IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 12434 of 2017

ESSAR STEEL INDIA LIMITED & 1....Petitioner(s)
Versus
RESERVE BANK OF INDIA & 3....Respondent(s)

Appearance:

MR MIHIR THAKORE, SENIOR COUNSEL WITH MR SAURABH SOPARKAR, SENIOR COUNSEL WITH MR MIHIR JOSHI, SENIOR COUNSEL WITH MR KEYUR GANDHI, ADVOCATE WITH MR MAHESH AGRAWAL, ADVOCATE WITH MR NISARG DESAI, ADVOCATE WITH MR RAHEEL PATEL, ADVOCATE WITH MR SHRIRAJ KHAMBETE FOR NANAVATI ASSOCIATES, ADVOCATE for the Petitioner(s) No. 1 - 2

MR DARIUS KHAMBHATTA, SENIOR COUSNEL WITH MR AMAR N BHATT, ADVOCATE WITH RAJENDRA BAROT, ADVOCATE WITH NISHANTH SHASHIDHARAN, ADVOCATE WITH MR VIVEK SHETTY for the Respondent(s) No. 1

NOTICE SERVED BY DS for the Respondent(s) No. 2 , 4

MR RAVI KADAM, SENIOR COUNSEL WITH MR ANSHIN DESAI, SENIOR COUNSEL WITH MR NIRAG PATHAK, ADVOCATE WITH MR AMEYA GOKHLE, ADVOCATE WITH MS GRISHMA AHUJA FOR SHARDUL AMARCHAND MANGALDAS AND CO, ADVOCATE for the Respondent(s) No.2

MR KAMAL B TRIVEDI, ADVOCATE GENERAL WITH MR RASHESH SANJANWALA, SENIOR COUNSEL WITH MR SANDEEP SINGHI WITH MR SIDDHARTH JOSHI FOR SINGHI & CO, ADVOCATE for the Respondent(s) No. 3

CORAM: **HONOURABLE MR.JUSTICE S.G. SHAH**

Date : 17/07/2017

ORAL ORDER

1. Heard learned Senior Counsel Mr. Mihir Thakore, with learned Senior Counsels Mr. Saurabh Soparkar, and Mr. Mihir Joshi, with learned advocates Mr. Keyur Gandhi for M/s. Nanavati Associates, Mr. Mahesh Agrawal, Mr. Nisarg Desai, Mr. Raheel Patel and Mr. Shriraj Khambete for the petitioner on 7.7.2017 and 12.7.2017.

2. Heard learned Senior Counsel Mr. Darius Khambhatta, with learned advocates Mr. Amar N Bhatt, Mr.Rajendra Barot, Mr. Nishanth Shashidharan, and Mr. Vivek Shetty for the Respondent No. 1.

3. Heard learned Senior Counsel Mr. Ravi Kadam, with learned Senior Counsel Mr. Anshin Desai, with learned advocate Mr. Nirag Pathak, Mr. Ameya Gokhle, and Ms. Grishma Ahuja for M/s. Shardul Amarchand Mangaldas & Co., for the respondent No.2.

4. Heard learned Senior Counsel and Advocate General Mr. Kamal B. Trivedi, with learned Senior Counsel Mr. Rashesh Sanjanwala, with Mr. Sandeep Singhi with Mr. Siddharth Joshi for M/s. Singhi & Co. for the respondent No.3 opposing

the petition on 12.7.2017 and 13.7.2017.

5. Heard learned Senior Counsels Mr. Mihir Thakore and Mr. Darius Khambhatta, in reply on 13.7.2017 & 14.7.2017. Perused the record including notes of submissions.

6. The petitioner Essar Steel India Limited has invoked jurisdiction of the Court under Article 14, 19(1)(g) and 226 of the Constitution of India in the matter of the provisions of Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by challenging the Decision of the Reserve Bank of India (in short 'RBI') vide their Press Release dated 13.06.2017 directing banks to initiate proceedings against 12 Companies including the Petitioner under the Provisions of IBC and the decision of Consortium Of Lenders to initiate Petition under Section 9 of The Insolvency and Bankruptcy Code, 2016 and failure of the Consortium of Banks led By State Bank of India (in short 'SBI') to implement the package of debt restructuring approved by the Board of Directors of the Petitioner – Company.

7. The Respondent No. 1 is RBI, Respondent No. 2 is SBI, respondent No. 3 is Standard and Chartered Bank (in short 'SCB') and Respondent No. 4 is National Company Law Tribunal (in short 'NCLT').

8. The petitioner has prayed for following directions and order in form of a writ by the court:

a) Issue a writ, order or direction or any other writ, order or direction quashing / setting aside the decision of the Reserve Bank of India contained in Press Release dated 13.06.2017 directing the lenders to initiate proceedings under the Insolvency and Bankruptcy Code, 2016 in relation to the Petitioner.

b) Issue a writ, order or direction or any other writ, order or direction quashing / setting aside the decision of the STATE BANK OF INDIA of filing proceedings under the Insolvency and Bankruptcy Code, 2016 in relation to the Petitioner;

c) Issue a writ, order or direction or any other writ, order or direction quashing / setting aside the decision of the Standard Chartered Bankof filing proceedings under the Insolvency and Bankruptcy Code, 2016 in relation to the Petitioner;

d) Issue a writ, order or direction restraining the respondent No.4 – adjudicating authority under Bankruptcy Code, 2016 (National Company Law Tribunal, Ahmedabad) from proceeding further with proceedings in the petition initiated under Section 7 of Bankruptcy Code by Respondent 2 and 3;

e) Issue a writ, order or directing Respondent to place the Petitioner in the category of companies falling in para 4 of the Press Release dated 13.6.2017 directing the banks to finalise the resolution plan within six months;

Pass such other or further orders, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

9. Since the main challenge in the petition is decision of June 13, 2017 in the form of press release by the RBI, it would be relevant to recollect its contents, as on 13.06.2017; because it has been modified/corrected on July 08, 2017; after the order dated 4.7.2017 by this

Court, calling upon RBI to initially explain that what they mean by "Such cases will be accorded priority by the National Company Law Tribunal", which is a statement in such Press release, which reads thus:

"Date : Jun 13, 2017
RBI identifies Accounts for Reference by Banks under the Insolvency and Bankruptcy Code (IBC)
The Reserve Bank of India had issued a Press Release on May 22, 2017 outlining the steps taken and those on the anvil pursuant to the promulgation of the Banking Regulation (Amendment) Ordinance, 2017. The Press Release had mentioned inter alia that the RBI would be constituting a Committee comprised majorly of its independent Board Members to advise it in regard to the cases that may be considered for reference for resolution under the Insolvency and Bankruptcy Code, 2016 (IBC). 2. An Internal Advisory Committee (IAC) was accordingly constituted and it held its first meeting on June 12, 2017. The IAC, in the meeting, agreed to focus on large stressed accounts at this stage and accordingly took up for consideration the accounts which were classified partly or wholly as non-performing from amongst the top 500 exposures in the banking system. 3. The IAC also arrived at an objective, non-discretionary criterion for referring accounts for resolution under IBC. In particular, the IAC recommended for IBC reference all accounts with fund and non-fund based outstanding amount greater than Rs. 5000 Crores, with 60% or more classified as non-performing by banks as of March 31, 2016. The IAC noted that under the recommended criterion, 12 accounts totaling about 25 per cent of the current gross NPAs of the banking system would qualify for immediate

reference under IBC.

4. As regards the other non-performing accounts which do not qualify under the above criteria, the IAC recommended that banks should finalise a resolution plan within six months. In cases where a viable resolution plan is not agreed upon within six months, banks should be required to file for insolvency proceedings under the IBC.

5. The Reserve Bank, based on the recommendations of the IAC, will accordingly be issuing directions to banks to file for insolvency proceedings under the IBC in respect of the identified accounts. Such cases will be accorded priority by the National Company Law Tribunal (NCLT).

6. The details of the resolution framework in regard to the other non-performing accounts will be released in the coming days.

7. The circular on revised provisioning norms for cases accepted for resolution under the IBC is being issued separately.

Jose J. Kattoor
Chief General Manager

Press Release: 2016-2017/3363”

10. Thus the intention which is disclosed by the RBI is clear that they will identify the accounts, will issue directions to banks to file insolvency proceedings under the IBC and such cases will be accorded priority by the NCLT; as if they are directive authority above NCLT, when para 5 of the press release reads:

> "5. The Reserve Bank, based on the recommendations of the IAC, will accordingly be issuing directions to banks to file for insolvency proceedings under the IBC in respect of the identified accounts. Such cases will be accorded priority by the National Company Law Tribunal (NCLT)."

This mean NCLT has to give priority to cases filed by the directives of RBI against the cases, which are filed by other creditors or petitioners before the NCLT.

11. Therefore, this Court has to call upon the RBI to explain their stand on returnable date 7.7.2017. However no explanation has come forward on record on 7.7.2017 but learned counsel for the RBI has admitted that there is mistake on the part of the RBI and seek apology and convey sorrow on behalf of RBI for such drafting, submitting that there is improper drafting but not the intention as is visualized from the para 5 of such press release dated 13.6.2017 and confirm that RBI will issue corrigendum to delete such line. In turn RBI has issued corrigendum on July 8, 2017 (page 942 with petition), and disclosed such fact on record by way of affidavit dated 13.7.2017 submitting that:

> "2. Respondent No.1 issued a corrigendum dated July 8, 2017 to its press release dated June

13, 2017 bearing No.2016-2017/3363 titled "RBI identifies Accounts for Reference by Banks under the Insolvency and Bankruptcy Code (IBC)" (the Press Release"), whereby the sentence "Such cases will be accorded priority by the National Company Law Tribunal (NCLT)" in paragraph No.5 of the Press Release has been deleted. Hereto annexed and marked as Exhibit-1 is the copy of corrigendum dated July 8, 2017."

The corrigendum reads as under:

Date : Jul 08, 2017
Corrigendum
The Reserve Bank of India had issued a Press Release on June 13, 2017 bearing reference number 2016-2017/3363 ("Press Release") titled 'RBI identifies Accounts for Reference by Banks under the Insolvency and Bankruptcy Code (IBC)'. The third line of paragraph no. 5 of the Press Release, which reads as follows: "*5. ...Such cases will be accorded priority by the National Company Law Tribunal (NCLT).*" stands deleted. The remaining contents of the Press Release remain unchanged. Jose J. Kattoor Chief General Manager Press Release : 2017-2018/78

12. Unfortunately though RBI has admitted through its counsel before the court that it was their mistake in releasing press note with such statement, they failed to disclose their regret on record and therefore they have to file another affidavit on 14.7.2013, submitting as under:

> "3. Given the purpose of expeditious resolution of non-performing accounts for which the Press Release was issued, the words *"Such cases will be accorded priority by the National Company Law Tribunal (NCLT)"* ("the Sentence") were included into the Press Release. The intention was to underline the time-bound nature of the resolution process envisaged under the Insolvency and Bankruptcy Code, 2016 and recommend to the Banks to make appropriate applications to the Hon'ble National Company Law Tribunal for expeditious hearing. However, the language used did not properly express that intention, was unfortunate and is regretted.
>
> 4. However, Respondent No.1 forthwith issued the corrigendum for deleting the Sentence in deference to this Hon'ble Court immediately after the hearing before the Hon'ble Court on July 7, 2017. Respondent No.1 humbly submits that the intention was not in any manner to show disrespect to the

Hon'ble National Company Law Tribunal."

