S.No.1

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
SPECIAL BENCH

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
30-10-2023 AT **04:00 PM**

IA (IBC) No.567/2021, IA (IBC) 1046/ 2022, IA (IBC) No.1047/2022, IA (IBC) No.1048/2022, IA (IBC) 45/2023 and IA (IBC) No.386/2023 in CP (IB) No. 205/7/HDB/2021.

U/s 7 of IBC, 2016

IN THE MATTER OF:

The State Bank of India **…Financial Creditor**

Vs

India Power Corporation Ltd **…Corporate Debtor**

C O R A M:-
Dr. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
Dr. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

O R D E R

CP (IB) No. 205/7/HDB/2021 :

Order is pronounced. In the result, CP (IB) No. 205/7/HDB/2021 is hereby rejected.

Since CP (IB) No.205/7/HDB/2021 is disposed of, Interlocutory Applications are disposed as under:

IA (IBC) No.567 of 2021:

This IA is filed by the Corporate Debtor praying to defer hearing of CP (IB) No.205/7/2021 sine die till final decision is rendered by the

Hon'ble Supreme Court of India in Civil Appeals No.3307 of 2020 and 3309 of 2020. Disposed of as infructuous.

IA (IBC) No.1046 of 2022 :

This IA is filed by the Corporate Debtor praying to dismiss CP (IB) No.205/7/2021 for want of jurisdiction in light of the grounds elaborated in paras 13 to 15 in the IA, on the ground of fraud practised by the Financial creditor, etc.

Since we have comprehensively considered each and every submission/ contention raised by both the sides and disposed of the Company Petition, this IA does not survive. Hence disposed of as infructuous.

IA (IBC) No.1047 of 2022 :

This IA is filed by the Corporate Debtor praying that M/s Cyril Amarchand Mangaldas, respondent no.2 herein be restrained from appearing for any of the parties to the present proceedings. Since we have considered all the issues on law and facts including the allegation of the Corporate Debtor that M/s Cyril Amarchand Mangaldas, Solicitors had induced the respondent/ Corporate Debtor to execute Corporate Guarantee.

As the Company Petition itself is disposed of, this IA does not survive. Hence disposed of as infructuous.

IA (IBC) No.1048 of 2022 :

This IA is filed by the Corporate Debtor praying that the Financial creditor be directed to answer the Interrogatories under Order XI, Rule 4 of the Code of Civil Procedure, 1908, annexed to the IA, produce documents listed in para 56 of the IA and other prayers.

Since the company petition is disposed of, this IA does not survive. Hence disposed of as infructuous.

IA (IBC) No.45 of 2023 :

This application is filed by the Corporate Debtor praying that pleadings made in paras 1 to 115 of Counter Affidavit dated 08.12.2022 by the petitioner/ Financial creditor in IA No.1046 of 2022, in exercise of jurisdiction under Rule 11 of NCLT Rules, 2016 read with Order VI, Rule 16 of the Code of Civil Procedure, and other analogous prayers.

Since the Company Petition is disposed of, this IA does not survive. Hence disposed of as infructuous.

IA (IBC) No.386 of 2023:

This application is filed by the Corporate Debtor praying that the submissions made by the petitioner/ Financial creditor in the following paras of its Rejoinder in CP (IB) No.205/7/2021 be struck off:

- Preliminary submissions, para no.5 (pages 2 to 6).
- Paras no.1, 2, 4, 5, 7 to 21, 32 to 40, 48 to 52, 63, 64, 80 to 93 and 98 (Pages no.10 to 19, 26 to 30, 35 to 38, 42 to 50, 53 to 69, 71 and 72).

While examining various contentions put forth by the petitioner, we have borne in mind the above prayer of the Corporate Debtor, in view of our order dated 30.01.2023 in IA 1547 /2022 which was upheld by Hon'ble NCLAT, in Company Appeal 87/2023 dated 04.10. 2023.

This IA accordingly, disposed of.

Any other pending IA also stands disposed of.

SD/-
MEMBER (T)

SD/-
MEMBER (J)

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IN THE NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH-1

(SPECIAL BENCH)

CP (IB) No.205/7/HDB/2021

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority Rules), 2016, read with Section 60(2) of the Insolvency and Bankruptcy Code, 2016.

In the matter of:
State Bank of India
State Bank Bhavan, Madam Cama Road
Mumbai – 400021, and acting through its
Branch at Stressed Assets Management Branch
Hyderabad (Code:18359)
D. No.3-4-1013A, 1st Floor, CAC
TSRTC Bus Station, Kachiguda
Hyderabad – 500027.
Represented by its authorised representative
T. Veerabhadra Rao.

.. Petitioner
Financial Creditor

VERSUS

India Power Corporation Limited
A company having its registered office at:
Centre for Excellence, Plot No.X-1, 2 & 3.

Block EP, Sector V, Salt Lake
Kolkata – 700091.
Represented by its Managing Director.

.. Respondent
Corporate Debtor

Date of Order: 30th October 2023

Coram:

Dr. VENKATA RAMAKRISHNA BADARINATH NANDULA
HON'BLE MEMBER (JUDICIAL)

Dr. BINOD KUMAR SINHA
HON'BLE MEMBER (TECHNICAL)

Parties/Counsels present:

For applicant :Shri Vivek Reddy, Senior Counsel assisted by
Shri Madhav Kanoria
Ms. Surabhi Khattar
Ms. Aishwarya Gupta
Ms. Anayani Agarwal
Shri Bishwajit Dubey
Shri Narendra Naik, Counsels.

For respondent :Shri Satish Parasaran, Senior Counsel assisted by
Shri Anirban Bhattacharya
Shri Deepak Khosla and
Shri I.V. Sidhivardhan, Counsels.

PER BENCH

I. This is an Application filed by State Bank of India, Stressed Assets Management Branch, Hyderabad (Code:18359) (hereinafter referred as 'Financial Creditor'), through its authorised representative,

Shri T. Veerabhadra Rao pursuant to Letter of Authorisation dated 24.02.2020 read with Gazette Notifications dated 27.03.1987 and 31.08.2005 issued by Government of India under Regulation 76(1) read with Regulation 77 of SBI General Regulations, 1955, on behalf of SBI and its Associate Banks by virtue of Gazette Notifications dated 22.02.2017 ('Associate Bank Gazette Notifications' for brevity), under Section 7 of Insolvency and Bankruptcy Code (hereinafter to be referred as "IBC"), read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, read with Section 60(2) of the Insolvency and Bankruptcy Code, 2016, for initiation of Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the respondent, India Power Corporation Limited, Kolkata (hereinafter referred as 'Corporate Debtor'), alleging that the following amounts are due and payable to the petitioner/ Financial Creditor:

Pha-se	**Principal Rs.**	**Interest Rs.**	**As on**	**Documents attached**
I	500,47,58,255.44	350,54,21,828.61	31.01.2020	Exhibit-5 Page 65

II	Financial Creditor seeks to file its claim in respect of Phase-II facilities as well as amounts/ charges before IRP/ RP, which are lawfully owed to the Financial Creditor in accordance with IBC, 2016 and rules made thereunder.

II. Particulars of the petitioner/ Financial Creditor:

The petitioner/ State Bank of India-SBI was constituted on 01.07.1955 pursuant to enactment of State Bank of India Act, 1955. By way of Notification dated 22.02.2017, SBI has consolidated and merged its associate banks, viz. State Bank of State Bank of Bikaner & Jaipur (SBBJ), State Bank of Mysore (SBM), State Bank of Patiala (SBP), State Bank of Hyderabad (SBH) and State Bank of Travancore (SBT). Said banks, SBBJ, SBM, SBP and SBH, shall hereinafter be referred to as "Associate Banks". Its effective date of merger is 01.04.2017. Copy of Associate Bank Gazette Notifications are collectively annexed as Exhibit-1 (pages 36 to 59).

III. Particulars of the respondent/ Corporate Debtor :

The respondent/ Corporate Debtor, India Power Corporation Limited has its registered office at Kolkata. In fact, Meenakshi Energy Limited ("MEL") is the principal borrower and IPCL is the Corporate Guarantor

for MEL debts. MEL is a company incorporated and registered under the Companies Act, 1956. It is in the process of developing, owning, designing, financing, constructing, commissioning, operating and maintaining a 270 MW (comprising 2 units of 135 MW each) coal based power project at Thamminapatnam Village, near Krishnapatnam in the Nellore District of the State of Andhra Pradesh.

IV. Authorisation issued in favour of Shri T. Veerabhadra Rao, Assistant General Manager, SBI, Stressed Assets Management Branch, Hyderabad, and copy of Gazette Notifications are at Exhibit-2 (Collectively), pages 60-62 of the petition. Letter of Authorisation dated 26.02.2020 issued in favour of advocates by Shri T. Veerabhadra Rao, Assistant General Manager is at Exhibit-3, page 63. Statement showing details of amounts of debt disbursed and dates of disbursement under the facilities is at Exhibit-4, page 64. Computation of amount of default and dates of default in respect of Phase-I Project is at Exhibit-5, page 65. Copies of Financial Contracts are at Exhibit-6 (Colly.), pages 66 to 1602. Copy of Bankers' Book in accordance with Bankers' Book Evidence Act, 1891 is at Exhibit-7, pages 1603-1818.

V. Averments made in the Company Petition are:

(i) The respondent/ Corporate Debtor has obtained Term Loan Facilities by providing two Corporate Guarantees by way of two separate Deeds of Guarantee, each dated 23.09.2016, which were availed by Meenakshi Energy Limited (MEL) from the Associate Banks of the petitioner/ Financial Creditor. MEL has availed facilities from Consortium of Lenders in two different phases (Phase-I and Phase-II) to set up coal based thermal power project at Thamminapatnam Village near Krishnapatnam, Nellore District, A.P), as detailed below:

Pro-ject	To set up	Power plant of capacity	At	Vide Common Loan Agreement dated	Deed of Guarantee executed on
Pha-se-I	Coal based Powe r Pro-ject	270 MW (two units of 135 MW each). Subsequen tly increased to 300 MW (two units of	Thammin apatnam Village near Krishna-patnam, Nellore District, A.P)	10.07.200 9 (as amended from time to time)	23.09.201 6 in favour of SBICAP Trustee Company (Trustee of lenders)

		150 MW each)			
Pha-se-II	Coal based ther-mal powe r pro-ject	600 MW (two units of 300 MW each). Subseque-ntly, increased to 700 MW (two units of 350 MW each)	Thammin apatnam Village near Krishna-patnam, Nellore District, A.P)	01.10.10 (as amended from time to time)	- do -

(ii) It is submitted by the petitioners that in Phase-II Project there was a cost over-run from what was estimated by MEL and informed to Consortium of lenders. To meet increase in cost for Phase-II Project, certain lenders of the Consortium sanctioned additional facilities in accordance with terms contained in Common Loan Agreement dated 20.03.2015 as amended by Amendment Agreement dated 23.09.2016. Such facilities under the above loan agreements to meet the increased cost of Phase-II Project were sanctioned by SBI, but not actually disbursed by SBI and Associate Banks.

(iii) Summary of total debt sanctioned by Consortium of Lenders and disbursed by SBI and its Associate Banks in the accounts of MEL are as under:

Sr. No.	Facility Agreement	Total Amount sanctioned by the consortium of lenders (INR Crores)	Total Amount sanctioned by the financial creditor (INR Crores)	Amount disbursed (in Rs.)
1.	Phase I Loan Agreements	Facility: 1057	1. SBI: 302 (including sub-limit of LC facility of 180) 2. SBH: 100 3. SBBJ: 50 4. SBM: 50 (including sub-limit of LC facility of 50) 5. SBT: 50 Total: 552	1. SBI (i) 249,87,73,665 (A/c No.30919759304, and (ii) 50,21,59,235 (A/c No.3221650929). 2. SBH: 99,34,90,586. 3. SBBJ: 49,17,62,197 4. SBM: 49,68,07,646 5. SBT: 49,99,99,174 Total: 548,29,92,503

Sr. No.	Facility Agreement	Total Amount sanctioned by the consortium of lenders (INR Crores)	Total Amount sanctioned by the financial creditor (INR Crores)	Amount disbursed (in Rs.)
2.	Phase H Loan Agreements	Facility: 3386.35 (i.e., 2340 by existing lenders and 1046.35 by refinancing lenders.)	1. SBI: 896.35 (with a foreign LC/little of comfort equivalent to 300) 2. SBH: 100 (with foreign LC/domestic LC equivalent to 50) 3. SBBJ: 100 (with foreign LC/domestic LC equivalent to 100) 4. SBM: 100 (with foreign LC/domestic LC equivalent	1. SBI: 828,14,50,863 2. SBH: 93,09,77,597 3. SBBJ: 89,34,34,333 4. SBM: 92,47,63,415 5. SBP: 90,89,38,796 Total: 1193,95,65,004

Sr. No.	Facility Agreement	Total Amount sanctioned by the consortium of lenders (INR Crores)	Total Amount sanctioned by the financial creditor (INR Crores)	Amount disbursed (in Rs.)
			to 60) 5. SBP: 100 (with foreign LC/domestic LC equivalent to 100) Total: 1296.35	
3.	Additional Phase II Loan Agreements	Facility: 1131 (i.e., 222.84 - additional facility and 908.16 - stand by facility)	1. SBI: 197.48 2. SBH: 50 3. SBBJ: 48.29 4. SBM: 50 5. SBP: 50 Total: 395.77	These facilities were sanctioned but not disbursed.

(iv) However, MEL had defaulted in timely servicing the principal repayments and interest thereon for the facilities actually disbursed..0The events that unfolded are thus:

LIST OF DATES AND EVENTS

Date	Event
July 10, 2009	Common Loan Agreement entered into and subsequently amended by the Amendatory Agreement to Common Loan Agreement dated May 30, 2011.
Oct. 01, 2010	Common Loan Agreement entered into an amended and restated by the Amended and Restated Common Loan Agreement dated January 30,2014.
Sept. 18, 2012	Working Capital Consortium Agreement was entered into for an overall limit of Rs. 209 Crores wherein exposure of SBH was Rs. 127 Crores.
Dec. 26, 2014	Second Amended and Restated Common Loan Agreement to the Common Loan Agreement dated October 1,2010 subsequently, amended by the Amendment Agreement dated September 23, 2016.
January 24, 2014	Amendment and Restatement Agreement to the Common Loan Agreement dated July 10, 2009 subsequently, amended by the Amendment Agreement dated September 23, 2016.
March 20, 2015	Common Loan Agreement was entered into for part financing of the increased cost of Phase II Project and amended by the Amendment Agreement dated September 23,2016.
Sept. 23, 2016	Two separate Deeds of Guarantee executed by the Corporate Debtor herein to secure payment obligations towards debt availed for Phase I Project and Phase H Project respectively.
July 07, 2017	MEL had defaulted in timely servicing principal repayments and interest thereon for Phase-I Project from 31.07.2017 (initial date of default).

Dec. 20,2017	Demand Certificate (Exhibit-8, page 1819, Volume-X) issued by SBI to the Corporate Debtor under the Deed of Guarantee dated September 23,2016 for Phase I Project.
Dec. 28,2017	Initial date of default in respect of demand made from Corporate Debtor under Demand Certificate dated December 20, 2017 and such default continuing since December 28, 2017.
August 7,2018	SBI/ Financial Creditor in its capacity as Lenders' Agent, on behalf of the lenders to the Corporate Debtor, had issued Recall Notice (Exhibit-9, page 1821, Volume-X) to the Corporate Debtor and MEL calling upon them to pay the outstanding as of July 31,2018.
August 13, 2018	The respondent/ Corporate Debtor has given Reply dated 13.08.2018 (Exhibit-10, page 1827, Volume-X) to Recall Notice dated 07.08.2018. By the said Reply the respondent/ Corporate Debtor requested the Financial Creditor to withdraw Recall Notice dated 07.09.2018 (sic., 07.08.2018) and to reverse all adjustments made by the lenders w.e.f. 02.05.2018 and to carry out just, proper and transparent valuation of IPCL shares and to return balance shares/ amounts remaining after adjusting necessary shares towards repayment of all dues under Phase-I and Phase-II.
Aug. 17, 2017	Respondent/ IPCL has issued letter dated 17.08.2017 (Exhibit-12, page 1833, Volume-X) to the Secretary, West Bengal Electricity Regulatory Commission, Kolkata, whereby the respondent has submitted a petition seeking permission of the Commission to allow IPCL to issue Corporate Guarantees to funding agencies from time to time for business acquisition

	activities outside normal area of its distribution licence under Regulation 5.13.2 of West Bengal Electricity Regulatory Commission (Licensing & Conditions of Licence) Regulations, 2013.
Sept. 04, 2018	SBI/ Financial Creditor has given Counter (Exhibit-11, page 1830-1832, Volume-X) to MEL and IPCL in response to MEL letter dated 13.08.2018.
Sept. 20, 2017	West Bengal Electricity Regulatory Commission, Kolkata addressed letter dated 20.09.2017 (Exhibit-13, page 1838, Volume-X) to the IPCL asking the IPCL to deposit a sum of Rs.15,00,000/- towards fee.
Nov. 22, 2017	Respondent/ IPCL has addressed letter dated 22.11.2017 (Exhibit-14, page 1840-1845, Volume-X) to Rural Electrification Corporation Limited. The respondent has enclosed copy of order dated 09.11.2017 passed by the Regulatory Authority and stated that in view of the said order the Corporate Guarantee given by them is non-est, unenforceable and cannot be given effect to. Said order reads that: "In re application submitted by India Power Corporation Limited seeking permission to allow IPCL to issue Corporate Guarantee to funding agencies for acquiring business activities beyond its licensed area under Regulation 5.13.2 of the West Bengal Electricity Regulatory Commission (Licensing & Conditions of License) Regulations, 2013. 7.0 Under the circumstances, the Commission do not allow IPCL to issue Corporate Guarantee to any funding agencies and/ or any other agencies as prayed for. However, the petitioner may come up with specific proposal of business acquisition for prior

	approval of the Commission, as per the provisions specified in the Regulations. 8.0 With the above direction, the petition of IPCL is disposed of."
Dec. 01, 2017	Rural Electrification Corporation of India Limited (REC), New Delhi addressed letter dated 01.12.2017 (Exhibit-15, page 1846, Volume-X) to IPCL in response to the IPCL Letter dated 22.11.2017 (Exh.14). By the aforesaid letter REC has formulated six points, based on which it has required IPCL as under: "In view of the above, it is clear that IPCL has filed the application before Regulatory Commission with ulterior motive and has obtained the order by presenting misleading facts. For the reasons mentioned above, the consent of Regulatory Commission is not required for the Corporate Guarantee furnished to lenders. The Corporate Guarantee given by IPCL is valid, subsisting and enforceable. Therefore, you are hereby called upon to recall the letter dated 22.11.2017 and stand by your commitments made under the Deed of Corporate Guarantee."
Nov. 07, 2019	CIRP was initiated in respect of Meenakshi Energy Limited (MEL) vide order dated 07.11.2019 (Exhibit-16, page 1849, Volume-X) passed in CP (IB) No.184/7/HDB/ 2019 by this Tribunal.
Feb. 7, 2020	SBICAP Trustee has issued Demand Certificate dated 07.02.2020 (Exhibit-17, page 1878, Volume-X) to IPCL in respect for Phase I Facility from the Corporate Debtor calling upon IPCL to pay an amount aggregating INR 967,21,68,885.68/- (including

	outstanding in respect of SBI), within seven days from the date of the said Certificate.
Feb. 15, 2020	IPCL/ Corporate Debtor issued reply dated 15.02.2020 (Exhibit-18, page 1886, Volume-X) to the Demand Certificate dated February 7, 2020, addressed to SBICAP Trustee Company Limited, Mumbai, stating that: "In the backdrop of such above mentioned facts and circumstances, you are requested to forthwith withdraw the said demand certificate dated 7th February 2020 and forthwith pay an amount of Rs.3827.04 crores to IPCL being the excess sum/ amount already recovered by you illegally without any justification and/ or without giving any credit to IPCL, within seven (7) days from the receipt of this letter."
Feb. 26, 2020	Application under Section 7 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (read with and 60 (2) of the Insolvency and Bankruptcy Code, 2016), in Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to initiate corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 was filed by the Financial Creditor.

(v) MEL had defaulted in timely servicing of the principal repayments and interest payments for the facilities in relation to the

Phase I Project from July 31, 2017 (initial date of default). SBICAP Trustee Company Limited on behalf of Phase I Lenders, vide demand certificate dated December 20, 2017, demanded payment of overdue amounts under the Phase-I Facilities from the Corporate Debtor, under the Deed of Guarantee dated September 23,2016.

(vi) Further, the Financial Creditor, by its notice dated August 7, 2018 demanded payment for the outstanding debt as on July 31, 2018 from MEL and the Corporate Debtor herein and on account of failure in making such payments by MEL/ Corporate Debtor, the Financial Creditor has accelerated/recalled the facilities availed by the MEL and the entire exposure of the Financial Creditor in the Phase I Project and certain overdue, at that point of time, in Phase II Project, which is due and payable by MEL and the Corporate Debtor.

(vii) The Financial Creditor filed an application numbered C.P. (IB) No. 184/7ZHDB/2019 under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiation of corporate insolvency resolution process ("CIRP") in respect of MEL. The Adjudicating Authority admitted the said application by its order dated November

7,2019 and initiated CIRP in respect of MEL.

(viii) Further, SBICAP Trustee Company Limited, by its Notice/Demand Certificate dated February 7, 2020 (Exhibit-17, page 1878) addressed to IPCL demanded payment of an amount aggregating INR 967,21,68,885.68/- (including outstanding in respect of SBI) from the Corporate Debtor (in its capacity as a guarantor to MEL) in respect of its guarantee obligation under Deed of Guarantee dated September 23, 2016 for Phase-I facilities. The Corporate Debtor (in its capacity as a guarantor to MEL) has replied to the Demand Certificate dated February 7, 2020, vide Reply dated 15.02.2020 (Exhibit-18, page 1886, Volume-X), raising frivolous and untenable grounds. The Corporate Debtor (in its capacity as a guarantor to MEL) as on date of this application has not made payment pursuant to the said demand notice.

(ix) Hence this Application under Section 7 and Section 60(2) of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, in Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016,

(x) For the purposes of this application, the total amounts in default and the computation of amounts under default as of January 31,2020 are set out in detailed manner in Exhibit – "5" of this Application. The Financial Creditor seeks to file its claim in respect of the Phase II Facilities, as well as any amounts/charges, which are lawfully owed to the Financial Creditor before IRP/ RP under the provisions of the Insolvency & Bankruptcy Code, 2016.

VI. COUNTER/ REPLY DATED 22.11.2021 IS FILED BY THE RESPONDENT/ CORPORATE DEBTOR WITH THE FOLLOWING CONTENTIONS:

At the outset the respondent/ Corporate Debtor has relied on Innoventive Industries Ltd Vs. ICICI Bank, (2018) 1 SCC 407 and quoted para 28 thereof. The respondent has raised the following issues claiming that there is no debt due either in fact or in law against them:

CONTENTION (A):

There is no debt due in law since the debt of the Principal Debtor, viz. Meenakshi Energy Limited already stands discharged. Thus, no debt or liability exists under the Corporate Guarantee dated 23.09.2021 as

liability of the Guarantor is co-extensive and co-terminus with that of the Principal Debtor.

SUBMISSIONS OF RESPONDENT IN SUPPORT OF CONTENTION (A):

Meenakshi Energy Ltd (MEL) had availed from SBI and its Associate Banks in two different phases to set up 300 MW Coals Based Power Project (Phase-I) and 700 MW Coals Based Power Project (Phase-II) in Nellore District, A.P. Common Loan agreements dated 10.07.2009 and 01.10.2019 were entered into for that purpose. MEL pledged its shares held by IPCL as security and had executed two Deeds of Guarantee dated 23.09.2016. Also executed Share Pledge Agreement dated 23.09.2016 in favour of SBICAP Trustee by virtue of which additional securities were created in the form of pledge of 100% of the equity shares of MEL owned by IPCL/ Corporate Debtor herein. A copy of Share Pledge Agreement dated 23.09.2016 is at ANNEXURE-1 of this Counter.

NOTICES ISSUED BY SBI:

- DEMAND NOTICE:

MEL had defaulted in principal repayment and interest payments for the facilities qua Phase-I Project from 31.07.2017. Therefore, account of MEL was classified as Non-Performing Asset (NPA) since 28.10.2017. The Financial Creditor has issued Demand Notice dated 07.08.2018. Subsequently, SBI recalled the facilities availed by MEL and the entire exposure of SBI in Phase-I Project and Phase-II Project became due and payable by MEL.

- ‘NOTICE OF DEMAND’ and ‘NOTICE OF INVOCATION OF PLEDGE’:

‘Notice of Demand’ and ‘Notice of Invocation of Pledge’ dated 20.12.2017 were issued by SBICAP Trustee to IPCL and MEL. On 02.05.2018, a total of 381,15,06,509 of the pledged shares of MEL, which were held by IPCL, were sold/ transferred to SBICAP Trustee. That made SBICAP Trustee the beneficial owner of shares on behalf of and in the interest of the Consortium of Lenders of Phase-I and Phase-II facilities. Said pledged shares were invoked and transferred to SBICAP Trustee on 02.05.2018 onwards towards repayment of MEL’s loan, value of which was more than Rs.6000 crores as per Valuation

Reports prepared by Deloitte Touch Tohmatsu India Pvt Ltd. And LSI Engineering and Consultants Ltd.

PREVIOUS LITIGATION AGAINST M.E.L.:

- SBI has filed CP (IB) No.184/7/HDB/ 2019 against MEL for default of Rs.15,97,44,66,368.24 (Rupees one thousand five hundred and ninety seven crores forty four lacs sixty six thousand three hundred and sixty eight and paise twenty four only), in respect of Phase-I and Phase-II Projects.
- Said petition was admitted by this Tribunal vide order dated 07.11.2019. It was challenged before the Hon'ble NCLAT vide Company Appeal (AT) Insolvency No.1220 of 2019 and Company Appeal (AT) Insolvency No.1450 of 2019. The Hon'ble NCLAT, vide order dated 10.09.2020 has upheld this Tribunal's order.

It is contended on behalf of the respondent that on account of invocation of the pledged shares, there exists neither financial debt nor default on the part of MEL for which IPCL became a surety vide Deed of Guarantee dated 23.09.2016.

The respondent submitted that SBI has realised more amount by invocation of the pledged shares as under:

Admission made by Financial Creditor in Form-1 filed in CP (IB) No.184/7/ HDB/2019 for initiating CIRP against MEL.	Rs.5505.72 crores
Purported Financial debt (this was secured by pledge of valuable security in the form of 95.07% shares of the Corporate Debtor held by IPCL).	Rs.1597,44,66,368. 24
The amount realised by SBI by invocation of pledges shares.	Rs.3636.00 crores

ENTIRE AMOUNT OF DEBT OF M.E.L. STOOD DISCHARGED:

SBI ceased to be Financial Creditor having invoked the pledge and transferring 3,81,15,06,509 shares amounting to 95.07% shares in MEL held by IPCL to SBICAP Trustee Company Ltd on 02.05.2018, SBICAP Trustee became beneficial owner of shares on behalf of and in the interest of the Consortium of Lenders of Phase-I and Phase-II facilities. The moment shares invoked, the debt of MEL stood discharged.

Clause 2.6 of Share Pledge Agreement dated 23.09.2016 is reproduced hereunder:

"*2.6 Remedies on an Event of Default*

The Pledgor agrees that at any time after an Event of Default occurs and is continuing, the Phase I Security Trustee shall have the right, in its discretion to exercise all the rights, powers and remedies vested in it (whether vested in it by this Agreement or any other Finance Document and/ or Financing Document or by Applicable Law) for the protection and enforcement of its rights in respect of the Collateral, and the Phase 1 Security Trustee shall be entitled, without limitation, to exercise the following rights, which the Pledgor hereby agrees:

2.6.1

to receive all amounts payable in respect of the Collateral or otherwise payable under Clause 2.5 above to the Pledgor;

2.6.2

to transfer or register in the name of the Phase 1 Security Trustee or any of their nominees, as the Phase I Security Trustee shall direct, all or any of the Pledged Shares, at the cost of the Pledgor;

2.6.3

to vote on all or any part of the Pledged Shares (whether or not transferred in the name of the Phase (Security Trustee) and otherwise act with respect thereto as though it were the outright owner thereof;

2.6.4

to sell the Collateral (or any part thereof) in exercise of the power conferred under and in accordance with the terms of Clause 6, at public or private sale or on any securities exchange for cash, upon credit or for future delivery or transfer or procure registration in the name of the Phase I Security Trustee or any of its nominees at the cost of the Pledgor, as the Phase 1 Security Trustee may deem commercially reasonable and apply the proceeds thereof towards payment of the Obligations, provided that the Phase 1 Security Trustee shall not be obliged to make any sale of any Collateral if it determines not to do so, regardless of the fact that notice of sale may have been given."

A copy of the Share Pledge Agreement dated 23.09.2016 is annexed herewith and marked as Annexure – 1 of Counter dated 22.11.2021.

Under section 176 of the Indian Contract Act, 1872, SBI being 'pawnee' had two choices in law –

- Either to sue while retaining shares; OR
- To sell the shares and transfer of the pledged shares on 02.05.2018 in the name of SBICAP Trustee, who as per Clause 1.3 and Clause 2.1 of Share Pledge Agreement was acting for the benefit of Lenders including SBI, which amounted to sale under section 176 of the Indian Contract Act, 1872. Therefore, the entire debt of MEL stood discharged.

Clause 1.3 of Share Pledge Agreement dated 23.09.2016 read as under:

"*1.3 Beneficial Interest*
The Phase I Security Trustee shall hold in trust for the benefit of the Lenders the Security Interest created hereunder and all rights, title, interest, benefits, claims and demands whatsoever to, under, or in respect of the Collateral including the terms, conditions, undertakings, declarations and covenants given by the Borrower and the Pledgor.

The Security Interest created hereunder or pursuant to this Agreement in favour of the Phase I security Trustee shall be for the benefit of the Lenders, inter se, on a, pari passu basis among the Lenders."

Clause 2 – Pledge of Shares of Share Pledge Agreement dated 23.09.2016 read as under:

"*2. PLEDGE OF SHARES*

2.1 This Agreement is for the benefit of the Lenders to secure the due discharge, payment, redemption and/or repayment as the case may be, in full of the Obligations, and in order to secure the obligations, the Pledge or both:

2.1.1 hereby (a) pledge in favour of the Phase I Security Trustee for the benefit of the Lenders, the Initially Pledged Shares along with all the rights, titles, claims, demands, benefits and interest whatsoever of the Pledgor in, to, under, or in respect of such initially Pledged Shares and within 1 (one) Business Day of the Completion Date, deposit and deliver to the Phase I Security Trustee, the Deposited Documents as security for the due discharge, payment, redemption and/ or repayment, as the case may be, of the Obligations; and (b) pledge, assign, transfer, hypothecate and charge to the Phase I Security Trustee for the benefit of the Lenders, as a continuing Security Interest, all of the Pledgors right, title, interest, benefits, claims and demands whatsoever in, to, under, or in respect of the Collateral and any indemnity, warranty or guarantee, payable by reason of loss to or otherwise with respect to any of the initially pledged shares upon the terms and conditions set forth in this Agreement.

2.1.2 hereby agree:

(a) to pledge in favour of the Security Trustee for the benefit of the Lenders, Equity Shares acquired in addition to initially pledged shares (by subscription, purchase conversion or otherwise together with all sections) at any time after Effective date (hereinafter referred to as "Subsequently Acquired Shares"), within a period of 7 (seven) days of such acquisition of subsequently Acquired Shares such that the number of Equity Shares pledged by the Pledger with the Security Trustee for the benefit of Lenders represent 100% (one hundred percent) of the paid up and voting Equity Shares held by the Pledger in the Borrower until the Final Settlement Date; and

(b) to deliver to the Security Trustee the Deposited Documents relating to such Subsequently Acquired Shares along with such further documents (including copies of the statement of account issued by its participant, initiating the for the terms pledge in respect of the Pledged Shares) which in the opinion of the Phase I Security Trustee are necessary to create and /or perfect the Security Interest expressed to be created under or pursuant to this Agreement and which are acceptable to the Phase I Security Trustee along with a letter in the form set out in Schedule IV hereof and thereafter, such additional Subsequently Acquired Shares together with the initially Pledged Shares as of that date, shall comprise the Pledged Shares hereunder.

2.1.3 hereby agrees to pledge, assign, transfer, hypothecate and charge to the Security Trustee for the benefit of Lenders as a continuing Security Interest of all the pledger's right, title, interest, benefits, claims and demand whatsoever of the Pledger is, to, under, or in respect of the Collateral and any indemnity, warranty or guarantee payable by reason of loss to or otherwise with respect to any Subsequently Acquired Shares, as and when pledged upon the term and conditions set forth in this Agreement."

SALE OR TRANSFER OR PROCUREMENT OF REGISTRATION LEADS TO "PROCEEDS" MAKING IT BOTH TRNASFER OR PROCUREMENT OF REGISTRATION AMOUNT TO "SALE" FOR

PURPOSE OF SECTION 176 OF THE INDIAN CONTRACT ACT, 1872.

SBICAP Trustee, the Trustee for Phase-I Project, under Clause 2.6.2 of the Share Pledge Agreement, independent of its remedy to sell the pledged shares, retained its right to transfer or register in the name of Phase-I Security Trustee or any of their nominees, as Phase-I Security Trustee shall direct, all or any of the pledged shares, at the cost of the Pledgor and under Clause 2.6.4, Phase-I Security Trustee shall have right to sell the collateral (or any part thereof) in exercise of the power conferred under and in accordance with the terms of Clause-6. From the above it is clear that after sale or transfer or procurement of registration, application of the proceeds thereof towards payment of the obligations was required to be done. Thus, both sale or transfer or procurement of registration leads to "proceeds" making it both transfer or procurement of registration amount to "sale" for the purpose of section 176 of the Indian Contract Act, 1872.

The respondent/ Corporate Debtor submitted that in absence of 'debt' much less 'financial debt' due to SBI and/ or any other Consortium Lender, question of any 'default' committed by MEL and IPC as its

Guarantor, any time post 02.05.2018, does not arise. Thus, the present petition u/s 7 of Insolvency & Bankruptcy Code, 2016 is not maintainable.

CONTENTION (B):

The issue whether the debt of Meenakshi Energy Limited (MEL) stands discharged is at large pending adjudication at the stage of final hearing before the Hon'ble Supreme Court of India.

SUBMISSIONS OF RESPONDENT IN SUPPORT OF CONTENTION (B):

The issue whether debt of MEL stood discharged by transfer of pledged shares is pending adjudication before the Hon'ble Supreme Court of India in Civil Appeals No.3307 of 2020 and 3309 of 2020. It is contended by the respondent/ Corporate Debtor that the Hon'ble Supreme Court is seized of the following questions of law:

(A) Whether there existed any 'financial debt' within the meaning of Section 5(8) of the Code on 07.01.2019 pursuant to invocation of pledge and consequent transfer of 95.07% equity

shares of the Corporate Debtor in the name of the Security Trustee?

(B) Whether there existed any 'default' of the purported 'financial debt' on 07.01.2019 pursuant to invocation of pledge and consequent transfer of 95.07% equity shares of the Corporate Debtor in the name of the Security Trustee?

(C) Whether an application under Section 7 of Insolvency & Bankruptcy Code, 2016 is maintainable in the absence of any 'financial debt' and default thereof?

(D) Whether the 'financial debt' of the purported Financial Creditor stood discharged after invocation and consequent transfer of the pledged shares in terms of Regulation 58 of Securities Exchange Board of India (Depositories and Participants) Regulations, 1996 read with Section 176 of the Indian Contract Act,1872?

(E) Whether invocation and consequent transfer of the pledged shares in terms of Regulation 58 of Securities Exchange Board of India (Depositories and Participants) Regulations, 1996 and in terms of the Pledge Agreement dated 23rd September, 2016 amounts to a sale under Section 176 of the Indian Contract Act,1872 discharging the purported 'financial debt' of the Corporate Debtor?

(F) Whether the purported 'financial debt' stood completely discharged pursuant to invocation of pledge and consequent

transfer of 95.07% equity shares of the Corporate Debtor in the name of the Security Trustee?

(G) Whether the Learned Appellate Tribunal, after having held that the pledge having been invoked and pledged shares transferred in accordance with Regulation 58 of the SEBI (Depositories and Participants) Regulations, 1996 and the terms of the Share Pledge Agreement, erred in holding that SBI continued to remain a Financial Creditor.

(H) Whether the Learned Appellate Tribunal misconstrued the decision of the Learned Appellate Tribunal in PTC India Financial Services v. Mr. Venkateshwarlu Kari & Anr. decided on 20.06.2019 in Company Appeal (AT) (Insolvency) No. 450 of 2018 and failed to apply the same in its correct perspective.

(I) Whether SBI can be termed as a Financial Creditor within the meaning of Section 5(7) of Insolvency & Bankruptcy Code, 2016 pursuant to invocation of pledge and consequent transfer of 95.07% equity shares of the Corporate Debtor in the name of the Security Trustee in the year 2018?

