

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 506 of 2021

AND

Company Appeal (AT) (Insolvency) No. 507 of 2021

AND

Company Appeal (AT) (Insolvency) No. 516 of 2021

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Company Appeal (AT) (Insolvency) No. 506, 507 & 516 of 2021

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Company Appeal (AT) (Insolvency) No. 506, 507 and 516 of 2021

[Arising out of common impugned Order dated June 7, 2021, in I.A. No. 903/2020, I.A. No. 1847/2020, I.A. No. 1993/2020 & I.A. No. 759/2021 in C.P. (I.B.) No. 4258/MB/C-II/2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench]

1. Company Appeal (AT) (Insolvency) No. 506 of 2021

IN THE MATTER OF:

1. **Vinay Kumar Mittal**
On his behalf as well as on behalf
of 443 others
R/o 605, Satpura Apartment
Kaushambi, Ghaziabad, Uttar Pradesh **Appellant No.1**

2. **Rashmi Shrivastava**
W/o Gynesh Shrivastava
R/o A-700, Saurabh Park Society
B/h Samta Flats, Subhanpura
Vadodara, Gujarat - 390023 **Appellant No.2**

3. **Jesuit Research and Development Society**
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi - 110014
Office at: D-25-D, NDSE-II
South Extension, Part-II
New Delhi - 110049 **Appellant No.3**

4. **JIV Prakash Vidyapeeth**
Through Mr Shishit Kumar
R/o B-7, 3rd Floor, Jungpura Extension
New Delhi - 110014
Office at: 23, Raj Niwas Marg
New Delhi - 110054 **Appellant No.4**

5. **Indian Social Institute, Bangalore**
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension

- New Delhi – 110014
Office at: 24, Benson Road
Nenson Town, Bengaluru
Karnataka – 560046** **Appellant No.5**
- 6. The Nagaland Jesuit Educational
and Charitable Society
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi – 110014
Office at: P.B. 17, Kohima
Nagaland – 797001** **Appellant No.6**
- 7. The Delhi Jesuit Society
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi – 110014
Office at: St. Xavier's,
4 Raj Niwas Marg
New Delhi – 110054** **Appellant No.7**
- 8. Institute of Sisters of Charity
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi – 110014
Office at: 21-A, Ring Road
Lajpat Nagar-IV, New Delhi – 110024** **Appellant No.8**
- 9. Amar Seva Samithi
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi – 110014
Office at: A.C. Provincial House
94, Hill Road, Bandra, Mumbai
Maharashtra – 400050** **Appellant No.9**
- 10. Presentation Society of India
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi – 110014
Office at: B-161, Greater Kailash-1
New Delhi – 110048** **Appellant No.10**

- 11. Indian Social Institute
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi – 110014
Office at: 10, Institutional Area
Lodi Road, New Delhi – 110003**

Appellant No.11
- 12. Bhola Developers Pvt Ltd
Through Mr Atul Bhola
29/300, Beadon Pura
Karol Bagh, New Delhi – 110005**

Appellant No.12
- 13. The Society of Sacred Heart College
Satya Nilayam
Through Mr Shishit Kumar
R/o B-7, 3rd Floor, Jungpura Extension
New Delhi – 110014
Office at: 201, Kalki Krishnamurthy Road
P.B. No.8665, Thiruvanmiyur
Chennai, Tamil Nadu – 600041**

Appellant No.13
- 14. Jesuit Conference of India
Through Mr Shishit Kumar
R/o B-7, 3rd Floor,
Jungpura Extension
New Delhi – 110014
Office at: 225, Jor Bagh
New Delhi – 110003**

Appellant No.14
- 15. Jesuits of Santal Society
Through Mr Shishit Kumar
R/o B-7, 3rd Floor,
Jungpura Extension
New Delhi – 110014
Office at: Jisu Jaher Dudhani
P.O. & Dt. Dumka,
Jharkhand – 814101**

Appellant No.15
- 16. Kerala Jesuit Society
Through Mr Shishit Kumar
R/o B-7, 3rd Floor, Jungpura Extension
New Delhi – 110014
Office at: Christ Hall, Malaparamba
P.O. Calicut, Kerala – 673009**

Appellant No.16
- 17. Chotparua Jesuit Society – Raiganj
Through Mr Shishit Kumar**

**R/o B-7, 3rd Floor, Jungpura Extension
New Delhi – 110014
Office at: St. Xavier's Telghani
Raiganj, West Bengal – 733130**

Appellant No.17

- 18. Ashitavinayak Hospital and
Maternity Centre
Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
Kaushambi, Ghaziabad, Uttar Pradesh
Office at: Vidhan Sabha Road
Ama Seoni, Chhattisgarh**

**Also at:
226, Sapphire Greens
Raipur, Chhattisgarh**

Appellant No.18

- 19. Audyogik Sikshan Mandal
Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
Kaushambi, Ghaziabad, Uttar Pradesh
Office at: Chinchwad, Pune
Maharashtra – 411019**

Appellant No.19

- 20. Sundaram Chhokkanathan
Educational
And Charitable Trust
Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
Kaushambi, Ghaziabad, Uttar Pradesh
Office at:
Paramveer Institution Campus
Dharmapuri, Dharmapuri District
Tamil Nadu – 636809**

Appellant No.20

- 21. Shri Chalukya Education Society
Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
Kaushambi, Ghaziabad, Uttar Pradesh
Office at: 11, Confier Apartment
Parihar Chowk, Aundh
Pune, Maharashtra – 411007**

Appellant No.21

Versus

- 1. Dewan Housing Finance Corporation Ltd
Through its Administrator
Warden House, 2nd Floor**

- Sir P.M. Road, Fort, Mumbai – 400001**
Email: dhfladministrator@dhfl.com **Respondent No.1**
- 2. Reserve Bank of India**
Through its Governor
18th Floor, Central Office Building
Shahid Bhagat Singh Road
Mumbai – 400001
Email: rdmumbai@rbi.org.in
csahoo@rbi.org.in **Respondent No.2**
- 3. Committee of Creditors of Dewan**
Housing Finance Corporation Limited
Also, through the Union Bank of India
Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai – 400001
Email: advsonutandon@gmail.com
raunak.dhillon@cyrilshroff.com **Respondent No.3**
- 4. Authorised Representative for**
FD Holders Ms Charu Desai
Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai – 400001
Email: arforfd@dhfl.com **Respondent No.4**
- 5. National Housing Bank**
Core 5-A, India Habitat Centre
Lodhi Road, New Delhi – 110003
Email: ho@nhb.org.in **Respondent No.5**
- 6. Piramal Capital & Housing Finance Ltd**
Through its Managing Director
4th Floor, Piramal Tower
Peninsula Corporate Park
Ganpatrao Kadam Marg,
Lower Parel West, Mumbai – 400012
Email: housing.customercare@piramal.com
ashish.bhan@trilegal.com **Respondent No.6**

Present:

For Appellant : None

For Respondent : Mr Ashish Bhan, Mr Ketan Gaur, Ms Chitra Rentala, Mr Aayush Mitruka, Mr Kaustub Narendran, Ms Samriddhi Shukla, Ms Lisa Mishra and Mr Vishal Hablani, Advocates for Intervenor (Piramal Capital & Housing Finance Ltd., SRA).

Mr Ramji Srinivasan, Sr Advocate with Mr Raunak Dhillon, Mr Animesh Bisht, Ms Saloni Kapadia, Ms Madhavi Khanna, Mr Shubhankar Jain and Ms Rajshree Chaudhary, Advocates for COC.

Mr Ashish S Kamat and Mr M.F. Philip, Advocates for RBI.

With

2. Company Appeal (AT) (Insolvency) No. 507 of 2021

IN THE MATTER OF:

- 1. Vinay Kumar Mittal
On his behalf as well as on behalf
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- 2. Rashmi Shrivastava
W/o Gynesh Shrivastava
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B/h Samta Flats, Subhanpura
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Office at: D-25-D, NDSE-II
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Office at: 23, Raj Niwas Marg
New Delhi – 110054 Appellant No.4**
- 5. Indian Social Institute, Bangalore
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi – 110014**

**Office at: 24, Benson Road
Nenson Town, Bengaluru
Karnataka - 560046**

Appellant No.5

- 6. The Nagaland Jesuit Educational
and Charitable Society
Through Mr Biju Daniel
R/o 217-C, Pocket C,
Sidhartha Extension
New Delhi - 110014
Office at: P.B. 17, Kohima
Nagaland - 797001**

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Office at: St. Xavier's,
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Office at: 21-A, Ring Road
Lajpat Nagar-IV, New Delhi - 110024**

Appellant No.8

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Office at: B-161, Greater Kailash-1
New Delhi - 110048**

Appellant No.10

- 11. Indian Social Institute**

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R/o 217-C, Pocket C,
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New Delhi – 110014
Office at: 10, Institutional Area
Lodi Road, New Delhi – 110003** **Appellant No.11**
- 12. Bhola Developers Pvt Ltd
Through Mr Atul Bhola
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Karol Bagh, New Delhi – 110005** **Appellant No.12**
- 13. The Society of Sacred Heart College
Satya Nilayam
Through Mr Shishit Kumar
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Office at: 201, Kalki
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- 14. Jesuit Conference of India
Through Mr Shishit Kumar
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New Delhi – 110014
Office at: 225, Jor Bagh
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Through Mr Shishit Kumar
R/o B-7, 3rd Floor,
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Office at: Jisu Jaher Dudhani
P.O. & Dt. Dumka,
Jharkhand – 814101** **Appellant No.15**
- 16. Kerala Jesuit Society
Through Mr Shishit Kumar
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New Delhi – 110014
Office at: Christ Hall, Malaparamba
P.O. Calicut, Kerala – 673009** **Appellant No.16**

17. **Chotparua Jesuit Society – Raiganj**
Through Mr Shishit Kumar
R/o B-7, 3rd Floor,
Jungpura Extension
New Delhi – 110014
Office at: St. Xavier's Telghani
Raiganj, West Bengal – 733130 **Appellant No.17**
18. **Ashitavinayak Hospital and**
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Through Vinay Kumar Mittal
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Kaushambi, Ghaziabad, Uttar Pradesh
Office at: Chinchwad, Pune
Maharashtra – 411019 **Appellant No.19**
20. **Sundaram Chhokkanathan**
Educational
And Charitable Trust
Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
Kaushambi, Ghaziabad, Uttar Pradesh
Office at:
Paramveer Institution Campus
Dharmapuri, Dharmapuri District
Tamil Nadu – 636809 **Appellant No.20**
21. **Shri Chalukya Education Society**
Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
Kaushambi, Ghaziabad, Uttar Pradesh
Office at: 11, Confier Apartment
Parihar Chowk, Aundh
Pune, Maharashtra – 411007 **Appellant No.21**

Versus

1. **Dewan Housing Finance Corporation Ltd**
Through its Administrator
Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai – 400001
Email: dhfladministrator@dhfl.com **Respondent No.1**

2. **Reserve Bank of India**
Through its Governor
18th Floor, Central Office Building
Shahid Bhagat Singh Road
Mumbai – 400001
Email: rdmumbai@rbi.org.in
csahoo@rbi.org.in **Respondent No.2**

3. **Committee of Creditors of Dewan**
Housing Finance Corporation Limited
Also, through the Union Bank of India
Warden House, 2nd Floor
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Email: advsonutandon@gmail.com
raunak.dhillon@cyrilshroff.com **Respondent No.3**

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FD Holders Ms Charu Desai
Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai – 400001
Email: arforfd@dhfl.com **Respondent No.4**

5. **National Housing Bank**
Core 5-A, India Habitat Centre
Lodhi Road, New Delhi – 110003
Email: ho@nhb.org.in **Respondent No.5**

6. **Piramal Capital & Housing Finance Ltd**
Through its Managing Director
4th Floor, Piramal Towers
Peninsula Corporate Park
Ganpatrao Kadam Marg,
Lower Parel West, Mumbai – 400012
Email: housing.customercare@piramal.com
ashish.bhan@trilegal.com **Respondent No.6**

Present:

For Appellant : None

**For Respondent : Mr Ashish Bhan, Mr Ketan Gaur, Ms Chitra
Rentala, Mr Aayush Mitruka, Mr Kaustub**

**Narendran, Ms Samriddhi Shukla, Ms Lisa Mishra and Mr Vishal Hablani, Advocates for Intervenor (Piramal Capital & Housing Finance Ltd., SRA).
Mr Ramji Srinivasan, Sr Advocate with Mr Raunak Dhillon, Mr Animesh Bisht, Ms Saloni Kapadia, Ms Madhavi Khanna, Mr Shubhankar Jain and Ms Rajshree Chaudhary, Advocates for COC.
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Jungpura Extension
New Delhi – 110014
Office at: Christ Hall, Malaparamba
P.O. Calicut, Kerala – 673009 **Appellant No.16**

17. **Chotparua Jesuit Society – Raiganj**
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R/o B-7, 3rd Floor,
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Office at: St. Xavier's Telghani
Raiganj, West Bengal – 733130 **Appellant No.17**
18. **Ashitavinayak Hospital and Maternity**
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Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
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Ama Seoni, Chhattisgarh
- Also at:**
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Raipur, Chhattisgarh **Appellant No.18**
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Office at: Chinchwad, Pune
Maharashtra – 411019 **Appellant No.19**
20. **Sundaram Chhokkanathan**
Educational
And Charitable Trust
Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
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Office at:
Paramveer Institution Campus
Dharmapuri, Dharmapuri District
Tamil Nadu – 636809 **Appellant No.20**
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Through Vinay Kumar Mittal
R/o 605, Satpura Apartment
Kaushambi, Ghaziabad, Uttar Pradesh
Office at: 11, Confier Apartment
Parihar Chowk, Aundh
Pune, Maharashtra – 411007 **Appellant No.21**

Versus

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Email: dhfladministrator@dhfl.com **Respondent No.1**

2. **Reserve Bank of India**
Through its Governor
18th Floor, Central Office Building
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Mumbai – 400001
Email: rdmumbai@rbi.org.in
csahoo@rbi.org.in **Respondent No.2**

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Also, through Union Bank of India
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Email: advsonutandon@gmail.com
raunak.dhillon@cyrilshroff.com **Respondent No.3**

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Through its Managing Director
4th Floor, Piramal Tower
Peninsula Corporate Park
Ganpatrao Kadam Marg,
Lower Parel West, Mumbai – 400012
Email: housing.customercare@piramal.com
ashish.bhan@trilegal.com **Respondent No.6**

Present:

For Appellant : None

**For Respondent : Mr Ashish Bhan, Mr Ketan Gaur, Ms Chitra
Rentala, Mr Aayush Mitruka, Mr Kaustub**

Narendran, Ms Samriddhi Shukla, Ms Lisa Mishra and Mr Vishal Hablani, Advocates for Intervenor (Piramal Capital & Housing Finance Ltd., SRA). Mr Ramji Srinivasan, Sr Advocate with Mr Raunak Dhillon, Mr Animesh Bisht, Ms Saloni Kapadia, Ms Madhavi Khanna, Mr Shubhankar Jain and Ms Rajshree Chaudhary, Advocates for COC. Mr Ashish S Kamat & Mr M.F. Philip, Adv. for RBI.

