopsis of sequence of events and a litigation along with orders of Judicial Forums. Based upon the order of the Hon'ble Delhi High Court dated 9.4.2009, it was pleaded that assignment had been upheld, hence, the matter stood closed. He also drew our attention to the order of the Hon'ble Supreme Court dated 11.9.2017 to show that only a liberty had been granted to the parties to raise the issue before the Tribunal in the proceedings under IBC, 2016 read with Eighth Schedule to the IBC, 2016. Thus, it was contended that it was not a case where the Hon'ble Supreme Court had directed the Tribunal to consider the issue of assignment mandatorily even if it was not raised. It was further contended that as per the provisions of Eighth Schedule, the reference should have been made within 180 days from the date of commencement of IBC, 2016 which had not been done, hence, for this reason also the issue of validity of assignment stood closed. The Ld. Sr. Counsel also reiterated his submissions as regards the status of Mr. R.G. Govani as director of corporate debtor and submitted that this issue had already been closed by the order of this Tribunal dated 19.11.2019. He further supported the contentions made by Ld. Sr. Counsel for CoC/RP in this regard.

38. We have considered the submissions made by all the parties and have also perused the material on record.

39. From the perusal of reliefs sought in various applications, except CA(IB) No.1171/KB/ 2019, **the substantive question emerges is whether liquidation proposal approved by the Committee of Creditors ("CoC") is valid in law** ? This question involves various aspects which are being dealt with hereunder.

40. **First, we shall deal with the aspect whether efforts should be made for insolvency resolution at the first instance**. In this regard, it has been emphasized that as per preamble to the Code, reorganization and insolvency resolution is the first priority. In our considered

view, there is no dispute to this proposition which is now well settled by several judicial pronouncements. However, in a given situation, considering the ground realities, it may not be possible or advisable to continue with such process just to complete empty formalities. In our opinion, this is not so even as per scheme of the Code as in a given situation liquidation only could be an inevitable outcome.

41. **Thus, if it is so, then, the question arises is at what stage and in what circumstances liquidation can be decided.** As per section 5(14) of the Code, CIRP period means 180 days from the date of initiation and ending thereon. Time of CIRP can be extended if the circumstances warrant so. During this period, all possible efforts have to be made towards resolution of insolvency by change of management/ownership through resolution plan which needs to be prepared in accordance with the provisions of section 30 and requires approval of Adjudicating Authority under Section 31 of IBC, 2016. In case no resolution plan comes or if a resolution plan is not in accordance with the statutory requirements of Section 30(2) of IBC, 2016, then, the legal consequence is liquidation under section 33C of IBC, 2016. This is the normal course of action as contemplated under the IBC, 2016. During CIRP, another key obligation/feature is that corporate debtor be continued as a going concern and all efforts be made to transfer the corporate debtor as a going concern. The statutory provisions exist in this regard. As per section 5(26), resolution plan means a plan proposed by a resolution applicant for insolvency resolution of corporate debtor as a going concern in accordance with part II of the IBC, 2016. An explanation has also been added to to this section clarifying that such resolution plan may include the provisions for restructuring of the corporate debtor by way of merger / amalgamation / demerger. As per section 20(1) of the IBC, 2016, Interim Resolution Professional is obliged to make every endeavour to protect and preserve the value of the property of the corporate debtor and **manage the operations of the corporate debtor as a going concern.** Further, as per section 20(2), for the purpose of sub-section i.e., keeping the corporate debtor and management of operations of the corporate debtor as going concern, the IRP shall have authority to issue instructions to personnel of the corporate debtor and to take all such actions as are necessary in this regard. Subsequently, Resolution Professional has to carry out the same obligations as per the provisions of section 23(2) of the IBC 2016 read with section 25(1) of

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IBC, 2016 which provides that it shall be the duty of RP to preserve and protect the assets of the corporate debtor including the **continued business operations** of corporate debtor.

42. From the above discussion, the crucial aspect which is noticed is the term "going concern". Admittedly, it has not been defined in the Code though used at many places, hence, to find out the meaning of 'going concern', we have to look into the dictionary, accounting literature and judicial decisions.

43. Firstly, we shall look into the legal meaning. As per **Black's Law dictionary**, "going concern means a commercial enterprise actively engaging in business with the expectation of indefinite continuance." From the perusal of the above definition, a going concern must be actively engaged in business and there must be expectation of indefinite continuance.

