

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT No.-I

*** **

MA No. 2764 of 2019
CA No. 688 of 2020
& CA No. 1069 of 2020
in
CP No. 265/MB/2017

In the matter of

CP No. 265/MB/2017

Fiba Shipping Agency and 137 Ors.

... **Petitioners**

v.

Dreams the Mall Company Ltd & 9 Ors.

... **Respondents**

1. MA No. 2764/MB/2019

Dreams the Mall Company Ltd.,

Dreams the Mall, LBS Marg,

Bhandup (W), Mumbai – 400 078.

(Respondent No. 1 in CP No. 265/MB/2017)

... **Applicant**

Appearance:

For the Applicant: Mr Ashish Kamat, Advocate i/b Mr Subir Kumar, Advocate

For the Respondent (Petitioner No. 1 in the CP): J. S. Kini, Advocate i/b Mr
Suresh Dubey, Advocate

2. CA No. 688/MB/2020

Punjab and Maharashtra Co-Operative Bank Ltd.,

Office Nos. 4 & 5, 3rd Floor, Dreams Mall, L. B. S. Road,

Bhandup (West), Mumbai – 400 078.

... **Applicant**

v.

Dreams the Mall Company Ltd.,

Through its Administrator,

Dreams the Mall, L. B. S. Marg,

Bhandup (West), Mumbai – 400 078.

... **Respondent**

Appearance:

For the Applicant: Mr Amey Kulkarni and Associates, Advocates.

For the Respondent: Ms Prachi Wazalwar and Associates, Advocates.

3. CA No. 1069/MB/2020

Rahul Sahasrabuddhe, Administrator, Dreams The Mall,
D-703, Orchid Coop Housing Society,
Unnati Garden, Off Pokhran Road No. 1,
Thane (West) – 400 606.

... Applicant

v.

1. Senior Police Inspector of Bhandup Police Station.
2. Commissioner of Police, Mumbai.
3. Housing Development and Infrastructure Limited,
represented through Insolvency Resolution Professional,
Abhay Narayan Manudhane.
4. Privilege Health Care Limited,
represented through Resolution Professional.
5. Punjab and Maharashtra Co-Operative Bank, represented through
Jai Bhagwan Bhoria, Administrator appointed by Reserve Bank of India.
6. Municipal Corporation of Greater Mumbai.
7. M/s Car Shine.

... Respondents

Appearance:

For the Applicant: Ms Prachi Wazalwar and Associates, Advocates

For the Respondents: R3 – Shadab S. Jan, Advocate

R4 – Ashish Kamat, Advocate

R5 – Amey Kulkarni, Advocate

Order Dated: 19.05.2021

CORAM:

Janab Mohammed Ajmal, Hon'ble Member (Judicial)

Shri V. Nallasenapathy, Hon'ble Member (Technical)

Per: Janab Mohammed Ajmal, Member (Judicial)

ORDER

These Applications detailed infra based on interlinked facts were heard together and shall abide by this common order.

2. The facts leading to the filing of the Applications are as under.
 - a. The Company Petitioners are 138 of the 993 shareholders of R1 Company (hereinafter called the Company) initially formed by R2, R3, R5 and R7 to R10, the subscribers to the Memorandum of Association. It was incorporated on 10.05.2013 under the Companies Act, 1956. The authorised and issued share capital of the Company was ₹. 50,00,000 divided into 5,00,000 equity shares of ₹. 10 each. The paid-up share capital of the Company is ₹.47,77,350/- divided into 4,77,735 equity shares of ₹. 10/- each. R2, R3 and R4 were the first Directors of the Company.
 - b. The Company allotted shares to the owners of the shops in the Mall namely 'Dreams The Mall' (hereinafter the Mall) and to some others. Between them the Petitioners jointly hold 27,519 shares of the Company. The object of incorporation of the Company was to carry on and manage the affairs of the Mall and to look after its maintenance and provide essential services to the shareholders/members and public visiting the Mall.
 - c. The first Annual General Meeting (AGM) of the Company was held on 28.11.2014. But notice thereof was not sent to the minority shareholders. In case of transfer of shop(s), the shares held were also required to be transferred to the transferee(s). The Company despite being a Public Limited Company had not been acceding to any request of transfer of shares. Various such transfers are pending with the Company on flimsy grounds. Many letters of

request for share transfer returned as the Company Office was closed. The Petitioners received notices from Municipal Corporation of Greater Mumbai (MCGM) for non-payment of outstanding property tax/dues. R1 and R8 had collected six months' advance Common Area Maintenance (CAM) charges of around ₹. 4.82 crores @₹. 18/- for the 4.46 lakh sq. ft. of space occupied by the shop owners. Despite payment of such sum the Mall has not been properly maintained. The conditions of washrooms are deplorable and housekeeping leaves much to be desired. Basic amenities have been lacking putting the shop owners and the customers in great hardship and severe inconvenience. The maintenance of the Mall has been in complete disarray.

- d. The shop owners numbering 1093, had at the time of taking possession of their respective premises, 5 years back, paid approximately ₹. 1.64 crores to the Company for installation of electrical meters to receive electricity supply directly from Maharashtra State Electricity Distribution Company Limited (MSEDCL). Non-payment of electricity dues by the Management to the MSEDCL had resulted in disconnection of power supply. The centralised air conditioning is not functioning.
- e. The shop owners have also been suffering from disconnection of water supply due to non-payment of water charges by the Company to the authority concerned, i.e., MCGM
- f. The security of the mall has been a matter of grave concern. The Company has not made any security arrangements in the Mall where the public regularly frequented. Parking area provided is also not sufficient. The Petitioners had made complaints to the Police authorities against the Respondents seeking immediate

redressal. There has been complete mismanagement of the affairs of the Company and resultant chaos in the Mall. The Petitioners, who are mostly small shop owners, have been facing serious problems affecting their existence and have not been in a position to carry on the business/trade. Many of the shop owners had to close down their shops due to these problems and have not been able to carry on their businesses in the Mall. The Petitioners alleging their oppression and mismanagement of the Company at the hands of the Respondents filed Company Petition on 04.07.2017 under sections 241-242 read with 244 of the Companies Act, 2013 (the Act) seeking various reliefs.