13. Therefore, though such issue may be treated as resolved after corrigendum as above, two more points needs discussion and consideration.

1) When the Court has specifically inquired about the decision in form of a document of RBI to publish such press release, Mr. Darius Khambhatta, learned Senior Counsel with Mr. Amar N. Bhatt, learned advocate appearing for respondent No.1 has placed on record (page No. 948) the stand of RBI that;

> "pursuant to the recommendations of the Internal Advisory Committee (IAC) (which held its meeting on June 12,2017), RBI took the decision which is contained in the Press Release dated June 13,2017 (Annexure A, Pg.30). There is no other document in which the decision to issue the press release has been recorded. There are subsequent specific directions issued to Banks, akin to the one issued by the RBI to SBI which is produced by the Petitioner at Page 947 of the Additional Affidavit dated July 14, 2017."

Therefore, it becomes clear and certain that the Reserve Bank of India is under the impression that now when jurisdiction of matters pertaining to Company Law has been transferred to NCLT by enacting IBC, the NCLT has to follow their

advice and directions. This is a serious issue because irrespective of factual details and merits against any borrower or any litigant, the basic Constitutional mandate is quite clear that the adjudicating authorities; either judicial authorities, or even quasi-judicial authorities; are not supposed to be guided by the advises or directions of the administrator in form of Government or its bodies or Government institution like RBI. Therefore, as it is repeatedly conveyed to all concerned that the initial concern of the Court is to verify that how and why RBI has published a press release, which discloses that NCLT will act as per the directions of the RBI. In addition to expressing regret for such drafting, it is repeatedly confirmed at bar by the respondents that they never intended to do so and that it is a result of poor drafting only.

In view of such stand taken by RBI, the query of the Court is very much material and relevant to know that based upon which office order or directions or decision such press release has been issued or published. In response to such query, now, there is a categorical admission, which is recorded herein above, whereby it is disclosed that there is no other document in which the decision to issue the press release has been recorded and no other document on the basis of which such decision is taken. However, there are subsequent specific directions issued

to Bank. This also goes to show the manner in which RBI is functioning, inasmuch as there is a press release even without a decision at certain level that press release is to be published and what should be included in such press release. This is also an equally serious issue. It has been conveyed to the respondents that on such disclosure that there is no other document, pursuant to such disclosure, now, they would be debarred from relying upon any such document, if any.

2) With reference to such practice, if we peruse the press release dated 13.6.2017, now, when it becomes clear that there is one another press release dated 22.5.2017, (page 863 with the petition), which is also touching the subject under reference. Whereas the impugned press release dated 13.6.2017 is in fact based upon the previous press release of May 22, 2017; which reads as under:

Date : May 22, 2017
Reserve Bank of India Outlines the action plan to implement the Banking Regulation (Amendment) Ordinance, 2017
In a Release today, the Reserve Bank of India outlined the steps taken and those on the anvil post the promulgation of the Banking Regulation (Amendment) Ordinance, 2017. 2. The amendments to the BR Act 1949, introduced through the Ordinance, and the notification issued thereafter by the Central Government

empower RBI to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC). It also enables the Reserve Bank to issue directions with respect to stressed assets and specify one or more authorities or committees with such members as the Bank may appoint or approve for appointment to advise banking companies on resolution of stressed assets.

3. Immediately upon the promulgation of the Ordinance, the Reserve Bank issued a directive bringing the following changes to the existing regulations on dealing with stressed assets.

i. It was clarified that a corrective action plan could include flexible restructuring, SDR and S4A.

ii. With a view to facilitating decision making in the JLF, consent required for approval of a proposal was changed to 60 percent by value instead of 75 percent earlier, while keeping that by number at 50 percent.

iii. Banks who were in the minority on the proposal approved by the JLF are required to either exit by complying with the substitution rules within the stipulated time or adhere to the decision of the JLF

iv. Participating banks have been mandated to implement the decision of JLF without any additional conditionality.

v. The Boards of banks were advised to empower their executives to implement JLF decisions without further reference to them

It was made clear to the banks that non-adherence would invite enforcement actions.

4. Currently, the Oversight Committee (OC) comprises of two Members. It has been constituted

by the IBA in consultation with RBI. It has been decided to reconstitute the OC under the aegis of the Reserve Bank and also enlarge it to include more Members so that the OC can constitute requisite benches to deal with the volume of cases referred to it. While the current Members will continue in the reconstituted OC, names of a few more will be announced soon. The Reserve Bank is planning to expand the scope of cases to be referred to the OC beyond those under S4A as required currently.

5. The Reserve Bank is working on a framework to facilitate an objective and consistent decision making process with regard to cases that may be determined for reference for resolution under the IBC. Reserve Bank has already sought information on the current status of the large stressed assets from the banks. The RBI would also be constituting a Committee comprised majorly of its independent Board Members to advise it in this matter.

6. The current guidelines on restructuring are under examination for such modifications as may be necessary to resolve the large stressed assets in the banking system in a value optimising manner. The Reserve Bank envisages an important role for the credit rating agencies in the scheme of things and, with a view to preventing rating-shopping or any conflict of interest, is exploring the feasibility of rating assignments being determined by the Reserve Bank itself and paid for from a fund to be created out of contribution from the banks and the Reserve Bank.

7. The Reserve Bank notes that the proper exercise of the enhanced empowerment would require coordination with and cooperation from several stakeholders including banks, ARCs, rating agencies, IBBI and PE firms, to which end the Reserve Bank would be holding meetings in the near future with these stakeholders.

8. The Reserve Bank will issue further updates as

may be deemed necessary at an appropriate time.

Jose J. Kattoor
Chief General Manager

Press Release: 2016-2017/3138

On perusal of such press release dated 22.5.2017 makes it clear that in fact a decision is taken to change the percentage or value of Non-performing Accounts (in short 'NPA') from 75% to 60% on or before 22.5.2017, but at the same time, it is surprising to note that RBI has conveyed the Banks that the Boards of Banks were advised to empower their executives to implement Joint Lenders' Forum (in short 'JLF') decisions without further reference to them. Therefore, it seems that the RBI wants Bank's officers to act upon the decision of JLF, and take steps for its implementation, without referring such decision to its own Board of Directors. It may be an administrative issue, but it speaks for itself.

Similarly, there are some directions regarding restructuring so as to include flexible restructuring, including Strategic Debt Restructuring (SDR) and Scheme for Sustainable Structuring of Stressed Assets (S4A). Since its reference is there in impugned press release dated 13.6.2017, it cannot be ignored when bare perusal of such press release gives above image about the functioning of RBI and, therefore, it

is relevant to record it here because ultimately, though whether petitioner is entitled to the relief/s claimed in this petition, may rest upon the overall facts and circumstances, such attitude gives a reason to observe in conclusive part of the judgment that nobody is entitled or empowered to advise, guide or direct the judicial or quasi-judicial authority in any manner whatsoever.

14. Irrespective of position as discussed herein above, the case of the petitioner is based upon following amongst other submissions:

1) When the restructuring proposal was under active consideration by the Banks under the mandatory circulars issued by the Reserve Bank of India, Reserve Bank of India could not have issued a directive to the banks to take action to approach NCLT under the Insolvency and Bankruptcy Code, 2016 for resolution of the debt. The petitioners submit that the petitioner is not a willful defaulter and there is no allegation against the petitioner of diversion of funds, fraud or malfeasance. There is no opinion that the petitioner's industrial units are not viable if the debt is appropriately restructured. The petitioner's debt has not been restructured pursuant to the huge losses suffered by the petitioner in view of (i) steel industry getting out of being a priority core sector for supply of gas, (ii) international

market of steel and (iii) dumping of foreign steel into the country and there is no failure on the part of the petitioner in not complying with the restructured debt. The petitioner has in fact paid Rs. 3467 Crores in the last 15 months to the banks and financial institutions. In the circumstances, there is a clear conflict between the existing circulars issued under Section 35AA of the Banking Regulation Act, 1949 (in short BRA) which are binding to the banks and under which restructuring proposal is almost on the verge of being finalized and recent directive of Reserve Bank of India issued on 13.06.2017 directing the banks to take action of filing insolvency petition even in respect of companies where restructuring proposals are under consideration under the existing circulars and direction issued by RBI is clearly discriminatory vis-à-vis the Petitioner and is required to be struck down. Moreover, the direction is issued without considering the relevant factors viz. the restructuring was underway in case of the Petitioner and was at the stage of finalization as per existing mandatory circulars of RBI and considering the irrelevant factors viz the quantum of debt completely ignoring the stress faced by the steel industry as a whole in India.

2) On a true and correct interpretation of Section 35AA of BRA, the Central Government is required to authorize the Reserve Bank of India

to issue directions to any banking company or companies to initiate insolvency resolution process in respect of a default, under the provisions of Insolvency and Bankruptcy Code. The above section therefore implies that in each case of default, the RBI will have to come to a subjective satisfaction based on objective facts to give such directions to the Banking Company and the Central Government cannot give general direction to the Banking Company to initiate insolvency proceedings in respect of various defaults. The RBI has not considered specific cases of defaults before issuing authorization and consequently their authorization, which is generic in nature, is bad. Without prejudice to the aforesaid, the petitioner submits that each case of default will have to be considered on facts by the RBI and only after it considers the objective facts relating to the defaulting company that it can come to a subjective satisfaction entitling it to authorize the Reserve Bank of India to initiate the insolvency resolution process in respect of the default. There is nothing on record to show that the RBI has considered objective facts of each defaulting company and in particular of the petitioner and reached a subjective satisfaction to issue directions to initiate insolvency resolution process. The action of the RBI to direct the SBI to initiate insolvency resolution process without considering the specific cases

of default more particularly objective facts of the defaulting company and reaching a subjective satisfaction in respect of the same is clearly bad and is required to be quashed in view of the following decisions of the Supreme Court as the exercise of powers is arbitrary, unreasonable, manifestly unjust and outrageous:

(i) Barium Chemicals v. Company Law Board AIR 1967 SC 295

(ii) Bhikhubhai Vitthalbhai Patel v. State of Gujarat AIR 2008 Supreme Court 1771

(iii) Vinod kumar v. State of Haryana (2013) 16 SCC 293

3) Without prejudice to the aforesaid, the circular dated 13.06.2017 issued by Respondent no.1 Reserve Bank of India in so far as it has classified the defaulting companies solely on the basis of outstanding amount greater than Rs. 5000 Crores with 60% or more classified as NPAs by banks as of 31.03.2016 and those not falling in the above criteria is clearly violative of Article 14 of the Constitution of India. The object of inserting Section 35AA of the Banking Regulation Act is to authorize the Reserve Bank of India to issue directions in respect of default to initiate insolvency resolution process considering each case of default and the steps otherwise taken to restructure the debt. The decision of the Internal Advisory Committee to classify solely on the basis of quantum has no rational nexus to the object sought to be

achieved either by Section 35AA of the Banking Regulation Act, 1949 or the relevant provisions of the Insolvency and Bankruptcy Code, 2016. In fact, the Reserve Bank of India has not looked into any material and relevant facts in creating two classes: one, where, direction is given to commence resolution under IBC and other where resolution is to be finalized within 6 months. The Petitioner's case clearly is that a resolution process was underway and was being finalized by the JLF. The Petitioner could never have been classified in category falling under para 3 of the circular dated 13.06.2017 when as late as on 13.06.2017 itself, the JLF was considering the finer details of the proposal for restructuring the debt of the Petitioner. Classifying the petitioner in para 3 and not para 4 is clearly arbitrary, discriminatory and violative of Article 14 of the Constitution of India as the classification has no rational nexus to the object sought to be achieved viz. restructuring of debt.