44. For accounting purposes, this is a fundamental assumption i.e., financial statements are prepared assuming that the business is a going concern. AS-1 defines going concern in the following manner:-

> *"The enterprises is normally viewed as a Going Concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations and is also capable of meeting its financial obligations.*

45. Ind AS-1 further prescribes following in this regard :-

> *"25. When preparing financial statements, management shall make an assessment of an entity's ability to continue as a going concern. An entity shall prepare financial statements on a going concern basis unless management either intends to liquidate the entity or to cease trading, or has no realistic alternative but to do so. When management is aware, in making its assessment, of material uncertainties related to events or conditions that may cast significant doubt upon the entity's ability to continue as a going concern, the entity shall disclose those uncertainties. When an entity does not prepare financial statements on a going concern basis, it shall disclose that fact, together with the basis on which it prepared the financial statements and the reason why the entity is not regarded as a going concern."*

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"26. In assessing whether the going concern assumption is appropriate, management takes into account all available information about the future, which is at least, but is not limited to, twelve months from the end of the reporting period. The degree of consideration depends on the facts in each case. When an entity has a history of profitable operations and ready access to financial resources, the entity may reach a conclusion that the going concern basis of accounting is appropriate without detailed analysis. In other cases, management may need to consider a wide range of factors relating to current and expected profitability, debt repayment schedules and potential sources of replacement financing before it can satisfy itself that the going concern basis is appropriate."

46. IBBI while discussing with stakeholders in May 2018 about the possibility of sale of corporate debtor as a going concern in liquidation coined the following definition of going concern:

*"**Going Concern**" means all the assets, tangibles and or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource."*

47. Authority for Advance Ruling *in Karnataka Goods and Service Tax,* in a case involving the issue whether sale of business came within the scope of supply of service or it was exempt from GST being a case of transfer of a going concern as a whole or an independent part thereof, observed as under:

"A going concern is a concept of accounting and applies to the business of the company as a whole. Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc."

From the perusal of the above, it is noted that going concern concept applies to the business of the company as a whole. The remaining observations are being made with reference to the taxability under GST on account of transfer, hence, not of much significance for us. Having said so, for our purpose, what is important is that since the concept of going concern is applicable to the company and its business **as a whole**, hence, if a company

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closes a small business segment or discontinues one of its products and continues with others, it does not mean that the company is no longer a going concern because the going concern concept is applicable to the entity as a whole and not to the particular segment of business or product or location. Conversely, if any particular location or segment remains operational and that too, in a temporary manner or does not contribute significantly to the revenues or does not enable the company as a whole to meet its all financial obligations in respect of assets and liabilities as well as recurring expenses, then, closure of such unit cannot make the whole business not a going concern.

48. Based upon above discussion, it can be concluded that an organisation is normally viewed as a going concern when it will be running business or continuing operations for a foreseeable future and such organization has neither any intention nor any compulsion or necessity of shutting down or reducing the scale of operations in a substantial manner. Further, going concern also implies ability of a business to meet its financial obligations. Thus, in the event of either business failure or financial failure, question mark is raised on the status of a business entity.

49. In the background of the above conceptual framework of going concern, analysis of all facts of the present case is necessary to arrive at the conclusion whether corporate debtor can be considered as going concern. The company was incorporated way back in 1920 for the manufacture of various kinds of electrical cables, wires and conductors, radio frequency cables, equipment wires, high temperature cables for domestic and industrial use and for sophisticated applications in defence, electric, electronic and space research in India. Commercial production was started in 1923. Expansions also took place from time to time and in 1970, a factory was acquired in Pune. In fact, upto a certain period, corporate debtor was the only private sector unit which used to manufacture almost all the cables at its Jamshedpur and Pune factories. It is also noted that besides the conventional type of cable accessories and specialised materials related thereto for jointing and terminating the cables were also manufactured. The company was profitable till 1991. Subsequently, it started incurring losses and during 1993-1996, there was a virtual stalemate in the company's operations. Jamshedpur plant was closed down completely for 34 months. The lenders of the company started looking for another promoter and entered into an MoU with Leader

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Universal Holdings Berhad - a Malaysia based company, in December 1996, who acquired 51.16% equity shares by forming a special purpose vehicle in Mauritius. In spite of the above arrangements, corporate debtor incurred further losses and due to massive losses suffered in financial year 1999, its worth was completed eroded. Accordingly, it became a sick company and the main reasons were lack of management efficiency, non-investments in new productive assets in line with upcoming cable product categories, lower productivity, very high leverage and poor working capital management, high power and fuel, employee and interest costs and excessive manpower. Thereafter, it was referred to BIFR under section 15(1) of SICA in October 1999. on 4th April 2000, BIFR declared the corporate debtor a sick company and SBI was appointed as Operating Agency (OA). BIFR had directed OA to issue an advertisement for change of management due to non-cooperation from the then promoter. Revised process continued but without much progress. Ultimately, as per the directions of the Hon'ble Delhi High Court, vide order dated 09.04.2009, and Hon'ble Supreme Court, vide order dated 14.05.2009, proposals of M/s. R.R. Cabel Ltd. (RRK), Tata Steel Ltd. (TSL) and Pegasus Asset Reconstruction Pvt. Ltd. (PARL) were considered for evaluation by BIFR. Final orders were passed by BIFR and AAIFR on 09.12.2009 and 30.06.2011 respectively. Proposal of TSL was considered as best and suitable. An appeal was filed against this order of BIFR before AAIFR which upheld the order of BIFR vide its order dated 09.12.2009. R.R. Cabels Ltd. and Pegasus Assets Reconstruction Pvt. Ltd. filed writ petitions before Hon'ble Delhi High Court. However, no stay was granted against such orders of BIFR and AAIFR. In the interim, the Hon'ble Supreme Court had also directed Hon'ble Delhi High Court to hear the petitions filed against the order of BIFR and AAIFR approving TCL as a proposed agency for revival of the company on merits as the company was sick since 1997 and issue of its revival was of paramount importance. It is also to be noted that Pegasus Asset Reconstruction Pvt. Ltd. had withdrawn the petition filed before the Hon'ble Supreme Court. Ultimately, Hon'ble Delhi High Court vide its order dated 6th January 2016 confirmed the order of BIFR/AAIFR. This order was also carried before the Hon'ble Supreme Court and the Hon'ble Supreme Court vide its order dated 01.07.2016 dismissed the petitions filed challenging the order of Hon'ble Delhi High Court upholding the decision of BIFR/AAIFR. Thus, the matter of rehabilitation / revival of the corporate debtor became final. TSL was the agency chosen for this purpose. However, as indicated during the

