IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Shekhar B. Saraf

W. P. No. 5595 (W) of 2020

With

C.A.N. 3347 of 2020

Univalue Projects Pvt. Ltd.
Versus
The Union of India & Ors.

And

W.P. No. 5861 (W) of 2020

With

C.A.N. 3937 OF 2020

Cygnus Investments and Finance Pvt. Ltd. & Anr.
Versus
The Union of India & Ors.

For the Petitioners in W.P. No. 5595(W) of 2020	: Ms. Ujjaini Chatterjee, Advocate, Ms. Meenakshi Manot, Advocate, Mr. Arjun Asthana, Advocate.
For the Petitioners in W.P. No. 5861(W) of 2020	: Mrs. Manju Bhuteria, Advocate, Mr. Rajesh Upadhyay, Advocate.
For the Respondents	: Mr. Vipul Kundalia, Advocate, Mr. Avinash Kankania, Advocate.

Heard on : 29.06.2020, 09.07.2020, 06.08.2020 & 10.08.2020

Judgment on : August 18, 2020

Shekhar B. Saraf, J.:

1. These writ petitions have been filed by the petitioners under Article 226 of the Constitution of India, in which a stern challenge has been mounted to an impugned order dated May 12, 2020 issued by the Registrar of the National Company Law Tribunal (hereinafter referred to as "NCLT") at its Principal Bench in New Delhi (hereinafter referred to as "Respondent No. 3"), that *prime facie*, appears to have been issued with the approval of the Hon'ble Acting President of the NCLT, New Delhi (hereinafter referred to as "Respondent No. 2").

2. It appears that the order dated May 12, 2020 imposes a *mandatory* prescription on *all financial creditors*, as defined under the extant provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") to submit certain *financial information* as a record of default before the *Information Utility* (hereinafter referred to as, "IU") as a condition precedent for filing any *new* application under Section 7 of the IBC, 2016. The order further transcends to impose this purported mandatory prescription *retrospectively* on all those applicants / financial creditors who have *pre-existing* applications filed under Section 7 of the IBC, 2016 and pending before the various Benches of the NCLT, prior to such final hearing of these applications.

3. It is the grouse of the first writ petitioner that by virtue of being a financial creditor who has such a *pre-existing* application filed under Section 7 of the IBC, 2016 pending before the NCLT at its Kolkata Bench, the impugned order has the effect of adversely altering their substantive rights as granted to a creditor under the provisions of the IBC, 2016. Not restricting themselves to a singular dimension to such a judicial challenge of such order, the petitioner has also urged that this order has been issued *de hors* the parent Act that establishes the NCLT, i.e. the Companies Act, 2013 (hereinafter referred to as "CA, 2013"), other relevant provisions of the IBC, 2016 as well as in contravention of prevailing Regulations issued by the Insolvency and Bankruptcy Board of India (hereinafter referred to as, "IBBI"), the regulatory board established under the IBC, 2016.

4. When this matter was taken up on July 9, 2020, Mrs. Manju Bhuteria, the learned counsel pressed the second writ petition with a sense of extreme urgency while contending that the petitioner, Cygnus Investments and Finance Pvt. Ltd, intended to file a new application under Section 7 of the IBC, 2016 so as to initiate a corporate insolvency resolution process against the targeted corporate debtor, but was precluded from doing so as the impugned order proscribes such a filing in express terms if such an application is not appended with the record of default from an IU.

5. The issuance of this impugned order by the NCLT dated May 12, 2020 thus, has led to the genesis of this *lis,* and therefore, based on the grounds of challenge to this order that have been levelled by both the writ petitioners, I have heard the two writ petitions conjointly and am passing a common judgement. The petitioners and the respondents have jointly agreed that since the issue relates to a point of law and does not contain any disputed questions of fact, affidavits need not be called for. Based on the arguments advanced by both sides, I am framing the two main issues that need to be dealt with herein:

   I. What is the scope of the powers of the NCLT and whether the exercise of the same in the impugned order May 12, 2020 is *de hors* the IBC, 2016 and the rules and regulations framed thereunder?

   II. In the event the answer to the above is in the negative, whether the NCLT could enforce the same *retrospectively* thereby adversely affecting the rights of the petitioner No. 1 as a financial creditor under the extant provisions of the IBC, 2016?

6. The learned counsel for the first writ petitioners, Ms. Ujjaini Chatterjee, has relied upon the following judgments of the Supreme Court and the National Company Law Appellate Tribunal, in support of arguments that the NCLT does not possess the statutory or regulatory backing to issue the impugned order, let alone enforce it retrospectively:

i. ***Pradyut Kumar Bose –v- The Hon'ble the Chief Justice of Calcutta High Court***, AIR 1965 SC 285,

ii. ***Hitendra Vishnu Thakur –v- the State of Maharashtra***, (1994) 4 SCC 602,

iii. ***Pallawi Resources Limited –v- Protos Engineering Company Pvt. Ltd.***, (2010) 5 SCC 196,

iv. ***Satheedevi –v- Prasanna***, (2010) 5 SCC 622

v. ***Neelkanth Township & Construction Pvt. Ltd. –v- Urban Infrastructure Trustees Ltd.***, Company Appeal (AT) (Insolvency) No. 44 of 2017 dated August 11, 2017.

vi. ***Bharti Defence and Infrastructure Ltd. –v- Edelweiss Asset Reconstruction Company Ltd.***, Company Appeal (AT) (Insolvency) No. 71 of 2017 dated October 17, 2017.

7. Ms. Chatterjee, in her submissions, has cast aspersions on the competency of the NCLT to issue the impugned order. She has referred to Section 424 of the CA, 2013 to contend that though the functioning of the NCLT and NCLAT is not bound by the rigours of the Code of Civil Procedure (hereinafter referred to as "CPC, 1908"), the same are guided by the rules of natural justice and *subject* to the provisions of both the CA, 2013 and the IBC, 2016 alongside any regulations

that may be framed under it. Only the arena of regulating their day to day administration and such procedure that may be followed for the same, in the opinion of Ms. Chatterjee, has been left to the NCLT. She submitted that Section 424 of the CA, 2013, confers no powers to either the NCLT/NCLAT to makes any rules of such procedure that have the effect of altering the provisions of the CA, 2013 or the IBC, 2016 or the regulations that may be framed under the IBC, 2016.

8. Venturing further, Ms. Chatterjee has stressed on the phraseology '*as may be specified'* in the text of the IBC, 2016 to contend that it is a well-established principle of statutory interpretation wherein the legislature is assumed to be specially precise and careful in its choice of language. She has relied on paragraph 24 of the Supreme Court's dictum in ***Pallawi Resources Limited*** *(supra)* to contend the same and therefore, based on the definition of the term 'specified' under sub-section (32) to Section 3 of the IBC, 2016, '*as may be specified*' would imply such regulations as have been specified by the IBBI, and not the NCLT. Therefore, it is her submission, that it cannot be presumed that such a delegated legislation to regulate the tribunals' own administrative procedure can be equated on the same plinth as the power of the IBBI to make such regulations consistent with the IBC, 2016.