4) The Petitioner further submits that the Petitioner's case is most eminently suited to be classified under para 4 as the resolution plan was under process. To classify the Petitioner in para 3 is to treat the Petitioner dissimilarly as compared to others who have been given 6 months time to finalize the resolution process. The Petitioner submits that there is no reasonable basis applied for classification into

two classes. The only criteria adopted is the quantum of debt which has no rational nexus to the object sought to be achieved viz. restructuring of the debt and survival of the Company. For the purpose reliance is placed on the following decisions

i. *State of West Bengal v. Anwar Ali Sarkar AIR 1952 SC 75*

ii. *Union of India v. N.S. Ratnam and Sons (2015) 10 SCC 681*

5) It is further submitted that without prejudice to the aforesaid, the Court is entitled to test any decision of any authority on the basis of reasonableness of the process adopted by the concerned authority. When Reserve Bank of India classified the defaulting companies into two classes viz. those who have debts above Rs. 5000 Crores with 60% or more classified as NPA as on 31.03.2016 and the others, it is evident that it has not taken into consideration any relevant factors except focusing on the large stressed accounts. The various factors which have been highlighted both in the petition and in written submission would indicate that the Petitioner's debt was in finalization stages of restructuring have been completely ignored by the Reserve Bank of India in issuing the directions. The relevant facts which ought to have been looked into before issuing the directions have been completely ignored. The process adopted by Reserve Bank of

India is clearly unreasonable and deserves to be struck down. The Petitioner submits that the Petitioner Company has vast operation with multi-location facilities, the impact of the decision would be severe and may result in the Company going into serious problem because of the change in management. In such circumstances, the Reserve Bank of India ought to have considered all relevant facts other than the mere largeness of the stressed account before making such a vital decision. In these circumstances, such decision is clearly subject to judicial review. The Petitioner submits that the following factors would clearly establish that the decision of Reserve Bank of India is not only discriminatory and violative of Article 14 but the Reserve Bank of India has not taken into consideration relevant and taken into consideration irrelevant factors in classifying the Petitioner in Para 3 and not para 4 of press release dated 13.6.2017.

a) The initiation of proceedings under the Bankruptcy Code results in coercive steps including mandatory suspension of the functioning of the Board of Directors and hands over of management to Insolvency Resolution Professional (IRP). Such harsh consequences ought to be resorted to only when there is no other resolution or reconstruction of the Company is possible. In the present case, the facts clearly show that any reasonable person would come to a conclusion that the progress achieved by the

Company including in particular repayment of Rs. 3500 Crores would show that the resolution process between the Banks and the Petitioner is eminently possible to be achieved.

b) The Petitioner has its operations in six locations i.e., Hazira (Gujarat), Vishakamatnam (Andhra Pradesh), Kirundal (Chattisgarh), Paradeep (Odisha), Dabuna (Odisha) and Pune (Maharashtra). All the plants in these six locations spread over 5 states are operational. There are atleast 8 finished products being manufactured by the Petitioner. Such as HRC, plates, pipes, pellets, etc. These manufacturing units given direct employment to 4500 persons. Sudden change of management of these vast operations spread all over India from the Board of Directors to a single individual i.e., the Insolvency Resolution Professional is likely to disrupt the smooth functioning and operations of the Company. It is in the interest of Bankers and all stakeholders that the Company continues to operate smoothly without any interruption.

c) The Petitioner also has long term contracts with various customers to supply its finished products. The business and operations of these customers is also thus dependent upon assured supply of the final product produced by the Petitioner. The turnover of the Company has been at an average of Rs. 12,000 Crores per year in the last two years and as is estimated to be Rs. 21,700 Crores in the year 2018. With such large turnover requiring skilled and

experienced management for the operations, any disruption by handing over management to a third party i.e., the IRP is bound to cause some disruption in production and erosion in value. It is for this reason that even the Banks have been actively discussing and negotiating a restructuring proposal for last over one year. A mutually acceptable restructuring proposal between the Petitioner and the Banks would ensure smooth operations as also repayment of debt as per the restructuring package. therefore RBI was not justified in categorizing the Petitioner with 11 companies headed for Bankruptcy proceedings or should have given an opportunity to restructure as has been done in respect of companies under para 4. No prejudice will be caused to the Banks by giving an opportunity to restructure the debt. The entire financial operations of the Company are already in the control of the Bankers. The Bankers have their nominee on the Board of Directors and all payments are made with the consent of the Bankers. The last one year's performance of the Company also shows that its manufacturing operations are improving and the repayments to the Banks are taking place.

d) On the one hand there is serious likely hood of disruption or interference with the smooth operations of the Company, as also erosion in value if the management is handed over to the IRP and on the other hand if the period of six months is given to the Bankers for the Company to work out a mutually acceptable restructuring proposal, no prejudice would

be cause to the Bankers. If for any reason the restructuring proposal is not finalized within six months, as is the case with the other Companies in para 4, it will be open for the Banks to initiate Bankruptcy proceedings. Hence, atleast in the case of the Petitioner it ought to be categorised with other companies who have been given six month's time to have a restructuring proposal. In this regard, reliance is placed upon *Union of India v. G Ganayutham (1997) 7 SCC 463*.

6) The Petitioner further submits that Section 35AA and 35AB of BRA have been inserted to enable the Government of India to authorize Reserve Bank of India to give necessary directions in respect of specific default to initiate Insolvency Resolution Process. From the language of above two Sections, it is evident that unless a Directive is issued by Reserve Bank of India on a Bank, the Bank is not entitled to initiate Insolvency Resolution Process. It is evident that no Directive is issued to the Standard Chartered Bank to initiate Insolvency Resolution Process. This apart, if the Petitioner's contention is accepted that it should be classified in para 4, then there should be specific Directive by the Reserve Bank of India that the Banks should finalize the restructuring within six months. This Directive should equally apply to the Standard Chartered Bank and would be binding on it. It would be mandatory for the Standard

Charted Bank to consider the restructuring proposal and cannot initiate any Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 for a period of six months. Without prejudice to the above, the Petitioner submits that Standard Chartered Bank was also in active discussion and negotiations with the Company for over last one year. It has given a proposal to the Company for settlement on 21.06.2017. Before the Petitioner could respond, the Standard Chartered Bank has initiated the Insolvency Resolution Process before the NCLT on 27.06.2017,in view of Directive issued by Reserve Bank of India on State Bank of India and the Joint Lenders Forum and the JLF having taken decision on 22.06.2017 to initiate Insolvency Resolution Process as per the Directive of the Reserve Bank of India.

15. As against that the Respondent No. 1 has submitted as under:

1) Despite the existence of several laws and statutory circulars issued by Respondent No.1 ("the RBI") for recovery / restructuring of Non Performing Accounts ("NPA"), the problem of NPAs in India remained staggering. As on March 31, 2017, the gross NPAs in India aggregated more than Rs.7,28,768 Crores, i.e., about 5% of the GDP. About 12% of the total advances by public sector banks are NPAs. Consequently, several banks, which should have been instruments for

rejuvenating the economy, have been bogged down leading to systemic crisis in the Banking sector. NPAs cause economic loss to the country.

2) Even according to Petitioner, as on September 30, 2016, the total bank exposure of the Petitioner was admittedly Rs.45,655 Crores (Annexure C at page 32). As per the data collected by Central Repository of Information on Large Credits, as on March 31, 2017, the total fund based outstanding of the Petitioner with banks was Rs. 33,842 Crores. As on 31st March 2016, an amount of Rs.31,671 Crores (i.e., 94% of the outstanding amount) was classified as NPA. As on 31st March 2017, this figure increased to Rs.32,864 Crores (i.e., 97% of the outstanding).

3) Without prejudice to the above, it is submitted that there existed several objective facts that support the Order and the press release dated June 13, 2017 issued by the RBI ("the Press Release") and Directives to Banks as:

i. the Petitioner's account was in NPA even prior to March 31, 2016 (Rs. 31,671 Crores);

ii. on March 31, 2017, the Petitioner's account was in NPA to the extent of Rs.32,864 crores;

iii. the general position of NPAs country wide was drastic and required urgent action to be

taken under the IBC;

iv. on February 29, 2016, SBI had written to the Petitioner to declare its account NPA;

v. even according to the Petitioner its outstanding were about Rs.45,695 Crores as on September 30, 2016; and

vi. the JLF restructuring of the Petitioner had proved ineffective and was nowhere near completion.

4) The directives of the RBI were thus, not on any "imaginary grounds" or "wishful thinking". - what in law, the Petitioner would have to establish to have them quashed (Bhikhubhai Patel v. State of Gujarat, (2008) 4 SCC 144 – Paragraph 24 – cited by the Petitioner).

5) The law as to permissible classification is well settled and the judgments cited by the Petitioners themselves lay down the following:

a) classification must be founded on an intelligible differentia which distinguishes persons grouped together from others left out and that differentia must have a rational relation to the object sought to be achieved by the statute (Union of India v. *N. S. Rathnam & Sons,(2015) 10 SCC 681 – paragraph 14);*

b) the person challenging the act of the State as violative of Article 14 has to show that there is no reasonable basis for the differentiation between the two classes created. Article 14 prohibits class legislation and not reasonable classification *(Union of India v. N. S. Rathnam & Sons,(2015) 10 SCC 681 – paragraph 13 @ page 695c)*;

c) the extent of reasonability of a statute has is in its efficiency to achieve the object sought to be achieve by the statute *(Union of India v. N. S. Rathnam & Sons,(2015) 10 SCC 681 – paragraph 15 @ page 696 citing Aashirwad Films v. Union of India, (2007) 6 SCC 624)*; and

d) in making the classification, the legislature cannot certainly be expected to provide "abstract symmetry". It can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience (AIR 1952 SC 75 – paragraph 44). [State of West Bengal v. Anwar Ali Sarkar – An extreme case, unlike the present one, where the West Bengal Special Courts Act, 1950 laid down substantially different rules for trial of offences and denied the procedure under the Cr.P.C., imposed heavier liabilities, denied privileges, deprived the accused of the

committal procedure, deprived them of a *de-novo* trial in the case of transfer, deprived them of the right to call witness in defence and made them liable for conviction and punishment for major offences other than those for which they had been charged or tried.]