course of hearing by all the parties, Tata Steel Ltd. has chosen not to proceed further and such revival efforts reached a dead end.

50. From the order of the Hon'ble Delhi High Court dated 6.1.2016 in para 2, it is observed that BIFR on 19.03.2004 expressed its prima facie opinion that corporate debtor should be wound up under section 20(1) of SICA. However, subsequently on 24.09.2004, it directed publication of advertisement vis-a-vis change of management of the company. As per the provisions of section 20 of SICA, the winding up order is passed when an opinion is formed that sick industrial company was not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and company was not likely to be viable in future although subsequently proposals were asked, but the preliminary opinion formed by BIFR was of winding up. Hence, as early as in 2004, writing on the walls regarding fate of corporate debtor became evident and in spite of subsequent proposals, the situation has remained so even as on date. The other situation as has been prevalent is embroiled and protracted litigation without any tangible results for last 20 years.

51. Thus, considering overall facts of the case and applicable legal position, it is concluded that the corporate debtor is not a going concern, particularly when vast technological changes have taken place over a period of last 25 years and the plant and technology in possession of the corporate debtor are obsolete, out-dated and beyond repair/ renovations due to depletion thereof. **To put it in simple words, corporate debtor is not a going concern but already a gone concern.**

52. **Now, we have to look into the plea whether corporate debtor can be or should be made a going concern.** It is an undisputed legal position that IRP is appointed when CIRP is initiated against the corporate debtor by the order of the Adjudicating authority and such IRP is made responsible to manage the operations of corporate debtor as a going concern, hence, what is most crucial is that as on the date of initiation of CIRP, corporate debtor should be a going concern. This is not the case here, hence, to say that it should be continued as a going concern when it is not so nor there appears to be any possibility of the ne due to reasons mentioned by CoC while passing the resolution for liquidation which

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have been listed in para 24 herein before. This view can further be fortified by the observations made in para 8.1 of the report of the Insolvency Law Committee dated 26.03.2018 while considering the aspect of responsibility of statutory compliances at various stages of CIRP which are reproduced hereunder:-

> *"8.1 The provisions of the Code entrust the responsibility of managing the affairs of the corporate debtor as a going concern on the IRP and the RP. This involves meeting meeting various statutory compliance requirements for which the management of the corporate debtor was responsible prior to commencement of the CIRP such as filing of financial statements, maintaining board's reports, appointment of auditor, etc. It may also involve informing the Registrar of Companies that a corporate debtor is going through a CIRP.* ***THE PHRASE "AS A GOING CONCERN" IMPLY THAT THE CORPORATE DEBTOR WOULD BE FUNCTIONAL AS IT WOULD HAVE BEEN PRIOR TO INITIATION OF CIRP, OTHER THAN THE RESTRICTIONS PUT BY THE CODE."***

53. Although the Code implies that only a going concern at the date of initiation of CIRP should be made to run as such subject to conditions imposed in the IBC, 2016, however, if CoC provides necessary interim finance and other requisite infrastructure is put in place, then, there is no bar that a closed concern cannot be made operational or a going concern. Though it is easy to say but a herculean task in reality, but it remains a possibility and depends upon the willingness of all the parties involved in the resolution of insolvency of a corporate debtor in a most beneficial manner to all.

54. Thus, in our considered view, having regard to the facts and circumstances of the case as well as intent of the Code and Regulations as amended recently, the status of the corporate debtor need not be made as a going concern as there is no legal necessity to do so mandatorily. However, as mentioned earlier, if the lenders wish to do so voluntarily, they can do so.