3. The Company (R1); R3, R5, R6 & R9 and R8 filed their respective replies to the Company Petition raising various contentions. A preliminary objection was taken as to the maintainability of the Petition under sections 241 & 242 of the Act. Meanwhile, this Bench on 23.04.2018 after hearing both the sides appointed Advocate Raturaj V Banker as Commissioner to visit the Mall to ascertain as to whether common facilities as mentioned in the Articles of Association have been provided or not; to check whether payments to the respective departments have been made by R1; and whether the Petitioners have been regularly paying the prescribed (in the AoA) dues to the R1. The Commissioner so appointed was directed to submit the report before the next date of hearing i.e., 08.06.2018. The Commissioner Mr. Bankar submitted his report on 17.07.2018. This Tribunal perused the report and by order dated 20.08.2018/31.08.2018 observed and directed as follows:

“5. On looking at the report of the Commissioner it appears that the condition prevailing in the mall is not only creating problems to the Petitioners and other shop owners in respect to their business, but it is life threatening not only to the Petitioners but also to the public regularly visiting the mall.

When we see the financial condition of RI Company, it is apparent on record that it has been consistently in losses, therefore, if the maintenance of the mall is left in the hands of RI Company, which has been admittedly continuing in losses, it may not be possible for this Company to clear all these dues and provide services to the shareholders in near future. In view of the same, we are of the view that for time being if an Administrator is appointed to run this Mall for providing common area maintenance on the contribution provided by the Petitioners and other shop owners of the Company, at least for the time being there would not be any problem for the shop owners and shareholders doing business in the Mall.

6. Accordingly, Mr. Rahul P. Sahasrabuddhe, Company Secretary, SPRS Co., B-411, 4th Floor, Kanara Business Center, Ghatkopar-Andheri Link Road, Laxmi Nagar, Ghatkopar (East), Mumbai - 400075, we hereby appointed as an Administrator to run this Mall independently on the contributions made by the Petitioners and other shop owners herein until further orders. The said Administrator is further directed to file progress report on fortnightly basis before this Bench until further directions. As to the remuneration of the Administrator is concerned, these Petitioners and other shop-owners are directed to pay remuneration as agreeable to the Administrator by this Bench. However, since this Bench has not seen what the reply of the Respondents, they have given a liberty to file reply within three weeks hereof and rejoinder, if any, within two weeks thereof. It is further clarified that this order will not have any bearing on the rights and contentions of either side. It is an order to run the Mall so as not to let any hazards come upon the people working there and public coming there.

7. The Administrator appointed in this case is limited to carry on the functions of the common areas maintenance of the Mall, not in relation to the affairs of the Company.”

4. The Administrator has been filing periodical progress reports with the Tribunal. This Tribunal by order dated 10.12.2018 directed thus:

“By the report of the Administrator, we at this moment direct the respondents to handover list of all the owners owing shop/offices/units in the Mall and list of shareholders of the Respondent Company,

updated as on date within seven days from today to the Administrator to realise common area maintenance, i.e. ₹. 15 per sq. ft. of carpet area per month starting from 01.09.2018, on an immediate basis, failing which Administrator is directed to take necessary legal measures.

It is further prayed that direction be issued to police to remove illegal occupants of the Mall and car, rickshaws; vehicles parked unattended and in unauthorised manner.

Administrator is directed to take police help.

Administrator is further directed to submit the report on monthly basis by the end of 30th of each month.

List on 6.2.2019.”

5. Apparently, due to myriad factors and non-cooperation from various quarters, the Administrator showed his difficulty/inability in carrying out the orders of this Tribunal. He accordingly filed MA No. 489 of 2019 with the following prayers.

- a) *The Hon'ble Tribunal be pleased to direct the City Civil and Sessions Court, Mumbai or any other Appropriate Court, as the Hon'ble Tribunal may deem fit, for execution of order dated 10th December, 2018 to direct and recover from the shareholders / shop owners / Office Owners / Unit Owners including the Anchor Shareholders of the Mall, the Common Area Maintenance / Contribution charges for the month(s) of September, October, November or December, 2018 and January, 2019.*
- b) *The Hon'ble Tribunal be pleased to direct the Local Police Authority i.e. Bhandup Police Station for execution of order dated 10th December, 2019 to extend support and police protection for removal of illegal occupant(s) and Trespasser(s) of the Mall, removal of Car, Rickshaws, Vehicles parked unattended and in unauthorized manner and to help the Administrator in recovering the list of all the owners owning shops / offices / units in the mall and the updated list of shareholders from the Respondent(s).*
- c) *Any other order as the Hon'ble Tribunal may deem fit and proper.*

6. This Tribunal on consideration of the prayers made by the Administrator and upon hearing the Respondents on 11.02.2019 *inter alia* directed as follows.

“However, in compliance of our order dated 10.12.2018, we pass an order for extending the police protection for removal of the illegal occupants and trespassers of the Mall, removal of the car, rickshaws, vehicles parked unattended and in unauthorised manner and to help the Administrator in recovering the list of all the owners owning shops /offices/units in the mall. Copy of the order may be sent to the concerned in charge of police of Bhandup Police Station and Police Commissioner of Mumbai for necessary compliance.

