IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT ROOM NO. 1,

MUMBAI BENCH

CA 137/2023 CA 170/2023 in CP 3638/MB/2018

Company Applications under Rule 11 of National Company Law Tribunal Rules, 2016

CA 137/2023 in CP 3638/2018

1) **Abhigam Shares & Securities Pvt. Ltd.**,
8, Trivedi Niwas, New Nagardas Road,
Andheri (East), Mumbai- 400069

2) **IDBI Trusteeship Services Limited**
Gr. Flr., Universal Insurance Building,
Sir Phirozshah Mehta Rd., Fort, Mumbai,
Maharashtra -400001

… Applicants

Versus

1) **Union of India,**
Ministry of Corporate Affairs
Through the Regional Director
(Western Region)
2) **Infrastructure Leasing and Financial Services Limited,**
The IL&FS Financial Centre Plot
No. C-22, G Block, Bandra-Kurla Complex,

Mumbai-400051

3) **IL&FS Energy Development Company Limited,**
Unit No. 1, ABW Rectangle One, Saket,
New Delhi-110017.

… Respondents

CA 170/2023 in CA 137/2023 in CP 3638/2018

1) **Somany Provident Fund Institution through its Authorised Signatory**,
2 Red Cross Place, Kolkata – 700 001

… Applicant

AND

2) **Abhigam Shares & Securities Pvt. Ltd.**,
8, Trivedi Niwas, New Nagardas Road,
Andheri (East), Mumbai- 400069

… Original Applicant No. 1

AND

3) **IDBI Trusteeship Services Limited**
Gr. Flr., Universal Insurance Building,
Sir Phirozshah Mehta Rd., Fort, Mumbai,
Maharashtra -400001

… Original Applicant No. 2

Versus

3) **Union of India,**

Ministry of Corporate Affairs
Through the Regional Director
(Western Region)

4) Infrastructure Leasing and Financial Services Limited,
The IL&FS Financial Centre Plot
No. C-22, G Block, Bandra-Kurla Complex,
Mumbai-400051

5) IL&FS Energy Development Company Limited,
Unit No. 1, ABW Rectangle One, Saket,
New Delhi-110017.

… Original Respondents

In the matter of

Union of India

… Petitioner

versus

Infrastructure Leasing & Financial Services Ltd. & Ors.

… Respondents

Order delivered on 30/01/2024

CORAM:

Hon'ble Member (Judicial), SH. Justice Virendrasingh G. Bisht

Hon'ble Member (Technical), SH. Prabhat Kumar

Appearance:

For the Applicants : Mr. Janak Dwarkadas a/w Mr. Prateek Seksaria,

Senior Advocates a/w Mr. Rohan Rajadhyaksha, Ms. Tina Abraham, Mr. Akshay Puri, Mr. Pundrakaksh Mitruka, Advocates i/b Trilegal

For Respondent Nos. 2 & 3: Mr. Ashish Kamat, Sr. Advocate a/w Mr. Animesh Bisht, Ms. Drishti Das, Ms. Roma Bhojani, Advocates i/b Cyril Amarchand Mangaldas

For Union of India : Mr. Aditya Sikka a/w Mr. Guarav Jaiswal, Advocates

Per : ***Prabhat Kumar***

ORDER

1. This Company Application CA 137/2023 is filed by M/s Abhigam Shares & Securities Private Limited ("Applicant No. 1") and M/s IDBI Trusteeship Services Limited ("Applicant No. 2") {both together referred as "Applicants"} in the Company Petition No. 3638 of 2018 filed by Union of India ("Respondent No. 1" herein) in the matter of Infrastructure Leasing & Financial Services Limited ("Respondent No. 2" herein) seeking certain directions in the Insolvency Resolution of M/s IL&FS Energy Development Company Limited ("Respondent No. 3" herein). The Applicant has sought the following reliefs :
    a. Order, declare and direct that the claims of the Applicant No. 1 and all other debenture holders (represented by Applicant No. 2) have a priority over the purported claims of Respondent No. 2;
    b. Restrain Respondent No. 3 from making any payment by way of interim distribution or otherwise to Respondent No. 2 till such time the amounts due and payable by Respondent No. 3 under the Debentures issued and

forming subject matter of Debenture Trust Deeds are paid in priority to the Applicant No. 1 and other Debenture holders (represented by Applicant No. 2);

c. Order and direct Respondent No. 3 to pay amounts under the interim distribution to the Applicant and other Debenture holders (represented by Applicant No. 2) in priority over Respondent No. 2;
d. Order and direct any independent agency to be appointed by this Tribunal to verify, ascertain and determine the claims of Respondent No. 2; and
e. Pass any other or further orders/ directions as this Tribunal may deem fit and proper in the facts and circumstances of this case.

2. The Applicant No. 1 is the holder of certain Debentures having ISIN numbers INE938L08072, INE938L08080 and INE938L08098 (Debentures)of IL&FS Energy Development Company Ltd. (i.e., Respondent No. 3). In relation to the Debentures, the Respondent No. 3 entered into two debenture trust deeds dated 07.06.2018 pursuant to which Applicant No. 2 was appointed as the Debenture Trustee (acting for the benefit of the Debenture holders). It is stated by the Applicant that security towards the Debentures issued was created by Respondent No. 2 by executing two DSRA Support Undertakings dated 14.05.2018 and 28.05.2018 in favour of the Applicant No. 1 and the Applicant No. 2 in relation to Debentures issued by Respondent No. 3.

2.1. Under the Debenture Trust Deeds, the Respondent No.3 was under the contractual obligation to service the Debentures by making payment at regular intervals as set out in detail under Schedule 3 to the Debenture

Trust Deeds. The DSRA Support Undertakings were executed by the Respondent No. 2 to protect the interests of the Debenture holders including the Applicant No. 1. The DSRA Support Undertakings provided that if Respondent No 3 failed to deposit the Required DSRA Amount within the specified timelines, then any such shortfall was required to be deposited by Respondent No. 2. In addition to this, the Respondent No. 2 specifically undertook that:

(a) it shall not in the event of the insolvency of Respondent No. 3, prove in competition with the Applicant No. 2 in the insolvency proceedings;

(b) the liability of the Respondent No. 2 under the DSRA Support Undertaking will not be affected by any dispute between the Respondent No. 3 and the Applicant No. 2/ Debenture holders; and

(c) it shall not, for so long as the Debentures are outstanding, make any claims against the Respondent No. 3 in competition with the claims of the Applicant No. 2 or the Debenture holders.