Glossary

DHFL	Dewan Housing Finance Corporation Ltd
CoC	Committee of Creditors
NHB	National Housing Bank
NCLT / Adjudicating Authority	National Company Law Tribunal
NCLAT / Appellate Authority	National Company Law Appellate Tribunal
F.D. Holders	Fixed Deposit Holders
AR	Authorized Representative of F.D. Holders
I&B Code	Insolvency and Bankruptcy Code
HFC	Housing Finance Companies
NBFC	Non-Banking Financial Companies
NHB Act	National Housing Bank Act, 1987
CIRP	Corporate Insolvency resolution Process
BUDSA	Banning of Unregulated Deposit Schemes Act, 2019
ILC report	Insolvency Law Committee Report

CORAM:

Hon'ble Mr Justice M. Venugopal, Member (J)

Hon'ble Mr V. P. Singh, Member (T)

Hon'ble Dr Ashok Kumar Mishra, Member (T)

J U D G M E N T

(Virtual Mode)

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

1. The current set of Appeals, i.e. Company Appeal (AT) (Ins) No. 506 of 2021, 507 of 2021 and 516 of 2021, have been preferred against a common impugned order dated June 7, 2021, passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench in I.A. No. 903/2020, I.A. No. 1847/2020, I.A. No. 1993/2020 & I.A. No. 759/2021 in C.P. (I.B.) No. 4258/MB/C-II/2019, declaring objections raised against the Resolution Plan through the Interim Applications as infructuous given the approval of the Resolution Plan in I.A. No. 449/2021 in CP 4258 of 2019 by the previous Order. The Adjudicating Authority disposed of the IA's mentioned above with the following observations mentioned in para 2-9 of the Order on 7th June 2021, which are challenged in these Appeals.

2. *"Main prayers in all these applications are common, identical, similar and are as under:-*

i. Declare that the Resolution Plan as approved by the CoC is illegal and violative of the provisions of the Code and Regulations framed thereunder;

ii. Quash and set aside the Resolution Plan as approved by the CoC and the Resolution of CoC.

iii. Strictly, in the alternative, modify the Resolution Plan to direct that the Applicants be refunded their Fixed Deposits

along with interest in terms of the provisions of NHB Act as per the particulars of claims Exhibit A.

iv. To order and declare that any terms in the resolution plan extending the recoveries made under applications filed in section 43 to 51 under section 66 of the Code or any one or more of these provisions including appeal proceedings arising therefrom and recoveries contributions made consequent thereto shall in any manner whatsoever be for the benefit of the Resolution Applicant including its nominee, assignee, or any person claiming through or under it is contrary to law, void-ab-initio and non-est in law;

v. To order and declare that any recoveries contribution made it over the benefit of any order passed in the avoidance application filed by the respondent under section 43 to 51 or under section 66 of the Code or any one or more of these provisions including appeal proceedings arising therefrom shall be for the sole benefit of the creditors of DHFL, including the Fixed Deposit Holders.

vi. Restrain the Respondent and its Committee of Creditors from granting any loan or other credit facility by whatever name called or make any investment or create any other asset as long as the default in repaying the matured deposit holders continues;

vii. Direct the Respondent and its Committee of Creditors to repay matured deposits to the applicants, and continue paying the maturing deposits to the applicants and also ensure that interest on the fixed deposits is continued to be paid to the applicants on their fixed deposits.

viii. *During the pendency of the application restrain the Respondent and its Committee of Creditors from granting any loan or other credit facility by whatever name called or make any investment or create any other asset as long as the default in repaying the matured deposit holders continues;*

ix. *Direct the Respondent and its Committee of Creditors to make pre-mature repayments the applicants in case of death/critical illness of the applicants/ deposit-holders.*

x. *Direct the Financial Service Provider to release the amounts due to the Applicant, i.e. amounts due on matured Fixed Deposits both principal and interest details whereof are provided in Annexure 6;*

3. *We have heard the arguments, submissions of both the sides, at length on various dates perused the documents, provisions of NHB Act etc. and our observations, findings are as under:-*

4. *Details of claim of all these Applicants in the form of NCDs fixed deposits etc., claims admitted, amount payable were discussed in detail in the Resolution Plan approved vide IA No. 449/ 2021 in CP 4258 of 2019 and for the sake of brevity the same is not reproduced.*

5. *With regard to the claims of more than 70,000 Fixed Deposit Holders (including individuals), Lakhs of Employees of Uttar Pradesh State Power Sector Employees Trust, Board of Trustees of Uttar Pradesh Power Corporation Contributory Provident Fund Trust, investment by Capgemini Business Services India Ltd, Employees Provident Fund Trust, other claimants falling in the similar category, and we are of the considered view that considering the number of small investors*

running into lakhs, senior citizens, who had deposited their hard earned savings, have to meet various expenses especially in this Covid-19 Pandemic situation, loss of jobs to number of depositors, to meet marriage, education expenses, other essential needs the employees of the P.F. Trust which is the money they would get at the time of/after superannuation. Therefore, we are of the considered view that they should get a fair, increased share money out of the Resolution Plan. Since FSP is a different nature of company than a normal Corporate Debtor, where in thousands, Lakhs of Small Investors invest their funds for a reasonable interest income to take care of their future needs.

6. *It is generally considered that investment in Fixed Deposit, NCDs are low risk investment than investing in Equity Shares therefore these small investors should not be put to more risk, take more hair cut than the stronger Financial Institutions viz Banks, Financial Institutions and accordingly for this limited purpose we request, suggest the CoC to reconsider their distribution method, distribution amongst various members of CoC within two weeks from today and report the same to this Adjudicating Authority.*

7. *With regard to the decision on distribution to this public depositors, Fixed Deposit holders, subscribers to NCDs we also suggest, request the COC to reconsider their grievances, plights and generally they did not oppose the resolution plan and their request includes to enhance the percentage of payment made in the plan and the same should be increased to the level of Secured Financial Creditors i.e. approximately 40% the Financial Creditors would be getting in this plan. We further make it clear that there is no additional monetary obligation for the Successful Resolution Applicant to pay anything more than*

what it has committed in the Resolution Plan i.e. an amount of Rs. 37,250 Crores. It is only an inter se distribution of resolution money amongst various creditors. Therefore, with regard to the manner of distribution, the method of distribution amongst various creditors viz Public Depositors, Fixed Deposit Holders, NCD Holders, Small Investors, Employees Provident Fund Trust etc we request, suggest the CoC to reconsider the same so that lakhs of small investors would be benefited. Further, while directing and observing so, we find support from the decision of NCLT Ahmedabad Bench in the matter of **Standard Chartered Bank and State Bank of India V/s Essar Steel Limited** which has been confirmed by the Hon'ble Supreme Court of India wherein the Adjudicating Authority has directed to the CoC to consider the distribution mechanism for giving more apportionment Amount to the Operational Creditors and unsecured Financial creditors. This was duly considered by the CoC and was pleased to grant Rs. 1,000 Crore (One Thousand Crore) ex gratia to Operational Creditors and unsecured Financial creditors without any prejudice to their rights and contentions and such distribution/ apportionment of amount has been further confirmed by the Hon'ble Supreme Court of India in the matter of CoC of **Essar Steel India Limited V/s Satish Kumar Gupta**.

8. In the matter of **Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. Ors. (Civil Appeal No. 3395 of 2020)** Hon'ble Apex Court has held that the Adjudicating Authority cannot modify the approved resolution plan but it can remand back the plan to consider the issue referred to suggestions given by it.

9. In view of the above discussion, facts, findings and judgments relied upon for the limited purpose we suggest,

*request the CoC to reconsider their distribution method, distribution amongst various Members of CoC within two weeks and report the same to this Adjudicating Authority. Accordingly, **IA-625/2021, IA-903/2021, IA1847/2020, IA-1993/2020, MA-415/2020 MA-416/2020 IA605/2021 and IA-759/2021 are disposed of.***

(verbatim copy)

3. **Brief Facts under the common set of Appeals**

3.1 The Appellant, Mr Vinay Kumar Mittal, has filed these three Appeals on behalf of himself and 444 Individual fixed deposit holders and various charitable trusts who hold fixed deposits of DHFL ('**F.D. Holders**').

3.2 The F.D. Holders are aggrieved by the impugned Order and allege that the Adjudicating Authority has approved the resolution plan without even examining the specific contentions raised by the Appellants that they had deposited their money in trust with DHFL (Respondent No. 1) although, the assets belonging to the Appellants / F.D. Holders.

3.3 Therefore, the Fixed Deposits could not have been legally subjected to the Resolution Process by considering the same assets of Respondent No. 1. Accordingly, the instant Appeal has been preferred against the impugned orders dated 07.06.2021 (Appeal Nos. 506 and 507/2021) and the impugned Order dated 28.06.2021 (Appeal No. 516/2021) passed by the Ld. National Company Tribunal, Mumbai ("NCLT"), inter-alia, approving the resolution plan without even considering the objections raised by the Appellants / Fixed deposit holders ("F.D. Holders") and without even passing a speaking order on the detailed submissions made by the Appellants.

4. **Common grounds raised by the Appellants**

4.1 A housing finance institution registered under Section 29A of the NHB Act is required to ensure compliance with the provision of the NHB Act, Rules, Regulations, Directions, etc., issued thereunder. These specific requirements are also a part of the license conditions, which were granted to DHFL. However, the same was not complied with by DHFL.

4.2 That, Respondent No.1 is prohibited from making loans and investments until failure to repay deposit holders in terms of their deposit continues. However, the Administrator has not fulfilled the pre-condition of law before extending loans and investments.

4.3 That, Respondent No. 1's decision to carry on its lending activities without repayment of the fixed deposit does not take into consideration the legal mandate as per Sections 29A(6), 29A(4)(a), 36 and 36A of NHB Act read with para 39 of the NHB Directions, 2010, as well as Section 45Q and 45QA of RBI Act, read with para 39 of RBI Directions.

4.4 Out of all the provisions enumerated above, only section 28(1)(k) of the I&B Code deals with the transfer of rights/ financial debts/ operational debts, which are done otherwise than in the ordinary course of business. Upon maturity, repayment of the F.D.'s to their deposit holders would fall within the normal course of business for Respondent No. 1, a Financial Service Provider¹ on its showing.

¹ (FSP)

4.5 The Housing Finance Companies Directions, 2010 issued under NHB Act (NHB Direction) provides that a Housing Finance Corporation has failed to repay any public deposit or part shall not grant any loan or other credits.

4.6 That NHB letter dated August 14, 2019, directs DHFL not to stop/delay the repayment of public deposits. Any failure to repay the public deposits would be detrimental to its Resolution Plan.

4.7 The RBI master directions on Non-Banking Financial Companies Acceptance of Public Deposits (Reserve bank) Directions, 2016 (RBI Directions) provides that NBFC, having failed to repay any public deposit or part, shall not grant any loan or other credit.

4.8 The treatment of F.D. Holders under the Resolution Plan as unsecured creditors is entirely erroneous, illegal, arbitrary and discriminatory. F.D. Holders are entitled to their money in priority over any other creditors, as in fact, F.D. Holders are not mere creditors, but their money is in trust with DHFL. As per Rule 10 of FSP Rules, the amount held in trust for the benefit of the Appellants cannot be illegally misappropriated and cannot be diminished as a part of the resolution process.

4.9 Anything required to be done for continued business operations or keeping the company as a going concern cannot fall within the exceptions specified in section 14 of the I&B Code, especially Section 14(1)(b).

4.10 In the 18th meeting of CoC, it was decided that all the expenses incurred by the Authorised Representative of F.D. Holders (AR) about the

discharge of their duties, including litigation expenses, will be deducted from cash recoveries to F.D. Holders. Such a prescription not only shocks one's conscience, but it is also ex-facie contrary to law.

4.11 That, Section 25(1) of the I&B Code, prescribed that Administrator/ Resolution Professional has to preserve and protect the assets of Respondent No. 1, including its continued business operations. Similarly, Section 20(1) and Section 20(2)(e) of the Code also cast a duty on the Administrator to ensure that Respondent No. 1 is managed as a going concern.

4.12 Even though the payment is made to F D holders, it cannot be categorised as a preferential transaction in terms of the deposit. Because section 43(3)(a) of the Code excludes explicitly a transfer made in the ordinary course of the business or financial affairs of the Corporate Debtor from the definition of a 'preferential transection'.

4.13 The CoC has illegally decided to create a class within a class to repay money to the F.D. Holder, wherein it was agreed that deposits below Rs. 2 Lacs to be paid in full, and only a part to others. Such discriminations between similarly situated F.D. Holders are arbitrary and contrary to the interest of the F.D. Holders.