List MA 489/2019 on 1.3.2019 for disposal.

MA 539/2019 is disposed of accordingly.”

7. Despite this order, the Administrator was at a loss to realise Common Area Maintenance (CAM) charges. He also observed complete mismanagement in the parking area of the Mall. According to him the mismanagement and irresponsibility exhibited by the Respondents in maintaining the Mall properly directly affected not only the shop owners but also the visitors to the Mall. He also did not receive any cooperation from the public authorities viz. The MCGM and the Insolvency Professional of the Housing Development and Infrastructure Limited (HDIL, R8 in the CP) who is the developer of the Mall as well as M/s Car Shine, the parking contractor.
8. The lead shareholders [PMC Bank, (Respondent No. 5 in CA 1069 of 2020) and the Privilege Health Care Private Limited (R9 in the CP)] have not been cooperating with the Administrator and have put unauthorised constructions in the Mall premises. The vehicles have been parked in an unauthorised and unattended manner in the Mall premises. M/s Car Shine, the parking contractor has not been cooperating with the Applicant (Administrator) for amelioration of the situation. The Applicant (Administrator) has no record with regard to such vehicles. The Security arrangement and water and electricity connection in the Mall has been in complete shambles. As the shop owners, mostly the

major area occupiers, are not paying the dues despite the order of the Tribunal, there has been mounting dues to the electricity and water supply agencies. The Dreams Banquet Hall, the premises belonging to the HDIL has been misusing the premises by unduly using the passages and improper disposal of garbage.

9. Meanwhile the Applicant (Administrator) filed MA No. 2856 of 2019 seeking immunity from Civil and Criminal actions arising out of his discharge of the duty as Administrator. This Tribunal by order dated 10.10.2019 while disposing of MA No. 2856 of 2019 passed the following order:

“In the circumstances, we are of the considered opinion that the Administrator should be provided with the protection against any illegal activities which are causing hindrances in discharging the official duties of the Administrator. The Administrator is an officer of the Court, and in the circumstances, he should be protected for the acts, which are being done in discharging his official duties assigned to him.

In the above circumstances, we at this moment grant immunity to the Administrator from all the actions arising out of discharging duties as an Administrator of the Mall.

MA 2856 of 2019 is disposed of accordingly”

10. The shop owners have also not been complying with the directions of the Tribunal with regard to the payment of CAM charges. Some shop owners also contended that the charges fixed at ₹. 15 per sq. ft. was burdensome. The Tribunal taking into consideration the submissions passed the following order on 16.01.2020.

“In view of the same, we hereby direct all the shop owners in the mall to forthwith comply with the directions of the Court and make the payment of Rs. 15/- per sq. Ft. as maintenance charges as ordered by this court earlier. Subsequently, if at all there is any difficulty on their part after making the payment, they may approach this Bench in a representative capacity and agitate their grievance. Without making the payment and by putting the Administrator into difficulty, no purpose can be served. The asset value will be depleted because of

non-maintenance. We once again reiterate that all the shop owners whosoever is conducting business or whosoever is holding the premises shall make the payment without fail and may approach this Bench after making the payment for any clarification in a representative capacity, that means as a group together but not individually.

The Administrator is directed to submit the list of defaulters on 30.01.2020.

List the matter for further consideration on 30.01.2020”.

11. Taking into account the overall conduct of the large shop owners and the poor maintenance of the Mall and lack of cooperation from the major shop owners in the Mall, the Administrator has filed CA No. 1069 of 2020 for the following reliefs:

- 1) That this Hon'ble Tribunal be pleased to direct the Respondent No. 1 and Respondent No. 2 to comply with the earlier order of this Hon'ble Tribunal and provide assistance to the Administrator to recover the unpaid CAM charges and to take immediate action for removal of vehicles parked in an unauthorised and unattended manner in the parking area of the Dreams Mall to implement the orders of this Hon'ble Tribunal effectively.*
- 2) That this Hon'ble Tribunal be pleased to pass an order directing Respondent No. 3, Respondent No. 4 and Respondent No. 5 (anchor shareholders of Dreams The Mall Company Limited) to make payment towards outstanding Common Area Maintenance (CAM) charges, with an immediate effect.*
- 3) That this Hon'ble Tribunal be pleased to pass an order empowering the Administrator of Dreams Mall for attachment of property of defaulters in dreams the Mall for default in payment of Common Area Maintenance (CAM) Charges.*
- 4) That this Hon'ble Tribunal be pleased to allow the Administrator to float a tender for parking contract to implement the orders of this Hon'ble Tribunal effectively.*
- 5) That this Hon'ble Tribunal be pleased to pass an order directing Respondent No. 4 and Respondent No. 6 to immediately eradicate illegal construction made at entrance No. 2 of the Dreams Mall.*

- 6) *That this Hon'ble Tribunal be pleased to pass an order directing the Respondent No. 4 and Respondent No. 6 to immediately to take coercive action with respect to heavy water leakage in shops of the Dreams Mall, caused due to repairs of fire safety equipment by Respondent No. 4 and Respondent No. 6.*
- 7) *This Hon'ble Tribunal direct the M/s Car Shine (Respondent No. 7) to handover the parking space to the Administrator and Respondent No. 1 & 2 assist the Administrator in taking control of the parking premises.*
- 8) *That this Hon'ble Tribunal be pleased to allow the Administrator to charge interest at the rate of 18% per annum w.e.f. 31st December, 2019 on the outstanding common area maintenance charges / contribution, if remained unpaid as on 30th July 2020 to implement the orders of this Hon'ble Tribunal effectively.*
- 9) *Any other order as the Hon'ble Tribunal may deem fit and proper.*

12. Since the prayers essentially covered the prayers made in MA No. 489 of 2019, this Tribunal by order dated 03.03.2021 disposed of MA No. 489 of 2019 and took up present Application for consideration.

