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BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH

IA 430 of 2018 In C.P. (I.B) No. 39 & 40/NCLT/AHM/2017

Coram: **Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER JUDICIAL**
Hon'ble Ms. MANORAMA KUMARI, MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 29.01.2019

Name of the Company: Essar Steel Asia Holdings Ltd. & Ors.
V/s.
Satish Kumar Gupta & Ors.

Section of the Companies Act: Section 60(5) of the Insolvency and Bankruptcy Code

S.NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.				
2.				

ORDER

The Parties are represented through their concerned Learned Counsel(s).

The order is pronounced in open Court, vide separate sheet.

MANORAMA KUMARI
MEMBER (JUDICIAL)

HARIHAR PRAKASH CHATURVEDI
MEMBER (JUDICIAL)

Dated this the 29th day of January, 2019.

VS

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH

IA No.430/NCLT/AHM/2018

In

CP (IB) No.39/7/NCLT/AHM/2017

And

CP(IB) NO.40/7/NCLT/AHM/2017

With

Inv. P. No.77 of 2018 in IA No.430/NCLT/AHM/2018

In the matter of :-

1. Essar Steel Asia Holdings Limited,
   Essar House,
   10, Frere Felix,
   De Valois Street,
   Port Louis,
   Mauritius.

2. Mahesh Bhagwan Makhija,
   Flat No.11, Sindhudhara Society,
   Polot No.765,
   5th Road, Khar West,
   Mumbai – 400 052.

3. Jayesh Manek,
   202, Safal Height,
   Opp. Maitri Park,
   Chembur Highway,
   Mumbai – 400 071.

4. Jitender Prakash Maheshwari,
   Flat No.702, Sham Smruti,
   79a Tagore Road,
   Santacruz West,
   Mumbai – 400 054.

5. Ashalata Maheshwari,
   Flat No.702, Sham Smruti,
   79a Tagore Road,
   Santacruz West,
   Mumbai – 400 054.

Applicants

Versus

1. Satishkumar Gupta,
   Resolution Professional of
   Essar Steel India Limited,
   Essar House, 27 Km,
   Surat Hazira Road,

2. State Bank of India
On behalf of the Committee of Creditors,
State Bank Bhavan,
Madame Cama Road,
Nariman Point,
Mumbai – 400 021.
Maharashtra.

3. Standard Chartered Bank
1, Basinghall Avenue,
London,
England – Ec2v 5dd

4. Essar Steel India Limited,
Essar House, 27 Km,
Surat Hazira Road,
Hazira,
Surat – 394 270 (Gujarat). Respondents

And

Arcelormittal India Private Limited,
8, JD Corporate, 3rd Floor,
Near Mahabir Tower,
Jokhiram Durgadutt Compound,
Main Road, Ranchi,
Jharkhand – 834 001 Applicant of Inv. Petition No.77 of 2018

Order delivered on 29th January, 2019

Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (J)

And

Hon'ble Ms. Manorama Kumari, Member (J)

Appearance:

1. Mr. Mihir Joshi, Senior Advocate with Mr. Aayog Y. Doshi, Advocate for the Applicants.

2. Mr. Navin Pahwa, Senior Advocate with Messrs Raunak Dhillion, Animesh Bisht, Sahil Shah and Parth Shah i/b Cyril Amarchand Mangaldas for the RP, ESIL.

3. Mr. Siddharth Joshi, Advocate with Ms. Trisha Baxi and Mr. Abhishek Shah, i/b M/s Singhi & Company for respondent No.2-Standard Chartered Bank.

4. Messrs Prateek Seksaria, Sapan Gupta, Siddhant Kant, Shalin Jani, and Nishant Doshi, Ms. Grishma Ahuja and Ms. Mrida Lakhmani, Advocates i/b Shradul Amarchand Mangaldas for the CoC.

4. Dr. A.M. Singhvi, Senior Advocate with Messrs Shalin Mehta, Neeraj Kaul, Sudhir Sharma, Abhishek Swaroop, Vishal Gehrana, Anupam Prakash, Amit Bhandari, Akhil Anand, Shezad Kazi, Avishkar Singhvi,

Deepak Joshi, Nachiket Dave, Ms. Ruby Singh Ahuja and Ms. Misha Chandana for Arcelormittal India Private Limited, Applicant in Inv. Petition No.77 of 2018.