2.2. Meanwhile, Union of India (i.e., Respondent No. 1) filed a Petition under Section 241(2) read with Section 242 of the Companies Act, 2013 before this Tribunal, Mumbai being Company Petition No. 3638 of 2018 against the Respondent No. 2 and its then existing board of directors claiming that the affairs of the Respondent No. 2 were being conducted in a manner prejudicial to the public interest. Through an order dated 15.10.2018, the National Company Law Appellate Tribunal ("NCLAT") granted interim stay on any coercive action by the creditors and other parties against the IL&FS Group. The Hon'ble NCLAT, vide order and judgement dated

12.03.2020, confirmed the order dated 15.10.2018 vis-à-vis assets of Respondent No. 2 and Respondent No. 3. Subsequently, claims were invited from the creditors of Respondent No. 3, and the Applicant No. 2 (on behalf of the Debenture holders) submitted its claim to Grant Thornton (i.e., the claims advisor and manager). Subsequently, a summary of claims that were received and admitted up to 31.03.2022 in relation to the Respondent No. 3 was published, wherein the Debentures were classified as unsecured debt and the Debenture holders were classified as Unsecured financial creditors of Respondent No. 3.

2.3. Subsequently, the Applicant No. 1 on multiple occasions submitted their concerns to Grant Thornton highlighting that they were a secured creditor and that the Debentures will be given priority over any debt provided to the Respondent No. 3 by the Respondent No. 2 and that all claims of the Respondent No. 2, whether secured or unsecured, will be subordinate to the claims of the Debenture holders. However, Grant Thornton never considered the averments of the Applicant and refused to consider the claim of the Applicant No. 1 as secured creditor.

2.4. In furtherance of this, on 19.02.2023, the Applicant No. 1 filed an application before the Hon'ble NCLAT seeking that:

(a) Respondent No. 3 be kept out of scope of the Interim Distribution Order,

(b) claims of Applicant No. 1 will be prioritized over claims of Respondent No. 2; and

(c) classify Applicant No. 1 as a secured creditor of Respondent No. 3.

2.5. This application IA 1162/2023 was heard on 22.03.2023 by Hon'ble NCLAT and after hearing the submissions of the Applicant No. 1 was granted express liberty to approach this Tribunal for adjudication of the aforesaid issues and determination of the status of the Applicants as financial creditor and the inter-se priority of claim between Applicant No. 1 and Respondent No. 2. Pursuant to this, Grant Thornton on 22.02.2023 classified the Applicant No. 1 as a secured creditor to the extent of security held by the Applicant No. 1 and for the remaining it was still retained as Unsecured Financial Creditor. However, Grant Thornton did not consider the seniority which the Debentures held over the debts of Respondent No. 2 due from Respondent No. 3. Meanwhile, in January 2022, Respondent No. 1 filed an interlocutory application having I.A. No. 586 of 2022 before the Hon'ble NCLAT requesting for an interim distribution of funds. The Hon'ble NCLAT, through an order dated 31.05.2022, allowed the application and approved the interim distribution of the funds as per the procedure set out by Respondent No. 1.

2.6. Given this, the Applicants apprehends that the interim distribution of funds can take place without considering the contractual superiority which the Debentures have over the debts of the Respondent No. 2. In the event the interim distribution of funds takes place for Respondent No. 3 without considering the superiority of the Debentures, it will cause grave harm and irreplaceable injury to the Applications.

3. Another Application CA 170/2023 was filed by M/s Somany Provident Fund Institution seeking to intervene in CA 137/2023 and praying for making the relief claimed in CA 137 of 2023 as absolute. Since, the reliefs claimed in this CA 170/2023 prays for making relief claimed in CA 137 as absolute, both the Company applications are disposed of by this common Order.

4. The Respondent No. 1 filed the reply stating that the Original Petitioner in C.P. 3638 of 2018 had filed the captioned Petition in larger public Interest with a view to prevent the downfall of Infrastructure Leasing & Financial Services Limited (IL&FS) and its group companies (IL&FS Group) and the repercussions of the same on the financial markets and the economy. After the appointment of the New Board by this Tribunal on the basis of the Petition of the Original Petitioner's Petition, the Original Petitioner has merely considered the resolution mechanism and distribution framework suggested by the New Board and monitored the progress from time to time. The Original Petitioner is not involved in the day-to-day affairs (and therefore in the day-to-day Implementation of the resolution process) of the IL&FS Group and the commercial and day to day affairs of IL&FS and entities in the IL&FS Group. Accordingly, the Original Petitioner is filing the present limited affidavit in reply on issues of law and the issues pertaining to the resolution process (including the distribution of sale proceeds) that have been raised in the captioned Petition.

   4.1. The Respondent No. 1 submitted that the Applicant's contentions/reliefs prayed for are untenable, devoid of merit and cannot be accepted as being completely contrary to the Resolution Framework and the Revised

Distribution Framework that has been approved by the Hon'ble NCLAT in terms of an order dated March 12, 2020 passed in Company Appeal Nos. 346 and 347 of 2018 and they are contemplating by this Application a modification/granting a stay on the order dated May 31, 2022 passed by the Hon'ble NCLAT in IA No. 586 of 2022. It is further stated that the clause in the inter-se agreement between IL&FS and the Applicants which the Applicants seek to rely on does not contemplate subordination of the Respondent No. 2's debt/claim to the Applicants' debt/claim and/or priority to the Applicants vis a vis the Respondent No. 2's debt/claim.

4.2. The Respondent No. 1 has contested the present application on ground of non-joinder of necessary party, as its preliminary objection stating that it is settled law that a necessary party is a party to a proceeding without whom no order can be made effectively. A necessary party would thus include such parties who are directly affected by the outcome of proceedings and/or parties against whom allegations have been made and/or parties who are necessary to answer primary issues raised in a proceeding. In the present case, the Applicant has challenged the decision by the independent claims management consultant appointed for the IL&FS Group to vet and verify the claims of all creditors to entities in the IL&FS Group. Keeping the Applicant's case, contentions and consequent reliefs sought in perspective, the claims of the Applicant and Respondent No. 2 in relation to Respondent No. 3 have admittedly been vetted. verified and accepted by the independent claims management consultant appointed for the IL&FS Group viz. M/s, Grant Thornton (India) LLP (GT).

Likewise, admittedly, GT (and not the Respondents) also disregarded/rejected the Applicants contentions of priority over Respondent No. 2. The Applicants are thus aggrieved by primarily by actions of GT and have therefore filed the present Application essentially challenging the admission of claims by GT. However, surprisingly, GT has not been impleaded as a party Respondent. Further, in terms of the Resolution Framework, the voting rights in the committee of creditors for Respondent No. 3 depend on the quantum of debt of the creditors which are admitted by Grant Thornton, GT therefore is clearly a necessary party to the present Application since: (a) the Application raises issues pertaining to the conduct and outcome of the claims management process of the IL&FS Group which has admittedly been conducted by GT; and (b) the Issues raised in the captioned Application requires, for its complete adjudication, the presence of GT and the consideration of its rationale for rejection/admission of claims.