13. R1 & R2 to the Application did not file any reply despite notice nor took part in the hearing. R3 & R4 have respectively been put under Corporate Insolvency Resolution Process (CIRP) by order dated 28.08.2019 in CP (IB) No. 227 of 2019 and order dated 04.12.2019 in CP (IB) No. 1902 of 2019 of National Company Law Tribunal, Mumbai Bench. The CIRP against R4 was however withdrawn by an order dated 16.09.2020 as per the data available on the Insolvency and Bankruptcy Board of India (IBBI) website. The R4 represented by a Counsel contested the Application. R5 is not a party to the Company Petition. It is however in occupation of 3641.76 sq. mtrs. area in the Mall under an agreement of sale dated 27.12.2007 with HDIL (R3). They have filed separate replies objecting to the averments and prayers made in the Application.

14. It is contended by R3 that pursuant to the order of CIRP a public notice was issued inviting claims from the creditors of HDIL. The Applicant herein i.e. (Administrator of the Mall) submitted the claim under Form-B dated 05.09.2019 for ₹. 2,60,29,965/-. For want of adequate particulars the Resolution Professional (RP) of HDIL opined that in fact sum of ₹. 9,39,570/- was due from the Applicant. Therefore, he did not admit the claim submitted under Form-B. It is further submitted that in view of the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (the Code), no auction for the recovery of the CAM charges would presently lie. It would only be recoverable as an operational debt under the Code. The parking space in the Mall and all incidental rights thereto belong to HDIL and it had leased the parking space to an entity called Somerset. The RP of HDIL has also impugned such transaction. It is accordingly contended that no action, executory or otherwise, can be taken against the HDIL (R3) in the present proceeding.
15. R4 in its reply submitted that it is a different class of occupant, in occupation of 6878.43 sq. ft. area on the third floor of the Mall covered under exclusive and independent maintenance agreement. It has been incurring and paying its own expenses unlike other shop owners on the ground floor. It is a Multi-Speciality Hospital which has exclusive arrangement for electricity, water supply, housekeeping, security, independent entrance and lift arrangement. These arrangements were part of the condition of acquisition of the premises. It does not avail or share the maintenance services from the pool of services provided by the Company to other shop owners.
16. It has an agreement with R3 for the payment of ₹. 1.50 per sq. ft. toward CAM charges as and when occupation certificate was granted to it. The agreement further provided that in the event a body is appointed by law for the

maintenance of the Mall premises, the terms of the said agreement would prevail and continue to be binding upon the parties.

17. Upon the outbreak of the Covid-19 pandemic, the MCGM has taken over the Hospital for Covid treatment. Accordingly provisional occupation certification has been granted to R4 by the MCGM w.e.f. 06.05.2020. R4 is using a separate entrance of the Mall on the advice of the MCGM to prevent the spread of the virus and has also made separate provisions for security to ensure testing of incoming patients and to maintain social distancing norms.
18. The Applicant has failed to present these facts before the Tribunal. It is accordingly stated that the order dated 16.01.2020 was passed without taking into consideration of the aforesaid materials. Thus, the order dated 10.12.2020 and 11.02.2019 need to be reviewed to exclude R4 from its purview. Even otherwise CAM charges of ₹. 15 per sq. ft. is without any rationale and proper evaluation. The Applicant has not provided any evidence in support of the nexus between the leakage of water and repair of fire safety system. R4 on its own has taken initiative to get the fire safety system repaired. The Applicant has also suppressed the initiation of proceedings before the Hon'ble Bombay High Court for execution of the order of this Tribunal. The Applicant in order to justify his own misdoings has filed the frivolous Application against the Respondent. In connection to this reference is made to the following:
 - *Oswal Fats & Oils Ltd v. Additional Commissioner: 2010 (4) SCC 728* wherein the Hon'ble Supreme Court has held that, a party suppressing material fact is not entitled for any reliefs.
 - *Shree Ram Urban Infrastructure Limited vs. Shri R. K. Dhall & others: Company Appeal No. 45 of 2009* decided on 11.09.2009 wherein the Hon'ble Bombay High Court has clearly opined that, the matters which

were not part of the petition cannot be taken into account for considering the interim application.

19. In reply to the Application, it is submitted by R5 that it has filed CA No. 688 of 2020 *inter alia* claiming that the CAM charges raised by the Applicant were not payable by it. R5 states that by an Agreement for Sale dated 27.12.2007 entered into between HDIL and R5, the latter acquired from HDIL on ownership basis office Nos. 4 & 5 on the 3rd Floor admeasuring 3641.76 sq. mtrs. of area in the Mall on terms and conditions mentioned therein. Further by an Agreement for Sale dated 29.09.2010 between the same parties, R5 purchased from HDIL carpet area admeasuring 118.70 sq. ft. adjoining office No. 5 on such terms and conditions mentioned in the Agreement. HDIL had also granted 25 four-wheeler parking and 50 two-wheeler parking to R5. The Applicant has not been prompt and proactive in maintaining the Mall. R5 had made payment to the Administrator *vide* letter dated 27.03.2019 which was under protest as the condition of the premises was deteriorating despite payment of maintenance charges.
20. It is further submitted that R5 is maintaining all the common areas of the Mall itself, which otherwise would have to be maintained by the Administrator. Almost all the obligations (including taxes, bills, etc.) in relation to the maintenance of the common area on 3rd floor, where the office of R5 is located are met by R5 itself. Therefore, any payment of CAM charges to the Administrator would mean paying the same charges twice. It pays the property tax and water charges directly to the authorities concerned. It has installed water tanks to meet the water requirement of its staff for which it has spent a sum of ₹. 8,77,584/- and also spends approximately ₹. 45,000/- per month towards the water tankers. It also bears the entire amount towards the electricity charges and has spent approximately ₹. 1 Crore for the installation