ORDER

[Per: HP Chaturvedi, Member (J)]

1. The present Application, i.e. I.A No.430 of 2018, is filed in the main Company Petition (IB) No.39 of 2017 and Company Petition (IB) No.40 of 2017 seeking for appropriate direction of this Bench to the Resolution Professional (RP) as well as Committee of Creditors (CoC) to give due consideration to the settlement plan dated 25.10.2018 (Annexure-J) as proposed by the present applicants and for a further direction to place the settlement plan for voting before all members of the CoC and for a further direction to the CoC of ESIL to facilitate the process of settlement and withdrawal of insolvency applications and C.I.R.P. against ESIL if the settlement plan of the applicants is approved by its requisite majority. The applicants have further prayed that, pending hearing and final disposal of the present application, respondent No.1-Resolution Professional be directed to circulate the settlement plan dated 25.10.2018 among all members of the CoC. The applicants have also sought a relief to the effect that in case the settlement plan as proposed by the applicants is accepted, then the CIRP proceedings initiated against the Corporate Debtor, i.e. ESIL, shall stand withdrawn and concluded under the provisions of the Insolvency and Bankruptcy Code, 2016 ("IB Code" for short).

2. The present applicants claim to be majority shareholder of the Corporate Debtor Company, having possessed of around 70 per cent of the shareholding. The Applicant No. 1 is a holding company of the present Corporate-Debtor. They have raised certain questions of law and facts for consideration of this Adjudicating Authority, which are narrated in detail in paragraph III of the present application. The applicants have also raised a

question making alternate plea that in case the settlement proposal made by the applicants is not accepted by the CoC, the right of the shareholders on principle of redemption of debt under the provisions of the Transfer of Properties Act to pay the amount agreed to be accepted by the CoC in order to discharge the liability of the Corporate Debtor in their books and accounts cannot be taken away under the provisions of Section 91 of the TP Act. Thus, the present CIRP against the Corporate-Debtor ought to have been terminated by the CoC and R.P. by accepting such offer of settlement. The Applicant also made a plea that their case needs to be considered on similar footings of principle of Section 12A of the Insolvency and Bankruptcy Code for moving application for settlement, being shareholders, in respect of present CIRP. Hence, such Section ought not to be interpreted as if it excludes shareholders from making offer for settlement or prevent them from seeking redemption of their debts, as they being shareholders or owners of the company. It is further submitted that the applicants by making such move have made an effort for maximisation of recovery for lenders, which is the prime objective of the IB Code and by proposing such settlement, the applicants have categorically tendered a proposal offering to repay the entire debt of ESIL and thus requested for withdrawal of CIRP against ESIL.

3. According to the applicants, they have made an offer for settlement invoking the right of redemption as per Section 91 of the Transfer of Property Act by making full payment which is much higher than the offer made by the Resolution Applicant whose bid has been finalised. Hence, it was incumbent upon the RP and the CoC to consider the settlement plan in favour of the applicants, i.e. for full settlement of **INR 54,389 crore** to all the creditors including the upfront payment of INR 47,507 crore, which ensures payment of entire admitted claims of all creditors. It is alleged that the CoC did not consider their settlement plan fairly but approved the Resolution Plan of ArcelorMittal India Private Limited ("ArcelorMittal" for

short) and further moved an application under Section 30(6) of the IB Code before this Adjudicating Authority for approval of such Resolution Plan, which, as per the applicants, is illegal, inacceptable and even premature because it has been considered without being objectively and fairly considering the applicants' superior offer for settlement plan. Hence, the applicants have prayed that appropriate directions may be issued by this Adjudicating Authority to the R.P. and the CoC.

4. The present application is vehemently opposed not only by the RP and the CoC by filing detailed reply/written submission, but also by moving Intervention Application by the successful bidder-cum-Resolution Applicant, ArcelorMittal, to be impleaded as party in the present application, i.e. IA No.430 of 2018, and further raising the question of maintainability of such subsequent application before this Adjudicating Authority after the Honourable Supreme Court's decision dated 4th October, 2018 in the case of ArcelorMittal, 2018 SCC Online SC 1733, as the Honourable Supreme Court has already dealt with and decided the major issue involved in respect of the main petitions, i.e. C.P.(IB) Nos. 39 and 40 of 2017 and it was pleased to observe and hold that, "**ordinarily these appeals would have been disposed of by merely declaring both resolution applicants to ineligible under Section 29A(c) of the IB Code, but on the request of learned counsel for the CoC (Shri Subramanium), gave one more opportunity to the parties before the Honourable Supreme Court to pay off their corporate debtors' debts in accordance with Section 29A of the IB Code, so that the best Resolution Plan can be selected by the requisite majority of the CoC and all dues could be cleared as soon as possible. Acceding to such a request, in order to do complete justice under Article 142 of the Constitution of India and also for the reason that the law on Section 29A has been laid down for the first time by this judgment, the Honourable Supreme Court was pleased to give one more opportunity to both the Resolution**