4.3. It is further stated that by an order dated October 1, 2018 (1st October Order), this Tribunal, in larger public interest inter alia superseded the then existing board of directors by appointing a new board of 6 directors after considering the Original Petitioner's recommendations. The 1st October Order further directed the board of 6 new directors (New Board) to conduct the business of Respondent No. 2 as per the Memorandum of Association and Articles of Association and tasked them with resolving the debt contagion that had infected the IL&FS Group.

4.4. The new Board found that entities in the IL&FS Group have borrowed externally from banks/financial institutions and public fund creditors and borrowed internally from other IL&FS Group companies, Specifically,

there have been significant borrowings by entities in the IL&FS Group from Respondent No.2 or from certain Intermediate Holding Companies in the IL&FS Group who have in turn borrowed externally from the aforesaid external creditors.

4.5. It is further stated that, for the purpose of the present Application, the relevant features of the Resolution Framework are as follows :

a. Collection and verification of claims from creditors of entities in the IL&FS Group by an independent claims management consultant. This involves invitation of claims from all creditors of entities in the IL&FS Group i.e. group creditors and external creditors:

b. Constitution of a Creditors Committee (according to the bid received) for approval of the H1 Bid/resolution by way of InvIT proposed for the relevant IL&FS Group Company. The Resolution Framework further contemplates that such Creditors Committee will comprise of all financial creditors of the relevant IL&FS Group Company including IL&FS Group Companies that have lent money to the relevant IL&FS Group Company. The inclusion of all IL&FS Group Creditors on the relevant Creditors Committee can only follow collection, verification and admission of claims of such IL&FS Group Creditors by the independent claims management consultant

c. Distribution of the H1 Bid Value / termination amount/settlement amount etc in the following manner

i. first, towards all resolution process costs incurred in the resolution process of the relevant IL&FS Group entity, whether Incurred by that IL&FS Group entity or on behalf of that IL&FS Group Company in full,

ii. second, towards distribution of the net sale proceeds paid by the H1 bidder/ termination amount settlement amounts up to the average liquidation value' (determined by two independent valuers in accordance with Regulation 35 (1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016) to the creditors of the relevant Group Company in accordance with Section 53 of the Insolvency & Bankruptcy Code (IBC) which includes all components of Section 53 of the IBC. and

iii. third, the remaining sale proceeds/ termination amount/ settlement amounts to be distributed pro-rata to each class of creditors of the relevant Group Company, adjusted for any recovery made by the relevant creditor on account of distribution under Section 53 (of the IBC), as contemplated above,

4.5.1. Thus, in essence, the distribution under the Resolution Framework involves and includes all components of Section 53 of the IBC.

4.6. As set out above, the Resolution Framework was filed with the Hon'ble NCLAT for its approval vide affidavits dated January 24, 2020, January 9 2020 and February 7, 2020. Specific reliefs were sought in respect of approval of the Resolution Framework generally and the aforesaid features/key principles. The Hon'ble NCLAT by way of its order dated March 12, 2020 approved the procedures for resolution set out in the affidavit including the Resolution Framework which include the foregoing. While appeals have been filed before the Hon'ble Supreme Court challenging the order dated March 12, 2020 passed by the Hon'ble NCLAT, no stay has been granted on the said Order or on the Resolution Framework and its implementation.

4.7. Thereafter, while the Resolution Framework contemplated distribution of sale proceeds/termination amounts/settlement amounts/InviT units and other amounts after the resolution process of the relevant IL&FS Group Company was complete, the Original Petitioner filed Interlocutory Application No. 586 of 2022 (IA 586) before the Hon'ble NCLAT seeking interim distribution of funds and InvIT Units lying with IL&FS Group Companies in accordance with the procedure set out in IA 586 and on the same principles as prescribed in the Resolution Framework. It is pertinent to note that the procedure inter alia contemplated interim distribution to creditors only upon receiving an undertaking from the creditors receiving payouts/funds that they would return/refund any monies/funds which

exceeded their entitlement eventually at the time of final resolution/distribution pertaining to the relevant entity.

4.8. By an order dated May 31, 2022, the Hon'ble NCLAT approved the procedure and principles for interim distribution the Original Petitioner's request for interim distribution for 13 select entities in the manner and on the principles set out in IA 586. This included Respondent No. 3. Subsequently, vide orders dated January 19, 2023 and February 13, 2023, the Hon'ble NCLAT permitted interim distribution to be conducted for all but 1 entity in the manner and on the principles set out in IA 586.

4.9. The Applicants filed an Application IA 1162/2023 before the Hon'ble NCLAT. At the hearing before the Hon'ble NCLAT, the Applicants primarily highlighted its grievance that it was allegedly and incorrectly categorized as an unsecured lender. The Hon'ble NCLAT was pleased to direct the Applicants to approach this Tribunal first. It appears thereafter or simultaneously; the Applicants' claim was recategorized as a secured creditor of Respondent No. 3.

4.10. Against the aforesaid factual backdrop and considering the Applicant’s pleaded case, the Applicant’s Application is devoid of merit, contrary to the facts and the settled positions of law and therefore must be dismissed on the following amongst other grounds each of which are in the alternative and without prejudice to each other –

a. A Reliefs prayed for will tantamount to granting a stay on the orders of the Hon'ble NCLAT as the Application effectively seeks a modification of and/or a stay on the order of the Hon'ble NCLAT. It is

respectfully submitted that such reliefs cannot be granted by this Tribunal and therefore the present Application in so far as it seeks such reliefs cannot be granted. Admittedly, by an order dated May 31, 2022 in IA No. 586 of 2022, the Hon'ble NCLAT permitted the interim distribution in respect of certain entities in the IL&FS Group. This included Respondent No. 3 where the Applicants are concerned. Thereafter, by orders dated January 19, 2023 and February 13, 2023, the Hon'ble NCLAT has extended the order dated May 31, 2022 and permitted interim distribution for all entities (save and except one) in the IL&FS Group. After the passing of these orders, the Applicant has filed the captioned Application seeking an order restraining the interim distribution in respect of Respondent No. 3. This relief, if granted, would tantamount to a stay on and/or recall of the order dated May 31, 2018 passed by the Hon'ble NCLAT and cannot be permitted. Under the circumstances, the Applicants Application in so far as it seeks a restraint on interim distribution pertaining to Respondent No. 3 cannot be granted.

b. Application contrary to the Resolution Framework - It is submitted that the very basis of the Applicants Application is contrary to the Resolution Framework that was approved by the Hon'ble NCLAT vide the order dated March 12, 2020 and therefore must be rejected. The Resolution Framework as approved by the Hon'ble NCLAT as set out above and in the documents inter alia contemplates collection and verification of all claims in respect of an IL&FS Group Company by an independent claims management consultant. It also specifically mandates that all financial creditors of a particular IL&FS Group