of the Transformer and DG Unit in the basement and pays ₹. 13 lakhs approximately per month towards electricity bills for its premises in the Mall. Further, all the common amenities and the common lights on the 3rd Floor are maintained by it since the year 2010. That HDIL has allocated an elevator to R5 for exclusive use by its officials and customers for which R5 spends approximately ₹. 1,25,303/- towards maintenance. R5 also incurs expenditure of ₹. 38,420/- per month towards the watchmen and security guards in the said premises. With respect to charges of sweepers and housekeeping etc. it is stated that the entire 3rd Floor is maintained by them and it spends a sum of ₹. 2 lakhs per month towards housekeeping. Thus, R5 maintains the entire 3rd floor under its occupation all by itself.

21. R5 submits that the Reserve Bank of India (RBI) *vide* a circular dated 23.09.2019 issued certain directions to R5 in the public interest and restricted R5 in granting or renewing any loans and advances and making any new investments etc. without the prior approval of RBI. The said circular clearly indicates that the financial position of R5 was not stable and it would have to incur all the future expenditure cautiously.

22. R5 further submits that it has been operating amidst the Pandemic as it comes under essential services. It was imperative for R5 to urgently shift its vault from its Central Office to Carnac Bunder Branch but, use of labour for such task would have violated the social distancing norms and therefore it was necessary for R5 to use Forklift Truck for the purpose. R5 had requested the Applicant by two letters dated 30.06.2020, for permission to shift the cash vault. However, R5 did not receive any response from the Applicant. The work of shifting cash vaults is extremely sensitive and any compromise on the aforesaid arrangement would mean compromising on the cash and other valuables of R5. Besides very few shops were open and fewer people were

around at the time due to the Lockdown. No damage to any person and premises was caused due to the use of Forklift truck. The Applicant has also not replied to its letter dated 09.07.2020 informing the above facts and nor has the Applicant gave any particulars of damage caused because of use of such Forklift truck. Under the above-mentioned circumstances levy of CAM charges at the rate of ₹. 15 per sq. ft. per month would not only mean that R5 would be paying twice for the same services but would be in clear violation of the RBI directions.

23. R5 thus seeks direction from this Tribunal to the effect that orders dated 10.12.2018 and 16.01.2020 may not be made applicable to R5. In light of the above R5 submits that the present Application filed by the Applicant deserves to be dismissed. In support of the contentions reference is made to *Sudhir Shantilal Mehta vs. Central Bureau of Investigation: (2009) 8 SCC 1*. The Hon'ble Court held that the RBI issuing 'caution' under Section 36(1) of the Banking Regulation Act, 1949 would be different from the RBI issuing 'directions' under Section 35-A of the Act. The banking company would be statutorily bound to comply with the 'directions' under Section 35-A of the Act.
24. R5 filed CA No. 688 of 2020 on the self-same grounds against the Applicant (in CA No. 1069/2020)/Administrator seeking the following reliefs:
- a) *The Administrator be directed not to charge any Common Area Maintenance charges for the premises of the Applicant on the 3rd Floor and Basement parking area of the Dreams The Mall, as the Applicant is not using any common area facilities of the said Mall.*
 - b) *The Hon'ble Court pass directions that the Order dated 10th December 2018 and 16th January, 2020 are not applicable to the Applicant Bank;*
 - c) *For interim and ad-interim reliefs in terms of prayers clause (a) & (b);*
 - d) *For costs of this Petition;*

e) For such other reliefs as this Hon'ble Tribunal may deem fit in the facts and circumstances of this case.

25. The Respondent-Administrator has filed reply and submitted that order dated 16.01.2020 of this Tribunal is clear and does not bear any exception as far as the Applicant (in CA No. 688 of 2020) is concerned. The Applicant occupies an area of 39,199.6 sq. ft. in the Mall and had paid CAM charges only for seven months from September 2018 to March 2019 and has defaulted subsequent thereto. The Application thus cannot be allowed. More so in the interest of the Mall and the shareholders of the Company, the Applicant cannot be treated preferentially. The Application deserves to be dismissed.
26. The Respondent No. 1 i.e., the Company challenged the maintainability of the Company Petition, in MA No. 2764 of 2019 on the following grounds.
- a. The Company Petitioners have not complied with the requirements of Section 244 of the Act. It is contended that the Company Petition has been filed by one Mr. Nitin Bangera as a representative of the Petitioners. The records would reveal that the Petitioners did not accord informed consent for filing of the Petition.
 - b. In order to maintain the Petition under Sections 241 & 242 of the Act, the Petitioners have to either hold 10% or more shares of the subscribed capital or the Petitioners should at least be 100 in number. If the consent given by the Petitioners (138 in number) is without Application of mind and is not an informed consent, the Petition has no legal validity and cannot be entertained. In this connection the Authority given to Mr. Nitin Bangera appended to the Company Petition is highlighted to show that the consent could not have been a proper authorisation for filing of the Company Petition.
 - c. The genesis of the Company Petition being without authority, the Petition needs to be dismissed at the threshold.