6) The RBI Directives are reasonable and make a classification valid under Article 14, because the Press Release and the Directives to Banks issued by the RBI were for giving effect to the economic policy contained in the IBC as well as the Ordinance and the Order in the following rational manner:

a) the RBI constituted an Internal Advisory Committee ("IAC") to advise it in regard to the cases that may be considered for reference under the IBC;

b) the IAC accessed information reported by the banks on Central Repository of Information on Large Credits ("CRILC") as on March 31, 2017. From such information, out of the top 500 exposures of the banking system the IAC segregated exposures which were wholly / partly classified as NPA ("List A");

c) from List A, the IAC identified the largest stressed cases (NPAs) using the objective filter of companies where the banking exposure was more than Rs.5000 Crores ("List

B"); and

d) to ensure that the identification process does not include companies who have only recently faced stress, the IAC identified the seasoned NPAs from List B, i.e., those companies which were classified as NPA to the extent of more than 60% as on March 31, 2016 until March 31, 2017 ("List C").

Though there is reference of List "A", "B" and "C" in written submissions, no such list is found on record. However facts are explained in above sub-paras.

7) Thus, contrary to the argument canvassed by the Petitioners, Respondent No.1 has not arbitrarily identified 12 companies for action under the IBC by the Press Release. The process adopted by the RBI for identifying the 12 entities was completely consistent with the object of making quickest recovery of substantial economic value. The RBI seeks to focus on the cases which have the twin criteria of being the largest and longest standing NPAs. Such classification is based on an intelligible differentia, i.e., both quantum (Rs.5000 Crores and 60% NPA) as well as length of outstanding (at least fifteen months, i.e., from March 31, 2016) and has a nexus with the object of the IBC and the Ordinance, viz., rapid recovery of the largest possible economic value for the country.

8) By the process of filtration adopted by IAC, Respondent No.1 has shortlisted 12 companies for action under the IBC. These 12 companies constitute 25% of the total NPAs of India. The combined value of their exposure is close to Rs.1,78,032 Crores. The classification of the largest and long standing NPAs is reasonable:

a) it adopts scientific criteria selected by experts (the IAC) that seek to achieve the objects of the IBC and the Ordinance;

b) it is based on the "needs and exigencies of the society", i.e., the need to attack the scourge of NPAs urgently; and

c) it achieves targeting of 25% of the total NPAs – "abstract symmetry" is not required.

9) In any event, the Petitioner has not shown that there is no reasonable basis for the classification (Union of India v. N. S. Rathnam & Sons, (2015) 10 SCC 681 – paragraph 13).

10) The Directive reflected in the Press Release is an economic measure by which the RBI seeks to tackle the problem of NPAs. It is well settled that laws relating to economic activities should be viewed with greater latitude and ought to be given some play in the joints as they deal with complex problems that do not admit of strait-jacket formula solutions. Every legislation, particularly in economic matters, is essentially

empiric and based on experimentation. Given the complexity of economic regulation greater judicial restraint is shown when adjudging the validity of economic legislation(R. K. Garg v. Union of India, (1981) 4 SCC 675 - paragraphs 7 - 8 @ pages 690 and 691).

11) Banks have already initiated proceedings against Jyoti Structures, Electrosteel Steels Limited, Monnet Ispat Limited and Amtek Auto Limited, some of the 12 companies identified by the IAC. Any order would have serious and far reaching ramifications on the entirety of proceedings to resolve, reconstruct and recover NPAs.

12) The RBI's decision has not been shown by the Petitioner to be either "so outrageous as to be in total defiance of logic or moral standards" *(Union of India v. G. Ganayutham, (1997) 7 SCC 463* – paragraphs 14, 15, 27 and 31 – cited by the Petitioner).

13) (i) It is only if a decision is "manifestly unjust or outrageous or directed to an unauthorized end" that a decision can be set aside as arbitrary and unreasonable. *(Vinod Kumar v. State of Haryana (2013) 16 SCC* – paragraph 25 – cited by the Petitioner) The RBI Press Release/Directives are just and required in the public interest, cannot by any stretch of the imagination be called outrageous and are

directed towards the end authorized by Section 35AA and the Order.

14) The review by the Court is a secondary review and not a primary one (Union of India v. G. Ganayutham, (1997) 7 SCC 463 – paragraphs 27 and 31 – cited by the Petitioner).

15) It is the decision making process and not the decision that an Article 226 Court can review. (Vinod Kumar v. State of Haryana (2013) 16 SCC – paragraph 24 – cited by the Petitioner)

16) Petitioner's alternative relief – Priority for package; at paragraph 2 (l) of the Application, the Petitioner seeks the following: "In the alternative without prejudice to the aforesaid the Petitioner seeks a direction of this Hon'ble Court to the NCLT to consider at the first instance the revival package that has been under discussion with the banks before proceeding further with the petition."

Thereby, it is submitted that the Petitioner accepts the Press Release and the validity of the NCLT proceedings against it but seeks a priority for its revival package. Such priority is not permissible under the IBC. However, the Petitioner can always submit its revival package as a resolution applicant to the RP under Section 30(1) of the IBC.

17) Finally, at paragraph 12 of its Additional Affidavit dated July 7, 2017 (at page 799F) the

Petitioner has prayed for a period of six months to continue efforts of restructuring under the RBI Circulars and to place the Petitioner in the category under Para 4 of the Press Release. It is respectfully submitted that a prayer to continue under an ineffectual restructuring process rather than the overriding new statutory one, is not worthy of relief apart from being contrary to law.

18) No prejudice caused to the Petitioner: from what is stated herein above, it is clear that the very package which was under consideration of the JLF can be considered by the RP under the IBC under Section 30(1). In fact, the process under the IBC will be structured by statute and confined by strict time lines for the corporate insolvency resolution process. The process is designed to ensure that where a company can be made viable it will have the best chance of doing so by a statutory and balanced reconstruction/resolution of its debt under the supervision and guidance of experts and the NCLT. Thus, no prejudice whatsoever will be caused to the Petitioner if SBI and SCB or either of them have initiated and proceed against it under the IBC.

19) It is also submitted by Ld. Sr. Counsel on behalf of Respondent no. 1 & 2, that because of appointment of IRP, the working of company will not be adversely affected and confirmed that it

is provided in IBC and ensured that keeping in mind the scheme of IBC, though IRP will be appointed the management of company will not be changed because company is run by its officer and not by board of directors and thereby existing working of the company will not be disturbed till time limit provided under the code which is maximum 180 days with provision to extent it for further 90 days. During this period IRP will see that whether company is able to come out from its debt liability by appropriate restructuring formula.

20) The Banking sector is one of the largest and most crucial sectors in India. It involves heavy financial and economic stakes of not only the banks themselves but also industry and commerce in India as a whole apart from the public. Any interference with this process formulated by RBI will prejudice the very significant economic reform formulated by Parliament and the Government of India which was to bring value back in the system. It will also have wide ranging repercussions not only in economic and commercial terms but also for the public. The reliefs sought by the Petitioner will cause damage to public interest and have a long-term impact. These are significant factors to be taken into account whilst deciding interim relief.

16. The Learned counsel for Respondent No. 2 has

submitted as under:

1) Writ Petition cannot lie restraining the Respondent No. 2- SBI from exercising its legitimate statutory right under Section- 7 of IBC. The IBC is a complete code, which has given a specific statutory right to the Respondent No. 2 (Financial Creditor) to initiate insolvency resolution process against the Petitioner (Corporate Debtor). In the instant case all three requirements of Section- 7 of IBC are satisfied viz.:

(A) A Financial Creditor (Respondent No. 2- State Bank of India)

(B) A Corporate Debtor (Petitioner- Essar Steel)

(C) A default in respect of a financial debt by the (Corporate Debtor- Essar Steel).

2) Once the three requirements of Section- 7 are satisfied, the Respondent No. 2 herein, is statutorily entitled to file an application under Section- 7 against the Petitioner herein. After an application is filed and NCLT being the Adjudicating Authority is satisfied, that it complies with the requirement of Section- 7, a non-discretionary statutory process takes over. Under Section 7(4), the NCLT is to determine the existence of default within 14 days and either admit or reject the Section-7 application. On

admission of the application under Section- 7, consequences as contemplated Chapter-4 would follow as matter of law. Hence, under Section-14, there is a moratorium on institution of suits, transfer of assets, etc.; under Section-15, there is a public announcement of corporate insolvency resolution process, under Section-16, appointment of interim resolution professional ("IRP") by the Adjudicating Authority and under Section- 17, the IRP takes over the management of affairs of the corporate debtor and the powers of Board of Directors or the powers of the corporate debtors stand suspended. These consequences are statutory in nature and there is no discretion with either the NCLT or the financial creditors in this regard. It is submitted that the Petitioners have not challenged this statutory scheme.

3) Since the Respondent No. 2- SBI, has a statutory right to apply under Section- 7, the same can be invoked irrespective of the Respondent No. 1- RBI Press Release/ directive. It is submitted that, an application filed by the Respondent No. 2 under Section-7 before the NCLT is in exercise of its statutory right and this right can always be exercised by the Respondent No. 2, independently of directions given by the Respondent No. 1. Seen in this light, the challenge to the Press Release of the Respondent No. 1 dated 13.06.2017/ or any other directive cannot and will not take away or

affect the validity of the proceedings already initiated by the Respondent No.2 before the NCLT.

4) The Petitioners' submission that JLF (Respondent No. 2 being lead consortium banker) has agreed to restructuring proposal is false and contrary to the material on record. It is submitted that, the Petitioners have not approached this Hon'ble Court with clean hands and have suppressed vital information from this Hon'ble Court. It is the case of the Petitioners that, the Respondent No. 2 led JLF has accorded approval to the restructuring scheme. However, the record shows that no such approval has been granted by the JLF, till date. There are many open issues and critical conditions in relation to the restructuring proposal, which remain unresolved and pending the same, there cannot be any question of JLF even finalizing the proposal much less, granting "in-principle" or for that matter any approval *per se* to the restructuring scheme. It is further pertinent to note that,though there were series of written communications between the Petitioner and the Respondent No. 2 in respect of boundary conditions and pending issues pertaining to restructuring scheme dating, as far back as June 2016, till date,both the parties have not been able to resolve the pending issues. Moreover, the restructuring proposal/scheme was not as per Respondent No.1/RBI's guidelines/circulars

pertaining to the restructuring of loans. The latest letter int his regard sent by the Respondent No. 2 was on 17th June, 2017 ("17th June Letter") to the Petitioner wherein, the Respondent No. 2 in clear terms recorded more than 25 pending issues, in relation to the restructuring proposal, which remained unresolved. The Petitioners were in receipt of the said letter before filing of the present Petition. The said letter belies the case in the Writ Petition and therefore, is extremely relevant and material to the submissions being canvassed by the Petitioners before this Hon'ble Court. The Petitioners deliberately did not disclose the Letter dated 17th June in the Petition and have sought to mislead this Hon'ble Court into believing that, in-principle approval to the restructuring scheme has been granted and it is only due to Respondent No.1/RBI's Directive, that the Respondent No. 2 has derailed the restructuring talks and initiated the insolvency proceedings against the Petitioner before the NCLT. The Petitioners have consented, accepted and acquiesced in the proceedings being initiated by the Respondent No. 2- SBI before the NCLT.

