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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 01st AUGUST, 2022

IN THE MATTER OF:

\+ **W.P.(C) 1273/2021 & CM APPLs. 3544/2021, 8050/2021, 16374/2021, 27429/2021 & 33701/2021**

SASAKAWA INDIA LEPROSY FOUNDATION ..... Petitioner

Through: Mr. Rony John, Mr. Piyush Swami, Mr. Arshdeep Singh, Advocates

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr. Anurag Ahluwalia, CGSC with Mr. Danish Faraz Khan, Advocate for R-1 & R-2

Mr. Parag P. Tripathi, Senior Advocate with Mr. Ramesh Babu, Ms. Manisha Singh, Ms.Sanya Panjwani, Ms. Nisha Sharma, Ms.Mishika Bajpai, Advocates for R-3 & R-4/RBI

Mr. H. S. Parihar, Mr. Kuldeep Singh Parihar and Ms Ikshita Parihar, Advocates for NHB.

Mr. Raunak Dhillon, Ms. Madhavi Khanna and Ms. Niharika Shukla, Advocates for R-7 & R-8

CORAM:
HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SUBRAMONIUM PRASAD, J

1. The instant Writ Petition has been filed under Articles 226, read with 227 of the Constitution of India, by the Petitioner herein i.e. Sasakawa-India Leprosy Foundation challenging the constitutional validity of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (hereinafter referred to as the "Impugned Rules") and Notification No. S.O. 4139 (E) dated 18.11.2019, notified by the Central Government in exercise of its powers under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "IBC"), on the ground that they are *ultra vires* Articles 14, 19 (1) (g) and 21 of the Constitution, Chapter III-B of the Reserve Bank of India Act, 1934 (hereinafter referred to as the "RBI Act") and Section 36A of the NHB Act.

2. The Petitioner herein is a Public Charitable Trust engaged in providing education, livelihood opportunities, and advocating for the rights of individuals affected by leprosy. Between March 2017 to January 2018, the Petitioner opened four fixed deposit accounts with various branches of Dewan Housing Finance Corporation Limited (hereinafter referred to as "DHFL") in Delhi, to the tune of Rs. 7,56,07,000/. These FDs were non-cumulative deposits, under yearly interest schemes, and were to mature only after 03.12.2019.

3. However, in the interim, insolvency proceedings were initiated against DHFL under the IBC. In exercise of powers conferred under Section 227 read with Section 239(zk) of the IBC, the Central Government brought

out the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019. These rules were to apply to such financial providers as were to be notified by the Government. In sum and substance, the financial providers which were unable to pay their debts were brought under the scope of the IBC, and in the facts and circumstances of the present case the DHFL being such a financial service provider, was also resolved under the IBC. Subsequently, after following the procedure laid down under the Impugned Rules, several meeting of the Committee of Creditors (hereinafter referred to as "COC") were convened. As per the Impugned Rules, depositors such as the Petitioner herein were being represented by an authorised representative during the course of the COC meetings. Thereafter, the COC approved the plan floated by one, Piramal Capital and Housing Finance Limited, with an exceeding majority of 93.65% votes in its favour. It is pertinent to note that under the successful Resolution Plan, the Petitioner Trust is entitled for a refund of about 20-25% of the admitted claim amount. Upon being entitled for a refund of only a miniscule sum, the Petitioner Trust is aggrieved by the initiation of the insolvency process under the Impugned Rules, as opposed to the process envisaged under the RBI Act.

4. The contention of the Petitioners herein is that as the Impugned Rules brought financial service providers within the ambit of the IBC, small depositors and financial service providers were hit inasmuch as they were unable to recover their investment. It is also the contention of the Petitioners that in the present case, the State Bank of India has more than 90% stake in the Committee of Creditors and Resolution Plan is only under the dictum of

SBI and the approved plan does not take into account the grievances of the small scale creditors in such NBFCs which are going through a corporate insolvency process. It is, therefore, the contention of the Petitioners that these rules have been framed in violation of the rules guaranteed to such public depositors which though are in large number but have very small amounts in the NBFCs under the various provisions of RBI Act and the National Housing Bank Act, 1961 (hereinafter referred to as "**NHB Act**").

5. It is the principal contention of the learned counsel for the Petitioner that the effect of the rules which are impugned in this Writ Petition is that it nullifies the rights of depositors guaranteed under Section 45-QA of the RBI Act and Section 36-A of the NHB Act which assures that the depositors are to be repaid the value of their deposits. It is contended that the process envisaged under IBC takes away the "vested rights" of public depositors.