(J) Whether there can be any invocation of the Share Pledge Agreement dated 23rd September,2016 and the transfer of the pledged share by the Security Trustee in its favour without ascribing any value to the same?

(K) Whether admission of debt by a party can be relied upon to affix liability upon such a party in the event there is no such liability under the extant laws in force in India?

(L) Whether a debt can continue to exist in full or in part even after the collateral security is sold to realize the same?

(M) Whether a debt can remain outstanding despite the security for the same having been realized and without an examination as to whether the said debt stands discharged in whole or in part?

The above Civil Appeals were listed for the hearing before the Hon'ble Supreme Court several times commencing from 13.10.2020. The appeals are pending adjudication before the Hon'ble Apex Court. During pendency of such appeal the present petition being CP (IB) No.205 of 2021 is filed. In absence of any 'debt' much less 'financial debt' due to SBI or any other consortium lender, application u/s 7 of Insolvency & Bankruptcy Code, 2016 against MEL is not maintainable. Besides, the same issue is pending adjudication before the Hon'ble Supreme Court of India.

The issues, inter alia, in the present application including as to whether the present application u/w 7 of Insolvency & Bankruptcy Code, 2016 filed by SBI against IPCL in its capacity as Guarantor for a purported financial debt of MEL is maintainable or not is premised on the prior determination of the issues presently pending adjudication in the

Hon'ble Supreme Court of India. The Corporate Debtor has filed IA No.567 of 2021 to defer hearing of the present Company Petition till order in Civil Appeals No.3307 of 2020 and 3309 of 2020 is delivered by the Hon'ble Supreme Court of India.

CONTENTION (C):

The underlying instrument sought to be enforced vide present petition, viz. Corporate Guarantee dated 23.09.2016 is in contravention of Regulation 5.13.2 of the West Bengal Electricity (Licensing & Conditions of Licence) Regulations, 2013. Thus, the same is void and unenforceable in law u/s 23 of the Indian Contract Act, 1972.

SUBMISSIONS OF RESPONDENT IN SUPPORT OF CONTENTION (C):

In absence of any 'debt' much less 'financial debt' due to SBI and/or any other consortium lender, the present application under Section 7 of Insolvency & Bankruptcy Code, 2016 is not maintainable on the following grounds:

The application is based on purported Corporate Guarantee dated 23.09.2016 which is void under Section 23 of the Indian Contract

Act,1872 being in contravention of Regulation 5.13.2 of the West Bengal Electricity (Licensing and Conditions of Licence) Regulations, 2013.

The Corporate Debtor/ IPCL is admittedly a deemed distribution licensee as per first proviso to Section 14 of the Electricity Act, 2003 doing business in the area of supply specified in the license as defined under Section 2(17) of Electricity Act, 2003. IPCL is thus a regulated entity and is regulated by the Electricity Act and the regulations framed thereunder, more particularly, West Bengal Electricity (Licensing and Conditions of Licence) Regulations, 2013 (hereinafter "2013 Regulations").

The respondent invited attention to the Preamble of Electricity Act, 2003, which reads:

> "*An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies regarding subsidies, promotion of efficient and*

environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

The respondent contended that Regulation 5.13.2 of Regulation 5.13.2 of West Bengal Electricity (Licensing and Conditions of Licence) Regulations, 2013 is intended to protect interest of consumers and contravention of the said mandatory Regulation makes Corporate Guarantee dated 23.09.2016 void/ unenforceable I law. Said Regulation reads:

> "*5.13.2 The licensee shall obtain prior written consent from the Commission in making any loans to, or issuing any guarantee for any obligation of any person which is beyond the normal area of business activities of the licensee in respect of its core activities.*
> *Loan to the employees pursuant to the terms of services and advances to the suppliers etc. in the ordinary course of business are excluded from the requirement to seek such approval. If any affiliates of the licensee undertake any loan for which the licensee's business may be effected directly or indirectly then in such case licensee is required to obtain such written consent from the Commission in a manner as already specified.*"

The respondent has also quoted the following Regulations of West Bengal Electricity (Licensing and Conditions of Licence) Regulations, 2013:

1.3.1 (xviii) “Distribution License”

5.19 Penalty for Contravention

146. Punishment for non-compliance of orders or directions.

It is contended by the respondent that it being a deemed electricity distribution licensee and a regulated entity governed by the West Bengal Electricity Regulatory Commission (WBERC) and the Electricity Act, 2003, **though** represented to the lenders including the Financial Creditor herein that the Corporate Guarantees could not be provided by them without prior consent of the WBERC, it was induced to provide the same to the lenders on their opinion/ advice that prior approval of WBERC shall not be required.

The respondent furnished facts leading to furnishing of Corporate Guarantee as under:

That vide letter dated 29.07.2016 (ANNEXURE-2 of Counter), IPCL intimated to REC that Sanction Letter dated 28.07.2016 stipulated certain additional conditions which were not discussed. Relevant para of said letter dated 29.07.2016 addressed by IPCL to REC are as under:

"*However, we observe that the above referred sanction letter stipulates certain additional conditions, which were not discussed with IPCL/MEPL while preparing the IM and compliance of which would be difficult/impossible/result in delay in consummation of the transaction, and as an incoming promoter, IPCL cannot agree. Hence, we have enumerated the same along with rationale in Annexure I.*

We request you to kindly consider suitable modification/deletion of the conditions and convey the revised sanction at the earliest for our acceptance and further sharing with the other consortium lenders for expeditious consummation of the transaction."

MODIFICATION OF CLAUSE-21 GRANTED BY RECL:

Respondent/ IPCL has addressed letter dated 14.09.2016 (ANNEXURE-3 of Counter) to Rural Electrification Corporation Limited (RECL), New Delhi. By the said letter IPCL suggested RECL to modify Clause 21 to Pre-Commitment Condition (PCC). Said letter is reproduced hereunder:

"*This is in reference to: (a) your Approval for Change in Ownership and Control of MEPL vide letter No REC/CO/Gen./MEPL/2016-628 dated 28th July 2016, wherein clause no 21 to the Pre- commitment conditions states that "Corporate Guarantee of IPCL to be provided. LLC to certify whether IPCL is required to take permission from State Regulatory Commission under clauses of License, if any"; (b) our discussions over the conference call with Cyril Amarchand Mangaldas ("Legal Advisors", together with its written opinion). REC team and ourselves earlier today (on September 14, 2014 at noon, collectively, "Joint/ Discussion").*

Sir as was understood during our Joint Discussion, it may please be noted that: (a) IPCL is not required to obtain any specific consent from the regulator to provide corporate guarantee (in the

form as agreed upon) to lenders of MEPL, and, (b) as additional comfort to REC, IPCL further and hereby agrees to undertake that any surplus funds that are generated from the WBERC regulated asset that is, funds remaining after meeting the requirements of the regulated business viz. after payment of statutory dues, capital expenditure, operating costs and debt servicing payments that are required to be made in relation to the WBERC regulated asset, will be utilized to make payments towards debt servicing obligations of the Company if a demand is made by Phase II Lenders ("Undertaking").

In addition, it has been expressly clarified by Legal Advisors that no approval of WBERC is required in respect of the above Undertaking.

Sir, we further understand that in accordance with the relevant REC guidelines, the project rating is IR 4 and that there is no requirement of a corporate guarantee as such; however, as additional comfort/ security taken together with 100 % pledge of MEPL shares held by IPCL, we have also agreed to provide a corporate guarantee to the lenders.

Existing Condition	***Requested Modified Condition***
PCC No. 21 *Corporate Guarantee of IPCL to be provided. LLC to certify whether IPCL is required to take permission from State Regulatory commission under clauses of licensee, if any, as IPCL acts as Distribution Franchisee. Necessary due diligence*	*Corporate Guarantee of IPCL to be provided on all assets other than WBERC regulated asset.* *Additionally, with respect to WBERC regulated asset, following additional condition is stipulated-* *IPCL to provide an Undertaking that any surplus funds that are*

to be done by Law division of REC.	*generated from the WBERC Regulated Asset i.e. funds remaining after meeting the requirements of the regulated business viz after payment of statutory dues, capital expenditure, operating costs and debt servicing payments that are required to be made in relation to the WBERC Regulated Asset, be utilized by IPCL to make payments towards debt servicing obligations of the Company if a demand is made by the Phase II Lenders.* *The above Undertaking shall form part of the Corporate Guarantee of IPCL.*

Trust that you will find this in order, and we would request you to kindly accept the above Undertaking along with Corporate Guarantee in view of our Joint Discussion with LLC, or alternatively, please waive the requirement of a corporate guarantee."

OPINION OF FORMER CHAIRPERSON, APPELLATE TRIBUNAL, ELECTRICITY.

That an Opinion dated 19.09.2016 (ANNEXURE-4 of COUNTER) authored by Justice M. Karpaga Vinayagam (Rtd.) [Former Chairperson of the Appellate Tribunal for Electricity, New Delhi] was also shared by the Lenders. Relevant part of the opinion is extracted herein for ready reference:

> *"27. We shall now refer to Clause 5.13. Clause 5.13 of the WBERC Regulations envisages prior consent for certain actions. Clause 5.13.1 gives details of the activities where the distribution licensee shall obtain prior consent from the State Commission. Clause 5.13.2, inter alia, provides that the licensee shall obtain prior consent from the State Commission in issuing any guarantee for any obligation of any person which is beyond the business activities of the licensee in respect of its core activities only or, in case when affiliates of the licensee undertake any loan for which the licensee's business may directly or indirectly be affected. Similarly, Clause 5.13.3 also provides that if any affiliate of the licensee has to provide any goods or services to the licensee in connection with its core activities, then prior approval will be required.*
>
> *Clause 5.13.4 also provides that the licensee or its affiliates shall obtain prior consent of the State Commission in acquiring a licence or the undertaking of, or acquire a controlling interest in the business of a distribution licensee, where such a business or undertaking situated in the State. None of these clauses would apply to IPCL, because of the following reasons:*
>
> > *(i) It has been proposed to limit the recourse of the lenders under the corporate guarantee only to the non-core*

activities of IPCL.., i.e., to businesses other than the distribution business in the State of West Bengal which is exclusively regulated by the WBERC pursuant to the 2003 Act and the WBERC Licensing Regulations;

(ii) a loan taken by an affiliate of the licensee (i.e., the Company post conclusion of share purchase transaction) would not directly or indirectly affect the distribution licensee's business since there is no repayment obligation on the licensee. The obligations of the licensee arising out of the proposed corporate guarantee is covered in paragraph (i) above;

(iii) IPCL proposes to acquire a controlling interest in a generating company which is not a licensee under the 2003 Act."

28. IPCL is merely purchasing the shares of the generating company from the current shareholders who intend to sell the same to IPCL. Therefore, Clause 5.13 would not apply to IPCL, especially when the transaction which IPCL proposes to have with the shareholders of the generating company having operations in Andhra Pradesh would not be construed to be the core activities or distribution activities of IPCL.

30. In view of the above analysis, I am of the opinion that if recourse of the lenders under the guarantee provided by IPCL is limited to the assets or business other than the regulated assets/business, i.e., the distribution business, then there is no necessity for obtaining the prior approval or consent from the State Commission for the issuance such guarantee. To make it clear, the lender gets a guarantee only in respect of the revenues/ proceeds from business/ assets other than the regulated business/assets to honour IPCL's payment obligations under the corporate guarantee. IPCL should specifically mention the same in the corporate guarantee."

Said modification as suggested by IPCL vide its letter dated 14.09.2015 (Annexure-3) has been accepted by

Rural Electrification Corporation Limited (REC) vide letter dated 22.09.2016 (ANNEXURE-5)

Affidavit dated 23.09.2016 (ANNEXURE-6) was tendered by Asok Kumar Goswami, Director of IPCL. He has declared and confirmed on behalf of IPCL that IPCL is a Distribution Licensee under WBERC (Licensing and Conditions of License) Regulations, 2013 and that it was not required to obtain the prior consent of WBERC for issuing the Corporate Guarantee.

It is further contended by the respondent that false representations of the lenders that:

> *no prior consent was required by IPCL from the WBERC under Regulation 5.13.2 of the WBERC (Licensing and Conditions of License) Regulations, 2013, if the Corporate Guarantee was framed in such a manner so as to restrict the Corporate Guarantee only to the Non- Regulated Assets and Surplus Amounts from the Regulated Assets of IPCL,*

led to execution of Corporate Guarantee dated 23.09.2016 (ANNEXURE-7) for Phase-I Loan Facilities, with Clauses 2.1, 2.2 and 2.7. Said Clauses read thus:

> *"2.1 The Guarantor, hereby irrevocable, absolutely and unconditionally guarantees to the Phase I Security Trustee for the benefit of the Phase I Lenders that the Borrower and/or the Guarantor shall duly and punctually pay/repay the*

Guaranteed Obligations stipulated in or payable in accordance with the terms and conditions contained in the Existing Common Loan Agreement and the other Finance Documents and on the failure of the Borrower to pay the Guaranteed Obligations (or any part thereof) in accordance with the terms and conditions contained in the Existing Common Loan Agreement (or any part thereof) or upon the occurrence of an Event of Default, the Guarantor shall forthwith pay, from the Non Regulated Asset, to the Phase I Lenders, without demur or protest or without the right of any set off, deductions or adjustments of any kind whatsoever, the amount of the Guaranteed Obligations as may be claimed by the Phase I Lenders in relation to the Phase I Facility, as stated in the Demand Certificate to be issued by the Phase I Lenders/ Phase I Security Trustee."

"2.2 The Guarantor, hereby irrevocable, absolutely and unconditionally undertakes to utilize all Surplus Amounts towards meeting any shortfall in debt servicing in relation to the Phase I Project. Any such shortfall to be funded by the Guarantor shall be as may be claimed by the Phase I Lenders in relation to the Phase I Facility, as stated in the Demand Certificate to be issued by the Phase I Lenders/Phase I Security Trustee."

"2.7 In order to perform its obligations under Clause 2.1 above, the Guarantor shall utilize the Non Regulated Asset. In order to perform its obligations under Clause 2.2 above, the Guarantor shall utilize the Surplus Amounts."

PROCEEDINGS BETWEEN WEST BENGAL ELECTRICITY REGULATORY COMMISSION (WBERC) AND IPCL.

WBERC NOT ALLOWING IPCL TO ISSUE CORPORATE GUARANTEE:

IPCL has submitted application dated 17.08.2017 to West Bengal Electricity Regulatory Commission (WBERC). WBERC has passed order dated 09.11.2017 (ANNEXURE-8) on the said application. Relevant part of the said order reads:

> *"3.0 In view of the above, the petitioner has prayed before the Commission to grant consent to the petitioner for issuance of Corporate Guarantees to lenders for the business acquired/ proposed to be acquired.*
>
> *4.0 Upon receipt of the petition, the Commission vide its letter no. WBERC/OA-260/17-18/0937 dated 20th September 2017 advised the petitioner to submit their clarification to the following extent through affidavit, in absence of which the Commission will not be in a position to admit petitioner's petition.*
>
> > *a) The purpose of issuing corporate guarantee.*
> >
> > *b) To confirm that it has no/will not have any impact on the tariff.*
> >
> > *c) To confirm whether there is any type of mortgage of asset of existing distribution license.*
>
> *5.0 IPCL has provided the additional information to the queries raised by the Commission in its letter dated 20th September 2017, as mentioned hereinabove through an affidavit dated 22nd September, 2017.*
>
> *6.0 Upon scrutiny of the petition and examining the additional information provided by IPCL through affidavit on 22nd September 2017, the Commission came to a conclusion that the proposal of business acquisition, as per the Regulations, is not specific and that the interest of the consumers within the existing licensed area of the petitioner may hamper if the corporate guarantee is enforced by the lenders due to adverse business situation.*
>
> *7.0 Under the circumstances, the Commission do not allow IPCL to issue Corporate Guarantee to any funding agencies and/ or any other agencies as prayed for. However, the petitioner may come up with*

specific proposal of business acquisition for prior approval of the Commission, as per the provisions specified in the Regulations."

Further, letter dated 22.11.2017 (ANNEXURE-9) addressed by respondent/ IPCL to the Financial Creditor / SBI states that the Corporate Guarantee given by them was unenforceable. Relevant part thereof reads:

"*You are aware and it is a matter of record that as a lender of MEL, you insisted on a Corporate Guarantee to be provided by IPCL, who had agreed to purchase the Equity Shares of MEL.*

In order to expedite the transaction and out of economic compulsion which was unavoidable at that particular time, we agreed to provide you with the Corporate Guarantee which we did.

Subsequently thereafter, we were advised by Regulatory Authority that such Corporate Guarantee cold not have been provided to you without the prior approval of the Regulatory Authority. Please note that on our petition, the Regulatory Authority advised us that the Commission will not allow IPCL to give the Corporate Guarantee to any funding agency and/or and other agency for any business acquisition without the prior approval of the Commission. For your perusal, a copy of the order passed by the Regulatory Authority is enclosed herewith.

In view of the aforesaid, please note that the Corporate Guarantee as given by us is non-est, unenforceable and therefore cannot be given effect to."

That in reply to the IPCL letter dated 22.11.2017, REC issued letter dated 01.12.2017 (ANNEXURE-10 of COUNTER), confirming that since the Corporate Guarantee dated 23.09.2016 only related to Non

Regulated Assets and Surplus Amounts as defined under the said Corporate Guarantee, the consent of WBERC was not required.

Curiously, the letter also asserted that though the infringement of the Regulations would not have any impact on the validity of the Corporate Guarantee but would make IPCL liable to penalties under the aforesaid regulation including revocation/cancellation of distribution license.

This conclusively establishes that the Lenders were not only aware of the bar as contained in Regulation 5.13.2 of the WBERC (Licensing and Conditions of License) Regulations, 2013 but worded the Corporate Guarantee to defeat the said provision of law.

LEGAL OPINION BY TWO LEGAL EXPERTS:

IPCL vide its letter dated 13.12.2017 (ANNEXURE-11 of COUNTER, page 177-192) reminded REC that REC had itself in meetings prior to IPCL executing the Share Purchase Agreement had made it known to IPCL that it had received legal opinions confirming though generally permission was required from WBERC for executing the guarantee to be given by IPCL to the Lenders but "could be considered permissible" if the corporate guarantee was restricted to

Non Regulated Assets and surplus from Regulated Assets of IPCL. Relevant paras of draft legal opinion provided by Cyril Amarchand Mangaldas enclosed to letter dated 13.12.2017, at page 179 of Counter is extracted herein:

> *"2. QUERY.*
> *2.1 In view of the aforementioned background, the Phase II Lenders have requested out views on whether IPCL is required to take permission from the relevant State Regulatory Commission under clauses of the license, if any, as New Promoter acts as distribution franchisee and a licensee?"*
>
> *"3.4 We note that no license has been granted to IPCL either under the India Electricity Act, 1910 or under the Electricity Act read with the BERC license Regulations in respect of distribution or supply of electricity in the State of Bihar. Rather, IPCL has been awarded the LoI pursuant to which the DFA has been entered into amongst IPCL, IPCL Bodhgaya and SBPDCL. Under the DFA, IPCL Bodhgaya is required to distribute electricity in Gaya and adjoining areas. .. .."*
>
> *"3.5 Regulation 1.3.1 (xxviii) of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of License) Regulations, 2013 (the "WBERC License Regulations") defines a licensee to mean a person who has been granted a license by the West Bengal Electricity Regulatory Commission ("WBERC") under Section 14 of the Electricity Act and includes a deemed licensee as defined in Regulation 1.3.1 (xvi) of the WBERC License Regulations. Regulation 1.3.1 (xvi) of the WBERC License Regulations defines a deemed licensee to be a person deemed to be a licensee under Section 24 of the Electricity Act and as mentioned in column no. 3 of Schedule – 1 of the WBERC License Regulations. IPCL has been specified as a deemed licensee in column no. 3 of Schedule – 1 of the WBERC License Regulations."*
>
> *"3.6 As stated hereinabove, IPCL was granted the Dishergarh Electric License to supply power. Pursuant to Paragraph 3.2 and Paragraph 3.5 above, IPCL would be considered to be a distribution*

licensee in the State of West Bengal. As a distribution licensee, IPCL has to abide by the obligations of a licensee as provided for the under the Electricity Act and the WBERC License Regulations."

"3.10 Regulation 5.13.2 of the WBERC License Regulations states that a licensee is required to obtain prior written consent from the WBERC in making any loans to, or issuing any guarantee for any obligation of any person which is beyond the normal area of business activities of the licensee in respect of its core activities. Further, the licensee is also required to obtain the prior written consent of WBERC, in case any of its affiliates undertakes any loan which may directly or indirectly affect the licensee's business. .. .."

"3.11 Pursuant to the above, we are of the view that any loan or guarantee that may be required to be provided by IPCL (the distribution licensee in the State of West Bengal) for any obligation of the Company (a generating company) would generally require the prior approval of WBERC pursuant to the provisions of Regulation 5.13.2 of the WBERC License Regulations. Having said that, we are given to understand that IPCL has multiple sources of revenue in addition to revenues from its distribution license in the State of West Bengal. In this regard, since WBERC only regulates the specific assets of IPCL (i.e. Dishergarh Electric License and business and revenues arising therefrom (hereinafter referred to as the "WBERC Regulated Asset")), we are of the view that if IPCL utilizes the proceeds/ revenues from its assets other than the WBERC Regulated Asset to honor the payment of obligations under the corporate guarantee, the issuance of such guarantee could be considered as permissible without the consent of WBERC. Additionally, the Phase II Lenders may consider obtaining an undertaking from IPCL that any surplus funds that are generated from the WBERC Regulated Asset i.e. funds remaining after meeting the requirement of the regulated business viz. after payment of statutory dues, capital expenditure, operating costs and debt servicing payment that are required to be made in relation to the WBERC Regulated Asset, be utilized by IPCL to make payments towards the debt servicing obligations of the Company if a demand is made by the Phase II Lenders. We are of the view that such an undertaking should not require the approval of WBERC. The corporate guarantee to be furnished by IPCL would reflect the aforesaid understanding."

The respondent/ Corporate Debtor has filed Memo dated 08.07.2022, enclosing therewith copy of Legal Notice served by Shri Deepak Khosla, learned advocate on behalf of the Corporate Debtor dated 08.07.2022 on M/s Cyril Amarchand Mangaldas, Solicitors for the petitioner/ Financial Creditor alleging that the respondent/ Corporate Debtor was induced to execute Corporate Guarantee, on assurance given by M/s Cyril Amarchand Mangaldas, Solicitors to the effect that:

> *"It was only intended to be supported by its 'unregulated assets' [i.e. its assets which fell outside the purview of the regulatory control of the WBERC and that therefore, prior permission was not required by CD to be obtained from WBERC."*

Lenders provided another draft legal opinion provided by M.G. Ramachandran, learned Senior Advocate, the relevant portion of which is as under:

> *"8. Thus, reading Regulation 5.13.2 in a contextual manner and harmoniously construing, the licensed activities should not get affected by any loan or guarantee to be given by the licensee and this should be regulated by the Regulatory Commission. There is no purpose of the Regulatory Commission controlling the loan or guarantee of the corporate entity which is given in respect of other activities. There may be other Regulators controlling such other activities who will be regulating the loan or guarantee. For example, a loan or guarantee by the corporate entity is also regulated under the Companies Act, 1956.*

9. In view of the above, the provisions of Regulation 5.13.2 cannot be given such a wide interpretation to control the loan or guarantee given by a corporate entity unrelated to the licensed or core activity as defined in the Regulation. Accordingly, in my opinion the said provision should be interpreted as not providing the requirement of obtaining a prior approval from the Regulatory Commission for the purpose of extending a loan or guarantee for an activity unrelated to the licensed or core activity in terms of the Regulation. However, in order to ensure that there is no issue being raised, the loan or guarantee given by a corporate entity having, amongst others, a license to undertake transmission or trading or distribution should specifically say that the Guarantee will not have any right, interest or title to proceed against the licensed activities or the assets forming part of the licensed activities. Such a stipulation would satisfy the purpose of the Regulation. (Emphasis supplied)"

Rural Electrification Corporation Limited (REC) addressed letter dated 11.01.2018 (ANNEXURE-12, page 193 of COUNTER) to the respondent/ IPCL in response to letter dated 13.12.2017 of IPCL. In that letter REC raised various issues with regard to WBERC order including that WBERC had not expressed opinion on the IPCL Corporate Guarantee and had in fact directed IPCL to file specific proposals seeking consent of WBERC and that WBERC had nowhere in its order stated that the IPCL Corporate Guarantee could not have been issued for the benefit of the Phase II Lenders.

The respondent further submitted that vide order dated 07.08.2018 (ANNEXURE-13, page 195 of COUNTER), WBERC declined permission to IPCL on its application seeking specific permission to allow IPCL to issue Corporate Guarantee to the tune of Rs. 3345 crores to the lenders of MEL under Regulation 5.13.2 of the WBERC Regulations, 2013. Relevant extracts of the WBERC Order dated 07.08.2018 are as under:

> *"1.0 India Power Corporation Limited (in short "IPCL") has submitted an application on 15th May, 2018 under regulation 5.13.2 of West Bengal Electricity Regulation Commission (Licensing and Conditions of License) Regulations, 2013, (to be referred as the 'Regulations') in case no. OA-274/18-19 to the West Bengal Electricity Regulatory Commission (in short 'Commission') for allowing IPCL to issue Corporate Guarantee to the tune of Rs. 3345 crores to the lenders of Meenakshi Energy Limited (MEL), a subsidiary of IPCL having generation activities outside the normal area of its distribution license.*
>
> *5.0 As ground of their prayer, IPCL has submitted the following:*
>
> *(b) IPCL had filed a petition before the Commission in Case No. WBERC/OA-260/17-18 seeking generic permission to allow IPCL to issue Corporate Guarantee to funding agencies for acquiring business activities beyond its licensed area under regulation 5.13.2 of the WBERC Licensing Regulations, 2013.*
>
> *(c) Vide para 7.0 of its order dated 09.11.2017 in Case No. WBERC/OA-260/17-18, the Commission had directed the Petitioner to come up with the specific proposal of business acquisition for prior approval of the Commission as per the provisions specified in the said regulations.*
>
> *(d) Accordingly, IPCL has approached the Commission seeking the permission to extend Corporate Guarantee to the lenders with respect to the specific project of MEL.*

7.0 It appears from the financials as available from the last Audited Annual Accounts for 2016-17 that Debt Service Coverage Ratio (DSCR) is below 1.33 which indicates that the debt-service capacity of IPCL is stressed. There is a net negative cash flow of Rs. 34 Crs in 2016-17.

The Corporate Guarantee, if extended, may attract a charge on the assets of IPCL in case of a default in debt servicing by MEL and subsequent inadequacy of Security, if so arises. Such assets of IPCL are dedicated for supply of Power to consumers of electricity including those within the State of West Bengal. It also appears from the last Audited Annual Accounts for 2016-17 that the available security of Fixed Assets for Rs. 358 Crs is inadequate to arrange comfort for a loan size of Rs 3345 Crs. Again, even the total Non – Current Asset of IPCL for Rs 1561 Crs is far from being sufficient.

Apart from the above, it is noted that Corporate Guarantee has been asked for a loan attributable to a project outside the distribution license area of IPCL under WBERC.

8.0 Accordingly, in consideration of the facts stated above, the Commission has reasonable concluded that financials of IPCL do not accommodate to extend a Corporate Guarantee to the lenders of MEL as prayed for against Loan attributable to a project beyond the distribution license area of IPCL under WBERC, which may attract a charge on the assets of IPCL used for supplying power to the consumers of electricity in the state of West Bengal."

"9. In view of the above, the prayer of IPCL is not admitted by the Commission."

That IPCL has filed application dated 26.10.2021 (ANNEXURE-14, page 200 of COUNTER) before WBERC seeking WBERC's interpretation under Regulation 5.15.1 of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licence) Regulations,2013 as to whether prior consent under Regulation 5.13.2

of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licence) was required to be obtained by IPCL from the WBERC before issuing the Corporate Guarantees dated 23.09.2016 to the concerned lenders and the same is presently pending adjudication.

CIVIL PROCEEDINGS BY RESPONDENT:

On receiving the Notice for invocation of Pledge dated 20.12.2017, IPCL and MEL filed a suit bearing COS NO. 266 of 2017 in the City Civil Court, Hyderabad praying for a declaration that the Corporate Guarantee is Null and Void, SBICAP Trustee submitted Written Statement (ANNEXURE-15, page 209-285 (at page 266) of COUNTER) stating the following:

> "*47. That the contents of paragraph 47 are incorrect and hence denied in entirety, save and except what may be a matter of record. As stated above, since under the Deed of Guarantee executed by Plaintiff No. 2, it is only required to utilize the proceeds/ revenues from its non-regulated assets, i.e., assets other than the WBERC Regulated Asset, to satisfy its guaranteed obligations, the issuance of such a Deed of Guarantee without prior written consent of WBERC is permissible. Further, the legal opinion received from Justice M. Karpaga Vinaygam dated September 19,2016 confirms that no prior approval of WBERC was required for executing the IPCL Deed of Guarantee. A copy of the legal opinion of IPCL Deed of Guarantee is annexed herewith and marked as Document No. 31."*

Winding up its submissions under Contention (C), the respondent concludes that from the above submissions the following clearly emerge:

(i) That IPCL did not agree to giving any guarantee citing Regulation 5.13.2 of the 2013 Regulations;

(ii) The Lenders' Legal Counsel affirmed that IPCL cannot give such a guarantee but in order to defeat the purpose of Regulation 5.13.2 of the 2013 Regulations opined that if the Lenders have limited recourse under the Corporate Guarantee i.e. limit their recourse to only the Non-Regulated Assets and surplus from Regulated Assets without having recourse to the Regulated Assets of IPCL, it may be permissible for IPCL to provide such a Corporate Guarantee to the Lenders;

(iii) That the Lenders were aware of the legal bar under Regulation 5.13.2 of the 2013 Regulations but chose to word the terms of the Corporate Guarantee in a manner that would defeat the purpose behind enactment of Regulation 5.13.2 of the 2013 Regulations.

(iv) That the Lenders also coerced an affidavit from a Director of IPCL to agree to such terms;

(v) That IPCL first went to the WBERC with a generic application which vide its order dated 09.11.2017, WBERC declined to grant permission to IPCL to give guarantees to funding agencies.

(vi) That upon a specific application seeking approval of the WBERC for providing a corporate guarantee to the Lenders, the same was also declined by WBERC vide its order dated 07.08.2018.

(vii) A determination as to whether prior approval was necessary in terms of the Corporate Guarantee is pending adjudication before the WBERC.

(viii) That the instrument on which the present application is based is clearly in violation of the mandatory requirement of obtaining prior consent of the WBERC and that the same was within the knowledge of the lenders who by creating an artificial distinction between regulated and non-regulated assets (which is alien to the Electricity Act, 2013) worded the Corporate Guarantee in a manner so as to defeat the mandatory requirement of Regulation 5.13.2 of the 2013 Regulations.

CONTENTION (D):

The contract, which involves in its fulfilment the doing of an act prohibited by a Statute is void.

SUBMISSIONS OF RESPONDENT IN SUPPORT OF CONTENTION (D):

A contract which involves in its fulfilment the doing of an act

prohibited by a statute is void. It is equally well established that private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend assistance to give it effect. What is done in contravention of the provisions of an Act enacted by Legislature cannot be made the subject of an action.

That it is equally settled law that if anything is against law though it is not prohibited in the Statute but only a penalty is annexed, the agreement is void. Further, despite the absence of any express provision declaring any transaction in contravention of Regulation 5.13.2 as void, public purpose behind enacting Regulation 5.13.2 and its purport renders any giving of the Corporate Guarantee dated 23.09.2016 unenforceable in law and enforcement of any contract which is against any provision of law (the Regulation herein) will amount to enforcement of an illegal contract which no court shall come to assist.

By invoking Insolvency & Bankruptcy Code, 2016, Financial Creditor seeks enforcement of the Corporate Guarantee dated 23.09.2016. That is in violation of Regulation 5.13.2 of the 2013 Regulations. Financial

Creditor has no right to do so. The doctrine of *ex dolo malo non oritur actio or ex turpi causa non oritur actio* applies against the Financial Creditor in the present case.

CONTENTION (E) :

Application under Section 7 of the Insolvency & Bankruptcy Code, 2016 is otherwise also not maintainable since the Corporate Guarantee is limited to only the Non-regulated Assets and surplus from regulated assets and not the entire assets of the Corporate Debtor.

SUBMISSIONS OF RESPONDENT IN SUPPORT OF CONTENTION (E):

Corporate Guarantee was framed in such a manner so as to restrict the recourse of the lenders under the Corporate Guarantee only to the Non-Regulated Assets and Surplus Amounts from the Regulated Assets of IPCL. Thus, Corporate Guarantee dated 23.09.2016 was executed with Clauses 2.1, 2.2 and 2.7. Said Clauses are:

> *"2.1 The Guarantor, hereby irrevocable, absolutely and unconditionally guarantees to the Phase I Security Trustee for the benefit of the Phase I Lenders that the Borrower and/or the Guarantor shall duly and punctually pay/repay the Guaranteed Obligations stipulated in or payable in accordance with the terms and conditions contained in the Existing Common Loan Agreement and the other Finance Documents and on the failure of the Borrower to pay the Guaranteed Obligations (or any part thereof) in accordance with the terms and conditions contained in the Existing Common Loan Agreement (or any part thereof) or upon the*

occurrence of an Event of Default, the Guarantor shall forthwith pay, from the Non Regulated Asset, to the Phase I Lenders, without demur or protest or without the right of any set off, deductions or adjustments of any kind whatsoever, the amount of the Guaranteed Obligations as may be claimed by the Phase I Lenders in relation to the Phase I Facility, as stated in the Demand Certificate to be issued by the Phase I Lenders/ Phase I Security Trustee."

"2.2 The Guarantor, hereby irrevocable, absolutely and unconditionally undertakes to utilize all Surplus Amounts towards meeting any shortfall in debt servicing in relation to the Phase I Project. Any such shortfall to be funded by the Guarantor shall be as may be claimed by the Phase I Lenders in relation to the Phase I Facility, as stated in the Demand Certificate to be issued by the Phase I Lenders/Phase I Security Trustee."

"2.7 In order to perform its obligations under Clause 2.1 above, the Guarantor shall utilize the Non Regulated Asset. In order to perform its obligations under Clause 2.2 above, the Guarantor shall utilize the Surplus Amounts."

Apart from the above, even assuming without admitting that the Corporate Guarantee is enforceable, the present application u/s 7 of Insolvency & Bankruptcy Code, 2016 is not maintainable for the following reasons:

Since the Corporate Guarantee admittedly provides a limited recourse to the lender seeking to enforce it and admittedly confines itself to the non-regulated assets and surplus from regulated assets alone, it cannot be enforced at all under the Insolvency & Bankruptcy Code, 2016 since

any such enforcement would affect the entire assets of the Corporate Debtor and not just its non-regulated assets or surplus from regulated assets.

Insolvency & Bankruptcy Code, 2016 does not make any distinction between regulated and non-regulated assets of the Corporate Debtor;

Corporate Guarantee was given on the basis of an alleged bifurcation of the assets. Section 7 application cannot and does not segregate the assets. There is no guarantee either in fact or in law for the regulated assets as there could not be.

Corporate Guarantee having been executed prior to the enforcement of Section 7 of the Insolvency & Bankruptcy Code, 2016; the effect of the provisions of Insolvency & Bankruptcy Code, 2016 was not within the contemplation of the parties to the Corporate Guarantee. Remedies available to the lenders upon any purported default were limited to the non-regulated assets and surplus, if any, from the regulated assets under the general law of recovery rather than Insolvency & Bankruptcy Code, 2016.

CONTENTION (F):

The application suffers from *suppressio veri suggestio falsi.*

SUBMISSIONS OF RESPONDENT IN SUPPORT OF CONTENTION (F):

Pledged item 2 mentioned at page 27 of the Company Petition has been invoked and transferred to SBI CAP Trustee being the Security Trustee of the Applicant and other Phase -I lenders and the Security Agent of the Phase-II lenders and the financial debt of the purported principal debtor i.e., Meenakshi Energy Limited (MEL) has long since been discharged and converted into equity. Financial Creditor could not disclose this fact in its application.

CONTENTION (G):

Form-I is defective with no date of default mentioned in Part-IV.

SUBMISSIONS OF RESPONDENT IN SUPPORT OF CONTENTION (G):

The Company Petition is otherwise defective sans 'date of default' in part IV.

VII. REJOINDER DATED 13.06.2022 IS FILED BY THE PETITONER/ FINANCIAL CREDITOR IN RESPONSE TO THE

COUNTER/ REPLY DATED 22.11.2021 FILED BY THE RESPONDENT/ CORPORATE DEBTOR.

