KANCHAN PRASHANT DHURI

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL (L) NO. 27370 OF 2021

IN

INTERIM APPLICATION (L) NO. 14224 OF 2021

IN

COMMERCIAL SUIT (L) NO. 14223 OF 2021

WITH

INTERIM APPLICATION (L) NO. 855 OF 2022

AND

INTERIM APPLICATION (L) NO. 27373 OF 2021

Securities and Exchange Board of India
A Statutory Body established under the provisions
of the Securities and Exchange Board of India
Act, 1992 having its head office at SEBI Bhavan,
Plot No.C4A, G-Block, Bandra-Kurla Complex,
Bandra (East), Mumbai – 400 051. … Appellant
(Original Defendant No.12)

Versus

1] Rajkumar Nagpal,
PPG-092, Park Place, Golf Course Road,
Sector 54, Gurgaon, Haryana 122011
through its Authorized Representative

2] Bhupinder Singh Gill,
V-37/22, DLF Phase-3, Gurgaon,
Haryana 122610.
through its Authorized Representative

3] Ramachandra Radhakrishnan,
A-157, Sector 40, Noida, U.P. 201303.
through its Authorized Representative

4] Ravinder Nath Kapoor,
56, Shyam Enclave, Karkadoomba,
New Delhi 110092.
through its Authorized Representative

5] Ratika Khanna,
House No.765, Sector 8B, Chandigarh 160009.
through its Authorized Representative

6] Chanakya Kocheria,
No.2, Cookson Road, Richards Town,
Bengaluru, Karnataka 560084.
through its Authorized Representative

7] Lalit Kumar Sawhney,
Flat A 122, The Crest, Golf Course Road,
Sector 54, Gurgoan 122 009, Haryana.
through its Authorized Representative

8] Jayshree Sawhney,
Flat A 122, The Crest, Golf Course Road,
Sector 54, Gurgoan 122 009, Haryana.
through its Authorized Representative

9] Anil Lal,
N-128, Panchsheel Park, New Delhi 110017.
through its Authorized Representative

10] Sanjay Mehta,
Villa 37, Shankerpally Road, Kokapet,
Hyderabad 500075, Telangana
through its Authorized Representative

11] Reliance Commercial Finance Limited,
CIN L65910MH1986PLC165645
Having its registered office at Reliance
Centre, Off – Western Express Highway,
Santacruz (East), Mumbai – 400 055.

12] Bank of Baroda,
Corporate Financial Service Branch,
8, Meghdoot, 1st Floor Junction of Linking
and Turner Road, Bandra (West),
Mumbai – 400 050.

13] Vistra (ITCL) India Limited,
Company incorporated and registered under
the erstwhile Companies Act, 1956, Having its
registered office at IL & FS Financial Centre,
Plot No. C-22, Bandra-Kurla Complex,
Bandra (East), Mumbai – 400 051.

14] Reserve Bank of India,
New Central Office Building,
Shahid Bhagat Singh Marg,
Fort, Mumbai – 400 001.

15] Jasleen Kaur Sethi,
A-1/244, Second Floor, Paschim Vihar,

West Delhi, New Delhi 110063
through its Authorized Representative

16] Bhavika Nandan Ganatra,
Komalvila, Hapani Street, Gandhi Chowk,
Savarkundla, Dist : Amreli, Gujarat 364515
through its Authorized Representative

17] Jitendra Bhatia,
Flat 376, AFNOE, Sec-7, Plot-11, Dwarka, Delhi
through its Authorized Representative

18] Mridula Singh,
143, Trishul, Gross Road No.3,
Lokhandwala Complex, Andheri (West),
Mumbai – 400 053.
through its Authorized Representative

19] Kushal Pal Singh,
143, Trishul, Gross Road No.3,
Lokhandwala Complex, Andheri (West),
Mumbai – 400 053.
through its Authorized Representative

20] Sandya Alexander,
No.26, 6th Cross, CL, Ramaiah Layout,
Near Dr. B.R.A.M.C.,
Bangalore 560032.
through its Authorized Representative

21] Satish Yambal,
A-306, Vallonia, LMD-Chowk, Bavdan,

Pune 411 021.

through its Authorized Representative … Respondents
(original Plaintiffs and Original Defendant Nos.1 to 11)

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Mr. Arvind Datar, Senior Advocate alongwith Mr. Mustafa Doctor, Mr. Suraj Choudhary, Mr. Mihir Mody, Mr. Dhaval Patil and Mr. Arnav Misra instructed by K. Ashar & Co. for the Appellant.
Mr. Rohan Mathur instructed by Aroma Law Group LLP for Respondent Nos.1 to 10.
Mr. D.J. Khambatta, Senior Advocate alongwith Mr. Prateek Sekseria, Mr. Subir Kumar, Ms. Disha Shah, Mr. Karan Rukhana, Mr. Nishant Chotani and Mr. Yash Chheda instructed by SDS Advocates for Respondent No.11.
Mr. Ravi Kadam, Senior Advocate alongwith Mr. Yohaann Limathwalla and Mr. Shahbaz Malbari instructed by J. Sagar Associates for Respondent No.12.
Dr. Birendra Saraf, Senior Advocate alongwith Ms. Tine Abraham, Mr. Siddharth Ranade, Ms. Varuna Bhanrale, Ms. Samrudhi Chothani and Mr. Raghav Bhargava instructed by Trilegal for Respondent No.13 Vistra ITCL (India) Ltd.
Mr. Janak Dwarkadas, Senior Advocate alongwith Mr. Tushad Kakalia, Ms. Anaisha Zachariah and Ms. Vidhi Dhanuka instructed by Crawford Bayley & Co. for the Applicant in IAL-855-2022.

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CORAM : S.J. KATHAWALLA AND
MILIND N. JADHAV, JJ.

RESERVED ON : 14th FEBRUARY 2022
PRONOUNCED ON : 21st MARCH 2022

JUDGMENT (Per: S.J. KATHAWALLA & MILIND N. JADHAV, JJ.)

INTRODUCTION :

1. This Appeal filed by the Securities & Exchange Board of India **("SEBI")** challenges an order dated 28th October, 2021 read with an order dated 15th November, 20211, both passed by the Ld. Single Judge **("Impugned Orders")**.

FACTS

2. Prior to proceeding further, it would be necessary to set-out the following facts:

2.1 On 3rd May, 2017, a Debenture Trust Deed was executed between Reliance Commercial Finance Limited / Respondent No.11 **("RCFL")** as *'Issuer'* and Vistra ITCL (India) Limited / Respondent No.13 **("Vistra")** as *'Debenture Trustee'* for the issuance of Non-Convertible Debentures **("NCDs")** in the sum of Rs.2,000 Crores.

2.2 Two further Debenture Trust Deeds were also executed on 23rd May, 2017 and 5th February, 2018 respectively between RCFL as *'Issuer'* and Vistra as *'Debenture Trustee'*.

2.3 The aforesaid Debenture Trust Deeds are hereinafter collectively referred to as the **"DTDs"**.

2.4 On 7th June, 2019, the Reserve Bank of India / Respondent No.14 **("RBI")** issued its Prudential Framework for Resolution of Stressed Assets Circular **("RBI Circular")**.

2.5 On 6th July, 2019, an Inter-Creditor Agreement was entered into between Bank of Baroda / Respondent No.12 **("BoB")** and other lenders of RCFL **("ICA")**. Under the ICA, BoB came to be appointed as the lead Bank.

2.6 On 20th September, 2019, RCFL committed its first default under the

DTDs.

2.7 By a letter dated 7th November, 2019, Vistra wrote to SEBI informing them about the steps taken by it as Debenture Trustee and sought guidance in respect of the ICA and mechanism thereunder.

2.8 On 13th October, 2020, SEBI issued a Circular in relation to *"Standardisation of procedure to be followed by Debenture Trustee(s) in case of 'Default' by Issuers of listed debt securities"* **("SEBI Circular")**.

2.9 On 11th March, 2021, a Supplementary Debenture Trust Deed was entered into between RCFL and Vistra amending the DTDs **("Supplementary DTD")**.

2.10 On 1st July, 2021, the Plaintiffs, being 17 Debenture Holders, filed a Suit before this Court seeking an injunction restraining RCFL, BoB and RBI from implementing the RBI Circular.