55. **The other question is as regards the role and power of CoC.** As far as role and power of CoC are concerned, the basic structure of the IBC, 2016 is based on the theme of creditors in control. Therefore, the CoC has been empowered to exercise its jurisdiction in respect of all the key matters during CIRP without any interference as far as its commercial

wisdom is concerned. The only restriction is that any activity/decision of CoC should not be in contravention or violation of any law for the time being in force. The role of Adjudicating Authority to disturb the decisions of CoC is very limited in scope and its obligation is further circumscribed by explicit provisions of IBC, 2016 giving extensive jurisdiction to CoC in respect of all crucial decisions. This position has been confirmed in an array of decisions of Hon'ble Supreme Court and Hon'ble NCLAT. In the background of this position, now, we would look into Banking Law Committee report as to what was the intention as regards the role of CoC and supremacy. The relevant observations extracted from the said report are as under:-

55.1 ***The key economic question in the bankruptcy process***

55.1.1 When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

55.1.2 The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.

54.2 ***The Insolvency Resolution Process (IRP)***

55.2.1 For some firms, the right answer after default is to take the firm into liquidation. But there may be many situations in which a viable mechanism can be found through which the firm is protected as a going concern. To the extent that this can be done, the costs imposed upon society go down, as liquidation involves the destruction of the organisational capital of the firm.

55.3 ***Liquidation***

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55.3.1 Firms go into liquidation through one of two paths. ***Sometimes, the creditors committee can quickly decide that the right path is to go into liquidation.*** *Alternatively, 180 days can go by and no one plan is able to obtain the required supermajority in the creditors committee. In this case also, liquidation is triggered."*

56. Thus, the intent of the code since beginning can be clearly gathered from above findings. However, the need for statutory mechanism for early liquidation arose due to the course of action suggested in some judicial decisions was that firstly, CIRP should be tried and even in the course of liquidation an entity could be sold as going concern. In this regard, it is noteworthy that in such cases corporate debtor was a going concern at the time of initiation of CIRP which is not the case here. Further, other circumstances of those cases also suggested for such a view. As one of the stated objectives of the code is that essence of the code is speed which was the main lacunae in earlier insolvency resolution regimes. It was also observed that delay in decision for liquidation eroded valuation of corporate debtor also. Accordingly, explanation to section 33(2) was added w.e.f. 25.07.2019, simultaneously with the incorporation of new regulations focusing on sale of corporate debtor as a going concern during liquidation. The said clause reads as under:

> *33(2) where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six percent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).*
>
> *Explanation- For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.*

57. The purpose of inserting this explanation has been to declare that CoC may take the decision to liquidate the corporate debtor in accordance with the requirements provided in sub-section 2 of section 33 **any time after the constitution of the CoC** under sub-section 1 of section 21 until the confirmation of resolution plan, including at any time before the preparation of the information memorandum. As per statement of objects and reasons, this

explanation is clarificatory in nature and it has been brought on statute to overcome the judicial rulings wherein it was held that the CoC could not opt for liquidating the corporate debtor without even trying for resolution. Thus, this amendment makes it clear in unambiguous terms that ultimate decision lies with the creditors as regards keeping the entity alive or to liquidate it and the creditors can do so at any point of time. The emphasis is on the stage that such step can be taken even before preparation of information memorandum is of paramount significance and, in our considered opinion, which has been brought in the statute to deal with the situation like the one which we have in hand. At this point, one must not forget that we are dealing with the economic legislation having wider economic ramifications and protracted litigation or delayed decision may further erode the value of the corporate debtor as have been seen in last 20 years of history of the present corporate debtor.

58. The Ld. Counsel on behalf of the Operational Creditor referred to the observations of the Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta & ors. ..... (supra), for the proposition that if the decision of the CoC did not balance interest of all stakeholders including operational creditors and pass any resolution in maximising the value of the assets of the corporate debtor and also the fact that corporate debtor was required to keep going as a going concern during resolution process, then, limited judicial review of the decision of the CoC could be done by the Adjudicating authority. In our most humble opinion, this decision does not help the cause of the applicant for the simple reason that in the present case corporate debtor is not a going concern, hence, how it can be kept as a going concern. Secondly, in case of liquidation, the workmen and employees generally gain more as compared to resolution in view of the provisions of section 53 of IBC 2016, which also refers to section 326 of Companies Act 2013 for determining "workmen's dues". As far as taking care of interest of workmen / employees being operational creditors, no doubt, liquidator is supposed to dispose of the assets as a package, in terms of provisions of Regulation 32 and 32A of IBBI (Liquidation Process) Regulations 2016 read with Regulation 39C of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, keeping in mind such objective along with maximisation of value for all stakeholders. Having said so, we are of the view that

commercial wisdom of CoC cannot be challenged as it is basic instinct of the Code and this has been held so in the case of *K. Sashidhar Vs. Indian Overseas Bank & ors.*, and aforesaid decision also.