9. Ms. Chatterjee has cited ***Pradyut Kumar Bose*** *(supra)* on the scope of delegation of statutory powers and stated that where the law specifically provides for such delegation, it is permissible in law only for the IBBI to frame such regulations while they remain consistent with the parent statute, that is, the IBC, 2016, and the NCLT has traversed beyond its statutory borders in issuing the impugned order. She also relied on ***Hitendra Vishnu Thakur*** *(supra)* to point out that a procedural statute should not generally speaking be applied retrospectively where the result would be the creation of new disabilities or obligations, or if it were to impose new duties in respect of transactions already accomplished. Ms. Chatterjee argued that this is exactly what the impugned order has accomplished post its promulgation.

10. Ms. Chatterjee thereafter dealt with the substantive provision which forms the core of this impugned order: Section 7 of the IBC, 2016. She had relied upon clause (a) to sub-section (3) of Section 7 of the IBC, 2016 to stress on the fact that a record of default recorded with the IU is *one* of the designated methods of furnishing proof to the Adjudicating Authority (hereinafter referred to as, "AA") or in other words, the NCLT, to prove the existence of a financial debt that has accrued to a financial creditor. The learned counsel for the petitioners based, on such interpretation of Section 7(3)(a) of the IBC, 2016 contends that the continuous usage of the word *'or'* makes it clear that the intention of the legislature was to make this section 'disjunctive' and thereby indicate that such 'record of default recorded with the IU' was *one* of the forms of evidence to be

produced and not the *only* form of evidence that would be considered by the AA / NCLT. To lend credence to this argument, the counsel for the petitioner has placed reliance on ***Satheedevi*** (*supra*) to state that it is trite law that the intention of the legislature must be found in the words used by the legislature itself in their plain grammatical meaning.

11. Ms. Chatterjee has further quoted Regulation 8 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as, "CIRP Regulations, 2016") to highlight that sub-regulation (2) also lists *other relevant documents,* specially four (4) categories of documents, in addition to the records of default available with an IU, that may be submitted by a financial creditor to prove the financial claims of such a creditor. And therefore, based on conjoint reading of Section 7(3)(a) of the IBC, 2016 with Regulation 8 of the CIRP, 2016 framed by the IBBI, the counsel for the petitioners contends that the AA or NCLT can consider either of the options: a record of default recorded with the IU *or* such documents that have been specified by the IBBI vide *its regulations*.

12. *Apropos* of the record of default with the IU, Ms. Chatterjee contends that the "core services" defined in Section 2(9) of the IBC, 2016, is merely *one of the full proof ways* of producing an evidence of financial debt by a financial creditor '*who chooses to do so*' before the AA or NCLT. To provide a certain finesse to this

aspect of the argument, the counsel has directed my attention to Section 214 of the IBC, 2016 which lists down extensively the obligation of an IU and Section 215 of the IBC, 2016 which deals with the procedural formalities envisaged as far as the submission of *financial information* to the IU is concerned.

13. It is the argument of Ms. Chatterjee that the IBBI, in exercise of its powers, *inter alia,* under Secs. 214 and 215 read with Sec. 240 of the IBC, 2016, framed the IBBI (Information Utilities) Regulations, 2017 (hereinafter referred to as, "IU Regulations, 2017") to provide a framework for registration and regulation of information utilities and that has been in effect since April 1, 2017. Sub-regulation (1) of Regulation 20 of IU Regulations, 2017 provides that an IU shall accept information submitted by a user in Form C of the Schedule appended to the IU Regulations, 2017. And based on this limb of the argument, the learned counsel for the first writ petitioners contends that sub-section (2) of Section 215 becomes imperative in the case of those class of financial creditors who have a '*security interest'* created with respect to this financial debt, in contradistinction to other financial creditors, as the petitioners, who do not have such a security interest, who then have to *mandatorily (the sub-section employs the phrase 'shall')* submit the requisite financial information under Form C of the IU Regulations, 2017.

14. Ms. Chatterjee, accordingly also relied on the NCLAT judgments of ***Neelkanth Township and Construction Pvt. Ltd.*** *(supra)* and ***Bharti Finance and Infrastructure Ltd.*** *(supra)* that have already held that submitting financial information before the IU cannot be a mandatory provision or the *sole* repository of a provision to prove the existence of a default in relation to a financial debt accrued to a financial creditor.

15. She has also urged that they are not financial creditors who possess a 'security interest', as defined under sub-section (zf) to Section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as, "SARFESI, 2002") but the first writ petitioners had merely extended an "Inter Corporate Deposit" (hereinafter referred to as, "ICD") to the corporate debtor under Section 186 of the CA, 2013 which does not entail the creation of such a security interest.

16. Hence, according to Ms. Chatterjee, Section 7(3)(a) of IBC, 2016 read with Regulation 8 of CIRP, 2016 coupled with Section 215(2) of IBC, 2016 with Regulation 20 of IU Regulations, 2017 makes it abundantly clear that the impugned order that has been issued by the NCLT is beyond its jurisdiction.

17. Mrs. Bhuteria, the learned counsel appearing for the petitioners in the second writ petition, has very admirably supported the arguments of Ms. Chatterjee, and has chosen to make a few additional submissions before the court, all the while relying on the following cases:

i. ***General Officer Commanding-in-Chief –v- Subhash Chandra Yadav***, AIR 1988 SC 876,

ii. ***Kunj B. L. Butail –v- State of Himachal Pradesh***, (2000) 1 SCC 40,

iii. ***Addl. District Magistrate (Rev.) Delhi Admin. –v- Siri Ram***, (2000) 5 SCC 451

iv. ***K.K.Velusamy –v- N.Palanisamy***, (2011) 11 SCC 275,

v. ***Ram Rati –v- Mange Ram & Ors.***, (2016) 11 SCC 296,

vi. ***Director General of Foreign Trade and Ors. –v- Kanak Exports***, (2016) 2 SCC 226,

vii. ***Innoventive Industries –v- ICICI Bank***, (2018) 1 SCC 407,

viii. ***Swiss Ribbons (P) Ltd. –v- Union of India***, (2019) 4 SCC 17

ix. ***Indian Young Lawyers Association –v- the State of Kerala & Ors.,*** (2019) 11 SCC 1,

x. ***Committee of Creditors of Essar Steel India Limited –v- Satish Kumar Gupta & Ors.,*** SCC Online SC 1478,

xi. ***Tata Chemicals Ltd. –v- Kshitish Bardhan Chunilal Nath***, AIR 2019 Cal 353

xii. ***Union Bank of India –v- Oriental Bank of Commerce***, Company Appeal (AT) (Insolvency) No. 1417 of 2019

18. Mrs. Bhuteria has contended that neither the Acting President of the NCLT nor the Registrar possess the authority to make any such rule or regulation as promulgated vide the May 12, 2020 order. She drew the attention of this Court to Rules 16 and 17 of the NCLT Rules, 2016, framed by the Central Government, which deals with the functions of the President and Registrar of the NCLT, respectively. None of these rules envisage either the President or Registrar possessing such powers to promulgate an order in the nature of the one notified on May 12, 2020.