5. **Joint submissions by Appellants/F.D. Holders**

5.1 Appellants submitted that a majority of the Appellants / F.D. Holders are senior citizens, single earning members and persons in dire need of their money for medical purposes, spread across the country who have invested

their life savings in the form of secure Fixed Deposits in trust with Respondent No. 1, which was a 'AAA' credit rated institution. These deposits have either already matured or are nearing maturity. Therefore, the Appellants had deposited their life earnings with Respondent No. 1, hoping to utilise them in the sunset of their lives and meet emergent situations, such as medical emergencies, pandemics, loss of job, and meeting essential needs.

5.2 The Appellants further submitted that the Appellants filed detailed applications, especially I.A. No. 903/2020 and IA No. 1099/2021 were followed by detailed written submissions. It is noted at para 2 of the impugned Order that detailed arguments have been heard. However, a 'request' is made by the NCLT at para 6 of the impugned Order to the Committee of Creditors ("CoC") to reconsider the pay-out to the Appellants without even considering a single submission of the Appellants.

5.3 The Appellant contended a violation of the Principles of Natural Justice as the objections to the resolution plan filed by the Appellants through IA No. 1099/2021 had not been considered. Instead, a perverse finding is rendered by the NCLT at para 6 of the impugned Order that the Resolution Plan has not been objected to. The Resolution Plan filed vide IA No. 449/2021 has been heard behind closed doors without adequate opportunity for the Appellants to be heard. Repeated requests and applications for hearing of IA No. 1099/2021 vide Application dated 26.05.2021, 28.05.2021, 31.05.2021 and even oral mentioning were not even considered by the Adjudicating Authority, while the main matter was suo-moto taken up for clarifications by the

Adjudicating Authority on 31.05.2021 just before the impugned Order was passed on 07.06.2021.

5.4 Appellants further contended that there is an obligation over the Administrator and the successor-in-interest of DHFL to ensure full repayment of deposit to F.D. holders as per existing laws governing the actions of DHFL and the power coupled with the duty of the RBI and NHB to ensure full repayment to F.D. holders.

5.5 Appellants further contended that the CoC seeks to evade repayment to F.D. Holders by claiming exemption under the I&B Code and claiming that in terms of Section 238 of the I&B Code, the provisions of the I&B Code will override the other provisions of law. However, no provision in the I&B Code provides F.D. Holders are not required to be paid as per the terms and conditions of their deposit or discharge DHFL, its CoC or the Administrator from complying with law provisions. Therefore, there is no inconsistency between the provisions of the I&B Code and other provisions of law requiring repayment to deposit holders as per the terms and conditions of their deposit.

5.6 Appellant further argued that Payment to F.D. Holders, in terms of their deposit, is not a preferential transaction. Section 43(3)(a) of the IBC excludes explicitly a transfer made in the ordinary course of the business or financial affairs of the Corporate Debtor from the definition of a 'preferential transaction'. [Anuj Jain v. Axis Bank Ltd., (2020) 8 SCC 401].

5.7 Appellants further contended that the F.D. Holders have entrusted their money with DHFL, which are assets belonging to the F.D. Holders, which are in the custody and possession of DHFL. The amounts held in trust for the benefit of the Appellants cannot be illegally misappropriated and cannot be subjected to the moratorium or the Resolution Process. A deposit by the depositors is not a sum lent to the company but is deposited with the company to be held in trust until maturity. Therefore, it is not a loan in the strict sense of the term.

5.8 The Appellants further contended that the Adjudicating Authority and this Appellate Tribunal have the absolute power to decide on any question of law or facts arising 'out of or about' the Corporate Insolvency Resolution Process under Section 60(5) of I&B Code, which begins with a non-obstante clause and the words of this provision are to be widely interpreted. Moreover, there were specific directions by the Hon'ble Supreme Court in *Vinay Kumar Mittal v. DHFL*, Civil Appeal No. 654-660 of 2020, whereby the Court directed that in case the rights of the depositors are not considered as per law by the Administrator or the CoC, the Appellants may approach the Adjudicating Authority/ NCLT (and by logical extension, this Appellate Tribunal).

5.9 Appellants further argued that the Classification of depositors based on amounts deposited is illegal. Creating a class within a class by prescribing that deposits below Rs. 2 lacs would be repaid in full and not the others are illegal. Such discrimination between similarly situated F.D. holders is arbitrary.

5.10 Appellants also submitted that if arguments of the Committee of Creditors or the Administrator is accepted, it will render the express words and the intent of all provisions of law, directions, statute, license, etc., to protect the interest of small depositors, otiose.

6. **Submissions on behalf of Committee of Creditors (Respondent No. 3)**

6.1 Respondent No. 3 submitted that RBI, in its administrative discretion, decided to initiate the Insolvency Resolution proceedings concerning DHFL under I&B Code and not the RBI Act. The RBI as the expert Regulator for Housing Finance Companies ("HFC") and Non-Banking Financial Companies ("NBFC"), consciously chose to resolve the issues of non-payment and governance concerns of DHFL under the provisions of the Code by filing C.P. (I.B.) No. 4258 of 2019 and not as per the RBI Act. RBI has reasonably exercised its administrative discretion by invoking the Code, which would result in the maximisation of the assets of the FSP in a time-bound manner, as opposed to the un-tested mechanism under the RBI Act. In any event, it is not within the jurisdiction of this Tribunal to adjudicate on the correctness of an administrative decision taken by RBI.

6.2 Respondent No. 3 further submitted that there is no provision in either the RBI Act, NHB Act or any other law which mandates that depositors have to be paid in full. A plain reading of Sections 29A(6), Section 29(4)(a), 36 and 36A of the National Housing Bank Act, 1987 ("NHB Act"), read with para 39 of the Housing Finance Companies Directions, 2010 ("NHB Directions"), as

well as Sections 45Q and 45QA of the RBI Act read with para 39 of RBI Master Direction on Non-banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 2016 ("RBI Directions") makes it amply clear that none of the enactments guarantees full payment to the F.D. Holders.

6.3 Respondent No. 3 further argued that the I&B Code being a subsequent enactment overrides the provisions of the NHB Act, NHB Directions and RBI Act. No full payment right exists under the National Housing Bank Act, 1987 ("NHB Act"), the RBI Act, or any subordinate legislation. Any such right, even if it exists, would be wholly repugnant with the provisions of the I&B Code, which provide for a specific manner and priority of payment and sets out the right and extent to which a creditor is mandatorily required to be paid in a Resolution Plan, i.e. the liquidation value. The provisions of the Code will override the NHB Act and the RBI Act by the non-obstante clause in Section 238 of the Code, and no preferential treatment can be granted to the F.D. Holders in the CIRP of DHFL on the basis of these enactments.

6.4 Respondent No. 3 further contended that the F.D. Holders are Financial Creditors of DHFL and have been treated accordingly as per the provisions of the I&B Code. F.D. Holders filed their claims with the Administrator in 'Form C', and as a result of admission of their claims, they have been recognised as Financial Creditors under the Code. Consequently, the dues of the F.D. Holders are financial debt, and there is no rationale for treating them as a separate class.

6.5 Additionally, the ILC Report also clarifies that the amounts deposited by the depositors with an FSP would be treated as financial debt and that such depositors would be classified as Financial Creditors. The legislative intent is clear that F.D. Holders are entitled to the same rights and protections as per the terms of the I&B Code as every other Financial Creditor of DHFL. They cannot claim any preferential treatment under the duly approved Resolution Plan.

6.6 Respondent No. 3 further submitted that on a harmonious reading of Section 20(1) and Section 25, it is clear that the primary obligation on the Resolution Professional/ Administrator is to protect and preserve the Corporate Debtor's assets. There is also a duty to keep the corporate debtor as a going concern. However, this duty does not entail an obligation to carry on the business if the same results in a direct breach of Section 14 of the Code. Sections 14, 20 and 25 of the Code need to be read harmoniously. Loans were granted for limited amounts only to ensure that the business of DHFL is kept as a going concern in line with the duty of the Administrator. Further, the term dues in the Explanation to section 14 of the Code means only those 'current dues' that arise for the use or continuation of the license and would not include any preferential payment to the F.D. Holders. Further, payment to F.D. Holders too will not fall under the scope of 'ordinary course of business' as it will amount to a payment to a Financial Creditor and will defeat the whole purpose of the CIRP under the Code.

6.7 It is further contended on behalf of Respondent No. 3 that the license provided to an FSP cannot be suspended or cancelled during the moratorium or the CIRP. Rule 5(b)(ii) of the FSP Rules clearly and unconditionally provide that a license granted to an FSP (DHFL) shall not be suspended or cancelled during the moratorium and the CIRP. The ILC Report² also states that the license granted to the FSP³ should not be terminated during the CIRP as such cancellation would erode the value proposition of the entity and deter the Resolution Applicants from submitting Resolution Plans.

6.8 It is further submitted that no class within a class has been created under the Resolution Plan. The Impugned Order categorically holds that the Resolution Plan is compliant with the law and all F.D. Holders are entitled to receive the minimum liquidation value as dissenting creditors provided in the Code. It is well-established that the decision on fair and equitable payments to the creditors falls within the commercial wisdom of the CoC, subject to payment of minimum liquidation value to creditors. The commercial wisdom of CoC is not amenable to judicial review on any grounds.

6.9 Further, in the exercise of its commercial wisdom, CoC had decided, voted, and approved the distribution mechanism providing for value over and above the liquidation value to benefit certain small-scale F.D. Holders, if the F.D. Holders were assenting Financial Creditors. However, the F.D. Holders as a class voted against the Resolution Plan.

² Insolvency Law Committee Report

³ Financial Service Provider

6.10 Respondent No. 3 further submitted that in addition and without prejudice to the above, the CoC as a body has voted against granting any additional amounts to the F.D. Holders. Under the direction of the Adjudicating Authority vide Impugned Order dated June 7, 2021, to reconsider the distribution mechanism and give F.D. Holders equal benefits as the assenting secured Financial Creditors, CoC deliberated to vote on a partial modification to the distribution mechanism on June 17, 2021. The resolution for modification of distribution mechanism was voted upon and rejected by 89.19% of the voting share of the CoC, including the F.D. Holders. Thus, the F.D. Holders are now bound by the resolution passed by the CoC and cannot be permitted to challenge the distribution mechanism before this Appellate Tribunal.

6.11 Respondent No. 3 further argued that the distribution of funds under the approved Resolution Plan is a commercial decision of the CoC. Therefore, this Appellate Tribunal does not have the jurisdiction to review the same.

7. Submissions on behalf of Piramal Capital & Housing Finance Limited (Respondent No. 6)

7.1 Respondent No. 6 contends that the Adjudicating Authority in the impugned Order while approving the Resolution Plan, directed the CoC to reconsider the amount payable to F.D. Holders. This direction aligns with the Hon'ble Supreme Court's decision in *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. Ors.*, reported in (2021) SCC Online SC 253 (para 278), which states that the Tribunal does not have the power to modify the terms of the resolution plan but can direct

the CoC to reconsider altering the terms of the resolution plan. Under the said direction, the CoC, in its 20th meeting, voted for the resolution for maintaining parity between the Appellant/F.D. Holders and secured Financial Creditors. However, the resolution was rejected by 89% (approx.) of the voting members of the CoC.

7.2 Further, Appellants have relied on Sections 36 and 36A of the National Housing Bank Act and Section 45QA RBI Act to contend that they have the further right of repayment of their deposits fully. However, the above provisions do not provide for the rights of F.D. Holders are paid in full when the concerned non-banking financial company undergoes insolvency under the I&B Code.

7.3 The Code and allied Regulations govern the Resolution Plan. For example, section 30(2) of the I&B Code assures only liquidation value to dissenting Financial Creditors such as the Appellants and not any higher amount. Clause 1.2 of the financial proposal of the Resolution Plan provides for the same.

7.4 Further, the Appellants cannot bypass the distribution mechanism under the Code and seek preferential treatment. Moreover, they cannot claim priority in payment on the ground that they have deposited their hard-earned money with the Corporate Debtor as they had been well aware of the risks associated with their investments with the Corporate Debtor. Naturally, when making their investment, the Appellants would have been apprised that their

deposits are unsecured and pari-passu with other unsecured liabilities. As such, the repayment of deposits cannot be guaranteed by RBI or NHB.

7.5 The Classification of F.D. Holders' based on their deposits with DHFL is valid and acceptable in law. Moreover, this is not the first instance in which a sub-class of creditors was created based on their admitted claims. [Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors., (2020) 8 SCC 531 (para 132)].

7.6 Further, F.D. Holder cannot claim payment of matured deposits during the subsistence of moratorium under Section 14 of the I&B Code.

7.7 It is further contended that the Appellants cannot claim violation of principles of natural justice. The Appellants contend that the hearing on the I.A. No. 449 of 2021 (Plan Approval Application) took place behind closed doors and without affording the Appellants a right of hearing cannot be sustained as Appellants being members of CoC were aware of the approval of the Resolution Plan by CoC on January 15, 2021, and filing of the plan approval application by the Administrator in February 2021. Also, Appellants filed their objections to the Resolution Plan, i.e. I.A. No. 1299 of 2021 only on 15th may, 2021, i.e. almost three months after plan approval application and after the said application was reserved for orders on May 13, 2021.

8. Issues under the present set of Appeals

I. Whether the Adjudicating Authority erred in approving the Resolution Plan, which proposes extinguishing claim to the Fixed Deposit Holders without discharging their payments in

full, contravenes the statutory provisions of the NHB Act and RBI Act?

II. Whether the NHB Act or RBI Act, as the case may be, mandate the full payment to the Fixed Deposit Holders even though the corporate Debtor is undergoing CIRP under the I& B Code,2016?