59. **The other aspect is whether the process of passing such resolution can be said to be fair and reasonable.** In this regard it is to be noted that as per section 25(2)(g) read with section 29 of the IBC 2016, the resolution professional is required to prepare Information Memorandum in the manner and form as prescribed by IBBI. Regulation 36 of CIRP Regulations 2016 prescribes timeline for preparation of such Information Memorandum. The term resolution professional for this purpose includes both Interim Resolution Professional (IRP) appointed under section 16 and Resolution Professional (RP) appointed under section 22 of IBC 2016 as section 29 read with regulation 36 of CIRP Regulations 2016 refers to resolution professional which is defined in section 5(27) to include both IRP and RP as resolution professional for the purpose of Part II of the IBC, 2016.

60. In the present case, it is not in dispute that financial statements have not been prepared after the year 1999. The statutory records and other accounting records at different locations are not available to the extent to enable the resolution professional to prepare the accounts for which efforts had been done as mentioned in the various progress reports filed after initiation of CIRP. The claims by the creditors have been verified mostly from their own records or through the records of the third parties. The immovable assets belonging to corporate debtor are identified and there is a dispute as regards the status of land at Jamshedpur, though, in respect of the same, it is not in dispute that the land is on sub-lease basis which has already expired and Tata Steel Ltd. has not renewed the same. Thus, the same cannot be considered as an asset of the corporate debtor. Regulation 36(2) of CIRP Regulation prescribes the details which will be part of such Information Memorandum. Apart from assets, the liabilities are also to be given. Details of litigations are also to be given. Audited financial statements are also to be annexed. Any additional requirement may be prescribed by a member of CoC under sub-rule 3 of Regulation 36. Such information memorandum can be shared only when an undertaking is received as regards the confidentiality and not to use such information to cause an undue gain or undue loss to itself or any other person. In the facts of the present case, it cannot be disputed that

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all the information as required in Information Memorandum cannot be given. It has also been observed in the earlier part of the order that corporate debtor is not a going concern and cannot be continued as such, unless some material positive development happens. In these circumstances, information memorandum, if prepared, in our view, would not have served any purpose. Further, in the first four CoC meetings, it has been submitted that efforts were made to prepare Information Memorandum. However, once a decision has been taken by CoC for liquidation, then, preparation of information memorandum loses all its significance as liquidator has to prepare asset memorandum.

61. An allegation has been made that there was no requirement for taking permission of CoC for preparation of Information Memorandum. We can understand that it can be so in general, but once a resolution professional, who has been appointed by CoC and who is less independent as compared to liquidator in the scheme of the Code, if such resolution professional, in the background of this case, seeks permission for preparation of information memorandum from CoC where regulation 36(3) also allows for intervention by CoC or its member, then such action cannot be considered as a case of negligence or non-performance or acting in concert with CoC. Reliance has been placed on the provisions of section 28 of IBC which provides for mandatory approval of CoC in respect of certain actions, which, in our considered view, cannot be interpreted to mean that resolution professional cannot take a view or approval of CoC in respect of other matters, if he deems it necessary. Accordingly, we do not find any merit in contentions raised in this regard.

62. Thus, after taking into consideration the applicable legal position and carefully analysing the facts of conducting of CIR Process including meetings of CoC and the fact that progress reports of all minutes of such meetings have been filed with this Authority as per the relevant Regulation, we hold that there is no lacunae or non-compliance in regard to following of process. Further, all other lenders who are financial institutions and also have substantial stake by way of outstanding debts, have also consented to the proposal made by CoC. Thus, for this reason also, there remains no scope for us to have a limited judicial review of such actions.

63. **Consequence of order of liquidation -**

As per the provisions of the code, when the order of liquidation is passed, CIRP comes to an end and COC stands dissolved. Moratorium remains in respect of institution of new proceedings, but, unlike CIRP, earlier proceedings / suits can be continued against the corporate debtor. Further, security interest can also be realised by the secured creditor in terms of provisions of section 52 of IBC 2016. Other significant impact is on the workers as they stand discharged from employment in case there is no continued business of the corporate debtor i.e. corporate debtor is not in business or operations on the date of initiation of CIRP or thereafter or during liquidation process. However, the liquidator can re-employ them only for the purpose of carrying on business, if possible, for the beneficial liquidation of the corporate debtor as per provisions of section 35(1)(e) of IBC, 2016. This is an established position in winding up cases and liquidation matters as there has never been statutory provision for revival / sale of going concern during liquidation / winding up historically. The revival and sale as a going concern is a judicial mechanism evolved during winding up over the years to protect the interest of workers whose efforts cannot be ignored in making of an organisation over a long period. An attempt was made by introducing section 457 in Companies Act, 1956 by an amendment thereto and by incorporating section 282(2) in the Companies Act 2013. However, both attempts did not materialise. However, Judicial pronouncements have been made under IBC as well to see that corporate debtor remains a going concern or it can be sold as a going concern so that workers and employees can be taken over by the new promoter. Still, there is no definition of liquidation under IBC 2016 nor any substantive provision has been brought in IBC 2016, except through an indirect implication by virtue of section 35(1)(f) of the IBC, 2016, proposal of compromise or arrangement under section 230 of the Companies Act 2013 through the liquidator can be made although Regulation 39C has been brought in CIRP Regulations 2016 and Regulation 2B, Regulation 32(e) and 32(f) read with Regulation 32A of (Liquidation Process) Regulations, 2016 have been brought whereby scheme of arrangement can be devised or liquidator can sell the corporate debtor or its business as a going concern. Thus, two independent mechanisms through different routes exist which are materially different though the purpose is the same. This may pose several challenges, but, in spite of that, it is