- d. It is contended that the consent obtained in sub-section (2) has been complied in the breach of the requirements. There has been no application of mind and the so-called consent cannot be accepted to be an informed consent required for a Petition/Application in a representative capacity. The Authorisation marked at Exhibit-B in the Company Application (pages 349-368 of the CP) is merely signed by the Petitioners. The signatures of many are in Hindi while the authorisation is in English. There is no endorsement that the contents were explained to them and they put their hand understanding the import thereof. It is thus stated that the Petitioners were not made aware of the contents of the Authorisation before they put their hand thereon to.
- e. The authorisation on behalf of the companies, who are arrayed as Petitioners, is bereft of the authority under which authorisations were made nor there is any Board Resolution consenting to such Authority. Some of the signatures against the name of the shareholders are also missing. With regards to the importance of consent and its propriety reference is made to the following principle laid down in *M. C. Duraiswamy v. Sakthi Sugars Ltd.*: (1980) 2 MLJ 77.

“Before a member can be said to have consented to a particular action, the said member should have known what was the action to be taken, what was the relief to be prayed for and what was the ground to be urged in support of the relief claimed. It is one thing to say that the member who gives consent should have applied his mind to the question before him before giving consent; it is another thing to say that before a member gives his consent, the actual petition prepared to be filed, must be before him”.

The principles propounded therein have been quoted with the approval by the Company Law Board (CLB) in *S. S. Laxminarayanan & Anr. v. Mather and Platt India Ltd. & Ors.*:

(1997) SCC OnLine CLB 27. Further the Hon'ble High Court of Madras in the case of *Mrs. Saroj Goenka and Ors. Vs. Nariman Point Building Services & Trading Pvt Ltd & Ors.*: 1993 SCC Online Mad 382 wherein it was held:

“4. ...there may be cases in which large number of issues may arise, such as the case on hand, wherein the petition itself runs into several hundred pages and involves several issues. If in such a case, maintainability question has to be decided along with the other several issues arising in the case, and ultimately if it is held that the petition is not maintainable, the parties, would have been unnecessarily compelled to go through the mill of the trial. Therefore, as we have already pointed out, even in cases where the issue as to maintainability or lack of jurisdiction involves a mixed question of law and fact, they can also be decided as a preliminary issue, depending upon the facts and circumstances of each case.”

27. It is accordingly argued that the authorisation annexed to the Company Petition is invalid and the basis for the Company Petition being devoid of any authority, the Petition cannot stand and deserves to be dismissed as not maintainable.
28. Mr. Nitin Bangera, the Company Petitioner No. 1 has filed reply to the Application on behalf of all the Company Petitioners. It is submitted that the averments made in the Petition cannot be considered at this stage and is required to be considered taking into account the facts as well as law, at the final hearing. The objections raised are totally misconceived and without substance. The Company Petition has been duly filed in accordance with the provisions of Section 244 of the Act and the representation of Mr. Nitin Bangera on behalf of all the Company Petitioners cannot be faulted. The Application being devoid of any merits is liable to be rejected.

29. Since the Application bearing MA No. 2764 of 2019 deals with the maintainability of the Company Petition and has been heard, it would be accordingly appropriate to decide the Company Application prior to the consideration, if any, of the other Applications. The Application on the issue of maintainability having been heard, the referred decisions on the point may not be delineated here.

30. There is no dispute that the Company Petitioners are shareholders of R1 Company (Dreams The Mall). Section 244 of the Act mandates the eligibility of the members of a Company to apply under Section 241 thereof. It will be profitable to refer to the language of Section 244 as under:

“244. Right to apply under section 241.—

(1) The following members of a company shall have the right to apply under section 241, namely:—

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members:

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Explanation.—For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(2) Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.”

31. It is contended on behalf of the Petitioners that Exhibit-B annexed to the Application is sufficient compliance of Section 244(2) of the Act. The letter of authority given by the Petitioners authorising Mr. Nitin Bangera for making the Petition and pursuing it on behalf of and for benefit of all the Petitioners is available at page No. 349 of the Company Petition. The authorisation runs as follows:

*“To,
National Company Law Tribunal,
Mumbai Bench.*

Sub: LETTER OF AUTHORITY IN THE MATTER OF COMPANY PETITION U/SECTIONS 241, 242 AND 244 OF THE COMPANIES ACT, 2013 AND OTHER APPLICABLE PROVISIONS OF COMPANIES ACT, 2013

Dear Sir,

We hereby authorize Mr. Nithin Bangera, reside of 1/C, 605 DREAMS COMPLEX L.B.S. ROAD BHANDUP, WEST, MUMBAI – 400 078 to sign and execute company petition as mentioned above and necessary Reply(ies), Rejoinder(s), Application(s), thereto to be filed before the Hon’ble National Company Law Tribunal, Mumbai Bench, Mumbai and also before any of the Bench of the National Company Law Tribunal filed against / by us and also to represent us in any proceedings connected to the said Company Petition filed against us in connection with the Company Petition and also to make written or oral submission and to do all acts and deeds, things as deem necessary for and on our behalf in the said Company Petition.

I accept

Mr. Nithin Bangera, reside of 1/C, 605 DREAMS COMPLEX L.B.S. ROAD BHANDUP, WEST, MUMBAI – 400 078.”

32. Basing on this authorisation Mr. Nitin Bangera has sworn the Affidavit in support of the Company Petition at page nos. 327A & 327B of the Company Petition. All the Petitioners including Mr. Nitin Bangera appointed Mr. Suresh

Dubey, Advocate as their Counsel in the present Company Petition. Their authorisation to appoint Mr. Suresh Dubey as an Advocate is at page No. 328 to 348 of the Company Petition.