2.11 On 15th July, 2021, the Resolution Plan submitted by Authum Investment and Infrastructure Limited / the Intervenor **("Authum")** came to be approved by RCFL's lenders with a majority of over 75% in value and 60% in number **("Resolution Plan")**.

2.12 Following approval of the Resolution Plan, the Plaint came to be amended now seeking an injunction restraining RCFL and BoB from acting upon, implementing or taking any steps for diluting, extinguishing or creating third party

rights in respect of the security provided under the DTD.

2.13 On 9th August, 2021, on the Plaintiffs' Interim Application, the Ld. Single Judge passed the following order:

> "4. Until that date (and no further), there will be an ad-interim order in terms of amended prayer clause (a)(i) restraining the 1st and 2nd Defendants from creating any third party rights over the security mentioned in the plaint. The reason is that if these Defendants are permitted to transact the security which was offered in a contract to the Plaintiff Debenture Holders, then there is every likelihood that the Plaintiffs will be left without any recourse. It is equally likely that the suit itself will be rendered infructuous as a result. On the other hand, the grant of the injunction for a limited period of time can cause no conceivable prejudice either to the 1st and 2nd Defendants or to other lenders/security holders in question. It surely cannot be suggested that the security (especially by way of a hypothecation of book debts) in favour of the Plaintiffs should be allowed to be rendered meaningless by making operational an inter-creditor agreement that permits the disbursal of the 1st Defendant's cash in hand to all classes of lenders irrespective of their security. When a Debenture Holder has a security for the redemption of the debenture, prima facie this cannot be permitted to be compromised without an affirmative consent of that Debenture Holder. The prejudice to the Plaintiff Debenture Holders is far greater than any prejudice to other lenders. The balance of convenience is, therefore, with the Plaintiffs Debenture Holders for this very limited ad-interim injunction, and one that will operate only for a few days.
>
> 5. Nothing in this order is to be construed as being a conclusive finding.
>
> 6. All contentions are left open.
>
> 7. List the matter on 17th August 2021."

2.14 On 11th August, 2021, Vistra made a representation to SEBI calling upon it to clarify as to whether any meeting or meetings of Debenture Holders was required to approve the ICA and the Resolution Plan and if so, whether voting in this meeting is to be conducted by the Debenture Trustee in accordance with SEBI's Circular i.e. ISIN-wise or in accordance with the provisions contained in the DTD.

2.15 On 17th August, 2021, the Ld. Single Judge continued the ad-interim relief until 20th August, 2021.

2.16 On 20th August, 2021, the Ld. Single Judge passed the following order :

> "1. Mr Ankhad appears pursuant to the previous orders on behalf of the 3rd Respondent Vistra (ITCL) India Limited ("Vistra"). Vistra is the Debenture Trustee for a number of Debenture Holders under different Debenture Trust Deeds. The Plaintiffs are among the Debenture Holders under a Debenture Trust Deed and of which Vistra is a Debenture Trustee.
>
> 2. The lenders have an Inter Creditor Arrangement ("ICA"). This is what is broadly challenged by the Plaintiffs in the Suit. They say that their rights as Debenture Holders (and specifically their rights as Debenture Holders of high value n on-convertible debentures) will be compromised by the terms of this ICA.
>
> 3. Prima facie, it is clear that a meeting or possibly meetings of Debenture Holders are required. The question presently that Vistra faces relates to the terms on which such a meeting is to be called. Mr Ankhad explains that one option is to proceed according to the ISIN series. The second is to proceed according to the Debenture Trust Deeds. There are three different Debenture Trust Deeds. The first option does not commend itself. Surely, the series of debentures is immaterial in a situation like this.

4. Another problem that presents itself is the curtailing or abbreviation of the necessary notice that is required.

5. Both aspects are not, prima facie, ones on which this Court can make a recommendation. It is one thing to ask a Civil Court to adjudicate on the correctness or otherwise of a decision of a regulator or a validity of a rule or regulation. But I am unable to see how a Civil Court can direct that a notice that is required by the Trust Deed or by the applicable regulation should be shortened or that a meeting should be held of all Debenture Holders in one particular manner over preference to another. These are directions that only a regulator can issue.

6. A common request from all sides is that SEBI be requested to respond urgently to Vistra's application or representation of 11th August 2021 for a clarification on the first aspect, i.e. the manner holding the meeting. I have no doubt that this is urgently required. There is financial prejudice all around. It should not be worsened by a delay in deciding what seems to me to be an administrative or ministerial clarification. The fact that this clarification can only be done by SEBI only adds to the urgency.

7. Vistra may also need to make a supplemental representation by seeking a direction that the required notice period be curtailed. It is at liberty to make that application.

8. I must request SEBI to consider Vistra's representation on a priority and extremely urgent basis. I do not think it is necessary for SEBI hear all parties in a formal fashion. Vistra's representation should be sufficient. At best, Vistra, as a Debenture Trustee, may be allowed to explain or amplify its concerns.

9. I must, therefore, request SEBI to render its decision on Vistra's representation by 25th August 2021. With that clarification in hand, this Court can then pass appropriate directions.

10. List the matter on 26th August 2021.

11. The previous ad-interim order will continue until 26th August 2021."

2.17 On 23rd August, 2021, SEBI issued a letter *inter alia* directing that voting will have to be done in accordance with the SEBI Circular.

2.18 On 27th August, 2021, whilst continuing the ad-interim protection, the Ld. Single Judge adjourned the matter to 17th September, 2021.

2.19 On 17th September, 2021, the Ld. Single Judge granted leave to the Plaintiffs to join SEBI as a Respondent to their Interim Application and continued the ad-interim protection.

2.20 SEBI entered appearance before the Ld. Single Judge on 24th September, 2021 and sought for time to take complete instructions from SEBI. Accordingly, the matter was adjourned to 4th October, 2021 whilst continuing the ad-interim protection.

2.21 On 4th October, 2021, the matter came to be adjourned to 7th October, 2021 whilst continuing the ad-interim protection with a direction to SEBI to file its Affidavit with this Court's Registry.

2.22 Arguments were concluded before the Ld. Single Judge on 8th October, 2021 and the matter was stood over to 14th October, 2021.

2.23 On 14th October, 2021, the Ld. Single Judge passed the following order:

> "1. The matter is placed for orders today. I have made a suggestion to all concerned. Counsel have agreed to consider it.
>
> 2. List the matter for orders on 20th October 2021.
>
> 3. Previous orders, if any, to continue until the next date."

2.24 On 20th October, 2021, the Ld. Single Judge passed the following order:

> "1. Negotiations do not seem to have proceeded in the manner in which they should.
>
> 2. Parties and their legal advisors will meet today on a Zoom call. I have briefly considered both the proposals from Mr Seksaria for Defendant No. 1 and Mr Khandeparkar for the Plaintiffs. I see no reason why a negotiated settlement is not possible.
>
> 3. List the matter on 21st October 2021.
>
> 4. Previous order, if any, to continue until next date."

2.25 The next order passed was on 28th October, 2021 which would be necessary to reproduce as under:

> "1. It is agreed that the following order will suffice to dispose of the IA and the Suit itself.
>
> 2. The resolution plan approved by the Inter Creditor Agreement ("ICA") Lenders presently proposes to pay to all secured debenture holders as on cut-off date of 15th July 2021 an amount equivalent to 24.96% of the total principal outstanding (including all amounts already paid) to secured creditors.
>
> 3. In terms of the ICA-lenders' approved resolution plan, the Plaintiffs would be entitled to receive an aggregate sum of Rs.1,34,78,400/- being 24.96% of the total principal outstanding.
>
> 4. Of the aforesaid sum of Rs.1,34,78,400/- (24.96% of the total principal outstanding), the Plaintiffs have already received a sum of Rs.72,36,000/- leaving thereby Rs.62,42,400/- as the balance amount in terms of the ICA-lenders' approved resolution plan.
>
> 5. In view of the negotiations between the Plaintiffs, debenture holders, the company and the resolution applicant/their advisors, the resolution applicant has agreed, as an exception and without setting any

precedent, that in addition to the sum of Rs.62,42,400/-, the resolution applicant shall pay to the Plaintiffs as debenture holders an additional sum equivalent to 5% of the total principal, outstanding sum as additional settlement amount. ("Additional Settlement Amount"). Thus, the aggregate pay-out to the Plaintiffs shall be 29.96% of the total principal outstanding (including all amounts paid).