Applicants to pay off the NPAs of their related Corporate Debtors within a period of two weeks from the date of receipt of the judgment in accordance with the proviso to Section 29A(c). The Honourable Supreme Court further held that, if such payments are made within the aforesaid period, both the Resolution Applicants can resubmit their resolution plans dated 2.4.2018 to the CoC, who were then given a period of 8 weeks' time to accept, by the requisite majority, the best amongst the plans submitted including the resolution plan submitted by a third party, **Vedanta**. While directing so, the Honourable Supreme Court was equally conscious to make clear that in the event no plan is found worthy of acceptance by the requisite majority of CoC, the **Corporate Debtor, i.e. ESIL, shall go into liquidation**. Thus, the Honourable Supreme Court was pleased to dispose of the appeal accordingly.

5. It is an undisputed position in the matter that the present application as well as the proposed Settlement Plan is made by the Applicants (being majority Shareholding Company of the Corporate Debtor) after the pronouncement of verdict of the Honourable Supreme Court. The Honourable Supreme Court, while issuing such directions in exercise of extraordinary powers conferred to it under Article 142 of the Constitution of India to the RP and CoC has defined the scope and jurisdiction of the RP and the CoC to consider or otherwise any subsequent application. Even if it may be for settlement plan; then also it may not be appropriate for the RP & the CoC to consider such a subsequent application because it may dilute the direction and mandate given by the Honourable Supreme Court to the RP and the CoC. Moreover, Their Lordships have already made it clear that, in case no plan is found worthy of acceptance, **the Corporate Debtor Company shall go into liquidation.** Hence, if such subsequent settlement plan, as submitted by the present applicants after the verdict of the Honourable Supreme Court, is not given consideration, we cannot find fault in their decision keeping in view of the mandate of the Honourable Supreme

Court as it is not open for the RP and the CoC to take and consider additional agenda or subsequent development for settlement in the matter. Because, in our humble, view, the Honourable Supreme Court granted one more opportunity to Resolution Applicants to pay off their debts and make bid at the request of learned counsel for the CoC. The Honourable Supreme Court was pleased to make it clear that if no valid Resolution Plan is found, then the Corporate Debtor shall go into liquidation. Hence, in our view, if the RP and CoC are willing to consider such Settlement Plan, they are legally expected to apprise of such development in the matter to the Honourable Supreme Court and seek appropriate directions, so that the Honourable Supreme Court might be pleased to issue further directions in the matter. Therefore, we, being Adjudicating Authority, are equally bound by the above stated direction of the Honourable Apex Court. Keeping in view of the above stated direction of the Honourable Supreme Court to do complete justice under Article 142 of the Constitution of India, it is not open to this Adjudicating Authority to dilute or modify the same. Hence, we are required to examine the scope of entertaining the present application and its maintainability within the ambit and scope of Section 60(5) of the IB Code. Moreover, it is a matter of record that the Honourable NCLAT also, by its subsequent order dated 3rd January, 2019 passed in Company Appeal (AT)(Insolvency) No.03 of 2019 has directed us to dispose of the main petition strictly following and in the light of the decision of the Honourable Supreme Court in the case of ArcelorMittal (supra). Thus, our jurisdiction to entertain such application in the present case has been defined by the Honourable NCLAT. Accepting the present application, if the case is reopened on the pretext of inquiry of settlement plan under the provisions of Section 60(5) of the IB Code, then it would amount to redoing exercise by the RP and the CoC for considering the applicants' plan for settlement other than the Resolution Applicant's plan, which may amount to dilution of the order passed by the Honourable Apex Court. Hence, on such ground also, the present IA is found not maintainable.