pertinent to note that timeline for both the process to sell the corporate debtor as a going concern has been prescribed. Such timeline is of 90 days from the date of order of liquidation as mentioned in regulation 2B and Regulation 32A(4) of Liquidation Process Regulations. It is seen that as per regulation 39C of CIRP Regulation, CoC has been given an option while deciding to liquidate the corporate debtor under section 33 to recommend that the liquidator may first explore sale of corporate debtor or its business as a going concern under clause (e) and clause (f) of regulation 32 of Liquidation Process Regulations, if an order of liquidation is passed under section 33. However, in the present case, no such recommendation has been made by CoC. This is not mandatory also as Regulation 39C(2) starts from the word 'where'. Accordingly, the group of assets and liabilities have not been identified for sale as a going concern under Regulation 32(e) or 32(f). This leads to a situation where, now, liquidator has to act for sale as a going concern under Regulation 32(e) and 32(f) as per the provisions of Regulation 32A(3) of the Liquidation Process Regulations, 2016 and he shall identify the group of assets and liabilities in consultation with the Consultation Committee to be sold as a going concern. Thereafter, if such process does not yield any result, then the liquidator shall be at liberty to realise assets in terms of provisions of regulation 32(a) to 32(d) of Liquidation Process Regulations, 2016.

64. **Next question which arises before us is whether in the facts and circumstances of the case, the corporate debtor or its business or any part thereof be sold as a going concern if the order of liquidation is passed.**

65. As stated earlier also, the main consideration which has prevailed in the minds of judicial authorities for evolving a practice of sale of a business entity as a going concern during the course of liquidation/winding up is interests of the workers and their employment. In the past there have been several instances where, in spite of a business entity remaining closed for years and having no tangible usable assets except land and building, such business entities have been sold to new promoter who took the risk of infusing funds and took care of the workers' interests though with certain conditions and compromises being made by all the parties to enable such effort. Having said so, in the present case, there is no technological advantage or tangible assets exist except one land at Pune which can be undisputably used for industrial activity. Assets other than this and

leasehold land at Jamshedpur for which lease deed has already expired are non-business assets which may fetch surplus capital. However, issue in the present case does not appear to be so simple nor there can be any straight jacketed formula in a case like this where the history is of a chequered litigation and indifferent approach of all concerned to this effect and now a huge competition exists. There are competing challenges. In case of all assets including surplus assets, if any, issue of mortgage and encumbrance remain there. There could be other liabilities, obligations, dues against the corporate debtor which need to be settled out from the liquidation proceeds in accordance with the provisions of the IBC, 2016. Thus, only a large corporate having entrepreneurial instincts coupled with a necessity to establish a unit suitable to his corporate requirements may come forward. Since it is very hard to conceive as to how the undertaking which comprises of only land and workers could be useful to him. Thus, it is the intention of the acquirer that would be the deciding factor for disposal of the corporate debtor or its assets as a going concern. This business paradigm needs to be passed through the legal mechanism prescribed under the IBC, 2016. Though we have already held that it is not a going concern, hence, it cannot be run as a going concern by RP and liquidator is required to run the unit only for its beneficial liquidation but there is no bar also if somebody comes and wants to start an industrial activity with the help of the assets of the corporate debtor or in the name and style of the corporate debtor as well.

66. Thus, considering both legal provisions as narrated in para 65 herein above and considering entrepreneurship spirits of Corporates in India, sale of the corporate debtor or its business or any part thereof as a going concern can still be a possibility.

67. Now, the question of validity of assignment is being dealt with. It is not in dispute that none of the lenders should assign the debt as not challenged deed of assignment nor they are party to any petition. While narrating the historical background of the corporate debtor and litigation in para 49 of this order, it has been noted that on 11.09.2017 the Hon'ble Supreme Court dismissed the Special Leave Petition in view of promulgation of IBC 2016, which was made operational on 01.12.2016 and Eighth Schedule thereto. In the said order, liberty was also given to the aggrieved parties to raise all issues including validity of assignment. There can be two situations having regard to this order of the Hon'ble Supreme