III. Whether Section 238 of the Insolvency and Bankruptcy Code, 2016, overrides the RBI Act and NHB Act? Is the approved Resolution Plan stipulates extinguishment of the claims to the Fixed Deposits without discharging their payments in full, valid and legal in terms of the Code?

IV. Whether the transactions involving repayment to Fixed Deposits Upon maturity of their deposit would fall within the ordinary course of business for Respondent No. 1, as specified under section 28(1)(k) of the Code?

V. Whether Respondent No. 1 is legally authorised for disbursing loans and investments despite its failure to repay Fixed Deposit holders as per the terms of their deposits?

VI. Whether any payment made against the F.D.'s in terms of their deposits during CIRP would be categorised as a preferential transaction?

9. We have heard the arguments of the Learned Counsels for the parties and perused the record.

10. **ANALYSIS**

Submissions of the Ld Senior Counsel for the Appellants can be summarised as under;

- The impugned order is non-speaking, and it violates the Principles of Natural Justice.
- The obligation of the Administrator and the successor-in-interest of DHFL to ensure full repayment of deposit to FD holders under the RBI and NHB Act.
- The moratorium order under IBC would not affect the payments to deposit holders during CIRP.
- There is no inconsistency between the provisions of the IBC and other provisions of law requiring repayment to deposit holders as per the terms and conditions of their deposit.
- Section 238 does not override the requirement of law governing Financial Service providers.
- Payment to FD Holders in terms of their deposit would not be a preferential transaction to one class of creditors of DHFL during CIRP.
- Money of the Appellants FD Holders is deposited in trust with the Respondent, and it is not the property of the Corporate Debtor.
- The Appellants have locus standi to maintain the instant Appeal and Application.
- Classification of depositors on the basis of amounts deposited with DHFL is illegal.

Non-speaking order

A. The impugned order is non-speaking, and it violates the Principles of Natural Justice.

11. The instant appeals are preferred against the impugned orders dated 07.06.2021 (Appeal Nos. 506 and 507/2021) and the impugned order dated 28.06.2021 (Appeal No. 516/2021) passed by the Ld. National Company Tribunal, Mumbai ("NCLT"), inter alia, approving the resolution plan without even considering the objections raised by the Appellants / Fixed deposit holders ("FD Holders") or passing a speaking order on the detailed submissions made by the Appellants. Learned senior counsel for the appellant refers to the judgement of the Hon'ble Supreme Court in case of Asst Commissioner, Commercial Tax Department v Shukla and Brothers reported in (2010) 4 SCC 785 wherein in para 26 and 27 it is observed that ;

“26. Our procedural law and the established practice, in fact, imposes unqualified obligation upon the courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is no more res integra and stands unequivocally settled by different judgments of this Court holding that the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order 14 Rule 2 read with Order 20 Rule 1 of the Code of Civil Procedure requires that, the court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the court.

27. By practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an

indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. [1974 ICR 120 (NIRC)] there are apt observations in this regard to say “failure to give reasons amounts to denial of justice”. Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher court. Absence of reasons thus would lead to frustrate the very object stated hereinabove.”

The Appellant submits that the impugned order approving the Resolution Plan is passed with a non-speaking order without any discussion on the objections raised by the Appellants; hence the impugned order is also hit by the above-noted case law of the Hon’ble Supreme Court.

B. The obligation of the Administrator and the successor-in-interest of DHFL to ensure full repayment of deposit to FD holders under the RBI and NHB Act.

12. Learned Counsel for the Appellant submits that Rule 5(d) of Financial Service Providers Rules, 2019 mandates that the Resolution Plan include a statement explaining how the resolution Plan satisfies or intends to satisfy the requirements of engaging in the business of the FSP. Resolution Plan of Respondent No. 6 fails to include a statement explaining how it plans to meet

the needs of engaging in the business of an FSP, especially concerning the repayment of deposits. Further, the plan should comply with existing laws governing the entity's actions and the interest as per the terms of the deposit made by the F.D. holders.

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

"52. We, therefore, endorse the opinion expressed by the High Court that the Scheme has been introduced only with a view to avoid repayment to the small depositors as it contemplates that instead of repaying of amount in accordance with the terms and conditions of the deposit, such amount shall be considered as convertible debentures with interest @ 6%, which would be converted into equity shares within a period of one year. Such a provision is clearly contrary to the mandatory requirements under Section 45-QA(1) which requires that:

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

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

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

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

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

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

17. The allocation of the Resolution Amount is contrary to law, and the Resolution Plan/resolutions passed by the CoC to the extent that the F.D. Holders are not required to be paid following the terms of their deposit are illegal. Therefore, any stipulation under the Resolution plan or as per the approved minutes of the CoC, which provides that the claims of the Fixed Deposit Holders shall be extinguished upon payment as per the Resolution Plan, is entirely illegal violative of law and cannot be sustained.

18. Appellants submit that the relevant parts of the Resolution Plan extinguish the resolution applicant's liability to repay the depositors in full

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

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

"45-Q. Chapter III-B to override other laws⁴.—*The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*

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

(2) *Where a non-banking financial company has failed to repay any deposit or part thereof in accordance with the terms*

⁴ 45QA and 45QB inserted by Act No.23 of 1997 w.e.f. 09.01.1997

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

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

[45-MB. Power of Bank to prohibit acceptance of deposit and alienation of assets.—(1) *If any non-banking financial company violates the provisions of any section or fails to comply with any direction or Order given by the Bank under any of the provisions of this Chapter, the Bank may prohibit the non-banking financial company from accepting any deposit.*

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

[45-MBA. Resolution of non-banking financial company.—

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

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

(b) *reconstruction of the non-banking financial company;*

(c) *splitting the non-banking financial company into different units or institutions and vesting viable and non-viable businesses in separate units or institutions to preserve the continuity of the activities of that non-banking financial company that are critical to the functioning of the financial system and for such purpose establish institutions called "Bridge Institutions".*

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

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

(a) *reduction of the pay and allowances of the chief executive officer, managing director, chairman or any*

officer in the senior management of the nonbanking financial company;

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

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

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

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

(a) is unable to pay its debt; or

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

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

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

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

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

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

20. According to the Appellant stand of the RBI in other proceedings is not relevant before this Appellate Tribunal. The RBI's stand in washing away its obligation to repay the depositors in full and follow its mandate under the RBI Act to protect depositors is contrary to law. The RBI is obligated by its duty coupled with its power to ensure that the depositors are protected.

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

22. As such, the provisions of the NHB Act, 1987 and the RBI Act, 1935 expressly stipulate that every deposit is taken by a 'Housing Finance Institution' or a 'Non-Banking Financial Institution' has to be repaid according to the terms and conditions of the deposit. No provision in the IBC provides to the contrary, and therefore, there is no overlap in the requirements for section 238 of the IBC to kick in. In any case, the Court would first endeavour to give a harmonious construction to the seemingly inconsistent provisions.

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

24. In response to the argument of the Appellant, the Learned Senior Counsel representing CoC submits that there is no provision either in the RBI Act, the NHB Act, or any other law that mandates fixed depositor holders full payment.

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

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

27. The RBI Act and the NHB Act merely provide that the license of an HFC⁵ or NBFC⁶ may be cancelled if the deposit holders are not paid, and such a decision can be taken only after allowing the concerned HFC or NBFC to present its case. None of the legislation provides that the F.D. Holders are required to be paid in full, and hence the Appeals proceed on an incorrect interpretation of law with a view to mislead this Tribunal.

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

⁵ Housing Finance Compaany

⁶ Non Banking Finance Company

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

30. Rule 10 of the FSP Rules⁷ is only applicable in situations where the assets of third parties are held in trust by the corporate debtor. The Holders of F.D. have failed to produce any documentation or law which shows that the funds deposited by F.D. Holders are assets held in trust. Consequently, there is no legal justification whatsoever given by the Appellants / F.D. Holders. Instead, F. D. holders failed to show that the money deposited by them was held in trust by DHFL or that the amounts held by DHFL were not assets of DHFL. Thus, Rule 10 of the 'FSP Rules' is inapplicable about the amounts deposited by F.D. Holders.

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

32. Further, Section 16B of the NHB Act is entirely inapplicable to F.D. Holders and thus, the Appellants have made a baseless claim.

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33. Hence, while an Appeal from the Order passed in IA 1104/2020 is pending before this Tribunal, being Company Appeal (AT) (Ins) No. 461 of 2021, the CoC is contesting the stand of NHB and without prejudice to the same, it is stated that F.D. Holders have not shown any law or document like National Housing Bank has demonstrated, in any manner, to substantiate their argument.

34. Respondent No.3 proceeds to state that the amounts deposited by the F.D. Holders in DHFL are shown as liabilities in the balance sheet of DHFL and the F.D. Holders are financial creditors of DHFL and have been treated accordingly. Thus, the bald, unsupported and misleading contention of the Appellants that the amount payable to F.D. Holders are held in trust by DHFL is entirely fictional and ought not to be entertained.

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

"[29-A. Requirement of registration and net owned fund.—
[(1) Notwithstanding anything contained in this Chapter or in any other law for the time being in force, no housing finance institution which is a company shall commence housing finance as its principal business or carry on the business of housing finance as its principal business without—

(a) obtaining a certificate of registration issued under this Chapter; and

(b) having the net owned fund of ten crore rupees or such other higher amount, as the Reserve Bank may, by notification, specify.

(2) Every housing finance institution which is a company shall make an application for registration to the Reserve Bank in such form as may be specified by the Reserve Bank:

Provided that an application made by a housing finance institution which is a company to the National Housing Bank and pending for consideration with the National Housing Bank as on the date of commencement of the provisions of Part VII of Chapter VI of the Finance (No. 2) Act, 2019, shall stand transferred to the Reserve Bank and thereupon the application shall be deemed to have been made under the provisions of this sub-section and shall be dealt with accordingly:

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

[* *]*

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

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

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

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

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

(e) that the public interest shall be served by the grant of certificate of registration to the housing finance institution to commence or to carry on the business in India;

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

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

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

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

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

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

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

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

(iv)

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

(b) to maintain accounts in accordance with the requirement of any law or any direction or Order issued by the ⁶⁰[Reserve Bank or the National Housing Bank] under the provisions of this Chapter; or

(c) to submit or offer for inspection its books of account and other relevant documents when so demanded by an inspecting authority of the ⁶¹[Reserve Bank or the National Housing Bank]; or

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

Provided that before cancelling a certificate of registration on the ground that the [housing finance institution which is a company] has failed to comply with the provisions of clause (ii) or has failed to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (4), the [Reserve Bank], unless it is of the opinion that the delay in cancelling the certificate of registration shall be prejudicial to public interest or the interest of the depositors or the [housing finance institution which is a company], shall give an opportunity to such institution on such terms as the [Reserve Bank] may specify for taking necessary steps to comply with such provision or fulfilment of such condition:

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

(7) A housing finance institution aggrieved by the Order or rejection of application for registration or cancellation of

certificate of registration may prefer an appeal, within a period of thirty days from the date on which such Order of rejection or cancellation is communicated to it, to the Central Government and the decision of the Central Government where an appeal has been preferred to it, or of the ⁶⁶[Reserve Bank] where no appeal has been preferred, shall be final:

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

Explanation.—For the purposes of this section,—

- (I) "net owned fund" means—*
- (a) the aggregate of the paid-up equity capital and free reserves as disclosed in the latest balance sheet of the housing finance institution after deducting therefrom—*
 - (i) accumulated balance of loss;*
 - (ii) deferred revenue expenditure; and*
 - (iii) other intangible assets; and*
 - (b) further reduced by the amounts representing—*
 - (1) investments of such institution in shares of—*
 - (i) its subsidiaries;*
 - (ii) companies in the same group;*
 - [(iii) all other housing finance companies; and]*
 - (2) the book value of debentures, bonds, outstanding loans and advances (including hire-purchase and lease finance) made to, and deposits with,—*
 - (i) subsidiaries of such company; and*
 - (ii) companies in the same group, to the extent such amount exceeds ten per cent of (a) above;*

[(II) the expressions "subsidiaries" and "companies in the same group" shall have the meanings respectively assigned to them in the Companies Act, 2013 (18 of 2013):

Provided that the National Housing Bank shall, in consultation with the Reserve Bank, specify the companies to be deemed to be in the same group.]

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

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

36. Chapter V to override other laws.—*The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*

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

(2) *Where a housing finance institution which is a company has failed to repay any deposit or part thereof in accordance with the terms and conditions of such deposit, such officer of the National Housing Bank, as may be authorised by the Central Government for the purpose of this section (hereinafter referred to as the "authorised officer") may, if he is satisfied, either on his own motion or on any application of the depositor,*

that it is necessary so to do to safeguard the interests of the housing finance institution, the depositors or in the public interest, direct, by order, such housing finance institution to make repayment of such deposit or part thereof forthwith or within such time and subject to such conditions as may be specified in the Order:

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

36. Further, it is necessary to point out that RBI Act and the NHB Act merely provide that the licence of a Housing Finance Corporation and Non-Banking Finance Corporation may be cancelled if the deposit holders are not paid. Such a decision can be taken only after giving the concern HFC or NBFC an opportunity to present its case. None of the legislation provides that F.D. Holders are required to be paid in full. Hence the Appellant's contention is based on an incorrect interpretation of the law.

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

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

39. The Learned Senior Counsel representing CoC submits that no full payment right exists under NHB Act, RBI Act, or any other subordinate legislation. Moreover, even if it exists, any such request would be wholly repugnant to provisions of the Code, which provide for a specific manner and priority of payment; hence will not be applicable in terms of S. 238 of the Code. The minimum amount a creditor is mandatorily required to be paid in a resolution plan, i.e. liquidation value.

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

41. In the case of *Innoventive Industries Limited vs ICICI Bank* (2018) 1 SCC 407, the Hon'ble Supreme Court has held that in case of any inconsistency between the provisions of Code and any other law, the provisions of the Code shall prevail. Therefore, Insolvency & Bankruptcy Code

which was enacted later, will override the NHB Act and RBI Act by the non-obstante clause of Section 238 of the Code.