Before we delve into the contents of the Rejoinder we take note of the fact that this Rejoinder was filed on 13.06.2022 by the petitioner/ Financial Creditor belatedly. Seeking a direction to take on record the said Rejoinder, the petitioner/ Financial Creditor has filed IA No.1547 of 2022. This Tribunal has allowed the said IA with the following observations:

> *"31. In so far as the plea of the Respondent that, rejoinder is filed with additional factual assertions that were not pleaded in the main petition is concerned, we accept the submission of the Ld. Counsel for the Respondent that, any factual assertions that were not pleaded in the main petition cannot be allowed to be pleaded in the Rejoinder. We therefore, hereby order that any additional factual assertions that were not pleaded in the main petition, if found to have been introduced under the Rejoinder filed on 16/03/2022 the same will not be taken into consideration and will be eschewed.*
>
> *32. We also find force in the submission of the Ld. Sr. Counsel that that respondent will not be prejudiced if the Rejoinder which has been filed on 13/06/2022 is received.*
>
> *33. Therefore, in the light of our discussion as above, we are of the view that, this Application can be allowed by enlarging the time that has expired for filing the Rejoinder by the Applicant in terms of the Order of this Tribunal dated 03/12/2022. Accordingly, this Petition is allowed and the Rejoinder to the Counter filed on 16/03/2022 in received subject to our observation in the preceding paragraph. Considering the peculiar facts and circumstances of this case, and as a special case we hereby grant liberty to the respondent to file it's brief additional pleading, if any, within 7 days from the date of this order. In default the liberty granted shall stand revoked automatically."*

Thereafter, the respondent/ Corporate Debtor has filed IA (IBC) No.45 of 2023 praying that the submissions made by the petitioner/ Financial Creditor in the following paras of its Rejoinder in CP (IB) No.205/7/221 be struck off:

- Preliminary submissions, para no.5 (pages 2 to 6).

Paras no.1, 2, 4, 5, 7 to 21, 32 to 40, 48 to 52, 63, 64, 80 to 93 and 98 (Pages no.10 to 19, 26 to 30, 35 to 38, 42 to 50, 53 to 69, 71 and 72).

(A) How the petitioner/ Financial Creditor answered the Counter filed by the respondent/ Corporate Debtor. (pages 72 to 86 of Rejoinder).

(B) New facts/ averments with additional documents (page 5 to 72 of Rejoinder)

(C) List of litigations instituted by IPCL/ MEL (page 57-69 of Rejoinder)

APPRECIATION OF CONTENTIONS IN REJOINDER DATED 13.06.2022:

(A) The petitioner/ Financial Creditor has answered the Counter filed by the respondent/ Corporate Debtor from page 72 onwards of the Rejoinder. Let us appreciate the same hereunder:

IPCL's Contention	Reason
CONTENTION A: There is no debt due in law since the debt of the Principal Debtor, viz. Meenakshi Energy Limited, already stands discharged and therefore no debt or liability exists under the Corporate Guarantee dated 23.09.2021 as the liability of the Guarantor is co-extensive and co-terminus with that of the Principal Debtor.	The law in this regard stands settled by the Hon'ble Supreme Court's judgment in PTC India Financial Services Limited v. Venkateswarlu U Kari & Anr. (2022 SCC Online SC 608), wherein Hon'ble Supreme Court has inter alia held that the transfer of shares to DP account of pledgee upon invocation of pledge and the consequent registration of pledgee as a 'beneficial owner' in the depository's record does not tantamount to an 'actual sale' under Section 176 and 177 of the Indian Contract Act, 1872 ("ICA") but is a mere pre-condition enabling the pledgee to exercise its right to sell the pledge. 'Actual Sale' under Section 177 of the ICA is a sale to a third party and not oneself. Transfer of dematerialised shares upon invocation does not lead to discharge of the debt as no money is received on mere registration which can be adjusted against the debt due.
CONTENTION B: That in any event the issue whether the debt of Meenakshi Energy Limited stands discharged	The appeal filed by IPCL before the Hon'ble Supreme Court in case of MEL has been unconditionally withdrawn by IPCL on May 20, 2022 and it cannot be a ground for seeking deferment of the instant Section 7 Petition.

is at large pending adjudication at the stage of final hearing before the Hon'ble Supreme Court of India.	
CONTENTION C: That the underlying instrument sought to be enforced vide the present Section 7 application, i.e. Corporate Guarantee dated 23.09.2016 being in contravention of Regulation 5.13.2 of the West Bengal Electricity (Licensing and Conditions of License) Regulations, 2013 is void/ unenforceable in law under section 23 of the Indian	The Corporate Guarantee dated September 23, 2016 is valid and subsisting. Further, Mr. Asok Kumar Goswami, had himself submitted an affidavit dated 23.09.2016, stating that: "That I hereby certify, declare and confirm on behalf of IPCL that IPCL is a distribution licensee in terms of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of License) Regulations, 2013, and it is not required to obtain the prior consent of the West Bengal Electricity Regulatory Commission for issuing the Corporate Guarantee in accordance with terms thereof.". In any case, any failure on part of IPCL to obtain any approvals cannot be now used by it as an excuse from discharging its liabilities. IPCL cannot be allowed to renege on its obligations under the Corporate Guarantee and cannot take advantage of its own fault in not

Contract Act, 1872	obtaining permission from WBERC, if it is deemed appropriate.
CONTENTION D: That a contract which involves in its fulfilment the doing of an act prohibited by a statute is void.	As stated above, the Corporate guarantee is valid and subsisting and does not involve doing of any act prohibited by law. Without prejudice to the abovementioned, it is submitted that IPCL has executed a deed of undertaking and indemnity dated September 23, 2016 fully indemnifying the lenders for any losses or damages incurred by Lenders in connection with the obligations under the Corporate Guarantee not being discharged by MEL or as a result of obligations under Corporate Guarantee becoming void, voidable, unenforceable or ineffective against MEL or IPCL, whether or not such reason was known or ought to have been be known to the Lenders. Further, under Section 5(8) of the Code, financial debt includes any liability with respect to indemnity, therefore, in any case, Section 7 against IPCL is maintainable as IPCL is liable under the Indemnity Agreement and such liability has not been discharged
CONTENTION E: Section 7 application is	It is submitted that IPCL has attempted to draw an artificial distinction between regulated and non-regulated assets.

otherwise also not maintainable since the corporate guarantee is limited to only the unregulated assets and surplus from regulated assets and not the entire assets of the Corporate Debtor.	Such a distinction is not relevant in adjudication of the present Section 7 petition. Such an interpretation adopted by IPCL, if accepted would make it immune from initiation of any proceedings under Sections 7, 9 and 10 of the Code, which could not be the intent of the legislature. The Code does not provide any distinction for the CIRP of a regulated corporate person. IPCL has executed a deed of undertaking and indemnity dated September 23, 2016 fully indemnifying the lenders for any losses or damages incurred by Lenders on account of any omission or commission by Engie. IPCL also undertook to indemnify the Lenders for any loss or damages in connection with the obligations under the Corporate Guarantee not being discharged by MEL or as a result of obligations under Corporate Guarantee becoming void, voidable, unenforceable or ineffective against MEL or IPCL, whether or not such reason was known or ought to have been be known to the Lenders. Further, under Section 5(8) of the Code, financial debt includes any liability with

	respect to indemnity. In any case, Section 7 application against IPCL is maintainable as IPCL is liable under the Indemnity Agreement and such liability has not been discharged.
CONTENTION F: That the application suffers from *suppressio veri suggestio falsi*.	There has been no suppression of facts and no false statements have been made in the Section 7 Petition and IPCL is put to strict proof of the same.
CONTENTION G: Form I is defective with no date of default mentioned in Part IV.	Relevant documents including Demand Certificates dated 20.12.2017 and 07.02.2020 have been annexed to the Petition. Demand Certificate dated 07.02.2020 (Exh.17 of the CP) requires the respondent to pay the amount within seven days. IPCL has failed to comply with. Accordingly, Section 7 Petition filed by SBI on February 26, 2020 is complete and does not suffer from any infirmity. Said averment is an attempt to mislead this Tribunal.

The petitioner/ Financial Creditor has answered each paragraph in the Counter dated 13.06.2022 as under:

Para No. in Counter	Page no. in Counter	Response by the petitioner/ Financial Creditor

I	1	Reliance placed on decision of the Hon'ble Supreme Court in Innoventive Industries Ltd v ICICI Bank: Does not merit response.
1, 2 & 3	3, 4	Contents do not warrant any reply. Besides, IPCL itself has admitted the default in payment on part of MEL in paragraph 3 of the instant reply.
4 & 5	4	Pledged Shares were never sold. The Hon'ble Supreme Court in its judgment dated May 12, 2022 in PTC India Financial Services Limited v. Venkateswarlu Kari v. Anr., Civil Appeal 5443 of 2019 (2022 SCC Online SC 608), has held that: "registration of the pawn, that is the dematerialised shares, in favour of PTC India as the 'beneficial owner' does not have the effect of sale of shares by the pawnee." In view of the same, the Hon'ble Supreme Court held that the pledge has not been discharged in part or full. Therefore, the law is clear that invocation of pledge does not amount to sale of shares. Averment of IPCL that the debt is discharged upon invocation is fallacious.

		SBI had got the equity valuation done, on the basis of which the valuation report dated 01.08.2018 was prepared. As per the report, the equity shares of MEL have been valued at INR (-) 2,210.66 crores. Valuation reports prepared by Deloitte Touche Tohmatsu India Private Limited ("Deloitte") and LSI Engineering are inflated and based on erroneous considerations.
6 & 7	5	Section 7 Petition was admitted by this Tribunal after detailed hearings and after coming to the clear conclusion that there existed debt and default. Further, even the Hon'ble NCLAT upheld the Admission Order passed by this Hon'ble Tribunal.
8 to 15	5 to 10	Contents of these paras are misplaced, false and frivolous. Invocation of pledge does not amount to sale of shares, as held by the Hon'ble Supreme Court in PTC India Financial Services Limited v. Venkateswarlu Kari v. Anr., Civil Appeal 5443 of 2019 (2022 SCC Online SC 608). The Hon'ble Supreme Court in the said Judgment has held that: ● Transfer of shares to DP account of pledgee upon invocation of pledge and the consequent registration of pledgee as a

		‘beneficial owner’ in the depository’s record does not amount to an ‘actual sale’ under Section 176 and 177 of the Indian Contract Act, 1872 but is a mere pre-condition enabling the pledgee to exercise its right to sell the pledge. ● ‘Actual Sale’ under Section 177 of the ICA is a sale to a third party and not to oneself and the transfer of dematerialised shares upon invocation does not lead to discharge of the debt as no money is received on mere registration which can be adjusted against the debt due. It is denied that any amount has been realised by SBI from the said pledged shares or debt of MEL stood discharged upon the invocation of the Pledged Shares. In fact, IPCL in its Rejoinder in IA No.648 of 2021 has itself admitted to its liability as MEL’s guarantor. In the Rejoinder submissions in IA 648/ 2021, IPCL has stated the following: “This goal of maintaining the Corporate Debtor as ‘going concern’ would eventually culminate in maximisation of the assets of the

		Corporate Debtor and increasing its financial viability which would resultantly benefit the lenders of the Corporate Debtor under the Resolution Plan. Further, any benefit so accrued to the lenders of the Corporate Debtor would make the Applicant liable only for the unsatisfied amount of the claim of the lenders of the Corporate Debtor. The Applicant is legally entitled to take steps to reduce its liability as a Corporate Guarantor of the Corporate Debtor as any reduction in liability of the Corporate Debtor would concomitantly reduce the liability of the Corporate Guarantor too."
16 to 22	10 to13	On 20.05.2022, IPCL has withdrawn its Civil Appeal No.3309 of 2020 before the Hon'ble Supreme Court. Thus, IPCL has no grievance with the Admission order of MEL and therefore admits to the debt and default of MEL and thereby its co extensive liability under the Corporate Guarantee.
23 to 28	13 to 16	The Corporate Debtor denied that the lenders got the Corporate Guarantee issued in a manner that defeats the purpose of Regulation 5.13.2 of WBERC Licensing Regulations. The Corporate Guarantee was executed on 23.09.2016 after Mr. Asok Kumar Goswami, the erstwhile director of

		IPCL had also submitted an affidavit dated 23.09.2016 certifying on behalf of IPCL that IPCL is a distribution licensee in terms of the WBERC Licensing Regulations and it is not required to the obtain the prior consent of WBERC for issuing the Corporate Guarantee in accordance with terms thereof. Assuming without admitting that even if the Corporate Guarantee is held to be null and void, IPCL still has an indemnity liability under the Indemnity Agreement, since no payment has been made by IPCL, the debt under the Indemnity Agreement remains unpaid.
29 to 31	16 to 35	The Corporate Debtor denied that the lenders induced IPCL into executing the Corporate Guarantee. In fact, IPCL submitted an Affidavit stating the WBERC permission was not required and even the Corporate Guarantee records the representations from IPCL that it was duly authorised to provide the Corporate Guarantee and all acts that need to be done for execution and/ or

		performance of the guarantee have been done.
32 to 34	35 to 36	The alleged duty, if any, to obtain the prior approval was cast on IPCL and any failure to do so does not have the effect of making the Corporate Guarantee void and this cannot be used as a defence by IPCL for backing out of its obligations.

(B) New facts/ averments with additional documents (page 5 to 72 onwards of Rejoinder).

The petitioner/ Financial Creditor has brought out certain new facts by way of this Rejoinder. Though not part of the Company Petition, gist of the same is taken note as under:

MEL, a coal-based power project company was originally promoted by Meenakshi Energy and Infrastructure Holding Private Limited. However, in the year 2013 Engie Global Developments B.V. (formerly GDF Suez Energy International Global Developments B.V.),

("Engie") a French energy company acquired the Company by acquiring about 89% of shares. Subsequently, due to decision of French Government to reorient the state-backed companies towards renewable energy, Engie initiated its efforts to exit the project. Thus, MEL came to be acquired by IPCL around February 2016 at the cost USD 1 (One Dollar) with reward of USD 40 million to be paid by Engie to IPCL, as reward for completion of the transaction and to be inducted in the project and further infusion of USD 300 million by the said Engie in MEL as equity before transfer of shareholding to IPCL.

25.02.2016 : Engie, the erstwhile promoter of MEL, exited MEL and entered into a Share Purchase Agreement with IPCL, for sale of its stake in MEL to IPCL. SBI along with other lenders of MEL had accorded their approval for the transfer of Engie's stake in MEL to IPCL on the condition that upon transfer, IPCL will step in and assume Engie's obligations by providing undertakings and corporate guarantee under the financing documents.

The lenders of MEL, including SBI accorded their approval for transfer of shareholding by Engie to IPCL on the following conditions:

(a) Vide an Unattested Share Pledge Agreement and Power of Attorney dated September 23, 2016 executed amongst MEL, IPCL and SBI Cap Trustee Co. Ltd for the benefit of the Phase I and Phase II Lenders ("IPCL Share Pledge Agreement"), IPCL pledged its 100% shareholding to SBICAP Trustee for the benefit of Lenders of both Phase I and Phase II for securing the term facilities granted to MEL.

Copy of the Unattested Share Pledge Agreement dated September 23, 2016 executed amongst MEL, IPCL and SBI Cap Trustee Co. Ltd for the benefit of the Phase I and Phase II Lenders is annexed herewith as Annexure R-1.

(b) Mr. Asok Kumar Goswami, the erstwhile director of IPCL had also submitted an affidavit dated September 23, 2016 ("Affidavit") stating certifying, declaring and confirming on behalf of IPCL that IPCL is a distribution licensee in terms of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licence) Regulations, 2013 ("WBERC Licensing Regulations") and it is not required to the obtain the prior consent of West Bengal Electricity Regulatory Commission ("WBERC") for issuing the Corporate Guarantee in accordance with terms thereof.

Copy of the Affidavit dated September 23, 2016, filed by Mr. Asok Kumar Goswami is annexed herewith as herewith as Annexure R-2.

(c) On the basis of the Affidavit, and after various discussions, IPCL, with its eyes open, executed the Deed of Guarantee dated September 23, 2016 in favour of the Phase I and Phase II Lenders ("Corporate Guarantee"), wherein IPCL provided its Corporate Guarantee (in respect of non-regulated assets) for securing the loan granted to MEL by the Phase I and Phase II Lenders. Certain clauses of the Corporate Guarantee, viz. Clauses 2.1, 12, 17 and 18 were quoted in the Rejoinder.

(d) IPCL infused the amount of USD 40 million into Trust and Retention Account ("TRA") pertaining to Phase II Project within 15 days of receipt of money from Engie. On September 23, 2016, a TRA for the Phase – II Lenders was also created as per the Trust and Retention Account Agreement.

30.09.2016 : Engie exited MEL for which IPCL received USD 40 Million. However, it is pertinent to note that MEL/ IPCL never remitted the said amount to the TRA, as agreed with the lenders.

16.11.2016 : IPCL sent a letter to MEL confirming that it had received an amount USD 40 million from the outgoing promoter Engie and the same would be infused in MEL immediately on completion. However, the same has not been done till date.

Copy of the said letter dated November 16, 2016 sent by IPCL to MEL is annexed herewith as Annexure R-3.

20.12.2017 : As MEL kept on defaulting in the repayment of the dues regularly, on 20.12.2017, a demand certificate was issued by SBI Cap Trustee Co. Ltd. under the Corporate Guarantee calling upon IPCL to pay the overdue amount of INR 93,57,91,585 (Indian Rupees Ninety Three Crores Fifty Seven Lakhs Ninety One Thousand Five Hundred and Eighty Five) within 7 (seven) days.

Copy of the demand certificate dated December 20, 2017 issued by SBI Cap Trustee Co. Ltd. is annexed herewith as Annexure R-4.

20.12.2017 : On the same day a notice under Section 176 of the Indian Contract Act, 1872 was also issued by SBI on behalf of Phase I Lenders, for invocation of pledge of shares of MEL that were held by IPCL, under IPCL Share Pledge Agreement. It may be noted that a

total of 3,81,15,06,509 shares had been pledged to SBI Cap Trustee Co. Ltd. ("Pledged Shares").

20.12.2017 : Copy of Notice dated 20.12.2017 under Section 176 of the Indian Contract Act, 1872 issued by SBI on behalf of Phase I Lenders is annexed herewith as Annexure R-5.

26.12.2017 : MEL and IPCL filed a Civil Suit bearing COS No. 266 of 2017 in the Court of Hon'ble XXIV Additional Chief Judge cum, Commercial Court, City Civil Court Hyderabad inter alia challenging the notice for invocation of pledge dated December 20, 2017 and raising similar challenges as raised in the Reply and seeking, inter alia, a declaration that the Corporate Guarantee dated September 23, 2016 executed by IPCL be declared null and void.

Copy of the Plaint filed by IPCL COS No. 266 of 2017 before the Court of Hon'ble XXIV Additional Chief Judge cum, Commercial Court, City Civil Court Hyderabad is annexed herewith as Annexure R-6.

02.04.2019 :

Subsequently on 02.04.2019, Plaintiff sought withdrawal of the suit. The suit was disposed of as not pressed; however, no liberty was either sought or granted to IPCL for filing a fresh suit.

Copy of the order dated April 02, 2019 passed in COS No. 266 of 2017 by the Court of Hon'ble XXIV Additional Chief Judge cum, Commercial Court, City Civil Court Hyderabad is annexed herewith as Annexure R-7.

26.12.2017: MEL along with IPCL had filed the suit. MEL with an intention to defraud its creditors passed a resolution whereby 10,02,34,046 number of equity shares of MEL with differential voting rights and having a nominal value of Rupees 10 were allotted at par to IPCL upon conversion of loan ("Additional Shares"). The voting rights were 1000 on each Additional Share.

During the change in shareholding of MEL from Engie to IPCL, IPCL received the incentive of USD 40 million from Engie, for the timely execution of change in management. It is humbly submitted that while the said sum of USD 40 million was agreed to be infused as equity in the Phase-II Project, however MEL and IPCL did not act on the said agreement and IPCL breached its obligations under the Common Loan Agreement dated October 01, 2010 executed amongst MEL and its lenders extending the Phase II Facility Phase II CLA and the Additional Common Loan Agreement dated March 20, 2015. IPCL

fraudulently kept this money away from the Phase II Project, and accordingly on 04.01.2018, Rural Electrification Corporation ("REC") issued notice of event of default upon MEL and IPCL, pointing out the defaults committed by IPCL.

Copy of notice of default dated January 04, 2018 issued by REC to IPCL is annexed herewith as Annexure R-8.

08.02.2018 : Joint Lenders Meeting was conducted wherein MEL was directed to cancel the allotment of Additional Shares to IPCL failing which the Phase I Lenders and Phase II Lenders would be constrained to take appropriate legal actions.

02.05.2018 : Further, since the pledged shares that had been invoked vide letter dated 20.12.2017 were in dematerialized form, on 02.05.2018 they were transferred in the DP account of SBICAP Trustee Company Limited. It is pertinent to point out that these shares have only 3.75% voting rights (pursuant to the issue of Additional Shares) and management control continued with MEL and IPCL who controlled the composition of the board.

Further, MEL had issued several letters dated January 18, 2018, February 5, 2018, February 16, 2018, May 25, 2018,June 11, 2018 and July 10, 2019 to Phase I Lenders wherein it had given settlement proposals. It is pertinent to note that all these letters were post invocation of pledge, which reflects the admission on part of MEL (and thereby IPCL) that invocation of pledge did not amount to satisfaction of debt.

Copies of the aforesaid letters dated January 18, 2018, February 5, 2018, February 16, 2018, May 25, 2018, June 11, 2018 and July 10, 2019 are annexed herewith collectively as Annexure R-9 (Colly).

30.07.2018 : IPCL filed a Writ Petition bearing W.P. No.26999 of 2018 before the Hon'ble High Court of Andhra Pradesh at Vijayawada challenging the advertisement issued by lenders inviting bids for change of management of MEL. The Hon'ble High Court of Andhra Pradesh (prior to bifurcation of the Hon'ble High Court) at Hyderabad vide Order dated August 01, 2018 passed an interim order in W.P. No. 26999 of 2018 that no coercive steps shall be taken by the Phase I Lenders and Phase II Lenders against IPCL. However, on

February 15, 2019, IPCL withdrew this writ, and the same has been dismissed as withdrawn.

Copy of the Writ Petition bearing number 26999 of 2018 filed by IPCL before the Hon'ble High Court of Andhra Pradesh at Vijayawada is annexed herewith as Annexure R-10.

Copy of the case status of Writ Petition bearing number 26999 of 2018 is annexed herewith as Annexure R-11.

30.07.2018 : IPCL preferred another Writ Petition bearing number W.P. No.26977 of 2018 before the Hon'ble High Court for State of Telangana and Andhra Pradesh at Hyderabad, wherein it stated that the equity shares have been wrongly transferred to SBICAP without conducting valuation of shares of MEL.

01.08.2018: The Hon'ble High Court for State of Telangana and Andhra Pradesh at Hyderabad vide Order dated August 01, 2018 passed an interim order in W.P. No. 26977 of 2018 that no coercive steps shall be taken by the Phase I Lenders and Phase II Lenders against IPCL.

Copy of the Writ Petition bearing number 26977 of 2018 filed by IPCL before the Hon'ble High Court of Telangana and Andhra Pradesh at Hyderabad is annexed herewith as Annexure R-12.

21.08.2018: MEL, on August 21, 2018, also filed a Writ Petition bearing number W.P. No.30048 of 2018 before the Hon'ble High Court of Andhra Pradesh (prior to bifurcation of the Hon'ble High Court) at Hyderabad, highlighting that since the same Court had passed interim order in W.P. No. 26977 of 2018 and W.P. No. 26999 of 2018, both filed by Plaintiff No. 1, IPCL and Mr. Asok Kumar Goswami (Director, IPCL), SBI should be restrained from taking any coercive steps in terms of the Recall Notice dated August 07, 2018.

24.08.2018: The Hon'ble Court passed an order dated August 24, 2018 granting the interim relief that no coercive step shall be taken against MEL. However, the said order granting interim relief was later vacated vide order dated 23.01. 2019.

Copy of W.P. No.30048 of 2018 filed before the Hon'ble High Court of Andhra Pradesh is annexed herewith as Annexure R-13.

Copy of the order dated January 23, 2019 vacating the interim relief is annexed herewith as Annexure R-14.

17.04.2019 : Aggrieved by order dated 23.01.2019, MEL filed a Writ Appeal bearing Writ Appeal No. 203 of 2019 before the Division Bench of Hon'ble High Court of Telangana at Hyderabad. However, the appeal was dismissed vide order dated 17,04,2019.

07.11.2019 : When Hon'ble High Court of Telangana at Hyderabad vacated interim injunction order, SBI filed an application under Section 7 of the Code against MEL before this Tribunal seeking the commencement of the CIRP against MEL ("MEL S. 7 Petition"). This Tribunal vide its order dated 07.11.2019 ("Admission Order") admitted the application.

Copy of the Admission Order is attached to the present Section 7 Petition as Exhibit-16.

10.09.2020 : Admission Order was challenged by IPCL before the Hon'ble Appellate Tribunal in Company Appeals (AT) Insolvency No. 1220/2019 and 1450/2019. The Hon'ble NCLAT after detailed hearings on all the issues raised (similar to the issues raised herein), on September 10, 2020, dismissed the appeals.

IPCL filed two Civil Appeals i.e., Civil Appeals No. 3307/2020 and 3309/2020 ("Civil Appeals") under Section 62 of the Code before the Hon'ble Supreme Court of India. The Hon'ble Apex Court did not grant stay on the order of the Hon'ble NCLAT.

20.05.2022 : **IPCL unconditionally** withdrew its appeal on May 20, 2022.

Copy of Civil Appeal No. 3309/2020 filed by IPCL before the Supreme Court is annexed herewith as Annexure R-15.

Copy of Order dated May 20, 2022 recording withdrawal of the Civil Appeal No. 3309/2020 by IPCL is annexed herewith as Annexure R-16.

07.02.2020: SBI Cap Trustee Company Limited sent a demand notice to IPCL in respect of the Corporate Guarantee for Phase I facility provided to MEL. SBI Cap Trustee Company Limited called upon IPCL to pay the amount of INR 967,21,68,885.68 under the Corporate Guarantee within a period of 7 days from the date of the demand certificate. However, IPCL failed to make such payment.

26.02.2020: Consequently, SBI filed the present Section 7 Petition under the provisions of the Code seeking initiation of CIRP

against IPCL claiming default in respect of the Corporate Guarantee towards the Phase I facilities to the tune of INR 500,47,58,255.44 (Indian Rupees Five Hundred Crores Forty Seven Lakh Fifty Eight Thousand Two Hundred Fifty Five and Paise Forty Four Only). The Tribunal issue notice on Section 7 Petition vide its order dated August 24, 2021. However, IPCL filed its reply only in November 2021, after a prolonged delay. IPCL filed multiple applications in the said proceedings, being I.A. No. 586 of 2021 seeking the recusal of Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical) of NCLT from hearing the Section 7 Petition and IA No. 567 of 2021 seeking deferment of the hearing of the Section 7 Petition till the Hon'ble Supreme Court has decided the Civil Appeal No. 3307/2020 and Civil Appeal No. 3309/2020. IPCL's withdrawal of its Supreme Court appeal has now rendered the application seeking deferment infructuous.

PRELIMINARY SUBMISSIONS ON BEHALF OF SBI
(RESPONDENT PRAYED FOR DELETION)

(i) Without prejudice to the arguments made hereinbelow, issues raised in the Reply filed by IPCL remains decided by the Hon'ble Supreme Court of India vide its detailed judgment dated May 12, 2022

in Civil Appeal No. 5443 of 2019 'PTC India Financial Services Limited vs. Venkateswarlu U Kari & Anr.' (2022 SCC Online SC 608). A copy of the said judgement is at ANNEXURE R-17 of this Rejoinder.

The contentions raised by IPCL in its Reply that the debt stands discharged upon invocation of pledge, are liable to be dismissed at the outset in light of the recent Hon'ble Supreme Court judgment in the Civil Appeal No. 5443 of 2019 titled 'PTC India Financial Services Limited vs. Venkateswarlu U Kari & Anr.', 2022 SCC Online SC 608 ("PTC Judgment").

Copy of the Hon'ble Supreme Court's judgment in PTC India Financial Services Limited vs. Venkateswarlu U Kari & Anr. (2022 SCC Online SC 608) is annexed herewith as Annexure R-17. Relevant observations of the Hon'ble Supreme Court in this regard are reproduced below:

(ii) Registration of Pledgee as 'Beneficial Owner' of dematerialised shares is a necessary precondition for exercise of rights under Section 176 of the ICA:

"9.4 … No person, including the pawnee, can transfer the pawn held in dematerialised form without being registered as a 'beneficial owner'.

[…] 9.11 … the stipulation that the pawnee may invoke the pledge, and on such invocation, the pawnee is to be recorded as the 'beneficial owner' of the pledged securities is mandatory.

[…] 9.12 … the pawnee must record itself as a 'beneficial owner' before he proceeds to sell the pledged securities. Without the pawnee being accorded the status of a 'beneficial owner', a pawnee cannot proceed to sell the pledged dematerialized securities.

[…] 10.1 … As per the 1996 Regulations, the pledgor/pawnor is not entitled to sell the pledged/pawned securities. The special rights of the pledgee/pawnee in the pawn remain intact under the Depositories Act and the 1996 Regulation. However, the right to sell dematerialized securities is conferred and given to the 'beneficial owner', who exercises this right through the participants. Consequently, if a pawnee wants to exercise his right to sell dematerialized security it is mandatory for the pawnee first to get himself recorded as a 'beneficial owner' in the 'depository's records. Without the said exercise, the pawnee cannot exercise its rights to sell the pledge and retrieve the monies due by taking recourse to its rights under Section 176 of the Contract Act."

Thus, in accordance with the PTC Judgment, it remains settled that invocation of pledge and the subsequent transfer of pledged shares of IPCL in MEL to the DP Account of SBICAP (as Phase I Security Trustee) and registration of SBICAP as the 'Beneficial Owner' in the Depository's records is only to enable SBICAP (on behalf of lenders) to exercise the rights available to a pledgee under Section 176 of ICA, and nothing else.

(iii) IPCL is barred from challenging the Deed of Guarantee as it had

already raised similar challenges in the Commercial Original Suit (COS) bearing No. 266 of 2017 before the Hon'ble Additional Chief Judge cum Commercial Court at Hyderabad, which was later withdrawn. The petitioner/ Financial Creditor has reproduced the prayer clauses and Cause of Action in respect of the COS No.266 of 2017, and contended that the IPCL has raised same issues of validity of Deed of Guarantee, which suit was withdrawn without seeking liberty to file a fresh suit. Thus, it is deemed that IPCL has admitted validity of the Deed of Guarantee and thus IPCL is barred from raising the same plea again in the instant Reply before this Tribunal.

(iv) While order dated 09.11.2017 in Case No. WBERC/OA-260/17-18, passed by the WBERC directing the Petitioner to come up with the specific proposal of business acquisition for prior approval of the Commission, is appealable, the respondent stayed silent. On 15.05.2018 the respondent filed another application before WBERC seeking approval of WBRC for providing Corporate Guarantee to the lenders. Copy of Application dated 15.05.2018, filed by IPCL before WBERC is annexed herewith as Annexure R-18.

(v) WBERC vide its order dated 22.12.2021 directed IPCL to explain within fourteen days why an action under Section 142 of the Electricity

Act, 2003 shall not be instituted against it. Copy of the order dated December 22, 2021 passed by WBERC is annexed herewith as Annexure R-19.

Existence of debt and default has already been ascertained by this Hon'ble Tribunal

1. It is submitted that similar issues with respect to discharge of debt upon invocation of pledge were posed before this Hon'ble Tribunal in the MEL. After hearing the contentions in detail, this Hon'ble Tribunal had passed Admission Order as under:

   "26. In these circumstances, this Adjudicating Authority having satisfied with the submissions put forth by the Financial Creditor that there exists a default on the part of the Corporate Debtor for which the Corporate Debtor was liable to pay, is inclined to admit the instant Application. Further, the Financial Creditor has fulfilled all the requirements as contemplated under section 7 of the IB Code, in the present Company Application and has also proposed the name of IRP after obtaining the written consent in Form-2."

Said order has been upheld by the Hon'ble NCLAT.

(vi) Admissions made by IPCL itself vis-a-vis its liability under the Corporate Guarantee.

As stated above, IPCL/MEL through various communications, both pre and post the invocation of pledge, have repeatedly acknowledged

the existence of debt owed to Lenders. In this chain of acknowledgements, I.A. No. 648 of 2021 in CP (IB) No. 184/7/HDB/2021 was filed by IPCL in September 2021. In the above IA No.648 of 2021, IPCL has stated the following and sought for following reliefs:

Statement made by IPCL:

> *"17. That the inability of the RP and the CoC to fulfil the obligations under the Bangladesh PPA coupled with the inordinate delay in closing the CIRP by approving a Resolution Plan and filing Appeals against decision of this Hon'ble Adjudicating Authority instead of complying with the same, has led to the destruction of the assets of the Corporate Debtor by risking termination of its only substantial asset i.e., the Bangladesh PPA. It is submitted that for the value of this asset alone, that the Form G's were revised and reissued on 25.01.2021 re-inviting fresh bids. Despite receipt of fresh Resolution Plans prior to the expiry of 330 days and substantial improvement of such Resolution Plans pursuant to the exhaustive negotiations held with the CoC, the CoC continues to both drag its feet in approving either of the said two bids or fulfil the obligations under the Bangladesh PPA in order to maintain the Corporate Debtor as a "going concern". That if the Bangladesh PPA is cancelled, any loss caused thereby must be solely attributable to the CoC without any liability of the Corporate Debtor or the Applicant herein. : [...]"*

(vii) PRAYER MADE BY IPCL:

> *"(i) Allow the present application and direct the lender banks forming part of the Committee of Creditors of MEL to take all necessary actions to fulfil the obligations under the Bangladesh PPA to ensure that the said PPA is not cancelled so that the Corporate Debtor continues as a "going concern" and declare that the lenders Banks as members of the COC shall be solely*

liable for the loss if any sustained by MEL/IPCL due to such cancellation;

ii.) Direct the Resolution Professional and the Committee Of Creditors to complete the CIRP Process forthwith in compliance of the earlier direction dated 24.06.2021 passed by this Hon'ble Adjudicating Authority: […]"

Copy of the Application I.A. No. 648 of 2021 filed in CP (IB) No. 184/7/HDB/2021 is annexed herewith as Annexure R-20.

VIII. In REJOINDER SUBMISSIONS in IA 648/ 2021, IPCL further stated the following:

"*This goal of maintaining the Corporate Debtor as 'going concern' would eventually culminate in maximisation of the assets of the Corporate Debtor and increasing its financial viability which would resultantly benefit the lenders of the Corporate Debtor under the Resolution Plan. Further, any benefit so accrued to the lenders of the Corporate Debtor would make the Applicant liable only for the unsatisfied amount of the claim of the lenders of the Corporate Debtor. The Applicant is legally entitled to take steps to reduce its liability as a Corporate Guarantor of the Corporate Debtor as any reduction in liability of the Corporate Debtor would concomitantly reduce the liability of the Corporate Guarantor too."*

Copy of the Rejoinder filed in I.A. No. 648 of 2021 in CP (IB) No. 184/7/HDB/2021 is annexed herewith as Annexure R-21.

Evidently, in the IA 648/2021 and the Rejoinder filed therein, IPCL has inter alia admitted that;

(a) the CIRP has been rightly initiated against MEL;

(b) that debt is not discharged upon invocation of pledge by SBICAP upon instructions of Phase I Lenders;

(c) IPCL is liable for the debt due against MEL as its liability is co-extensive with the liability of MEL as the corporate guarantor;

(d) that Deed of Guarantee is valid and subsisting; and (e) that IPCL is liable to the debt under the said Deed of Guarantee.

It is also pertinent to highlight that MEL had submitted several debt resolution and settlement proposals to the lenders, thereby indicating that MEL/IPCL itself believed that the debt is still existing. The details of the proposals submitted are as below:

Date	**Particulars of the Proposal**
18.01.2018	MEL submitted resolution proposal to the lenders (Debt Resolution Proposal 1)
05.02.2018	MEL submitted debt resolution plan to the lenders (Debt Resolution Proposal 2)
16.02.2018	MEL acknowledged the debt. This acknowledgement clearly has been issued after notice of invocation of pledge dated December 20, 2017.

25.05.2018	Settlement Letter sent by MEL to Phase I Lenders submitting its settlement proposal. This proposal constitutes 'admission of debt' even post transfer of shares to DP Account of SBICAP on May 2, 2018.
11.06.2018	Settlement Letter sent by MEL to Phase I Lenders submitting its settlement proposal. This proposal also constitutes 'admission of debt' even post transfer of shares to DP Account of SBICAP on May 2, 2018.
10.07.2019	Settlement Letter sent by MEL to its Lenders submitting revised settlement proposal. This proposal also constitutes 'admission of debt' even post transfer of shares to DP Account of SBICAP on May 2, 2018.

Corporate Guarantee issued by IPCL is valid and subsisting.