6. Accordingly, the Plaintiffs shall now be entitled to receive an aggregate sum of Rs.91,00,000/- (a sum of Rs.1,63,46,800/-, i.e. 29.96% less the amount of Rs.72,46,000/- already paid) as full and final settlement, and shall thereupon be required to transfer the debentures in favour of the resolution applicant or its nominee.

7. The Plaintiffs agree and undertakes that upon payment of the amount of Rs.91,00,000/-, each of the Plaintiffs shall forthwith transfer or assign their debentures and all rights therein in favour of the Resolution Applicant/its nominee, and shall execute all such forms and documents as may be necessary for an effective transfer.

8. In view of the above, the Plaintiffs accept that the present terms are in full and final satisfaction of all their claims against the parties hereto and the Resolution Applicant, and they shall not raise any further claims or dispute or any legal proceedings directly or indirectly.

9. The Plaintiffs unconditionally withdraw all objections, complaints or any grievances made before this Court or any other authority against the Company, Debenture Trustee, Lenders and the Resolution Applicant.

10. The Company, the lenders, and the Resolution Applicant and their advisors have agreed that in view of the Plaintiffs (individual non-ICA lenders having principal value of more than Rs.10,00,000/-) having been offered a compromise or settlement and thus an exit at a value which is 5% higher than the amount proposed under the resolution plan, the same terms of settlement and compromise should be offered to similarly placed individual Debenture Holders.

11. For placing such terms of settlement, compromise or arrangement

before the Debenture Holders seeking their assent in terms of the respective Debenture Trust Deeds, the Debenture Trustee (Defendant No.3) is directed to call and conduct a meeting in the manner specified in the respective Debenture Trust Deeds.

12. Mr Ankhad for the 3rd Defendant, the Debenture Trustee, points out that the Debenture Trust Deeds require a meeting to be called in a certain manner. On Affidavit, SEBI has taken a different position. SEBI's submission has been that it is the very latest or most recent of the SEBI resolutions that will govern such meetings, irrespective of what a Debenture Trust Deed says in regard to the holding of a meeting. Prima facie, I do not think this is a submission that I can accept. The Debenture Trust Deed is a contract between the parties to it. They must know the terms of the contract at the time when the execute it. Those terms cannot be later altered except with their consent. The submission by SEBI would amount to saying that a critical term of the contract is always unknown and always liable to change or modification at any given time, conceivably upsetting the entire structure. Further, SEBI's regulations all say that they are with effect from a particular date. It is not possible to read them as operating retrospectively. Correctly read, SEBI's submission is to be understood as meaning that it is the latest of the SEBI resolutions as amended at the time of the Debenture Trust Deed's execution that must compulsorily be incorporated in the Debenture Trust Deed. This is unexceptionable. But this cannot and does not mean that a later regulation after the Debenture Trust Deed can be retrospectively made to govern the Trust Deed. Between the parties the calling and conduct of a meeting and the voting at it are all governed by the terms of Debenture Trust Deed. There is simply no other way of looking at it.

13. In view of this, the 3rd Defendant is directed to call and conduct meeting of all the Debenture Holders under all three Debenture Trust Deeds within 30 days of this order ensuring that the calling and conduct of the meeting/s and the voting at such meetings conforms to the terms of

the respective Debenture Trust Deeds. At such meeting/s, the 3rd Defendant will place for consideration and approval of the beneficial owners or debenture holders the settlement offer/compromise/ arrangement as envisaged in the approved resolution plan and as modified to the extent provided herein above.

14. If there is any further or later or supplementary trust deed, then the provisions of that supplementary trust deed will also be taken into account.

15. All parties agree and undertake to maintain confidentiality of the settlement and/or compromise and/or arrangement arrived hereto.

16. In view of the above compromise arrived at between the parties, the suit stands disposed off in these terms.

17. It is made clear that the aforesaid order is passed considering the peculiar facts and circumstances of the present case. It also has consent of all the parties.

18. As regards SEBI, I am making it clear that this order will constitute no precedent against SEBI nor will SEBI be held to the terms of this order for other cases. This order is made on the peculiar facts and circumstances of this case.

19. The demand drafts in question are handed over to the Advocates for the Plaintiffs.

20. Mr. Khandeparkar for the Plaintiffs says this order is sufficient to dispose of the Suit itself with all undertakings given to the Court being accepted. So ordered. The suit is disposed of in these terms.

xxx

22. The IA is infructuous and disposed of accordingly."

2.26 On 15th November, 2021, a clarificatory order came to be passed by the Ld. Single Judge as under :

> "2. This seeks a clarification of my order of 28th October 2021 and particularly paragraph 14. It is clarified that I have not, by that paragraph, directed that the meeting that is to be held should be in deviation from the terms of the Debenture Trust Deed. I also clarified that at no time had any of the party made any submissions on the basis of any later or Supplementary Trust Deed.
>
> 3. Obviously, the Supplementary Trust Deed will have to be read with the previous three Trust Deeds in a coherent and consistent manner. . A mere reference to SEBI circulars will not and cannot override the express terms of any of the Trust Deeds.
>
> 4. The 30 day period will commence from today in view of this clarification."

2.27 Challenging the Impugned Orders, the Appeal came to be filed on 25th November, 2021. At the first hearing held on 3rd December, 2021, we passed the following order:

> "1. By the above Appeal, the Appellant (SEBI) has impugned the Order dated 28th October, 2021. We have gone through the impugned Order dated 28th October, 2021. Paragraphs 15 to 17 of the said Order reads thus :
>
> > "15. All parties agree and undertake to maintain confidentiality of the settlement and/or compromise and/or arrangement arrived hereto.
> >
> > 16. In view of the above compromise arrived at between the parties, the suit stands disposed off in these terms.
> >
> > 17. It is made clear that the aforesaid order is passed considering the peculiar facts and circumstances of the present case. It also has consent of all the parties."

2. The Advocates appearing for Respondent Nos.1 to 10, 11 and 12 have submitted that the Order dated 28th October, 2021, is passed by consent. In fact, Advocate Khandeparkar representing Respondent Nos.1 to 10 states that SEBI was not only represented during the hearing of the matter but SEBI was also present during the settlement talks held on six occasions. The Learned Senior Advocate appearing for SEBI states on instructions, that save and except the fact that SEBI was represented before the Learned Single Judge at the time of hearing, SEBI disputes all the other statements/ submissions made on behalf of Respondent Nos. 1 to 10, 11 and 12. In view of the above, before we proceed further, we allow SEBI to seek a clarification from the Learned Single Judge qua the allegation that SEBI has consented to the impugned Order being passed.

3. In view of the urgency, parties may move the Learned Single Judge today itself and obtain necessary clarification.

4. We make it clear that the Appeal is not disposed off and shall be taken up for Admission on 6th December, 2021, first on board."

2.28 Further to the aforesaid order, on 3rd December, 2021, the Ld. Single Judge passed the following order:

"1. The matter is placed before me. By an order passed today by the Division Bench for an urgent clarification of my order of 28th October 2021, and which is challenged in Appeal. I have already once clarified that order at the instance of some of the parties on 15th November 2021.

2. The present clarification is sought at the instance of SEBI. The Appeal Court specifically asks for a clarification as to whether the compromise recorded in that order of 28th October 2021 was by consent even of SEBI. Paragraph 17 of 28th October 2021 order says that the order has the consent of all parties. Hence the request for clarification.

3. SEBI was not, as I recollect, a party to the Suit but was a Respondent to the IA. I had directed notice to SEBI and called for an

Affidavit. Mr Dada learned Senior Advocate argued extensively on that Affidavit. After judgment was reserved, I asked the principal contesting parties (other than SEBI) to consider a settlement, which they ultimately did. SEBI obviously could not be a party to any such compromise. Paragraph 12 of my order therefore dealt, though briefly, with the contentions of the SEBI. That paragraph of the order is not by consent, but is an order in invitum. Paragraph 18 of the order is specifically for SEBI's protection and is also not by consent.

4. Consequently, the last line of paragraph 17 which says that the order is by consent of all parties is necessarily subject to this one exception as regards the contentions of SEBI and which I have dealt with in paragraphs 12 and 18.

5. I do not believe any further clarification is required. Mr Seksaria, Mr Khandeparkar and Mr Kadam all urge me to note that the SEBI did not protest or object when this order was being passed in open Court. I do not think I can make any such observation at all. SEBI had placed its submissions on Affidavit and through Counsel and which I dealt with in paragraphs 12 and 18 of my 28th October 2021 order.