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

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

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

“16. ... a non obstante clause [must be construed strictly and] the Court must try to find the extent to which the legislature had intended to give one provision overriding

effect over another provision." (A.G. Varadarajulu case [(1998) 4 SCC 231], SCC p. 236, para 16)."

43. The above case relates to the period before the enactment of the I & B Code, 2016, and pertains to the scheme and arrangements under the Companies Act, 2013; hence not applicable to the present case.

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

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

*" As already clarified by us, to prove the charge under Section 409 IPC, the prosecution need not prove the exact manner of misappropriation. Once the 'entrustment' is admitted or proved, as has been done in the present case, the onus lies on the Accused to prove that the entrusted property was dealt by him in an acceptable manner. Thus, misappropriation with this dishonest intention is one of the most important ingredients of proof of 'criminal breach of trust'. The offence under Section 409 IPC can be committed in varied manners, and as we are concerned with its applicability in the case of a bank officer, it is fruitful to point out that the banker is one who receives money to be drawn out again when the owner has occasion for it. Since the present case involves a conventional bank transaction, **it may be further noted that in such situations, the customer is the lender and the Bank is the borrower, the latter being under a super added obligation of honouring***

the customer's cheques up to the amount of the money received and still in the banker's hands. The money that a customer deposits in a bank is not held by the latter on trust for him. It becomes a part of the banker's funds who is under a contractual obligation to pay the sum deposited by a customer to him on demand with the agreed rate of interest. Such a relationship between the customer and the Bank is one of a creditor and a debtor. The Bank is liable to pay money back to the customers when called upon, but until it's called upon to pay it, the Bank is entitled to utilise the money in any manner for earning profit."

(emphasis supplied)

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

"56. ICICI Bank Counsel has argued that money is fungible, therefore unless money has gone out from JAL for repayment, it can't be said as money deposited by JIL is the money payable to JIL homebuyers.

*57. No doubt money is fungible, but obligation to repay is not fungible, therefore **when money is deposited or clawed back to repay it to the creditor, the money being fungible and there being an obligation for repayment, it can no more be considered as money owned by the debtor. Though JAL is per se not a debtor to the Homebuyers, when money has come on behalf of the debtor in relation to a debt obligation or for discharge of an obligation, the person deposited it towards that obligation cannot subsequently say that he is the owner of the money, therefore entitled for return of it.***

58. If trust concept is examined, we will know that trust is a relationship where property/money held by one party for the benefit of another party. Trustee holds the property/money for the benefit of the trust beneficiaries. Trustee is under fiduciary duty to ensure that the property of the owner is maintained and the benefit thereof is reached to the persons to whom it is intended to. In the case of trust, the owner is under no obligation to pass on the benefit to the beneficiary, therefore, the owner/settler being the owner of the property, he is entitled to take it back in the event it is not utilized for the purpose the owner intended to. **But that is not the case when money from the Debtor or on behalf of the Debtor has gone out towards discharge of an obligation. In the case of trust, ownership of that property or money remains with the owner as long as it is not utilized for the purpose intended to. That owner has no obligation to part with his property/money.**

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

47. **Therefore, it is clear that the relationship between the customer and the Bank is the creditor and debtor and not a trustee. The Bank is not a trustee of money deposited by customers. In this case, the Corporate Debtor, i.e. DHFL, took fixed deposits from their customers**

on the agreed interest on the amount invested in the fixed deposits. Therefore, the relationship of the DHFL with the fixed deposit holders is that of a creditor and debtor and not of a trustee. The money so deposited becomes a part of the DHFL's funds which is under a contractual obligation to pay the sum deposited by a customer to him and on maturity or as per the terms of the contract they were getting agreed rate of interest. Such a relationship between the DHFL & the fixed deposit holders is one of the creditor and debtor and not of a trustee.”

No Locus to maintain the Appeal;

48. The Learned Senior Counsel for the Committee of Creditors raised objections about the locus to maintain the instant Appeal.

49. In response to the Respondents' above objections, Appellant submits that they have rejected the Resolution Plan and depositors as a class have rejected it. Therefore, instant Appeal is maintainable at the behest of the Appellants. It is further said that the judgment of the Hon'ble Supreme Court in the case of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. Ors.* (2021) SCC Online SC 253 does not apply and is distinguishable since, in that case, homebuyers as a class had assented to the plan. Whereas only a few individual homebuyers challenged the plan. In this case, the class of depositors and Appellant's has rejected the Resolution Plan.

50. Further, Hon'ble Supreme Court's specific directions in the case of *Vinay Kumar Mittal Vs. DHFL*, Civil Appeal No.654-650 of 2020, stating that

“in case the right of the depositors as per orders of the Hon’ble Supreme Court not considered as per law by the Administrator or the CoC, the Appellant may approach the NCLT and also gives the right to the Appellants to raise the issue before NCLAT.”

51. Based on the orders of the Hon’ble Supreme Court in the case of Vinay Kumar Mittal Vs. DHFL, Civil Appeal No.654-650 of 2020, wherein right is given to the Appellants to raise the issue before NCLT/NCLAT the appellants have filed the appeal. Therefore contention of the respondent COC that the appellant had no locus to file the present appeal is not sustainable.

C. Resolution Plan is discriminatory as it creates class within a class of similarly situated creditors

52. The Learned Counsel for the Respondents further argues that creating a separate class, from other creditors of the same class, by prescribing deposits below rupees, two lakhs, shall be paid in full, and not others are discriminatory—such discrimination between the similarly situated F.D. Holders are illegal. The said contention is without any basis because distribution among the creditors is approved by the overwhelming majority of the CoC exercising commercial wisdom, which is not justiciable. Hence, this objection has no force.

53. The Learned Counsel for the Respondents argued that the F.D. Holders are Financial Creditors of DHFL and have been treated accordingly as per the provision of the Code. They had filed their claims in Form 'C', and as the result

of admission of their claims during CIRP, they have been recognised as Financial Creditor. Consequently, the dues of F.D. Holders are financial debt, and there is no rationale for treating them as a separate class.

54. Additionally, the ILC report⁸ also clarifies that the amount deposited by the depositor's with Financial Service Provider would be treated as financial debt, and such depositors would be classified as Financial Creditors. The relevant part of the **I. L .C. Report** is given below ready reference:

"Any liability on the balance sheet of an FSP, other than a liability in respect of its share capital, will be considered as a financial debt or an operational debt, as the case may be.

The clarification in relation to any liability on the balance sheet of an FSP (other than liability in respect of its share capital) being considered as a financial debt or an operational debt has been provided out of abundant caution and in order to avoid confusion with respect to what constitutes debt and what an FSP, such amounts will be treated as financial debt and such depositors will be classified as financial creditors and will be treated accordingly. In cases where there are a large number of depositors, the provisions of section 21(6A) will apply and they will be represented accordingly.

One of the financial sector regulators suggested that a third category of regulatory dues may be introduced in addition to financial debt and operational debt, as such dues do not fall either under financial debt or operational debt. The Sub-Committee felt that this may not serve any useful purpose, as

⁸ Insolvency Law Committee Report

the Code confers rights and obligations only on financial and operational creditors."

55. Therefore, the legislative intent is clear that F.D. Holders are entitled to the same rights and protections as per the terms of the Code as every other Financial Creditors of DHFL.

56. Further, the F.D. Holders claim for seeking priority payment during CIRP under the Resolution Plan is in contravention with the Code's provisions and law laid down in the case of Chitra Sharma Vs. Union of India reported in (2018) 18 SCC 575, wherein in paras 48,48.1, and 48.2 Hon'ble Supreme Court had observed that;

"48. As we have stated earlier, an amount of Rs 750 crores is lying in deposit before this Court pursuant to the interim directions, on which interest has accrued. The homebuyers have earnestly sought the issuance of interim directions to facilitate a pro rata disbursement of this amount to those of the homebuyers who seek a refund. We are keenly conscious of the fact that the claim of the homebuyers who seek a refund of monies deserves to be considered with empathy. Yet, having given our anxious consideration to the plea and on the balance, we are not inclined to accede to it for more than one reason;

*48.1. Firstly, during the pendency of the CIRP, it would, as a matter of law, be impermissible for the Court to direct a preferential payment being made to a particular class of financial creditors, whether secured or unsecured. For the present, we leave open the question as to whether the homebuyers are unsecured creditors (as was urged by Mr Tripathi) or secured creditors (as was urged by the counsel appearing for them). **Directing disbursement of the amount***

of Rs 750 crores to the homebuyers who seek refund would be manifestly improper and cause injustice to the secured creditors since it would amount to a preferential disbursement to a class of creditors. Once we have taken recourse to the discipline IBC, it is necessary that its statutory provisions be followed to facilitate the conclusion of the resolution process.

48.2. Secondly, the figures which have been made available presently, following the opening of the web portal by the Amicus Curiae, indicate that 8% of the homebuyers have sought a refund of their monies while 92% would evidently prefer possession of the homes which they have purchased. We cannot be unmindful of the interests of 92% of the homebuyers many of whom would also have obtained loans to secure a home. They would have a legitimate grievance if the corpus of Rs 750 crores (together with accrued interest) is distributed to the homebuyers who seek a refund. The purpose of the process envisaged by IBC for the evaluation and approval of a resolution plan is to form a composite approach to deal with the financial situation of the corporate debtor. **Allowing a refund to one class of financial creditors will not be in the overall interest of a composite plan being formulated under the provisions of IBC.**"

57. Based on the observations of the Hon'ble Supreme Court in the above case mentioned case, it is clear that during the pendency of the CIRP, it is impermissible for the Court to direct a preferential payment being given to a particular class of financial creditors, whether secured or unsecured. Therefore, Fixed Deposit Holders as a class cannot claim a separate treatment

during CIRP. If payment is made during CIRP to a particular type of deposit holder, it will amount to a preferential disbursement to a class of creditors.

58. The Learned Counsel representing CoC has further proceeded to argue that F.D. Holders had requested for making the payments. However, during the CIRP moratorium order is applicable. Therefore, no payment can be made during CIRP. If any payment is made to the F.D. Holders during CIRP then it will amount to preferential treatment to a particular class of creditors, which dehors the provision of the Code, which is impermissible under the Code

D. The I & B Code, a subsequent enactment, overrides the provisions of the NHB Act, NHB Directions and RBI Act.

59. The Learned Senior Counsel representing CoC argued that F D Holders have no right to full payment under the NHB Act, the RBI Act, or any other subordinate legislation. Moreover, any such right, even if it exists, would be wholly repugnant to provisions of the Code, which provide for a specific manner and priority of payment and sets out the right and the minimum amount a creditor is mandatorily required to be paid in a Resolution Plan, i.e. the liquidation value.

60. Without prejudice to the above, it is established law that when two special statutes contain non-obstante clauses, the later statute will prevail over the earlier statute. It is a settled proposition of law that in case of any inconsistency between the provisions of the I & B Code and any other enactment, the Code's provisions shall prevail. The Learned Counsel refers to Paragraphs 13, 59 – 61 of the Judgement of Hon'ble Supreme Court in

Innoventive Industries Ltd. v. ICICI Bank and Ors. [(2018) 1 SCC 407) to bolster its contention.

61. Respondent also relied on the judgment of Hon'ble Supreme Court in the case of Rajendra K. Bhutta v Maharashtra Housing and Development Authority & Ors. ((2020) 13 SCC 208) (paragraphs 25, 27), Principal Commissioner of Income Tax v Monnet Ispat and Energy Limited, [(2018) 18 SCC 786) (paragraph 2), PSL Limited vs Jotun India Pvt Ltd. [2018 SCC Online Bom 36) (paragraphs 31, 35 to 37 and 87) upheld by the Division Bench in Jotun India Pvt. Ltd. vs PSL Limited [2018 SCC Online Bom 1952) (paragraphs 43) and the case of Forech India Limited vs Edelweiss Asset Reconstruction Company Limited & Anr. [(2019) 18 SCC 549] (paragraph 20) in support of its contention.

62. Thus, the provisions of the Code (which was enacted later) will override the NHB Act and the RBI Act by the non-obstante clause in Section 238 of the Code.

63. Respondent further argues that the Amendments were brought in various enactments by way of the First to Eleventh Schedules provided under the Code, *inter- alia*, to grant primacy to the Code over other enactments in matters relating to insolvency. However, Section 238 of the Code is independent of the Schedules under the Code. Therefore, it will override any inconsistent enactment, and therefore, no preferential treatment or priority can be given to the F.D./Deposit Holders under the NHB Act or the RBI Act.

64. It has been held by the Hon'ble Supreme Court and this Hon'ble Tribunal in numerous judgments that in case of any inconsistency between the provisions of the Code and any other enactment (in cases also the statute in question was not covered under the Schedules to the Code), the provisions of the Code shall prevail. (Ref case ;Innoventive Industries Limited, ICICI Bank and Anr. (2018) 1 SCC 407 at paragraphs 34; The Directorate of Enforcement v. Sh. Manoj Kumar Agarwal and Ors., Company Appeal (AT) (Ins) No 2019 at paragraphs 41, 42)

65. The case of Integrated Finance Company Ltd. vs Reserve Bank of India, (2015) 13 SCC 772 concerning the non-obstante clause in Section 45Q of the RBI Act has no applicability in the facts of the present case since the same was pronounced before the enactment of the Code and pertains to the schemes and arrangements under the Companies Act, 2013.

66. Further, after the initiation of CIRP of DHFL, the rights and issues of the appellant shall be governed as per the provisions of IBC. The I & B Code is enacted with the objective of the revival of the Corporate Debtor. However, the same is a complete Code and exhaustively deals with all the stakeholders' rights.