19. She cited the dictum of ***General Officer Commanding-in-Chief*** *(supra)* to state that two conditions must be fulfilled for a subordinate rule to have the effect of a statutory provision, namely: (a) such rule must conform to the provisions of the statute under which it is framed, and (b) it must also come within the scope and purview of the rule making power of the authority framing the rule.

20. It was Mrs. Bhuteria's submission that if either of these two conditions are not satisfied, the subordinate rule so framed would be void. She placed her reliance on Sections 239 and 240 of the IBC, 2016 to drive home her point that only the Central Government and the IBBI had been conferred with rule-making and regulation-making powers respectively. She also placed her reliance on ***Indian Young Lawyers Association*** *(supra)* to point out that a rule-making authority does not have the power to make a rule beyond the scope of the enabling law or inconsistent with the law. Add to this the scope of Section 424 of the CA, 2013, and it becomes apparent, in Mrs. Bhuteria's opinion, that the President or the Registrar of the NCLT does not have the power to frame such a rule/ regulation.

21. She had also relied on ***Addl. District Magistrate (Rev.) Delhi Admin. v. Siri Ram*** *(supra)* and ***Kunj B. L. Butail*** *(supra)* to establish the contours and specifics of the process of delegated law-making, within the four corners of the law.

22. Mrs. Bhuteria introduced a fresh point not touched upon by Ms. Chatterjee. She submitted that the NCLT was also not empowered by the inherent powers under Rule 11 of the NCLT Rules, 2016 to promulgate the impugned order dated May 12, 2020. She relied on the Supreme Court's judgment in ***K.K. Velusamy*** *(supra)* which dealt with an in-depth analysis of Section 151 of the CPC, 1908 which was followed in ***Ram Rati v. Mange Ram & Ors.*** *(supra)*. Not stopping there, she also

relied on one of my previous judgments, namely ***Tata Chemicals Ltd.*** *(supra)* to hold that a civil court cannot in the guise of inherent powers available under Section 151 of the CPC, 1908 pass orders that are in conflict and are in contravention to the provisions of the Code. Based on such reliance, she has argued that the scope of inherent powers cannot be exercised such that it is in conflict with the statute or against legislative intent.

23. She introduced another additional point by placing reliance on the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "AA Rules, 2016"), specifically Rule 4(1) that deals with the aspects of an application filed by a financial creditor. In pursuance of Rule 4(1), it was pointed out that '**Form-1'** has to be filed accompanied with such documents and records as have been specified in the CIRP Regulations, 2016. Mrs. Bhuteria drew my minute attention to this Form-1 at 'PART-V', where at serial no. 3, the entry reads: "**Record of default with the information utility, if any**" while the entry at serial no. 8 reads: "**List of other documents attached to this application in order to prove the existence of financial debt, the amount and date of default.**" As per her submission, it clearly showcases, that a record of default with the IU is not mandatory but the law accommodates other kinds of evidences for proving the existence of such a default.

24. Accordingly, she relied on the Supreme Court's dictums in ***Innoventive Industries*** *(supra)*, which was subsequently also relied on in ***Committee of Creditors of Essar Steel India Limited*** *(supra)* and ***Swiss Ribbons (P) Ltd.*** *(supra)*, that have held that apart from the record maintained with the IU, such Form-1 made it clear that there were other sources to bring forth evidence of a financial debt.

25. Lastly, she placed her reliance on ***Director General of Foreign Trade*** *(supra)* to contend that a delegated/subordinate legislation can only be prospective and not retrospective, unless the designated rule-making authority has been vested with such powers to make rules with retrospective effect.

26. *Per contra*, the learned counsel for the Respondent, Mr. Kundalia, had argued that based on Section 424 of the CA, 2013, both the NCLT and NCLAT were vested with powers to regulate their own procedures. It is his submission that the impugned order dated May 12, 2020 was nothing but the implementation of the mandatory and necessary requirement and compliance of various provisions of the IBC, 2016. Therefore, the NCLT was well within its rights to issue the impugned order dated May 12, 2020 while being in compliance with the provisions of the IBC, 2016.

27. As far as the interpretation of Section 215 of the IBC, 2016 by Ms. Chatterjee is concerned, Mr. Kundalia has urged that she has misconstrued the interpretation of Section 215(2) of the IBC, 2016, which as per Mr. Kundalia, does not make any distinction between a secured creditor or an unsecured creditor. Such classification by the petitioners, has been dubbed as 'illusory' and 'against settled principles of interpretation'. According to him, Section 215(2) of the IBC, 2016 postulates that in both situations i.e. submission of financial information *and* information relating to assets in relation to which any security interest has been created in such form and manner as may be specified by regulations, a financial creditor has to mandatorily file such information with the IU, irrespective of its classification as either a secured or an unsecured creditor.

28. Mr. Kundalia has strongly shrugged off the arguments which portrayed the role of the IU as a mere 'idle formality'. Rather, as per his submissions, it is both the duty and services of the IU to authenticate and verify the financial information submitted by a financial creditor, which as per his submission, is an inherent feature of "core services" rendered by such IU defined in Section 214(e) of the IBC, 2016.

29. Mr. Kundalia has dismissed the reliance placed on the NCLAT judgments of ***Neelkanth Township and Construction Pvt. Ltd.*** *(supra)* and ***Bharti Finance and Infrastructure Ltd.*** *(supra)* relied on by Ms. Chatterjee as having no persuasive value before this court and also for the reason that both these judgments were passed by the NCLAT prior to the promulgation of the impugned order dated May 12, 2020. He has also rebuffed the reliance placed on ***Hitendra Vishnu Thakur*** *(supra)* to argue that new disabilities have not been created retrospectively with the promulgation of the impugned order since in his interpretation, Section 7(3)(a) of the IBC, 2016 specifically mandates from the onset that a financial creditor shall alongwith the application under Section 7 furnish the record of default recorded with the IU. On the interpretation of section 7, he has submitted that the term "as may be specified" refers to all three classes of documents that precede the term. He submitted that the record of default recorded with the IU is the only document that has been specified in the regulations, and therefore, the same is mandatory. According to him, there are no specific regulations with regard to "such other record" and "evidence of default". In light of the same, he submits, that the NCLT has only reiterated the position under the IBC, 2016.