6. There is nothing further that needs to be added."

2.29 On 6th December, 2021, this Court passed the following order:

"1. The above Appeal is admitted and fixed for hearing and final disposal on 16th December, 2021.

2. The meeting may be held on 8th December, 2021. However, the resolutions passed at the said meeting shall not be implemented till the Appeal is heard and disposed off."

2.30 On 21st December, 2021, a co-ordinate Bench of this Court passed the following order:

> "1. Perused the orders passed by this Court on earlier dates. In view of the orders passed by this Court, respondent No.13- Vista (ITCL) India Limited is directed to place on record the results of e-voting of the meeting conducted on 8th December, 2021, in a sealed envelope. Learned counsel appearing for the respective parties, agree for posting the application and appeal for further consideration/hearing on 4th January, 2022. Accordingly, post the appeal along with application for further consideration on 4th January, 2022, at 2.30 p.m.
>
> 2. The results be submitted to the Court in sealed envelope on/or before 23rd December, 2021."

2.31 On 14th February, 2022, we reserved the Appeal for orders after hearing the Appeal finally.

SUBMISSIONS *:*

3. Appearing for SEBI, we have heard Ld. Senior Advocate Mr. Arvind Datar. Mr. Datar's submissions can be summarized as under:

(i) The SEBI Circular is wholly applicable in the present case. The DTDs and Resolution Plan within themselves contemplate the requirement of compliance with securities laws which would include compliance with the SEBI Circular as also the clarificatory letter dated 23rd August, 2021;

(ii) The SEBI Circular has the force of law;

(iii) In the event of a conflict between the SEBI Circular and the DTDs, the SEBI Circular must prevail owing to Clause 59 of the DTDs;

(iv) For the ICA to be implemented, consent of the Debenture Holders at the ISIN level is necessary;

(v) Approval at the ISIN level is necessary to protect the interest of small debenture holders otherwise Yes Bank Limited **("YBL")**, which holds a substantial number of debentures, can influence the outcome of the resolution process single handedly;

(vi) Hardship is not a factor on the basis of which the applicability of the SEBI Circular can be decided.

4. Appearing for RCFL, we have heard Ld. Senior Advocate Mr. Darius Khambata. Mr. Khambata's submissions can be summarized as under:

(i) SEBI's Appeal is not maintainable;

(ii) SEBI's stand completely disregards the rights of the Debenture Holders of RCFL;

(iii) The SEBI Circular is inapplicable as the SEBI Circular cannot be given retrospective effect;

(iv) SEBI's stand is premised on a misreading and incorrect application of the SEBI Circular;

(v) SEBI's attempted application of the SEBI Circular *(which is for the purpose of signing the ICA)*, after the ICA has already been approved, is entirely misconceived;

(vi) SEBI's stand seeks to override a contract between RCFL and its lenders, thereby derailing the debt resolution process carried out following the RBI Circular;

(vii) There is no conflict between the SEBI Circular and the DTDs;

(viii) The SEBI Circular cannot override the terms of the DTDs;

5. Appearing for BoB, we have heard Ld. Senior Advocate Mr. Ravi Kadam. Mr. Kadam's submissions can be summarized as under:

(i) The SEBI Circular has no application to this case as the SEBI Circular does not contemplate a scenario where the debenture holders would enter into a compromise, settlement or arrangement with the issuer of the debentures;

(ii) Whilst the logic of mandating / requiring an ISIN-wise consent appears to be to protect debenture holders, having signed the ICA, the Debenture Trustee is entitled to single handedly and with no recourse to debenture holders, take a decision involving even sacrifice of their interest without being placed before them for their consideration;

(iii) The SEBI Circular cannot operate retrospectively;

(iv) In the alternative and without prejudice, in case the SEBI Circular is held to apply even to a compromise directly entered into between the Debenture Holders and the Issuer, the same would operate only prospectively to only such debentures issued after that date;

(v) Any change in the steps taken in furtherance of the resolution process under the RBI Circular, would derail the efforts undertaken by all stakeholders for restructuring and reorganizing RCFL.

6. Appearing for Authum / the Intervenor, we have heard Ld. Senior Advocate Mr. Janak Dwarkadas. Mr. Dwarkadas' submissions can be summarized as under:

(i) Authum has locus to intervene in these proceedings considering that it has already acted on the basis of and in pursuance of the suggestions for settlement made by the Ld. Single Judge in the Suit and has altered its position by paying a sum of Rs.91,00,000/-. Therefore, it is not open to SEBI to contend that Authum has no locus to intervene and/or be joined as a Respondent to the Appeal;

(ii) If ISIN-wise voting is permitted, the common security available for the benefit of the Debenture Holders will not be released. If voting is to be conducted ISIN-wise as submitted by SEBI, if any one of the ISIN Debenture holder(s) were not to approve the settlement at the meeting of the secured debenture holders, the common security held by the secured Debenture holders would not be released to the resolution applicant;

(iii) The classification of Debenture Holders ISIN-wise will be inequitable, invidious, discriminatory and arbitrary;

(iv) SEBI's Circular was never intended to apply to cases in which defaults took place prior to 13th October, 2020.

MAINTAINABILITY OF THE APPEAL :

7. RCFL has argued that this Appeal is not maintainable owing to SEBI not having any locus to file it. In support of this submission, it was argued that admittedly, SEBI is not a party to the Suit as filed. It is only a party to the Interim Application and consequently, SEBI cannot be recognized as an *'aggrieved party'*. Pertinently, SEBI made no application to be made a party to the Suit. It was also argued that in view of the law laid down by the Supreme Court in *IKISAN Limited*[1], SEBI does not have locus to challenge any order sanctioning a merger scheme under Section 391 of the Companies Act, 2013. Lastly, on maintainability, it was argued that the Impugned Orders do not affect SEBI as has been clarified by the Ld. Single Judge.

8. We have considered the aforesaid submissions. This Appeal, as filed, has been filed under Section 13 of the Commercial Courts Act, 2015. Section 13 (1A) provides that *"Any person aggrieved"* by a judgment / order of the Commercial Division of a High Court may appeal to the Commercial Appellate Division.

9. In order to appreciate whether or not SEBI would qualify as *"Any person aggrieved",* it would be necessary to trace certain events that transpired before the Ld.

1 (2015) SCC OnLine Bom 6358

Single Judge. On 20th August, 2021, the Ld. Single Judge recorded the joint request of all parties requesting SEBI to urgently respond to Vistra's application / representation dated 11th August, 2021 seeking a clarification from SEBI. Thereafter, on 17th September, 2021, the Ld. Single Judge granted leave to the Plaintiffs to join SEBI as a Respondent to their Interim Application. Thereafter, SEBI entered appearance and even filed a detailed Affidavit. SEBI was heard prior to the passing of the Impugned Orders. In fact, the Ld. Single Judge has clarified that *"SEBI was not, as I recollect, a party to the Suit but was a Respondent to the IA. I had directed notice to SEBI and called for an Affidavit. Mr Dada learned Senior Advocate argued extensively on that Affidavit."*

10. In the above circumstances, having participated extensively before the Ld. Single Judge and having been impleaded to the Interim Application, in our considered opinion, SEBI certainly has a right to approach this Commercial Appellate Division under Section 13. In our view, if SEBI has a statutory right to file an Appeal, such right cannot be divested by virtue of certain remarks passed by the Ld. Single Judge in the Impugned Orders to the effect that the order would not constitute a precedent against SEBI. As we understand SEBI's Appeal, it *inter alia* impugns paragraph nos. 11 – 13 of the Impugned Order dated 28th October, 2021 which provides for the mechanism of voting which per SEBI, is in contravention of applicable law and more particularly, the SEBI Circular. The decision in *IKISAN Limited*[2] cannot certainly come to the aid of the Respondents considering that the facts

2 (2015) SCC OnLine Bom 6358

of the present case and the circumstances such as the Ld. Single Judge calling upon SEBI to provide a clarification, SEBI being impleaded to the Interim Application, SEBI filing a detailed Affidavit and SEBI's submissions being taken into account, put the present case on a completely different footing than that of IKISAN.

11. For the reasons aforesaid, we reject the Respondents' arguments on maintainability of the Appeal.

THE DTDs :

12. As stated hereinabove, there are in question 3 DTDs. All 3 DTDs were executed prior in time to the SEBI Circular. Under the DTDs, various Listed, Secured and Unsecured Debentures came to be issued by RCFL. Vistra came to be appointed as Debenture Trustee under all the DTDs.