Company (including other IL&FS Group Companies that have lent monies to an IL&FS Group Company) would constitute the Creditors Committee for the relevant IL&FS Group Company. The inclusion of all IL&FS Group Creditors on the relevant Creditors Committee can only follow from collection, verification and admission of claims of such IL&FS Group Creditors by the independent claims management consultant. The distribution mechanism/framework contemplated under the Resolution Framework prescribes a pro-rata distribution inter alia in accordance with Section 53 of the IBC which includes all components of Section 53 of the IBC. Section 53 (1) of the IBC prescribes the payment waterfall whereas Section 53 (2) of the IBC provides for disregarding contractual arrangement between recipients of equal ranking under sub-section 1 of Section 53 of the IBC which would disrupt the order of priority under the said sub-section. Therefore, under the Resolution Framework, any contractual obligations or stipulation which would affect the order of priority between two equally ranking creditors prescribed under Section 53(1) of the Act is to be disregarded.

c. In the present case, the Applicant is a secured creditor of Respondent No. 3. Likewise Respondent No. 2 is also a secured creditor of Respondent No. 3. The Applicants' have sought to contend that the contractual arrangements between the Applicants' and Respondent No. 2 bar/prohibit (a) the submission and/or entertaining a claim by Respondent No. 2; and/or (b) distribution of monies pursuant to interim or final distribution to Respondent No.2 before the Applicants' claims are satisfied. It is submitted that these contentions/reliefs cannot be

countenanced as it would be directly contrary to the Resolution Framework approved by the Hon'ble NCLAT. The Resolution Framework clearly (a) enables and mandates filing and entertaining claims of all financial creditors including IL&FS Group Creditors (intra group creditors); and (b) provides to disregard any distinction between equally ranking creditors under Section 53(1) of the Act.

d. The Applicants' reliefs as regards the alleged Inflated claims of Respondent No. 2 cannot be granted without the presence and without hearing GT.
e. No grave prejudice will be caused to the Applicants if the interim/final distribution for Respondent No. 3 proceeds as per the Resolution Framework (as approved by the Hon'ble NCLAT).
f. The interim distribution and/or final distribution as per the Resolution Framework is not arbitrary, incorrect, unlawful and unjust. The interim distribution and the final distribution as per the Resolution Framework are based on sound principles and reasons and in-fact, have been approved by the Hon'ble NCLAT vide the order dated March 12, 2020. The submission/suggestion of the Applicants thus is highly Improper.
g. The Original Petitioner has had and does not have any role to play in admission or rejection of claims by the independent claims management consultant in any event, the Applicants are put to strict proof of their contention.

5. The Respondent No. 2 has filed the reply taking the similar objections as the Respondent No. 1 has taken in its reply. It is further stated that the Respondent

understands that on the basis of a claim submitted by Applicant no. 2 on behalf of the aforesaid debenture holders including Applicant No. 1 herein pursuant to the Claims Invitation Advertisement, GT has admitted a total amount of Rs. 4,058,143,343/- in respect of the Non Convertible Debentures (NCDs). Initially, the said claim was treated as an unsecured amount, however, by an email dated 22.3.2023, it appears that GT has classified ITSL (and consequently the debenture holders of the NCDs) as "*secured creditors having an exclusive lien over the respective FDRs*" in light of the lien marking in favour of ITSL over certain fixed deposits pertaining to the aforesaid DSRA, i.e. GT has admitted ITSL's claim in respect of the NCDs as a secured claim to the extent of the fixed deposit amount underlying the DSRA.

5.1. It is stated that the GT had responded to the ITSL vide email dated March 31 that "*We understand that the issue mentioned in your communication (dated March 25, 2023) is in relation to priority of your debt over the debts of IL&FS. [.....] From a reading of relevant clauses of the DSRA Support Undertaking, we understand that IL&FS has undertaken not to make any claim in competition with the Debenture Trustee/Debenture Holders. Accordingly, it is clear that this is not a clause with regard to priority of security and merely mentions when IL&FS can claim*."

5.2. It is also contended that the Applicant No. 1 even approached the Hon'ble NCLAT by way of IA No. 1162 of 2023 inter alia seeking directions that its claim in respect of Respondent No. 3 i.e. IEDCL be treated in priority over this Respondent's claim. Save for seeking a precatory relief that Respondent No. 3 be kept out of the scope of the Interim Distribution Order, Applicant No. 1 did not seek any of the final or interim reliefs qua the interim distribution of Respondent No. 3 being sought in the present

application before the Hon'ble NCLAT. Accordingly, the liberty granted by Hon'ble NCLAT to Applicant No. 1 to approach this Tribunal pertains only to the claims management process of the Respondent No. 3, and not for modification and/or deviation from the Resolution Framework or the interim distribution process.

5.3. Section 53 of the IBC has been incorporated in totality in the Revised Distribution Framework, where payments to secured creditors are concerned. It is pertinent to note that Section 53(2) of the IBC provides that "*any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the Liquidator*". Therefore, by virtue of Section 53(2) of the IBC, all contractual inter-se priorities between creditors are overridden by the operation of law. Since all components of section 53 have been incorporated in the Revised Distribution Framework, therefore, Section 53(2) is applicable to the IL&FS Group's resolution process and the interim distribution process.

5.4. It is further contended that the Revised Distribution Framework having been approved by Hon'ble NCLAT, no party can seek enforcement or recognition of any purported 'priority' of their claims before this Tribunal. The Applicant's reliance on clause 4.1 of the DSRA Support Undertakings to contend that their claims pursuant to the NCDs are to be treated in priority over Respondent's claim in relation to IEDCL, can not stand in view of Hon'ble NCLAT order holding the provisions of section 53 applicable to the distribution mechanism.

5.5. Clause 4.1 is not a clause than can be said to create a "priority" of payment in favour of Debenture Holders. Assuming whilst denying it is at best, a

contractual provision restricting this Respondent in "filing" a claim against Respondent No. 3 for dues owed to it by Respondent No. 3 under the DSRA support undertaking. Such a clause cannot be enforced, since it would be in breach of the Orders passed by the Hon'ble NCLAT and this Tribunal and is also in restraint of legal proceedings, and the same therefore cannot be countenanced. In any event, even when claims are only contractually restricted from being 'filed in competition', such a clause is to be overridden by the March 12 Order approving the Resolution Framework, which requires all claims of intra-group creditors to be filed to ensure group level resolution of debts. Further, if any intra group debt claims are restricted from being filed on account of any contractual rights, especially those created by the earlier management of the IL&FS group, then the very object of the present proceedings under section 241 and 242 of the Companies Act for the resolution of IL&FS group as a whole (not merely individual resolution of entities) would be severely prejudiced.