6. It has further been contended by the learned Counsel for the Petitioner that as the insolvency process results in the imposition of a moratorium under Section 14 of the IBC, depositors are debarred from initiating proceedings against the Corporate Debtor. It is further contended that the grievances of small financial creditors are never heard during the proceedings.

7. It is also the contention of the learned Counsel for the Petitioner that Section 45MBA of the RBI Act would prevail over provisions of the IBC in light of the non-obstante clause in Section 45MBA of the RBI Act. The Petitioner has contended that since Section 45MBA of the RBI Act was enacted "later in time", it would prevail over the provisions of the IBC. In this regard, the learned Counsel for the Petitioner has placed reliance upon

the Integrated Finance Company Limited v. Reserve Bank of India, **(2015) 13 SCC 772**.

8. Reliance has been placed upon by the judgments titled Lord Krishna Sugar Mills Ltd. v. Union of India, **(1960) 1 SCR 39**, and Cellular Operators Assn. of India v. TRAI, **(2016) 7 SCC 703** to argue that while adjudging the constitutionality of a subordinate legislation, the Court ought to take into account the relative restrictions and advantages of laws which form part of a single scheme.

9. *Per contra,* learned Counsel for the Reserve Bank of India i.e Respondent Nos. 3 and 4, has stated that the RBI is the primary statutory authority which is entrusted with the responsibility of regulating the banking sector. The counsel for Respondent Nos. 3 and 4 has stated that although RBI has issued various guidelines to ensure that NBFCs have adequate capital base to repay deposits, the deposits made with NBFCs still do not fall within the purview of the Deposit Insurance And Credit Guarantee Corporation Act, 1961. This implies that deposits with NBFCs are riskier than those in banks. Hence, it is the contention of Respondent Nos. 3 and 4 that Section 45-QA of the RBI Act and Section 36-A of the NHB Act simply underscores the contractual liability of the NBFC to its depositors.

10. The Respondent Nos. 3 and 4 have further argued that a perusal of Section 45MBA of the RBI Act indicates that it is simply an enabling section and is not mandatory in nature. It is submitted that since RBI is the primary regulator for banking, it had the discretion to invoke the insolvency under the provisions of the IBC, which envisage a more detailed and comprehensive resolution process.

11. It has further been contended by the counsel for the Respondent Nos. 3 and 4 that the laws related to economic activities are to be given greater latitude as there exists no straight jacket formula to deal with economic issues. Further, due deference is supposed to be given to the judgment of experts, and that Courts should refrain from substituting their judgment in place of experts. In this regard, reliance has been placed upon the following judgments:-

i. R.K. Garg v. Union of India, **(1981) 4 SCC 675**;
ii. Peerless General Finance and Investment Co. Limited v. Reserve Bank of India, **(1992) 2 SCC 343**;
iii. Shri Sitaram Sugar Co. Ltd. and Another v. Union of India andOrs., **(1990) 3 SCC 223**;
iv. Prag Ice & Oil Mills v. Union of India, **AIR 1978 SC 1296;**
v. P.T.R. Exports (Madras) (P.) Ltd. v. Union of India, **AIR1996 SC 346**; Balco Employees' Union (Regd) v. Union of India, **(2002) 2 SCC 333**; Bhavesh D. Parish v. Union and India, **(2000) 5 SCC 471**.

12. DHFL i.e. Respondent No. 6 and Mr. R. Subramaniakumar i.e. the administrator of DHFL (hereinafter referred to as "Respondent No. 7") raised the preliminary objection that although the Petitioner has challenged constitutionality of the Impugned Rules and Notification, the real intent of the Petitioner was otherwise. It is the submission of the Respondent Nos. 6 and 7 that the instant Writ Petition is an oblique method of challenging the approved resolution plan, for which the NCLAT is the appropriate forum.

13. The learned Counsel for the Respondent Nos. 6 and 7 have brought to the attention of this Court that 97 deposit holders had also approached the

Hon'ble Supreme Court in Vinay Kumar Mittal & Ors. v. Dewan Housing Finance Corporation Ltd. Mumbai & Ors., **(2020) 11 SCC 288** where the Hon'ble Supreme Court on 30.01.2020 upheld the CIRP process of DHFL/ Respondent No. 6.