13. Of the 3 DTDs, there are no ICA Lenders in the Debenture Trust Deed dated May 23, 2017. The Debenture Trust Deed dated May 23, 2017 comprises of 6 ISIN(s) with 32 Debenture Holders holding Rs.81 Crores in aggregate which is 0.90% of the total debt of RCFL.

14. In the Debenture Trust Deed dated May 3, 2017, YBL holds Rs.869.4 Crores out of the Rs.1,277 Crores worth of debentures translated to 68%.

15. Certain relevant clauses of the DTDs read as under:

"(xiii) "**Meeting of the Beneficial Owner(s)/Debenture-holder(s)"**

means a meeting of the Beneficial Owner(s)/Debenture-holder(s) duly called, convened and held in accordance with the provisions set out in the Fifth Schedule hereunder written;"

16. The aforesaid Clause 1(xiii) provides that a meeting of the Debenture Holders is to be conducted in the manner set-out in Schedule V of the DTDs. Schedule V is as under:

Schedule V , Clause 22 :

"22. A meeting of the Beneficial Owner(s)/Debenture holder(s) as the case may be shall, inter alia, have the following powers exercisable in the manner hereinafter specified in Clause 23 hereof.

i Power to sanction reconvevance and release, substitution or exchange of all or any part of the Mortgaged Premises from all or any part of the principal moneys and interest owing upon the debentures.

ii Power to sanction any compromise or arrangement proposed to be made between the Company and the Beneficial Owner(s)/Debenture holder(s).

iii Power to sanction any modification, alteration or abrogation of any of the rights of the Beneficial Owner(s)/Debenture holder(s) as the case may be against the Company or against the Mortgaged Premises or other properties whether such right shall arise under the Trust Deed or Debentures or otherwise.

iv Power to assist to any scheme for reconstruction or amalgamation of or by the Company whether by sale or transfer of assets under any power in the Company's memorandum of association or otherwise under the Act or provisions of any law.

v Power to assent to any modification of the provisions contained

in the Trust Deed and to authorize the Trustee to concur in and execute any Supplemental Deed embodying any such modification.

vi Power to remove the existing Trustee and to appoint new Trustee in respect of the Trust Securities.

vii Power to authorize the Trustee or any Receiver appointed by them where they or he shall have entered into or taken possession of the Mortgaged Premises or any part thereof to give up possession of such premises to the Company either unconditionally or upon any condition.

viii Power to give any direction, sanction, request or approval which under any provision of the Trust Deed is required to be given by a Special Resolution. "

17. As can be seen from the aforesaid Clause 22(ii), the Debenture Holders may, at a meeting, sanction any compromise or arrangement proposed to be made between RCFL and the Debenture Holders. Clause 25 reads thus:

Clause 25

"The powers set out in Clause 22 hereof shall be exercisable by a Special Resolution passed at a meeting of the Beneficial Owner(s)/Debenture holder(s) as the case may be duly convened and held in accordance with provisions herein contained and carried by a majority consisting of not less than three-fourth of the persons voting thereat upon a show of hands or if a poll is demanded by a majority representing not less than three-fourths in value of votes cast on such poll. Such a Resolution is hereinafter called 'Special Resolution'."

18. As can be seen from the aforesaid Clause 25, the majority required to carry a Special Resolution is a 3/4th majority.

19. The DTDs came to be amended by execution of the Supplementary DTDs on March 11, 2021 incorporating a reference to the SEBI Circular.

ISIN(s) :

20. The International Securities Identification Number or ISIN is a 12 digit alphanumeric code that uniquely identifies a specific security. An ISIN is generated for a particular issue of debt securities which have similar terms and conditions of such issue.

21. SEBI informs us that in a particular Information Memorandum / Issue Document, there may be multiple sets of bonds/securities issued having different terms and conditions. For example, there may be four tranches/buckets of bonds requiring quarterly pay-out of interest, while others may have monthly pay out, cumulative and annual. Each set of conditions of such an issuance will have a unique ISIN. All these 4 tranches may be possible to raise in a particular issue. Debenture Trust Deeds would be executed after the closure of the issue either for each set of ISIN or single Debenture Trust Deed for multiple ISINs within the period of three months from the date of closure of the issue.

22. According to SEBI, the rationale for calling an Event of Default at the ISIN level has been provided in the Board Memo on Review of the Regulatory Framework for Corporate Bonds and Debenture Trustees as under :

> "It was observed that the practice of issuance of debenture in the market varies from issuer to issuer. The debentures are sometimes issued in multiple tranches under an umbrella DTD. Often it is observed that there are multiple International Securities Identification Numbers (ISINs) in an IM. With regard to the calling of EoD also, it was observed that the current market practices are inconsistent and differ from DT to DT. Some DTs call ED at DTD level whereas some do it at ISIN level. Considering the fact that if a single investor is invested in a debenture under an ISIN, he has full right to enforce the security under that ISIN. Accordingly, it is proposed that EoD shall be called at ISIN level."

23. According to SEBI, the DTDs have an aggregate of 19 ISIN(s).

THE RBI CIRCULAR :

24. The RBI Circular came to be published on 7th June, 2019 *"with a view to providing a framework for early recognition, reporting and time bound resolution of stressed assets"*. The RBI Circular was issued under powers conferred by the Reserve Bank of India Act, 1934 and the Banking Regulation Act, 1949.

25. Certain relevant clauses of the RBI Circular read as under:

> "**Applicability**
>
> 3. The provisions of these directions shall apply to the following entities:
>
> a Scheduled Commercial Banks (excluding Regional Rural Banks);
>
> b All India Term Financial Institutions (NABARD, NHB, EXIM Bank, and SIDBI);
>
> c Small Finance Banks; and,

d Systemically Important Non-Deposit taking Non-Banking Financial Companies (NBFC-ND-SI) and Deposit taking Non-Banking Financial Companies (NBFC-D).

Purpose

4. These directions are issued with a view to providing a framework for early recognition, reporting and time bound resolution of stressed assets.

B. Implementation of Resolution Plan

9. All lenders must put in place Board-approved policies for resolution of stressed assets, including the timelines for resolution. Since default with any lender is a lagging indicator of financial stress faced by the borrower, it is expected that the lenders initiate the process of implementing a resolution plan (RP) even before a default. In any case, once a borrower is reported to be in default by any of the lenders mentioned at 3(a), 3(b) and 3(c), lenders shall undertake a prima facie review of the borrower account within thirty days from such default ("Review Period"). During this Review Period of thirty days, lenders may decide on the resolution strategy, including the nature of the RP, the approach for implementation of the RP, etc. The lenders may also choose to initiate legal proceedings for insolvency or recovery.

10. In cases where RP is to be implemented, all lenders shall enter into an inter-creditor agreement (ICA), during the above-said Review Period, to provide for ground rules for finalisation and implementation of the RP in respect of borrowers with credit facilities from more than one lender. The ICA shall provide that any decision agreed by lenders representing 75 per cent by value of total outstanding credit facilities (fund based as well non-fund

> based) and 60 per cent of lenders by number shall be binding upon all the lenders. Additionally, the ICA may, inter alia, provide for rights and duties of majority lenders, duties and protection of rights of dissenting lenders, treatment of lenders with priority in cash flows/differential security interest, etc. In particular, the RPs shall provide for payment not less than the liquidation value due to the dissenting lenders."

26. The RBI Circular provides for a comprehensive framework for resolution of stressed assets. The RBI Circular, to our mind, provides lenders with freedom to commercially negotiate and arrive at a resolution plan. The ICA prescribed under the RBI Circular acts as a tool for collective action by RBI regulated lenders in working towards, arriving at and implementing a resolution plan.

27. Whilst the RBI Circular does not provide for all of the contents of an ICA, it provides that voting by Lenders has to be 75% in value and 60% of the total number of Lenders.

28. As stated hereinabove, further to the RBI Circular, the Lenders entered into the ICA on 6th July, 2019 and voted in favour of the Resolution Plan in terms of the voting mechanism provided under the RBI Circular.

THE RESOLUTION PLAN & VOTING THEREON :

29. Following the terms of the RBI Circular, RCFL's lenders entered into the ICA on 7th July, 2019 with a view to resolve RCFL's debt to the tune of Rs.9,017

Crores. At this stage, it is pertinent to note that despite a copy being shared with the Debenture Trustee Vistra, it had not executed the ICA.