67. Hon'ble Supreme Court in case of Embassy Property Developers Private Limited v state of Karnataka and others reported in 2019 SCC online SC 1542 (Para 11) has held that IBC is a unified umbrella Code, covering the entire gamut of the law relating to the insolvency resolution of corporate entities in a time-bound manner. On a combined reading of the FSP Rules, related

provisions of the IBC and the various judgements as relied upon, it is clear that IBC provides a detailed mechanism whereunder the claims of the creditors, including the Appellants, have been sufficiently dealt with. Accordingly, the interest of the fixed deposit holders as a class of creditors, including the Appellants, is represented and protected in the CIRP and is valid in law. Therefore, the claims of the Appellant's must be considered only in terms of the statutory mechanism under IBC and the FSP Rules.

68. Section 238 of the IBC provides explicitly that the provisions of IBC override other laws which are inconsistent with it. Therefore, since Section 238 of IBC overwrites any law inconsistent with it, the NHB Act, NHB directions, Deposit Act, gives the right to payment to the Appellant's under any of these Act, must be read as subject to the provisions of IBC read with FSP Rules. However, the NHB directions are like delegated legislation and, in any event, cannot override a statute, i.e. IBC.

69. Further, the letter dated 14 August 2019 addressed by National Housing Bank cannot apply since the same was issued before the initiation of CIRP of DHFL. The Appellants have also placed reliance on Section 36 of the NHB Act, which provides an overriding effect and begins with a non-obstante clause. It is settled law that “where two special statutes are containing non-obstante clauses, the latter must prevail”.

70. Respondent further draws our attention towards the observation of the Hon'ble Supreme Court in paragraphs 8, 9 & 10 in the case of *Solidaire India*

Ltd. v. Fairgrowth Financial Services Ltd., reported in (2001) 3 SCC 71, wherein it is observed that;

“8. *The effect of this provision is that the said Act will have effect notwithstanding anything inconsistent therewith contained in any other law except to the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976. A similar non obstante provision is contained in Section 13 of the Special Court Act which reads as follows:*

“13. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority.”

9. *It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. [(1993) 2 SCC 144] ; Sarwan Singh v. Kasturi Lal [(1977) 1 SCC 750 : (1977) 2 SCR 421] ; Allahabad Bank v. Canara Bank [(2000) 4 SCC 406] and Ram Narain v. Simla Banking & Industrial Co. Ltd. [AIR 1956 SC 614 : 1956 SCR 603]*

10. *We may notice that the Special Court had in another case dealt with a similar contention. In Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd. [(1997) 89 Comp Cas 547 (Special Court)] it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention,*

the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The headnote which brings out succinctly the ratio of the said decision is as follows:

“Where there are two special statutes which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.

The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, provides in Section 13, that its provisions are to prevail over any other Act. Being a later enactment, it would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985. Had the Legislature wanted to exclude the provisions of the Sick Companies Act from the ambit of the said Act, the Legislature would have specifically so provided. The fact that the Legislature did not specifically so provide necessarily means that the Legislature intended that the provisions of the said Act were to prevail even over the provisions of the Sick Companies Act.

Under Section 3 of the 1992 Act, all property of notified persons is to stand attached. Under Section 3(4), it is only the Special Court which can give directions to the Custodian in respect of property of the notified party. Similarly, under Section 11(1), the Special Court can give directions regarding property of a

notified party. Under Section 11(2), the Special Court is to distribute the assets of the notified party in the manner set out thereunder. Monies payable to the notified parties are assets of the notified party and are, therefore, assets which stand attached. These are assets which have to be collected by the Special Court for the purposes of distribution under Section 11(2). The distribution can only take place provided the assets are first collected. The whole aim of these provisions is to ensure that monies which are siphoned off from banks and financial institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only. Under Section 22 of the 1985 Act, recovery proceedings can only be with the consent of the Board for Industrial and Financial Reconstruction or the appellate authority under that Act. The Legislature being aware of the provisions of Section 22 under the 1985 Act still empowered only the Special Court under the 1992 Act to give directions to recover and to distribute the assets of the notified persons in the manner set down under Section 11(2) of the 1992 Act. This can only mean that the Legislature wanted the provisions of Section 11(2) of the 1992 Act to prevail over the provisions of any other law including those of the Sick Industrial Companies (Special Provisions) Act, 1985.

It is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted. If an interpretation is given that the Sick Industrial Companies (Special Provisions) Act, 1985, is to prevail then there would be a clear conflict. However, there would be no conflict if it is held that the 1992 Act is to prevail. On such an interpretation the objects of both

*would be fulfilled and there would be no conflict. **It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick company was in a position to first pay back the public money, there would be no difficulty in reconstruction. The Board for Industrial and Financial Reconstruction whilst considering a scheme for reconstruction has to keep in mind the fact that it is to be paid off or directed by the Special Court. The Special Court can, if it is convinced, grant time or instalments.** There can, therefore, be no stay of any proceedings for recovery against a sick company so far as the Special Court under the 1992 Act is concerned.”*

(emphasis supplied)

71. It is pertinent to mention that when the statute has conferred the power to do an act and has laid down the method in which the power is to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The terms of the IBC are clear and unambiguous, especially dealing with the facts in the present matter. The IBC guarantees a minimum liquidation value to dissent financial creditors like the Appellants.

72. In the instant case, the fixed deposit holders are provided with the liquidation value of their debt under the I& B Code provisions. Hence for the Appellants seeking relief beyond the scheme of IBC is not permissible and expressly barred as per provisions of the IBC.

73. The learned Senior Counsel for the Appellants further submits that the Insolvency Resolution of DHFL could have been carried out under the RBI Act

instead of IBC. But, they have failed to place any material before us to indicate that the returns to public depositors would be higher if the insolvency of DHFL had been under the RBI Act.

74. The learned Senior Counsel for the Appellants further contends that Section 45-MBA under the RBI Act contains a non-obstante clause enacted after IBC. Therefore, provisions of Section 45-MBA of the RBI Act would prevail. Section 45-MBA of the RBI Act begins with the words **“without prejudice to any other provisions of this Act or any other law for the time being in force, the bank may.....”**.

75. Hence, **Section 45-MBA of the RBI Act does not contain a non-obstante clause but rather a ‘without prejudice clause’**. Section 45-MBA in fact, preserve the rights of the RBI to act under all other provisions of the law and provide flexibility. Had it been the intention of the legislation to require RBI only to pursue insolvency resolution of NBFC under the IBC prescribed under the RBI Act, then the same would have been expressly provided by the legislature by including a non-obstante clause in Section 45-MBA. The said section retains discretion with the RBI to resolve the insolvency of an NBFC under the RBI Act or any other provision of law, including IBC. Further, the FSP rules were enacted after Section 45-MBA. Hence, the provisions of the FSP Rules are also significant in this regard.

76. Further, the fixed deposit holders, including the appellant’s are secured Financial Creditors whose rights are secured to the extent of floating charge created over the assets in terms of the Circular dated 27 November 2006

issued by National Housing Bank. The floating charge was created over the assets of DHFL in terms of the NHB Act and the surplus therein for an amount aggregating to the Resolution Plan approved by NCLT. Further, since the fixed deposit holders are dissenting Financial Creditors, they shall be paid upfront cash and not debt securities before making any payment to other Financial Creditors as per the Resolution Plan.

77. The mere fact that 'Form C' has been filed by the Appellants is not ipso facto determinative of the Appellants' status as Financial Creditors or persons who have deposited their monies in trust with DHFL. Therefore, there can be no estoppel against the law (MCGM v. Abhilash Lal & Ors., Civil Appeal No. 6530 of 2019 dated 15.11.2019 (at p.838, para 48 at p.890) and the status of the Appellants has to be determined in the light of the facts of the case.

78. Based on the facts of the case, it is clear that there are about 77,000 public deposit holders of the corporate debtor, i.e. DHFL. The IBC and the Rules framed thereunder provide a mechanism to represent the interest of the fixed deposit holders through an authorised representative. In the present case, the fixed deposit holders of DHFL are represented through Respondent No. 4. In the I& B Code, individual fixed deposit holders do not have the right to challenge the Resolution Plan approved by CoC or file separate action to challenge the same before different forums.

79. In the instant case, the total claim amount of public depositors was ₹5,433 crores, out of which a claim of ₹ 5374 crores was admitted. The Appellants have participated in the CIRP by filing the claims and have been

adequately represented on the CoC through an authorised representative who has attended all the meetings of the CoC. The Appellant's received and had knowledge about the meetings of the COC through their authorised representative and were also supplied with the minutes of the CoC on behalf of the entire class of public depositors.

80. Further, the Appellant has also participated in the voting process through their authorised representative. While exercising their voting rights under Section 25 A (3A) of IBC, they have dissented with the Resolution Plan and further dealt with the distribution of proceeds under it. The Appellant chose to file the objections before NCLT only at a belated stage, i.e. when the application for approval of the Resolution Plan was reserved for the Orders. Therefore, the contentions regarding violations of natural justice during the CIRP of the NCLT are incorrect. However, neither the NCLT nor NCLAT is authorised to sit in judgement over the commercial wisdom of the CoC.

81. Hon'ble Supreme Court in the Committee of Creditors of Essar steel v Satish Kumar Gupta and others reported in (2020) 8 SCC 531 has reinforced the position that the COC is the key decision-maker in the rehabilitation of Corporate Debtors. For the approval of the Resolution Plan, the Committee of Creditors is to take a business decision based on ground realities by a majority, which binds all the stakeholders, including dissentient creditors. The Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors. The limited judicial review available is to see that the Committee of Creditors has taken into account the

fact that the Corporate Debtor needs to keep going as a going concern during the Insolvency Resolution Process; it needs to maximise the value of its assets; and that the interest of all stakeholders including operational creditors has been taken care of.

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

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

against a holistic resolution for maximisation of value & distribution of funds between different classes of creditors.

84. The Appellant herein had challenged the CIRP before the Hon'ble Supreme Court in Vinay Kumar Mittal & Others Vs. DHFL and others by seeking a refund/repayment of the respective deposits. The Hon'ble Supreme Court had directed that the fixed deposit holders could raise the contentions before the CoC, the Administrator, and if necessary, the NCLT, which would be dealt with in accordance with the law.

85. Accordingly, the Authorised Representative of the public depositors had raised the issue of refund/payment of deposits before the CoC. However, the CoC was of the view that differential treatment cannot be given to one class of Financial Creditors during CIRP. Furthermore, during the CIRP of any Corporate Debtor, it is not permissible in law to repay any creditor due to a moratorium imposed under Section 14 of the IBC.

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

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

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

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

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

89. The Learned Senior Counsel representing Successful Resolution Applicant submits that the Appellants were not entitled to payment of matured FDs during CIRP. The Appellants have erroneously argued that the erstwhile administrator ("Administrator") of the CD was obligated to repay deposits of the Appellant and other FD holders during the pendency of CIRP, as part and parcel of the Administrator's obligation to keep the CD as a "going concern".

90. The response to this argument is two-fold:

The FDs formed part of the Erstwhile CD's assets and, therefore, could not be alienated throughout CIRP.

a) The Appellants argue that an FD, like a "trust", cannot be considered part of the CD's assets, and the Appellants are not technically financial creditors. Further, they erroneously argue that under Rule 10 of the FSP Rules, the obligation to repay FD holders is not hit by the effect of Section 14 of the IBC as the amount of the deposit are third-party assets. This argument is flawed for the following reasons.

- b) Firstly, FD holders are classified strictly as financial creditors, i.e., persons to whom a "financial debt" is owed within the term's meaning under Section 5(8) of the IBC. Time and again, the Hon'ble Supreme Court of India has stated and cemented the position that an FD holder is a Financial Creditor within the strict sense of the phrase. Therefore, an FD holder is entitled to initiate insolvency proceedings against a company and is also allowed to participate in CoC meetings.
- c) The Learned Senior Counsel for Respondent No.1, advert to the judgement of Hon'ble Supreme Court in the case of Shanti Prasad Jain Vs. Director of Enforcement, FERA reported in (1963) 2 SCR 297, wherein at paragraph 37 it is observed that;

“37. Now the law is well settled that when moneys are deposited in a bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor and not trustee and beneficiary. The banker is entitled to use the monies without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. And it makes no difference in the jural relationship whether the deposits were made by the customer himself, or by some other persons, provided the customer accepts them. There might be special arrangement under which a banker might be constituted a trustee, but apart from such an arrangement, his position qua banker is that of a debtor, and not trustee. The law was stated in those terms in the old and well-known decision of the House of Lords in Foley v. Hill [11

HLC 28: 9 ER 1002] and that has never been questioned.”

91. Further, in the case of *Swiss Ribbons (P) Ltd. v. Union of India*, reported in (2019) 4 SCC 17 in para 46 Hon’ble Supreme Court has observed that ;

“46. However, the Insolvency Law Committee (ILC), in its Report of March 2018 dealt with debenture-holders and fixed deposit-holders, who are also financial creditors, and are numerous. The Report then went on to state:

“10.6. For certain securities, a trustee or an agent may already be appointed as per the terms of the security instrument. For example, a debenture trustee would be appointed if debentures exceeding 500 have been issued [Section 71(5), Companies Act, 2013] or if secured debentures are issued [Rule 18(1)(c), Companies (Share Capital and Debenture) Rules, 2014]. Such creditors may be represented through such pre-appointed trustees or agents. For other classes of creditors which exceed a certain threshold in number, like home buyers or security-holders for whom no trustee or agent has already been appointed under a debt instrument or otherwise, an insolvency professional (other than IRP) shall be appointed by NCLT on the request of IRP. It is to be noted that as the agent or trustee or insolvency professional i.e. the authorised representative for the creditors discussed above and executors, guarantors, etc. as discussed in Para 9 of this Report, shall be a part of the CoC, they cannot be related parties to the corporate debtor in line with the spirit of proviso to Section 21(2).