14. Learned Counsel for the Respondent Nos. 6 and 7 also pointed out that the Petitioner can approach the NCLT, under Section 60(5) of the NCLT, if it is aggrieved by the manner in which its claims have been dealt with under the approved Resolution Plan. It is stated that Section 60(5) of the IBC ensures that only the NCLT has jurisdiction over proceedings by or against a corporate debtor. In this regard, the reliance has been placed upon Arcelor Mittal India (P) Ltd. v. Satish Kumar Gupta, **(2019) 2 SCC 1.**

15. Learned Counsel for Respondent No. 8 i.e. the COC has sought to argue that the Impugned Rules and Notification are neither bad in law, nor in conflict with the provisions of the RBI Act or the NBH Act. In this regard, the learned Counsel has placed reliance upon the report dated October 4, 2019, of the Sub-Committee of the Insolvency Law Committee for Notification of Financial Service Providers under Section 227 of the Code (hereinafter referred to as the "ILC Report"). A perusal of the ILC report indicates that the Impugned Notification and Rules were enacted after careful consideration, and after duly considering the pre-existing regulations of the RBI Act.

16. Learned Counsel for Respondent Nos. 3 and 4 added that the assertion that the no-objection granted by the RBI will result in the depletion in the value of public deposits is baseless and ought to be outrightly rejected. It is argued that the RBI gave its approval to a resolution plan which had been approved by 93.65% of the COC, and is binding upon all stakeholders,

including dissenting creditors. In this regard, reliance is placed upon Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta &Ors., **(2020) 8 SCC 531**.

17. The learned Counsel has also pointed out that the Petitioner has failed to challenge Section 227 of the IBC but has only challenged the Impugned Rules and the Impugned Notification, which is untenable in law. The counsel for Respondent No. 8 has also argued that the deposit holders do not have a right to claim to full repayment. In this regard, attention is drawn to Section 12 of the Banning of Unregulated Deposit Schemes Act, 2019 which categorically makes the repayment of deposits subject to the rigours of *inter alia* the IBC.

18. The learned Counsel for the Union i.e. Respondent No. 1, after going through the scheme of the IBC, submitted that the objective of the Impugned Rules and Notification was to provide a framework for the insolvency of Financial Service Providers, and that due process was followed in the formulation of the same.

19. In his rejoinder, the ld. Counsel for the Petitioner has reiterated that the depositors will only get a refund of about 20-25% of their claim amount, and that this indicates an abdication of administrative discretion by the RBI. It has been argued that this abdication of power is more evident from the RBI's submissions that deposits in NBFCs are riskier. It has also been highlighted that while the RBI's role under the IBC is relegated to being a mere spectator, it plays the primary role of ensuring regulatory oversight under the RBI Act, and NHB Act.

20. The Petitioner further submitted that the ILC Committee had categorically discussed the non-viability of resorting to the IBC for systematically important entities such as DHFL.

21. Heard the arguments advanced by the counsel for the Petitioner, and Respondents, and perused the material on record.

22. The legal matrix, as relevant to the instant Writ Petition, spans three principal legislations *namely*, the RBI Act, the NHB Act and the IBC. The law governing NBFCs at various points in time has been delineated below:-

a. On 01.12.1964, Chapter III-B titled *'Provisions Relating to Non-Banking Institutions Receiving Deposits and Financial Institutions'* was inserted in the RBI Act. *Vide* this amendment, the RBI gained supervisory authority over, *inter alia,* non-banking financial institution (hereinafter referred to as "NBFIs/NBFCs"), as defined under Section 45-I (a) of the RBI Act.

b. On 09.01.1997, as the previous amendments were considered to be inadequate to regulate NBFIs, Sections 45-IA (Requirement of registration and net owned fund), 45-IB (Maintenance of percentage of assets), 45-IC (Reserve Fund), 45-JA (Power of Bank to determine policy and issue directions), 45-MB (Power of Bank to prohibit acceptance of deposit and alienation of assets), 45- NC (Power of Bank to exempt) and 45-QA (Power of Company Law Board to order repayment of deposit) were also inserted in Chapter III-B of the RBI Act.

c. On 18.06.1997, *vide* Notification DFC (COC) No. 112/ED(SG)-97, the RBI exempted NBFIs, as defined in Section 2(d) of the NHB Act from the application of Chapter III-B of the RBI Act.

d. On 12.06.2000, certain Sections *namely*, Sections 29-A (Requirement of registration and net owned fund), 29-B (Maintenance of percentage of assets), 29-C (Reserve Fund) and 36-A (power to order repayment of deposit) were inserted in the NHB Act. It is pertinent to note that these Sections were analogous to Sections 45-IA, 45-IB and 45-IC, Section 45-QA of RBI Act. Hence, the regulatory power as had previously existed with the RBI was now to be exercised under the NHB Act.