30. On the point of "evidence of default", Mr. Kundalia has placed his reliance on ***Izhar Ahmad Khan –v- Union of India***, AIR 1962 SC 1052, to submit that there are two categories of law that are well known, that is, substantive and

procedural law wherein evidence is a part of the procedural law. Taking this argument forward he submits that evidence being part of procedural law falls within the powers of the tribunal to regulate its own procedure within the ambit of Section 424 of CA, 2013.

31. Mr. Kundalia, has also chosen to rely on the following judgments, to buttress his arguments pertaining to retrospective application of the impugned order:

i. ***Shyam Sunder –v- Ram Kumar & Anr.***, (2001) 8 SCC 24,

ii. ***Gurbachan Singh –v- Satpal Singh***, (1990) 1 SCC 445,

iii. ***K. Kapen Chako –v- Provident Investment Co. Ltd.,*** (1977) 1 SCC 593,

iv. ***New India Assurance Co. Ltd. –v- Smt. Shanti Misra, Adult.***, (1975) 2 SCC 840.

32. Mr. Kundalia had also drawn my attention to Regulation 1(3) of the CIRP Regulations, 2016 which allows a fast-track process under Chapter IV of Part-2 of the IBC, 2016. He had argued that the petitioners, represented by Ms. Bhuteria, had not made out a case that their case falls within and/or qualifies to be processed under Section 55(2) of the IBC, 2016.

33. Mrs. Bhuteria, in her supplementary note of written arguments, has strongly rebuffed this line of argumentation, drawing the attention of the Court to Regulation 2(1)(a) of the CIRP Regulations, 2016 which clearly defines an applicant filing an application, under Section 7 of the IBC, 2016. She has categorically stated that they do not wish to apply under Chapter IV of Part II of IBC but wish to do so under Section 7 of the IBC, 2016. In her opinion, the said chapter has no relevance in this case.

34. I have heard the learned counsels appearing on behalf of both the parties at length and perused the materials that they have been placed on record.

35. Let me commence with the process of adjudicating the *vires* or propriety of the impugned order by reproducing the same below:

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ORDER

All concerned are directed to file default record from Information Utility alongwith the new petitions being filed under section 7 of Insolvency and Bankruptcy Code, 2016 positively. No new petition shall be entertained without record of default under section 7 of IBC, 2016

The Authorized Representatives/Parties in the cases pending for admission under aforesaid section of IBC also directed to file default record from Information Utility before next date of hearing.

This issues with approval of Hon'ble Actg. President.

(Shiv Ram Bairwa)
Registrar

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Analysis on the "Powers of the NCLT':

36. At the very outset, I would like to examine the extent of the powers granted to and available with the NCLT and NCLAT. It was as far back as 1963 when the Constitution Bench of the Supreme Court in ***Engineering Mazdoor Sabha –v- Hind Cycles Ltd.***, AIR 1963 SC 874 had noted:

> *" 6. ..[T]he Tribunals which are contemplated by Article 136(1) are clothed with some of the powers of the courts. They can compel witnesses to appear, they can administer oath, they are required to follow certain rules of procedure: the proceedings before them are required to comply with rules of natural justice, they may not be bound by the strict and technical rules of evidence, but nevertheless they must decide on evidence adduced before them; they may not be bound by other technical rules of law, but their decisions must, nevertheless, be consistent with the general principles of law. In other words, they have to act judicially and reach their decisions in an objective manner and they cannot proceed purely administratively or base their conclusions on subjective tests or inclinations."*
>
> **Emphasis supplied**

This view was reiterated in an encapsulated form yet again by the Supreme Court in ***State Bank of India –v- Jah Developers Pvt. Ltd.***, (2019) 6 SCC 787 wherein the Court held:

> *"12..[W]hile this may be correct, it is clear that before a body can be said to be a "tribunal", it must be invested with the judicial power of the State to decide a lis which arises before it. This would necessarily mean that all "tribunals" must be legally authorised to take evidence by statute or subordinate legislation or otherwise, the judicial power of the State vesting in such Tribunal.*

Emphasis supplied

37. When it comes to the exercise of powers by Tribunals like the NCLT or NCLAT while being subjected to certain statutory limitations, the Supreme Court in ***Grindlays Bank Ltd.***, 1980 (Supp) SCC 420 had held:

> "*6…[B]ut it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary.*"

Emphasis supplied

Therefore, based on the above view of the Supreme Court, even the exercise of incidental or ancillary powers by tribunals are permitted unless proscribed by any indication which speaks to the contrary through the statute governing the tribunal so constituted. A similar extended view was reiterated by the Supreme Court yet again in paragraph 8 of its judgment in ***Union of India –v- Paras Laminates (P) Ltd.***, (1990) 4 SCC 453 wherein the Court held:

> "*8..[T]he powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective.*"

Emphasis supplied

38. With the above observations in mind, I proceed to produce the extract of Section 424(1) of the CA, 2013 which pertains to the procedure before both the NCLT and the NCLAT:

> *"**424. Procedure before Tribunal and Appellate Tribunal.** – (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it, or the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by **the principles of natural justice,** and **subject to** the **other provisions of this Act or of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and of any rules made hereunder**, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.*

Emphasis supplied

Therefore, what becomes clear to me is that while both the NCLT and NCLAT have been conferred with powers to regulate their own procedure, such use of its power is circumscribed and **subject to** *inter alia*, the principles of natural justice as well as the provisions of CA, 2013 or the IBC, 2016, inclusive of any rules/ regulations made under the IBC, 2016 by the regulatory body, IBBI. Therefore, the powers of the NCLT and NCLAT is limited both by principles of natural justice as well as statutory provisions and regulations framed under such legislations.

39. Based on the jurist Kelsen's 'Pure Theory of Law', the Supreme Court in the case of ***Government of Andhra Pradesh –v- P. Laxmi Devi (Smt)***, (2008) 4 SCC 720 had recorded the hierarchy of legal norms in India, in the following manner:

> *"34. In India the grundnorm is the Indian Constitution, and the hierarchy is as follows:*
>
> *i. The Constitution of India;*
>
> *ii. Statutory law, which may be either law made by Parliament or by the State Legislature;*
>
> *iii. Delegated Legislation, which may be in the form of rules made under the statute, regulations made under the statute, etc.;*
>
> *iv. Purely executive orders not made under any statute.*
>
> *35. If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail…"*
>
> **Emphasis supplied**

40. Accordingly, based on the above hierarchy, I am in agreement with Ms. Chatterjee as far as the hierarchy of legal norms involved in this case is concerned and I adumbrate it as follows:

i. Provisions of the CA, 2013 and IBC, 2016 as they are Acts passed by the Parliament;

ii. Rules enacted by the Central Government and Regulations enacted by the IBBI under powers granted by Sec. 239 and Sec. 240 of the IBC, 2016 respectively;

iii. NCLT/NCLAT regulating their own procedure subject to Sec. 424 of the CA, 2013 and the NCLT/NCLAT Rules, 2016.