Court. Firstly, there must be a pending proceeding before BIFR / AAIFR which could be referred and considered under IBC 2016 because of repeal of SICA 1985 as provided in Eighth Schedule. Further, such reference is to be made within 180 days. As stated earlier, order of BIFR / AAIFR had already attained finality and no proceeding was pending as SLP against such order had been dismissed by the Hon'ble Supreme Court vide its order dated 01.07.2016. Further, no reference has been made under Eighth Schedule by any of the aggrieved parties within 180 days from the date of commencement of IBC, 2016 if any proceeding was pending though no material has been brought to record. Even if it is assumed that the period of 180 days had expired before passing of this order by the Hon'ble Supreme Court and which cannot be the intent of the Hon'ble Supreme Court to keep the aggrieved parties remediless, hence, even considering the limitation of 180 days from the date of the order of the Hon'ble Supreme Court i.e. 11.09.2017, no petition has been filed under IBC, 2016 within a period of 180 days therefrom. In this regard, the fact which is noticeable even in petition filed under section 9 on 28.11.2018 and no aggrieved party filed any interlocutory application to raise this issue as it would have an impact on the composition of CoC if the corporate debtor was admitted into CIRP. Thus, prima facie, this issue has been closed by the parties by their own conduct and cannot be raised now.

68. Having said so, even on merits, the aggrieved parties have relied on the provisions of section 5 of SARFAESI Act, 2002 as to the eligibility of M/s. Kamala Mills Ltd. and Factoring Regulation Act, 2011. In our view, having regard to the provisions of IBC 2016, provisions of SARFAESI Act are at all not applicable as there is no such condition prescribed in IBC 2016 that an assignment could be made only to an Asset Reconstruction company, Banking Financial company or other Financial Institutions. As far as reliance placed on Factoring Regulation Act 2011 is concerned, that is also not applicable for the reason that it is not retrospective and in the present case assignment had happened much before the promulgation of this Act. Further, this Act is applicable to factors and to regulate the business of factoring in respect of receivables and for this reason also this Act is not applicable to assignments in question. Apart from this, section 27 of the said Act does not exclude the applicability of section 130 of Transfer of Property Act, 1882 which governs the provisions relating to execution of deed of assignments and which has been duly complied

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with in the present case. Reliance has also been placed on the circular dated 13.07.2005 of RBI, which, in our considered opinion, is applicable for governing the transactions between banks and financial institutions for purchase and sale of NPCs and it does not by any stretch of imagination, can be interpreted to bar the transactions between banks and non-banking institutions.

69. It was also pleaded that only operational creditor could assign the debt and reliance was placed on section 21(5) of the IBC 2016. We find that this reliance is totally misplaced because this section deals with how the CoC could be constituted and who will form part of such committee. The purpose of this section 21(5) is post assignment / legally transferred debt at the first instance; secondly, in case a debt has been transferred by an operational creditor (OC) through a financial creditor (FC), such FC (assignee or transferee) shall stand on the footing of an OC to that extent, meaning thereby, it shall not have the footing right because OC has not been given any voting right as such. Thus, this contention is rejected. Apart from this, it was also pleaded that assignee could have right only for the purpose of recovery and thus, could not be member of CoC and in lieu of such assignee, original lender should be member of CoC and hence, voting rights. Firstly, this contention is again devoid of merits as no such prescription is made in IBC 2016 and secondly, if this view is accepted, then, it would result into a situation where an assignee or transferee could file the petition under section 7 or section 9, as the case may be, but could not become a part of CoC. Further, as per section 21(2), CoC shall comprise of all FCs. FC includes an assignee or a transferee as per section 5(7) of the IBC 2016, hence, for this reason also, this contention is rejected. The reliance placed on the judicial decision by the applicant workers / employees is also misplaced because such decision does not help the cause of the applicants for the reason that rights of original lenders have been legally assigned/transferred as per the applicable laws thereof. It is further to be noted that in view of the definition of term "claim" as given in section 3(6) read with section 238 of IBC, such pleas do not serve any purpose because on equitable ground such claim or even being not legal then also such claim can be considered. However, the workers/employees will be subjected to the provisions of the code i.e. if they get distribution of sale proceeds as per section 53 of Code, they cannot

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claim the same amount again or any right of employment which stands discharged in accordance with the provisions of section 33(7) of IBC 2016.

70. Thus, all pleas of all parties regarding validity of assignment are rejected and dismissed, both on the ground of maintainability as well as on merits.

71. The other challenge is that M/s. Kamala Mills Ltd. and M/s. Fasqua Investment Pvt. Ltd. were related parties of the corporate debtor because Mr. Ramesh G. Govani was a common director in all these entities. This plea is also devoid of merits for the reason that in our order dated 19.11.2019 it has been held that he has never been a director of the company and which order has been attained finality. In addition to that, section 260 of Companies Act, 1956 now cited by the applicants, in fact, further support our order. As per this provision, read with the circular issued by MCA, Mr. Ramesh G. Govani is deemed to have vacated the office on 29th September 1999, in the event he was found to be additional director validly appointed. Further, as far as the aspect of resignation on 20.11.2019 is concerned, in our considered view, it is of no consequence as it has already been established that he was never a director or be deemed to have vacated much before. We further find force in the contention made on behalf of Mr Govani that such action was taken as a precautionary measure and to update the MCA records which were pending for updation since 1999 as no meetings of shareholders i.e. AGM or EGM have taken place since then.