e. Thereafter, on 28.05.2016, the Central Government notified the Insolvency and Bankruptcy Code, 2016 ("IBC/Code") to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner. The provisions of the IBC, as relevant to the instant Writ Petition are as follows:-

> ***"Section 227 - Power of Central Government to notify financial service providers, etc***
>
> *[Notwithstanding anything to the contrary 2[contained in this Code] or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators,* ***notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed.]***
>
> *[Explanation. -- For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be*

conducted with such modifications and in such manner as may be prescribed.]"

"238. Provisions of this Code to override other laws.
The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

"239. Power to make rules.
(1) The Central Government may, by notification, make rules for carrying out the provisions of this Code.
(2) Without prejudice to the generality of the provisions of sub-section (1), the Central Government may make rules for any of the following matters, namely,

xxx

(zk) the manner of conducting insolvency and liquidation proceedings under Section 227."

(emphasis supplied)

f. The IBC did not regulate the insolvency of NBFIs when it was enacted. However, Section 227, read with Section 239 of the IBC gave the Central Government the power to notify 'financial service providers' to carry out their insolvency under the IBC, and enact Rules to regulate the procedure as well.

g. On 01.08.2019, the Finance (No. 2) Act, 2019 came into force. Thereafter, on 09.08.2019, *vide* Chapter VI of the Finance Act, 2019, Section 45MBA was notified under Chapter III-B of the RBI Act. Pertinently, Section 45MBA(2) gave the RBI the power

to frame schemes for the reconstruction of NBFCs. The relevant Section reads as under:-

> ***"45MBA. 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:--*
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> ***
>
> ***(b) reconstruction of the non-banking financial company;**.'*

h. Thereafter, on 15.11.2019, the Central Government in exercise of its powers under Section 227 read with Section 239(zk) of the IBC, notified the Impugned Rules to govern the insolvency resolution and liquidation of Financial Service providers/NBFCs. The Impugned Rules were to apply to such categories of financial service providers, as may be notified by the Central Government under section 227.

i. On 18.11.2019, the MCA/Respondent No. 1 under exercise of its power under section 227 of the IBC, notified one such financial service provider i.e NBFCs, having assets of Rs. 500 crore or more. The relevant excerpt of the notification is set out below:-

> *"S.O. 4139(E).—In exercise of the powers conferred by section 227 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government in consultation with the Reserve Bank of India hereby notifies as under:*
> *The insolvency resolution and liquidation proceedings of the following categories of financial service providers shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 read with the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (in this notification referred to as the 'Rules') and the applicable Regulations...."*

j. By virtue of the above, insolvency and liquidation proceedings of NBFIs, with asset size of Rs.500 crore or more, could be undertaken under the Impugned Rules.

k. On 19.11.2019, *vide* Notification No. DOR.047/CGM(MM)-2019, the earlier notification dated 18.06.1997 (which exempted housing finance institutions from Chapter III-B of the RBI Act) was withdrawn. This implies that *inter alia* Section 45MBA of the RBI Act could be exercised to govern NBFCs, such as DHFL.

23. NBFC has been defined under both, the NHB Act, and the RBI Act. Further, as they are banking institutions, the RBI is the primary regulator for NBFCs. The Impugned Rules have been formulated under the IBC and seek to subject financial service providers including NBFCs, to the resolution process as envisaged under the IBC. The Petitioner has challenged the Impugned Rules on the ground that they are in the teeth of certain sections of the RBI Act and NHB Act, and consequently that they take away certain vested rights of depositors, such as the Petitioners herein.

24. It is trite law that the Impugned Rules being subordinate legislation, can be challenged on certain well established principles. The Supreme Court in State of T.N. v. P. Krishnamurthy, **(2006) 4 SCC 517**, has laid down the parameters of judicial review of subordinate legislation as under:-

> *"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:*
> *(a) Lack of legislative competence to make the subordinate legislation.*
> *(b) Violation of fundamental rights guaranteed under the Constitution of India.*
> *(c) Violation of any provision of the Constitution of India.*
> *(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.*
> *(e) Repugnancy to the laws of the land, that is, any enactment.*
> *(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).*

25. The judicial pronouncements made it clear that while there exists a presumption of constitutionality in favour of the Impugned Rules, a successful challenge to them can be levelled on grounds such as, the lack of legislative competence, violation of fundamental rights, repugnancy to the other laws and manifest arbitrariness/unreasonableness.