5) The following letters/documents demonstrate that, the Petitioners were aware and have consented to and accepted the proceedings being adopted by the Respondent No. 2 before NCLT:

6) The Email Notice of the JLF meeting issued by the Respondent No. 2 on15th June, 2017 (which is at Annexure V of the Additional Affidavit dated 13.07.2017 filed by the Petitioner in the present proceedings)which specifies that:"We propose to hold a meeting of Top Management of the lenders,under JLF, of Essar Steel India Limited at State Bank of India,Corporate Centre, Madame Cama Road, Nariman Point, Mumbai at10.30 a.m. on 22nd June, 17 (Thursday) at Board Room (18th Floor)."

7) The Petitioner's presentation (Page-919 to 929) before the Joint Lenders meeting held on 22.06.17. This acquiescence and in any event acceptance and consent can be borne out from the Petitioners" statement."We have been informed that the Reserve Bank of India (RBI) has directed lenders to file an application under NCLT process" (Page-926 of Writ Petition)

8) The Petitioners have accepted that insolvency resolution process will take place before the NCLT by stating that"We therefore request the lenders to provide a standstill on the dues being paid to the banks through tagging till such time the process under NCLT mechanism is put in place." (Page-926 of Writ Petition)

9) In fact, the presentation shows that, the Petitioners were aware and had no serious objection to the IRP being appointed."Concern on

the resolution professional to be appointed – Request 3:We wish to also request the lenders to ensure that the role of the Resolution Professional (under the NCLT process) is proposed asunder:-

> (a) Allow the management team to continue to operate on day-to-day basis with checks and balances already in place so as to ensure continuity of operations in order to sustain value of the company.
>
> (b) Work in a cohesive manner with the Lenders and the Promoters/Company to draw up a suitable financial package, which is to be implemented in a time bound manner". (Page-928 of Writ Petition)

10) In fact it is pertinent to note that the top management of the Petitioner including Mr. Prashant Ruia attended the said meeting on 22.06.2017 as its seen from the attendance sheet of the said meeting which is at Annexure -D to the Affidavit dated 13.07. 2017 filed by the Respondent No. 2 – SBI in the present proceedings.

11) Thereafter, by letter dated 23.06.17 to the Respondent No. 2, the Petitioners acknowledged (decision of lenders to take Petitioners to NCLT)"In view of the decision of the lenders to take ESIL to National Company Law Tribunal ("NCLT") as per directions of the Reserve Bank

of India("RBI") for corporate insolvency resolution process ("CIRP") under the insolvency and Bankruptcy Code, 2016 (IBC), we have submitted to the member banks of the JLF our key requests which are quite critical for ESIL to continue its operations without any disruption, further enhance its performance in the interim period and to protect the interest of all stakeholders." (Page-934 of Writ Petition)

12) In fact the Petitioners even made suggestions regarding the role of IRP when it is stated that"Accordingly, we are addressing this letter to reiterate our request made during the meeting Yesterday that the resolution professional to be appointed by the lenders should (a) work seamlessly with the ESIL management team and allow it to operate on a day to day basis with checks and balance already in place so as to ensure continuity of operations; and (b) work in a cohesive manner with the lenders and promoters/personnel of ESIL to draw a suitable financial package and to implement the same in a time bound manner with a view to sustain and preserve the value of ESIL. We look forward to continuing to work with the lenders to ensure speedy resolution of issues faced by ESIL and its successful turnaround in a time-bound and effective manner." (Page-935of Writ Petition)

13) By another letter dated 27.06.2017, the

Petitioners requested for an interim standstill on tagging payments in following words:

14) "Subject: RBI Press release dated June 13, 2017 & Meeting of JLF on22nd June 2017 – Request for an interim standstill on tagging payments. (Page-936 of Writ Petition)

15) By the said letter, the Petitioners made suggestion for the same, which would, according to them, assist the company in sustaining its operations, during the time the resolution plan was implemented under the aegis of NCLT." which will assist the company in sustaining its operations during the time the Resolution Plan is implemented under the aegis of NCLT."(Page-937 of Writ Petition)

16) By letter dated 30.06.2017 to the Respondent No. 2, the Petitioners noted that the Respondent No. 2was filing an application before the NCLT against the Petitioners and IRP was likely to be appointed. The Petitioners herein, sought certain concession on tagging until the IRP was appointed. "We understand that SBI is filing the application in the NCLT for ESIL and IRP is likely to be appointed in the next couple of weeks. (Page-939 of Writ Petition) "We need your urgent and immediate assistance to waive the tagging with immediate effect until such time as the IRP is appointed. We understand that once the IRP is appointed, he would be deciding on

the matters in consultation with the Committee of Creditors."(Page-939 of Writ Petition)

17) Thus, the Petitioners were aware that the insolvency proceedings were being initiated by the Respondent No. 2 and accepted and consented to the same. Having agreed and consented to the initiation of the proceedings under the IBC by the Respondent No. 2 and having noted and accepted that,the IRP would be appointed, the Petitioners are not entitled to turn around and object to the7 10same. It is submitted that by reason of having accepted the aforesaid proceedings unconditionally,the Petitioners are dis-entitled to challenge the initiation of the proceedings by the Respondent No. 2before the NCLT by filing the Petition.

18) Mr.Ravi Kadam, learned Senior Counsel for respondent No.2 has also referred the preamble and statement of objectives and reasons for the Insolvency and Bankruptcy Code, 2016 emphasizing that the code is nothing but a provision to complete the insolvency resolution process in time bound manner for maximization of value of assets and debts for long term and for huge amount, considering that the existing frame work for insolvency and bankruptcy is inadequate, ineffective and results in undue delays and resolution of the dispute. Thereby, it becomes clear that the existing mechanism under the Provincial Insolvency Act, 1920 and pursuant to

the Presidency Towns Insolvency Act, 1909 are considered as inadequate, ineffective and resulting into undue delays. However, this does not allow the State to derogate the judicial system in any manner whatsoever and to empower the RBI to direct the adjudicating authority to act in particular manner. Therefore, even if aim of the Code may be proper, the reason for such aims so also the provisions of the Code should be in concurrence of constitutional mandates. However, when such Code is not under challenge, I do not have to opine on such issues.

19) It is submitted that, the right to management of a company is not an absolute right but, is always subject to law. Even under the provisions of the Companies Act, 2013, Section 242 states that, if the NCLT is of the opinion that the company's affairs have been or are being conducted in a manner, which is prejudicial or oppressive to any member or members, or prejudicial to public interest or in a manner prejudicial to the interests of the company, the Tribunal may pass an order for the removal of the managing director, manager or any of the directors of the company.

20) It is submitted that, the Insolvency Code in Section- 17 provides that, the management of the company shall vest with the IRP from the date of such resolution professional's appointment. Furthermore, Section- 17 (1) (b) of the IBC

provides that, the powers of the board of directors of the corporate debtor shall stand suspended and be exercised by the IRP. Section-19 of the IBC provides that, the management of the corporate debtor should extend co operation to the IRP, as may be required in managing the affairs of the corporate debtor. Therefore, it is submitted that, there is no vested right of management of the Company and any right to the management of the Company, is subject to law and liable to be exercised in accordance with law.

21) Prohibition cannot be issued against the judicial authority, a writ of prohibition against a judicial authority cannot be exercised unless the authority

a. proceeds to act without or in excess of jurisdiction;

b. proceeds to act in violation of the principles of natural justice;

c. proceeds to act under law which is itself ultra vires or unconstitutional;

d. proceeds to act in contravention of fundamental rights.

22) It is not the case of the Petitioners that, the Hon'ble NCLT has exceeded its jurisdiction. Moreover, the IBC specifically designates "NCLT" as the"Adjudicating Authority" for the purposes

of the insolvency proceedings initiated under the provisions of the IBC. The Petitioners have nowhere in their Writ Petition, even alleged that the Hon'ble NCLT lacks the jurisdiction or is exceeding its jurisdiction in hearing the insolvency proceedings initiated against the Petitioners. Therefore, in light of the above there is no question of issuing any Writ, much less Writ of Prohibition against the Hon'ble NCLT, as they are the statutory body vested with the jurisdiction of hearing the insolvency proceedings, initiated under the provisions of IBC.

17. Whereas respondent No. 3 has submitted as under:

1) The Respondent No. 3 is a bank which is incorporated in the United Kingdom and is regulated and supervised by the Prudential Regulatory Authority, United Kingdom. The Respondent No. 3 had provided a loan facility of US$413,000,000.00 to Essar Steel Offshore Limited, which is a company incorporated under the laws of Mauritius and a wholly owned subsidiary of the Petitioner No. 1, pursuant to Facility Agreement dated 03.01.2014, as amended by amendment letter dated 07.02.2014 (hereinafter referred to as the "Facility Agreement"). As a part of the Facility Agreement, the Petitioner No. 1 had provided a guarantee for the due repayment of the aforesaid loan. It is thus clear that the aforesaid facility was provided to an offshore entity by an offshore

bank and the transaction was executed outside the territory of India.

2) The Respondent No 1 regulates banking companies in India under the Banking Regulation Act, 1949, as amended (the "BR Act").Under the BR Act, a 'banking company' is defined as a "company which transacts the business of banking in India". In view of the aforesaid, the Respondent No. 3 cannot be said to be a 'banking company' under the provisions of section 5(c) read with section 5(d) of the Banking Regulation Act, 1949, as amended from time to time (hereinafter referred to as the "BR Act") for the purpose of the transactions carried out beyond the territory of India. It therefore follows that the Respondent No. 3 is not bound by the directions of the Respondent No. 1, by way of its circulars or otherwise. It is, therefore, categorically stated that the Respondent No. 1 cannot and has not issued any directives to the Respondent No. 3 for proceeding against the Petitioner No. 1 under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "IBC"), as has been done in the case of the Respondent No. 2. Therefore, the action of the Respondent No. 3 to proceed against the Petitioner No. 1 under the IBC cannot be said to have been initiated pursuant to any of the directions of the Respondent No. 1.

3)Even otherwise, the Respondent No. 1 has not issued any directive to the Respondent No. 3 nor

has Respondent No. 3 acted on the basis of any directive issued for filing proceedings against the Petitioner No. 1 under IBC. The same is evident from the following:

i. Written Submissions of the Petitioner No. 1, the relevant extract of which reads as follows: "… It is evident that no Directive is issued to the Standard Chartered Bank to initiate Insolvency Resolution Process." [Page 26 of the Written Submissions of the Petitioner No. 1]

ii. The directive dated 15.06.2017 (page 947)issued by the Respondent No. 1 to the Respondent No. 2, the relevant extract of which reads as follows: "In exercise of the powers conferred by the provisions of the Banking Regulation Act, 1949, and the Banking Regulation (Amendment) Ordinance, 2017, the Reserve Bank of India hereby directs State Bank of India to initiate insolvency resolution process, singly or jointly with other lenders, under the provisions of the Insolvency and Bankruptcy Code, 2016 in respect of the default committed by Essar Steel India Limited."