30. Post deliberations and negotiations, RCFL's lenders appear to have selected Authum as the successful Resolution Applicant in respect of RCFL and approved the Resolution Plan submitted by Authum in July, 2021.

31. The Resolution Plan is now to be placed for approval of the Debenture Holders as a compromise / settlement in terms of the Impugned Orders.

32. The repayment terms of the Resolution Plan are as under:

Sr. No.	Particulars	Nos.	Debt as on 6th July, 2019 (Rs.)	Recovery (Rs.)	% of Recovery
1 ICA Lenders					
1.1	Secured	19	7,586.05	1,893.47	24.96
	Unsecured	1	640.00	130.02	20.32
2 Non – ICA Lenders					
2.1	Secured Term Loan	1	250.00	62.40	24.96
2.2 NCDs					
2.2.1	Individuals & HUFs up to Rs.10 Lacs	227	13.92	13.92	100
2.2.2	Individuals & HUFs more than Rs.10 Lacs	37	43.95	13.17	29.96
2.2.3	Other secured NCDs	41	202.30	50.49	24.96
2.2.4	Unsecured NCDs	21	81.00	16.46	20.32
2.2.5	Related Party	1	200.00	26.90	13.45
Total			**9,017.22**	**2,206.83**	

33. As can be seen from the aforesaid table, all Individuals / HUFs holding debentures less than Rs.10 Lacs are to get 100% of their principal amounts. As opposed

to them, Individuals / HUFs holding debentures in excess of Rs.10 Lacs will only receive 29.96% of their principal due. Further, the secured ICA lenders, secured term loan holders and other secured debenture holders will receive 24.96% of the principal debt due to them. All other unsecured ICA lenders and unsecured NCD holders will receive 20.32% of the principal debt due to them.

34. As we see it, the signatories to the ICA *(being a class of creditors distinct from Debenture Holders),* have already entered into their *inter se* arrangement by executing the ICA on 6th July, 2019. The vote to now be cast is that of the Debenture Holders as they have a *pari passu* charge over certain common securities. The question that has arisen is, what would be the mechanism for such vote. This therefore brings us to the SEBI Circular which SEBI submits is the *applicable* mechanism for the forthcoming vote.

THE SEBI CIRCULAR :

35. As narrated hereinabove, SEBI issued the SEBI Circular on October 13, 2020. The SEBI Circular is titled *"Standardisation of procedure to be followed by Debenture Trustee(s) in case of 'Default' by Issuers of listed debt securities"*. Paragraph no.1 of the SEBI Circular reads:

> "1. Representations were made by Debenture Trustee(s) regarding the

process to be followed in case of 'Default' by issuers of listed debt securities. After consultation with stakeholders including investors, Debenture Trustee(s), Issuers etc., procedures to be followed by the Debenture Trustee(s) in case of 'Default' by issuers of listed debt securities has been decided. This circular prescribes the process to be followed by the Debenture Trustee(s)in case of 'Default' by issuers of listed debt securities including seeking consent from the investors for enforcement of security and/or entering into an Inter-Creditor Agreement ("ICA")"

36. Paragraph no.10 reads:

"10. The provisions of this circular shall come into force with immediate effect."

37. On a plain and literal reading of the aforesaid paragraphs of the SEBI Circular, we note that the SEBI Circular came into immediate effect from 13th October, 2020 and prescribes the process to be followed by Debenture Trustee(s) in case of a *'Default'* by issuers.

38. Clause(s) 6 – 8 of the SEBI Circular read:

"6. As the resolution plan in the ICA may involve restructuring including roll-over of debt securities, requiring the consent of the investors, the process to be followed for seeking consent for enforcement of security and/or entering into an Inter-Creditor Agreement shall be as under:

6.1. The Debenture Trustee(s)shall send a notice to the investors within 3 days of the event of default by registered post/acknowledgment due or speed post/acknowledgment due or courier or hand delivery with proof of delivery as also through email as a text or as an attachment to

email with a notification including a read receipt, and proof of dispatch of such notice or email, shall be maintained.

6.2. The notice shall contain the following:

6.2.1. negative consent for proceeding with the enforcement of security;

6.2.2. positive consent for signing the ICA;

6.2.3. the time period within which the consent needs to be provided, viz. consent to be given within15 days from the date of notice; and

6.2.4. the date of meeting to be convened,

6.3. Debenture Trustee(s) shall convene the meeting of all investors within 30 days of the event of default (as per para 6.1 above): Provided that in case the default is cured between the date of notice and the date of meeting, then the convening of such a meeting may be dispensed with.

6.4. In view of Regulation 15(2)(b) of SEBI (Debenture Trustees) Regulations, 1993, in case of debt securities issued by way of public issue, the notice sent by the Debenture Trustee(s) in para 6.2 shall not contain the consent as per para 6.2.1 and the requirement to convene a meeting for enforcement of security, as per para 6.3, shall not be applicable.

6.5. The Debenture Trustee(s) shall take necessary action to enforce security or enter in to the ICA or as decided in the meeting of investors, subject to the following:

6.5.1. In case(s)where the majority of investors expressed their dissent against enforcement of the security, the Debenture Trustee(s) shall not enforce security.

6.5.2. In case(s)where majority of investors expressed their consent to enter into ICA, the Debenture Trustee(s) shall enter into the ICA.

6.5.3. In case(s) consents are not received for enforcement of security and for signing ICA, Debenture Trustee(s) shall take further action, if any, as per the decision taken in the meeting of the investors.

6.5.4. The Debenture Trustee(s) may form a representative committee of the investors to participate in the ICA or to enforce the security or as may be decided in the meeting.

6.6. The consent of the majority of investors shall mean the approval of not less than 75% of the investors by value of the outstanding debt and 60% of the investors by number at the ISIN level.

C. Conditions for signing of ICA by Debenture Trustee(s)on behalf of investors.

7. The Debenture Trustee(s)may sign the ICA and consider the resolution plan on behalf of the investors upon compliance with the following conditions:

7.1. The signing of the ICA and agreeing to the resolution plan is in the interest of investors and in compliance with the Companies Act, 2013 and the rules made thereunder, the Securities Contracts (Regulations) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules, regulations and circulars issued thereunder from time to time.

7.2. If the resolution plan imposes condition(s) on the Debenture Trustee(s) that are not in accordance with the provisions of Companies Act, 2013 and the rules made thereunder, the Securities Contracts (Regulations) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules, regulations and circulars issued thereunder from time to time, then the Debenture Trustee(s) shall be free to exit the ICA altogether with the same rights as if it had never signed the ICA. Under these circumstances, the resolution plan shall not be binding on the Debenture Trustee(s).

7.3. The resolution plan shall be finalized within 180 days from the end of the review period. If the resolution plan is not finalized within 180 days from the end of the review period, then the Debenture Trustee(s) shall be free to exit the ICA altogether with the same rights as if it had never signed the ICA and the resolution plan shall not be binding on the Debenture Trustee(s). However, if the finalization of the resolution plan extends beyond 180 days, the Debenture Trustee(s) may consent to an extension beyond 180 days subject to the approval of the investors regarding the total timeline. The total timeline shall not exceed 365 days

> from the date of commencement of the review period.
>
> 7.4. If any of the terms of the approved Resolution Plan are contravened by any of the signatories to the ICA, the Debenture Trustee(s) shall be free to exit the ICA and seek appropriate legal recourse or any other action as deemed fit in the interest of the investors.
>
> 8. The Debenture Trustee(s) shall ensure that the conditions mentioned in paragraphs7.2, 7.3 and 7.4 are suitably incorporated in the ICA, before signing of the ICA."

39. As can be seen from the aforesaid paragraphs, the SEBI Circular provides for the process to be followed for seeking consent from investors for *(i)* enforcement of security and/or *(ii)* entering into an Inter-Creditor Agreement. In order for an approval to go through, the SEBI Circular mandates a threshold of not less than 75% of the investors by value of the outstanding debt and 60% of the investors by number at the ISIN level.

WHETHER OR NOT THE SEBI CIRCULAR CAN BE APPLIED RETROSPECTIVELY :

40. The SEBI Circular itself states that it shall come into force with immediate effect from 13th October, 2020. Admittedly, in the present case, RCFL committed defaults prior to 13th October, 2020 and the ICA was executed on 6th July, 2019 which are dates prior to the coming into force of the SEBI Circular and prior to the Supplementary DTD incorporating reference to the SEBI Circular.