5.6. It is further submitted that the claim "in competition" referred to in clause 4.1 can only mean a claim arising out of the relevant DSRA Support Undertaking at best i.e. dues owed to this Respondent by Respondent No. 3 under the DSRA Support Undertaking, and not for overall claims relating to amounts lent by this Respondent to Respondent No. 3 separately.

6. Heard learned Counsel and perused the material available on record.

6.1. The order dated 31.05.2022 passed by Hon'ble NCLAT in IA 586/2022 in Company Appeal (AT) No. 346/2018 approved the interim distribution mechanism and ordered that the interim distribution as prayed in the

Application IA 586/2022 shall be undertaken as per procedure indicated in Para 25(e) of the Application. The Para 25(e) reads as under:

> *"(e) Procedure for interim distribution: The procedure for interim distribution in respect of the relevant IL&FS Group entity shall be as follows:*
> *(i) The New Board shall decide the suitable time for interim distribution and the total amount (cash and InvlT Units) to be distributed;*
> *(ii) Two valuers shall be appointed by the New Board for determining the average liquidation value as on 15.10.2018 of the relevant IL&FS Group entity and, in the meantime, the claims verification process in respect of the relevant IL&FS Group entity shall be completed;*
> *(iii) The New Board shall appoint an independent third party consultant to ascertain the value of the security interests of the secured creditors of the relevant IL&FS Group entity (as is done under Section 53 of the IBC) so that distribution as per the Resolution Framework can take place;*
> *(iv) Alvarez & Marsal India Private Limited, the Resolution Consultant appointed by the New Board shall prepare the interim distribution calculations, which will show the distributable assets (i.e. cash and InvlT Units) proposed to be paid to each creditor of the relevant IL&FS Group entity by way of interim distribution, in*

accordance with the revised distribution framework (which forms part of the Resolution Framework that has already been approved by this Hon'ble Tribunal vide the March 12 Order);

(v) The interim distribution calculations shall be validated by the independent third-party consultant;

(vi) The validated interim distribution calculations shall be approved by the Board of the relevant IL&FS Group entity and the Board of the relevant HoldCo and the New Board shall authorize the said approved interim distribution calculations in respect of the relevant IL&FS Group entity; and

(vii) The relevant IL&FS Group entity shall make payments to its creditors as per the interim distribution calculations authorized by the New Board, subject to each creditor providing an undertaking to the relevant IL&FS Group entity stating that if it is subsequently found that such creditor has, by way of interim distribution, received an amount more than what such creditor ought to have received, the excess amount shall be liable to be returned, failing which the same may be recovered from such creditor either by way of adjustment at the time of final distribution or otherwise (including, without limitation, by way of appropriation from amounts payable by any other IL&FS Group entity to such creditor). Further, any amounts which have already been

set-off or appropriated by any creditor in breach of the October 15 Order shall be adjusted/ recovered while making such payment by way of interim distribution."

6.2. At the outset, it may be noted that the interim distribution has been given go ahead by Hon'ble NCLAT. Nonetheless, such interim distribution is subject to undertaking by the recipients that such recipient would refund any excess money received by it in accordance with final determination. Accordingly, we do not find that any prejudice is caused to the Applicant on account of such interim distribution in the light of this undertaking. Hence, we have no hesitation to hold that the prayer for staying the interim distribution, if any carried out prior to passing of this Order, requires any consideration at this juncture, more so, when this Bench is deciding the dispute finally as well. In our considered view, no irreversible prejudice is or shall be caused to the Applicant, if the Interim Distribution has already taken place or takes place.

6.3. The Respondent No. 1 has raised the objection that the GT, the Claim Management Consultant, being person against whose decision the applicants have filed this Application, is a necessary party and this Application ought to be decided after impleading them as a party and hearing them. The Counsel for the GT was allowed to submit it contention on the dispute involved in present application, and it was submitted by them that their scope of activities is limited to collation and verification of claim, amongst others, and they admitted the claim of the Applicants in accordance with their interpretation of the DSRA support undertakings. We find that the Respondent No. 2, who is party to DSRA support undertaking is directly affected by the clause relied upon by the Applicants

and it can be said to be aware of background which led to insertion of such clause in the DSRA support undertaking. This undertaking was executed in relation to Respondent No. 3. It is not in dispute that the scope of activities of GT was limited and it decided on the claim of the Applicants on basis of its understanding of relevant clauses and the said understanding is stated in the communications forming part of the Application. Accordingly, we are of considered view that non-impleadment of GT as necessary party cannot make the present application non-maintainable on ground of non-joinder of necessary party.

6.4. We find that GT, the Claim Management Consultant appointed in the Resolution Process vide its email dated 06.12.2022 informed the Applicants that

> "*1. In the current resolution process for the IL&FS Group companies, we have been appointed as the claims management advisor ("CMA") to the IL&FS group by the Hon'ble NCLT. Accordingly, pursuant to the resolution framework by the Hon'ble NCLAT, our scope of work is limited to the collation and verification of the claims submitted by the relevant creditors of the respective IL&FS entities.*
>
> *2. Accordingly, we are merely required to collate and verify the claims of the creditors on the basis of the relevant documents submitted and thereafter classify such creditors as financial creditors/operational creditors or secured creditors/unsecured creditors. However, we are not in a position to provide any comment on the priority of the claims.*

3. Further, with respect to the classification of the said claim as secured, we understand that IL&FS has provided an undertaking to ensure that the specified debt service reserve amount is maintained and to fund the excess amount in the event of a shortfall. However, it is important to note that the said facility has not been secured by any asset of IEDCL (borrower). Hence, the NCD holders would be classified as unsecured creditors of IEDCL.

4. The Hon'ble NCLT has directed that an interpretation of the provisions of the contract would be construed to the exercise of adjudication by CMA, which is not within the mandate of CMA.

5. We once again reiterate that as per the process in the resolution framework, we are merely listing out the creditors, after verifying the liability as on the cut off date, we are not in a position and have specifically mandated to not undertake interpretation of subordination clauses by the Hon'ble NCLT."

6.5. The above communication of the GT defines the dispute in the present application, which is solely in relation to priority between the debts of the Applicants and the debts of the Respondent No. 2. The said dispute is arising on account of covenants contained clause 4.1 of the DSRA agreement binding the Respondent No.2 in certain circumstances and stated to be executed by the Respondent No. 2. It is the case of the Applicants that this covenant persuaded them to subscribe the Debentures issued by the Respondent No. 3. Clause 4.1 of the DSRA agreement reads as follows:

"COVENANTS

4.1 Miscellaneous

Subject to the terms herein stated, the Promoter agrees and undertakes as under :

(a) The Promoter shall not, in the event of the insolvency of the Company, prove in competition with the Debenture Trustee in the insolvency proceedings.