41. Now, coming to the legal propriety of the impugned order that has been promulgated by the Registrar of the NCLT, in my opinion, it would have to withstand the challenge of the judicial test that has been outlined by the Supreme Court. Mrs. Bhuteria had relied on ***General Officer Commanding-in-Chief*** *(supra)*, wherein the Court had laid down the following two conditions for a subordinate rule to have the force of a statutory provision. I reproduce the extract of the relevant paragraph 14 below:

> "14. ..[I]t is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. *But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."*

Emphasis supplied.

42. Recently, the Constitution Bench of the Supreme Court in ***Indian Young Lawyers Association*** *(supra)*, popularly known as the '*Sabrimala Shrine*' judgment, had authoritatively ruled the following:

> "266. *When the rule-making power is conferred by legislation on a delegate, the latter cannot make a Rule contrary to the provisions of the parent legislation. The rule-making authority does not have the power to make a Rule beyond the scope of the enabling law or inconsistent with the law.* Whether the delegated legislation is in excess of the power conferred on the delegate is determined with reference to the specific provisions of the statute conferring the power and the object of the Act as gathered from its provisions."
>
> **Emphasis supplied**

43. What confounds me is that fact that the impugned order is silent on the enabling provision of law, that is, either the statutory or delegated source of power which enabled the NCLT to issue the order. Mr. Kundalia had argued that based on Section 424 of the CA, 2013, both the NCLT and NCLAT were vested with powers to regulate their own procedures. It was his submission that the impugned order dated May 12, 2020 was nothing but the implementation of the mandatory and necessary requirement and compliance of various provisions of the IBC, 2016. *Per contra*, the petitioners have vehemently submitted that the impugned exercise of power **fell foul to the provisions of the CA, 2013, the IBC, 2016 and the rules made under the IBC.**

Analysis on "Statutes, Rules and Regulations"

44. Moving on, since both the parties have been jostling with the interpretative scope of "legislative intent" of Section 7(3)(a) as it forms the core of their arguments, I am reminded of the wise caveat that was appended by the House of Lords in the landmark case of ***Salomon –v- Salomon & Co.***, [1897] A.C. 22 at page 38:

> *"..."Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.."*

45. And therefore going forward with the thrust of the above caveat, I intend to ascertain the true intent of the IBC, 2016 and the scope of Section 7(3)(a) of the IBC, 2016, borne out either by the express words used or by reasonable and necessary implication deduced. Therefore, based on the above discussion, I now come to clause (a) to sub-section (3) of Section 7 of the IBC, 2016. The relevant provision reads thus:

> "***7. Initiation of corporate insolvency resolution process by financial creditor.*** -
>
> *(1)****
>
> *(2)****

(3) The financial creditor shall, along with the application furnish-

a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

*b) ****

*c) ****

*(4)****

*(5)****

*(6)****

*(7)*** "*

The phrase 'as may be specified' as it so occurs in Section 7(3)(a), directs me to the definition of the term "specified" as defined in sub-section (32) to Section 3 of the IBC, 2016. It is defined as:

> *"(32) "specified" means specified by regulations made by the Board under this Code and the term "specify" shall be construed accordingly;"*

Furthermore, the term 'Board' as it appears in sub-section (1) of the IBC, 2016 means the Insolvency and Bankruptcy Board of India established under sub-section (1) of the self-same Code.

46. Clause (a) of sub-section 3 of Section 7 clearly states that the *financial creditor shall furnish along with the application record of the default recorded with the information utility or such other record or evidence of default as may be specified*. As is evident, the clause is disjunctive in nature and when the word "or" is used in drafting of positive conditions, the positive conditions separated by "or" are

read in the alternative.[1] The three categories of evidence that can be provided are as follows: (a) record of the default recorded with the information utility; (b) such other record; (c) evidence of default as may be specified. The disjunctive use of the above makes it clear that either of the three may be provided by the financial creditor to the adjudicating authority. As per Mr. Kundalia's arguments, the term "as may be specified" is applicable to all the three categories and not just to the evidence in default. In my view, if the intention of the legislature was to make the term applicable to all three categories a *comma* would have been inserted after the word "default". Following the principles of *litera legis*, I am of the view that the legislature had no intention to extend the term "as may be specified" to all the three categories. Furthermore, on a plain reading, I do not find this to be a case of *casus omissus*,[2] and therefore do not intend to add any punctuation mark (comma) to change the intent of the legislature. In conclusion, on a plain reading of the above provision, it is immanent that three different categories of

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[1] See ***Star Co. Ltd. –v- CIT (Central), Calcutta***, (1970) 3 SCC 864.

[2] See more: ***Unique Butyle Tube Industries (P) Ltd –v- U.P. Financial Corporation***, (2003) 2 SCC 455 at paragraph 13, ***Union of India –v- Deoki Nandan Aggarwal***, 1992 Supp (1) SCC 323 at paragraph 14, ***P.K. Unni –v- Nirmala Industries & Others.***, (1990) 2 SCC 378 at paragraph 15.

Note: The approach for a judicial intervention in supplementing an omission in a statute is a fiercely debated point of law. Denning, L.J. had opined that when such a defect appears, a judge cannot merely fold his hands and blame the draftsman but recourse should be taken to identify the legislative intent and supplement the words so as to give 'force of life' to the legislature's intention. See more: ***Seaford Court Estates Ltd. –v- Asher***, (1949) 2 All ER 155; these views were once again reiterated in his dissenting judgment in ***Magor & St. Mellons Rural District Council –v- Newport Corporation***, (1950) 2 All ER 1226). But these views drew the ire of the House of Lords, for such an approach, in the guise of interpretation, allowed a judge to venture into the restricted arena of legislating, and hence were disapproved. (***Magor & St. Mellons RDC –v- Newport Corporation***, (1951) 2 All ER 839 (HL)). The Supreme Court in the ***Bangalore Water Supply Case***, (1978) 2 SCC 213 did approve the rule of construction espoused by Denning, L.J. only in the exceptional circumstances of tackling the definition of the ambiguous term 'industry' in the Industrial Disputes Act, 1947. But such approach as repeatedly reiterated by the Supreme Court, must be sparingly used and an ubiquitous approach has been strictly discouraged.

documents are available to a financial creditor to prove proof of default by a corporate debtor. **In light of the above findings itself, the *lis* is resolved squarely in favour of the petitioners as the impugned order falls foul as it seeks to limit the intent of the legislature to the submission of only one document, that is, category (a) above**. However, since submissions have been made on various aspects and diligent and painstaking efforts have been gone into by the counsels appearing, I intend to answer all the issues and arguments advanced.

47. One now needs to examine the various rules and regulations that had been framed under the IBC, 2016 to understand as to whether any records and evidence of default have been specified.