72. It has been alleged that such person is *de facto* management of the corporate debtor and rental income and/or income from operations earned from Pune Plant activity have not been accounted for by them prudently. In this regard, we have no hesitation in holding that the RP should examine these allegations and report the transactions where sections 43/45/ 66 of the IBC 2016 are found applicable.

73. As regards the locus of the workers / employees, a lot of arguments have been made by all the parties, but in our view, it is in relation to an interlocutory application filed under section 60(5)(c) of IBC 2016, hence, considering this and the interests of workers as a whole, we hold that such application is maintainable. However, the plea made on behalf of the workers to be appointed as an RP or to act as such is not in consonance with the provisions

of the Code and Regulations made thereunder, hence, rejected. As far as the proposal of the workers to revive the unit is concerned, it is noted that it is not a concrete proposal in any manner, hence, not worthwhile considering at this stage. In this regard, we further observe that in the past no such proposal has ever been made and the workers have supported one or the other bidders during proceedings with BIFR/AAIFR, which have also yielded no results as far as revival of the corporate debtor is concerned. We further observe that the proposal made on behalf of the workers conceived to arrange the funds by selling surplus assets which is exactly their allegation against the lenders that they wish to usurp the land and properties and sell those assets, hence, from this angle also, the proposal of the workers cannot be considered at this stage. However, there is no bar against them to submit a proposal through Liquidator under section 230 of the Companies Act, 2013 or to the Liquidator in terms of provisions of IBC, 2016 and relevant regulations made therein.

74. Considering overall facts and circumstances of the case and in view of foregoing discussion, we approve the decision of CoC and order that corporate debtor be liquidated. However, in the course of liquidation, the liquidator is directed to act in accordance with the provisions of sections 35(1)(f), read with regulation 39C of IBBI Regulations 2016 and Regulations 23, 32 and 32A of IBBI (Liquidation Process) Regulations 2016. We also make it clear that interest of workers have to be taken into consideration as a priority, hence, if situation demands, the liquidator can approach us for suitable directions under section 60(5)(c) of IBC 2016 read with section 35(1) and section 35(1)(n).

ORDER

1. By this order, Corporate Debtor - **Incab Industries Limited** is liquidated.

2. **Mr. Shashi Agarwal**, whose name has been proposed and approved by CoC for appointment as the Liquidator, is hereby appointed as such, having registration no. IBBI/IPA-001/IP-P00470/2017-2018/10813.

3. Mr. Shashi Agarwal is directed to issue Public Announcement stating that the Corporate Debtor is in liquidation, in terms of Regulation 12 of the IBBI (Liquidation Process) Regulations, 2016.

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4. The Registry is directed to communicate this order to the Registrar of Companies, West Bengal and to the Insolvency and Bankruptcy Board of India (IBBI), New Delhi.

5. The Order of Moratorium passed under Section 14 of the I&B Code, 2016 shall cease to have effects and a fresh moratorium under Section 33(5) shall commence.

6. This order is deemed to be a notice of discharge to the officers, employees and the workmen of the Corporate Debtor as per Section 33(7) of I&B Code, 2016.

7. The Liquidator is directed to proceed with the process of liquidation in a manner laid down in Chapter III of the Insolvency and Bankruptcy Code, 2016.

8. Upon proceeding with the liquidation the Liquidator shall file a ***Preliminary report*** as per Regulation 5 read with Regulation 13 of the IBBI (Liquidation) Regulations, 2016 at the registry within 75 days from the liquidation commencement date and continue to file ***progress reports*** as per Regulation 15(1) within 15 days after the end of the quarter in which he is appointed.

9. The fee payable to the Liquidator shall form part of the liquidation cost as provided under Regulation 4(1) of the IBBI (Liquidation Process) Regulations, 2016.

10. Registry is hereby directed to communicate the order to the RP, Operational Creditor, Corporate Debtor and the Liquidator by Speed Post and also by email for information and for taking necessary steps.

11. Company Applications, being CA(IB) No. 1171/KB/2019, CA(IB) No.1748/KB/2019, CA(IB) No.1740/KB/2019, CA(IB) No.46/KB/2020, CA(IB) No.56/KB/2020 and CA(IB) No.57/KB/2020 connected with CP(IB) No. 1684/KB/2018 stand disposed of in terms indicated above.

12. CA(IB) No. 1519/KB/2020 was filed on behalf of some of the workers at Kolkata regarding disbursement of their salary which was not being given since initiation of CIRP and

raising of interim finance for that purpose. Registry is directed to list this application for hearing on 6.3.2020 along with main C.P. for consideration of preliminary report.

Let the certified copy of the order be issued upon compliance with requisite formalities.

(Virendra Kumar Gupta)
Member (T)

(Madan B. Gosavi)
Member (J)

Signed on this, the 7th day of February, 2020