(b) The Liability of the Promoter hereunder shall not be affected by any dispute between the Company and the Debenture Trustee / Debenture Holders, whether pending before any Court, Tribunal or Arbitrator(s), and the Promoter shall remain liable under these presents notwithstanding any orders passed therein.

(c) *The Promoter shall not, for so long as the Debentures are outstanding, make any claims against the Company in competition with the claims of the Debenture Trustee or the Debenture Holders*.

6.6. The Promoter in this clause is Respondent No. 2 and the Company is Respondent No. 3 herein. The Applicants are Debenture Holders and Debenture Trustee respectively.

6.7. It is undisputed fact that the Hon'ble NCLAT has approved the Resolution Framework for the resolution of IL&FS entities and such resolution is being carried out in accordance thereto. The provisions of the Insolvency & Bankruptcy Code, 2016 are kept outside unless otherwise expressly brought by such approved Resolution Framework, which in itself a comprehensive document prescribing the whole procedure for settling the claims of the creditors and resolution of entities. It is pertinent to note the

Hon'ble NCLAT at Para of March 12 Order held that "*In this background, while we reject the objections raised by some of the Creditors, as noticed above, we accept the suggestion of pro-rata distribution as suggested by Union of India and the procedure as suggested by it for the purpose of completing the resolution process*." The Respondent No. 1, in this regard, had filed an affidavit suggesting the pro-rata distribution, which was subsequently revised and this revised resolution framework came to be approved by Hon'ble NCLAT in March 12 Order.

6.8. It is to be noted that this pro-rata distribution was suggested by the Union of India in the back ground and noted by Hon'ble NCLAT in its Order dated March 12 that "*The amounts have been invested by Public Fund Creditors in debt instruments issued by Various Respondent No. 1 Group Entities particularly at the level of the HoldCos, which in turn have granted debt to various other entities of the Respondent No. 1 Group. Accordingly, for the Public Fund Institutions to be repaid atleast part of their dues by the HoldCos (and other such members of the Respondent No. 1 Group which have availed debt from these Public Fund Creditors), it is critical that the Respondent No. 1 Group Lenders who have lent amounts (mostly on an unsecured basis) to the Respondent No. 1 Group Entities are also able to receive some payments from the sale proceeds from the Asset Level Resolution currently underway*." The Respondent No. 1 had finally proposed the following distribution mechanism –

Revised Distribution Framework

In light of the above, the New Board has proposed a mechanism for distribution of the financial bid amounts/ termination amounts/ settlement amounts, after considering interests of each set of creditors in the Respondent No. 1 Group - whether secured or unsecured or situated at the HoldCo level or an operating asset level. Accordingly, having considered each of the aforesaid factors, the New Board has proposed that the financial bid amounts termination amounts/ settlement amounts are to be distributed in the following manner (the Revised Distribution Framework):

(a) first, towards all resolution process costs incurred in the resolution process of the relevant Respondent No. 1 Group entity, whether incurred by that Respondent No. I Group entity or on behalf of that Respondent No. 1 Group Company (including but not limited to fees payable to the financial and transaction advisors, legal counsels, Resolution Consultant, Claims Management Consultant, independent valuers, costs for issuing advertisements, conducting audits (including special or forensic audits)and conducting meetings of the Creditors' Committees etc.) in full;

(b) second towards distribution of the net sale proceeds paid by the H1 bidder/ termination amount/ settlement amounts up to the average liquidation value to the creditors of the relevant Group Company in accordance with Section 53 of the IBC (which will include all components of Section 53 of the IBC such as unpaid workmen's dues and unpaid employees dues etc., as applicable); and

(c) third, the remaining sale proceeds/ termination amount/ settlement amounts to be distributed pro-rata to each class of creditors of the relevant Group Company, adjusted for any recovery made by the relevant creditor on account of distribution under Section 53 (of the IBC), as contemplated above.

6.9. The Hon'ble NCLAT in its 12th March order at para 64 noticed that many of the financial creditors/secured creditors are opposing the aforesaid distribution, but wanted the distribution as per section 53 of the I&B Code, and held that "*we are not inclined to follow the procedure of I&B Code including Section 53, as this is a case where public interest is involved for following reasons……*". After considering this, the Hon'ble NCLAT at Para 66 of the Order concluded that while rejecting the objections raised by some of the creditors, as noticed above, we accept the suggestion of pro-rata distribution as suggested by Union of India and the procedure as suggested by it for the purpose of completing resolution process.

6.10. In this backdrop, the provisions of section 53 were ordered to be adopted with the modifications suggested by Union of India, wherein the distribution of Liquidation value after meeting CIRP cost was ordered to be distributed in accordance with Section 53 of the Code and the proceeds over and above liquidation value was to be distributed pro-rata amongst the creditors. It must be noted that the word "Section 53" is used by the Hon'ble NCLAT, which includes whole of section 53 and can not be said to be limited to Section 53(1) alone. Had it been intent of the Hon'ble NCLAT to exclude the applicability of section 53(2) for the purpose of

distribution of liquidation value in terms of step (b) in the revised resolution framework, it would have expressly said so.

6.11. The Hon'ble NCLAT, vide its Order in IA 1162 of 2023, has not dealt with the prayer of the Applicant to treat it as secured creditors, and instead, it directed the Applicant to approach this tribunal for the purpose. We further find that GT later on classified the Applicant as secured creditor to the extent of lien over FDRs held by the Applicant. It is undisputed fact that the Applicant's debt arising out of debentures is Secured to the extent of balance lying in the DSRA account as FDRs and the Applicant does not hold any security over any of the assets of the Respondent No. 3. DSRA is a mechanism to ensure timely discharge of periodic obligations arising in relation to a debt and such mechanism had further assurance from the Respondent No. 2 taking upon itself to keep the balance in DSRA account in terms of DSRA Support Undertaking. The pleadings of Respondent No. 3 confirms the fact that the Applicant was initially admitted as Unsecured Creditors and later on moved to Secured Creditors to the extent of lien over balance lying in DSRA Account in form of FDRs.

6.12. The Debenture Trust Deed dated 07.06.2018 executed between Respondent No.3 and Applicant No.2 provides for maintenance of 'Debt Service Reserve Account' ("DSRA") which is defined under clause 1.1 (ggg) to mean *"(a) for so long as the long-term rating of the Issuer is above BBB+, the amounts equal to the Scheduled Debt Obligation 1; and (b) for so long as the long term rating of the company is BBB+ or below,*

the amounts equal to the Scheduled Debt Obligation 2". Clause 1.1 (lll) defines scheduled debt obligation 1 means *on any date the amounts which are scheduled and not accelerated to be due and payable by the Issuer to the Debenture Holders, on the immediately succeeding Payment Date as identified in the Schedule 3 herein*. Further Clause 1.1(mmm) defines Scheduled Debt Obligation 2 means *on any date the amounts which are scheduled (and not accelerated) to be due and payable by the Issuer to the Debenture Holders, on the immediately succeeding 3 (Three) Payment Dates as identified in the Schedule 3 herein*.