48. At this stage, I note that Mr. Kundalia had repeatedly emphasized on the importance of the IU which was brought into operation on September 25, 2017. In a bid to explore the kinds of evidences that may be submitted to the adjudicating authority either by furnishing a record of default from the IU or through other modes of evidence specified, I direct my attention towards the AA Rules, 2016 that have been framed by the Central Government based on the powers conferred by Section 239 of the IBC, 2016 read with Sections 7, 8, 9 and

10 of the self-same Code whereby these Rules have been in force since December 1, 2016.

49. **Rule 4** of the AA Rules, 2016 provides the *modus operandi* when it comes to a financial creditor making an application for the initiation of a corporate insolvency resolution process. The sub-Rule (1) of Rule 4 is extracted below:

> "4. **Application by financial creditor.-** (1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor *under section 7 of the Code in* ***Form 1, accompanied with documents and records required therein and as specified*** *in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*
>
> **Emphasis supplied**

Mrs. Bhuteria had already drawn my minute attention to this Form-1 at 'PART-V' of the AA Rules, 2016, where at serial no. 3, the entry reads: "**Record of default with the information utility, if any (Attach a copy of such record)**" while the entry at serial no. 8 reads: "**List of other documents attached to this application in order to prove the existence of financial debt, the amount and date of default.**" As per her submission, it clearly showcases, that a record of default with the IU is not mandatory but the law accommodates other kinds of evidences for proving the existence of such a default. These 'documents and records' to prove the existence of a financial debt have been specified by the IBBI in Regulation 8 of the CIRP Regulations, 2016. The relevant Regulation 8 is delineated below:

"8. ***Claims by financial creditors:***

*1) ****

2) The existence of debt due to the financial creditor may be proved on the basis of –

(a) *the records available with an information utility,* ***if any; or***

(b) ***Other relevant documents, including –***

i. a financial contract supported by financial statements as evidence of the debt;

ii. a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

iii. financial statements showing that the debt has not been paid; or

iv. an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any."

Emphasis supplied.

50. The Supreme Court in ***Innoventive Industries*** *(supra)*, while considering Section 7 of the IBC, 2016 directed itself to the AA Rules, 2016 and observed the following vis-à-vis Rule 4 and its appendage Form-1:

"28. ...[U]nder Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires....documents, records and evidence of default in Part V....[T]he speed, within which the adjudicating authority is to *ascertain the existence of a default from the records of the information utility* **or** on t*he basis of the evidence furnished by the financial creditor, is important.*"

"30. On the other hand, as we have seen, in case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the *records of the information utility* **or** *other evidence produced by the financial creditor* to satisfy itself that a default has occurred..."

Emphasis supplied

Rohinton Nariman, J., relied upon the above quoted paragraphs of ***Innoventive Industries*** *(supra)* while authoring his judgment in ***Swiss Ribbons (P) Ltd.*** *(supra).* In addition to this, he also considered the pertinence of the IU in paragraph 31 before quoting the other sources of evidence which evidence a financial debt, in the following words:

> "32. ***Apart from the record maintained by such utility***, Form I appended to the Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt:
>
> a) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;
>
> b) Certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company);
>
> c) Order of a court, tribunal or arbitral panel adjudicating on the default;
>
> d) Record of default with the information utility;
>
> e) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;
>
> f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date;
>
> g) A record of default as available with any credit information company;
>
> h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891."

Emphasis supplied

Therefore, all **eight classes of documents enumerated under Part V of Form-1 appended to the AA Rules, 2016** have been held by the Supreme Court to be 'other sources which evidence a financial debt'.

On a close due diligence of the various provisions above, including section 7 of the IBC, 2016 read with Rule 4 of the AA Rules, 2016 and Form-1 therein, and regulation 8 of the CIRP Regulations, 2016, observations of the Supreme Court in paragraph 32 (provided above), it becomes crystal clear that apart from the financial information of the IU, eight classes of documents can be considered to be sources that evidence a "financial debt".

51. The only controversy that remains now is with respect to the interpretation of section 215 of the IBC, 2016. Section 215 is therefore pertinent and is extracted as follows:

> *"**215. Procedure for submission, etc., of financial information.** – (1) Any person who intends to submit financial information to the information utility or access the information from the information utility shall pay such fee and submit information in such form and manner as may be specified by regulations.*
>
> *(2) A financial creditor shall submit financial information and information relating to assets in relation to which any security interest has been created, in such form and manner as may be specified by regulations.*

(3) An operational creditor may submit financial information to the information utility in such form and manner as may be specified."

Emphasis supplied.

52. I would have to concede that on a bare perusal of the section it appears that subsection (b) having used the word "shall" makes it mandatory for an operational creditor to file all information including information with regard to assets in relation to which any security interest has been created. This is because in subsection (c) of the above section the words "may" has been used in contradistinction for operational creditors. One would have to however note that subsection (1) of the above section refers to "any person ***who intends to*** submit financial information". The use of the said term by the Legislature in subsection (1) leads me to an inference that submitting data to the information utility is not mandatory for all classes of people.

53. Furthermore, one may read the heading of section 215 that reads as follows: **Procedure for submission, etc., of financial information.** It is trite law that the Heading of a section does not necessarily limit the section. However, all factors being taken in consonance and on a harmonious reading of section 215 of the

IBC, 2016 with section 7 of the IBC, 2016 alongwith the Rules and Regulation discussed above, I come to the conclusion that the legislature did not intend to make it mandatory for financial creditors to submit financial information to the IU. This view of mine is fortified by the fact that the Supreme Court had also considered the pertinence of the IU based on the IU Regulations, 2017 and specifically stated that other sources of evidence are present apart from the record maintained by the IU. It may therefore be inferred that Section 215 of the IBC, 2016 is not mandatory in nature.

54. Therefore, based on the above discussion, I am of the view that financial creditors can rely on *either* of the modes of evidences at hand to showcase a financial debt, that is, either a record of default from the IU OR any other document as specified which proves the existence of a financial debt.

Analysis on "Inherent powers of the NCLT"

55. This brings me to the scope of the power of the tribunals under the CA, 2013 to invoke their inherent powers. The Central Government by virtue of its rule-making powers under Section 469 of the CA, 2013 formulated both the NCLT

Rules, 2016 as well as NCLAT Rules, 2016 which have been in operation with effect from July 21, 2016. Both Rules have a similar *Rule 11* which revolves around the inherent powers of these Tribunals. Since I am concerned with the order promulgated by the NCLT, I produce Rule 11 of the NCLT Rules, 2016:

> *"11. **Inherent Powers.**- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Tribunal."*

56. Since the impugned order is silent as to the enabling provision, for the sake of hypothesis and the convenience of assumption, let me assume that that the impugned order was issued by the NCLT by exercising its inherent powers under Rule 11 of the NCLT Rules, 2016.