In view of the aforesaid, it is clear that the directive in question is not issued to the Respondent No. 3. It may be pertinent to note that that since the Petitioner No. 1 is only challenging the Press Release in respect of the said directive, the action of the Respondent No. 3

to approach the Respondent No. 4 under the IBC falls beyond the scope of challenge contained in the captioned petition.

4) The Respondent No. 3 is not a part/member of the Joint Lenders Forum, which is led by the Respondent No. 2 in the present case. The same is evident from the following:

i. The statement of the Petitioner No. 1 in the captioned petition, which reads as follows: "… It is evident that having noticed the directives of the Reserve Bank of India to filed the petition before NCLT, Ahmedabad, even Standard Chartered Bank which is not part of the joint lenders forum led by STATE BANK OF INDIA, has also filed an identical petition before the IBC…" [page 19, paragraph 20 of the captioned petition]

ii. Letter dated 04.04.2017 addressed by the Petitioner No. 1 to the Respondent No. 3, the relevant extract of which reads as follows: "… Please note that as per the applicable laws of India and RBI regulations, the Joint Lenders Forum (JLF) has been mandatorily constituted by Indian (Onshore) lenders of ESIL to consider options for restructuring the debt of ESIL. SCB is not a part of the JLF and discussions being held at this forum…" [Page 771 of the captioned petition]

iii. Minutes of the Core Committee Meeting (JLF) held on 09.05.2017, the relevant extract of which reads as follows: "… Further, SCB being an

unsecured creditor, cannot be ranked at par with secured lenders and therefore, the issue cannot be addressed in JLF. The Company was further advised to resolve the matter bilaterally with SCB at the earliest…"[Page 88; at page 90 of the captioned petition]

iv. Minutes of the Board Meeting of the Petitioner No. 1 dated 15.05.2017, the relevant extract of which reads as follows: "… The Board members deliberated on legal suit filed by Standard Chartered Bank with regard to the loan availed by Essar Steel Offshore Ltd, wholly owned subsidiary of the Company for which Corporate Guarantee was given by the Company. It was informed that dues payable to Standard Chartered Bank is not forming part of the Debt Structuring proposal. The Board members opined that the Company to have a dialogue with Standard Chartered Bank to explore possibility of repaying the unsecured debt at a discount or issue CRPS on the same terms as per the Debt Restructuring proposal or such other measures which will resolve the matter amicably." [Page 102; at page 103/A of the captioned petition]

v. Letter dated 09.06.2017 addressed by the Petitioner No. 1 to the Respondent No. 3, the relevant extract of which reads as follows: "a. JLF has been constituted by the Lenders to ESIL under the RBI Guidelines and SCB is not a Lender to ESIL under the RBI Guidelines." [Page 778; at

page 779 of the captioned petition].

5) In view of the aforesaid, it is evident that the Respondent No. 3 was never a part of any Joint Lenders Forum or in any discussions/process for restructuring the debts of the Petitioner No. 1. Therefore, the contention of the Petitioner No. 1 that it was in advance stage of negotiation with the lenders of the Petitioner No. 1 and any other contentions based thereupon do not apply to the Respondent No. 3. While the Petitioner No. 1 has claimed payment of Rs. 3467 Crores to its lenders since April 2016, no such payment has been made by the Petitioner No. 1 to Respondent No. 3.

6)The contention of the Petitioner No. 1 that it is in the process of negotiation with the Respondent No. 3 and hence the proceedings cannot be initiated against it under the IBC is also not true. The fact is that there is a default committed by the Petitioner No. 1 in respect of payment of dues to Respondent No. 3. The same may be evident from the following:

i. The Respondent No. 3 invoked the guarantee given by the Petitioner No. 1 vide its notice dated 07.12.2015 calling upon them to make payment under the said guarantee. [Page 748 to 749 of the captioned petition]

ii. The Respondent No. 3 issued a notice dated 18.04.2016 to the Petitioner No. 1 under section 433 of the Companies Act, 1956, (the IBC was not

in effect as this time). [Page 750 to 752 of the captioned petition]

iii. The Petitioner No. 1, vide letter dated 24.01.2017, had proposed to repay the dues of the Respondent No. 3 at the end of 25 years and offered to pay interest @ 1% per annum on the outstanding loan till the repayment. [Page 757 of the captioned petition] The said proposal was rejected by the Respondent No. 3 vide its letter dated 28.01.2017 as the same was untenable and virtually destroyed the value of the debt owed to the Respondent No. 3. [Page 758 of the captioned petition].

iv. The Respondent No. 3, vide various correspondences dated 28.01.2017 [Page 758; at page 759 of the captioned petition], 21.02.2017 [Page 760; at page 764 of the captioned petition], 22.03.2017 [Page 768; at page 769 of the captioned petition], and 21.06.2017 [Page 781; at page 783 of the captioned petition], had informed the Petitioner No. 1 about its intention to initiate action under the IBC pursuant to the default committed by the Petitioner No. 1.

v. Nothing in the IBC states that if there are ongoing negotiations between the borrower and the financial creditor, proceedings under the IBC cannot be initiated.

It can also be observed from the aforesaid that the Respondent No. 3 had expressed its intention

to initiate action against the Petitioner No. 1 under the IBC much before the Press Release was issued by the Respondent No. 1. In the circumstances, it is false to the knowledge of the Petitioner No. 1 that the initiation of proceedings under the IBC by the Respondent No. 3 was pursuant to the directive of the Respondent No. 1 or that the same was triggered in view of the directive of the Respondent No. 1.

7) The contention of the Petitioner No. 1 that a bank can initiate proceedings under the IBC only upon a direction under Section 35AA of the BR Act issued by the Respondent No. 1 cannot be sustained. Section 35AA of the BR Act is only an enabling provision under which the Respondent No. 1 can direct those banks to initiate insolvency proceedings who otherwise have not done so. The said section cannot be interpreted to mean that a financial creditor cannot otherwise initiate proceedings under the IBC independently. If such an interpretation is to be accepted, then the provisions of the IBC would be rendered otiose. This is further evident from the following provisions:

i. Section 2 of the BR Act: "2. Application of other laws not barred. – The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of the Companies Act, 1956 (1 of 1956), and any other law for the time being in force."

ii. Section 238 of the IBC: "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."

8) The Respondent No. 3 is not a state within the meaning of Article 12 of the Constitution of India, and therefore, the reliefs sought by the Petitioner No. 1 against the Respondent No. 3 in the captioned petition, being in the nature of a writ, cannot be granted. In this regard, reliance is placed on the following decision of the Hon'ble High Court of Gujarat:

• *Ionic Metalliks v. Union of India, reported in 2015 (2) GLH 156*

9)The Petitioner No. 1, by way of the captioned petition, has sought a writ of Prohibition from this Hon'ble Court insofar as it seeks a direction to the Respondent No. 4 to restrain from proceeding with the matters filed before it under the IBC. It is a well settled position of law that a writ of prohibition must be issued only in rarest of rare cases, and is normally issued only when the inferior court or tribunal (i) proceeds to act without or in excess of jurisdiction, (ii) proceeds to act in violation of the rules of natural justice, (iii) proceeds to act under law

which is itself ultra vires or unconstitutional, or (iv) proceeds to act in contravention of fundamental rights. In this regard, reliance is placed of the following decision of the Hon'ble Supreme Court:

• *Thirumala Tirupati Devasthanams & Anr. V. Thallappaka Ananthacharyulu & Ors., reported in (2003) 8 SCC 134*

10) No such case is made out by the Petitioners in the captioned petition. The Petitioner No. 1, while approaching this Hon'ble Court, has suppressed various facts and correspondences in respect of its dues payable to Respondent No. 3. These correspondences clearly show that the Petitioner No. 1 was made aware of the intention of the Respondent No. 3 to initiate proceedings under the IBC well before the press release issued by Respondent No. 1. The Respondent No. 3 has been purposely dragged into the present proceedings before this Hon'ble Court, as otherwise it would not have been possible for the Petitioner No. 1 to achieve its ulterior object. From the aforesaid, it is evident that no case has been made out by the Petitioners against the Respondent No. 3 in the captioned petition. In light of the aforesaid, the captioned petition is required to be dismissed qua the Respondent No. 3 with exemplary costs.

18. As against that, learned advocate for the petitioner has pointed out different provisions

of the Code which is also relied upon by the respondents but their proposition are different inasmuch as, it is the case of the petitioner that pursuant to such provisions, the management of the company rests in the hands of the insolvency professional who may not be capable to run the company and, therefore, it would result into end of running company for no valid reason.

19. Whereas, learned Senior Counsel Mr. Darius Khambhatta for the RBI has submitted, relying upon different provisions of the Act being Sections 6 to 31 emphasizing that initiation of insolvency proceedings would not mean to declaring the company insolvent immediately but the Code provides for an elaborate mechanism to restructure the company but in a time bound frame which is 180 days with possibility of further extension for further 90 days only and, thereby, decision is to be arrived at within 270 days thatwhether restructuring is possible or not and if restructuring is not possible within such time frame, then and then, company is to be declared insolvent. It is also submitted that during this period, Company would carry on its business through its officers but without the control of Board of Directors under the supervision of Interim Resolution Professional.

20. All such issues can be dealt with only if the provision of law is under challenge but only because of such provision at this stage, it cannot be said that RBI has no authority to advise SBI to initiate insolvency proceedings, for the simple reason that irrespective of such advise or direction, SBI can on its own, initiate such proceedings and in that case, the issue regarding genuineness of such proceedings is to be decided only by the adjudicating authority and not by the Writ Court.

21. Petitioner has relied upon the frame work for Revitalizing Distressed Assets in the Economy – Guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP) issued by RBI on 26.2.2014 (page 885). However, in view of what is discussed herein above, at this stage, when this Court has not determined the merits of insolvency petition, there is no reason to enter into further discussion on points referred in such frame work.

22. Instead of placing any initial decision regarding issuance of any such direction, the respondent No.1 has produced on record a communication dated 15.6.2017 addressed to the respondent No.2 andforwarding a direction of same date to initiate insolvency resolution process singly and jointly with other lenders against the petitioner. This direction nowhere

discloses any classification and, therefore, there is no reason to comment upon such communication and direction in any manner whatsoever because otherwise it is in accordance with law.

23. The respondent No.1 is relying upon the minutes of High Level Joint Lenders Meet held on 22.6.2017 (page 930) contending that there is reference of insolvency proceedings and, thereby petitioner was aware about initiation of insolvency proceedings and, therefore, there is material suppression by the petitioner when it is stated in paragraph 18 of the petition that none of the meetings with the Bankers ever discussedin decision or proposal by the Bankers to ignorethe restructuring process and initiate proceedings before the NCLT under the Code. On such issue, hot and detailed arguments are submitted emphasizing that when petitioner has suppressed material facts, petition needs to be thrown out at threshold and summarily without entering into merits and for the same reasons, petitioner is neither entitled to any final relief nor any interim relief whatsoever. When I am already disposing this petition without granting any relief in favour of the petitioner, I do not wish to enter into such discussion on such issue except to make it clear that petition is not disposed of solely on such ground and to that extent let it be made clear that practically both the sides have their own

perception in considering particular information in particular manner and, therefore, I do not think that there is any suppression of material facts which may ultimately mislead the Court in any manner whatsoever as apprehended by the respondents. It seems that the Press Release on 22.6.2017 is in confirmation of communication dated 5.5.2017 by RBI to all Scheduled Commercial Banks regarding large stressed assets resolution wherein in paragraph 5, all those issues were disclosed in Press Release dated 22.5.2017. Therefore, generally, it is to be believed that press release would always be issued after some internal documentation or correspondence and may not be based upon any oral decision. To that effect, the disclosure by learned counsel for respondent No. 1 that there is no documentation in support of press release dated 13.6.2014 seems to be improper.