6.13. Clause 3.1 of the Debenture Trust Deed clearly defines the debentures to be unsecured. Clause 3.10 (b) thereof further provides that "*The Issuer has on or prior to the Deemed Date of Allotment: (i) credited an amount which is equal to the Required DSRA Amount and (ii) effectively marked lien on the DSRA Account in favour of the Debenture Trustee. The Company has provided/ shall provide all such authorisations to the Debenture Trustee, as is required to ensure that only the Debenture Trustee is entitled to provide any instructions / operate the DSRA Account in accordance with the terms contained herein and other Transaction Documents"*. Clause 3.10 (c) further provides that *"the Issuer shall ensure that, at all times until the final settlement debt, the amount lying to the Credit of the DSRA Account is at least equal to the required DSRA Amount"*. The Clause 3.10 (d) thereof further provides that *"in the event that the issuer fails to fund the Debt Service Account with the requisite Debt Service Amount required to meet the payment obligations on any Payment Date in accordance with the Payment Mechanism, pursuant to*

which the amounts available in the DSRA Account are utilised by the Debenture Trustee to meet such shortfall in accordance with the Payment Mechanism, the Issuer shall ensure that within a maximum period of 45 days from previous Payment Date, the DSRA Account is credited with such additional amounts as are required to ensure that the amounts lying to the credit of the DSRA Account is at least equal to the Required DSRA Amount".

6.14. Further, clause 3.10 (f) thereof of further provides that "*In the event that the issuer fails to replenish the DSRA account in the manner set out under clause 3.10(d) and 3.10 (e) above, the Debenture Trustee shall, immediately inform the promoter of such shortfall and the Issuer shall ensure that the promoter, within a maximum period of 60(sixty) calendar days from (i) the previous payment date in case of Deposit Shortfall Event; or (ii) the rating event in case of a Deposit Shortfall After Rating Event. As the case may be, arranges adequate funds through funds, to ensure that an amount equal to the Required DSRA Amount is deposited to the credit of the DSRA Account"*. The clause 1.1(nnn) defines sponsor or promoter to mean Infrastructure Leasing and Financial Services Limited, which is Respondent No.2 herein.

6.15. Harmonious reading of above clauses only leads us to finding that the debentures are unsecured debt; however, an amount equivalent to the balance required to be maintained with the DSRA Account has security in the form of lien over the balance lying in such DSRA Account. Further, in case of failure of the Respondent No. 3 to meet periodic Debt Service Obligation, such obligation was to be met after appropriation of the

balance lying in such DSRA Account. Accordingly, we have no hesitation to hold that the whole of debentures cannot be classified as Secured debt and only the amount of balance required to be maintained in DSRA Account shall be eligible for classification as secured debt and remaining amount of debenture obligation is to be classified as unsecured debt.

6.16. Having said so, we shall deal with the priority of claim over the claim of Respondent No. 2 in the Resolution of Respondent No. 3 in the following paragraphs:

6.17. Besides Debenture Trust Deed, the Respondent No. 2, 3 and Applicant No.1 executed a DSRA support undertaking dated 14.05.2018 and clause 2.3 interalia provides that "*the promoter shall upon receiving a notice from the Debenture Trustee as aforesaid, within a maximum period of 60 (sixty) calendar days from; (i) the previous Payment Date, in case of Deposit Shortfall Event; or (ii) the Rating Event Date in case of a Deposit Shortfall After Rating Event, as the case may be, arrange for adequate funds through any other person, failing which the promoter would arrange the said funds, so as to ensure that an amount equal to the Debt Service Reserve Amount is deposited into the DSRA Account by the Company"*.

6.18. 2nd para of Clause 2.3 of the DSRA support undertaking restricts the obligation of the Promoter to the shortfall, if any. It provides that

"*For the sake of abundant caution and avoidance of doubts, it is hereby clarified that : (i) the obligation of the Promoter to arrange*

for funds as aforesaid will be limited to any shortfall in the Scheduled Debt Obligation 1 or the Schedule Debt Obligation 2, as the case may be, irrespective of whether an Event of default has occurred in relation to the Debentures and all the amounts outstanding in relation to the Debentures have been accelerated; and (ii) this Undertaking provided by the Promoter shall be valid and binding on the Promoter until the completion of the tenure of the Debentures, irrespective of whether any Event of Default has occurred during the tenure of the Debentures, subject to the obligation of the promoter to arrange for funds (as aforesaid), being limited to the shortfall in the Schedule Debt Obligation 1 or the Scheduled Debt Obligation 2, as the case may be, and (iii) in the event the payments due on the Debentures are accelerated on account of occurrence of an Event of Default or otherwise, the obligation of the Promoter in terms of this Undertaking shall be limited only to the shortfall in the scheduled Debt Obligation 1 or the Scheduled Debt Obligation2, as the case may be, and this Undertaking can only be called upon to the extent that the Company has failed to make available the required amounts in the DSRA Account within a period of 45 (Forty five) calendar days from …….."

6.19. Clause 4.1 of the DSRA Agreement further provides that

"*subject to the terms hereinstated, the promoter agrees and undertakes as under:*

(a) the Promoter shall not, in the event of the Insolvency of the Company, prove in competition with the Debenture Trustee in the insolvency proceedings;

(b) The liability of the promoter hereunder shall not be affected by any dispute between the Company and the Debenture Trustee/ Debenture Holders, whether pending before any court, Tribunal or Arbitrator(s) and the Promoter shall remain liable under these presents notwithstanding any orders passed therein;

(c) *The Promoter shall not, for so ling as the Debentures are outstanding, make any claims against the Company in competition with the claims of the Debenture Trustee or the Debenture Holders."*

6.20. The 2nd para of clause 2.3 of the DSRA support undertaking is abundantly clear to the effect that the obligation of the Promoter is limited to any shortfall in the Scheduled Debt Obligation 1 or the Schedule Debt Obligation 2, as the case may be. Accordingly, it was pleaded, without prejudice, by the Respondent that clause 4.1 shall apply not to the whole Outstanding due under Debentures but, at best, may apply to liability of the Promoter in terms of Clause 2.3 only. We find substance in this argument as the Covenant in form of Clause 4.1 has to be read in conjunction with the Clause 2.3, accordingly, the limitation to prove debt in competition, if can be said exist, can exists only to the extent of Obligations of the Promoter under DSRA undertakings and it can not be said that the Promoters are barred from the proving their claim in

competition with Applicant till the liability under whole of debentures is satisfied.