26. The primary challenge of the Petitioner is that the Impugned Rules are

repugnant to the RBI Act, and the NHB Act. The ld. Counsel for the Petitioner draws attention to Section 45Q of the RBI Act which contains a non-obstante clause to the effect that Chapter III of the RBI Act would have effect notwithstanding anything inconsistent contained in any other law. Further reliance has been placed upon Section 45MBA of the RBI Act which categorically states that without prejudice to any other provision, the RBI is empowered to make regulations for the reconstruction of *inter alia* NBFCs. It is the contention of learned Counsel for the Petitioner that RBI Act which contains a non-obstante clause, and is the special statute governing NBFCs must prevail over the IBC, which is a general statute. Therefore, it is argued that the Impugned Rules are inconsistent with Section 45Q of the RBI Act, and are *ultra vires.*

27. The Impugned Rules have been framed under the powers granted under Section 227 read with Section 239 (2) (zk) of the IBC. Section 239 (2) of the IBC gives the Central Government the power to make rules to govern the insolvency process. Under Section 227, the Central Government has categorically been empowered to notify appropriate financial service providers to enable their insolvency process to be carried out under the Code.

28. It is pertinent to reproduce the observations in the 'Report Of The Sub-Committee Of The Insolvency Law Committee For Notification Of Financial Service Providers Under Section 227 of The Insolvency And Bankruptcy Code, 2016, which reads as under:-

> ***"FRAMEWORK FOR FACILITATING THE RESOLUTION OF FSPs***

*In light of the critical services provided by many FSPs and the impact that their failure can have on the economy, resolution frameworks, particularly for certain kinds of FSPs, such as NBFCs and HFCs, assume great significance. As per the latest financial stability report of the RBI released on June 27, 2019 (**FSR**)20, NBFCs are the largest net borrowers of funds from the financial system with gross payables of around INR 8,446 billion and gross receivables of around INR 723 billion as at March-end 2019. The highest funds have been received from scheduled commercial banks, followed by AMC-MFs and insurance companies. The FSR further notes that NBFCs depend largely on public funds which account for seventy percent of the total liabilities of the sector. Bank borrowings, debentures and commercial papers are the major sources of funding for NBFCs*

Recently, the Finance (No. 2) Act, 2019 has conferred certain additional resolution powers on the RBI in relation to NBFCs by amending the Reserve Bank of India Act, 1934. Such powers include: (i) removal of directors of NBFCs on grounds of public interest, to prevent the affairs from being conducted in a manner detrimental to the interests of depositors or creditors, in the interest of financial stability or for securing proper management; (ii) supersession of the board of directors on the grounds specified in (i) and appointment of an administrator for a specified period; and (iii) framing schemes which may provide for amalgamation, enabling creation of a bridge institution for transferring the viable part of the business to it, reconstruction of the NBFC, etc. These

schemes may be prepared in public interest, in the interest of financial stability or enabling the continuance of the activities if it is critical to the functioning of the financial system.

In light of the factors mentioned above and the possibility of a contagion effect in case of failure of NBFCs and HFCs, the resolution framework for such entities needs to be re-evaluated. As highlighted earlier, currently, India does not have a specialized and consolidated resolution framework for FSPs.

The Finance (No. 2) Act, 2019 has also amended the National Housing Bank Act, 1987 and conferred certain powers for regulation of HFCs with the RBI. After reviewing the regulatory framework applicable to HFCs, the RBI will issue revised regulations in due course. Till the RBI issues a revised framework, HFCs must comply with the directions and instructions issued by the National Housing Bank.

While the recent amendments might help the RBI in resolving at least some FSPs under distress, the resolution framework for FSPs in general remains uncomprehensive, with disparate powers conferred on various financial sector regulators across several statutes. Even the recent amendments to the Reserve Bank of India Act, 1934 remain untested. *Further, post enactment of the IBC, an event of default is no longer a ground for filing an application for winding up under the Companies Act, 2013. Consequently, the stakeholders of FSPs are left with no effective remedy against a defaulting FSP.*