33. When the Petition was initially heard, this Tribunal preliminary held that there was mismanagement and dislocation in the running of the Company. Most of the shop-owners were at a disadvantage and were not able to carry on their business in the Mall, for the purpose of which they had held shares in the Company. Satisfied that the Company was not being properly managed, the Tribunal had appointed an Administrator. But as the situation presently stands the appointment of the Administrator has also not been able to allay the sufferings of the majority of the shop owners and they continue to confront them.
34. The plea that the Directors of the Company have abdicated their responsibility in maintaining the Mall properly itself is sufficient to *prima facie* hold that all is not well and smooth in the Company. The fact that the Dreams Mall Commercial Premises Workers Association had written to the Hon'ble Minister for Energy for electricity connection itself goes to show that the Company has abandoned its responsibility and has put a deaf ear to the plight of the majority of the shop owners.
35. The fact that the shop owners had authorised Mr. Suresh Dubey, Advocate to file vakalatnama on their behalf itself is indicative of the fact that they were not getting services from the Mall administration as they should and wanted redressal of their grievances. They were conscious that they wanted reliefs against the Mall Management. The same shop owners have at page No. 349 of the Company Petition authorised Mr. Nitin Bangera to present the Petition on their behalf and for their benefit. Many of these Petitioners have also signed

the Company Petition itself against their respective name. The Authorisation at page No. 349, in our considered opinion is sufficient and substantial compliance of Section 244(2) of the Act. It is not in dispute that more than 100 shareholders of the Company have put their signatures authorising Shri Nitin Bangera. Therefore, absence of couple of signatures in the Authorisation would not affect the validity and propriety of the consent.

36. It is trite that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred and the courts may in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best. (see *Laxmibai (Dead) thru Lrs. & anr vs. Bhagwanthbuva (Dead) thru Lrs. & Ors Civil Appeal No. 2058 of 2003 decided on 29 January, 2013*). In this connection the reference may also be made to the observation of The Hon'ble Apex Court in *Sardar Amarjit Singh Kalra (dead) by Lrs. And Ors. V. Pramod Gupta (Smt.) (dead) by LRs. And Ors.: (2003) 3 SCC 272*, as follows:

“Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.”

37. Further the Hon'ble Apex Court in *Mr. Shaikh Salim Haji Abdul v. Mr. Kumar & Ors (Appeal (Civil) 6907 of 2005 decided on 18 November, 2005*, observed,

“All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express

and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. - Justice is the goal of jurisprudence - processual, as much as substantive. (See Sushil Kumar Sen v. State of Bihar (1975 (1) SCC 774).

No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See Blyth v. Blyth (1966 (1) All E.R. 524 (HL)).

A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See Shreenath and Anr. v. Rajesh and Ors. (AIR 1998 SC 1827)

Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.”

The materials available on record clearly indicate that the Petitioners, a motley group of shop-owners had come together to raise concerns regarding the running of the Mall to their detriment. The ‘common cause’ had brought them in to unison itself is indicative of the fact that their sole intention was redressal of their grouses and they were themselves aware what they wanted to do by authorising Mr. Nitin to take up cudgels on their behalf. They were conscious of the import and intent of the authorization. The principle laid down in

Duraiswamy (*supra*) is amply satisfied by the conduct of the Petitioners and the materials borne of the record. Considering the facts of the case and the law thus settled it can be safely be held that the consent by the Petitioners given to Mr. Nitin Bangera to present the Petition would accordingly be not susceptible to any misgivings nor can be invalidated. The citations referred to by the Applicant are distinguishable on facts and would not come in aid of the Applicant. There being no other objection to the maintainability of the Company Petition, the Company Application at the instance of the Respondent cannot be sustained. The fact that instead of allaying the apprehensions of its members and protecting their interests, the Company has taken recourse to technical objections as to the maintainability of the Company Petition goes a long way to show that the Company has not *ex facie* been acting for the benefit and in the interest of its shareholders. The Application is thus devoid of any merit and deserves to be dismissed.

38. It is not in dispute that the Applicant in CA No. 688 of 2020 (R5 in CA No. 1069 of 2020) is in occupation of an area of 3641.76 sq mtrs. on the 3rd floor of the Mall. It occupied such premises under an agreement to sell dated 27.12.2007 and an area of 118.70 sq. ft. under another agreement dated 29.09.2010. Para No. 15 (i) of the agreement dated 27.12.2007 covers the payment of CAM charges in the following terms:

“ 15(i) The Purchaser/s agrees and binds himself / herself / itself to pay regularly every month, by the 5th of each month to Promoters / Promoters until the Co-Operative society / Condominium / limited company (hereinafter referred to as “the said association”) is formed as herein stated and thereafter to the said association, the proportionate share that may be decided by the Promoters or the said association as the case may be for (a) insurance premium, (b) all municipal and other taxes that may from time to time to levied in respect of the said property described in the second schedule hereunder written and / or the said shopping Mall including water taxes and water charges and (c) outgoing for the maintenance and management of the said property

and the said shopping Mall and the common amenities, common lights for the lift/s installed in the said shopping Mall and all other outgoings such as collection charges, charges for watchmen, sweepers and maintenance of accounts and those otherwise incurred in connection with the said shopping Mall (d) all outgoings charges and all other dues, taxes, duties and levies of any nature whatsoever to be contributed by each purchaser/s for maintenance, repair, replacement of common areas and facilities and all infrastructural and all facilities and services to be provided in connection therewith and limited common area facilities”.