6. We also considered carefully the right of the borrower to settle the outstanding debt at any stage of the proceedings by redeeming the debt under the provisions of the Transfer of Property Act. However, after hearing rival submissions of learned counsel for both the parties at length, we are of the view that the provisions of the IB Code are made having an overriding effect under Section 238 of the Code on any other law in force and, in the present I.B. Code, the mode of settlement of debt has been made permissible only by way of an application to be moved under Section 12A of the Code and not otherwise. As per the above stated provision, it is made open to the applicants to move such application only through the RP and the CoC before this Court provided 90 percent members of the CoC have approved such settlement offer. Before introducing such Section 12A, it was not open to the Adjudicating Authority to settle the debts or accept settlement offer after admission of the Petition under the IB Code. The post admission settlement was not permissible because it is a settled legal position that once the petition is admitted, it becomes *remedy in Rem not in personem* under the scheme of the Code and it is not made open even for the Applicant/Financial-Creditor to seek withdrawal of the CIRP process on the pretext of subsequent settlement arrived at in the matter. Therefore, as a special case, depending on the facts and circumstances of the case, the Honourable Supreme Court was pleased to allow the settlement by closing the CIRP in order to do complete justice in exercise of its extraordinary powers conferred under Article 142 of the Constitution of India thus it was not open to an Adjudicating Authority to exercise its inherent powers as prescribed under NCLT Rule 11. Therefore, to consider and examine the scope of settlement within the purview of Section 60(5) of the IB Code would not be proper when the specific provisions for settlement of debts under Section 12A have already been incorporated in the Code and if such an application for settlement is considered under the provisions of Section 60(5) of the IB Code, it may amount to deviation from the expressed

statutory provisions because it is a settled legal position that if a particular thing is not allowed to do directly, it cannot be done indirectly.

7. It is a matter of record that the present application is filed by Essar Steel Asia Holdings Limited and Others claiming to be shareholders of the Corporate Debtor Company. It is the settled legal position as per the directions of the Honourable NCLAT, the shareholders cannot have a legal right to oppose the admission of an Insolvency Petition or to oppose the Corporate Insolvency Resolution Process. Moreover, the present applicants did not choose to file such application previously either before this Adjudicating Authority or before the Honourable NCLAT and the Honourable Supreme Court by making Intervention Application by showing their bona fide intention for settling the matter, which could have been dealt with at that point of time by this Adjudicating Authority or by higher forum. It is settled legal position that this Adjudicating Authority, after passing its order dated 19th April, 2018, while determining the eligibility of Resolution Applicants, namely, Numetal and ArcellorMittal has become *functus officio* and in normal course is not authorised to entertain subsequent application under Section 60(5) of the I.B. Code for settlement especially when the matter was carried up to the Supreme Court and reached it's finality as it amounts to reopening and rehearing of the case despite the categorical mandate of the Honourable Apex Court on the subject and further when time is mandate of the Code.

8. It is also pertinent to mention here that the Honourable Supreme Court in its subsequent decision dated 25th January, 2019 in the matter of ***Swiss Ribbon v. Union of India (Writ Petition(Civil) No.88 of 2018)*** has again confirmed and upheld the constitutional validity not only of the IB Code but also carefully examined the subsequent provisions of Section 12A read with Section 30A in its paragraphs 49 and 51 of the said judgment and pleased to hold that these provisions are not violative of Article 14 of the

Constitution of India. Paragraphs 49 to 51 of the said judgment of the Honourable Supreme Court read as under :

"**SECTION 12A IS NOT VIOLATIVE OF ARTICLE 14**

49. Section 12A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 06.06.2018. It reads as follows :-

> "**12-A. Withdrawal of application admitted under Section 7, 9 or 10.-** The Adjudicating Authority may allow the withdrawal of application admitted under Section 7 of Section 9 or Section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified."

50. The ILC Report of March 2018, which led to the insertion of Section 2A, stated as follows :

> "**29.1** Under rule 8 of the CIRP Rules, the NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted [*Lokhandwala Kataria Construction Pvt. Ltd v. Ninus Finance & Investment Manager LLP*, Civil Appeal No.9279 of 2017; *Mothers Pride Dairy India Private Limited v. Portrait Advertising and Marketing Private Limited*, Civil Appeal No.9286/2017; *Uttara Foods and Feeds Private Limited v. Mona Pharmacem*, Civil Appeal No.18520/2017]. This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that "*all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.*" Thus, it was agreed that once the CIRP is

initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors. (emphasis in original)

29.2 On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety percent. It was specifically discussed that rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage (as observed by the Hon'ble Supreme Court in the case of Uttara Foods and Feeds Private Limited v. Mona Pharmacem, Civil Appeal No.18520/2017) and even otherwise, as the issue can be specifically addressed by amending rule 8 of the CIRP Rules."

51. Before this Section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by the NCLT or the NCLAT. *(emphasis supplied)*

Regulation 30A of the CIRP Regulations states as under :-

"**30A. Withdrawal of application** .—(1) An application for withdrawal under Section 12-A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under Regulation 36A.

(2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses *(c)* and *(d)* of Regulation 31 till the date of application.

(3) The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.