> *Comparatively, the resolution framework for non-FSPs under the IBC is working reasonably well.* ***Since the Parliament in its wisdom has provided the flexibility for the IBC to be used for insolvency resolution of FSPs and even the FRDI Bill had envisaged the application of the IBC to certain categories of FSPs while formulating a dedicated framework for resolution of FSPs, there is a clear case for allowing some FSPs to be resolved under the IBC to the extent possible, as under:***
>
> *1. Where the business and regulation of an FSP is not different from that of a corporate debtor currently being resolved under the IBC, the FSP should be resolved under the normal process of the IBC;*
>
> *2. Where the business and regulation of an FSP is fairly different from that of a corporate debtor currently being resolved under the IBC, the FSP should be resolved under the IBC with appropriate modifications; and*
>
> *3. Where the business and regulations of an FSP is substantially different from that of a corporate debtor currently being resolved under the IBC, the FSP may be not resolved under the IBC."* (emphasis supplied)

29. In light of the foregoing, it is abundantly evident that the Central Government had the occasion to go through, and extensively evaluate the powers granted to the RBI under Section 45MBA of the RBI Act. It is only after carefully considering the pre-existing framework under the RBI Act, and noting its various shortcomings, did the legislature in its wisdom enact the Impugned Rules and Notification, and decide to subject a NBFC to the

rigours of the IBC. Hence, this Court finds no force in the argument of the Petitioner that the provisions of the RBI would prevail over the IBC.

30. As it appears, this Court needs to examine the scheme of the statutes in the context of the controversy presented before it. The IBC is a special statute to streamline and consolidate the insolvency process of various companies and institutions and also to ensure that the assets of the Corporate Debtor are maximized. While there is no doubt that the RBI Act principally governs financial institutions, including NBFCs, it is by no stretch of imagination a special statue in respect of insolvency.

31. The legislative intent in introducing the IBC can be gathered from the Statements of Objects and Reasons of the IBC, as reproduced below:-

> *"**Statement of Objects and Reasons**.—There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.*

2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such

> *proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.*
>
> *4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.*
> *5. The Code seeks to achieve the above objectives."*

32. The objective of the legislature in enacting the Code was to streamline and consolidate the various laws that existed in relation to insolvency and bankruptcy for companies and other financial institutions. The Apex Court in Swiss Ribbons Pvt. Ltd. and Ors. v. Union of India and Ors., **(2019) 4 SCC 17,** has held as under:-

> ***"11.*** *As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The* ***Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs.*** *When, therefore, a*

> *resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See* ***ArcelorMittal*** *(supra) at paragraph 83, footnote 3]."*

33. Furthermore, in Innoventive Industries Ltd. v. ICICI Bank and Ors., AIR 2017 SC 4084 the Apex Court held as under:-

> *13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World*

> *Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia.*
>
> *52. On the other hand, the Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, inter alia, of corporate persons. Insofar as corporate persons are concerned, amendments are made to the following enactments by Sections 249 to 252 and 255:*
>
> *…*
>
> *253. It is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein…"*

34. As has been noted by the Apex Court in Swiss Ribbons (supra), the IBC sought to effect the resolution in a time bound manner to ensure that the value of the assets of the Corporate Debtors does not deplete. The Code was enacted as a beneficial legislation and was intended to put the Corporate Debtor back on its feet, and is not a mere recovery legislation for aggrieved creditors. Furthermore, as was categorically noted in Swiss Ribbons (Supra), the moratorium imposed under Section 14 of the IBC is in the utmost interest of the Corporate Debtor, and is imperative to protect the distressed entity till such time a resolution is arrived at. Considering the objective of the IBC, this Court finds no force in the argument of the Petitioner that the Impugned Rules and Notification have extinguished the jurisdiction of the NCLT thereby causing prejudice to the Petitioners.

35. Further, the RBI has been the primary regulator of NBFCs under Chapter III-B of the RBI Act since 1964. Being the primary regulator for NBFCs, the RBI in its '*Summary of Recommendations of The Task Force On NBFCs'* noted that the existing legislative and regulatory framework governing the insolvency of NBFCs required further refinement and improvement because of the rising number of defaulting NBFCs, and also as there was an urgent need for an efficient redressal mechanism for individual depositors. It was also noted that the insolvency process for NBFCs remained deficit as it was unable to prevent the Corporate Debtor's assets from depleting and also did not adequately benefit creditors. This discretion accorded to the RBI has been underscored in the wording of Section 45MBA itself. The word "may" as opposed to 'shall' appears in Section 45 MBA of the RBI Act. This indicates that the Section is merely enabling/directory and not mandatory in nature.

36. As has been noted above, the RBI is the primary regulator of NBFCs and hence was well within its powers to apply its discretion to initiate the insolvency process under the Impugned Rules or invoke the newly added provisions under the RBI Act.