41. On a cumulative reading of Clauses 1 and 10 of the SEBI Circular, in our considered opinion, the SEBI Circular prescribes the process to be followed by Debenture Trustees upon the commission of a default by an issuer *after* 13th October, 2020. This being so, on first principles, we do not see how the SEBI Circular can be applied to defaults committed prior to 13th October, 2020 also considering that on the date of such default, the mechanism to vote etc. was already provided for under the DTDs.

42. Secondly, we note that there is no provision in the SEBI Circular which provides for its applicability to defaults prior to 13th October, 2020. As a matter of law, legislation, delegated or otherwise, is deemed to be prospective unless it has been given retrospective effect expressly or impliedly. In this regard, reference may be drawn to the Supreme Court's decision in *ITO vs. M.C. Ponnoose*[3] and more particularly, the following paragraphs therefrom:

> "5. Now it is open to a sovereign Legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are—in the words of Willes, J., in Phillips v. Eyre [40 Law J Rep (NS) QB 28 at p. 37] — "no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." The courts will not, therefore, ascribe retrospectively to new laws affecting rights unless by express words or necessary implication it appears that such was

3 (1969) 2 SCC 351

> the intention of the Legislature. Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect; (see Subha Rao, J., in Dr Indramani Pyarelal Gupta v. W.R. Nathu [(1963) 1 SCR 721] , the majority not having expressed any different opinion on the point; Modi Food Products Ltd. v. Commissioner of Sales Tax U.P. [AIR 1956 All 35] ; India Sugar Refineries Ltd. v. State of Mysore [AIR 1960 Mysore 326] and General S. Shivdev Singh v. State of Punjab [1959 PLR 514] .)"

43. We may also make a reference to the Supreme Court's decision in *M.D. University vs. Jahan Singh*[4] and more particularly, the following paragraphs therefrom:

> "19. The Act does not confer any power on the Executive Council to make a regulation with retrospective effect. The purported regulations, thus, could not have been given retrospective effect or retroactive operation as it is now well settled that in absence of any provision contained in the legislative Act, a delegatee cannot make a delegated legislation with retrospective effect."

44. Lastly, we also deem it fit to reproduce the following principles recognized by the Supreme Court in *Hitendra Vishnu Thakur & Ors. vs. State of*

4 (2007) 5 SCC 77

Maharashtra & Ors.[5] as under:

> **"26.** The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:
>
> (i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.
>
> (ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.
>
> (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.
>
> (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
>
> (v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

5 (1994) 4 SCC 602

45. Keeping the aforesaid considerations in mind and considering that there is no mention whatsoever in the SEBI Circular suggesting its retrospective applicability, we are unable to rule that the SEBI Circular would also apply to defaults committed prior to 13th October, 2020. As a consequence, it follows that the SEBI Circular cannot be applied retrospectively to the present case in view of the admitted fact that RCFL committed defaults prior to 13th October, 2020 and the ICA was executed on 6th July, 2019 which are dates prior to the coming into force of the SEBI Circular and prior to the Supplementary DTD incorporating reference to the SEBI Circular.

46. In our considered opinion, having held that the SEBI Circular cannot be applied retrospectively on settled principles of statutory interpretation, we are unable to appreciate SEBI's submission that the SEBI Circular being beneficial in nature ought to be applied nonetheless. We cannot also accept the submission that it must also apply in view of the fact that the SEBI Circular does not take away or impair the voting rights of debenture holders. We are therefore unable to apply the SEBI Circular to the defaults and DTDs which admittedly predate the SEBI Circular.

47. Keeping the aforesaid in mind, we are also guided by the overall structure of the SEBI Circular. Chapter A thereof provides for an Event of Default, Chapter B provides for seeking consent of investors for *(i)* enforcement of security; and *(ii)* signing an Inter-Creditor Agreement and lastly; Chapter C provides for the

conditions for signing of the Inter-Creditor Agreement by Debenture Trustee(s) on behalf of investors. The structure itself puts in place a chronological mechanism starting with the event of default and consequences thereafter. We fail to understand how this structure can be applied in a piecemeal manner to prior defaults and Inter-Creditor Agreements entered into post such defaults and prior to the SEBI Circular having come into force or even prior to the Supplementary DTD being executed.

48. SEBI has consistently submitted that the SEBI Circular has the force of law as has been recognized from time to time. Once again, we do not dispute this proposition. The question however, in the present case, is the applicability of the SEBI Circular to the present matter and not whether or not the SEBI Circular has the force of law. It is insufficient for SEBI to contend that the SEBI Circular has the force of law in the absence of demonstrating how the SEBI Circular is applicable retrospectively in the first place.

49. We cannot accept SEBI's submission that the most recent of its resolutions / circulars must govern meetings irrespective of the original contract between the parties. SEBI argues that the SEBI Circular is incorporated into the DTDs by virtue of the Supplementary Debenture Trust Deed(s) executed on 11th March, 2021. In order to deal with this submission, we note that the DTDs were executed on 3rd May, 2017, 23rd May, 2017 and February 5, 2018. As stated hereinabove, defaults were committed prior to, 13th October, 2020 and the ICA was

executed on, 6th July, 2019. We have already held that the SEBI Circular cannot be applied to defaults committed prior to 13th October, 2020. This being so, the subsequent incorporation of the SEBI Circular to the DTDs by virtue of the Supplementary Debenture Trust Deed(s) executed on 11th March, 2021 could only logically apply the SEBI Circular to defaults occurring post such incorporation or at best, to defaults post 13th October, 2020.

50. Mr. Datar next relied on the decisions in *Newtech Promoters and Developers Pvt. Ltd. vs. State of Uttar Pradesh*[6] and *Kingfisher Airlines Limited vs. Competition Commission of India*[7] to defeat the argument that the SEBI Circular is retrospective. We have carefully analysed these decisions. However, once again, we are unable to be apply the SEBI Circular to the present case. In *Newtech Promoters,* the Supreme Court ruled that the agreements in question even though executed prior in time, would be governed by subsequent legislation considering that they provided for applicability of subsequent legislations. However, this finding cannot be viewed in isolation. The paragraphs preceding this paragraph contain the finding that the subsequent statute in question, i.e. the Real Estate (Regulation and Development) Act, 2016, was retroactive in nature. It was on this basis that the Supreme Court proceeded to apply the subsequent legislation retroactively to past agreements. In the present case, as we have already held, the SEBI Circular, by its very language, is prospective in

6 2021 SCC OnLine SC 1044
7 2019 SCC OnLine Bom 2186

nature. In *Kingfisher Airlines,* this Court in fact held that *"if any cause of action has arisen under an old statute, that cause of action is not obliterated by new Act unless the Act specifically says so."*. Further, this Court deemed the statute to not be retrospective. Therefore, we do not see how this decision can be of any assistance to Mr. Datar.

51. For the reasons aforesaid, we agree with the findings of the Ld. Single Judge in paragraph no. 12 of the Impugned Order dated 28th October, 2021.

APPLICABILITY OF THE SEBI CIRCULAR :

52. On a cumulative reading of the entire SEBI Circular, in our considered opinion, there can be no ambiguity whatsoever as to its extent, scope and application. We are guided first by paragraph no.1 of the SEBI Circular which in one sense is its Preamble and provides " *This circular prescribes the process to be followed by the Debenture Trustee(s) in case of 'Default' by issuers of listed debt securities including seeking consent from the investors for enforcement of security and/or entering into an Inter-Creditor Agreement ("ICA")*". This paragraph suggests that the SEBI Circular would apply for *(i)* enforcement of security; and/or *(ii)* entering into an Inter-Creditor Agreement.

53. When we next consider paragraph no.6 of the SEBI Circular, it too provides for *"the process to be followed"* for "*seeking consent for enforcement of security*" and/or "*entering into an Inter-Creditor Agreement*". This restriction on the scope and ambit of the SEBI Circular is further buttressed by paragraph nos. 6.2.1, 6.2.2, 6.5.1

and 6.5.2. of the SEBI Circular. In our considered opinion, the terms of the SEBI Circular are clear and unambiguous and specifically deal with which actions require ISIN-wise voting.