57. Ms. Bhuteria had argued that such a recourse was not possible, as such powers could only be invoked on the judicial side and not on the administrative side by the tribunals. In my opinion, as per the Supreme Court's dictum in ***P. Laxmi Devi*** *(supra)*, when the hierarchy of legal norms are examined in this case, Sections 7(3)(a) of the IBC, 2016 and 424 of the CA, 2013 are superior norms (statutory provisions of Acts of Parliament), and are on a higher layer above the NCLT Rules, 2016 which is a delegated legislation made by the Central

Government made in accordance with its powers under Section 469 of the CA, 2013. In any case, I do not think such powers of the tribunal can rise above their source, that is a delegated form of legislation, and obstruct the operation of a statutory provision of the parent Act under which these Rules were formulated, in the first place.

58. Let me also place my reliance on a rather short Supreme Court order stated in ***Lokhandwala Kataria Construction Private Limited –v- Nisus Finance and Investment Managers LLP***, (2018) 15 SCC 589. The appeal raised an interesting question of law; whether in view of Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Rules), 2016, the NCLAT could take recourse to its inherent powers under Rule 11 to allow a compromise before it by the parties *after* admission of the matter. The NCLAT had held in view of Rule 8 of the 2016 Rules (which was a delegated legislation made by the Central Government under Sec. 239 of the IBC, 2016), it could *not* take recourse under Rule 11 of the NCLAT Rules, 2016 to allow a compromise after an application had been admitted. The Supreme Court stated, *prima facie*, this appeared to be the '*correct position of law*'; thereby exhibiting the hierarchy of the legal norms applicable as I have described in the foregoing paragraphs. **Ergo, the inherent powers of the NCLT under Rule 11 of the NCLT Rules, 2016 do not permit the NCLT to pass the impugned order**.

Analysis on "Substantive and Procedural laws'

59. Mr. Kundalia had strongly relied on the dictum of the Constitution Bench of Supreme Court in ***Izhar Ahmad Khan*** *(supra)*, specifically paragraph 18 to emphasize on the existence of two categories of laws, that is, substantive and procedural wherein the law of evidence is a part of the procedural law. However, as paragraph 15 of the same judgment displays, the Court was seized of a matter wherein the subordinate rules framed by the Central Government under a statute was under challenge. I cannot agree with such a reliance, for it does not aid the Respondent. I add at the cost of reiteration such powers of the tribunal cannot rise above their source, that is a delegated form of legislation, and obstruct the operation of a statutory provision of the parent Act under which these Rules were formulated.

60. Additionally, the Supreme Court, in the case of *Kailash v. Nanhku and Others*, (2005) 4 SCC 480 had laid down the scope of procedural law, in the following terms:

> *"28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner*

which would leave the court helpless to meet extraordinary situations in the ends of justice."

Emphasis supplied

The impugned order dated May 12, 2020 which abruptly imposed a mandatory prescription on financial creditors of adducing evidence of debt by way of *only* producing a record of default recorded with the IU, in my opinion, is a "prickly thorn" which not only goes against the principles of natural justice but also the statutory limitations inbuilt in Section 424 of the CA, 2013. ***The impugned order had become a fait accompli for the petitioners, which did indeed adversely affect their substantive rights as a financial creditor, as envisaged under the IBC, 2016.*** The very nature of the impugned order would create barriers for financial creditors and would leave them on the high seas as regards the corporate insolvency resolution process. Under the above circumstances it is apparent that the NCLT has acted without jurisdiction and exceeded its jurisdiction that is limited within the four corners of Section 424 of the CA, 2013 and Section 7(3)(a) of the IBC, 2016. Furthermore, the impugned order is clearly striking a discord with Rule 4 of AA Rules, 2016 and Regulation 8 of the CIRP Regulations, 2016. Hence, the impugned order is so patently without jurisdiction that it cannot be allowed to stand.

Accordingly, the first question is answered in the affirmative. The impugned order dated May 12, 2020 issued by the Principal Bench of the NCLT, is *de hors* the CA, 2013, the IBC, 2016 and the rules and regulations framed thereunder.

Analysis on "Retrospective power in a delegated legislation"

61. Now, *apropos* of the retrospective nature of this impugned order is concerned, I have already ruled that the NCLT possessed no enabling powers to pass such an order in the first place. Yet, when it comes to the retrospective nature of such delegated legislations, the Supreme Court had in the case of ***Director General of Foreign Trade*** (*supra*), categorically held as such:

> *"113. We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless the rule-making authority has been vested with power under a statute to make rules with retrospective effect."*

Emphasis supplied

62. Mr. Kundalia had relied on four judgments, ***Shyam Sundar*** *(supra),* ***Gurbhachan Singh*** *(supra),* ***K. Kapen Chako*** *(supra) and* ***New India Assurance Ltd.*** *(supra)* to support the retrospectivity of the impugned order. The commonality of these precedents bears the fact that the Supreme Court was seized with the question regarding if amendments made to an 'Act' could be retrospective in nature or not. However, in this case, no amendment has been made to either the CA, 2013 or the IBC, 2016 to reflect such a retrospective operation. The impugned order is by no stretch of imagination an amendment to an Act of Parliament, and therefore the reliance placed on these precedents by Mr. Kundalia does not salvage this limb of his argument.

63. Ms. Chatterjee had relied on ***Hitendra Vishnu Thakur*** *(supra)* to submit that any procedural amendment cannot be made retrospective if the same is in the nature of creating new disabilities and substantively alters the right of the parties. She had also relied on ***Pradyat Kumar Bose*** *(supra)* to stipulate that the law cannot delegate unless specifically provided for. While Mr. Vipul Kundalia, the learned counsel for the Respondents, had refuted the reliance on ***Hitendra Vishnu Thakur (supra),*** I am in agreement with both the precedents relied on by the petitioners.

64. Section 240 of the IBC, 2016 which empowers the IBBI to make regulations (which are essentially to be characterized as 'delegated legislations') stipulates that such regulations must be *consistent* with the IBC, 2016 to carry out the provisions of the IBC, 2016 and upon such perusal comes across as silent when it comes to empowering the IBBI to make regulations which are *retrospective* in nature, therefore being in conformity with the ruling of the Supreme Court in ***Kanak Exports*** *(supra)*. Therefore, *any delegatee*, let alone the NCLT, not even the IBBI can make regulations, by way of the impugned order or of such nature, to make a delegated legislation retrospective under the IBC, 2016. Therefore, the retrospective nature of the impugned order promulgated by the NCLT is bad in law and does in fact, create new disabilities for financial creditors, as is the case with the writ petitioner No. 1. **Accordingly, the second question is answered in the negative.**

65. As discussed above, IU is ***only one*** of the designated methods of furnishing proof to the AA or NCLT, to prove the existence of a financial debt that has accrued to a financial creditor. Coupled with Regulation 8 of CIRP Regulations, 2016 it becomes very apparent that the debt that is due to a financial creditor may be proved before the NCLT by any of the four classes of documents stated in sub-regulation 2(b) of Regulation 8 of the CIRP, 2016 or as the Supreme Court has observed in ***Swiss Ribbons (P) Ltd.*** *(supra),* all the eight classes of documents stated in Part-V to Form-1 appended with the AA Rules, 2016.