37. The Petitioner has argued that Section 45QA of the RBI Act read with Section 36A of the NHB Act bestow upon depositors, such as the Petitioner, the "vested right" to claim the entirety of their deposits. It is argued that the Impugned Rules have extinguished these "vested rights" of depositors, such as the Petitioner. In this regard, the relevant Sections reads as follows:-

> ***"Section 45-QA of the Reserve Bank of India Act, 1934***

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

(2) *Where a non-banking financial company has failed to repay any deposit or part thereof in accordance with the terms and conditions of such deposit, the Company Law Board constituted under section 10E of the Companies Act, 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.

Section 36-A of the NHB Act

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.* (emphasis supplied)

38. Upon a perusal of the abovementioned Sections, it is evident that these Sections lay down the procedure for repayment of deposit by a NBFC. Section 45QA(1) directs that every deposit accepted by a NBFC, unless renewed, shall be repaid in accordance with the terms and conditions of such deposit. Section 45QA(2) states that in case a NBFC has failed to repay the deposit, the Company Law Board shall, on its own motion or on an application of the depositor, direct, the NBFC to repay such deposit or part thereof forthwith. Section 36A of the NHB Act is analogous to Section 45QA of the RBI and is similarly worded.

39. In the considered opinion of this Court, the true import of the Sections is not to create a "vested right" in favour of the depositors to necessarily receive a full repayment of their deposits. A plain reading of Section 45-QA

of the RBI Act and Section 36-A of the NHB Act indicates that they simply underscore the contractual liability of the NBFC and provide for a redressal mechanism for depositors to claim their money. Further, although the RBI has issued various guidelines to ensure that NBFCs have adequate capital base to repay deposits, the deposits made with NBFCs still do not fall within the purview of the 'Deposit Insurance And Credit Guarantee Corporation Act, 1961', thereby making them riskier.

40. In this regard, the Supreme Court in Kanaya Ram and Ors. v. Rajender Kumar and Ors., **AIR 1985 SC 371** has noted the following with regard to a vested/accrued right:-

> *"... It has been held ever since the leading case of Abbot v. Minister for Lands LR (1895) AC 425* ***that a mere right to take advantage of the provisions of an Act is not an accrued right.*** *Abbot's case has been followed by this Court in a number of decisions. In such a situation, the Court is bound to take into consideration the subsequent events and mould the relief accordingly."*
>
> (emphasis supplied)

41. Further, the Supreme Court in Howrah Municipal Corpn. and Ors. vs. Ganges Rope Co. Ltd. and Ors., **[2003]Supp 6 SCR 1212** has observed as under:-

> *37. The argument advanced on the basis of so-called creation of vested right for obtaining sanction on the basis of the Building Rules (unamended) as they were on the date of submission of the application and the order of the High Court fixing a period for decision of the same, is misconceived. The word 'vest' is normally*

used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word 'vest' has also acquired a meaning as "an absolute or indefeasible right" [See K.J. Aiyer's 'Judicial Dictionary' (A complete Law Lexicon), Thirteenth Edition].

The context in which respondent - company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to 'ownership or possession of any property' for which the expression 'vest' is generally used. What we can understand from the claim of a 'vested right' set up by the respondent-company is that on the baas of Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the court for its consideration, it had a 'legitimate' or 'settled expectation' to obtain the sanction. ***In our considered opinion, such 'settled expectation', if any, did not create any vested right to obtain sanction. True it is that the respondent-company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such 'settled expectation' has been rendered impossible of fulfillment due to change in law. The claim based on the alleged 'vested right' or 'settled expectation' cannot be set up against statutory provisions which were brought into force by the State***

Government by amending the Building Rulesand not by the Corporation against whom such 'vested right' or 'settled expectation' is being sought to be enforced. The 'vested right' or 'settled expectation' has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this such a 'settled, expectation' or so-called 'vested right' cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon.