VIII(A) At the outset, it is submitted that the Corporate Guarantee given by IPCL is valid and subsisting. Corporate Guarantee was executed on 23.09.2016 after an Affidavit being filed by Mr. Asok Kumar Goswami, the erstwhile director of IPCL, who had also submitted an affidavit dated September 23, 2016 certifying that IPCL is a distribution licensee in terms of the WBERC Licensing

Regulations and it is not required to obtain prior consent of WBERC for issuing the Corporate Guarantee in accordance with terms thereof. The Affidavit stated as below:

> *"That I hereby certify, declare and confirm on behalf of IPCL that IPCL is a distribution licensee in terms of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of License) Regulations, 2013, and it is not required to obtain the prior consent of the West Bengal Electricity Regulatory Commission for issuing the Corporate Guarantee in accordance with terms thereof."*

IPCL has solely with the intent of avoiding its obligation to pay under the Corporate Guarantee, has now suddenly contended that lenders had induced IPCL to provide the Corporate Guarantee. It is a well-established legal principle by the Hon'ble Supreme Court in a catena of cases that threshold for an act to qualify as coercion or inducement is very high. "Inducement" is defined in various Dictionaries as –

- Black's Law Dictionary, Eighth Edition:

  > *"the act or process of enticing or persuading another person to take a certain course of action."*

- Merriam-Webster Dictionary:

  > "a motive or consideration that leads one to action or to additional or more effective actions."

‘Coercion’ under Section 15 of Indian Contract Act is defined as:

> *“Coercion” is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.”*

Artificial distinction being made out between regulated and non-regulated entities by IPCL which is irrelevant for the adjudication of the present Section 7 Petition

VIII(B) Artificial distinction is sought to be drawn between regulated and non-regulated assets, which is completely irrelevant for the adjudication of the present Section 7 petition. The Code does not provide any distinction for the CIRP of a regulated corporate person. Thus, it is evident that IPCL is raising these frivolous objections in order to delay and create hurdles in the resolution of IPCL.

Section 7 Petition is complete

VIII(C) It is submitted that the Petition filed by SBI is complete and the relevant documents including the demand certificate dated December 20, 2017 and demand certificate dated February 7, 2020 have been annexed with the Petition. Further, as per the demand certificate dated February 7, 2020 (annexed as Exhibit 17 to the

Petition) the amount was required to be paid within 7 days of February 7, 2020, which IPCL failed to do. Accordingly, the Petition filed by SBI on February 26, 2020 is complete and does not suffer from any infirmity.

It is submitted that IPCL/ MEL have been trying to evade the liability towards the discharge of debt since 2017 and are only indulging in dilatory tactics in order to escape the obligations as per the loan agreements as is evident from various such acts as described in para 91 of Rejoinder.

After the matter was heard and reserved for orders, on12.10.2023 a memo has been filed by the corporate debtor, that Hon'ble NCLAT, Chennai, Bench has dismissed the Appeals preferred against the Orders of this Bench in IA 1547/2022 and 1547/2022, vide its Order dated 04/10/2023, and the same was taken on record on 16.10.2023.

IX. In the light of the contest as aforementioned, the short but interesting Point, that fell for our consideration in the present Company Petition is:

- **Whether the debt claimed as due and payable by the corporate debtor under the impugned guarantee agreement, execution and invocation of which is not in dispute, is**

interdicted by section 23 of Indian Contract Act? If so, whether the present application under section 7 of I&B Code is maintainable?

X. We have heard Shri. Vivek Reddy Ld. Sr. Counsel for the Financial Creditor, Shri Satish Parasaran; Ld. Sr. Counsel and Shri Anirbhan Bhattacharya., Ld. Counsel for the Corporate Debtor, perused the record, written submissions and the case law.

XI. His Lordship R.F. Nariman, J. in re, M/S. Innovative Industries Ltd, a Landmark ruling which both sides herein have relied, which ruling has been re-affirmed by Hon'ble Supreme Court, in Suresh Kumar Reddy vs Canara Bank, [Civil Appeal No. 7121 of 2022] held that,

> *"Where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact."*
>
> *"in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date."*

In E.S. Krishnamurthy vs M/S Bharath Hi Tech Builders Pvt. Hon'ble Supreme Court, 2022 3 SCC 161 held that,

> "*On a bare reading of the provision, it is clear that both, Clauses (a) and (b) of sub-Section (5) of Section 7, use the expression "it may, by order" while referring to the power of the Adjudicating Authority. In Clause (a) of sub-Section (5), the Adjudicating Authority may, by order, admit the application or in Clause (b) it may, by order, reject such an application. Thus, two courses of action are available to the Adjudicating Authority in a petition under Section 7.*

In Vidarbha Industries Power Ltd. vs Axis Bank Limited | 2022 LiveLaw (SC) 587 Hon'ble Supreme Court held that:

> *"Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application under Section 7 of the IBC of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example, when admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the Awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion under Section 7(5)(a) of the IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do so. The Adjudicating Authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the Award/Decretal amount is incapable of realization. The example is only illustrative.*

XI(2) Here is a case where the executant of the corporate guarantee dated 23.09.2016, issued for the due discharge of the credit facilities availed by the principal borrower M/s. Meenakshi Energy

Limited, herein after referred to as 'MEL' for brevity, has challenged the present proceedings initiated under section 7 IBC, consequent upon the invocation of the corporate guarantee by the petitioner/ financial creditor due to the default committed by the principal borrower MEL, by contending that the 'debt' claimed as 'due and payable' under the corporate guarantee is interdicted by Section 23 of the Indian Contract Act, as the corporate guarantee became unenforceable, as the prior consent of West Bengal Electricity Regulatory Commission, for short 'WBERC', in terms of regulation 5.13.2 of the WBERC Regulations (Licensing & Conditions of License), 2013, was not obtained before execution of the subject corporate guarantee in favour of the company petitioner herein, which plea has been firmly denied by the petitioner/ Financial Creditor.

XI(3) Hence, the 'task' before us is to solve the 'tussle' regarding the enforceability or otherwise of the corporate guarantee agreement dated 23.09.2016, therefore, suffice if, the facts concerning the enforceability or **otherwise** of the corporate guarantee are referred to and discussed and a roving enquiry as to various other facts is unnecessary.

XI(4) Shri Vivek Reddy, Ld. Sr. Counsel for the Company Petitioner/financial creditor vehemently contends that on 23.09.2016, the corporate debtor herein has executed a corporate guarantee duly guaranteeing the repayment of the debt of the principal borrower MEL and the well-established principle of law being that the guarantor becomes liable when there is a default by the principal borrower and the liability of the principal borrower herein since crystallized on 19.11.2019 consequent upon admission of MEL in to corporate insolvency resolution process by NCLT, Hyderabad Bench II and upon approving the Resolution Plan for the resolution of debts of MEL vide order of this Tribunal, in I.A. No. 156 of 2023 in CP / dated 10.08. 2023, the liability of the corporate debtor to pay the 'debt' as defined under section 5 (8) of IB Code of the Principal barrower MEL and its 'default' by the respondent corporate debtor herein stands established unequivocally. As such the requirements for admission of the respondent herein, into corporate insolvency resolution process stand firmly established, hence it is a fit case for admission of the respondent into corporate insolvency resolution process.

XI(5) In support of this plea Ld. Sr. Counsel has relied on the

following rulings.

- Innoventive Industries Ltd. v. ICICI Bank, Civil Appeal 8337-8338

  "*16. At this stage, it is important to set out the important paragraphs contained in the report of the Bankruptcy Law Reforms Committee of November, 2015, as these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted:*

  "As Chairman of the Committee on bankruptcy law reforms, I have had the privilege of overseeing the design and drafting of a new legal framework for resolving matters of insolvency and bankruptcy. This is a matter of critical importance: India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India. Such dynamism not only needs reforms, but reforms done urgently."

  xxx xxx xxx xxx

  "The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say. This is not how companies in India work today. For many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. Only one element of a bankruptcy framework has been put into place: to a limited extent, banks are able to repossess fixed assets which were pledged with them. While the existing framework for secured credit has given rights to banks, some of the most important lenders in society are not banks. They are the dispersed mass of households and financial firms who buy corporate bonds. The lack of power in the hands of a bondholder has been one (though not the only) reason why the corporate bond market has not worked. This, in turn, has far reaching ramifications such as the difficulties of infrastructure financing.

Under these conditions, the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis.

When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. Hence, lending in India is concentrated in a few large companies that have a low probability of failure. Further, secured credit dominates, as creditors rights are partially present only in this case. Lenders have an emphasis on secured credit. In this case, credit analysis is relatively easy: It only requires taking a view on the market value of the collateral. As a consequence, credit analysis as a sophisticated analysis of the business prospects of a firm has shriveled.

Both these phenomena are unsatisfactory. In many settings, debt is an efficient tool for corporate finance; there needs to be much more debt in the financing of Indian firms. E.g. long-dated corporate bonds are essential for most infrastructure projects. The lack of lending without collateral, and the lack of lending based on the prospects of the firm, has emphasised debt financing of asset-heavy industries. However, some of the most important industries for India s rapid growth are " those which are more labour intensive. These industries have been starved of credit."

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"The key economic question in the bankruptcy process.

When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

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"Speed is of essence.

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the 'calm period' can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay."

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"The role that insolvency and bankruptcy plays in debt financing.

Creditors put money into debt investments today in return for the promise of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller (debtor) may make repayments as promised, or he may default and does not make the payment. When this happens, the debtor is considered insolvent. Other than cases of outright fraud, the debtor may be insolvent because of -

(i) Financial failure – a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or

(ii) Business failure – which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments.

Often, an enterprise may be a successful business model while still failing to repay its creditors. A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency."

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"Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this."

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"Objectives.

The Committee set the following as objectives desired from implementing a new Code to resolve insolvency and bankruptcy:

(1). Low time to resolution.

(2) Low loss in recovery.

(3) Higher levels of debt financing across a wide variety of debt instruments.

The performance of the new Code in implementation will be based on measures of the above outcomes.

Principles driving the design.

The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:

I. The Code will facilitate the assessment of viability of the enterprise at a very early stage. (1). The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an agreement among creditors who are the financiers willing to bear the loss in the insolvency.

(2). The legislature and the courts must control the process of resolution, but not be burdened to make business decisions.

(3). The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors.

(4). The law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.

II. The Code will enable symmetry of information between creditors and debtors.

(5). The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.

(6). The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.

(7). The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional.

III. The Code will ensure a time-bound process to better preserve economic value.

(8). The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start.

IV. The Code will ensure a collective process.

(9). The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

V. The Code will respect the rights of all creditors equally.

(10). The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.

VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.

(11). The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.

VII. The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

(12). The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.

(13). While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution."

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"An application from a creditor must have a record of the liability and evidence of the entity having defaulted on payments. The Committee recommends different documentation requirements depending upon the type of creditor, either financial or operational. A financial creditor must submit a record of default by the entity as recorded in a registered Information Utility (referred to as the IU) as described in Section 4.3 (or on the basis of other evidence). The default can be to any financial creditor to the entity, and not restricted to the creditor who triggers the IRP. The Code requires that the financial creditor propose a registered Insolvency Professional to manage the IRP. Operational creditors must present an "undisputed bill" which may be filed at a registered information utility as requirement to trigger the IRP. The Code does not require the operational creditor to propose a registered Insolvency Professional to manage the IRP. If a professional is not proposed by the operational creditor, and the IRP is successfully triggered, the Code requires the Adjudicator to approach the Regulator for a registered Insolvency Professional for the case.

In case the financial creditor triggers the IRP, the Adjudicator verifies the default from the information utility (if the default has been filed with an information utility, tit such be incontrovertible evidence of the existence of a default) or otherwise confirms the existence of default through the additional evidence adduced by the financial creditor, and puts forward the proposal for the RP to the Regulator for validation. In case the operational creditor triggers the IRP, the Adjudicator verifies the documentation. Simultaneously, the Adjudicator requests the Regulator for an RP. If either step cannot be verified, or the process verification exceeds the specified amount of time, then the Adjudicator rejects the application, with a reasoned order for the rejection. The order rejecting the application cannot be appealed against. Instead, application has to be made afresh. Once the documents are verified within a specified amount of time, the Adjudicator will trigger the IRP and register the IRP by issuing an order. The order will contain a unique ID that will be issued for the case by which all reports and records that are generated during the IRP will be stored, and accessed."

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"Steps at the start of the IRP.

In order to ensure that the resolution can proceed in an orderly manner, it is important for the Adjudicator to put in place an environment of a "calm period" with a definite time of closure, that will assure both the debtor and creditors of a time-bound and level field in their negotiations to assess viability. The first steps that the Adjudicator takes is put in place an order for a moratorium on debt recovery actions and any existing or new law suits being filed in other courts, a public announcement to collect claims of liabilities, the appointment of an interim RP and the creation of a creditor committee." (Emphasis Supplied)

PARA 18:

"18. There are two sets of definition sections. They are rather involved, the dovetailing of one definition going into another. Section 3 defines various terms as follows:

"Sec. 3(6) "claim" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

Sec. 3(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

Sec. 3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Sec. 3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

Sec. 3(13) "financial information", in relation to a person, means one or more of the following categories of information, namely:—

(a) records of the debt of the person;

(b) records of liabilities when the person is solvent;

(c) records of assets of person over which security interest has been created;

(d) records, if any, of instances of default by the person against any debt;

(e) records of the balance sheet and cash-flow statements of the person; and

(f) such other information as may be specified.

Sec. 3(19) "insolvency professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207;" (Emphasis Supplied)

PARA 27:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide

terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services."

PARA 28:

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt

may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

PARA 30:

"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

PARA 60 :

"60. It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner

that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of Article 254 (1), would operate to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment. Also, Section 238 of the Code reads as under:

"Sec. 238. Provisions of this Code to override other laws. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

It is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code."

PARA 62:

"62. Both the Tribunal and the Appellate Tribunal refused to go into the other contentions of Dr. Singhvi, viz. that under the MRA, it was because the creditors did not disburse the amounts thereunder that the appellant was not able to pay its dues. We are of the view that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22nd and 23rd December, 2016, presumably with little success. It is only as an after-thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken."

PARA 63:

"63. Even otherwise, Shri Salve took us through the MRA in great detail. Dr. Singhvi did likewise to buttress his point of view that having

promised to infuse funds into the appellant, not a single naya paisa was ever disbursed. According to us, one particular clause in the MRA is determinative on the merits of this case, even if we were to go into the same. Under Article V entitled "Representations and Warranties", clause 20(t) states as follows:

> *"(t) NATURE OF OBLIGATIONS.*
>
> *The obligations under this Agreement and the other Restructuring Documents constitute direct, unconditional and general obligations of the Borrower and the Reconstituted Facilities, rank at least pari passu as to priority of payment to all other unsubordinated indebtedness of the Borrower other than any priority established under applicable law."*

PARA 64"

"64. The obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company. Also, the argument taken for the first time before us that no debt was in fact due under the MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, we are of the considered view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd."

- E.S. Krishnamurthy & Ors. v. M/s Bharath Hi Tech Builders Pvt. Ltd.,

  (2022) 3 SCC 161

  PARA 27:

  "27. The Adjudicating Authority has clearly acted outside the terms of its jurisdiction under Section 7(5) of the IBC. The Adjudicating Authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the Adjudicating Authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5). The Adjudicating Authority cannot compel a party to the proceedings before it to settle a dispute."

XII(6) On the aspect of enforceability of the corporate

guarantee Ld. Sr. Counsel contends that, once the debtor has admitted its liability it cannot take a mutually contradictory and inconsistent stand to say that the debtor is not liable under the guarantee. Placing reliance on Clause 17.1(ii) and Clause 17.1(iv) of the Deed of Guarantee, which are as below,

> *"17.1 (ii) Authorization: The Guarantor is empowered and authorized to execute this Guarantee and all related documents in accordance with its memorandum of association and articles of association or constitution, as the case may be, and all regulatory and corporate authorizations and consents required in connection with the execution, perfection, delivery and performance of this Guarantee have been obtained and are in full force and effect and all conditions of each such authorization and consent have been complied with."*
>
> *"17.1 (iv) Government Consents and Actions: All acts, conditions and things, which are necessary or advisable to be done, fulfilled or performed in connection with (i) the execution, delivery or performance of the Guarantee; (ii) the legality, validity and enforceability hereof: and (iii) the admissibility in evidence of this Guarantee have been duly done, fulfilled and/or performed and are in full force and effect."*

Besides on an affidavit of Mr. Asok Kumar Goswami, the erstwhile director of Corporate Debtor dated September 23, 2016, wherein it has been stated certified, declared and confirmed on behalf of the corporate debtor that the corporate debtor (IPCL) is a distribution licensee in terms of the WBERC Licensing Regulations and it is not required to the obtain the prior consent of WBERC for issuing the Deed of

Guarantee in accordance with terms thereof, Ld. Senior Counsel firmly submitted that, the respondent is estopped from challenging the subject Deed of Guarantee.

In the same context Ld. Sr. Counsel also referred to the statement made by the respondent in the Rejoinder to I.A. No. 648 of 2021, that:

> *'further, any benefit so accrued to the lenders of the Corporate 0Debtor would make the Applicant liable only for the unsatisfied amount of the claim of the lenders of the Corporate Debtor. The Applicant is legally entitled to take steps to reduce its liability as a Corporate Guarantor of the Corporate Debtor as any reduction in liability of the Corporate Debtor would concomitantly reduce the liability of the Corporate Guarantor too.'*

XI(7). Therefore, according to the Ld. Sr. Counsel, the debtor (IPCL) cannot now approbate and reprobate and after having categorically admitted that it is a corporate guarantor of the principal barrower MEL. In support of this plea Ld. Sr. Counsel placed reliance on the ruling in re, Deewan Singh v. Rajendra Pd. Ardevi, (2007) 10 SCC 528,

> *"47. There is another aspect of the matter which cannot also be lost sight of. The State not only in the earlier round of litigation but also before the High Court had taken a categorical stand that it had all along been ready and willing to act in terms of the provisions of Chapter X of the Act and appoint a Committee; it cannot take a different stand now."*

"51. The stand of the State in the earlier round of litigation was that the temple in question was a Hindu temple. This Court categorically opined that it is a Jain temple. The principles of res judicata, thus, would come into play. The State, therefore, cannot still contend that the temple in question is a Hindu temple. Before us, the Respondent Nos. 1 to 4 in Civil Appeal No. 4086-4089 of 2002 have raised a contention that it is a Hindu temple but we cannot permit the State or the said respondents to raise such a contention before us. We are bound by the earlier judgment. The issue cannot be permitted to be reopened nor we have any jurisdiction in these matters to do so."

In Satyan Kasturi v. State Bank of India, order dated 25.08.2022 in Company Appeal (AT) (CH) INS No.239 of 2022 by the Hon'ble NCLAT, Chennai, it was held Paras 4, 65, 68, 90, 92 & 99 that:

"4. The Learned Counsel for the Appellant contends that the Appellant is an `Australian National' and cannot guarantee an `Indian Debt', without prior permission from the `Reserve Bank of India', being secured thereto, in terms of Regulation 3A of the Foreign Exchange Management (Guarantees) Regulations, 2000."

"65. Before this `Tribunal', on behalf of the `Appellant/Personal Guarantor' of the `2nd Respondent/Corporate Debtor', it is contended that the `Appellant' being an `Australian Citizen' (Foreign National), holds a `Valid Australian Passport', bearing No. PB4816649 and that as per Comp. App (AT) (CH) INS No. 239 of 2022 Regulation 3A of the Foreign Exchange Management (Guarantees) Regulations 2000, a `Foreign National' cannot guarantee a `INR Denominated Debt' of an `Indian Company' without the permission of the `Reserve Bank of India', and in the instant case, the said permission / sanction was not obtained by the 1st Respondent/Bank. Therefore, it is the plea of the `Appellant' that the underlying guarantee is not `Valid', in the `eye of law', in terms of Section 23 of the Indian Contract Act, 1872."

"68. In the Counter, filed by the `Appellant/Personal Guarantor' as 1st Respondent, before the `Adjudicating Authority' to CP (IB) No. 401/95 of IBC/ HDB/ 2020 filed by the 1st Respondent / Bank had not whispered

about the `Regulation 3A of the Foreign Exchange Management (Guarantees) Regulations', 2000. Also, the plea of the `Contract(s)' being `Void', as per Section 23 of the Indian Contract Act, 1872, was not raised."

"90. In the instant case, the Statement of Account filed together with the Company Petition before the `Adjudicating Authority' proves that the `Sum' is due and payable by the `Personal Guarantor'. Added further, the execution of `Revival Letter' dated 10.08.2016 by the `Appellant / Personal Guarantor', acknowledging its `Liability', in respect of the `1st Respondent/Bank/Financial Creditor', after two years' from the date of `Execution of the Guarantee Agreement', acknowledging its `Liability' shows the `Subsistence of a Valid Guarantee Agreement'."

"92. The Appellant / Personal Guarantor had entered appearance before the `Adjudicating Authority' resting upon the Indian Address and as such, the `Appellant' cannot take a mutually contradictory and inconsistent stand, especially in the teeth of I & B Code, 2016, which is an inbuilt, and self-contained Code, overriding other laws. Viewed in that perspective, this `Tribunal' holds that the `Appellant' as a `Personal Guarantor' of the `Corporate Debtor', cannot wriggle out of his `Liability' under the `Guarantee Deed'."

"99. In the light of foregoing detailed deliberations, this `Tribunal' keeping in mind of a vital fact that the `Appellant'/`Personal Guarantor' of the `Corporate Debtor' (`1st Respondent in CP(IB) No. 401/95(IBC)/HDB/2020, was served with a `Notice' and in spite of opportunity provided, the same was not availed by him before the `Adjudicating Authority'), taking note of the fact that in CP(IB)No.407/7/HDB/2018, the `Corporate Insolvency Resolution Process' was ordered on 13.08.2019 against the `Corporate Debtor', based on the `principle of law' that the `Liability' of the `Appellant'/`Personal Guarantor' being co-extensive with that of the `Corporate Debtor' (`2nd Respondent'), the `Appellant'/`Personal Guarantor' (in the instant case), whether he resides in India or outside India, when a `Petition' is filed against him, as `Personal Guarantor' of the `Corporate Debtor', the `Adjudicating Authority', (`National Company Law Tribunal') has jurisdiction, in whose `territorial jurisdiction', the Registered Office of the `Corporate Person' is located, the right showered upon the `1st Respondent/Bank/Financial Creditor' under Section 95 (1) of the Code being an `independent' and `special proceeding', which can be invoked by the `Financial Creditor' (without any fetter), despite, availability of any

other `Fora', as per Section 60 (1) of the Code, the residence of `Personal Guarantor' is not taken into account when proceedings against `Personal Guarantor' are initiated, without any hesitation, comes to a consequent conclusion that the view taken by the `Adjudicating Authority', (`National Company Law Tribunal', Hyderabad Bench) in admitting CP(IB) No. 401/95 (IBC) /HDB/2020, is free from any legal flaws. Resultantly, the `Appeal' fails."

XI(8) Ld. Sr. Counsel further contends that, the subsequent withdrawal of IA 648/ 2021 will not wipe of the admission made as above. In support of this contention Ld. Sr. Counsel relied on the ruling in SREI Equipment Finance Limited v. Rajeev Anand and others, (2020) 9 SCC 623. Paras 3, 4 and 7 read as under:

"3. To this section 7 application, a counter affidavit was filed by the corporate debtor on 15.05.2017, in which it was stated that though Rs.35.66 crores have become due, yet a section 7 application was premature inasmuch as instalment payments that were agreed upon had not yet matured. It was on this basis that this first application was withdrawn by the appellant on 30.05.2017 with liberty to file a fresh application."

"4. A fresh application was filed on 04.08.2017, in which it was claimed that insofar as the 01.04.2016 loan was concerned, the figure of Rs.21.41 crores was still outstanding. The corporate debtor now filed a counter affidavit in which it denied this and stated that, as a matter of fact, from 2008 till date, an amount of Rs.65.60 crores have been repaid by it. A supplementary affidavit was filed by the appellant dated 06.06.2018 which, owing to technical defects, was rejected. A second supplementary affidavit of 03.08.2018 was therefore filed, replacing this affidavit, in which it was explained that, as a matter of fact, the corporate debtor has made payment of Rs.18,86,00,000/- on 13.04.2016 and 16.04.2016, and thereafter of Rs.16,80,62,000/- from 05.07.2016 and 19.07.2016, as would be evident from pages 11 & 12 of the counter affidavit filed on behalf of the corporate debtor. Thus, the sum of Rs.35,66,62,000/- which has been paid by

the corporate debtor to the appellant is on account of its previous outstanding of Rs.35,66,61,986/- which was outstanding on the part of the corporate debtor as on 31.03.2016 as was unconditionally and unequivocally admitted by the corporate debtor in its counter affidavit filed by it in the prior proceeding (I.B. No. 54(PB)/2017). A sum of Rs.18,86,00,000/-, disbursed to the corporate debtor by the appellant on 01.04.2016, is still due and payable to it."

"7. We have heard learned counsel for the parties, including the parties in Civil Appeal No.1911 of 2020 and Civil Appeal No.3112 of 2020. A bare reading of the NCLT order shows that it is only after a perusal of the documents, pleadings, and the supplementary affidavit of 03.08.2018, including the counter affidavit in the earlier section 7 application, that the NCLT came to the conclusion that a loan amount remained outstanding. The NCLAT, when it dealt with the NCLT order, wrongly recorded that documents which were already rejected by the adjudicating authority could not have been the basis of the order of admission. The NCLAT also wrongly recorded that there was no further evidence in support of the fact that any amount was outstanding. Further, the NCLAT also held that a 'document' filed in the earlier petition that was dismissed as withdrawn could not have been relied upon by the adjudicating authority. The NCLAT is wrong on all these counts. As has been stated earlier, documents evidencing an outstanding loan amount were produced; a supplementary affidavit dated 03.08.2018 was also relied upon; and the admission made in the counter affidavit that was made in the first round of litigation, can by no means be described as a 'document' in an earlier petition that could not be relied upon. The 'document' was not a pleading by the appellant – it was a counter affidavit by the corporate debtor in which a clear admission of the debt being outstanding was made."

XI(9). On withdrawal of the Commercial Original Suit bearing No. 266 of 2017 filed before the Hon'ble Additional Chief Judge cum Commercial Court at Hyderabad, on 02.04.2019, where in the present corporate debtor had challenged the enforceability of the corporate guarantee as not pressed by without obtaining the liberty

specified under Order XXIII Rule 1(3) of the CPC, Ld. Sr. Counsel contends that the respondent is estopped from questioning the validity of the Deed of Guarantee again before this Hon'ble Tribunal.

XI(9) According to the Ld. Sr. Counsel, it is an undisputed fact that the Deed of Guarantee has been challenged by the corporate debtor only after MEL defaulted and the corporate debtor's liability was crystallized as the corporate debtor has chosen to approach the WBERC and not before. Learned Senior Counsel submits that thrice the corporate debtor has approached WBERC, and on two previous instances, the corporate debtor conveniently suppressed the fact that it had already given the guarantee in favor of the financial creditor. Therefore, if the corporate debtor was indeed of the view that giving of guarantee required WBERC approval, it could have gone to WBERC before executing the Deed of Guarantee and not after the same has been executed and only after this Tribunal had issued notice in the present Section 7 Petition.

XI(10) Ld. Sr. Counsel would further contend that, after taking thousands of crores from lenders on the basis of the guarantee, the

corporate debtor surreptitiously approached WBERC in 2017, seeking a generic permission without disclosing to WBERC about execution of the guarantee in 2016 itself. Ld. Counsel, further contends that, despite knowing fully well that the order of WBERC was appealable before APTEL, as per Section 111 of the Electricity Act, 2003, did not choose to Appeal the same but kept approaching WBERC again and again.

XI(11). Ld. Sr. Counsel further states that at any rate since WBERC did not declare the guarantee as void, the corporate debtor is bound by the terms of the corporate guarantee. At the same time, Ld. Sr. Counsel firmly, contends that absence of WBERC approval cannot make the guarantee null and void as both the Electricity Act, 2003 and WBERC Regulations envisage only penalty on the regulated entity for failure to obtain prior consent before issuing a guarantee since it is established principle of law that failure to take prior approval does not invalidate the contract itself and for violation of a provision when only penalty has been prescribed, as such the corporate guarantee remain intact and enforceable notwithstanding violation if any of the WBERC Regulations.

XI(12). In this regard, ld. Sr. Counsel relied on the following

provisions under the WBERC Regulations of the Electricity Act, 2003 ("Electricity Act"), which are extracted hereinbelow:

> *"Regulation 5.19.1 The Licensee shall be liable for action under the provisions of the Act, Rules, Regulations, Codes, Standards and Condition of license in appropriate cases for contravening any one or more of the provisions of the license including but not limiting to investigation, penalty, prosecution, revocation of license, amendment of license, appointment of administrator, sales of assets and or any other measure in accordance with the provisions of the Act, Rules, Regulations, Codes, Standards, etc. as the Commission may deem fit. "*
>
> *"Section 142. Punishment for non-compliance of directions by Appropriate Commission: In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the*
>
> *Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without , prejudice to any other , penalty to which he may be liable under this Act, such, person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing ~ failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction."*

Therefore, according to the Ld. Sr. Counsel as there is no provision in the WBERC Regulations which grants power to WBERC, to vitiate the corporate guarantee given by its Licensee, failure of the corporate debtor to obtain the requisite approvals (if IPCL was of the opinion that such approval was required) would not vitiate the subject Deed of Guarantee.

In this regard Ld. Sr. Counsel relied on the ruling of Hon'ble Supreme Court in Bank of India Finance v. Custodian, (1997) 10 SCC 488 wherein it was held that,

"failure to take prior approval does not invalidate the contract itself."

As regards the extensive reliance placed on Section 23 of the Indian Contract Act, 1872 , by the corporate debtor, to state that the Deed of Guarantee is invalid by relying on the ruling in Mannalal Khetan & Ors. v. Kedarnath Khetan & Ors. (1977) 2 SCC 424 and Asha John Divianathan v. Vikram Malhotra 2021 SCC OnLine SC 147, wherein it was held that, ' the agreements are void if their performance, though not prohibited in the statute, would result in a penalty', Ld. Sr. Counsel contends that the aforesaid cases are not applicable in the present case as they do not deal with the third party rights of the lender wherein the guarantor had represented to the lenders that it was duly authorized to execute the guarantee and subsequently challenged the guarantee on the ground of lack of approval. Ld. Counsel would further contend that the corporate debtor cannot be allowed to take advantage of its own wrong.

As regards the plea of the corporate debtor, that it cannot be admitted

into CIRP because its assets are regulated, ld. Sr. Counsel contends that, there is nothing in the Electricity Act or the WBERC Regulations which prohibit initiation of insolvency proceedings against companies with regulated assets. According to the Ld. Sr. Counsel, in any case, Section 238, IBC prevails over any other laws, including the Electricity Act.

XI(13) Reliance in this regard has been placed on the ruling in Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 and also, on Pashchimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat Private Limited, Civil Appeal Nos. 7976 of2019, 2023 SCC OnLine SC 842.

Ld. Sr. Counsel, submits that the 'onus' to obtain approval for giving guarantee lies upon the guarantor and that not taking such permission cannot be used to its advantage by the guarantor. A regulated entity cannot plead ignorance of law as an excuse. Failure to obtain such permission cannot now be used by IPCL to its own advantage to renege from its obligation. Furthermore, according to the learned Senior Counsel it is pertinent to note that IPCL has consistently demonstrated a pattern of abuse of the process of law by adopting different pleas

before different Forums in an attempt to invalidate the Deed of Guarantee, which it had executed willingly and with eyes wide open.

XI(14) According to the Ld. Sr. Counsel, in the following rulings, it has been held that lack of approval in furnishing a guarantee does not invalidate the guarantee and does not absolve the guarantor from its debt servicing obligations.

- Eurometal Limited vs. Aluminium Cables and Conductors (U.P.) P. Ltd, [1983] 53 Comp Cas 744 (Cal) at Paras 9 and 10, wherein it was held that:

PARA 9:

> *"9. Mr. S.B. Mukherjee, appearing with Mr. S. Baherjee, for the company, submitted that there are three conditions of the contract as set out in para. 7 of the contract, that is (1) approval of the Reserve Bank of India, (2) realisation in India of the export proceeds in full by the company, and (3) successful completion of the contract. Mr. Mukherjee submitted that those conditions are not fulfilled in this case as there is no permission for a remission of the alleged debt due to the petitioning creditor by way of commission as claimed in the winding-up petition and the statutory notice. Secondly, the contract was not fully performed and, therefore, the export proceeds cannot be said to have been realised in full, and, thirdly, the contract was not completed as part of the goods were not delivered by the company. In my view, the said submissions are not only a desperate attempt on the part of the company trying to confuse the real facts and issue before the court, as, from the documents exchanged between the parties, it appears that the company agreed to pay and remit the amount to the petitioning creditor as the agent through whom the said contract with WAPDA was finally entered into by the company for supply of the goods after obtaining permission from the Reserve Bank of India. It was the duty and it was also incumbent under the law, that is the F.E.R. Act and the*

Rules made thereunder, for the company to make the necessary application for permission for remitting the said amount to the petitioning creditor. The company cannot take advantage of its own default and set up the said plea of absence of permission of the Reserve Bank of India. Secondly, it is admitted that the company has realised the price of the goods supplied in full so far as the portion of the contract was executed and it also appears from the correspondence disclosed in this proceeding, that by mutual consent the balance quantity of the contract between the company and the WAPDA was not delivered and the contract was treated as concluded by performance in part and, therefore, prima facie all the three conditions are fulfilled in this case. Thereafter, Mr. Mukherjee submitted that the statutory notice under Section 434 of the Companies Act, 1956, is defective as the claim is made in dollars and no specific amount in rupee has been stated. In my view, there is no substance in the said contention as the said equivalent amount can easily be determined by calculating the amount at the prevailing exchange rate of dollar in rupee. And lastly, Mr. Mukherjee submitted that the debt is not presently Payable as the permission of the Reserve Bank of India under the F.E.R. Act is necessary. That again is also fallacious as the liability of the petitioning creditor, specifically in unequivocal terms, has been accepted by the company by issuing the credit notes in favour of the petitioning creditor as is recorded in the company's letter dated the 29th of April, 1978, which was payable to the petitioning creditor by remittance to be made by the company after obtaining the necessary permission from the Reserve Bank of India. If the company has failed to apply for the necessary permission and obtain the same in due course, that does not mean that the debt is not presently payable. It is due to the default of the company that such a situation has arisen and it is an elementary principle that nobody can take advantage of his own default. Therefore, it cannot be contended now by the company that the debt is not presently payable having not produced any document before this court to show that it made an application before the RBI under the F.E.R. Act for the remittance of the commission payable to the petitioning creditor, under the said contract between the parties, which is admitted. It is evident that the said plea raised by the company is not only frivolous, fallacious but lacks in commercial morality and involves a question of international commercial transactions, having impact on the public interest which the court should always zealously safeguard for upholding the national prestige in the international commercial transaction. Lastly, Mr. Mukherjee submitted that there is no allegation of insolvency in the winding-up petition but, in my view, that is also not a correct reading of the winding-up petition which in no uncertain terms in para. 18 has alleged that the company is in involved circumstances and it is just and equitable to wind up the company and it is also admitted that the notice under Section

434 of the Companies Act, 1956, has been duly served on the company and in spite of such service, the company has neither taken any step for making payment of the amount after obtaining the necessary permission of the Reserve Bank of India nor produced any material before this court that it has ever applied for the Reserve Bank of India's permission which has been refused. It also appears that the company has not given any reply to the statutory notice served on the company by the petitioning creditor's advocate-on-record being the letter dated 3rd/4th January, 1979, being annex. F to the winding-up petition."

PARA 10:

"10. In these circumstances, I am of the view that the company has not raised any bona fide dispute to the claim of the petitioning creditor and, there is no bar in presenting this winding-up petition by the petitioning creditor as the debt due to the petitioning creditor is admitted by the company and the company itself has created the difficulty by its own default in not obtaining the necessary permission of the Reserve Bank of India as it had specifically undertaken, in the correspondence mentioned hereinbefore, being the letters dated the 22nd of January, 1977, and 29th of April, 1978, addressed to the petitioning creditor and its Indian agent respectively. The amount of the debt due is admitted and because the same is expressed in dollars, that does not convert an undisputed debt to a disputed debt on bona fide ground and, lastly, it appears that the company has performed the contract and abandoned a portion of the contract by mutual consent of the WAPDA and there is no dispute that the company has realised the amount from the WAPDA against the letter of credit opened by WAPDA in respect of the said contract which was admittedly negotiated and entered into through the agency of the petitioning creditor and its Pakistani and Indian agents, as would appear from the correspondence set out before. Therefore, the present winding-up petition being a statutory right for the winding-up of an insolvent company which is Unable to pay its debt in spite of statutory notice being served for public interest, there is no bar in entertaining the winding-up petition. The winding-up petition is not ordinarily a case for realisation of the dues, even a suit for realisation is maintainable, but no decree can be passed and executed in favour of a foreigner without obtaining the permission of the Reserve Bank of India. Therefore, at this stage, the question of permission of the Reserve Bank of India for the payment of the debt due to the petitioning creditor cannot and does not arise. That will only arise if the company is wound up and the assets of the company are realised by the liquidator in the administration of the company in winding-up. Therefore,

there is no substance or any merit in the contentions raised by the respondent-company in this winding-up petition and, at this stage it cannot be said that the winding-up petition is an abuse of the process of the court. On the other hand, the company appears to be lacking in commercial morality and infringing the norms of international commercial transactions and trying to take advantage of its own default. Therefore, it must be held that the company is unable to pay its debts at this stage."