(4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(5) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4)."

Thus, the Honourable Supreme Court upheld its constitutional validity. Hence, in our humble view, it is the wisdom of the Legislature which took a conscious decision by making a specific provision for settlement under Section 12A with the voting of 90 per cent members of the Committee of Creditors for allowing such withdrawal by stipulating that such an application to be moved by the main applicant, i.e. Financial/Operational Creditor and none else. Therefore, we do not find any irregularity or illegality in the decision of the RP and the CoC in not considering the settlement plan which was not proposed by the Applicant/ Financial Creditor.

9. Learned counsel appearing for the applicant also submitted that the right of redemption of its property is a substantial right under the provisions of the Transfer of Property Act and it cannot be infringed nor taken away by an act of Legislation because the right to property was earlier a fundamental right and still it is a constitutional right under Article 300A of the Constitution of India. We follow Article 300A of the Constitution of India, which speaks as such that **no one shall be deprived of his property except save authority of law**. By a plain reading of the above stated constitutional provision of Article 300A, it is settled Legal position that there are reasonable restrictions in the right of property and such right to property can be curtailed and property can be acquired in the public

interest under the provisions of the Land Acquisition Act or under other statutory laws. Hence, such right to property is not made absolute in our constitution. It is equally important to note here that the reasonability and the constitutional validity of the IB Code have recently been tested and examined by the Honourable Supreme Court in various decisions, namely, **Innoventive Industries Ltd. v. ICICI Bank, & Another, (2018) 1 SCC 407, Chitra Sharma v. Union of India, 2018 SCC Online SC 874 and Swiss Ribbon v. Union of India** *(supra)*, wherein, the Honourable Supreme Court has been pleased to uphold its constitutional validity. Considering circumstances, if there is no specific provision for making settlement of the case and closing of CIRP by other than the Applicant of Petition/ Financial/Operational Creditor, it is not open to other persons to make application under Section 60(5) of the IB Code for making settlement. Hence, on this count also, the present application fails.

10. In addition to the above, the Honourable NCLAT in the order dated 03.01.2019, passed in the matter of ***Committee of Creditors of Essar Steel (India) Ltd. V. Satishkumar Gupta & Ors. (Company Appeal (AT)(Insolvency) No.03 of 2018***, has been pleased to observe as under :-

> *"From the record we find that the matter was finally decided by the Hon'ble Supreme Court in "Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors – Civil Appeal Nos.9402-9405 of 2018" by its judgment dated 4th October, 2018.*
>
> *2. It is informed that the 'Committee of Creditors' thereafter passed order in terms of sub-section (4) of Section 30 of the Insolvency and Bankruptcy Code, 2016 and the Resolution Professional placed the matter before the Adjudicating Authority (National Company Law Tribunal) on 26th October, 2018 for passing order in terms of Section 31 of the 'I&B Code'. It is not clear as to why after the decision of the Hon'ble Supreme Court and the approval of the 'Committee of Creditors' and placement of 'Resolution Plan', the Adjudicating Authority, Ahmedabad Bench, has adjourned the matter twice.*
>
> *3. it is informed that the matter is likely to be listed on 7th January, 2019, therefore, we are not making any observation with regard to non-disposal of the matter on an early date in spite of the judgment of the Hon'ble Supreme Court. We hope and trust that the Adjudicating Authority will pass final order in one or other way in terms of Section 31 of the 'I&B Code' taking into consideration the decision of the*

Hon'ble Supreme Court in "Arcelormittal India Private Limited (supra). In case the Adjudicating Authority do not pass any order in accordance with law on an early date, it will be open to the Appellant to bring this fact before this Appellate Tribunal."

11. In view of the above, the Intervention Application No.77 of 2018 filed by ArcelorMittal and R.P. Succeeds. Further on the maintainability the present IA No.430 of 2018 is not found maintainable within the ambit and scope of Section 12A and Section 60(5) of the IB Code and, hence, it is rejected on this limited ground that it is not maintainable before this Adjudicating Authority, keeping in view the decision of the Honourable Supreme Court in ArcelorMittal case (supra) read with the direction of the Hon'ble NCLAT in the matter of *Committee of Creditors of Essar Steel (India) Ltd. V. Satishkumar Gupta & Ors. (Company Appeal (AT)(Insolvency) No.03 of 2018* quoted hereinabove.

12. Accordingly, IA No.430 of 2018 is rejected. and stands disposed of

(Ms. Manorama Kumari)
Adjudicating Authority

(Harihar Prakash Chaturvedi)
Adjudicating Authority

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