(emphasis supplied)

42. In Manish Kumar vs. Union of India (UOI) and Ors., **(2021) 5 SCC 1,** the Supreme Court has observed as under:-

"361. However, we cannot also lose sight of the fact that the Legislature has power to impair and take away vested rights. The limitation that flows, however, is from both Article 14 and 19 read with Article 21. It flows from the Doctrine that the action of the State must be fair and reasonable. *The question, as to validity of the retrospective law, is a matter to be judged on a consideration of the facts, the period of time, over which the retrospective law operates, the impact of the law on the vested rights, the public interest, the nature of the right, which is the subject matter of the law and the terms of the law.*

362. The nature of the right involved in this case, is the right of the financial creditors to move an application Under Section 7. Though, Section 7 confers a right upon the financial creditor to file the application, the proceedings are one in rem. We have already dealt with

> *the scope of the Code and the consequences it can produce on the stakeholders and also the real estate project. The Legislature was faced with the situation, where it felt that the requirement, as to maintainability of the application Under Section 7, must, in regard to pending applications, be modified in the manner done. There is a determining principle, namely, the perception from experience about how the entire object of the Code would stand jeopardised if applications already filed could go on even when a fair and reasonable number of kindred souls are not available to support it. Once there is a principle, it cannot be capricious, excessive or disproportionate unless we find the time given under the proviso is manifestly arbitrary. A vested right under a statute can be taken away by a retrospective law.* ***A right given under a statute can be taken away by another statute. We cannot ignore the fact that there was considerable public interest behind such a law. The sheer numbers, in which applications proliferated, combined with the results it could produce, cannot be brushed aside as an irrational or capricious aspect to have been guided by in making the law. Being an economic measure, the wider latitude available to the Law Giver, cannot be lost sight of."***
>
> (emphasis supplied)

43. It emerges that the mere right to take advantage of certain provisions of an Act does not by itself create a vested right. Further, the legislature is well within its right to create subsequent laws which may take away vested rights. It also appears from a reading of Manish Kumar (Supra) that greater latitude is to be awarded to the legislature in dealing with economic policies. Considering this, this Court finds no force in the argument of the Petitioner

that the impugned rules violate the Petitioner's 'vested rights' supposedly created under Section 45-QA(1) of the RBI Act or Section 36-A of the NHB Act.

44. It also cannot be accepted that the Impugned Rules are unconstitutional as they unjustly curtail the jurisdiction of the NCLT, and the Board under NHB Act after the moratorium under Section 14 of the IBC is imposed.

45. Further, it is trite law that the scope of judicial review in matters relating to the financial and economic policies governed by special bodies, such as the RBI, is narrow. In Peerless General Finance and Investment Co. Limited and Ors. v. Reserve Bank of India and Ors., **(1992) 2 SCC 343,** the Supreme Court has observed as under:-

> ***"35. Before examining the scope and effect of the impugned paragraphs 6 and 12 of the directions of 1987, it is also important to note that Reserve Bank of India which is bankers' bank is a creature of Statute. It had large contingent of expert advice relating to matters affecting the economy of the entire country arid nobody can doubt the bonafides of the Reserve Bank in issuing the impugned directions of 1987. The Reserve Bank plays an important role in the economy and financial affairs of India and one of its important functions is to regulate the banking system in the country...***
>
> *36. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse Its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably.*

> *Courts are not to interfere with economic policy which is the function of experts. It is not the function of the Courts to sit in Judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts. "*
>
> (emphasis supplied)

46. It is a well-established principle that this Court ought not to interfere in matters of economic policy, for which competent and specialised bodies such as RBI have been created. This Court can only strike down the directions issued by the RBI upon being satisfied that the directions were wholly unreasonable or violative of the Constitution or provisions of a given statute. In the considered opinion of this Court, the MCA in consultation with the RBI has taken a considered decision to resolve the financial defaults of DHFL under the Impugned Rules. Hence, this Court finds no reason to interfere with discretion exercised by the RBI.

47. In light of the foregoing, it is evident that the Impugned Rules operate in their own sphere, and are not repugnant to or in the teeth of the provisions of the RBI Act or NHB Act. Further, Section 45MBA is only directory in nature, and does not mandate that the insolvency of an NBFC is carried out under the RBI Act. In light of this, it cannot be said that both the Impugned Rules and the Acts cannot be reconciled. Further, for matters concerning insolvency, the IBC may prevail unless anything to the contrary is expressly laid down by the RBI.

48. The Impugned Notification is simply procedural in nature, and lays down the threshold of Rs. 500 Crore or more, as the asset value of a NBFC

for the Impugned Rules to apply. The Central Government has issued this Notification in pursuance of its powers under Section 227 of the Code, and there is no infirmity in the same. Hence, this Court does not find occasion to interfere with the Impugned Rules or Notification as the Petitioner has failed to dislodge the presumption of constitutionality existing in their favour.

49. With these observations, the petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

AUGUST 1, 2022
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