The company entered into a contract with a creditor wherein the company agreed to pay an amount to the petitioning creditor after obtaining permission from the Reserve Bank of India. Subsequently, the petitioning creditor field a winding up petition and the company challenged the same on the ground that the debt is not payable as the approval was not taken. The Hon'ble Calcutta High Court held that the company had admitted its debt in correspondence and had itself created the difficulty by its own default in not obtaining the necessary permission of the Reserve Bank of India as it has specifically undertaken in the underlying contract. In view of the same, the Hon'ble court admitted the winding-up petition;

- In Vanguard Textiles Limited v. GHCL Ltd, Company Petition No. 20 of 2009. At Paras 6, 7 & 10 of order dated 26.08.2009 of the Hon'ble High Court of Gujarat, it is held that:

PARA 6:

"6. Therefore, prima facie it appears that the action by the supplier for commencing the proceedings against the Guarantor in any Court of the competent jurisdiction is not barred. If the respondent Company is registered in Gujarat, this Court can be said as that of the competent jurisdiction for entertaining of the proceedings of the winding up. Therefore, prima facie, the contention raised on behalf of the respondent cannot be said as acceptable for ousting the jurisdiction of this Court on a mere ground that the cause of action pertaining to the supply or the delivery or the guarantee had not arisen in India.

PARA 7:

7. The next contention raised by Mr.Sanjanwala was that the Deed of Guarantee is without prior approval of RBI as per the provisions of the Foreign Exchange Management Act, 1999 (hereinafter referred to as 'FEMA'). Therefore, the Deed of Guarantee is non-enforceable in India. It was submitted that if the Deed of Guarantee is non-enforceable in India in absence of the permission of the RBI, the same cannot be invoked nor any liability based on the same can be enforced in Indian Courts by the petitioner.

PARA 10:

10. It deserves to be recorded that as per the Decree of the Court of UK, the process is served, but the respondent Company has not defended. It may be that the decree is not on merit after dealing with each and every contention of the plaintiff, but thereby, it cannot be said that there is no foreign judgement against the respondent Company. After having being served the statutory notice by the petitioner, nothing prevented the respondent Company for filing the suit for a declaration that the decree is not binding, but such option available has not been exercised. Further, when there is a decree/judgment of a foreign Court for fastening the liability, it cannot be prima facie said that there would not be any liability at all of the respondent. In any case, the aspects of non-enforceability may be required to be considered in execution proceeding, if resorted to, but such cannot be a sole ground to deny the entertainment of the petition for winding up of the Company on the basis of such liability. The reference may be made to the decision of the Andhra Pradesh High Court in the case of Enernorth Industries Inc. Vs. VBC Ferro Alloys Ltd. reported at [2006] 133 Comp Case 130 (AP), more

particularly the observations made at para 34 and 35 that merely because the other modes are available, it cannot be said that the petition for winding up is not maintainable."

In SRM Exploration Pvt. Ltd v. N and S and N Consultants S.R.O, 2012 (129) DRJ 113. At Paras 13 and 14 of Order dated 21.03.2012 in Co. App. No.23-24 of 2011 of the Hon'ble High Court of Delhi it is held that:

PARA 13:

"13. The pleadings of the appellant Company are conspicuously silent as to why Mr. Ravi Chilukuri who has a substantial stake in the appellant Company and who from the documents filed by the respondent is the face/promoter of the appellant Company and/or of the Group of Companies to which the appellant Company belongs signed the Guarantee Declaration, Promissory Notes and as to how the Resolution aforesaid of the Board of Directors of the appellant Company landed with the respondent. Similarly, though it is contended that comfort letter aforesaid issued by the Bankers of the appellant Company does not refer to the transaction in question but there is no explanation as to for which transaction it was obtained from the bank. The appellant obviously had a stake in the Stock Purchase and Sale Agreement (supra), for the appellant Company to stand guarantee for the same. The world is a shrinking place today and commercial transactions spanning across borders abound. We have wondered whether we should be dissuaded for the reason of the transaction for which the appellant Company had stood surety/guarantee being between foreign companies. We are of the opinion that if we do so, we would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions."

PARA 14:

"14. As far as the argument of appellant Company of the purchasers under the aforesaid Stock Purchase and Sale Agreement being not before this

Court and of denial of the knowledge of default, is concerned, certainly the appellant Company which had stood guarantee for the purchaser i.e. M/s Newco Prague s.r.o. would be in the know as to whether the purchaser has paid the price or not. If the purchaser was not in default, that would have been the first plea of the appellant Company against the petition for winding up. No such plea has been taken. On the contrary advantage is sought to be taken of technicalities and which cannot be permitted. We are also of the view that the appellant Company by allowing Mr. Ravi Chilukuri to be shown in all its material available on the internet as a promoter of the appellant Company, cannot now be heard to deny his authority. The Resolution of the Board of Directors executed in his favour is of the widest possible amplitude. If the Board of Directors of the appellant Company were intending to confer restricted authority on Mr. Ravi Chilukuri it was for them to in the Resolution so clearly restrict his authority. On the contrary by passing the Resolution in such a manner it was conveyed to all concerned that the appellant Company would be bound by the actions of Mr. Ravi Chilukuri. Similarly the plea that Mr. Ravi Chilukuri was authorized to act jointly with Mr. Mohinder Verma is devoid of any merit. The language of the Resolution, if that had been the intention, would have been different. Also, though a lip service is sought to be paid by filing a copy of the complaint lodged with the Police against Mr. Ravi Chilukuri but no serious action for the folly if any committed by him has been taken. There is nothing to show that the Board of Directors of the appellant Company has dealt with the matter. Mr. Ravi Chilukuri who continues to be associated with the appellant Company has not come forward to explain the transaction. The Supreme Court in N. Rangachari v. BSNL (2007) 5 SCC 108 has held that a person normally having business or commercial dealing with a company will satisfy himself about its credit worthiness and reliability by looking at its promoters and Board of Directors and nature and extent of its business; other than that he may not be aware of arrangements within the company in regard to its management etc."

- Sandeep Kasare v. IL & FS Financial Services Ltd & another, judgement dated 20.09.2022 in Company Appeal (AT) (Insolvency) No.468 of 2022 by Hon'ble NCLAT, Principal Bench, New Delhi. In paras 9 and 13 it is held that:

PARA 9:

> *"9. Now we come to the first submission of the learned Counsel for the Appellant that Letter of Guarantee having not been sufficiently stamped could not be looked into for any purpose. The learned Counsel for the Respondent, although, contended that the Letter of Guarantee contains an E-stamp certificate, but have failed to prove that the Letter of Guarantee was sufficiently stamped as per requirement of the statute. The E-stamp, which is at Exhibit-C to the reply, only indicates that the Rs.150/- has been affixed. We, thus, proceed on the premises that Letter of Guarantee is not sufficiently stamped."*

PARA 13 :

> *"13. Further, in the reply, Charge Certificate dated 09.03.2018 issued by Registrar of Companies, Mumbai has been brought on record, which certifies creation of Charge dated 29.12.2017 between G.C. Property Private Limited (First Party) and IL&FS Financial Services Limited (Second Party). Charge having been registered by the Corporate Debtor himself, the Corporate Debtor cannot escape from its liability for payment of loan as per its own act of creating mortgage by deposit of Title Deed and registration of Charge. It is further relevant to notice that in the Offer Letter dated 27.12.2017, as extracted above in 'Security Package', where Primary Security was Flat No.6 and it was noticed in the Offer Letter itself that the valuation of Flat is Rs.300 million, i.e., equivalent to the Financial Facility, which was to be extended to the Principal Borrower. We, thus, are of the view that the Corporate Debtor cannot escape from its liability from repayment of the loan sanctioned to the Principal Borrower on the ground that Letter of Guarantee was insufficiently stamped."*

- Mauritius Commercial Bank v. Varum Corporation Ltd., 2017 SCC Online NCLT 2424, wherein NCLT, Mumbai Bench held in para 11 that:

PARA 11:

> *"11. The basic thing that one should not get lost sight of the fact is that a*

wrong doer should not take advantage of its own wrong, here this corporate Debtor is indeed under obligation to make post facto intimation to RBI, not only this, it appears that this corporate debtor knowingly has given guarantee to the loan obligation more than 400% of its net worth, fact of the matter is, this loan money has not been utilised for investing in its subsidiary RPML located in Mauritius, but clawed out to one of its group company situated in India through the route of equity. After all these mischievous acts of the debtor, can today this debtor back out from the promise of guarantee given to a loan availed by its wholly owned subsidiary of it? Hundred percent subsidiary means what, the acts of subsidiary are nothing but acts based on the wish of the holding company. Where this loan money has gone? It has gone to one of its group companies. If at all this approval from RBI has to be obtained prior to obtaining loan or execution of Corporate Guarantee, then it may be said that the guarantee dehors intimation is bad, in this case, it is only a post facte intimation, not making such intimation will not vitiate or frustrate the agreement or rights of the creditor. Why it has not gone to RBI, we can't make any guess work on it, but it is a fact that this debtor sent a letter on 29.3.2009 to the creditor Bank stating that corporate debtor already sent post facto intimation to the RBI by sending a letter addressed to Bank of Baroda to the creditor Bank to make them believe that execution of guarantee agreement to this loan has been intimated to the RBI. May be the debtor has not put its efforts to see it reached to the RBI because guarantee is more than its limits. Since this duty is cast upon the Corporate Debtor to intimate to RBI about giving guarantee, the person, done wrong by not ensuring intimation reached to the RBI, today cannot come out with a defense stating since intimation has not reached to the RBI, the liability arising under this agreement is not enforceable against the corporate debtor. Therefore, we have not found any merit saying that not sending intimation to RBI about execution of guarantee will make this transaction invalid. No law says a person made a gain out of a transaction can vilify the same saying by so and so glitch in the law he has become free from the obligation owed upon him. More so, even if any transaction is irregular in the teeth of any regulation, mere irregularity per se will not make an act illegal."

Since the duty was cast on the corporate debtor to intimate the RBI about giving the guarantee, and as the corporate debtor failed to give such intimation, it cannot take the plea that the guarantee was invalid

on account of the lack of RBI intimation;

- Baobab Brodband Ltd. v. Gemini Communication Ltd, NCLT, Chennai Bench vide order dated 20.06.2018 In CP No.699/ (B)/ CB/ 2017. In Paras 12 and 13 it is held that:

PARA 12:

> *"12. On the issue that there is no sanction/approval of RBI due to which the 'Corporate Guarantee' in question is not enforceable is stated to be wholly vague and baseless because as per Article 3 of the Loan Agreement, the Corporate Debtor/Guarantor assured the Financial Creditor of its ability to provide such Guarantee in accordance with the applicable law and regulations. Therefore, the Corporate Debtor/Guarantor cannot hide itself behind its own failure to obtain any required approval to wriggle out of its liability or consequences of default."*

PARA 13 :

> *"13. It has further been stated that the failure on the part of the Corporate Debtor/Guarantor to obtain such approval, does not impinge upon the validity of the Guarantee issued. The Financial Creditor has relied upon the judgment of Hon'ble High Court of Delhi given in SRM Exploration (P.) Ltd. vs. N & S & N Consultants SRO 2002 (129) DRJ 113 (DB). The Financial Creditor has also controverted the objection with regard to the period of limitation by relying upon the rulings given by Hon'ble NCLAT in Neelkant Township & Construction (P.) Ltd. vs. Urban Infrastructure Trustee Ltd. [CA (AT) No. 44 of 2017] , wherein the Hon'ble NCLAT has held that I&B Code, 2016 does not suggest that the Limitation is applicable to the Code."*

Hon'ble NCLAT held that since the corporate debtor/ guarantor had assured the financial creditor of its ability to provide the guarantee in

accordance with the applicable law, it cannot now hide behind its failure to obtain any required approval to wriggle out of its liability or consequence of default;

- Punjab National Bank v. M/s Superior Industries Limited, order dated 23.03.2023 in IA No.604/ND/ 2021 in CP (IB) No.1032/ ND/ 2018, by NCLT, Court VI, New Delhi. Paras 15 and 17 read as under:

PARA 15:

> *"15. The next issue raised by the Corporate Debtor is about legality of Guarantee due to the fact that there was no approval of RBI /FEMA. In the matter of Hon'ble High Court of Justice, Business and Property Court of England and Wales, Commercial Court (QBD) in Claim no CL-2017-000569 in Claim no CL-2017-000569 which was filed by the Corporate Debtor against the Financial Creditor, Mrs. Justice Cockerill has made following observations with respect to this issue: -*
>
> > *54. The issue really relates to the alleged invalidity of the guarantees if the guarantees are invalid there is no claim under them and this would be a good defence.*
> >
> > *55 This is a matter of Indian law evidence. However, what emerges from this evidence is that there is a dispute. It appears to me to be a real dispute. Mr Thacker says they were invalid when executed and 1 Agency Relationship of PNB (India) with PNB (International) Limited. 2 Authorised dealer being PNB (India). 22 I.A. 604/2021, 1552/ND/2021, 1553/ND/2021 (IB)– 1032/(ND)/2018 continue to remain invalid until the RBI grants permission (Known as post facto approval). Mr. Setalvad says they were valid at the time they*

were Signed and post facto approval can be obtained. 56 For all Ms. Vora's submissions that the Claimants argument faces enormous difficulties given the fact of the problems transferring money to the Claimants, it appears to me on the material before me to be well arguable that the Bank is right on this point. It is not fanciful to say that the guarantees would be valid. It is very far from that. Furthermore, I am strongly of the view that the question: could not even arise as regards the first Vishal guarantees which are governed by English law. I would also incline to the view that the point could not apply in relation to the second' Vishal guarantees; essentially for the reasons; outlined in the claimant's skeleton argument as to the implied proper law. While there is no express governing law clause, there would appear to be a strong argument that the second Vishal guarantees. are governed by English law.

58. It is not the case of the Applicants that the guarantee was unlawful or illegal per se. It was possible to perform the guarantee in a legal way so there cannot possibly either be a Foster v Driscoll point; where you have the complementary principle that if somebody intends to do something-illegal it is caught and is not capable of being enforced. So, essentially, for those reasons, I form the view that the "serious issue to be tried" hurdle is surmounted.

In summary the Court is of the view that both the Guarantees are governed by English Law and since the Guarantee is governed by English Law the question of illegality due to Indian Law i.e., FEMA does not arise. The Corporate Debtor has raised this objection that even if the submission of the Corporate Debtor is taken, the Corporate Debtor alleged that there is a violation of Regulation 5(d). Regulation 5(d) of the FEMA act is reproduced as under: -

5[d] a bank which is an authorised dealer may, subject to the directions of Reserve Bank in this behalf, permit a person resident in India to issue corporate guarantee in favour of an overseas lender or security trustee to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 (Notification No. FEMA 3/2000-RB, dated 3-5-2000).

The Corporate Debtor has relied on this Regulation however, the Corporate Debtor failed to show that how this Regulation violates Regulation 5(d) of FEMA. Since Regulation 5(d) deals with external commercial borrowing and in our understanding external commercial borrowing are commercial loans raised by eligible Indian resident entities from a foreign entity. However, in the present case the principal borrower and to whom guarantee was given was a foreign entity incorporated outside India i.e. in Mauritius. However, from the letter dated 11.12.2015`` it appears that RBI permission is required even for Corporate Guarantee to be given by an entity based in India in favor of an entity incorporated outside India which has borrowed monies from an overseas lender. It may well be covered under some other regulations/ guidelines issued by the RBI which have not been brought to our notice. Even if we assume that the Regulation as quoted above is applicable even then that would not make the Corporate Guarantee invalid. It is pertinent to refer to judgement of Hon'ble Delhi High Court in the matter of SRM Exploration Pvt. Ltd vs. N and S and N Consultants S.R.O. (21.03.2012 - DELHC): MANU/DE/2056/2012 wherein it was held that Corporate Guarantee is not void only due to violation of FEMA. Para 11 of the aforesaid judgement is reproduced as under: -

> *"11. We have perused the provisions of FEMA, 1999 Section 3 thereof prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein or under the Rules & Regulations framed thereunder without general or special permission of RBI. We are unable to find any provision therein voiding the transactions in contravention thereof. We may mention that the predecessor legislation to FEMA namely FERA 1973 vide Section 47 prohibited 25 I.A. 604/2021, 1552/ND/2021, 1553/ND/2021 (IB)–1032/(ND)/2018 entering into any contract or agreement directly or indirectly evading or avoiding any operation of the said Act or any provision thereof. However, Sub Section (3) thereof also provided that such prohibition shall not prevent legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due. However, the legislature while re-enacting the law on the subject has chosen to do away with such a provision. We are of the view that the same shows a legislative intent to not void the transaction even if in violation of the said Act. Thus, we are of the opinion that the plea of the appellant Company in this regard is without any force."*

Further in the matter of Eurometal Limited vs Aluminium Cables & Conductors, 1983 53 CompCas 744 Cal decided on 10 April, 1980, it was held that it was the duty of the company issuing the guarantee to take necessary permission from RBI/FEMA and the company cannot take advantage of its own default and set up the plea of absence of permission of the Reserve Bank of India. Relevant para of the aforesaid judgment is reproduced as under: -

> *4. Mr. S.B. Mukherjee, appearing with Mr. S. Baherjee, for the company, submitted that there are three conditions of the contract as set out in para. 7 of the contract, that is (1) approval of the Reserve Bank of India, (2) realisation in India of the export proceeds in full by the company, and (3) successful completion of the contract. Mr. Mukherjee submitted that those conditions are not fulfilled in this case as there is no permission for a remission of the alleged debt due to the petitioning creditor by way of commission as claimed in the winding-up petition and the statutory notice. Secondly, the contract was not fully performed and, therefore, the export proceeds cannot be said to have been realised in full, and, thirdly, the contract was not completed as part of the goods were not delivered by the company. In my view, the said submissions are not only a desperate attempt on the part of the company trying to confuse the real facts and issue before the court, as, from the documents exchanged between the parties, it appears that the company agreed to pay and remit the amount to the petitioning creditor as the agent through whom the said contract with WAPDA was finally entered into by the company for supply of the goods after obtaining permission from the Reserve Bank of India. It was the duty and it was also incumbent under the law, that is the F.E.R. Act and the Rules made thereunder, for the company to make the necessary application for permission for remitting the said amount to the petitioning creditor. The company cannot take advantage of its own default and set up the said plea of absence of permission of the Reserve Bank of India.*

We thus hold that even if RBI permission was required irrespective of the fact that the borrowing is by an entity 27 I.A. 604/2021, 1552/ND/2021, 1553/ND/2021 (IB)– 1032/(ND)/2018 based outside India that would not constitute an External Commercial Borrowing in India in terms of Regulation 5(d) of FEMA, it was the company

(Corporate Guarantor) which was required to make the necessary application for permission from RBI and other regulators The Corporate Debtor cannot take advantage of its own default and set up the said plea of absence of permission of the Reserve Bank of India. Further it is clearly stated in the agreement that this is a Guarantee of Indemnity and the consequences of signing the Corporate Guarantee which clearly says as under

> *"This is a guarantee and Indemnity. If the Principal does not repay the bank you may have to pay instead. You are strongly recommended to seek independent legal advice before signing".*

Relevant extract of schedule of the Corporate Guarantee is reproduced as under:

THE SCHEDULE
(The guarantors security)

Warning: This is a guarantee and indemnity. If the principal does not repay the Bank YOU MAY HAVE TO PAY INSTEAD. You are strongly recommended to seek independent legal advice before signing.

EXECUTED and DELIVERED as a Deed
By Superior Industries Ltd
Acting by Director and its Secretary or two directors.

Even after that the said Guarantee was signed by Authorised Signatory of Corporate Debtor after passing a resolution in its Board Meeting dated 18.07.2012. Now the Corporate Debtor cannot take this defense that the said Guarantee is void in the absence of approval of RBI/FEMA."

"17. In light of the above discussion, after giving careful consideration to the entire matter, hearing the arguments of the parties and upon appreciation of the documents placed on record to substantiate the claim, this Tribunal admits this petition and initiates CIRP on the Corporate Debtor with immediate effect.

18. The Corporate Debtor cannot take advantage of its own default and cannot challenge the corporate guarantee on the ground of absence of permission of the RBI."

- Yes Bank Limited v Zee Learn Limited, CP (IB) 301/MB/C-1/2022, at Paras 30, 46 55 & 58.

"30. The Deed of Guarantee dated 20.06.2016 being insufficiently stamped as per the provision of Maharashtra Stamp Act 1958, therefore cannot be looked into by this Tribunal. i. The stamp duty paid on the said document is only Rs.100. The Petitioner has brought the said document into the State of Maharashtra for the purposes of filing the present Petition against the Corporate Debtor. As per the requirement under section 19 of the Maharashtra Stamp Act, 1958 the said document or copy thereof (as the case may be) is required to be stamped in accordance with the Maharashtra Stamp Act, 1958. In the absence of such payment, such document cannot be looked into by this Tribunal. ii. The stamp duty payable on the aforesaid document in the State of Maharashtra is more than the stamp duty paid on the document in New Delhi. By virtue of Sections 18, 19, 33 and 34 of the Maharashtra Stamp Act, 1958, this Tribunal cannot act upon the IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-I CP (IB) 301/MB/C-1/2022 Page 28 of 50 Deed of Guarantee which is not sufficiently stamped as per the provisions of the Act and is bound to impound the said document and send the same to the appropriate authority who is required to deal with the same in accordance with Sections 37 and 39 of the Maharashtra Stamp Act 1958."

"46. Stamping: It is settled law that any adjudication on the issue of stamping is irrelevant and uncalled for in a Petition under Section 7 of the Code. Without prejudice to the aforesaid, it is equally well settled that a IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-I CP (IB) 301/MB/C-1/2022 Page 41 of 50 Petition under Section 7 of the Code can be founded even on an insufficiently stamped document. Thus, the plea raised by the Corporate Debtor is devoid of any merit and deserves to be rejected in limine."

"55. The Financial Creditor has placed on record valid deed(s) of guarantee entered into by the Corporate Debtor and Axis Trustees Services Limited, being the security trustee on behalf of the Financial Creditor, the Financial Creditor being the lender. Thus, as per the terms of the Deed(s) of Guarantee, in an event of default to repay the loan amount by the Borrowers, the Deed of Guarantee can be invoked by the Security Trustee or the Lender. Accordingly, on default by the Borrowers, the IN THE

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-I CP (IB) 301/MB/C-1/2022 Page 45 of 50 Financial Creditor has invoked the Deed of Guarantee. Hence, there is exists a valid debt."

"58. Apart from the above, the Corporate Debtor has raised various other defences, which have been considered by us, we do not find merit in it. There is no defence which can justify the rejection of the captioned petition."

Furthermore, the Hon'ble NCLT held that as long as the application made by the financial creditor is compete as required by law and the debt and default is established, there is no reason to deny the admission of the petition.

XII. As regards the reliance placed on the legal opinions in this case by the corporate debtor, Ld. Sr. Counsel, placing reliance on Section 91 of the Indian Evidence Act, 1872 which explicitly states that:

"no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself,"

submits that once a contract is executed such contract is the only relevant document. Ld. Counsel further contends that IPCL has deliberately and maliciously concealed and suppressed the fact that it also engaged a leading law firm and obtained opinion on the very issue

of WBERC permission. Thus, IPCL has itself taken its own independent legal advice from a leading law firm of the country and IPCL relied upon its own legal advice. Therefore, IPCL's allegation and reliance upon opinion that lenders obtained is absolutely misplaced and such practices and conduct of corporate debtors has to be strictly looked at and condemned.

According to the Ld. Sr. Counsel the doctrine of *pari delicto potior est conditio possidentis*, as pleaded by the Corporate Debtor is not applicable in the present case, as Mr. Asok Kumar Goswami, the erstwhile director of IPCL had also submitted an affidavit dated September 23, 2016 stating that the prior consent of WBERC for issuing the Deed of Guarantee is not required.

Last but not the least, the contention of the Ld. Sr. Counsel is that, both parties are sophisticated parties with equal bargaining power. The Corporate Debtor after availing a commercial opportunity to take over the Principal Borrower for just Rs 66, cannot now resile from its commercial obligations and claim that they had unequal bargaining power and were coerced into giving the guarantee. According to the

Ld. Sr. Counsel, if two sophisticated parties with equal bargaining power have entered into a contract willingly and such contract cannot be said to be tainted with illegality or unfairness or unreasonableness.

In support of this submission Ld. Sr. Counsel, relied on the following rulings.

- Central Inland Water Transport Corporation Limited vs. Brojo Nath Ganguly, AIR 1986 SC 1571 at para 89, wherein it was held that :

> *"89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all*

bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

- Phulchand Exports Ltd. vs. OOO Patriot, 2011 SCC OnLine SC 1368 at Paras 37 & 38, it was held that:

"37. The transactions covered by Section 23 are the transactions where the consideration or object of such transaction is forbidden by law or the transaction is of such a nature that, if permitted, would defeat the provisions of any law or the transaction is fraudulent or the transaction involves or implies injury to the person or property of another or where the court regards it immoral or opposed to public policy. Whether a particular transaction is contrary to a public policy would ordinarily depend upon the nature of transaction. Where experienced businessmen are involved in a commercial contract and the parties are not of unequal

bargaining power, the agreed terms must ordinarily be respected as the parties may be taken to have had regard to the matters known to them.

"38- The sellers and the buyers in the present case are business persons having no unequal bargaining powers. They agreed on all terms of the contract being in conformity with the international trade and commerce. Having regard to the subject-matter of the contract, the clause for reimbursement or repayment in the circumstances provided therein is neither unreasonable nor unjust; far from being extravagant or unconscionable. It is the precise sum which the sellers are required to reimburse to the buyers, which they had received for the goods, in case of the non-arrival of the goods within the prescribed time. More so, the fact of the matter is that the goods never arrived at the port of discharge. The Arbitral Tribunal has only awarded reimbursement of half the price paid by the buyers to the sellers and, therefore, the award cannot be held to be unjust, unreasonable or unconscionable or contrary to the public policy of India."

Thus, submitting Ld. Sr. Counsel prayed for an order of initiation of corporate insolvency resolution process against the respondent, by admitting this company petition.

XIII. Shri. Satish Parasaran, Ld. Sr. Counsel for the corporate debtor, while refuting the submissions and the contentions as put forth by the Ld. Sr. Counsel for the petitioner/financial creditor, submitted that, pursuant to the execution of the Share Purchase Agreement dated February 25, 2016, as amended, restated or modified from time to time ("Share Purchase Agreement") between M/s.Engie Group and IPCL for transfer of the shareholding of M/s. Engie Group in the Borrower, M/s

MEL, to IPCL, MEL has requested the Phase I Phase Lenders, inter alia, to consent to the change in the MEL's shareholding for exit of M/s. Engie Group to which the Phase I Lenders have agreed on the terms and conditions set out in the 'Existing Common Loan Agreement' and subsequently amended agreement dated September 23, 2016, for short "Amendment Agreement" which together with the original Common Loan Agreement, the Amended & Restated Common Loan Agreement and the Phase I Amendment Agreement be collectively referred to as the "Existing Common Loan, Agreement". Ld. Sr. Counsel would further contend that one of the conditions of the Amendment Agreement was that the Guarantor IPCL, shall give Corporate Guarantee in favour of the Phase I Security Trustee for the benefit of the Phase I Lenders and provide a guarantee and undertaking to secure the Guaranteed Obligations, which condition of providing corporate guarantee did not find place in the loan sectioned to MEL while M/s. Engie was the Promoter and the Clauses in the Amendment Agreement dated 23.09.2016 does not deal with **WBERC** Regulations and its effect.

Learned Sr. Counsel would further contend that, on 23rd September,

2016, after having acquired 95.02 per cent of shareholding of MEL from M/s Engie, the corporate debtor executed two deeds of corporate guarantee hereafter referred as "CS/CGs" guaranteeing repayment obligation of the barrower MEL to SBICAP Trustee and other lenders led by REC respectively.

Learned Senior Counsel further submits that IPCL also provided surety by pledge of 100 per cent shares held by it in MEL to SBI CAP Security Trustee Co. Ltd which held it for the benefit of the Lenders. SBI CAP Trustee was the Security Trustee for Phase 1 lenders and the Agent of REC which was the Security Trustee for Phase 2 lenders.

According to the Ld. Sr. Counsel, the corporate debtor being an electricity distribution licensee and a regulated entity governed by the WBERC and the Electricity Act, 2003, for providing any guarantee the corporate debtor is required to obtain prior approval of WBERC, hence the corporate debtor Vide letter dated 14.09.2016 intimated to REC that the Sanction Letter No. REC/CO/Gen./MEPL/2016-628 dated 28.07.2016 stipulated certain additional conditions, whether IPCL is required to take permission from West Bengal State Regulatory

Commission, under clauses of Licensee, if any, as IPCL acts as Distribution Franchisee, which were not discussed with IPCL/MEPL while preparing the IM, the compliance of which would be difficult/impossible/result in delay in consummation of the transaction.

Learned Senior Counsel further states that pursuant to the letter dated 14.09.2016, discussions over conference-call with Cyril Amarchand Mangaldas ("Legal Advisors", together with its written opinion) involving both the REC team and the Corporate Debtor were held. It was stated that IPCL was not required to obtain any specific consent from the regulator to provide CG (in the form as agreed upon) to lenders of MEPL, and as additional comfort to REC, the Corporate Debtor shall undertake that any surplus funds that were generated from the WBERC regulated asset, i.e. the funds remaining after meeting the requirements of the regulated business viz. after payment of statutory dues, capital expenditure, operating costs and debt servicing payments that were required to be made in relation to the WBERC regulated asset, would be utilized to make payments towards debt servicing obligations of the Company if a demand was made by Phase II Lenders ("Undertaking").

Learned Sr. Counsel further submits that thus, the corporate debtor having been expressly clarified by Legal Advisors that no approval of WBERC was required in respect of the above undertaking and that in accordance with the relevant REC guidelines, the project rating was IR 4 and that there was no requirement of a CG as such; however, as additional comfort/security taken together with 100% pledge of MEPL shares held by IPCL, the corporate debtor was persuaded by the lenders to submit the subject corporate guarantee on all assets other than WBERC regulated assets. Furthermore, with respect to WBERC regulated assets, it has been stated that, the corporate debtor shall provide an undertaking that any surplus funds that are generated from a WBERC regulated asset i.e. funds remaining after meeting the requirements of the regulated business viz, after payment of statutory dues, capital expenditure, operating costs and debt servicing payments that are required to be made in relation to the WBERC regulated asset, be utilized by IPCL to make payments towards debt servicing obligations of the company if demand was made by the Phase II Lenders.

In so far as the affidavit dated 23.09.2016 of Mr. Ashok Kumar

Goswami, Director of IPCL which declared and confirmed on behalf of IPCL that IPCL is a Distribution Licensee in terms of WBERC (Licensing and Conditions of License) Regulations, 2013 and that it was not required to obtain the prior consent of WBERC for issuing the Corporate Guarantee "in accordance with the terms thereof". the CGS were also signed on 26.09.2016, Ld. Sr. Counsel, contends that the same has been wrenched out from the said deponent.

Ld. Sr. Counsel, would further contend that, vide order dated 07.08.2017 the WBERC while deciding an application submitted by IPCL seeking permission to allow IPCL to issue Corporate Guarantee to the tune of Rs. 3345 crores to the lenders of MEL, a subsidiary of IPCL having generation activities outside the normal area of its distribution license under Regulation 5.13.2 of the WBERC Regulations,2013, concluded that the Debt Service Capacity of IPCL was stressed and the Corporate Guarantee if extended may attract a charge on the assets of IPCL in case of a default in debt servicing by MEL and subsequent inadequacy of security, if so arises, hence the financials of IPCL did not accommodate to extend a Corporate Guarantee to the lenders of MEL as prayed for against loan attributable

to a project beyond the distribution license area of IPCL under WBERC, which may attract a charge on the assets of IPCL used for supplying power to the consumers of electricity in the state of West Bengal. Hence, the corporate debtor vide letter dated 22.11.2017 much before the CIRP commencement date of MEL, communicated to the financial creditor, that the Corporate Guarantee given by them was non est, unenforceable and could not be given effect to because such Corporate Guarantee could not have been provided without prior approval of the Regulatory Authority and pursuant thereto, REC under its reply letter dated 01.12.2017 stated that during the disbursal of loan to MEL by the consortium of lenders, the corporate debtor had agreed and provided the subject Corporate Guarantee favour of the lenders for securing the said loan to MEL and it was further stated that the Guarantee Obligations of IPCL were related to Non-Regulated Assets and Surplus Amounts as defined under the Deed of Guarantee and therefore, the consent of WBERC was not required and also relied on the legal opinions confirming that no permission was required from WBERC for executing the guarantee given by IPCL and on the basis of such assurances IPCL had gone ahead and executed the guarantee

and that WBERC had nowhere in its order stated that the Corporate Guarantee could not have been issued for the benefit of the Phase II Lenders. It was further stated that IPCL had not disclosed to the WBERC that the IPCL Corporate Guarantee had been issued with respect to the Non-Regulated Assets and that IPCL had submitted a sworn affidavit that the IPCL Corporate Guarantee had been issued with respect to the Non-Regulated Assets. Furthermore, it was stated that IPCL had induced the phase II Lenders to extend financial assistance to MEL based on the representations and the IPCL Corporate Guarantee and the Corporate Guarantee even if it was not in compliance with the WBERC Regulations, was still valid and enforceable.

Learned Sr. Counsel, would further contend that, thereafter the corporate debtor had filed another application dated 26.10.2021 before the WBERC seeking WBERC's interpretation under Regulation 5.15.1 of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licence) Regulations,2013 as to whether prior consent under Regulation 5.13.2 of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licence), 2013

was required to be obtained by IPCL from WBERC before issuing the Corporate Guarantees dated 23.09.2016 to the concerned lenders even in respect of non-regulated assets and the WBERC was disposed of the same vide Order dated 22.12.2021 categorically holding that "prior consent in terms of Regulation 5.13.2 of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licence), 201 was required to be obtained from the State Commission before execution of the Corporate Guarantee."

Therefore, according to the Ld. Sr. Counsel, it is clear from the Order of WBERC dated 22.12.2021 that the Deed of Guarantee dated 23.09.2016 could never have been executed without the prior approval of the Hon'ble WBERC and since it had been executed without such prior approval, the same is non est, illegal and void.

Learned Sr. Counsel, would further contend that subsequently, MEL & the corporate debtor have filed a suit in the City Civil Court Hyderabad, (C.O.S. No. 266/2017) inter alia, praying for a declaration that the subject corporate guarantee corporate guarantee as null and void, however, after the Hon'ble High Court of Telangana granted

leave to the lenders to invoke Section 7 IBC, on 02.04.2019 the said suit was withdrawn and was disposed as not pressed. According to the Ld. Sr. Counsel, since the defendant financial creditor failed to file its Written Statement in the said suit the assertions of corporate debtor in the said suit stands admitted by virtue of the doctrine of non-traverse. Learned Sr. Counsel further submits that, the corporate debtor, also filed C.P. No. 660/242/HYD/2018 in NCLT, Hyderabad against the respondent Banks for the benefit and/or in the interest of MEL praying to restrain Respondent Banks from dealing with and/or appropriating monies of MEL lying in the Trust & Retention Account in any manner whatsoever pending adjudication of the present petition and for other reliefs, however during the pendency of the said company petition, CIRP against MEL has been ordered by the NCLT Hyderabad.

Learned Sr. Counsel further submits that SBI CAP Trustee vide letter dated 20.12.2017 demanded an amount of Rs. 93,57,91,585/- only as overdue from the corporate debtor by invoking the corporate guarantee dated 23.09.2016 and vide letter dated 07.02.2020 demanded an aggregate amount of Rs. 967,21,68,885.68/- as outstanding in respect of Phase I lenders and the same has been opposed by the corporate

debtor vide its letter dated 15.02.2020 stating, inter alia, that the banks no longer remained a lender/financial creditor to MEL as the entire debt of both Phase-I and Phase-II stood discharged pursuant to invocation of the pledged shares and subsequent transfer of 381,15,06,509 shares of MEL amounting to Rs. 6727 Crores to SBI CAP Trustee and claimed Rs. 3827.04 Crores being the excess amount directly recovered by SBI CAP Trustee without giving any credit to IPCL. Ld. Sr. Counsel states that after initiation of the CIRP process for MEL, all the lenders (Banks) filed their claims before the RP, which has been completely admitted by the RP, as evident from the list of the Creditors, which has been published at the website of MEL by the RP.