10.8. In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code

to mandate representation in meetings of security-holders, deposit-holders, and all other classes of financial creditors which exceed a certain number, through an authorised representative. This can be done by adding a new provision to Section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditors to the extent of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised representative of the financial creditors, a specific provision laying down the rights and duties of such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through regulations to enable efficient voting by the representative. Also, Regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to a large number of creditors voting at the same time.”

(emphasis supplied)

92. The Ld. Counsel for the 1st Respondent refers to the judgement of Hon’ble Supreme Court dated 26.7.2021, in case of Orator Marketing Pvt. Ltd. v. Samtex Desinz Pvt Ltd, reported in (2021) SCC OnLine SC 513 wherein at para 14 it is observed that ;

“14. *In Pioneer Urban Land and Infrastructure Ltd. v. Union of India⁴, this Court speaking through Nariman, J. referred to several earlier judgments including Innoventive Industries Ltd. (supra) and Swiss Ribbons Pvt. Ltd. (supra) and held that even individuals who were debenture holders and fixed deposit holders could also be financial creditors who could initiate the Corporate Resolution Process.”*

93. The 1st Respondent highlighted the **Insolvency Law Committee Notification, FSP Sub-Committee Report dated 04.10.2019**, (para 17), wherein a clarification is issued about deposits of FD holders, which is as follows:

“With respect to amounts deposited by depositors with an FSP, such amounts will be treated as financial debt and such depositors will be classified as financial creditors and will be treated accordingly.”

94. The Learned Senior Counsel for Respondent contends that the Appellants ought to be subjected to the same rights and treatment as any other financial creditor on the following grounds;

a) An amount held by a person cannot be classified both as a "debt" and 'being held in trust' at the same time. Furthermore, it is settled law that a depositor and bank relationship is not equivalent to one between a beneficiary and trustee. Instead, it is a relationship between a creditor and a debtor.

b) Secondly, in furtherance of the argument that the deposits are like trust, the Appellants attempted to argue that since FDs with the

CD are governed by the NHB Act and the RBI Act, there is a statutory guarantee of full repayment. Indeed the Appellants primarily rely upon Sections 36A of the NHB Act and Section 45QA of the RBI Act.

c) It is contended that FDs cannot be said to be in the nature of trust merely because, before CIRP, NHB Act and the RBI Act governed the CD. However, section 36A of the NHB Act and Section 45QA of the RBI Act clearly states that every deposit shall be repaid "according to the terms and conditions of such deposit". Notably, the Appellants have failed to point out a single instance within their arrangement with the Erstwhile CD, which guarantees full repayment of their FDs. Moreover, section 36A of the NHB Act and Section 45QA of the RBI Act is no different, in essence, from Section 73(3) of the Companies Act, 2013, which states that "Every deposit accepted by a company under sub-section (2) shall be repaid with interest in accordance with the terms and conditions of the agreement referred to in that sub-section." As such, there is absolutely nothing unique within the NHB Act or the RBI Act, which elevates the status of an FD with a housing finance company over and above any other FD.

d) The NHB Act itself contemplates a redressal mechanism where Section 36A is violated, i.e., under Section 36 A(2) read with Section 49 (2A)(C). However, on a cumulative reading of the provisions, it is apparent that the statute itself does not guarantee the complete repayment of deposits.

e) Furthermore, nothing whatsoever is contained in the NHB Act or the RBI Act that accords the trust status to an FD with a Housing Finance Company. Where the legislators intended to identify a trust under the NHB Act, they unequivocally expressed this within the provision's language. For instance, Section 16B of the NHB Act speaks of amounts and securities "to be held in trust". There is no such equivalent stipulation for depositors such as the Appellants.

f) The supposed terms of the license under the NHB Act and RBI Act do not, and cannot, govern the functioning of the Erstwhile CD during CIRP. The Appellants have argued that as a part of its operations as a going concern, it was mandatory for the Erstwhile CD to repay deposits in accordance with the terms of its license. In this regard, the Appellants primarily rely upon Sections 29 A(4)(a), 29 A(6) of the NHB Act, Section 45-IA of the RBI Act, Directions 18 & 39 of the Housing Finance Companies (NHB) Directions, 2010, and Directions 38 & 39 of the Non-Banking Financial Companies and Acceptance of Public Deposits (Reserve Bank) Directions, 2016.

g) At the outset, it is clarified that none of these provisions contemplates the survival of the terms of the license where the company is undergoing CIRP as per IBC. The provisions referenced by the Appellants are myopic. They do not contemplate that a company undergoing CIRP may not fulfil the conditions of the license to keep afloat as a going concern. For instance, Section 29 A of the NHB Act

requires that a housing finance company must have "adequate capital structure and earning prospects".

h) In consideration of such terms and conditions of a license that an FSP (such as the Erstwhile CD) may have been unable to fulfil, the requirements of FSP Rules explicitly states under Rule 5 (b)(ii) that "the license or registration which authorises the financial service provider to engage in the business of providing financial services shall not be suspended or cancelled during the interim-moratorium and the Corporate Insolvency Resolution Process."

i) The only reason for including such a provision within the FSP Rules is in contemplation of a scenario where the terms of the original license cannot be fulfilled, and yet, the FSP must carry on as a going concern.

j) Further, the Appellants erroneously argued that an obligation for payment is also made out under the Explanation to Section 14 of the IBC. However, it clarified that the phrase "dues" as referenced therein only means current dues arising for the use of continuation of the license. The said provision does not further the Appellants' cause in any way.

k) In view of the aforesaid, it is stated that the deposits, being assets of the Erstwhile CD, were hit by operation of Section 14 of the IBC. Therefore, alienation of the same militates against the very objective of having a calm period where the Corporate Debtor's assets remain

untouched. Further, to say that Corporate Debtor undertaking actions to its benefit must also undertake actions to its detriment would be contrary to the principle of maximization of the value of the Corporate Debtor's assets.

l) It is further submitted that repayment of deposits to FD Holders cannot fall within the ambit of the "ordinary course of business." As such, on a harmonious construction of Sections 14, 20 and 25 of the IBC, it is stated that the Administrator was obligated to keep the company as a going concern while ensuring that the Erstwhile CD's assets and interests remain protected.

m) The Learned Senior Counsel further placed reliance following case laws to emphasise that the deposits, being assets of the Erstwhile CD, were hit by operation of Section 14 of the IBC.

n) The Learned Senior Counsel relies on Para 10 of the judgement of the Hon'ble Supreme Court in the case of Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd., reported in 2017 SCC OnLine Del 12189 wherein it is observed that;

“10. In the light of above purpose or object behind the moratorium, Section 14 of the Code would not apply to the proceedings which are in the benefit of the corporate debtor, like the one before this court in as much these proceedings are not a ‘debt recovery action’ and its conclusion would not endanger, diminish, dissipate or impact the assets of the corporate debtor in any manner

whatsoever and hence shall be in sync with the purpose of moratorium which includes keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the process envisaged during the insolvency resolution process and ensuring the company may continue as a going concern.”

o) Further, in the case of P. Mohanraj v. Shah Bros. Ispat (P) Ltd., reported in (2021) 6 SCC 258 in para 30, Hon’ble Supreme Court has observed that;

“30. It can be seen that Para 8.11 refers to the very judgment under appeal before us, and cannot therefore be said to throw any light on the correct position in law which has only to be finally settled by this Court. However, Para 8.2 is important in that the object of a moratorium provision such as Section 14 is to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all stakeholders. The idea is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor. Also, the judgment of this Court in Swiss Ribbons (P) Ltd. v. Union of India [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] states the raison d'être for Section 14 in para 28 as follows: (SCC p. 55)

“28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protect the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.”

Recoveries from avoidance Application

95. It is pertinent to mention that the Appellant's/Fixed Deposit Holders had filed different Miscellaneous Applications after approval of the Resolution Plan challenging the same on the ground that Resolution Plan extending the recoveries made under Applications filed under Sections 43-51 and Section 66 of the Code shall be whatsoever may be for the benefit of the Resolution Applicant is contrary to law and void ab initio and non-est in law.

96. I.A. 449 of 2021 in CP No.4258 of 2019 also contains a relief that outcome of avoidance application filed under Sections 43-51 and Section 63 of the Code or anyone, or more of these provisions including appeal proceedings arising from there shall be for the sole benefit of creditors of the DHFL including the fixed deposit holders.

97. **The above issue has been separately dealt with in the Company Appeals, i.e. CA (AT)(Ins) No. 454 of 2021, 63 Moons Technologies Limited Vs. The Administrator Dewan Housing Finance Corporation Limited and Ors; CA (AT)(Ins) No. 455 of 2021, 63 Moons Technologies Limited Vs. The Administrator Dewan Housing Finance Corporation Limited and Ors. and in CA (AT)(Ins) No. 750 of 2021 Roopjyot Engineering Pvt. Ltd. Vs. The Administrator Dewan Housing Finance Corporation Limited and Ors.**

Decision on this issue about recoveries of avoidance application is also treated as a decision in the instant Appeals.

98. The objections of fixed deposit holders, and by depositors under EPF Act, Public Deposit Holders against the approved Resolution Plan on being dissatisfied by the distribution proposed in the approved Resolution Plan against their deposit are also not maintainable on the ground that the NCLT/NCLAT has been endowed with limited jurisdiction as specified in the I & B Code, and not to act as a court of equity or exercise plenary powers.

99. Hon'ble Supreme Court in case of Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel and Others ..., (2021) SCC OnLine

SC 569 in Paras 29-51, while dealing with the issue of the scope of interference by the Adjudicating Authority and the powers of the NCLT and NCLAT regarding approval of the Resolution Plan has referred different Supreme Court judgements pronounced so far, and summarised the law in this regard.

100. In this case, Hon'ble Supreme Court has held that;

29. *The function of the Adjudicating Authority under Section 31 is to determine whether the resolution plan “**as approved by the CoC**” under Section 30(4) “meets the requirements” under Section 30(2). If the Adjudicating Authority is satisfied that the resolution plan, as approved, meets the requirements under sub-Section (2) of Section 30, “**it shall by order approve the resolution plan**” which shall then be binding on the Corporate Debtor and all stakeholders, including those specifically spelt out:*

“31.(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.”

30. The jurisdiction which has been conferred upon the Adjudicating Authority in regard to the approval of a resolution plan is statutorily structured by sub-Section (1) of Section 31. The jurisdiction is limited to determining whether the requirements which are specified in sub-Section (2) of Section 30 have been fulfilled. This is a jurisdiction which is statutorily defined, recognised and conferred, and hence cannot be equated with a jurisdiction in equity, that operates independently of the provisions of the statute. The Adjudicating Authority as a body owing its existence to the statute, must abide by the nature and extent of its jurisdiction as defined in the statute itself.

31. The jurisdiction of the Appellate Authority under Section 61(3), while considering an appeal against an order approving a resolution plan under Section 31, is similarly structured on specified grounds. Section 61(3) provides:

“61.....(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.”

32. Section 5(7) defines the expression ‘financial creditors’ while Section 5(8) defines the expression ‘financial debt’. The expression ‘operational creditor’ is defined in Section 5(20), while the expression ‘operational debt’ is defined in Section 5(21). Now, insofar as the operational creditors are concerned, there are specific requirements which have been spelt out in sub-Section (2)(b) of Section 30. Section 30(2)(b) requires the RP to confirm upon examination that the resolution plan:

“30...(2)...(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides

for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors....”

33. *In other words, the amount which is payable to the operational creditors towards their debts must at least be either what is provided in sub-clause (i) or sub-clause (ii) of clause (b), whichever is higher. Sub clause (i) refers to the amount paid to the operational creditors in the event of a liquidation under Section 53. Sub-clause (ii) refers to the amount that would have been paid to the operational creditors, if the amount to be distributed under the resolution plan was distributed in accordance with the order of priority under Section 53(1)(b), which provides for a waterfall mechanism.*

34. *These provisions indicate that the ambit of the Adjudicating Authority is to determine whether the amount that is payable to the operational creditors under the resolution plan is consistent with the above norms which have been stipulated in clause (b) of sub-clause (2) of Section 30. Significantly, Explanation-1 to clause (b), which is clarificatory in nature, provides that a distribution which is in accordance with the provisions of the clause “shall be fair and equitable” to such creditors. Fair and equitable treatment, in other words, is what is fair and equitable between the operational creditors as a*

class, and not between different classes of creditors. The statute has indicated that once the requirements of Section 30(2)(b) are fulfilled, the distribution in accordance with its provisions is to be treated as fair and equitable to the operational creditors.

35. The appellants are challenging the treatment of operational creditors on the ground that it has not been fair and equitable. The entitlement of the operational creditors being defined by sub-clause (b) of sub-section (2) of Section 30, the clarification contained in Explanation-1 must apply. As such, as long as the payment under the resolution plan is fair and equitable amongst the operational creditors as a class, it satisfies the requirements of Section 30(2)(b).

“36. The nature of the jurisdiction which is exercised by the Adjudicating Authority, while approving a resolution plan under Section 31, has been interpreted in the judgment of a two-Judge Bench in *K Sashidhar v. India Overseas Bank* (“K Sashidhar”). The decision emphasizes that the Adjudicating Authority is circumscribed by Section 31 to scrutinizing the resolution plan “as approved” by the CoC under Section 30(4). Moreover, even within the scope of that enquiry, the grounds on which the Adjudicating Authority can reject the plan is with reference to the matters specified in sub-Section (2) of Section 30. **Similarly, the Court notes that the jurisdiction of the Appellate Authority to entertain an appeal against an approved resolution plan is defined by sub-Section (3) of Section 61. Now, it is in this context, that the consistent principle of law which has been laid down is that neither the Adjudicating Authority nor the Appellate Authority can enter into the commercial wisdom underlying the approval granted by the CoC to the resolution plan. The**

commercial wisdom of the CoC in its collegial capacity is, hence, not justiciable.