66. The impugned order, if allowed to persist in terms of its current legality, would not only *restrict* the modes of evidence to showcase or adduce an existence of debt accrued to a financial creditor under the IBC, 2016, before the AA or NCLT, it would directly be in confrontation with the Sec. 7(3)(a) read with Regulation 8 of the CIRP, 2016, be inconsistent with the IBC, 2016 and thereby defeat the very purpose for which the IBC, 2016 had been enacted. And therefore, this impugned order dated May 12, 2020, warrants an interference under the writ jurisdiction of this Court. In conclusion thereof, this writ petition succeeds. **The impugned order dated May 12, 2020 issued by the Principal Bench of the NCLT, New Delhi is held to be *ultra vires* the IBC, 2016 and the Regulations thereunder, and is accordingly struck down**.

67. Therefore, to summarize my conclusions:

a) The NCLT has acted without jurisdiction and exceeded its jurisdiction that is limited within the four corners of Section 424 of the CA, 2013 by passing the impugned order in violation of Section 7(3)(a) of the IBC, 2016. Furthermore, the impugned order is clearly in confrontation with Rule 4 of

AA Rules, 2016 and Regulation 8 of the CIRP Regulations, 2016 and thereby defeats the very purpose for which the IBC, 2016 has been enacted.

b) I am of the view that financial creditors can rely on *either* of the modes of evidences at hand to showcase a financial debt, that is, either a record of default from the IU OR any other document as specified which showcases the existence of a financial debt. Such other documents may belong to any of the four classes of documents stated in sub-regulation 2(b) of Regulation 8 of the CIRP, 2016 or as the Supreme Court has observed in ***Swiss Ribbons (P) Ltd.*** *(supra),* all the eight classes of documents stated in Part-V to Form-1 appended with the AA Rules, 2016.

c) Based on sub-paragraph (b) above, it may therefore be inferred that Section 215 of the IBC, 2016 is not mandatory in nature.

d) The NCLT could not exercise its inherent powers under Rule 11 of the NCLT Rules, 2016 to promulgate the impugned order dated May 12, 2020.

e) As far as the distinction that was sought to be drawn between substantive and procedural laws whereby the tribunal could regulate its own procedure, such powers of the tribunal regulated by a delegated form of legislation cannot rise above their source, that is the CA, 2013 and thereby obstruct the operation of a statutory provision of the parent Act (a substantive provision) and the Rules formulated thereunder.

f) *Any delegatee* under the IBC, 2016, and the CA, 2013, that is, the Central Government, the IBBI and the NCLT cannot make regulations that have a retrospective effect.

68. Even though I have held that the impugned order is *ultra vires* the IBC, 2016, I would go amiss if I do not acknowledge the superlative assistance given to the Court by counsel appearing on behalf of the respondents during arguments as well as with the detailed notes of arguments and judgements submitted to this Court. I would also like to show my appreciation to the counsel appearing on behalf of the petitioners for the consummate and diligent efforts during arguments coupled with the dexterity in submitting precise notes of arguments.

69. There shall be no order as to costs. Both the writ petitions are finally disposed of.

70. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

AN AFTERWORD

71. While India's experiment with political autonomy began post-midnight on August 15, 1947, when it comes to the question of economic reforms, notable Indian economists opine that the decades of the 1980s and 1990s ushered in a more robust set of reforms to enhance the nation's economic growth. As prominent Indian economist Arvind Panagariya had noted:[3]

> "..[G]rowth during the 1980s was fragile, highly variable from year to year, and unsustainable. In contrast, once the 1991 reforms took root, growth became less variable and more sustainable with even a slight upward shift in the mean growth rate.
>
> At the same time, reforms played a significant role in spurring growth in the 1980s. The difference between the reforms in the 1980s and those in the 1990s is that the former were limited in scope and without a clear road map whereas the latter were systematic and systemic. This said the reforms in the 1980s must be viewed as precursor to those in the 1990s rather than a part of the isolated and sporadic liberalizing actions during the 1960s and 1970s, which were often reversed within a short period. The 1980s reforms proved particularly crucial to building the confidence of politicians regarding the ability of policy changes such as devaluation, trade liberalization, and delicensing of investment to spur growth without disruption."

One of the crucial arenas where such a reform was also witnessed was the genesis and operationalization of India's credit recovery infrastructure. The Parliament passed the Sick Industrial Companies Act, 1985 (hereinafter referred to as "SICA") to combat the then prevalent eco-system which allowed rampant

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[3] Arvind Panagariya, *India in the 1980s and 1990s: A Triumph of Reforms*, IMF Working Paper WP/04/43, last accessed from: https://www.imf.org/external/pubs/ft/wp/2004/wp0443.pdf

industrial sickness which was thriving. As the Statement of Objectives of SICA read:

> " An Act to make, in the public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto."

The mischief which the Indian Parliament clearly wanted to address was to identify sick companies or companies with such potential of being sick and take such *preventive, ameliorative, remedial and other measures* to ensure an attempt at their revival. Such an identification process was adopted in all probability to ensure that the tied investment in such sick industrial undertakings were freed, for a more profitable use.

72. SICA was repealed and replaced by the Sick Industries Companies (Special Provisions) Act of 2003 which was essentially a dilution of particular SICA provisions but it also filled certain prevailing lacunae. One notable change however, was the aim in reduction of the increasing practice of such sick entities to resort to the SICA provisions simply to evade tentative legal obligations. Yet, this Act of 2003 also came up woefully short to foster a change in practice *apropos* of the credit recovery landscape and was ultimately replaced by the comprehensive IBC, 2016 which has been in effect from December 1, 2016. The IBC, 2016, has remarkably brought in a paradigm shift when it comes to tackling

the complications of the credit recovery landscape and no one captures the soul of the IBC, 2016 better than Rohinton Nariman, J. in the epilogue to ***Swiss Ribbons (P) Ltd.*** *(supra)*, while ruling on the constitutionality of the Code, in the following words:

> "120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. *Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders*, including the petitioners.
>
> 121. **We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid.**.....These figures show that the experiment conducted in enacting the Code is proving to be largely successful. **The defaulter's paradise is lost. In its place, the economy's rightful position has been regained.**"

73. As noted by Nariman, J., multiple amendments have been made to the IBC, 2016 itself alongside the subordinate legislations framed under it in the period of almost three and half years during which the Code has operated and India's economy has reaped the dividends. Nothing prevents another one of such amendments to be ushered in by the Parliament, if it deems it necessary and fit, to reflect the very same change that was sought to be brought in by the NCLT

through its now struck down order dated May 12, 2020. Until then, let the "unscrupulous corporate debtor' continue to exist under the foreboding threat of the *Damocles' sword* of comprehensive action under the IBC, 2016 that hangs over its head !

(Shekhar B. Saraf, J.)