On the plea of estoppel pleaded by the financial creditor, Ld. Sr. Counsel submits that, the requirement under Regulation 5.13.2 of the 2013 Regulations, mandating a prior written consent from the WBERC being in public interest since the WBERC, being the regulator of the distribution licensee such as the Corporate Debtor is statutorily mandated to ensure that it does not take upon itself any kind of obligation which may have an adverse effect on its regulated business.

According to the learned Sr Counsel the present action under Section 7 IBC has the potential effect of affecting the entire assets of the Corporate Debtor including its non-regulated assets and Regulation 5.13.2 of the 2013 of the Regulations exactly seeks to prevent the same in public interest. Learned Senior Counsel submits that it is equally clear that the lenders, having complete knowledge of the mandatory requirement of obtaining prior consent under Regulation 5.13.2, had the Corporate Guarantee(s) written and got them issued in such a manner that defeats the very purpose of the Regulation 5.13.2 of the 2013 Regulations. It is settled law that any statutory provision visited by a penalty (Section 142 of the Electricity Act, 2003 provides a penalty) is a mandatory prohibition, the violation of which makes the contract of guarantee void. No amount of admission by the Corporate Debtor can cure such a defect whether it is IPCL's Director's Undertaking dated 23.09.2016 or pleadings in the MEL proceedings there being no estoppel against law/statute.

In support of this submission Ld. Sr. Counsel, relied on the decision of the Hon'ble Supreme Court of India in Municipal Corporation of Greater Mumbai v. Abhilash Lal, (2020) 13 SCC 234 held as under:

"In this regard, the Court notices the well-known principle that there can be no estoppel against the express provisions of law."

In Union of India v. Mohanlal Likumal Punjabi, (2004) 3 SCC 628 : 2004 SCC (Cri) 844 at page 632, it was held as under:

"9. In Uptron India Ltd. v. Shammi Bhan [(1998) 6 SCC 538 : 1998 SCC (L&S) 1601] it was held that a case decided on the basis of wrong concession of a counsel has no precedent value. That apart, the applicability of the statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law would invariably depend upon the scope and meaning of the provisions concerned and has got to be adjudged not on any concession made. Any such concessions would have no acceptability or relevance while determining rights and liabilities incurred or acquired in view of the axiomatic principle, without exception, that there can be no estoppel against statute."

Makali Engg. Works Pvt. Ltd. v. Dalhousie Properties Ltd., 2000 SCC OnLine Cal 512, it was held as under:

"46. Having regard to the various decisions cited at the Bar there cannot be doubt whatsoever that an admission made by the defendant cannot be permitted to be resiled or explained by filing an application for amendment but for the said purpose the nature of admission must also be considered. An admission made by a party creates an estoppel. It is admissible against him proprio vigore but it is also equally well-settled that there cannot be any estoppel against statute.

47. The status of the parties which has been granted by reason of a registered indenture and requires interpretation. For the purpose of arriving at a definite conclusion as regards their status an admission made in that regard would not be binding on the Court in view of the fact that interpretation of a document gives rise to a pure question of law. Despite an admission the defendant may raise a contention that the admission as regards his status was not legally tenable. Thus, a distinction must be made between an admission on fact and admission on law. Whereas a party cannot raise a question

or adduce evidence contrary to or inconsistent with a plea taken in his pleadings, he can do so in relation to a question of law."

Mayank Poddar v. Wealth Tax Officer, 2003 SCC OnLine Cal 63 : (2003) 9 AIC 320 : (2003) 262 ITR 633 it was held as under:

> *"9. Thus, unless the definition of 'net wealth' real with the definition of 'asset' as provided in section 2(m) and section 2(ea) respectively, include a building let out to a tenant used for commercial purposes, the same cannot be subjected to wealth tax. Even if the assessee had included the same in his return, that would not preclude the assessee from claiming the benefit of law. There cannot be any estoppel against statute. A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or on his misappreciation. If in law an item is not taxable, no amount of admission or misappreciation can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assessee. The department cannot rely upon any such admission or misappreciation if it is not otherwise taxable."*

Union of India and another vs VVF Ltd and another, (2020) 20 SCC 57 at para 21.5, the Hon'ble Supreme Court of India held that:

> *"21.5 In Shree Sidhbali Steels Ltd., in paragraphs 32 and 33, it has been observed and held as follows:*
>
> > *"32. The doctrine of promissory estoppel is by now well recognised and well defined by a catena of decisions of this Court. Where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 229 of the Constitution. The rule of promissory estoppel being an*

equitable doctrine has to be moulded to suit the particular situation. It is not a hard-and-fast rule but an elastic one, the objective of which is to do justice between the parties and to extend an equitable treatment to them. This doctrine is a principle evolved by equity, to avoid injustice and though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. For application of the doctrine of promissory estoppel the promisee must establish that he suffered in detriment or altered his position by reliance on the promise.

33. Normally, the doctrine of promissory estoppel is being applied against the Government and defence based on executive necessity would not be accepted by the court. However, if it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the court would not raise an equity in favour of the promisee and enforce the promise against the Government. Where public interest warrants, the principles of promissory estoppel cannot be invoked. The Government can change the policy in public interest. However, it is well settled that taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute. Thus, the Government or public authority cannot be compelled to make a provision which is contrary to law."

Thus, as held by this Court, when the public interest warrants, the principles of promissory estoppel cannot be invoked. It is further held that the rule of promissory estoppel being an equitable doctrine has to be moulded to suit the particular situation. It is not a hard-and-fast rule but an elastic one, the objective of which is to do Justice between the parties and to extend an equitable treatment to them."

In Indira Bai vs Nand Kishore, (1990) 4 SCC 668 at para 5, the Hon'ble Supreme Court of India held that:

"... Therefore, that which is statutorily illegal and void, cannot be enforced resorting to the rule of estoppel. Such extension of rule may

be against public policy…" And "…the distinction between validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter…"

In I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer, (1996) 6 SCC 634 (Para 30), the Hon'ble Supreme Court of India held that:

"The proposition urged by the learned counsel for the appellant falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well-settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to the rules of estoppel. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel."

Referring to the ruling in Sandeep Kasare v. ILFS & Anr., relied upon by the Petitioner, the Hon'ble NCLAT held as under:

"13. Further, in the reply, Charge Certificate dated 09.03.2018 issued by Registrar of Companies, Mumbai has been brought on record, which certifies creation of Charge dated 29.12.2017 between G.C. Property Private Limited (First Party) and IL&FS Financial Services Limited (Second Party). Charge having been registered by the Corporate Debtor himself, the Corporate Debtor cannot escape from its liability for payment of loan as per its own act of creating mortgage by deposit of Title Deed and registration of Charge. It is further relevant to notice that in the Offer Letter dated 27.12.2017, as extracted above in 'Security Package', where Primary Security was Flat No.6 and it was noticed in the Offer Letter itself that the valuation of Flat is Rs.300 million, i.e., equivalent to the Financial Facility, which was to be extended to the Principal Borrower. We, thus, are of the view that the Corporate Debtor

cannot escape from its liability from repayment of the loan sanctioned to the Principal Borrower on the ground that Letter of Guarantee was insufficiently stamped."

Ld. Sr. Counsel submits that, it was a case of agreement not sufficiently stamped which goes to admissibility as opposed to enforceability and no contention with regard to stamping had been raised by the Respondent and as such the said decision is wholly inapplicable in the present case.

According to the learned Senior Counsel, distinguishing Asha John Divianathan v. Vikram Malhotra & Ors.: (supra) by stating the finding was rendered in a judgment which arose out of a suit and the principle laid down therein cannot be applied in IBC proceedings is fallacious, since the said principle is a legal principle applicable to all legal proceedings including IBC proceedings and recognized at para 30 of Innoventive which states that,

"It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

On the contention that, IBC overrides the Electricity Act, 2003, learned Senior Counsel submits that the same is misconceived since the legal bar is not under the Electricity Act,2003 but the Indian Contract Act,1872 as there is no valid 'contract of guarantee' before this Hon'ble Adjudicating Authority in the first place. According to the Ld. Sr. Counsel, the application dated 26.10.2021 filed by the corporate debtor before the Hon'ble WBERC was disposed of vide Order dated 22.12.2021, whereby the WBERC held that,

> *"prior consent in terms of Regulation 5.13.2 of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licence), 201 was required to be obtained from the State Commission before execution of the Corporate Guarantee."*

In so far as the reliance on the decision of Paschimanchal Vidyut Vitran Nigam Limited v Raman Ispat Private Limited and Others , 2023 SS Online SC 842 is concerned, according to the Ld. Sr. Counsel, the same is equally misplaced since in the said case, the Hon'ble Supreme Court was pleased to hold that the statutory dues under the Electricity Act would not enjoy any priority over other creditors mentioned in Section 53 of IBC and to that extent the IBC overrides the Electricity Act, 2003. The said case was not dispositive of the issue which has fallen for

adjudication before this Hon'ble Adjudicating Authority i.e., whether there is any valid contract of guarantee in view of the wilful contravention of the WBERC Regulation rendering the guarantee an agreement unenforceable in law in light of Section 10 and Section 23 of the Indian Contract Act, 1872.

In so far as the ruling in Satyan Kasturi v. SBI & Ors., Company Appeal (AT) (CH) INS. 239/2022 relied upon by the Petitioner, Ld. Sr. Counsel submits that, as per the facts of the said case, the Appellant contended that he being an Australian National could not have guaranteed an Indian Debt without prior permission from the RBI in terms of Regulation 3A of the FEMA (Guarantee) Regulations, 2000. However, the Hon'ble NCLAT @ para 92 of the said judgment found that the Appellant entered appearance before the Adjudicating Authority resting upon an Indian Address and thus the Hon'ble Appellate Tribunal held that the Appellant cannot take mutually contradictory and inconsistent stand and "viewed in that perspective" held that the Appellant was a personal guarantor and cannot wriggle out of his liability under the guarantee.

Therefore, the said matter did not rest on an adjudication as to whether there was any debt arising under an invalid agreement which is not a

contract of guarantee at all in the first place, hence has no application to the case on hand.

XV. Ld. Sr, Counsel further submits that if the Corporate Debtor herein is admitted into CIRP, the entire assets of the corporate debtor would come under the supervision of the Interim Resolution Professional irrespective of whether such assets are non-regulated assets or not which would be travelling beyond the terms of the guarantee which is admittedly is a limited recourse guarantee as shall be clear from the definitions of the terms Non-Regulated Asset, Regulated Asset and Surplus Amounts as stated in the Deed of Guarantee dated 23.09.2016.

Learned Sr. Counsel, further submits that, even assuming without admitting that the Corporate Guarantee dated 23.09.2016 is enforceable, a section 7 IBC proceeding cannot be initiated for the same on the terms of the said Corporate Guarantee under which admittedly, there is only a limited recourse i.e. non-regulated assets of IPCL and surplus from regulated assets; Pertinently, Sections 4 to 32 of IBC were notified only on 01.12.2016, which is before the Agreements or the Corporate Guarantees were executed and thus the parties did not have

the provisions of IBC in their contemplation at the relevant point in time and equally the remedies available due to default could not have envisaged any remedy under IBC.

(a) SBI has differing position of liability of IPCL/MEL in different judicial forums;

(b) SBI has failed to mention the date of default as mandatorily required under Part IV;

(c) SBI has failed to disclose material facts including non-disclosure of invocation and subsequent transfer of the pledged shares in its Form I and thus guilty of *suppressio veri suggestio falsi*.

Learned Senior Counsel, further firmly contended that, it is well settled law that a contract is void if prohibited by a Statute under penalty even without express declaration that the contract is void, because such a penalty implies a prohibition.

Ld. Sr. Counsel, relied on the following rulings.

- Murli Prasad v. Parasnath Prasad, wherein Patna High Court, held as follows:

> "*11. ……(1) When a transaction is forbidden, the grounds of prohibition are immaterial. Courts cannot take note of any difference between mala prohibita (that is, things which, if not forbidden by positive law, would not be immoral) and mala inse (that is, things which are so forbidden as being immoral) Bensley v. Bignold, (1822) 106 ER 1214 at p. 1216 and Brightman and Co. v. Tate, (1919) 1 KB 463 at pp. 467-68.*
> *(2) The absence of a penalty in a statute will not prevent the Court from giving effect to a substantive prohibition- Montreal Trust Co. v. Canadian National Rly Co., (1939) AC 613. –*
> *(3) When conditions are prescribed by a statute for the conduct of any particular business or profession, and such conditions are not observed, agreements relating to such business or profession are void, if it appears by the context that the object of the legislature in imposing the conditions was the maintenance of public order or safety. Mahmoud and Ispahani. In re. (1921) 2 KB 716.*
> *(4) An agreement is void and unlawful when it could not be performed without doing some act unlawful in itself, or the performance is in itself lawful, but on grounds of public policy is not allowed to be made a matter of contract -Anderson. Ltd. v. Daniel. (1924) 1 KB 138.*
> *(5) What the law forbids to be done directly cannot be made lawful by being done indirectly Sykes v. Beadon, (1879) 11 Ch D 170, and Phillips v. Innes. (1837) 7 ER 90."*
> *The Court further went on to observe as follows:*
> *"53. Certain principles as to when a provision of law would amount to a prohibition are well settled. I have summarised them in an earlier part of this judgment. It will, however, be profitable to refer to some of them as contained in Pollock's Principles of Contract (Thirteenth Edition) at pages 275-276:*
> *(1) "The imposition of a penalty by the legislature on any specific act or omission is prima facie equivalent to an express prohibition."*
> *(2) "Conversely, the absence of a penalty, or the failure of a penal clause in the particular instance will not prevent the Court from giving effect to a substantive prohibition."*
> *(3) "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are"*

not observed, agreements made in the course of such business or profession-

(e) are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed:

(f) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g., the convenient collection of the

Mannalal Khetan v. Kedar Nath Khetan

"18. The High Court said that the provisions contained in section 108 of the (Companies) Act are directory because non-compliance with section 108 of the Act is not declared an offence. The reason given by the High Court is that when the law does not prescribe the consequences or does not lay down penalty for non-compliance with the provision contained in section 108 of the Act the provision is to be considered as directory. The High Court failed to consider the provisions contained in section 629(A) of the Act. Section 629(A) of the Act pre- scribes the penalty where no specific penalty is provided elsewhere in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or namely to make the person who did it liable to pay the penalty."

- Asha John Divianathan v. Vikram Malhotra and Ors., 2021 SCC OnLine SC 147 which are as under:

"1. The central issue in this appeal is in reference to Section 31 of the Foreign Exchange Regulation Act, 1973. To wit, transaction (specified in Section 31 of the 1973 Act) entered into in contravention of that provision is void or is only voidable and it can be voided at whose instance?

2. The undisputed facts are that one Mrs. F.L. Raitt, widow of late Mr. Charles Raitt, a foreigner and the owner of the property in question, gifted it to respondent No. 1 (Vikram Malhotra) without obtaining previous permission of the Reserve Bank of India2 under Section 31 of the 1973 Act. Further, before executing the gift deed, she had executed an agreement of sale in favour of one Mr. R.P. David, father of appellant (Asha John Divianathan) and husband of respondent No.

4 (Mrs. R.P. David, wife of Mr. R.P. David). That agreement was executed on 05.04.1976 whereunder the title deed of the schedule property was delivered by Mrs. F.L. Raitt to late Mr. R.P. David. However, Mrs. F.L. Raitt gifted the portion of schedule property admeasuring 12,306 square feet, vide gift deed dated 11.03.1977, in favour of respondent No. 1 without seeking previous permission of the RBI under Section 31 of the 1973 Act. She then executed a supplementary gift deed in favour of respondent No. 1 on 19.04.1980. Even this deed was executed by Mrs. F.L. Raitt without seeking previous permission of the RBI. The respondent claimed that a power of attorney was executed in his favour by Mrs. F.L. Raitt on 09.01.1982, which it appears, was revoked by Mrs. F.L. Raitt on 03.06.1982. Thereafter, Mrs. F.L. Raitt executed a ratificatory agreement to sell the schedule property in favour of Mr. R.P. David (predecessor of the appellant and respondent no. 4) on 04.12.1982, followed by a power of attorney in favour of Mr. Peter J. Philip dated 26.01.1983. That a formal permission of RBI under Section 31 of the 1973 Act was then sought for completing the transaction in favour of Mr. R.P. David (predecessor of the appellant and respondent no. 4). The RBI granted that permission on 02.04.1983, permitting transfer of the immovable property No. 12 (old No. 10A), Magrath Road, admeasuring 35,470 square feet in favour of Mr. R.P. David (predecessor of the appellant and respondent no. 4). Consequent to the said permission of the RBI, a registered sale deed came to be executed by Mrs. F.L. Raitt in favour of Mr. R.P. David (predecessor of the appellant and respondent no. 4) on 09.04.1983. However, Mrs. F.L. Raitt filed a suit being O.S. No. 10328 of 1983, on 30.07.1983, to declare the power of attorney dated 26.01.1983 given to Mr. Peter J. Philip as null and void and for cancellation and setting aside of the registered sale deed dated 09.04.1983 executed in favour of Mr. R.P. David (predecessor of the appellant and respondent no. 4) - pertaining to the entire property admeasuring 35,470 square feet. The said Mrs. F.L. Raitt, however, expired on 08.01.1984 and after her death, Mrs. Ingrid L. Greenwood was substituted as her legal representative in the pending suit. Mr. R.P. David (predecessor of the appellant and respondent no. 4) and others then filed O.S. No. 10079 of 1984 on 10.02.1984 against respondent No. 1 (Vikram Malhotra) praying that the gift deed and the supplementary deed allegedly executed in his favour in respect of portion of the larger property to the extent of 12,306 square feet bearing No. 12 (Old No. 10A) be declared as null and void and not binding and consequentially for relief of possession, permanent injunction and mesne profits. Mr. R.P. David (predecessor of the appellant and respondent no. 4) also filed

O.S. No. 10155 of 1984 against Mrs. Ingrid L. Greenwood and Mr. Clive Greenwood, who were claiming to be successor in title of Mrs. F.L. Raitt, for declaration and possession of entire property No. 12 (Old No. 10) admeasuring 35,470 square feet. All the three suits were tried and decided by the City Civil & Sessions Judge, Mayo, Bangalore.

11. In the present appeal, the sole point urged by the appellant is that the stated gift deeds dated 11.03.1977 and 19.04.1980 in favour of respondent No. 1 are null and void and not binding on the appellant and respondent no. 4; and in any case are unenforceable in law, in light of the mandate of Section 31 of the 1973 Act. According to the appellant, the dispensation specified in the said provision is mandatory and no transaction in contravention thereof would be enforceable in law. That position is reinforced by Section 47 of the same Act. Further, violation of Section 31 has also been made punishable under Section 50 of the 1973 Act. In support of this submission, reliance is placed on the dictum of Constitution Bench of this Court in Life Insurance Corporation of India v. Escorts Ltd.5. Reliance has also been placed on the observations made by three-Judge Bench of this Court in Renusagar Power Co. Ltd. v. General Electric Co.6 and Vijay Karia v. Prysmian Cavi E Sistemi SRL7. According to the appellant, the reasons weighed with the Punjab & Haryana High Court in Piara Singh (supra) are manifestly wrong. That decision has not analysed the true scope and purport of Section 31 of the 1973 Act in correct perspective. Similar view taken by the Madras High Court in R. Sambasivam v. Thangavelu Dhanabagyam8, following the decision in Piara Singh (supra), suffers from the same error. On the same lines different High Courts have construed Section 31 to mean that the transaction in contravention thereof is not void. (see Ajit Prashad Jain v. N.K. Widhani9, Tufanu Chouhan v. Md. Abdur Rahman10, Geeta Reinboth v. Mrs. J. Clairs Brohier through LRs. Mrs. Cheryl Brohier Gosens11, Sivaprakasam v. Ilangovan12 and Mathu Sree Akkabai Ammani Charitable Trust v. Samikannu13). None of the decisions of the different High Courts dealing with the purport of Section 31 of the 1973 Act have invoked principle that would stand the test of judicial scrutiny. It is urged that any transaction, which is in violation of Section 31 of the 1973 Act, would be unenforceable in law until such permission is accorded by the RBI and for that reason, the gift deeds in question cannot be given effect to or will be of any avail to respondent No. 1. Instead, the entire property No. 12 (old No. 10A), Magrath Road, admeasuring 35,470 square feet stood validly transferred in favour of Mr. R.P. David (predecessor of the appellant

and respondent No. 4 herein). It is then urged that despite the above, respondent no. 1 sought to transfer the stated property to one Dr. Thomas Chandy under sale deed dated 15.09.2005 (which has not seen the light of day) by wilfully disobeying the High Court's interim order dated 07.04.2005. Hence, this transaction in any case is nullity.

17. Before we analyse Section 31 of the 1973 Act, it is essential to understand the object and purpose for which the 1973 Act was brought into force. It was to consolidate and amend the law relating to certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of the foreign exchange resources of the country and the proper utilization thereof in the interests of the economic development of the country. While introducing the Bill in the Lok Sabha and explaining the object of Section 31 of the 1973 Act, Mr. Y.B. Chavan, the then Minister of Finance rose to state as follows:

> *"As a matter of general policy it has been felt that we should not allow foreign investment in landed property/buildings constructed by foreigners and foreign controlled companies as such investments offer scope for considerable amount of capital liability by way of capital repatriation. While we may still require foreign investments in certain sophisticated branches of industry, there is no reason why we should allow foreigners and foreign companies to enter real estate business."*

19. On a bare reading of sub-Section (1), it is crystal clear that a person, who is not a citizen of India, is not competent to dispose of by sale or gift, as in this case, any immovable property situated in India without previous general or special permission of the RBI. The only exception provided in the proviso is that of acquisition or transfer of immovable property by way of lease for a period not exceeding five years. This provision applies to foreign citizens and foreign and FERA companies only. A non-resident Indian citizen is not covered thereunder. Sub-Section (2) mandated such person, who is not a citizen of India, to make an application to the RBI in the prescribed form making necessary disclosures. Sub-Section (3) postulates that on receipt of such an application, the RBI after due inquiry as it deems fit, either may grant or refuse to grant the permission applied for. The second proviso to sub-Section (3) provides for a default permission, if no response is received to the application within the specified period. What is significant to notice is that as per sub-Section (4),

every person, who is not a citizen of India, holding immovable property situated in India at the time of commencement of the 1973 Act, is obliged to make declaration within ninety days from the commencement of the 1973 Act or such further period as may be allowed by the RBI.

20. xxxxxxx xxxxxxxxxxxxxx

50. Penalty.— If any person contravenes any of the provisions of this Act [other than section 13, cl. (a) of sub-section (1) of section 18 and cl. (a) of sub-section (1) of section 19] or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer).
24. xxxxx xxxxxx xxxxxx
21. Clive Lewis in his work Judicial Remedies in Public Law at p. 131 has explained the expressions "void and voidable" as follows: "A challenge to the validity of an act may be by direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This will usually be by way of an application for judicial review or by use of any statutory mechanism for appeal or review. Collateral challenges arise when the invalidity is raised in the course of some other proceedings, the purpose of which is not to establish invalidity but where questions of validity become relevant."

25. It is well established that a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. Further, it is settled that prohibition and negative words can rarely be directory. In the present dispensation provided under Section 31 of the 1973 Act read with Sections 47, 50 and 63 of the same Act, although it may be a case of seeking previous permission it is in the nature of prohibition as observed by a three-Judge Bench of this Court in Mannalal Khetan v. Kedar Nath Khetan18. In every case where a statute imposes a penalty for doing an act, though, the act not prohibited, yet the thing is unlawful because it is not intended that a statute would impose a penalty for a lawful act. When penalty is

imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable. We may usefully reproduce paragraphs 18 to 22 of the said reported decision, which read thus:

"18. The High Court said that the provisions contained in Section 108 of the Act are directory because non-compliance with Section 108 of the Act is not declared an offence. The reason given by the High Court is that when the law does not prescribe the consequences or does not lay down penalty for non-compliance with the provision contained in Section 108 of the Act the provision is to be considered as directory. The High Court failed to consider the provision contained in Section 629(a) of the Act. Section 629(a) of the Act prescribes the penalty where no specific penalty is provided elsewhere in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or merely to make the person who did it liable to pay the penalty.

19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See Mellis v. Shirley L.B. [(1885) 16 Q.B.D. 446 : 55 LJQB 143 : 2 TLR 360]) A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract : if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See St. John Shipping Corporation v. Joseph Rank [[1957] 1 Q.B. 267].) (See also Halsbury's Laws of England, 3rd Edn., Vol. 8, p. 141.)

20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim A pactis privatorum publico juri non derogatur means that private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no

court can lend its assistance to give it effect. (See Mellis v. Shirley L.B.) What is done in contravention of the provisions of an Act of the legislature cannot be made the subject of an action.

21. If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

22. Penalties are imposed by statute for two distinct purposes:
(1) for the protection of the public against fraud, or for some other object of public policy; (2) for the purpose of securing certain sources of revenue either to the State or to certain public bodies. If it is clear that a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable."

28. Notably, the Constitution Bench of this Court in Life Insurance Corporation of India (supra) had an occasion to examine the objects and reasons for enacting the 1973 Act. The Court was called upon to consider the purport of Section 29 of the 1973 Act, which does not qualify the words "general or special permission of the Reserve Bank of India" with word "previous" or "prior" unlike in the case of Section 31 of the same Act. In paragraph 63, this distinction has been noticed and reference has been specifically made to Section 31 of the 1973 Act. That makes it amply clear that the dispensations provided in Sections 29 and 31, must be regarded as distinct and violation whereof would visit with different consequences. As regards Section 29, this Court opined that the permission can be sought from the RBI at some stage for the purchase of shares by non-resident companies and not necessarily prior permission. The Court, therefore, opined that even ex post facto permission can be accorded by the RBI in reference to transaction covered by Section 29 of the Act.
29. Significantly, the consequence of contravention of Section 31 of the Act as being rendering the transfer void, is also taken notice of in the recent decision of a three-Judge Bench of this Court in Vijay Karia (supra). It has been so noted in paragraph 88 while distinguishing the dispensation provided in the Foreign Exchange Management Act, 1999 (FEMA). The Court has noted that FEMA unlike FERA — refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being

RBI under FERA. Indeed, it is not a decision dealing directly with the question involved in the present appeal. Nevertheless, it does take notice of the strict dispensation under Section 31, as it obtained under the 1973 Act, particularly requiring "previous" general or special permission of the RBI.

32. From the analysis of Section 31 of the 1973 Act and upon conjoint reading with Sections 47, 50 and 63 of the same Act, we must hold that the requirement of taking "previous" permission of the RBI before executing the sale deed or gift deed is the quintessence; and failure to do so must render the transfer unenforceable in law. The dispensation under Section 31 mandates "previous" or "prior" permission of the RBI before the transfer takes effect. For, the RBI is competent to refuse to grant permission in a given case. The sale or gift could be given effect and taken forward only after such permission is accorded by the RBI. There is no possibility of ex post facto permission being granted by the RBI under Section 31 of the 1973 Act, unlike in the case of Section 29 as noted in Life Insurance Corporation of India (supra). Before grant of such permission, if the sale deed or gift deed is challenged by a person affected by the same directly or indirectly and the court declares it to be invalid, despite the document being registered, no clear title would pass on to the recipient or beneficiary under such deed. The clear title would pass on and the deed can be given effect to only if permission is accorded by the RBI under Section 31 of the 1973 Act to such transaction.

33. In light of the general policy that foreigners should not be permitted/allowed to deal with real estate in India; the peremptory condition of seeking previous permission of the RBI before engaging in transactions specified in Section 31 of the 1973 Act and the consequences of penalty in case of contravention, the transfer of immovable property situated in India by a person, who is not a citizen of India, without previous permission of the RBI must be regarded as unenforceable and by implication a prohibited act. That can be avoided by the RBI and also by anyone who is affected directly or indirectly by such a transaction. There is no reason to deny remedy to a person, who is directly or indirectly affected by such a transaction. He can set up challenge thereto by direct action or even by way of collateral or indirect challenge.

34. In other words, until permission is accorded by the RBI, it would not be a lawful contract or agreement within the meaning of Section 10 read with Section 23 of the Contract Act. For, it remains a forbidden transaction unless permission is obtained from the RBI. The fact that the transaction can be taken forward after grant of permission by the RBI does not make the transaction any less

forbidden at the time it is entered into. It would nevertheless be a case of transaction opposed to public policy and, thus, unlawful. In this view of the matter, the appellant must succeed and would be entitled for the reliefs claimed in O.S. No. 10079 of 1984 for declaration that the gift deed dated 11.03.1977 and supplementary deed dated 19.04.1980 in favour of respondent No. 1 are invalid, unenforceable and not binding on the plaintiff. A fortiori, the plaintiff is entitled for possession of the suit property from respondent no. 1 and persons claiming through him, admeasuring 12,306 square feet and also mesne profits for the relevant period for which a separate inquiry needs to be initiated under Order 20 Rule 12 of the Code of Civil Procedure, 1908.

36. In the first place, provision for penalty under Section 50 for contravention referred to in Section 31, does not mean that the requirement of previous permission of RBI is directory or a mere formality. It is open to the legislature to provide two different consequences for the violation. As already noted hitherto, despite the absence of express provision declaring the transfer void, the intent behind enacting Section 31 and its purport renders the transfer in contravention thereof unenforceable until permission for such transaction is granted by the RBI.

37. Suffice it to observe that merely because no provision in the Act makes the transaction void or says that no title in the property passes to the purchaser in case there is contravention of the provisions of Section 31, will be of no avail. That does not validate the transfer referred to in Section 31, which is not backed by "previous" permission of the RBI. Further, the Punjab & Haryana High Court erroneously assumed that there was no provision regarding confiscation of the immovable property referred to in Section 31. Section 63 of the 1973 Act clearly refers to property in respect of which contravention has taken place for being confiscated to the Central Government. The expression "property" therein would certainly take within its sweep an immovable property referred to in Section 31 of the Act. The expression "property" in Section 63 is an inclusive term and, therefore, there is no reason to assume that consequence of confiscation may not apply to immovable property in respect of which contravention of the provisions of sub-Section (1) of Section 31 had taken place. The basis of that judgment is tenuous and is palpably wrong. For the same reason, the decision in R. Sambasivam (supra) of the Madras High Court is erroneous as it has merely followed the dictum of the Punjab & Haryana High Court. Suffice it to observe that the transaction of gift deed without previous

permission of the RBI may not be nullity, but certainly not enforceable in law until such permission is granted."

- Hon'ble Supreme Court of India in M/s. Somaiya Organics (India) Ltd & Anr vs State of Uttar Pradesh [Civil Appeal No. 4093 of 1991 Etc.] has held and observed that:

"what cannot be done directly, cannot be done indirectly either."

- In the case of Shri Lachoo Mal vs Shri Radhey Shyam (1971 (1) SCC 619, the Hon'ble Supreme Court of India at para (6) held that:

"The general principle is that everyone 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. If 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.

"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."

- Universal Plast Ltd. v. Santosh Kumar Gupta In this case, the statutory provision in contention was Clause 3 of Woollen Textiles (Production and Distribution) Control Order, 1962, issued under the Essential Commodities Act, 1955, which read as follows:

> *"3. Prohibition of acquisition, installation, sale, etc:*
> *(1) No person shall, except with the prior permission in writing of the Textile Commissioner, acquire or install or sell or otherwise dispose of (or change the location of) any spindle worked by power and use it for the purpose of manufacturing woollen yarn."*
> *As far as the fact is concerned; there was acquisition and sale of spindles in the absence of any permission from the Textile Commissioner, albeit without payment of the entire purchase consideration by the buyer/defendant. When the plaintiff had approached the Court to enforce its right to recover balance payment, the Court noted as follows:*
> *"(9) Mr. Saharya on the other hand submitted that there was no absolute bar under the law for transfer of the spindles and that this could be done with the permission of the Textile Commissioner. He said that it was the responsibility of the defendant to apply for permission and that the plaintiff was absolved of any such responsibility. He submitted that since the defendant failed to discharge his obligation under the agreement and as he had already taken delivery of the spindles, the suit of the plaintiff should be decreed. Mr. Saharya also submitted that there was no specific plea taken in the written statement challenging the validity of the agreement in question and no specific issue raised. I am afraid, I cannot agree to any of the submissions made by Mr. Saharva. The plea is very much there in the written statement: of the defendant. Though, no specific issue was raised as such, yet I find from the pleadings and evidence on record that the validity of the agreement in question was very much in issue. In Surasaibalini Debi v. Phanindra Mohan Majumder [AIR 1965 SC 1364] Ayyangar J. observed as under:-*
> > *" ..... Where a contract or transaction ex facie is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to toke judicial notice of the nature of the contract or transaction and would its relief according to the circumstances ..... "*
> > *(10) I put it to Mr. Saharya that if I decree the suit would it not have the effect of negating the provision of law as contemned in the Control Order. His reply was that a transaction remains unaffected and penalty and prosecution is provided if the provision of law is contravened. This*

argument is merely stated to be rejected. In Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. [AIR 1969 SC 504] I find complete answer to the argument put forward by Mr. Saharya.

(11) In this case the plaintiff instituted a suit for recovery of damages for breach of contract in respect of the goods purchased by the plaintiff on behalf of the defendant and of which the defendant refused to take delivery on the due dates. The plaintiff was carrying on the business as commission agents. The defendant placed three orders for purchase of hundred candies of coconut oil for one month's 'vaida' and, in accordance with those orders the plaintiff purchased hundred candies of coconut oil on three different dates. Since the defendant refused to take delivery of the goods on due dates, the plaintiff instituted the suit for damages being the difference in prices of the goods as purchased by him and the price prevailing as per closing market rates on the due dates. One of the grounds on which the claim in the suit was questioned, was that all these three contracts were onward Contracts and were void and unenforceable because they were made in contravention of the prohibition contained in the Travencore-Cochin Vegetable Oils and Oilcakes (Forward Contract prohibition) Order, 1950. There was another order called the Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order, 1119. There was some controversy as to which particular order was applicable. But the Supreme Court held as follows :-

" ..... Under either of those Orders, the transactions entered into between the appellant and the respondent were prohibited and. having been entered into against the provisions of law. no party can claim any rights in respect of the three contracts in suit: The claim for damages for breach of those contracts by the respondent against the appellant was therefore, not maintainable."

(12) In Waman Shriniwas Kini v. Ratilal Bhagwandas and Co. [AIR 1959 SC 689] the Supreme Court with reference to Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 which prohibited sub-letting observed that an agreement entered into after the Act has come into force, contrary to the provisions of Section 15 would be unenforceable as being in contravention of the express provision of the Act and which prohibited it and that it was not permissible to any person to rely upon a contract the making of which the law prohibits.

(14) Applying the principles enunciated above and the law on the subject it is quite clear that the agreement in question is illegal and cannot be enforced. The prohibition against acquisition and sale of spindles is absolute in the absence of any permission from the Textile Commissioner. If I decree the suit it will, in fact, be putting at naught the provisions of the Control Order. The plaintiff must, therefore, fail. For similar reasons the defendant also fails on issue No. 7. Even, otherwise also this issue

could not have been decided in favor of the defendant as the claim for refund of Rs. 10,000.00 was not raised by way of any counter-claim by the defendant.

(15) The prohibition in law to the transfer of spindles is absolute. The law is so strict that no one could even change the location of the spindles. Transfer could be effected only with the prior permission in writing of the Textile Commissioner. Permission of the Textile Commissioner is not therefore on idle formality. No one can be heard to say that as penalty and prosecution is provided if there is contravention of the provisions of Clause-3 of the Control Order, the agreement for sale of spindles which. in the present case, is without any prior written permission of the Textile Commissioner, could be given effect."

- Reference is also attracted to the following observation of the Supreme Court, in the case of Mannalal Khetan v. Kedar Nath Khetan [@ Pg. 119- 126; Paras 19, 20 at page 125]:

"19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See Mellis v. Shirley(l). A contract is void if prohibited by a statute under a penalty", even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract. or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is made to do a prohibited act, that contract will be unenforceable. ln the latter class, one has to consider not What act the statute prohibits, by what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See St. John Shipping Corporation v. Joseph Rank("). See also Halsbury's Laws of England Third Edition Vol. 8, p.141).

20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim 'A pastis preventorium publico juri non derogatur means that 'private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See Mellis

v. Shirley L.B.). (Supra). What is done in contravention of the provisions of an Act of the Legislature cannot be made the subject of an action."