37. *In K Sashidhar (supra), Justice A M Khanwilkar, speaking for the two-Judge Bench, held:*

“57. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an “order passed by the adjudicating authority (NCLT)”, which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order “approving a resolution plan” under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers “by the resolution professional” during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria

specified by the Board. Significantly, the matters or grounds—be it under Section 30(2) or under Section 61(3) of the I&B Code—are regarding testing the validity of the “approved” resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision.

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

59. *In our view, neither the adjudicating authority (NCLT) nor the appellate authority (Nclat) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors.....”*

(emphasis supplied)

38. The Court, also held (in paragraph 62) that the legislative history of the IBC indicated that “there is a contra indication that the commercial or business decisions of financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority”.

39. *The above principles have been re-emphasised and taken further by a three-Judge Bench in Essar Steel India Limited (supra). The Court, speaking through Justice R F Narminan, held:*

“73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that

the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.”

40. *The precedents laid down by this Court are in tandem with recommendations made in the UNCITRAL's Legislative Guide on Insolvency Law, which states that it is desirable that a court does not interfere with the commercial wisdom of the decisions taken by the creditors. The relevant extract is reproduced below:*

“63. The more complex the decisions the court is asked to make in terms of approval or confirmation, the more relevant knowledge and expertise is required of the judges and the greater the potential for judges to interfere in what are essentially commercial decisions of creditors to approve or reject a plan. In particular, it is highly desirable that the law not require or permit the court to review the economic and commercial basis of the decision of creditors (including issues of fairness that do not relate to the approval procedure, but rather to the substance of what has been agreed) nor that it be asked to review particular aspects of the plan in terms of their economic

feasibility, unless the circumstances in which this power can be exercised are narrowly defined or the court has the competence and experience to exercise the necessary level of commercial and economic judgment.”

F.3 Exercise of jurisdiction

41. *Mr. Dushyant Dave, learned Senior Counsel, sought to place emphasis on the abovementioned observations in paragraph 73 of the decision in Essar Steel India Limited (supra) to submit that the decision of the CoC must reflect that it has taken into account the need to:*

- (i) Maximize the value of assets of the CD; and*
- (ii) Adequately balance the interest of all stakeholders, including of operational creditors.*

42. *The submission of learned Counsel is that in the present case, there was a failure to maximise the value of the assets and to balance the interests of the stakeholders.*

43. *The submission that there has been a failure to maximise the value of the assets has not been substantiated by any concrete material before the Court, apart from the reference to the preference shares which has already been clarified earlier in this judgment. Whether the interest of all stakeholders, including the operational creditors, has been adequately balanced has to be determined within the four corners of the statutory provisions of the IBC. It must be borne in mind that the jurisdiction of the Adjudicating Authority is circumscribed by the terms of the provisions conferring the jurisdiction. In the present case, the approved resolution plan has in fact provided for the payments to operational creditors, the percentage of recovery being 19.62 per cent. On the other hand, the payment to financial creditors is 10.32 per cent.*

44. The observations in paragraph 73 of the decision in Essar Steel India Limited (supra) clarify that once the Adjudicating Authority is satisfied that the CoC has applied its mind to the statutory requirements spelt out in sub-Section (2) of Section 30, it must then pass the resolution plan. The decision also emphasises that equitable treatment of creditors is “equitable treatment” only within the same class. In this context, the judgment contains an elaborate foundation on the basis of which it has held that financial creditors belong to a class distinct from operational creditors. This distinction was emphasised in the earlier decision in Swiss Ribbons (supra), where a two-Judge Bench of the Court, speaking through Justice R F Nariman, observed:

“51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.”

45. *In Essar Steel India Limited (supra), this Court held that “the UNCITRAL Legislative Guide...makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors”. The Court finally also observed that the ‘fair and equitable’ norm does not mean that financial and operational*

creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, it noted:

“88...Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.”

46. *The Court also noted that:*

“89...by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors.”

47. *These decisions have laid down that the jurisdiction of the Adjudicating Authority and the Appellate Authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom. Nor*

is there a residual equity based jurisdiction in the Adjudicating Authority or the Appellate Authority to interfere in this decision, so long as it is otherwise in conformity with the provisions of the IBC and the Regulations under the enactment.

48. *Certain foreign jurisdictions allow resolution/reorganization plans to be challenged on grounds of fairness and equity. One of the grounds under which a company voluntary arrangement can be challenged under the United Kingdom's Insolvency Act, 1986 is that it unfairly prejudices the interests of a creditor of the company. The United States' US Bankruptcy Code provides that if a restructuring plan has to clamp down on a dissenting class of creditors, one of the conditions that it should satisfy is that it does not unfairly discriminate, and is fair and equitable. However, under the Indian insolvency regime, it appears that a conscious choice has been made by the legislature to not confer any independent equity based jurisdiction on the Adjudicating Authority other than the statutory requirements laid down under sub-Section (2) of Section 30 of the IBC.*

49. *An effort was made by Mr. Dushyant Dave, learned Senior Counsel, to persuade this Court to read the guarantees of fair procedure and non-arbitrariness as emanating from the decision of this Court in Maneka Gandhi v. Union of India into the provisions of the IBC. The IBC, in our view, is a complete code in itself. It defines what is fair and equitable treatment by constituting a comprehensive framework within which the actors partake in the insolvency process. The process envisaged by the IBC is a direct representation of certain economic goals of the Indian economy. It is enacted after due deliberation in Parliament and accords rights and obligations*

that are strictly regulated and coordinated by the statute and its regulations. To argue that a residuary jurisdiction must be exercised to alter the delicate economic coordination that is envisaged by the statute would do violence on its purpose and would be an impermissible exercise of the Adjudicating Authority's power of judicial review. The UNCITRAL, in its Legislative Guide on Insolvency Law, has succinctly prefaced its recommendations in the following terms:

“C. 15. Since an insolvency regime cannot fully protect the interests of all parties, some of the key policy choices to be made when designing an insolvency law relate to defining the broad goals of the law (rescuing businesses in financial difficulty, protecting employment, protecting the interests of creditors, encouraging the development of an entrepreneurial class) and achieving the desired balance between the specific objectives identified above. Insolvency laws achieve that balance by reapportioning the risks of insolvency in a way that suits a State's economic, social and political goals. As such, an insolvency law can have widespread effects in the broader economy.”

50. Hence, once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty bound to abide by the discipline of the statutory provisions. It needs no emphasis that neither the Adjudicating Authority nor the Appellate Authority have an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework.

G Conclusion

51. *In the present case, the resolution plan has been duly approved by a requisite majority of the CoC in conformity with*

*Section 30(4). Whether or not some of the financial creditors were required to be excluded from the CoC is of no consequence, once the plan is approved by a 100 per cent voting share of the CoC. **The jurisdiction of the Adjudicating Authority was confined by the provisions of Section 31(1) to determining whether the requirements of Section 30(2) have been fulfilled in the plan as approved by the CoC. As such, once the requirements of the statute have been duly fulfilled, the decisions of the Adjudicating Authority and the Appellate Authority are in conformity with law.***

(emphasis supplied)

101. Based on the law laid down by the Hon'ble Supreme Court, it is clear that the NCLT/NCLT has been endowed with limited jurisdiction as specified in the I & B Code and not to act as a court of equity or exercise plenary powers.

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

“210. To put in a nutshell, the Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code read with the parameters delineated by this Court in the decisions above-referred. The jurisdiction of the Appellate Authority is also circumscribed by the limited grounds of appeal provided in Section 61 of the Code. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the Adjudicating Authority or the Appellate Authority, as the case may be, would find any

shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by Code and expositied by this Court.

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

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

noting the interplay between the procedural design of the insolvency law and the corresponding institutional infrastructure by observing:

“27. While the institutional framework is not discussed in any detail in the Legislative Guide, some of the issues are touched upon below. Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature. The design of the procedural rules plays a critical role in determining how roles are to be allocated between the various participants, in particular in terms of decision-making. To the extent that the insolvency law places considerable responsibility upon the institutional infrastructure to make key decisions, it is essential that that infrastructure be sufficiently developed to enable the required decisions to be made.”

116. Any claim seeking an exercise of the Adjudicating Authority's residuary powers under Section 60(5)(c) of the IBC, the NCLT's inherent powers under Rule 11 of the NCLT Rules 2016 or even the powers of this Court under Article 142 of the Constitution must be closely scrutinized for broader compliance with the insolvency framework and its underlying objective. The adjudicating mechanisms which have been specifically created by the statute, have a narrowly defined role in the process and must be circumspect in granting reliefs that may run counter to the timeliness and predictability that is central to the IBC. Any judicial creation of a procedural or substantive remedy that is not envisaged by the statute would not only violate the principle of separation of powers, but also run the risk of altering the delicate coordination that is designed by the IBC framework and have grave implications on the outcome of the CIRP, the economy of the country and the lives of the workers and other allied parties who

are statutorily bound by the impact of a resolution or liquidation of a Corporate Debtor.

104. Based on the judgement of the Hon'ble Supreme Court in the case of Pratap Technocrats (P) Ltd (supra) wherein Hon'ble Supreme Court has while analysing the scope of Section 31 of I&B Code, considering the earlier judgement of the Hon'ble Supreme Court passed in the case of K. Shashidhar versus Indian Overseas Bank⁹, reiterated that neither the Adjudicating Authority (NCLT) nor the Appellate Authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the Committee of Creditors. Therefore, CoC's commercial or business decisions are not open to judicial review by the Adjudicating Authority or the Appellate Authority. The Hon'ble Supreme Court has further placed reliance on the earlier judgement of three-judge Bench in case of Essar Steel India Limited (supra) and observed that there is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such committee must reflect the fact that it has taken into account maximising the value of the assets of the Corporate Debtor and the fact that it has adequately balance the interests of all the stakeholders including Operational Creditors.

105. The judicial review of the Adjudicating Authority that the Resolution Plan as approved by the Committee of Creditors has met the requirements referred to in Section 30 (2) would include a judicial review that is mentioned

⁹ (2019)12 SCC 150

in Section 30 (2) (e), of the Code and is also in compliance with the provisions of the law for the time being in force.

106. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial wisdom taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the Corporate Debtor needs to keep going as a going concern during the Insolvency Resolution Process; that it needs to maximise the value of its assets; and that the interest of all the stakeholders including operational creditors has been taken care of.

107. It is pertinent to mention that the Hon'ble Supreme Court has explicitly clarified the scope of interference by the Adjudicating Authority under Section 60 (5) (c) of the IBC in the case of Ebix Singapore (supra). Hon'ble Supreme Court has clarified that the matters like the completion of the COC, the method and percentage of its voting, the timelines for and the obligation to explain to the Adjudicating Authority reasons for any diversions from the timeline while submitting a resolution plan, and other such procedural requirements create a mechanism which tightly structures the conduct of all participants in the insolvency resolution process. This process invariably impacts the conduct of the Resolution Applicant who participates in the process and consents to be bound by the RFRP and the broader insolvency framework. An analysis of the statute and regulations framework provides insight into the dynamic and comprehensive nature of the statute.

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

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

110. In the instant case, the RBI, in the exercise of its administrative discretion under Section 45-IE of the RBI Act, superseded the Board of DHFL and appointed Administrator. Accordingly, it decided to initiate the corporate insolvency resolution proceedings with respect to DHFL under the I.B.C and not the RBI Act. Therefore, the appellant's contention about the obligation of the Administrator and the successor in the interest of the DHFL to ensure full repayment of deposit to have FD holders under the RBI and NHB Act is not sustainable.

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

112. **After elaborate discussion, we have concluded that the F D holders are Financial Creditors of the DHFL and have been treated accordingly as per the provisions of the Code. It is also found that section 45Q of the RBI Act has no applicability in the facts of the present case. The decision about payments to the creditors falls within the commercial wisdom of the COC, subject to fair and equitable play, i.e. payment of minimum liquidation value to creditors. The commercial wisdom of COC is not amenable to judicial review of any kind.**

113. **The I & B Code being a subsequent enactment, overwrites the provisions of the NHB Act, NHB directions and RBI Act. No right of full payment exists under the NHB Act or the RBI Act or under any other**

subordinate legislation. Even if it exists, any such right would be wholly repugnant to the provisions of the Code, which provide for a specific manner in priority of payment and sets out the right. The minimum amount a creditor is mandatorily required to be paid in the Resolution Plan, i.e. the liquidation value.

114. **Based on the above discussion, we hold that;**

- a) The Adjudicating Authority has not erred on this count in approving the Resolution Plan that proposes extinguishing claims to the Fixed Deposits without discharging their payments in full to Holders of FD. Therefore, it does not contravene the statutory provisions of the NHB Act and RBI Act.**
- b) AS THE CASE MAY BE, the NHB Act or RBI Act does not mandate the FULL payment to the F.D./Deposit Holders.**
- c) Further, Section 238 of the Insolvency and Bankruptcy Code, 2016, overrides the RBI and NHB Act. Therefore the approved Resolution Plan that stipulates extinguishment of the claims to the F.D. without discharging their payments in full is valid and legal under the Code.**
- d) The repayment to Fixed Deposits Upon maturity of their deposit, during the moratorium, would not fall within the ordinary course of business for Respondent No. 1, as specified under section 28(1)(k) of the Code.**
- e) Respondent No. 1 is legally authorised for making loans and investments despite its failure to repay F.D. holders as per the terms of their deposits, but only after approval of the resolution plan under the terms of the Approved Resolution Plan.**
- f) Any payment made against the F.D.'s during CIRP could fall under the preferential transaction.**

115. **Based on the above discussion, it is clear that there is nothing on record that needs interference by this Appellate Court.**

116. **However, the issue raised about the outcome of avoidance application has not been decided here. This issue has been separately dealt with in CA (AT)(INS) Nos. 454, 455 & 750 of 2021; the same shall also be a part of this judgement.**

117. **All these Appeals are decided accordingly-no order as to costs.**

[Justice M. Venugopal]
Member (Judicial)

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

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
27th January 2022

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