24. It is submitted by the petitioner that though there is reference of proceedings before NCLT in Minutes of Meeting dated 22.6.2017, in fact, till 17.6.2017, practically, initiation was going on and in fact respondent No.3 Bank has addressed a letter to the petitioner seeking clarification on 25 open issues. Therefore, itis submitted that when till 17.6.2017, restructuring process was going on, there was no reason and in fact there was no disclosure of decision by the SBI to initiate proceeding under the Code though they are in receipt of direction

to that effect and, therefore, there is reason to believe that SBI has filed the petition only because of direction of RBI though they want to settle the restructuring proposal pursuant to discussion held for couple of months.

25. However, all such issues are to be dealt by NCLT because as already admitted by the petitioner that the present petition is mainly against the RBI so as to confirm that their direction dated 13.6.2016 is illegal. In any case, as already observed, when SBI has not initiated proceedings independent of such direction, as already issued herein above, now, it would be for the NCLT to determine that whether such petition is to be entertained or not.

26. Few of the citations, of which reference is made herein above while recording their oral submissions were relied upon by both the sides but considering the facts and circumstances as discussed herein above, I do not think that any of the citations except which are discussed hereinafter needs any further discussion herein since the principle laid down in such decision is well settled and it does not change the conclusion which is based upon the facts and circumstances also as discussed herein above.

27. In case of Barium Chemicals Ltd. (Supra) though it is confirmed that an order passed in exercise of powers under Statute is liable to be quashed on

the ground of malafide, dishonesty or corrupt purpose, petitioner has failed to show any such ground except arbitrariness or discrimination. But as already discussed, it is difficult to assign allegation of arbitrariness with impugned press release. The emphasis on opinion or necessity can be looked into by NCLT because discussion on factual merits would otherwise prejudice the either side and, therefore, I have avoided to discuss the factual details to ascertain that whether there was actual necessity to initiate proceedings under the Code or not. Similar is the position so far as case of Bhikhubhai Vithalabhai Patel (Supra) is concerned.

28. With reference to Vinod Kumar (Supra), petitioner has submitted that if any power is exercised on the basis of facts which do not exist or which are patently erroneous or inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness, such exercise of power will stand vitiated. Thereby, if such decision is manifestly unjust or outrageous or directed to an unauthorized end, then, it can be quashed by the judicial authority but otherwise the scope of judicial review is limited and the Courts are not to go into the merits of the decision but are concerned with the decision making process only and, therefore, interference with the order of the administrative authority is not permissible in absence of irrational,

unreasonable or improper procedure. In view of such fact, this case will also not be helpful to the petitioner.

29. Decision of Anwar Ali Sarkar (Supra) is with reference to speedy trial. Though conceptually it is affecting the provision of IB Code, it would be applicable only if constitutional validity of such Code is under challenge.

30. In N.S. Rathnam and Sons (Supra), there is consideration regarding validity of classification but reading of para Nos.13 to 16 does not confirm anything in favour of the petitioner.

31. In G.Ganayutham (Supra), the issue regarding judicial review of exercise of administrative or statutory discretion has been taken care of but therein also reading of Wednesbury case and para No.27 does not tilt the position in favour of the petitioner.

32. In case of Ruchi Soya Industries Limited (Supra) while dismissing the insolvency petition, the learned Single Judge of Bombay High Court has in- fact relied upon the factual details that 98% of the creditors in value of the total debts of the respondents have agreed to oppose the petition for winding up and have been participating in the JLF's meeting to take steps for rectification and restructuring of the respondent and some decisions taken by the JLF are

under implementation and, therefore, a petition for winding up at the instance of petitioner who claims about 1% of the total debts of the respondent was not entertained. Therefore, such judgment would not be helpful to the petitioner because the factual details are different in the present case.

33. In case of Ionic Metaliks (Supra), Division Bench of this Court has already confirmed that the Standard Chartered Bank being a private Bank is not amenable to the writ jurisdiction of this Court and, therefore, learned Senior Counsel and Advocate General Mr.Kamal Trivedi for such Bank is right in submitting that petition needs to be dismissed so far respondent No.3 – Bank is concerned. Otherwise also, when no relief is granted in favour of the petitioner disposing the petition, there is no need to discuss furthermore on such issue.

34. In Tirumala Tirupati Devasthanams (Supra) and U.P. Sales Tax Service Association (Supra), it is held that writ of prohibition cannot be issuedwhen the Court or Tribunal proceeded to act within their jurisdiction, however, it is also made clear that it can be issued when such authority proceeds to act in violation of rules of natural justice or in contravention of fundamental rights. Therefore, this petition is to be disposed of, with observation that mandate

of Hon'ble Supreme Court is to be followed by the NCLT.

35. Petitioner is also relying upon the judgment dated 1.5.2017 in Company Appeal (AT) No.09 of 2017 between J.K. Jute Mills Co. Ltd. v. M/s. Surendra Trading Company by the National Company Law Tribunal, wherein, it has been held that after relying upon several judgments of Hon'ble Supreme Court that the word 'shall' used in IB Code is not mandatory but directory in nature subject to condition that for adjudicating the time schedule prescribed under the Code the adjudicating authority must record reasons, though the time is essence of the Code. Thereby, the appellate tribunal under the Code has relied upon the judgment of Hon'ble Supreme Court which confirms that a provision in a Statute which is procedural in nature, that places the word 'shall' may not be held to be mandatory if thereby no prejudice is caused. Similarly the view which is being taken by this Court is also endorsed by the appellate bench while directing the adjudicating authority to reject the application though it seems to be on technical ground but it confirms that the adjudicating authority i.e. NCLT is not bound to admit the petition as a matter of rule but it has to be decided in accordance with law for which generally reasonable opportunity needs to be extended to all concerned.

36. It is specifically decided by the Appellate Tribunal that the procedural part of Section 7 or Section 9 or Section 10 are directory in natureand not mandatory.

37. I do not wish to discuss following citations any more since I am relying upon these judgments which are cited and referred by respondents.

(a) *Bhavesh D. Parish v. Union of India reported in 2000(5) SCC 471*

(b) *Senior Scale Bedi v. Union of India, reported in 1981(4) SCC 676*

(c) *Hirabhai Ashabhai Patel v. State of Bombay, reported in 1954 SCC Online Bom 77*

(d) *In Re the Special Courts Bill, 1978 reported in 1979(1) SCC 380*

(e) *Union of India v. Cipla Limited reported in 2017 (5) SCC 262*

(f) *Canara Bank v. P.R.N. Upadhyaya reported in 1998(6) SCC 526*

(g) *Sudhir Shantilal Mehta v. Central Bureau of Investigation reported in 2009(8) SCC 1*

(h) *Basheshwar Nath v. Commissioner of Income Tax, reported in AIR 1959 SC 149*

(i) *Higenlal Kapadia v. Thomas Chemicals Ltd.in*

Appeal No.333 of 1991 dated 22.4.1991 delivered by the learned Single Judge of Bombay High Court.

38. Similarly, I am not discussing following judgments in detail because considering the facts and circumstances emerging from the record, I do not wish to enter into further scrutiny or discussion so far as suppression of material facts is concerned, more particularly, for the reasons that petition is though disposed of, not solely on the ground of suppression of material facts and, therefore such issue is not much material at this stage.

(a) *Arunima Baruah v. Union of India reported in 2007(6) SCC 120*

(b) *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar, reported in 2004(7) SCC 166*

(c) *Prestige Lights Ltd. v. State Bank of India, reported in 2007(8) SCC 449*

(d) *S.P. Chengalvaraya Naidu v. Jagannath reported in 1994 (1) SCC 1*

39. However, even after considering all such submissions and perusing supporting documents and materials in support of such submissions, so also considering the statutory provisions, which is not declared ultra vires till date, I am of the opinion that:

1) Filing of insolvency proceedings would be a decision of the concerned person, who is entitled to file such application and, therefore, to that extent, it cannot be said either respondent No.2 or 3 can be restrained from filing such application in accordance with law.

2) It is undisputed fact that filing of such application itself cannot be questioned or that action cannot be quashed, but it goes without saying that such filing would not amount to admitting or allowing the petition for insolvency without offering reasonable opportunity to the company, which is requested to be taken into insolvency by any such person. Therefore, the adjudicating authority being NCLT herein, which is constituted in place of the Company Court, needs to decide on its own based upon factual details that whether the insolvency petition is required to be entertained as such or not.

3) For the purpose, adjudicating authority, certainly requires to extend hearing and reasonable opportunity to the company to explain that why such an application should not be entertained. In other words, filing of an application may not result into mechanical admission of application as seen and posed by RBI in impugned press release. It would be a decision based on judicial discretion by the

adjudicating authority to deal with such application in accordance with law and based upon facts, evidence and circumstance placed before it. To that extent, prayers 7(b) and (c) cannot be granted.

4) Then, remains the only issue that whether RBI is empowered to publish press release dated 13.6.2017 or not. So far as directions to the Bank to initiate insolvency proceedings against companies, which are in debt to certain level or extent, the amended provisions of the Banking Regulation Act, 1949 in the form of Sections 35(AA) and (AB), certainly makes it clear that, now, RBI has such powers to issue certain directions to certain Banks and banking companies so as to see that there is proper recovery of public money or for any other such purpose. Therefore, the issuance of press release alone, cannot be quashed and set-aside.

5) The issue that remains is now limited to the scrutiny that whether such press release is in accordance with law and whether it results into infringing any fundamental right of anybody, more particularly, present petitioner and whether it is arbitrary, discriminatory and without applying proper provisions of concerned law.

6) On such issue, it has been submitted by learned senior counsel Mr. Mihir Thakore for the

petitioner that the power of issuing such direction is available to the RBI u/s.35(AA) and (AB) and, therefore, such sections needs to be referred and scrutinized properly, which reads as under:-

> "35(AA) Power of Central Government to authorise Reserve Bank for issuing directions to banking companies to initiate insolvency resolution process: The Central Government may by order authorize the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016.
>
> 35(AB) Power of Reserve Bank to issue directions in respect of stressed assets:
>
> (1) Without prejudice to the provisions of section 35A, the Reserve Bank may, from time to time, issue directions to the banking companies for resolution of stressed assets.
>
> (2) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment to advise banking companies on resolution of stressedassets."

7) The bare reading of Section 35(AA) makes it clear that the RBI is authorised to issue directions to initiate insolvency resolution process in respect of a default, and explanation makes it clear that the default has the same meaning as assigned to it in Clause (12) of

Section 3 of the Insolvency and Bankruptcy Code, which means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor as the case may be. Therefore, when it is undisputed fact that the petitioner company has not paid its debt to the tune of more than Rs.32,000 Crores at the end of 31.3.2017 and when total debt is more than Rs.45,000 Crores, it is clear and obvious that RBI is authorised to direct any banking company to initiate insolvency resolution process.