In Naveen Chandra Sharma v. 6th Additional District and Sessions Judge and Ors wherein the Hon'ble High Court of Allahabad held that:

> *"20. The acceptance of the submission of the learned Counsel that the penal consequences contemplated in Section 31(1) flow only from the initial letting and occupation and they are not attracted to the continued occupation or operation of the agreement of tenancy would clearly amount to permitting the parties to circumvent the law in an indirect way. It is settled law that what may not, be done directly cannot be allowed to be done indirectly. (See Jagbir Singh v. Ranbir Singh, MANU/SC/0097/1978 : (1979) 1 SCC 560 : AIR 1979 SC 381. In Fox v. Bishop of Chister (1824) 2 B and C 635, it was held that the provisions of an Act of Parliament shall not be evaded by shifts and contrivances. To the same is what has been stated in the Maxwell's Interpretation of Statutes 11th Edition) page 109 - "to carry out effectually the object of a statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner, that which it has been prohibited or enjoined.*
>
> *21. The submission, therefore, that Sections 11 and 13 prohibit only the initial act of letting and occupation and that it is only these initial acts which have been made penal under Section 31(1) must be rejected on the short ground that the same will enable the parties to defeat the provisions of law by 'shifts and contrivances.' It would lead to strange results, if the submission is countenanced. There would be large-scale evasion of the Act. There are many a landlord or tenant Who would be willing to enter into contracts of tenancy thereby taking out of the field of immediate availability a large number of buildings which would otherwise be available for allotment to persons whose need might be far, far greater, by carrying out the operation in a clandestine and surreptitious manner. There will be no dearth of such daring landlords and tenants who would be Willing to go to any length, including running the risk of being prosecuted in the event of being caught, in their desire to make money or to pay money for giving or taking on rent houses under such private arrangements in order to avoid going through the cumbersome process of allotment prescribed under the law.*

22. My conclusion, therefore, is that the contract of tenancy relied on by the Petitioner was forbidden by law by virtue of the express prohibition contained under Sections 11 and 13, and is by its very nature such that if permitted it would defeat the provisions of the aforesaid Act. The contract is plainly opposed to public policy being repugnant to public interest. The policy which is unmistakably discernible from the various provisions of the Act is that no one shall let any accommodation or occupy the same after the coming into force of the Act except in pursuance of an order of allotment or release. That policy will clearly be defeated if such contracts of tenancy receive the seal of approval of the Court. And the mere fact that the authorities would not be bound by that contract and can on that account evict the unauthorised occupant is not enough consideration for holding that, the contract of tenancy would be binding on the parties in any case when the same is expressly forbidden by law. It is common knowledge that it takes years before an unauthorised occupant is thrown out.

35. The aforesaid statement of law provides a complete answer to the Petitioner's last submission. Contracts such as that upon which the Plaintiff's claim is founded affect not merely the parties thereto, but, if permitted or recognised, they would have much wider repercussions affecting adversely the public at large as discussed above. It is because of this principle and considerations of public policy that no assistance whatever can be given to the Petitioner. Further, it cannot be said that the Plaintiff is any the less blameworthy than the tenant. It cannot be said that the Plaintiff is not 'in pari delicto' with the Defendant. In any case, if the Plaintiff being deprived of profits out of the se of the demised premises, he has no body but himself to thank for. Thus, in any view of the matter, no relief what-ever can be granted to the Plaintiff."

On Section 238 of the IBC, Ld. Sr. Counsel submits that, IBC itself relies on a valid and/or a "contract of guarantee" as understood under the Indian Contract Act, 1872, and thus does not override the latter since there is no inconsistency in the latter. Further, the Hon'ble Supreme Court of India in Innoventive Industries Ltd. v. ICICI Bank,

(2018) 1 SCC 407 which explained as to when the IBC gets triggered stated as under:

> *"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."*
>
> *"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is*

"due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

- State of Maharashtra v. M.N. Kaul and Ors. (AIR 1967 SC 1634) held that;

"the guarantor must not be made liable beyond the terms of his engagement and that under the law he could not be made liable for more than he had undertaken."

Therefore, since the admission of IPCL into CIRP would entail all its assets being under the IRP, the same would amount to making the guarantor (if at all in law) liable to more than what IPCL had undertaken under the Corporate Guarantees.

According to the Ld. Sr. Counsel, the said interdiction is Section 23 read with Section 10 of the Indian Contract Act, 1872 read with the definition of a "corporate guarantor" under Section 5A of the IBC which means a corporate person who is the surety in a contract of guarantee to the corporate debtor. In the present case, the absence of prior consent from WBERC renders the agreement unenforceable in law in terms of Section 23 read with Section 10 of the Indian Contract Act, 1872 and thus there is NO "contract of guarantee" under which

any valid liability or any valid "counter indemnity obligation" arising out of the CG in question.

Learned Sr. Counsel, further submits that, the financial creditor was well aware of the legal bar (since IPCL red flagged the issue) and the Corporate Guarantee was drafted by the lenders in order to circumvent the WBERC Regulations and thus the parties can be said to be in *pari delicto potior est conditio possidentis*. Reliance is placed on the decision of the Hon'ble Supreme Court of India in Loop Telecom and Trading Limited v. Union of India and Another, (2022) 6 SCC 762 wherein it was held as under:

> *"62. ……. A court will not assist those who aim to perpetuate illegality. This rule was initially recognised by the House of Lords in its decision in Holman v. Johnson [Holman v. Johnson, (1775) 1 Cowp 341 at p. 343 : 98 ER 1120 at p. 1121] . Lord Mansfield held : (ER p. 1121)*
> *"The objection, that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted.*
>
> *63……This in pari delicto principle enables the court to analyse the particular circumstances of the case to determine whether the claimant is less responsible for the illegality than the defendant, for*

then, as between the claimant and the defendant, the just result is that the claimant should not be denied relief, since the parties are not in pari delicto. But where the claimant is more responsible for the illegality or the parties are considered to be equally responsible, the in pari delicto principle applies and restitution will be denied."

64. Thus, when the party claiming restitution is equally or more responsible for the illegality of a contract, they are considered in pari delicto.

65. In the decision of the UK Supreme Court in Patel v. Mirza [Patel v. Mirza, (2016) 3 WLR 399 : 2016 UKSC 42] , Lord Sumption, JSC has succinctly explained the nature of the inquiry to determine whether a party is in pari delicto : (WLR pp. 466-67, paras 241-43)

> *"241. To the principle that a person may not rely on his own illegal act in support of his claim, there are significant exceptions, which are as old as the principle itself and generally inherent in it. These are broadly summed up in the proposition that the illegality principle is available only where the parties were in pari delicto in relation to the illegal act. This principle must not be misunderstood. It does not authorise a general inquiry into their relative blameworthiness. The question is whether they were on the same footing. The case law discloses two main categories of case where the law regards the parties as not being in pari delicto, but both are based on the same principle.*
>
> *242. One comprises cases in which the claimant's participation in the illegal act is treated as involuntary: for example, it may have been brought about by fraud, undue influence or duress on the part of the defendant who seeks to invoke the defence. ...*
>
> *243. The other category comprises cases in which the application of the illegality principle would be inconsistent with the rule of law which makes the act illegal. The paradigm case is a rule of law intended to protect persons such as the plaintiff against exploitation by the likes of the defendant. Such a rule will commonly require the plaintiff to have a remedy notwithstanding that he participated in its breach."*

Thus, in determining a claim of restitution, the claiming party's legal footing in relation to the illegal act (and in comparison to the defendant) must be understood. Unless the party claiming restitution participated in

the illegal act involuntarily or the rule of law offers them protection against the defendant, they would be held to be in pari delicto and therefore, their claim for restitution will fail.

66. The position in India is similar to that of Kuju Collieries Ltd. v. Jharkhand Mines Ltd. [Kuju Collieries Ltd. v. Jharkhand Mines Ltd., (1974) 2 SCC 533] , where a Bench of three learned Judges of this Court relied on a judgment [Budhulal v. Deccan Banking Co., 1954 SCC OnLine Hyd 187 : AIR 1955 Hyd 69 : ILR 1955 Hyd 101] of a five-Judge Bench of the then Hyderabad High Court. While construing the provisions of Section 65, this Court held : (Kuju Collieries case [Kuju Collieries Ltd. v. Jharkhand Mines Ltd., (1974) 2 SCC 533] , SCC pp. 536-37, para 8)

"8. A Full Bench of five Judges of the Hyderabad High Court in Budhulal v. Deccan Banking Co. [Budhulal v. Deccan Banking Co., 1954 SCC OnLine Hyd 187 : AIR 1955 Hyd 69 : ILR 1955 Hyd 101] speaking through our Brother, Jaganmohan Reddy, J. as he then was, referred with approval to these observations [Harnath Kuar v. Indar Bahadur Singh, 1922 SCC OnLine PC 64] of the Privy Council. They then went on to refer to the observations of Pollock and Mulla in their treatise on Indian Contract and Specific Relief Acts, 7th Edn. to the effect that Section 65 of the Contract Act, 1872 does not apply to agreements which are void under Section 24 by reason of an unlawful consideration or object and there being no other provision in the Act under which money paid for an unlawful purpose may be recovered back, an analogy of English law will be the best guide. They then referred to the reasoning of the learned authors that if the view of the Privy Council is right, namely, that "agreements discovered to be void" apply to all agreements which are ab initio void including agreements based on unlawful consideration, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution and both the transferor and transferee are in pari delicto. The Bench then proceeded to observe : (Budhulal case [Budhulal v. Deccan Banking Co., 1954 SCC OnLine Hyd 187 : AIR 1955 Hyd 69 : ILR 1955 Hyd 101] , SCC OnLine Hyd paras 33-36)

'33. In our opinion, the view of the learned authors is neither supported by any of the subsequent Privy Council decisions nor is it consistent with the natural meaning to be given to the provisions of Section 65. The section by using the words "when an agreement is discovered to be void" means nothing more nor less than : when the plaintiff comes to know or finds out that the agreement is void. The word "discovery" would imply the pre-existence of something which is subsequently found out and it may be observed that Section 66, Hyderabad Contract Act makes the knowledge

(Ilm) of the agreement being void as one of the pre-requisites for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement ab initio void can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in Section 65 of the Contract Act, 1872 or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases.

34. A person who, however, gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right then a person who has paid money or transferred property to another for illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in pari delicto, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possesses an advantage over the plaintiff — in pari delicto potior est conditio defendentio.

35. Section 84 of the Trusts Act, 1882, however, has made an exception in a case:

"84. Transfer for illegal purpose.—Where the owner of property transfers it to another for illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

36. This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that Section 65, Contract Act, is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void ab initio and there would be no room for the subsequent discovery of that fact.'

We consider that this criticism as well as the view taken by the Bench is justified. It has rightly pointed out that if both the transferor and transferee are in pari delicto the courts do not assist them."

While upholding the view of the Hyderabad High Court, this Court held "it [the Full Bench [Budhulal v. Deccan Banking Co., 1954 SCC OnLine Hyd 187 : AIR 1955 Hyd 69 : ILR 1955 Hyd 101] of the Hyderabad High Court] has rightly pointed out that if both the transferor and transferee are in pari delicto the courts do not assist them".

67. In an earlier decision of this Court in Immani Appa Rao v. Gollapalli Ramalingamurthi [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] ("Immani Appa Rao"), a three-Judge Bench held that where both the parties before the Court are confederates in the fraud, the Court must lean in favour of the approach which would be less injurious to public interest. P.B. Gajendragadkar, J. (as he then was), speaking for the Court, held : (AIR p. 375, para 12)

"12. Reported decisions bearing on this question show that consideration of this problem often gives rise to what may be described as a battle of legal maxims. The appellants emphasized that the doctrine which is pre-eminently applicable to the present case is ex dolo malo non orituractio or ex turpi causa non oritur actio. In other words, they contended that the right of action cannot arise out of fraud or out of transgression of law; and according to them it is necessary in such a case that possession should rest where it lies in pari delicto potior est conditio possidentis; where each party is equally in fraud the law favours him who is actually in possession, or where both parties are equally guilty the estate will lie where it falls. On the other hand, Respondent 1 argues that the proper maxim to apply is nemo allegans suam turpitudinum audiendum est, whoever has first to plead turpitudinum should fail; that party fails who first has to allege fraud in which he participated. In other words, the principle invoked by Respondent 1 is that a man cannot plead his own fraud. In deciding the question as to which maxim should govern the present case it is necessary to recall what Lord Wright, M.R. observed about these maxims in Berg v. Sadler [Berg v. Sadler, (1937) 2 KB 158 (CA)] , KB at p. 162. Referring to the maxim ex turpi causa non oritur actio Lord Wright observed that : (KB p. 162)

'... This [maxim], though veiled in the dignity of learned language, is a statement of a principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities.'

Therefore, in deciding the question raised in the present appeal it would be necessary for us to consider carefully the true scope and effect of the maxims pressed into service by the rival parties, and to enquire which of the maxims would be relevant and applicable in the circumstances of the case. It is common ground that the approach of the Court in determining the present dispute must be conditioned solely by considerations of public policy. Which principle would be more conducive to, and more consistent with, public interest, that is the crux of the matter. To put it differently, having regard to the fact that both the parties before the Court are confederates in the fraud, which approach would be less injurious to public interest. Whichever approach is adopted one party would succeed and the

other would fail, and so it is necessary to enquire as to which party's success would be less injurious to public interest."

68. The principle which was enunciated in the judgment in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] has been more recently applied in a decision of a three-Judge Bench of this Court in Narayanamma v. Govindappa [Narayanamma v. Govindappa, (2019) 19 SCC 42 : (2020) 4 SCC (Civ) 363] . The Court held : (Narayanamma case [Narayanamma v. Govindappa, (2019) 19 SCC 42 : (2020) 4 SCC (Civ) 363] , SCC p. 59, para 28)

"28. Now, let us apply the other test laid down in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] . At the cost of repetition, both the parties are common participator in the illegality. In such a situation, the balance of justice would tilt in whose favour is the question. As held in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] , if the decree is granted in favour of the plaintiff on the basis of an illegal agreement which is hit by a statute, it will be rendering an active assistance of the court in enforcing an agreement which is contrary to law. As against this, if the balance is tilted towards the defendants, no doubt that they would stand benefited even in spite of their predecessor-in-title committing an illegality. However, what the court would be doing is only rendering an assistance which is purely of a passive character. As held by Gajendragadkar, J. in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] , the first course would be clearly and patently inconsistent with the public interest whereas, the latter course is lesser injurious to public interest than the former."

Learned Sr. Counsel, further submits that, it is a settled proposition of the Law that no Court and/or Tribunal will come to the aid of the parties who are at a mutual fault and violation of the Statutes. Reliance is placed on the English judgment in Holman v. Johnson, as followed till

as recently by our Hon'ble Supreme Court in Loop Telecom (supra) wherein it was held that:

> "*The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causâ, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.*"

XVI. Referring to the plea of the financial creditor that, the corporate debtor is precluded from raising the enforceability of the CG having withdrawn its Hyderabad suit without reserving any right/liberty under Order XXIII, Rule 3, CPC being oblivious of the fact that such an issue is only relevant qua the second suit filed at Alipore, if at all. Further, Section 7 IBC proceedings are not a suit as held by the Hon'ble Supreme Court in Dena Bank's case. SBI has wrongly contended that the issue stands closed by the unconditional withdrawal of the suit. Being a pure question of law, there is and can

be res judicata. Secondly, the present Section 7 proceedings are by SBI and the said issue has been raised in defense. Thirdly, both the suits i.e., at Hyderabad and Alipore were filed at different points in time and for distinct (and not the same) causes of action i.e., Hyderabad suit before the CG was invoked and Alipore suit after invocation of CG and after the pledged shares were transferred to SBI's security Trustee and SBI has further argued that IPCL having admitted that it is a guarantor in MEL proceedings before NCLT, cannot argue to the contrary. The said contention ignores the fact that until a competent court (which in view of Section 63 and 230 **of** IBC is this Hon'ble Adjudicating Authority) holds CG to be void, IPCL continues to remain the corporate guarantor and IPCL's plea that the CG is void is not an inconsistent stand. Further, there is no estoppel against statute. Reference is made to Point no. 45.16 above.

Learned Sr. Counsel further submits that SBI has pegged its case principally on para 33 of BOI Finance v. Custodian: (1997)10 SCC 488; Canara Bank v. Standard Chartered Bank (2002) 10 SCC 697 and Canbank Financial Services Ltd/ v Custodian (2004) 8 SCC 355.

Para 33 of BOI Finance (ibid) states as under :

> *"33. The aforesaid principles will clearly be applicable in the present case as well. The non-compliance of the directions issued by the Reserve Bank may result in prosecution/or levy of penalty under Section 46, but it cannot result in invalidation of any contract by the bank with the third party. If the contention of the Custodian is accepted it will result in invalidation of agreements by the banks, even where the third parties may not be aware of the directions which are being violated. To give an example if the Reserve Bank by confidential circulars fixes the limit in excess of which the banks cannot give any loan but, without informing the third party, the bank while exceeding its limit gives a loan which is then utilised by the bank's customer. It will be inequitable and improper to hold that as the directions of the Reserve Bank had not been complied with by the bank, the grant of loan cannot be regarded as valid and, as a consequence thereof, the customer must return the amount received even though he may have utilised the same in his business. Yet another instance may be where the bank advances loan by charging interest at a rate lower than the minimum which may have been fixed by the Reserve Bank, in a direction issued under Section 36(1)(a). As far as the customer is concerned, it may not be aware of the direction fixing the minimum rate of interest. Can it be said, in such a case, that the advance of loan itself was illegal or that the bank would be entitled to receive the higher rate of interest? In our opinion it will be wholly unjust and inequitable to hold that such transactions entered into by the bank with a customer, which transactions are otherwise not invalid, can be regarded as void because the bank did not follow the directions or instructions issued by the Reserve Bank of India.*"

According to Ld. Sr. Counsel, from the admitted facts of this case and any pleading and/or document to the contrary, reliance on BOI Finance (supra) is clearly misplaced. BOI Finance dealt with a case where the RBI circulars were (a) confidential in nature and (b) thus not to the knowledge of the customers who were entering into agreements with the said banks. In the present case, admittedly, the lenders were aware of the

legal embargo created in public interest and contained in a statute and also made aware of to the lenders by IPCL. SBI, by any stretch of imagination cannot contend that SBI is an innocent lender unaware of the legal embargo under the WBERC Regulations and having obtained three (3) opinions from its own Counsel and Senior Counsel, relied only on the affidavit of IPCL's director and that IPCL and not SBI, being the regulated entity was duty bound to obtain such approval and having failed so cannot take advantage of its own wrong. Therefore, the reliance by SBI on BOI Finance is misplaced in as much the said case dealt with a post facto approval and not a case going to the validity of the CG as in the present case.

Equally, none of the decisions listed at item nos. 11 , 12 and 13 of the master index of documents relied upon by the petitioner dealt with a case such as this present case where the lenders were aware of the legal embargo and prevailed over the guarantor that the prior consent was not required and worded the CG accordingly. The said cases do not deal with a wilful violation of statute, the doctrine of in *pari delicto potior est conditio possidentis* and are thus not remotely applicable in view of the admitted facts of the present case.

In Mauritius Commercial Bank v. Varun Corporation, 2017 SCC OnLine NCLT 2424 it was held that :

> *"11. The basic thing that one should not get lost sight of the fact is that a wrong doer should not take advantage of its own wrong, here this corporate Debtor is indeed under obligation to make post facto intimation to RBI, not only this, it appears that this corporate debtor knowingly has given guarantee to the loan obligation more than 400% of its net worth, fact of the matter is, this loan money has not been utilised for investing in its subsidiary RPML located in Mauritius, but clawed out to one of its group company situated in India through the route of equity. After all these mischievous acts of the debtor, can today this debtor back out from the promise of guarantee given to a loan availed by its wholly owned subsidiary of it? Hundred percent subsidiary means what, the acts of subsidiary are nothing but acts based on the wish of the holding company. Where this loan money has gone? It has gone to one of its group companies. If at all this approval from RBI has to be obtained prior to obtaining loan or execution of Corporate Guarantee, then it may be said that the guarantee dehors intimation is bad, in this case, it is only a post facte intimation, not making such intimation will not vitiate or frustrate the agreement or rights of the creditor. Why it has not gone to RBI, we can't make any guess work on it, but it is a fact that this debtor sent a letter on 29.3.2009 to the creditor Bank stating that corporate debtor already sent post facto intimation to the RBI by sending a letter addressed to Bank of Baroda to the creditor Bank to make them believe that execution of guarantee agreement to this loan has been intimated to the RBI. May be the debtor has not put its efforts to see it reached to the RBI because guarantee is more than its limits. Since this duty is cast upon the Corporate Debtor to intimate to RBI about giving guarantee, the person, done wrong by not ensuring intimation reached to the RBI, today cannot come out with a defence stating since intimation has not reached to the RBI, the liability arising under this agreement is not enforceable against the corporate debtor. Therefore, we have not found any merit saying that not sending intimation to RBI about execution of guarantee will make this transaction invalid. No law says a person made a gain out of a transaction can vilify the same saying by so and so glitch in the law he has become free from the obligation owed upon him. More so, even if any transaction is irregular in the teeth of any regulation, mere irregularity per se will not make an act illegal."*

The relevant finding of the Case Laws relied upon by the Petitioner] in the matter of Baobab Broadband Ltd. v. Gemini Communication Ltd., 2018 SCC OnLine NCLT 32410 is as under:

> *"On the issue that there is no sanction/approval of RBI due to which the "corporate guarantee" in question is not enforceable is stated to be wholly vague and baseless because as per article 3 of the loan agreement, the corporate debtor/guarantor assured the financial creditor of its ability to provide such guarantee in accordance with the applicable law and regulations. Therefore, the corporate debtor/guarantor cannot hide itself behind its own failure to obtain any required approval to wriggle out of its liability or consequences of default."*

In the present case, IPCL/corporate debtor red flagged the issue of the WBERC embargo and SBI obtained opinions to the effect that such an embargo may not be necessary if the CG was worded to exclude regulated assets and thus circumvented the law.

Yes Bank Limited v. Zee Learn Limited, C.P. (IB) 301/MB/C-1/2022 NCLT, Mumbai Bench-I wherein it was held that:

> *"30. The Deed of Guarantee dated 20.06.2016 being insufficiently stamped as per the provision of Maharashtra Stamp Act 1958, therefore cannot be looked into by this Tribunal.*
>
> *i. The stamp duty paid on the said document is only Rs.100. The Petitioner has brought the said document into the State of Maharashtra for the purposes of filing the present Petition against the Corporate Debtor. As per the requirement under section 19 of the Maharashtra Stamp Act, 1958 the said document or copy thereof (as the case may be) is required to be stamped in accordance with the Maharashtra Stamp Act, 1958. In the absence of such payment, such documents cannot be looked into by this Tribunal.*

i. *The stamp duty payable on the aforesaid document in the State of Maharashtra is more than the stamp duty paid on the document in New Delhi. By virtue of Sections 18, 19, 33 and 34 of the Maharashtra Stamp Act, 1958, this Tribunal cannot act upon the Deed of Guarantee which is not sufficiently stamped as per the provisions of the Act and is bound to impound the said document and send the same to the appropriate authority who is required to deal with the same in accordance with Sections 37 and 39 of the Maharashtra Stamp Act 1958."*

According to the Ld. Sr. Counsel payment of stamp duty on conveyance is entirely different from enforceability of a conveyance as in sufficiency in payment of proper stamp duty is an issue relating to admissibility and can be cured by impounding, unlike enforceability of a conveyance. No issue has been raised by the corporate debtor qua stamping, hence the above ruling has no relevancy or application to the case on hand.

Thus, submitting Ld. Sr. Counsel prayed for rejection of the company petition as not maintainable, under law.

Our Discussion

XVII. Having heard the Ld. Sr. Counsels at length, we wish to state that the outcome of our findings on the pleas such as, the corporate debtor is estopped from challenging the enforceability of the subject

guarantee, and mere failure to obtain the prior consent of the Regulator does not render the subject guarantee and the application of the rule, unenforceable and *ex turpi causa non oritur actio*, since have a direct bearing on the central issue, namely, whether or not the debt claimed as due and payable by the corporate debtor under the impugned guarantee agreement is interdicted by section 23 of Indian Contract Act, at the very outset we wish to separately discuss all the above pleas.

- **Estoppel – whether applies?**

Before we proceed further with our analysis, we wish to profitably quote the following;

(i) Section 115 of Indian Evidence Act, says,

> *"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.*
>
> *Illustration*
> *A, intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."*

However, one of the well-known exceptions to the rule of estoppel is, statute /statutory rules.

(ii). Regulation 5.13.2 of the License Regulations:

> *"The licensee shall obtain prior written consent from the Commission in making any loans to, or issuing any guarantee for any obligation of any person which is beyond the normal area of business activities of the licensee in respect of its core activities. Loan to the employees pursuant to the terms of services and advances to the suppliers etc. in the ordinary course of business are excluded from the requirements to seek such approval. If any affiliates of the licensee undertake any loan for which the licensee's business may be affected directly or indirectly then in such case licensee in required to obtain such written consent from the Commission in a manner as already specified."*

(iii). Regulation 5.19.1 of the West Bengal Electricity License Regulations, framed in exercise of power conferred under the Electricity Act 2003, says that,

> *"The Licensee shall be liable for action under the provisions of the Act, Rules, Regulations, Codes, Standards and Condition of license in appropriate cases for contravening any one or more of the provisions of the license including but not limiting to investigation, penalty, prosecution, revocation of license, amendment of license, appointment of administrator, sales of assets and or any other measure in accordance with the provisions of the Act, Rules, Regulations, Codes, Standards, etc. as the Commission may deem fit. "*(Emphasis is ours)

(iv). Section 146 of Electricity Act 2003, deals with the consequences of non-compliance of the orders or directions of the Regulator given under the said Act, is as below:

> *"Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one lakh rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to five thousand rupees for every day during which the failure continues after conviction of the first such offence:*
> *Provided that nothing contained in this section shall apply to the orders, instructions or directions issued under section 121." (Emphasis is ours)*

Our Analysis

Admittedly, in the instant case the approval of WBERC was not obtained prior to or post issuance of the Corporate Guarantees by the licensee/corporate debtor, since the lenders including the financial creditor herein, as well as the licensee/corporate debtor have obtained legal opinions clearly advising that corporate guarantee qua the non-regulated assets of the corporate guarantor would not require the corporate debtor to obtain such prior written consent of the WBERC. The request made for consent, post issuance of the subject guarantee by the corporate debtor/licensee in respect of "non-regulated" assets of the licensee/corporate debtor has been turned down by West Bengal Electricity Regulatory Commission (WBERC), a quasi-judicial Authority, vide its order dated 09.11.2017 (Annexure-8). It is pertinent to state herein, that the 'classification' of the assets of the corporate guarantor as 'Regulated' and

‘Non-Regulated’, finds place only in the impugned deed of guarantee in view of the legal opinions obtained by the lenders and the corporate debtor, while the Licensing Regulations do not make any such classification and in fact do not allow the Licensee/corporate debtor to issue corporate guarantee to any funding agency, except as indicated in Regulation 5.13.2 of the License Regulations. That apart, the WBERC, for the first time was informed of issuance/obtaining of the impugned deed of guarantee only through the letter of the respondent/ corporate debtor dated 17.08.2017.

In the above undeniable factual back drop, while the crux of the submissions of the Ld. Sr. Counsel for the financial creditor, is that, the corporate debtor having unequivocally stated, certified, declared and confirmed that the corporate debtor (IPCL) is not required to the obtain the prior consent of WBERC in terms of the WBERC Licensing Regulations for issuing the subject Deed of Guarantee in favor of the lenders, is estopped from challenging the subject Deed of Guarantee, besides that the corporate debtor has chosen to approach the WBERC only after giving a guarantee and not before and that, at any rate since WBERC did not declare the subject guarantee as void, the corporate debtor is bound by the terms of the corporate guarantee, that mere absence of WBERC prior consent cannot make the

guarantee null and void as both the Electricity Act, 2003 and WBERC Regulations envisage only a penalty on the regulated entity for failure to obtain prior consent before issuing a guarantee, the corporate guarantee remain intact and fully enforceable, notwithstanding violation if any of the WBERC Regulations, supra, the Ld. Sr. Counsel for the corporate debtor would submit that the object of the subject guarantee agreement since is forbidden by law, the well-established law being that a contract is void if prohibited by a statute under a penalty even without express declaration that the contract is void, the subject corporate guarantee is void and unenforceable, that there can be no estoppel against law and that no Court/Tribunal can come in aid of the parties who are mutually at fault and violation of a statue.

Both the Ld. Sr. Counsels have, in support of their above respective submissions placed reliance on several rulings which we would discuss in the latter part of the order.

A bare perusal of the above Regulation 5.13.2 reveals that, for issuing any guarantee for any obligation of any person which is beyond the normal area of business activities of the licensee in respect of its core activities, the licensee shall obtain prior written consent from the Commission. Since the

subject corporate guarantee given being not in respect of the normal area of business activities of the licensee, prior written permission from the Commission is mandatory. Thus, compliance of the Regulation, supra, is a statutory requirement.

We once again reiterate herein, that the classification of the assets of the corporate guarantor as 'Regulated' and 'Non-Regulated', finds place only in the impugned deed of guarantee in view of the legal opinions obtained by the lenders, wherein it was stated that,

> *"if recourse of the lenders under the guarantee provided by IPCL is limited to the assets or business other than the regulated assets/ business, i.e., the distribution business, then there is no necessity for obtaining the prior approval or consent from the State Commission for the issuance of such guarantee. To make it clear, the lender gets a guarantee only in respect of the revenues/ proceeds from business/assets other than the regulated business/ assets to honour IPCL's payment obligations under the corporate guarantee. IPCL should specifically mention the same in the corporate guarantee."*

and the Licensing Regulations do not make any such classification. That apart, it is pertinent to note that the legal opinion, supra, does not exempt the guarantor/licensee from obtaining the prior consent of the State Commission for issuance of such guarantee in respect of regulated assets/business i.e. the distribution business of the licensee/guarantor.

According to the Ld. Sr. Counsel for the financial creditor, the corporate debtor having unequivocally stated, certified, declared and confirmed that the corporate debtor (IPCL) is not required to the obtain the prior consent of WBERC in terms of the WBERC Licensing Regulations for issuing the Deed of Guarantee in favor of the lenders is estopped from taking a mutually contradictory and inconsistent stand to say that the debtor is not liable under the guarantee and that the corporate guarantee is unenforceable under law for want of prior written consent of its Regulator.

In support of this plea Ld. Sr. counsel relied on the following clauses in the impugned guarantee, pleadings and the rulings;

> *"17.1 (ii) Authorization: The Guarantor is empowered and authorized to execute this Guarantee and all related documents in accordance with its memorandum of association and articles of association or constitution, as the case may be, and all regulatory and corporate authorizations and consents required in connection with the execution, perfection, delivery and performance of this Guarantee have been obtained and are in full force and effect and all conditions of each such authorization and consent have been complied with."*
>
> *"17.1 (iv) Government Consents and Actions: All acts, conditions and things, which are necessary or advisable to be done, fulfilled or performed in connection with (i) the execution, delivery or performance of the Guarantee; (ii) the legality, validity and enforceability hereof: and (iii) the admissibility in evidence of this Guarantee have been duly done, fulfilled and/or performed and are in full force and effect. "*
>
> *"Affidavit of Mr. Asok Kumar Goswami, the erstwhile director of Corporate Debtor dated September 23, 2016, wherein it has been stated certified, declared and confirmed on behalf of the corporate debtor that the corporate debtor (IPCL) is a distribution licensee in terms of the WBERC Licensing*

Regulations and it is not required to the obtain the prior consent of WBERC for issuing the Deed of Guarantee in accordance with terms thereof"

Statement made by the respondent in the Rejoinder to I.A. No. 648 of 2021, that:

> *'further, any benefit so accrued to the lenders of the Corporate 0Debtor would make the Applicant liable only for the unsatisfied amount of the claim of the lenders of the Corporate Debtor. The Applicant is legally entitled to take steps to reduce its liability as a Corporate Guarantor of the Corporate Debtor as any reduction in liability of the Corporate Debtor would concomitantly reduce the liability of the Corporate Guarantor too.'*

Ld. Sr. Counsel further contends that, subsequent withdrawal of IA 648/ 2021 will not wipe off the admission made as above, In support of this contention Ld. Sr. Counsel relied on the ruling in SREI Equipment Finance v. Rajiv Anand, (2020) 9 SCC 623. In paras 3, 4 and 7 thereof it is held that:

> *"3. To this section 7 application, a counter affidavit was filed by the corporate debtor on 15.05.2017, in which it was stated that though Rs.35.66 crores have become due, yet a section 7 application was premature inasmuch as instalment payments that were agreed upon had not yet matured. It was on this basis that this first application was withdrawn by the appellant on 30.05.2017 with liberty to file a fresh application."*
>
> *"4. A fresh application was filed on 04.08.2017, in which it was claimed that insofar as the 01.04.2016 loan was concerned, the figure of Rs.21.41 crores was still outstanding. The corporate debtor now filed a counter affidavit in which it denied this and stated that, as a matter of fact, from 2008 till date, an amount of Rs.65.60 crores have been repaid by it. A supplementary affidavit was filed by the appellant dated 06.06.2018 which, owing to technical defects, was rejected. A second supplementary affidavit of 03.08.2018 was therefore filed, replacing this affidavit, in which it was explained that, as a matter of fact, the corporate debtor has made payment of Rs.18,86,00,000/- on 13.04.2016 and 16.04.2016, and thereafter of*

Rs.16,80,62,000/- from 05.07.2016 and 19.07.2016, as would be evident from pages 11 & 12 of the counter affidavit filed on behalf of the corporate debtor. Thus, the sum of Rs.35,66,62,000/- which has been paid by the corporate debtor to the appellant is on account of its previous outstanding of Rs.35,66,61,986/- which was outstanding on the part of the corporate debtor as on 31.03.2016 as was unconditionally and unequivocally admitted by the corporate debtor in its counter affidavit filed by it in the prior proceeding (I.B. No. 54(PB)/2017). A sum of Rs.18,86,00,000/-, disbursed to the corporate debtor by the appellant on 01.04.2016, is still due and payable to it."

"7. We have heard learned counsel for the parties, including the parties in Civil Appeal No.1911 of 2020 and Civil Appeal No.3112 of 2020. A bare reading of the NCLT order shows that it is only after a perusal of the documents, pleadings, and the supplementary affidavit of 03.08.2018, including the counter affidavit in the earlier section 7 application, that the NCLT came to the conclusion that a loan amount remained outstanding. The NCLAT, when it dealt with the NCLT order, wrongly recorded that documents which were already rejected by the adjudicating authority could not have been the basis of the order of admission. The NCLAT also wrongly recorded that there was no further evidence in support of the fact that any amount was outstanding. Further, the NCLAT also held that a 'document' filed in the earlier petition that was dismissed as withdrawn could not have been relied upon by the adjudicating authority. The NCLAT is wrong on all these counts. As has been stated earlier, documents evidencing an outstanding loan amount were produced; a supplementary affidavit dated 03.08.2018 was also relied upon; and the admission made in the counter affidavit that was made in the first round of litigation, can by no means be described as a 'document' in an earlier petition that could not be relied upon. The 'document' was not a pleading by the appellant – it was a counter affidavit by the corporate debtor in which a clear admission of the debt being outstanding was made."

On withdrawal of the Commercial Original Suit bearing No. 266 of 2017 filed before the Hon'ble Additional Chief Judge cum Commercial Court at Hyderabad, on 02.04.2019, where in the present corporate debtor had challenged the enforceability of the corporate guarantee as not pressed,

without obtaining the liberty specified under Order XXIII Rule 1(3) of the CPC, Ld. Sr. Counsel contends that the respondent is estopped from questioning the validity of the Deed of Guarantee again before this Hon'ble Tribunal.

This submission of the Ld. Sr. Counsel, has been, refuted by the Ld. Sr. Counsel for the corporate debtor, by contending that even though a party cannot raise a question or adduce evidence contrary to or inconsistent with a factual plea taken in his pleadings, but he can do so in relation to a question of law as there can be no estoppel against statue. In that view of the matter, the objection herein being regarding the enforceability of the deed of guarantee on the ground that the same was executed in breach of statutory provision, there cannot be any estoppel in this case. In support of the said submission Ld. Sr. Counsel relied on the following rulings.

Makali Engg Works Pvt. Ltd. v. Dalhousie Properties Ltd., 2000 SCC On Line Cal 512, wherein, it was held as under:

> "*46. Having regard to the various decisions cited at the Bar there cannot be doubt whatsoever that an admission made by the defendant cannot be permitted to be resiled or explained by filing an application for amendment but for the said purpose the nature of admission must also be considered. An admission made by*

a party creates an estoppel. It is admissible against him proprio vigore but it is also equally well-settled that there cannot be any estoppel against statute.

47. The status of the parties which has been granted by reason of a registered indenture and requires interpretation. For the purpose of arriving at a definite conclusion as regards their status an admission made in that regard would not be binding on the Court in view of the fact that interpretation of a document gives rise to a pure question of law. Despite an admission the defendant may raise a contention that the admission as regards his status was not legally tenable. Thus, a distinction must be made between an admission on fact and admission on law. Whereas a party cannot raise a question or adduce evidence contrary to or inconsistent with a plea taken in his pleadings, he can do so in relation to a question of law."