6.21. The Applicant relied upon Report of the Insolvency Law Committee February 2020 and submitted that para 8.2 under Chapter 2 thereof quoted the first ILC Report clarifying the Application of this provision on inter creditor or sub-ordination contracts between secured creditors by stating the following:

> *"the Committee was of the opinion that it is sufficiently clear from a plain reading of Section 53(1)(b) that it intended to rank workmen's dues equally with debts owned to secured creditors who have relinquished their security. Section 53(1)(b) does not talk about priority inter-se secured creditors. Thus, valid inter-creditor/subordination agreements would continue to govern their relationship. Further sub-section (2) of Section 53 must also be interpreted Accordingly. For instance, applying Section 53(2) in the context of Section 53(1)(b), any agreements between workmen and secured creditors which disrupts their pari passu rights will be disregarded by the liquidator. However, agreements inter-se secured creditors do not disturb the equal ranking sought to be provided by Section 53(1)(b) and therefore do not fall within the ambit of Section 53(2).*

6.21.1. We find that the Committee clarified that for the purpose of the correct interpretation of Section 53(2), necessary clarification needs to be provided by inserting explanation u/s 53(2) to clarify the

correct interpretation of the Section, as explained in First ILC Report. The said explanation has yet not been inserted. Accordingly, this Report remains an opinion of experts as of now. Nonetheless, it is also pertinent to note here that the Hon'ble NCLAT had held that *we accept the suggestion of pro-rata distribution as suggested by Union of India.* The words "Pro-rata" used in this assumes significance in the present context in as much as it over-rules the sequential distribution as suggested in the Insolvency Law Committee in its Report. It is undisputed fact that the resolution in the present case is carried out in terms of mechanism laid down by Hon'ble NCLAT and the provisions of IBC are applicable to the extent the same has been made part of such mechanism specifically.

6.22. The Ld. Counsel for the Applicant relied upon the decision in the case of ***H.R. Basavraj (DEAD) by His LRS. & Anr. versus Canara Bank and Others, (2010) 12 Supreme Court Cases 458: (2010) 4 Supreme Court Cases (Civ) 659: 2009 SCC OnLine SC 1747,*** wherein at para 12, it is stated as follows:

> *"As the Respondent has rightly contended that in view of the waiver of rights by the Guarantor, there can be no waiver of liability in exercise of such rights. The observations of this Court in Provash Chandra Dalui v. Biswanath Banerjee at AIR para 21 might be useful to recollect at this point of time. It runs as follows: (SCC pp. 498, para 24)".*

> *"24. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking the assertion of a right to the proper opportunity*".

6.23. Ld. Counsel for the Applicant also relied upon the decision in case of ***Shri Lachoo Mal…Versus…Shri Radhey Shyam, (1971) 1 Supreme Court Cases 619***, wherein, at para 6, it is stated that

> *"6. The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus, the maxim which sanctions the non-observance of the statutory provision is cuilibet licet renuntiare juri pro se introducto. (See Maxwell on interpretation of Statutes, Eleventh Edn., pp. 375 and 376). It there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In Halsbury's Law of England, Vol. 8, Third Edn., it is stated in para 248 at p. 143:*
>
> > *"As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the*

Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void".

6.24. That the above decisions are distinguishable on the facts. In the present case, the distribution is taking place in view of special scheme of Resolution framed by the Hon'ble NCLAT, which binds all the stakeholders, including the debenture holders. Since, the approved scheme contemplates distribution of the proceeds amongst the creditors in accordance with section 53 of the Code on pro-rata basis, which includes section 53(2) as well, we find the argument of involuntary waiver not binding on the other party is of no merit, since Hon'ble NCLAT was conscious of implications of section 53(2) of the Code while referring to section 53 and not section 53(1) of the Code while approving the revised distribution framework. We find that Applicant's claim has been classified under Secured Creditors to the extent of lien marked over FDRs in form of DSRA obligations. As held in preceding para, the remaining debt of the Applicant i.e. amount of debt other than debt equivalent to DRSA obligation, is unsecured. Section 53(2) clearly disregards any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section. Though the Insolvency Law Committee has opined in its report that the charges are sequential and not proportional, however, the recommendation of Committee to this effect has still not been incorporated under Section

53 by way of explanation as was recommended by the Committee. Nonetheless, the word "Pro-rata" used by the Hon'ble NCLAT in its order approving the Revised Distribution Framework nullifies the finding of Insolvency Law Committee in all respects. Having held that the debt of the applicant, as is in excess of DSRA Obligations, is unsecured, if the argument of the Applicant is accepted that clause c binds the Respondent No. 2 not to make any claim against Respondent No. 3 in competition with the claims of the Debenture Trustee or the Debenture Holder, that would lead to absurdity resulting in to inequitable distribution qua other creditors who shall stand in advantageous position by not allowing the Respondent No. 2 to file claim in the class of secured creditors. Accordingly, we do not find any force in the argument of the Applicant in this relation considering the facts and peculiar circumstances of the case.

6.25. As regards the priority of claim of the applicant in so far as balance in DSRA obligation is concerned, the pro-rata share of Applicant shall be determined without taking into account the claim of Respondent No. 2 and the amount so arrived at shall be paid to the Applicant. Any excess of the amount so paid over the pro-rata amount, which would have been attributable to share of the Applicant had the claim of the Respondent No. 2 been considered, shall be reduced from the amount attributable to the claim of Applicant. To explain, if debt of Applicant is 100 (out of which DSRA obligation is Rs. 10 – 90 shall be unsecured and 10 shall be secured), secured debt of Respondent no. 2 is 100 and secured Debt of other creditors is 100, the proceeds available for distribution is Rs. 120, and the Liquidation value is Rs. 100/-, the determination under clause (b) of the Revised Distribution Framework shall be as follows –

Share of Applicant as Secured Portion of Debt– 100*10/110 = 9.09

Share of Respondent No. 2 as secured creditor – {100*100/210} –{9.09-(10*100/210) = 43.29

Share of other secured creditors – 100*100/210 = 47.62

6.26. The remaining Rs. 20/- shall be distributed pro-rata in all the creditors as per clause © of the Revised Distribution Framework.

6.27. Since, the claim management agency is acting in terms of mandate given to it; the claim of the Respondent No. 2 has been decided on the basis of material placed before it; the applicant has not brought on record an evidence to suggest any bias towards Respondent No. 2 while verifying their claim by the Claim Management Agency; and the claim management agency is not a party to the present application, we have no hesitation to hold that no infirmity can be found in the claim of Respondent No. 2 accepted by the Claim Management Agency.

7. In view of the foregoing discussion and directions, the CA 137/2023 and CA 170/2023 are dismissed and disposed of accordingly.

Sd/-	**Sd/-**
PRABHAT KUMAR	**JUSTICE VIRENDRASINGH G. BISHT**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**