39. The Agreement does not offer any special privilege or status to the Applicant as far as payment of CAM charges is concerned. Therefore, the plea that the order dated 10.12.2018 and 16.01.2020 could not be applicable to the Applicant, cannot be accepted. The Applicant in CA No. 688 of 2020 is bound by these orders regarding CAM charges as any other constituents and members of the Mall. It would be a misnomer to say that the Applicant is not using any common area facility of the Mall, despite being in possession of portion of the Mall. The administrative guidelines issued by the RBI would not override the orders passed by this Tribunal in respect of payment of CAM charges. Therefore, the plea taken in CA No. 688 of 2020 by the Applicant does not hold water and cannot be accepted. The Application bears no merits whatsoever and is liable to be dismissed.
40. R4 is a hospital running on the 3rd floor of the Mall. R3 as the promoter of the Company sold 4100 sq. mtrs. of area on the 3rd floor of the Mall to R4 under his registered agreement to sale dated 09.02.2012. Under registered agreement for sale dated 18.10.2013, R3 sold an additional 2778.42 sq. mtrs. of carpet area on the same floor of the Mall to R4. The parties by supplementary agreement dated 05.03.2014 agreed to certain terms and conditions in respect of the earlier agreements for sale. Some of the terms are as under.

xxx xxx xxx

“2. The second party agrees to pay the electricity, housekeeping, security charges directly and maintain the said premises in good condition on its own and the first party will not be liable to pay these charges during the fit out possession period and also after the possession is handed over with OC to the second party. For this purpose, the second party may enter into an agreement with the concerned parties for Security, housekeeping services to which the first party shall not have any objection. During as well as after the fit-out period, the second party is entitled to install DG Sets/ separate electricity connection for its exclusive use and also have its own overhead and underground water tanks and arrangement for tanker water and water pumping arrangement for its exclusive use.

3. The Common area is not used by the second party except for the main entrance and maintenance expenses for the common area of the Mall shall be paid directly by the first party or by the society of the occupants of the Mall or by the company formed for the purpose or by any body entrusted by law for the purpose as the case may be, during fit out period as well as after the possession is given by the first party to the second party upon getting OC.

4. The second party further agrees to pay the common area maintenance at the rate of Rs. 1.50 per sq. ft. (carpet area) per month for the area occupied by the second party from the date the actual possession is delivered to the second party with OC and possession certificate and operation of the hospital commences.

5. The second party agrees and confirms that the second party will install the separate Lifts for their use and also bear the expenses for the construction of separate staircase for their use.

xxx xxx xxx

7. The parties to this agreement agree that in the event of any society of the occupants of the company for the maintenance is formed or anybody is appointed by law for the purpose of maintaining the affairs of the said mall in future, the terms of this agreement shall be followed by the said society or Company or the body as the case may be and this agreement shall be binding upon the said society or Company or the body as the case may be.”

These conditions agreed to between the parties indicate that R4 would essentially function independently and would only pay ₹. 1.5 per sq. ft of carpet area per month from the date of actual possession for the portion for hospital activities. It is admitted by R4 that the MCGM has furnished the provisional occupancy certificate w.e.f. 06.05.2020 for the treatment of patients affected by Covid-19. The maintenance and security arrangements of the area occupied by R4 have also been left to it. Therefore, R4 would be liable to pay ₹. 1.5 per sq. ft. of carpet area under its occupation per mensem from 06.05.2020. These facts were not brought to the notice of the Tribunal when the orders dated 10.12.2018 were passed requiring the occupants to pay ₹. 15 per sq. ft. of carpet area under their occupation. Therefore, the order dated 10.12.2018 with regard to the payment of CAM charges at the rate of ₹. 15 per sq. ft can be modified as ₹. 1.5 per sq. ft as far as R4 is concerned w.e.f 06.05.2020. R4 accordingly shall pay the amount to the Administrator until further orders.

41. Admittedly, the Constituents / Members / Shop-owners of the Mall have not been regular in paying the CAM charges fixed by the Tribunal as per order dated 10.12.2018. Therefore, for the better maintenance and proper administration of the Mall, the prayers made by the Administrator in CA No. 1069 of 2020 may have to be allowed in part as indicated infra. Hence ordered.

ORDER

The Applications in MA No. 2764 of 2019 and CA No. 688 of 2020 be and the same are dismissed on contest. CA No. 1069 of 2020 be and the same is allowed in part on contest on the following terms:

- i) The Police Authorities concerned are directed to provide necessary help/assistance to the Applicant to effectively carry out

the orders dated 10.12.2018, 11.02.2019, 10.10.2019 and 16.01.2020 of the Tribunal.

- ii) The Constituent Members / Shareholders / Shop-owners of the Mall except R4 shall pay the CAM charges at the rate of ₹. 15 per sq. ft per month w.e.f. 01.09.2018 till 30.04.2021 within a period of one month and shall continue to pay the current monthly charges by the first week of every succeeding month until further orders.
- iii) R4 shall pay CAM charges at the rate of ₹.1.5 per sq. ft. from 06.05.2020 to the Administrator till 30.04.2021 within one month. Thence it shall pay the current CAM charges at the same rate in the first week of every succeeding month until further orders.
- iv) The Applicant (Administrator) shall submit status report of collection of the CAM charges with the Tribunal with regard to the arrears charges up to 30.04.2021, after the given period of one month, in the following format for information.

Sr. No.	Member / Name of Shareholders of Dreams The Mall	Outstanding CAM charges as per order dated 10.12.2018 w.e.f. 01.09.2018 till 30.04.2021	Amount paid till date	Balance Outstanding
1				
2				

- v) He shall file status report every quarter thereafter until further orders.
- vi) The Administrator is allowed to float tender for parking contract for proper management of the parking facilities in the Mall. R7 shall forthwith handover the parking areas to the Administrator for the purpose.

- vii) The Administrator shall take into account any agreement between the Company and/or R3 with other constituents of the Mall in respect of any separate arrangement with regard to the parking area.
- viii) R6 through its proper officials may take appropriate steps to remove any illegal construction in the Mall premises. The Administrator and all concerned shall cooperate with R6 in that regard.
- ix) Rest of the prayers in CA No. 1069 of 2020 are refused.
- x) There would however be no order as to costs.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Janab Mohammed Ajmal
Member (Judicial)