8) However, the petitioner has pressed and submitted that when Section 35(AB) provides for direction for resolution of stress assets and when process of restructuring is on-going with JLF since long, the decision of the RBI to initiate insolvency resolution process against the petitioner is arbitrary. In support of such direction, petitioner has submitted that by impugned press release when RBI has classified the companies in two categories i.e. (1) with fund and non-fund based outstanding amount greater than Rs.5,000/- Crores with 60% or more classified as non-performing accounts by Bank as of March 31, 2016 and (2) rest of the companies; such classification is irrational, discriminatory and arbitrary inasmuch as there is no consideration of any material whatsoever for coming to such conclusion that why companies

having outstanding amount of more than Rs.5,000 Crores with 60% or more non-performing accounts and that too as on 31.3.2016, because petitioner company has deposited approximately Rs.3,500/- Crores during last 15 months, more particularly, when for rest of the companies, resolution plan is to be fixed within six months and not immediately.

9) In support of such submission, heavy reliance is placed on Central Government's resolution through its Ministry of Finance dated 5.5.2017, which reads as under:-

> "In exercise of the powers conferred by Section 35AA of the Banking Regulation Act, 1949 (10 of 1949), the Central government hereby authorizes the Reserve Bank of India to issue such directions to any banking companies which may be considered necessary to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016"

10) It is emphasized that in fact the Central Government has authorised the RBI to issue such direction, but while doing so the condition is that RBI has to consider necessity to initiate insolvency resolution process in respect of a default and, therefore, there must be a consideration of necessity of filing insolvency

proceeding. Thereby, in other words, it is submitted that only because of such directions by Central Government or RBI, insolvency resolution process is not to be initiated mechanically, but before initiating such process, the RBI must consider the necessity to do so and for such consideration, there must be some substance and there must be speaking order after affording reasonable opportunity to the concerned litigant.

11) Several Judgment are cited in support of all such submissions which are dealt with separately and referred in paragraph while recording submissions of the concerned litigants. However, none of such citation confirms that an administrative order requires hearing and reasons may be disclosed for such decision. It may be recollected here that if there is any representation against any company and if decision is taken based upon such feedback, then, probably authority needs to call upon the company to explain against such representation, but when RBI has categorically confirmed that their decision is based upon the advise received from their Internal Advisory Committee, and more particularly, when decision is to the effect that the companies which have outstanding debt with more than 60% non-performing accounts for more than a year beyond Rs.5,000 Crores, the concerned Bank should initiate insolvency proceeding at the earliest. It cannot be said

that there is classification of companies in any nature whatsoever. So far as identifying disclosure in paragraphs 3 and 4 of press release dated 13.6.2017 as classification is concerned, in fact there is no classification because in paragraph 4 also, it is stated that for rest of the companies against whom advise is issued for initiating insolvency resolution proceedings at the earliest, wherein petitioner No.1 includes the concerned Banks, which finalised a resolution plan within six months and if resolution plan is not agreed upon by companies within six months, then in those cases also, Banks are required to file insolvency proceedings. Therefore, practically, there is no classification, but only time schedule is given that companies whose debt is more than Rs.5,000 Crores, which is totaling 25% of current gross NPA of the country, insolvency proceedings need to be initiated at the earliest and in rest of the companies, if resolution plan could not be finalised within six months, then, insolvency proceedings should be initiated. Therefore, there is no direction that insolvency proceeding is to be initiated only against particular company(ies) and not to be initiated against any particular company(ies). It goes without saying that any action is to be started with someone and may not lie against all at the time. It also goes without saying, as already recorded herein above that for filing any such proceeding, none

of the financial company or Bank requires either the permission or direction from RBI for other agency or authority because it is their independent and absolute right to initiate any such proceeding/s. Therefore also, when respondents No.2 and 3 can initiate insolvency proceedings irrespective of any such directions, either by RBI or by any other authority, it cannot be said that direction by RBI or filing of petition by respondents No.2 and 3 is unwarranted or arbitrary. However, as already discussed herein above, filing of petition is different from admitting or allowing the petition and to that extent, this Court has issued notice to ascertain, affirm and re-confirm the position that it would be solely at the discretion of the adjudicating authority either to admit the petition and to proceed further in accordance with law or to refuse to admit the petition. It is also clear that such decision of the adjudicating authority, would be a judicial determination and, therefore, such authority has to deal with the rival submissions and factual details on the subject before taking any decision. Thereby, such adjudicating authority cannot be considered as mere rubber-stamp authority at the hands of RBI or any other institution. In view of above facts, the petition needs to be disposed of with certain observations when petitioner is not entitled to any relief/s as prayed in this petition.

12) However, before concluding the petition, one has to deal with the submission of the petitioner that considering the provisions of Insolvency and Bankruptcy Code, 2016, filing of petition would result into admitting the petition within 14 days being mandate of the NCLT under the Act, and it would result into drastic impact on the day to day functioning of the company and its process of restructuring the affairs of the company so as to survive. It is contended that on admission of the petition under Insolvency and Bankruptcy Code, 2016, if Interim Resolution Professionals are to be appointed mechanically, without considering the facts and circumstances and without offering an opportunity to finalise the restructuring plan, which is at the advance stage, and thereby, if control of the Board of Director is withdrawn, then, suppliers would not continue to supply raw-materials, which would result into closure of all units and thereby, retrenchment of 4500 employees' for no valid reasons, more particularly when company is functioning at its 80% capacity and doing well to cope-up with the competitive market against non-availability of gas (fuel) from Government and against dumping of similar product from foreign countries whereby there is imbalance in production because of final profit. Though it may seem to be an attractive argument, in my humble opinion, at this stage, in a petition under Article 226 of

the Constitution of India, I do not wish to explore all such issues and to determine anything precisely because, ultimately, all such issues would be raised before NCLT, which has to ascertain that whether there is reason to admit the insolvency resolution process immediately or not.

At this stage, though this Court has to decide the matter based upon the facts, circumstance and evidence, so also applicable law, I could not resist to apprehend that allowing foreign countries to dump similar goods, which is made by Indian companies, would certainly result into an invitation to old colonial system because, ultimately, the business groups, who are having huge turnover in particular manner, would have impressive control over administration. But, when petitioner has not challenged the provision of Insolvency and Bankruptcy Code, I have not to deal with such issue at this stage except to dispose of this petition, more particularly, when there is no scope of granting interim relief in favour of the present petitioner. Refusal of interim relief is obvious because petitioner company is in debt of more than Rs.45,000 Crores for couple of years, its NPA was more than Rs.32,000 Crores in last year and more than Rs.31,000 Crores in previous year. It is also clear that when total debt is more than Rs.45,000 Crores, there is no option, but to leave the issue at the discretion

of the lenders to take appropriate steps in accordance with law, thereby, without interference of this Court under the constitutional mandate. However, at the cost of repetition, it is made clear that factual details and on-going process of restructuring plan and other details would be taken care of by NCLT before taking any decision on merits.

40. Conclusion:-

(A) The Respondent No. 1 RBI has to be careful while issuing press releases; it must be in consonance with the Constitutional Mandates, based upon sound principles of Law, but in any case should not be in the form of advise, guidelines or directions to judicial or quasi-judicial authorities in any manner what so ever;

(B) Since the press release is referring the earlier press release dated May 22, 2017, and since in such press release there is reference of S4A - Scheme for Sustainable Structuring of Stressed Assets, which is also introduced on the same day i.e. 13.6.2017; it would be appropriate for RBI to see that benefit of all its schemes is equally offered and extended to all without any discrimination. It is quite clear and obvious that Court has to see that there is no arbitrariness or discrimination by State or its authorities.

(C) It cannot be held that directions under reference is in nature of classification or such classification is irrational, unjust, arbitrary or discriminatory; but it would be appropriate for RBI to see that benefit of all its schemes is equally offered and extended to all without any discrimination. Therefore relief in terms of para 7(a) cannot be granted.

(D) It cannot be held that Banking Company is not entitled to initiate insolvency proceedings without the directions of the RBI u/s 35AA of BRA. Therefore relief in terms of para 7(b) cannot be granted.

(E) It cannot be held that directives of RBI under reference by impugned press release is binding upon SCB and therefore SCB is bound to consider the restructuring proposal by the petitioner, wherein petitioner has offered to start payment of dues only after 25 years and that too only with 1 % interest. Therefore relief in terms of para 7(c) cannot be granted.

(F) Only because SCB has corresponded to SBI for its proposal with reference to JLF activities, it cannot be held that SCB could not have initiated insolvency proceedings but it has done it only because of RBI guidelines by way of press release. Therefore relief in terms of para 7(c) cannot be granted.

(G) Provisions of IBC may be drastic to some

extent, but since it is part of statue which is yet not declared unconstitutional and therefore they are to be followed, but in consonance with Constitutional mandate by all concerned i.e.

(1) Not to act upon it mechanically and that all provisions may not be treated mandatory but it could be treated directive only based upon facts, circumstances and evidence available before the authority (judgment dated 1.5.2017 in Company Appeal (AT) No.09 of 2017 between J.K. Jute Mills Co. Ltd. v. M/s. Surendra Trading Company by the National Company Law Tribunal);

(2) Without being guided by any advice or directions in any form or nature viz: impugned press release. There is reason to say so because RBI has tried to do so and changed its document when called upon to explain their stand; and

(3) Thereby it is obvious that adjudicating authority may though proceed in accordance with Law, there should not be undue pressure on it by administration and period of pendency of present petition can certainly be considered as reasonable ground to count the time limit from the date of receipt of writ of this order.

(H) So far factual details of Petitioner Company with reference to its activities and exercise

of restructuring through JLF is concerned, it would be appropriate not to enter into any determination on such point since that would be the subject matter before the Adjudicating Authority under IBC (i.e. NCLT) and therefore it is left open for it to consider it for its determination in accordance with Law, to avoid any prejudice to either party by discussion and determination on any such issue at this stage by this Court, where core issue is whether there is reasonable classification by the RBI and not that whether insolvency proceedings should be admitted or continued or not. Therefore, relief in terms of para 7(d) cannot be granted.

(I) For the same reason, issue of suppression of material facts or false statement is not much material at this stage because to decide that information or fact if at all suppressed or false is whether material or not would require same exercise and that may prejudice either side. Moreover, petition can be disposed of even without determining such issue and therefore no determination is required on such issue.

(J) Pursuant to decision in Ionic Metaliks (supra), no writ can be issued against SCB and therefore petition stands dismissed against Respondent No. 3 SCB. Factual details between the Petitioner and SCB has been avoided to be

discussed further because this Court has not to decide the validity or proprietary of action by SCB against the petitioner when petition by SCB against petitioner is pending before the NCLT and therefore discussion and determination on factual issues may prejudice either side.

41. In view of the above facts and circumstances, the present petition stands disposed of with above observation/conclusions in para 40.

(S.G. SHAH, J.)

binoy/vatsal