54. Clause 6.5.3 of the SEBI Circular goes further to provide for circumstances where the Debenture Holders do not consent for the signing of an ICA in which circumstance, "*Debenture Trustee(s) shall take further action, if any, as per the decision taken in the meeting of the investors*. "

55. In view of the aforesaid, we are unable to accept the submission that the SEBI Circular would apply to the present case considering that the ICA in question has already been previously executed on 6th July, 2019. Admittedly, the SEBI Circular came to be published subsequent in time to the ICA. This being so, the SEBI Circular which *inter alia* provides for the *"entering into an Inter-Creditor Agreement"* can have no application to an ICA which has already been previously *entered into.* In the present case, we note that the Debenture Holders are not even proposing to enforce their security or enter into an Inter-Creditor Agreement. The notice convening the meeting specifically provides that the agenda/business to be discussed is to *"Vote on the compromise, settlement or arrangement"* as per the Impugned Orders.

56. Mr. Datar has argued that SEBI took note of the fact that RBI could only mandate compulsory out of court resolution for "Lenders" and therefore, the SEBI Circular came to be issued to specify the conditions under which Debenture Holders

could accede to a Resolution Plan under the RBI framework. It was next argued by Mr. Datar that even under the RBI Circular, entering into an ICA is a precedent for implementation of any Resolution Plan and therefore, the ICA is the umbrella framework and the first step under which the Resolution Plan is to be implemented. Once again, we are not finding fault with the mechanism prescribed by SEBI under the SEBI Circular for it has not been challenged before us. Our considerations herein are limited to whether or not the SEBI Circular is *applicable* to the present matter with due consideration to the facts and circumstances of the present case. As has been set-out herein, we deem the SEBI Circular inapplicable to the present matter and therefore, SEBI's rationale in introducing the SEBI Circular merits no consideration.

57. Mr. Datar has also argued that the DTDs and Resolution Plan within themselves contemplate the requirement of compliance with securities laws which would include compliance with the SEBI Circular as also the clarificatory letter dated 23rd August, 2021. It cannot be disputed that clauses of the DTDs and Resolution Plan provide for compliance with applicable laws which may include various laws passed by various regulations and regulators. However, before considering compliance with a particular law, it must first be established that the law under question is *applicable*. As stated herein, in view of the fact that the SEBI Circular is not *applicable* to the facts of the present case, we fail to appreciate how the clauses of the DTDs and Resolution Plan mandating compliance with securities law can further the case of SEBI and

compel compliance with the SEBI Circular, which, as we have already held, is inapplicable to the present matter.

58. Mr. Datar's next argument is that in the event of a conflict between the SEBI Circular and the DTDs, the SEBI Circular must prevail owing to Clause 59 of the DTDs which provides that in the event terms of the DTDs are in conflict with the SEBI (Debenture Trustees) Regulations, 1993 **("DT Regulations")**, then such clauses shall stand null and void. Firstly, this argument overlooks a fundamental factor, *viz.* that Clause 59 of the DTDs will only come into operation should there in fact be a conflict between any of the provisions of the DTDs and the DT Regulations *(including Regulation 15(7) thereof)*. Having considered the material before us, in our opinion, there is no such conflict. The DT Regulations and more particularly Regulation 15(7) provides *"Subject to the approval of the debenture holders and the conditions as may be specified by the Board from time to time, the debenture trustee, on behalf of the debenture holders, may enter into inter-creditor agreements provided under the framework specified by the Reserve Bank of India".* As can be seen, Regulation 15(7) only provides for seeking approval of Debenture Holders but does not prescribe the procedure or % of majority to do so. Clause 23 of the DTDs prescribes for the procedure for Debenture Holders to enter into a settlement. To that end, Clause 23 of the DTDs is consistent with the DT Regulations and therefore, there is no question of any conflict and no further question of the SEBI Circular and/or the DT Regulations

defeating the DTDs by applying Clause 59 of the DTDs.

SEBI's LETTER DATED 23rd AUGUST, 2021 :

59. SEBI relies on its letter dated 23rd August, 2021 which came to be issued pursuant to the Ld. Single Judge's order dated 20th August, 2021 who asked for SEBI's *"clarification"*. In effect, the letter clarifies that under the SEBI Circular, there is a mandatory requirement of entering into the ICA as a pre-condition to considering the Resolution Plan.

60. In our considered opinion, having held that the SEBI Circular does not apply to the present case *(for the reasons stated herein),* we fail to appreciate how this clarificatory letter can expand the scope of the SEBI Circular and/or make it applicable to the present case. Once we have held the SEBI Circular to be inapplicable it would follow that the clarificatory letter which came to be issued post the SEBI Circular is also inapplicable to the present matter.

CONSEQUENCES OF APPLYING THE SEBI CIRCULAR :

61. It is settled law that hardship or inconvenience to a group of persons cannot be a ground to decide that a law is bad. The famous maxim being *Dura lex, sed lex* which means that the Law is harsh, but it is the law. Therefore, we have not taken

into consideration the elaborate submissions canvassed by the Respondents in respect of the consequences of applying the SEBI Circular whilst adjudicating this Appeal. However, for completeness, we only refer to these submissions briefly as under:

62. The Respondents submit that the DTDs have an aggregate of 19 ISINs of which 10 ISINs comprise entirely of a single investor / Debenture Holder. Should ISIN-wise voting be carried out, one single investor may vote against or abstain from voting, the consequence of which, is a failure of the Resolution Plan. Converted into figures, this could result in a situation where one Debenture Holder holding debentures worth Rs.5 Crores could veto a Resolution Plan worth Rs.9,017 Crores. This would lead to an incongruous situation wherein even if one single investor either votes against or worse, abstains from voting, the entire resolution plan would fail. In such situation, it would be the retail Debenture Holders who would suffer the most. Therefore, according to the Respondents, SEBI, whose role is to protect the interest of small investors, would in fact be defeating their rights by submitting that the meeting of Debenture Holders should be held ISIN-wise.

PROTECTING THE INTEREST OF RETAIL INVESTORS :

63. SEBI contends that Lenders and Debenture Holders are two separate classes of creditors. Further, that YBL falling under the class of a Lender and holding

Rs.1354 Crores worth of Debentures out of the total Rs.1895 Crores, is free to accept a 75% haircut under the Resolution Plan. However, this 75% haircut/waiver cannot be thrust upon retail investors and the provident fund trusts.

64. As set-out in the table hereinabove, retail Debenture Holders with an exposure of upto Rs.10,00,000/- are realizing 100% under the Resolution Plan. As compared to this figure, Lenders such as YBL are only realizing 24.96% of their dues. *Ex-facie,* therefore, the Resolution Plan appears more favourable towards retail Debenture Holders as compared to Lenders. Practically, therefore, SEBI appears to be defeating the rights of retail investors by insisting on an ISIN-wise vote considering the potential dire consequences arising therefrom.

65. We are informed that in so far as the Debenture Trust Deed dated May 23, 2017 is concerned, YBL has no voting share. Therefore, unless the 32 Debenture Holders under the Debenture Trust Deed dated May 23, 2017, approve the settlement / compromise, the settlement / compromise cannot go through. This is irrespective and independent of YBL, considering that YBL does not have any voting rights under this Debenture Trust Deed dated May 23, 2017. In so far as the Debenture Trust Deed dated May 3, 2017 is concerned, YBL holds 68% of the Debentures in value. The majority required to approve the Resolution Plan under the DTDs is 75%. Therefore, YBL would still require an additional 7% positive vote for approval of the Resolution Plan. Therefore, we do not see how YBL can in fact single handedly determine the

faith of the vote.

66. In any event, we do not see how the interest of retail investors is not protected should voting be carried out in terms of the DTDs. Under this procedure, the decision making power still vests with each individual Debenture Holder. Every Debenture Holder will have the right to vote and the faith of the vote shall be decided by a majority of 3/4th after taking into consideration the votes cast by the Debenture Holders. This mechanism, is in our opinion, fair, just, equitable and in keeping with the interest of all stakeholders.

CONCLUSIONS :

67. For all of the reasons aforesaid, the Appeal is dismissed. There shall be no order as to costs.

(MILIND N. JADHAV, J.) **(S.J. KATHAWALLA, J.)**

At the request of the Learned Advocate appearing for SEBI, status-quo as of today is directed to be continued upto 28th March, 2022.

(MILIND N. JADHAV, J.) **(S.J. KATHAWALLA, J.)**