Mayank Poddar v. Wealth Tax Officer, 2003 SCC OnLine Cal 63 : (2003) 9 AIC 320 : (2003) 262 ITR 633 it was held as under:

"9. *Thus, unless the definition of 'net wealth' real with the definition of 'asset' as provided in section 2(m) and section 2(ea) respectively, include a building let out to a tenant used for commercial purposes, the same cannot be subjected to wealth tax. Even if the assessee had included the same in his return, that would not preclude the assessee from claiming the benefit of law. There cannot be any estoppel against statute. A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or on his mis appreciation. If in law an item is not taxable, no amount of admission or mis appreciation can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assesses. The department cannot rely upon any such admission or mis appreciation if it is not otherwise taxable."*

Union of India vs VVF Ltd, (2020) 20 SCC 57, where in it was held that:

"There cannot be estoppel against statute."

State of West Bengal vs Gitashree Dutta, 2022 SCC OnLine SC 691 at paras 27 – 29, it has been held that

"There can be no estoppel against a statute – actions when not in conformity with the law, the doctrine of promissory estoppel will not be applicable."

Indira Bai vs Nand Kishore, (1990) 4 SCC 668 at para 5, the Hon'ble Supreme Court of India, held that,

"...Therefore, that which is statutorily illegal and void, cannot be enforced resorting to the rule of estoppel. Such extension of rule may be against public policy..." And "...the distinction between validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter..."

I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer, (1996) 6 SCC 634 (Para 30):, the Hon'ble Supreme Court of India, held that;

"The proposition urged by the learned counsel for the appellant falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well-settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to the rules of estoppel. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel."

XVIII. Having heard the Ld. Sr Counsels and on perusal of the afore mentioned rulings, we wish to state that, while the submission of the Ld. Sr. Counsel for the financial creditor that the corporate debtor having unequivocally stated, certified, declared and confirmed that it is not required to the obtain the prior consent of WBERC in terms of the WBERC Licensing

Regulations for issuing the Deed of Guarantee in favor of the lenders is estopped from denying the said acts as well as the statements which are nothing but pure factual assertions made by the party may be tenable, but the question here is, can an estoppel ever be applied so as to prevent the normal application of a statutory rule framed, by a quasi-judicial Body, the Regulator by virtue of the power conferred under the Electricity Act 2003 ?

The answer to the above question is no more, res integra, as right from the leading authority in re, Maritime Electric Co. v. General Dairies Ltd., wherein. "the relevant words of a New Brunswick statute were:

> *"No public utility shall charge, demand, collect or receive a greater or less compensation for any service than is prescribed.*
> *The Maritime Electric Company, a public utility within the meaning of the Act, by mistake considerably undercharged General Dairies for electricity supplied to them. The Privy Council held the Maritime Electric Company was not estopped from claiming the balance due to them although the dairy company had paid more to the farmers for their cream than they would have paid had the electricity been properly charged. It was further held that, to have admitted the estoppel would have had the effect of repealing the statute in the particular case'. (Emphasis is Ours)*

the Constitutional Courts in India, have consistently held that there can be no estoppel against the statue or statutory rule.

One such recent ruling is the ruling in re, Municipal Corporation of Greater Mumbai v. Abhilash Lal, (2020) 13 SCC 234, whereunder it was held;

"In this regard, the Court notices the well-known principle that there can be no estoppel against the express provisions of law"

XIX. Hon'ble Delhi High Court, in Universal Plast Ltd. v. Santosh Kumar Gupta AIR 1985 Del P 383, wherein while dealing with a similar issue arose in connection with Clause 3 of Woollen Textiles (Production and Distribution) Control Order, 1962, issued under the Essential Commodities Act, 1955, which read as follows, Hon'ble High Court, after having referred to several rulings of Hon'ble supreme Court held that:

> *"3. Prohibition of acquisition, installation, sale, etc:*
> *(1) No person shall, except with the prior permission in writing of the Textile Commissioner, acquire or install or sell or otherwise dispose of (or change the location of) any spindle worked by power and use it for the purpose of manufacturing woollen yarn."*

As far as the fact is concerned; there was acquisition and sale of spindles in the absence of any permission from the Textile Commissioner, albeit without payment of the entire purchase consideration by the buyer/defendant. When the plaintiff had approached the Court to enforce its right to recover balance payment, the Court noted as follows:

> *"(9) Mr. Saharya on the other hand submitted that there was no absolute bar under the law for transfer of the spindles and that this could be done with the permission of the Textile Commissioner. He said that it was the responsibility of the defendant to apply for permission and that the plaintiff was absolved of any such responsibility. He submitted that since*

the defendant failed to discharge his obligation under the agreement and as he had already taken delivery of the spindles, the suit of the plaintiff should be decreed. Mr. Saharya also submitted that there was no specific plea taken in the written statement challenging the validity of the agreement in question and no specific issue raised. I am afraid, I cannot agree to any of the submissions made by Mr. Saharva. The plea is very much there in the written statement: of the defendant. Though, no specific issue was raised as such, yet I find from the pleadings and evidence on record that the validity of the agreement in question was very much in issue."

In Surasaibalini Debi v. Phanindra Mohan Majumder [AIR 1965 SC 1364] Ayyangar J. observed as under:-

" ..... Where a contract or transaction ex facie is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of the nature of the contract or transaction and would its relief according to the circumstances ..... "

(10) I put it to Mr. Saharya that if I decree the suit would it not have the effect of negating the provision of law as contemned in the Control Order. His reply was that a transaction remains unaffected and penalty and prosecution is provided if the provision of law is contravened. This argument is merely stated to be rejected.
In Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. [AIR 1969 SC 504] I find complete answer to the argument put forward by Mr. Saharya.
(11) In this case the plaintiff instituted a suit for recovery of damages for breach of contract in respect of the goods purchased by the plaintiff on behalf of the defendant and of which the defendant refused to take delivery on the due dates. The plaintiff was carrying on the business as commission agents. The defendant placed three orders for purchase of hundred candies of coconut oil for one month's 'vaida' and, in accordance with those orders the plaintiff purchased hundred candies of coconut oil on three different dates. Since the defendant refused to take delivery of the goods on due dates, the plaintiff instituted the suit for damages being the difference in prices of the goods as purchased by him and the price prevailing as per closing market rates on the due dates. One of the grounds on which the claim in the suit was questioned, was that all these three contracts were onward Contracts and were void and

unenforceable because they were made in contravention of the prohibition contained in the Travancore-Cochin Vegetable Oils and Oilcakes (Forward Contract prohibition) Order, 1950. There was another order called the Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order, 1119. There was some controversy as to which particular order was applicable.
But the Supreme Court held as follows: -
" ..... Under either of those Orders, the transactions entered into between the appellant and the respondent were prohibited and. having been entered into against the provisions of law, no party can claim any rights in respect of the three contracts in suit: The claim for damages for breach of those contracts by the respondent against the appellant was therefore, not maintainable."

(12) In Waman Shriniwas Kini v. Ratilal Bhagwandas and Co. [AIR 1959 SC 689] the Supreme Court with reference to Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 which prohibited sub-letting observed that an agreement entered into after the Act has come into force, contrary to the provisions of Section 15 would be unenforceable as being in contravention of the express provision of the Act and which prohibited it and that it was not permissible to any person to rely upon a contract the making of which the law prohibits.
(14) Applying the principles enunciated above and the law on the subject it is quite clear that the agreement in question is illegal and cannot be enforced. The prohibition against acquisition and sale of spindles is absolute in the absence of any permission from the Textile Commissioner. If I decree the suit, it will, in fact, be putting at naught the provisions of the Control Order. The plaintiff must, therefore, fail."

Moreover, there cannot be any denial of the fact that, on the very same day of execution of the corporate guarantee dated 23.09.2016, the corporate debtor also submitted an affidavit whereby it unequivocally declared and confirmed that it is not required to the obtain the prior consent of WBERC in terms of the WBERC Licensing Regulations for issuing the subject deed of guarantee. However, these acts and factual

assertions by the corporate debtor cannot be considered/viewed in isolation to the events that admittedly preceded the execution of the corporate guarantee and the submission of the affidavit, namely, the two letters of the corporate debtor dated 29.07.2016 and 14.09.2016 to REC, which are reproduced here,

> *"INDIA POWER*
>
> *IPCL/MEPL/2016-17/REC/SG/17 Date July 29, 2016*
> *Mr. V. K. Singh*
> *General Manager-Generation*
> *Rural Electrification Corporation Limited;*
> *1st Floor, Core 3, Scope Complex*
> *Lodi Road*
> *New Delhi 110003;*
> *Dear Sir,*
> *Sub: Approval for Proposed Stake Sale of MEPI to IPCL.*
> *Ref: Your Sanction Letter No. REC/C0 /Gen,IMEPL/2016-62B dated 28-D7-2016;*
>
> *We would like to thank you for considering our request for change in control in MEPL*
> *We would like to bring to your kind attention that the conditions set out in the In-principle approval of SBI dated May 18, 2016, were deliberated between the lenders and IPCL and was accepted by IPCL along with additional comfort to the Lenders by way of various additional undertakings/100% share pledge etc against the comfort provided by the outgoing promoter Le. ENGIE*
> *However, we observe that the above referred sanction letter stipulates certain additional conditions, which were not discussed with IPCL/MEPL while preparing the IM and compliance of which would be difficult/impossible/ result in delay in consummation of the transaction, and as an incoming promoter, IPCL cannot agree. Hence, we have enumerated the same along with rationale in Annexure*
>
> *We request you to kindly consider suitable modification/deletion of the conditions and convey the revised sanction at the earliest for our*

acceptance and further sharing with the other consortium lenders for expeditious consummation of the transaction.

Yours sincerely
For India Power Corporation Limited
Jyoti Poddar
Director

Clause of Sanction	*Condition of the Sanction*	*IPCL Comments and Requests*
Pre commit-ment Conditio n (PCC) No. 2	*Promoters shall mean post transaction and include following:* *India Power Corporation Limited (IPCL)* *Meenakshi Energy & infrastructure Holdings Private Limited (MEIHPL)* *All the conditions imposed on promoters are to be complied by jointly or severally by the above*	*As per In Principle Approval of 5B1, IPCL has agreed to give its undertakings/ Guarantees/pledge of 100% of its shareholding in MEPL. Hence either the definition of Promoters may be modified with IPCL as only promoter or it may be stipulated that all undertakings/ obligations are to be given by IPCL only for effective and early consummation of the transaction. Also Please find the representation form MEPL of their inability to procure any undertaking/ guarantee /pledge from EIHPL or Mr Suresh(Letter dated 21st July 2016 attached)*
PCC No 11	*IPCL shall undertake IPCL shall not commit any equity in any new project except of investments required in ordinary course of its business, without explicit approval from the lenders.*	*Under In-principle approval of SB1, IPCL agreed not to commit any further equity till the balance amount out of USD 300 million (USD 300 MN to be reduced with the amount already infused post SPA signing and any adjustment as per SPA, if any) is infused to TRA account of MEPL. The condition may please be modified accordingly.*

PCC No.21	*Corporate Guarantee of IPCL to be provided. LLC to certify whether IPCL is required to take permission from State Regulatory Commission under clauses of Licensee, if any, as IPCL acts as Distribution Franchisee. Necessary due diligence to be done by Law Division of REC*	*Corporate Guarantee of IPCL to be provided. LLC to certify whether IPCL' is required to take permission from State Regulatory Commission under clauses of Licensee or the Distribution Franchisee Agreement if any, as IPCL acts as Distribution Licensee and Distribution Franchisee. Necessary due diligence to be done by Law Division of REC*
PCC No. 23	*Pledge of 100% shares of MEPL .*	*As per In Principle Agreement of SBI, IPCL agreed to pledge 100% of its shareholding in MEPL. Hence either the definition of Promoters may be kept as IPCL only or the condition maybe modified suitably.*
PCC No. 28	*Borrower Undertaking- that in case of prepayment of loans, from any source, including any refinancing of debt, the same shall be proportionately for all lenders.*	*We request modify the condition as : that in case of prepayment of loans, from any source, including other than any refinancing of debt, the same shall be proportionately for all lenders.*
Pre-Disbursement Conditions (PDC) No. 9 & 18	*PDC No. 9 states that MEPL shall enter into firm long term PPA through Case I prior to SCOD for such capacity and Tariff that financial in Base Case projections are maintained. PDC No. 18- Six Months prior to SCOD of Unit L the Borrower shall execute Back to Back*	*It is requested that in view of PDC No. 9, the PDC No. 18 may please be deleted. Accordingly the change in the CLA may be carried out.*

	PPA for 100% of the saleable power with Discoms/end users on terms satisfactory to Lenders	

Annexure I

"INDIA POWER

IPCL/MEPL/PK/16-17/12
Dated: 14 September 2016

Shri VK Singh
General Manager (Gen)
Rural Electrification Corporation Limited
Core 4, SCOPE Complex,
7 Lodi Road, New Delhi-110003

Sub: Induction of IPCL as majority shareholder in Coal Based Thermal power plant at
Nellore near Krishnapatnam, AP of MEPL-reg

Dear Sir,
This is in reference to: (a) your Approval for Change In Ownership and Control of MEPL vide letter No REC/CO/Gen./MEPL/2016-628 dated 28 July 2016, wherein clause no 21 to the Pre- commitment condition states that "Corporate Guarantee of IPCL to be provided. LLC to certify whether IPCL is required to take permission from State Regulatory Commission under clauses of Licence, if any; and, (b) our discussions over the conference call with Cyril Amarchand Mangaldas ("Legal Advisors", together with its written opinion), REC team and ourselves earlier today (on September 14, 2014 at noon, collectively, "Joint Discussion").

Sir, as was understood during our Joint Discussion. It may please be noted that: (a) IPCL is not required to obtain any specific consent from the regulator to provide corporate guarantee (in the form as agreed upon) to lenders of MEPL, and, (b) as additional comfort to REC, IPCL further and hereby agrees to undertake that any surplus funds that are generated from the WBERC regulated asset that is, funds remaining after meeting the requirements of the regulated business viz. after payment of statutory dues, capital expenditure, operating costs and debt servicing payments that are

required to be made in relation to the WBERC regulated asset, will be utilized to make payments towards debt servicing obligations of the Company if a demand is made by Phase II Lenders (Undertaking").

In addition, it has been expressly clarified by Legal Advisors that no approval of WBERC is required in respect of the above Undertaking.

Sir, we further understand that, in accordance with the relevant REC guidelines, the project rating is IR 4 and that there is no requirement of a corporate guarantee as such; however, as additional comfort/ security taken together with 100% pledge of MEPL shares held by IPCL, we have also agreed to provide a corporate guarantee to the lenders.

In view of the above, we would request you to kindly modify the clause no 21 to the Pre-
commitment condition as per the suggestion below:
INDIA POWER

Existing Condition	*Requested modified condition*
PCC No 21 *Corporate Guarantee of IPCL to be provided. LLC to certify whether IPCL is required to take permission from State Regulatory commission under clauses of licensee, if any, as IPCL acts as Distribution Franchisee. Necessary due diligence to be done by Law division of REC*	*Corporate Guarantee of IPCL to be provided, on all assets other than WBERC regulated asset.* *Additionally, with respect to WSERC regulated asset. following additional condition is stipulated-* *IPCL to provide an Undertaking that any surplus funds that are generated from the WBERC Regulated Asset Le funds remaining after meeting the requirements of the regulated business viz. after payment of statutory dues, capital expenditure,. operating costs and debt servicing payments that are required to be made in relation to the WBERC Regulated Asset, be utilized by IPCL to make payments towards debt servicing obligations of the Company if a demand is made by the Phase II Lenders*

	The above Undertaking shall form part of the Corporate Guarantee of IPCL

Trust you will find this in order, and we would request you to kindly accept the above Undertaking along with Corporate Guarantee in view of our Joint Discussion with LLC, or alternatively, please waive the requirement of a corporate guarantee.

Thanking you,

Yours sincerely,

For India Power Corporation Limited
Asok Kumar Goswami
Whole Time Director"

Red flagging, the condition of the lenders to provide corporate guarantee by raising the issue of requirement of obtaining prior written consent of the Regulator in terms of clause Regulation 5.13.2 of License Regulations, which prompted the letters for the opinions for the legal advisers, namely, M/s. Ciril Amarchand Mangal Das, Justice (Rtd) M Karpaga Vinayagam and Mr. M G Ramachandran, Senior Advocate, which was followed suit by the corporate debtor as well.

It is also an undeniable fact that only after the corporate debtor raised the issue of requirement of prior written consent of WBERC in terms of clause Regulation 5.13.2 of License Regulations vide its letters,

Supra, the lenders have taken recourse to obtain opinions from the legal advisers who in turn have opined that, "in view of the above analysis, I am of the opinion that if recourse of the lenders under the guarantee provided by IPCL is limited to the assets or business other than the regulated assets/ business, i.e., the distribution business, then there is no necessity for obtaining the prior approval or consent from the State Commission for the issuance of such guarantee. To make it clear, the lender gets a guarantee only in respect of the revenues/ proceeds from business/assets other than the regulated business/ assets to honour IPCL's payment obligations under the corporate guarantee. IPCL should specifically mention the same in the corporate guarantee." and pursuant thereto only the subject guarantees were executed in respect of non-regulated assets of the corporate debtor and the sworn affidavit has been submitted by the corporate debtor, however without knowledge or the prior written consent WBERC.

XX. Therefore, when it is overwhelmingly clear that the furnishing subject guarantees and the affidavit by the corporate debtor was undoubtedly preceded by the above events, the submission of the Ld. Sr. Counsel for the financial creditor that only as an afterthought

the corporate debtor has approached WBERC, post execution of the contract of guarantee, in our considered view, does not sound well. Moreover, in terms of the first proviso to sub-section (1) of section 82 of the Electricity Act, 2003 (36 of 2003), enacted by the Parliament of India, repealing the Electricity Regulatory Commission Act,1998 (14 of 1998), the West Bengal Electricity Regulatory Commission, has been established under section 17 of the Electricity Regulatory Commission Act, 1998 (14 of 1998) and functioning as the State Commission for the purpose of this Electricity Act, 2003 (36 of 2003) with powers and functions clearly defined in the statute. Therefore, the requirement of obtaining prior written consent of the Commission in terms of Regulation 5.13.2 of License Regulations, is thus, a statutory requirement. As such, compliance of statute and the statutory rules is imperative for the Licensee and is obligatory for the lenders to ensure due compliance Regulation 5.13.2 of License Regulations. Therefore, any prudent lender would prefer to ask the corporate debtor to first approach the Regulator for its consent in terms of the Regulation, supra, especially when informed specifically of the need to comply the Statutory Regulation, supra. However, instead of insisting compliance

of Regulation 5.13.2 of License Regulations, the lenders for the reasons best known to them have opted for legal opinion, obtained the same on 19.09.2016 which was also followed suit by the corporate debtor and got the subject corporate guarantee executed by the corporate debtor.

XXI. Thus, both the 'sophisticated parties' have circumvented compliance of Regulation 5.13.2 of License Regulations, under the 'guise' of the legal opinion supra, jeopardizing the larger public interest. That, apart, when the corporate debtor's request which was made post submission of the subject guarantee (without disclosing the fact that it had already furnished the guarantee), for consent in terms of 5.13.2 of License Regulations, has been rejected by the Regulator vide its Orders dated 07.08.2018, stating,

> *"prior consent in terms of Regulation 5.13.2 of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licence), 201 was required to be obtained from the State Commission before execution of the Corporate Guarantee."*

the corporate debtor immediately informed the same to the financial creditor and requested the lenders not to enforce the subject corporate guarantee claiming that the same is void, non-est and unenforceable.

XXII. It is pertinent to note that, even at this stage the financial creditor did not choose to take up the issue with the WBERC, stating that the guarantee was obtained only in respect of non-regulated assets and in respect of surplus funds remained after meeting all the requirements of the Regulator, and as such the enforceability of the corporate guarantee is limited and may not prejudice the interest of the Regulator or the public. Instead, just on the basis of the unilateral interpretation of Regulation 5.13.2 of License Regulations by virtue of the 'opinions' obtained from the lawyers of their choice, indulged in questioning/interpreting/interfering with the statutory rights of a public authority, a third party against its licence. Thus, it turned out to be a case of both the parties before us being confederates in breaching a statutory provision which both sides were fully aware of. Therefore, whether it is a case of *ex dolo malo non oritur actio* or *ex turpi causa non oritur actio*, will be considered by us in the latter part of our order.

XXIII. Therefore, in the light of our discussion, supra, we do not hesitate in rejecting the submission of the Ld. Sr. Counsel for the financial creditor that the corporate debtor is estopped from questioning

the enforceability of the impugned corporate guarantee. Accordingly, we hereby reject the same.

XXIV. In so far as the submission that the Commercial Original Suit bearing No. 266 of 2017 filed by the respondent/ corporate debtor before the Hon'ble Additional Chief Judge cum Commercial Court at Hyderabad, on 02.04.2019, wherein the corporate debtor had challenged the enforceability of the corporate guarantee, since was not pressed, without obtaining the liberty specified under Order XXIII Rule 1(3) of the Code of Civil Procedure, the respondent/corporate debtor is estopped from questioning the validity of the Deed of Guarantee again before this Hon'ble Tribunal, is concerned, we are afraid the same is thoroughly misconceived . Sub clause 4 (b) of Order 23 of Code of Civil Procedure, applicability of which to the proceedings in a Petition under section 7 of I&B Code, 2016 itself in serious doubt, even assuming it to be applicable only says that,

> *"Where the plaintiff, —*
>
> *(a) abandons any suit or part of claim under sub-rule (1), or*
>
> *(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the court may award*

and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim." (Emphasis is Ours)

Thus, the bar if any is for institution of any fresh suit in respect of such subject matter, and not from setting up of a defense by the corporate debtor in a petition filed under Section 7 of IB Code, that there can be no estoppel against statute.

Therefore, in the light of our discussion, supra, we do not hesitate in rejecting the submission of the Ld. Sr. Counsel for the financial creditor that the corporate debtor is estopped from questioning the enforceability of the impugned corporate. Accordingly, we hereby reject the same.

- **Is the Corporate guarantee intact and enforceable?**

Ld. Sr. Counsel for the financial creditor vehemently contended that, mere absence of WBERC's prior consent cannot make the subject guarantee null and void, as both the Electricity Act, 2003 and WBERC Regulations envisage only a penalty on the regulated entity for failure to obtain prior consent before issuing a guarantee, hence the corporate guarantee remains intact and fully enforceable, notwithstanding violation if any of the WBERC Regulations, supra.

In support of this submission Ld. Sr. Counsel relied on the following rulings;

- Bank of India Finance v. Custodian, (1997) 10 SCC 488, wherein Hon'ble Supreme Court held that;

  "If the contention of the Custodian is accepted it will result in invalidation of agreements by the banks, even where the third parties may not be aware of the direction which are being violated. To give an example if the Reserve Bank by confidential circulars fixes the limit in excess of which the banks cannot give any lone but, without informing the third party, the bank while exceeding its limit gives a loan which is then utilised by the bank's customer. It will be inequitable and improper to hold hat as the directions of the Reserve Bank had not been complied with by the bank, the grant of loan cannot be regarded as valid and, as a consequence thereof, the customer must return the amount received even though he may have utilised the same in his business".

  "Yet another instance may be where the bank advance loan by charging interest at a rate lower than the minimum which may have been fixed by the Reserve Bank, in a direction issued under Section 36 (1)(a). As far as the customer is concerned, it may not be aware of the direction fixing them minimum rate of interest. Can it be said, in such a case, that the advance of loan itself was illegal or that the bank would be entitled to received that higher rate of interest? In our opinion it will be wholly unjust and inequitable to hold that such transactions entered into by the bank with a customer. which transactions are otherwise not invalid, can be regarded as void because the bank did not follow the directions or instructions issued by the Reserve Bank of India. failure to take prior approval does not invalidate the contract itself".

- Eurometal Limited vs. Aluminium Cables and Conductors (U.P.) P. Ltd, [1983] 53 Comp Cas 744 (Cal). It is held at Paras 9 and 10 as under:

The company entered into a contract with a creditor wherein the company agreed to pay an amount to the petitioning creditor after obtaining permission from the Reserve Bank of India. Subsequently, the petitioning creditor field a winding up petition and the company challenged the same on the ground that the debt is not payable as the approval was not taken. The Hon'ble Calcutta High Court held that the company had admitted its debt in correspondence and had itself created the difficulty by its own default in not obtaining the necessary permission of the Reserve Bank of India as it has specifically undertaken in the underlying contract. In view of the same, the Hon'ble court admitted the winding-up petition;

Vanguard Textiles Limited v. GHCL Ltd, Company Petition No. 20 of 2009 at Para 6,7 & 10 it is held that:

PARA 6:

> *"6. Therefore, prima facie it appears that the action by the supplier for commencing the proceedings against the Guarantor in any Court of the competent jurisdiction is not barred. If the respondent Company is registered in Gujarat, this Court can be said as that of the competent jurisdiction for entertaining of the proceedings of the winding up. Therefore, prima facie, the contention raised on behalf of the respondent cannot be said as acceptable for ousting the jurisdiction of this Court on a mere ground that the cause of action pertaining to the supply or the delivery or the guarantee had not arisen in India.*

PARA 7:

> *7. The next contention raised by Mr.Sanjanwala was that the Deed of Guarantee is without prior approval of RBI as per the provisions of the Foreign Exchange Management Act, 1999 (hereinafter referred to as 'FEMA'). Therefore, the Deed of Guarantee is non-enforceable in India. It was submitted that if the Deed of Guarantee is non-enforceable in India in absence of the permission of the RBI, the same cannot be invoked nor any liability based on the same can be enforced in Indian Courts by the petitioner.*

PARA 10:

> *10. It deserves to be recorded that as per the Decree of the Court of UK, the process is served, but the respondent Company has not defended. It may be that the decree is not on merit after dealing with each and every contention of the plaintiff, but thereby, it cannot be said that there is no foreign judgement against the respondent Company. After having being served the statutory notice by the petitioner, nothing prevented the respondent Company for filing the suit for a declaration that the decree is not binding, but such option available has not been exercised. Further, when there is a decree/judgment of a foreign Court for fastening the liability, it cannot be prima facie said that there would not be any liability at all of the respondent. In any case, the aspects of non-enforceability may be required to be considered in execution proceeding, if resorted to, but such cannot be a sole ground to deny the entertainment of the petition for winding up of the Company on the basis of such liability. The reference may be made to the decision of the Andhra Pradesh High Court in the case of Enernorth Industries Inc. Vs. VBC Ferro Alloys Ltd. reported at [2006] 133 Comp Case 130 (AP), more particularly the observations made at para 34 and 35 that merely because the other modes are available, it cannot be said that the petition for winding up is not maintainable."*

SRM Exploration Pvt. Ltd v. N and S and N Consultants S.R.O, 2012 (129) DRJ 113 at Paras 13 and 14, HNCLAT

"13. The pleadings of the appellant Company are conspicuously silent as to why Mr. Ravi Chilukuri who has a substantial stake in the appellant Company and who from the documents filed by the respondent is the face/promoter of the appellant Company and/or of the Group of Companies to which the appellant Company belongs signed the Guarantee Declaration, Promissory Notes and as to how the Resolution aforesaid of the Board of Directors of the appellant Company landed with the respondent. Similarly, though it is contended that comfort letter aforesaid issued by the Bankers of the appellant Company does not refer to the transaction in question but there is no explanation as to for which transaction it was obtained from the bank. The appellant obviously had a stake in the Stock Purchase and Sale Agreement (supra), for the appellant Company to stand guarantee for the same. The world is a shrinking place today and commercial transactions spanning across borders abound. We have wondered whether we should be dissuaded for the reason of the transaction for which the appellant Company had stood surety/guarantee being between foreign companies. We are of the opinion that if we do so, we would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions."

PARA 14:

"14. As far as the argument of appellant Company of the purchasers under the aforesaid Stock Purchase and Sale Agreement being not before this Court and of denial of the knowledge of default, is concerned, certainly the appellant Company which had stood guarantee for the purchaser i.e. M/s Newco Prague s.r.o. would be in the know as to whether the purchaser has paid the price or not. If the purchaser was not in default, that would have been the first plea of the appellant Company against the petition for winding up. No such plea has been taken. On the contrary advantage is sought to be taken of technicalities and which cannot be permitted. We are also of the view that the appellant Company by allowing Mr. Ravi Chilukuri to be shown in all its material available on the internet as a promoter of the appellant Company, cannot now be heard to deny his authority. The Resolution of the Board of Directors executed in his favour is of the widest possible amplitude. If the Board of Directors of the appellant Company were intending to confer restricted authority on Mr. Ravi Chilukuri it was for them to in the Resolution so clearly restrict his authority. On the contrary by passing the Resolution in such a manner it was conveyed to all concerned that the appellant Company would be bound by the actions of Mr. Ravi Chilukuri. Similarly the plea that Mr. Ravi

Chilukuri was authorized to act jointly with Mr. Mohinder Verma is devoid of any merit. The language of the Resolution, if that had been the intention, would have been different. Also, though a lip service is sought to be paid by filing a copy of the complaint lodged with the Police against Mr. Ravi Chilukuri but no serious action for the folly if any committed by him has been taken. There is nothing to show that the Board of Directors of the appellant Company has dealt with the matter. Mr. Ravi Chilukuri who continues to be associated with the appellant Company has not come forward to explain the transaction. The Supreme Court in N. Rangachari v. BSNL (2007) 5 SCC 108 has held that a person normally having business or commercial dealing with a company will satisfy himself about its credit worthiness and reliability by looking at its promoters and Board of Directors and nature and extent of its business; other than that he may not be aware of arrangements within the company in regard to its management etc."

- Sandeep Kasare v. ILFS 2022 SCC OnLine HNCLAT 382

> *"9. Now we come to the first submission of the learned Counsel for the Appellant that Letter of Guarantee having not been sufficiently stamped could not be looked into for any purpose. The learned Counsel for the Respondent, although, contended that the Letter of Guarantee contains an E-stamp certificate, but have failed to prove that the Letter of Guarantee was sufficiently stamped as per requirement of the statute. The E-stamp, which is at Exhibit-C to the reply, only indicates that the Rs.150/- has been affixed. We, thus, proceed on the premises that Letter of Guarantee is not sufficiently stamped."*
>
> *"13. Further, in the reply, Charge Certificate dated 09.03.2018 issued by Registrar of Companies, Mumbai has been brought on record, which certifies creation of Charge dated 29.12.2017 between G.C. Property Private Limited (First Party) and IL&FS Financial Services Limited (Second Party). Charge having been registered by the Corporate Debtor himself, the Corporate Debtor cannot escape from its liability for payment of loan as per its own act of creating mortgage by deposit of Title Deed and registration of Charge. It is further relevant to notice that in the Offer Letter dated 27.12.2017, as extracted above in 'Security Package', where Primary Security was Flat No.6 and it was noticed in the Offer Letter itself that the valuation of Flat is Rs.300 million, i.e., equivalent to the Financial Facility, which was to be extended to the Principal Borrower. We, thus, are of the view that the Corporate Debtor cannot escape from its liability*

from repayment of the loan sanctioned to the Principal Borrower on the ground that Letter of Guarantee was insufficiently stamped."

- Mauritius Commercial Bank v. Varum Corporation Ltd., 2017 SCC Online NCLT 2424 at Para 11:

"*Since the duty was cast on the corporate debtor to intimate the RBI about giving the guarantee, and as the corporate debtor failed to give such intimation, it cannot take the plea that the guarantee was invalid on account of the lack of RBI intimation."*

- Baobab Broadband Ltd. v. Gemini Communication Ltd, NCLAT, at para 12 & 13, Hon'ble NCLAT held that:

"*since the corporate debtor/ guarantor had assured the financial creditor of its ability to provide the guarantee in accordance with the applicable law, it cannot now hide behind its failure to obtain any required approval to wriggle out of its liability or consequence of default*;"

- In Punjab National Bank v. M/s Superior Industries Limited 2023 SCC OnLine NCLT 62, held that:

"*The Corporate Debtor cannot take advantage of its own default and cannot challenge the corporate guarantee on the ground of absence of permission of the RBI*;"

- In Yes Bank Limited v Zee Learn Limited, (CP (IB) 301/MB/C-1/2022) at Para 30, 46 55 & 58, it was held that:

"*as long as the application made by the financial creditor is compete as required by law and the debt and default is established, there is no reason to deny the admission of the petition."*

XXV. Per contra, Ld. Sr. Counsel for the corporate debtor would contend that, the settled law being any agreement in contravention of statute visited by a penalty is void and unenforceable, the plea that mere absence of WBERC's prior consent cannot make the subject guarantee null and void, as both the Electricity Act, 2003 and WBERC Regulations envisage only a penalty on the regulated entity for failure to obtain prior consent before issuing a guarantee hence the corporate guarantee remains intact and fully enforceable, notwithstanding violation if any of the WBERC Regulations, is unsustainable.

In support of this plea Ld. Sr, Counsel relied on the following rulings:

- Asha John Divianathan vs Vikram Malhotra and another 2021 SCC online SC174,

> *"1. The central issue in this appeal is in reference to Section 31 of the Foreign Exchange Regulation Act, 1973. To wit, transaction (specified in Section 31 of the 1973 Act) entered into in contravention of that provision is void or is only voidable and it can be voided at whose instance?"*
>
> *"17. Before we analyse Section 31 of the 1973 Act, it is essential to understand the object and purpose for which the 1973 Act was brought into force. It was to consolidate and amend the law relating to certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of the foreign exchange resources of the country and the proper utilization thereof in the interests of the economic development of the country. While*

introducing the Bill in the Lok Sabha and explaining the object of Section 31 of the 1973 Act, Mr. Y.B. Chavan, the then Minister of Finance rose to state as follows:

> *"As a matter of general policy, it has been felt that we should not allow foreign investment in landed property/buildings constructed by foreigners and foreign controlled companies as such investments offer scope for considerable amount of capital liability by way of capital repatriation. While we may still require foreign investments in certain sophisticated branches of industry, there is no reason why we should allow foreigners and foreign companies to enter real estate business."*

19. On a bare reading of sub-Section (1), it is crystal clear that a person, who is not a citizen of India, is not competent to dispose of by sale or gift, as in this case, any immovable property situated in India without previous general or special permission of the RBI. The only exception provided in the proviso is that of acquisition or transfer of immovable property by way of lease for a period not exceeding five years. This provision applies to foreign citizens and foreign and FERA companies only. A non-resident Indian citizen is not covered thereunder. Sub-Section (2) mandated such person, who is not a citizen of India, to make an application to the RBI in the prescribed form making necessary disclosures. Sub-Section (3) postulates that on receipt of such an application, the RBI after due inquiry as it deems fit, either may grant or refuse to grant the permission applied for. The second proviso to sub-Section (3) provides for a default permission, if no response is received to the application within the specified period. What is significant to notice is that as per sub-Section (4), every person, who is not a citizen of India, holding immovable property situated in India at the time of commencement of the 1973 Act, is obliged to make declaration within ninety days from the commencement of the 1973 Act or such further period as may be allowed by the RBI.

20. xxxxxxx xxxxxxxxxxxxxx

50. Penalty.— If any person contravenes any of the provisions of this Act [other than section 13, cl. (a) of sub-section (1) of section 18 and cl. (a) of sub-section (1) of section 19] or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of

Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer).

24. xxxxx xxxxxx xxxxxx

21. Clive Lewis in his work Judicial Remedies in Public Law at p. 131 has explained the expressions "void and voidable" as follows: "A challenge to the validity of an act may be by direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This will usually be by way of an application for judicial review or by use of any statutory mechanism for appeal or review. Collateral challenges arise when the invalidity is raised in the course of some other proceedings, the purpose of which is not to establish invalidity but where questions of validity become relevant."

25. It is well established that a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. Further, it is settled that prohibition and negative words can rarely be directory. In the present dispensation provided under Section 31 of the 1973 Act read with Sections 47, 50 and 63 of the same Act, although it may be a case of seeking previous permission it is in the nature of prohibition as observed by a three-Judge Bench of this Court in Mannalal Khetan v. Kedar Nath Khetan18. In every case where a statute imposes a penalty for doing an act, though, the act not prohibited, yet the thing is unlawful because it is not intended that a statute would impose a penalty for a lawful act. When penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable. We may usefully reproduce paragraphs 18 to 22 of the said reported decision, which read thus:

"18. The High Court said that the provisions contained in Section 108 of the Act are directory because non-compliance with Section 108 of the Act is not declared an offence. The reason given by the High Court is that when the law does not prescribe the consequences or does not lay down penalty for non-compliance with the provision contained in Section 108 of the Act the provision is to be considered as directory. The High Court failed to consider the provision contained in Section 629(a) of the Act. Section 629(a) of the Act prescribes the penalty where no specific penalty is provided elsewhere in the Act. It is a

question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or merely to make the person who did it liable to pay the penalty.

19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See Mellis v. Shirley L.B. [(1885) 16 Q.B.D. 446 : 55 LJQB 143 : 2 TLR 360]) A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract : if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See St. John Shipping Corporation v. Joseph Rank [[1957] 1 Q.B. 267].) (See also Halsbury's Laws of England, 3rd Edn., Vol. 8, p. 141.)

20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim A pactis privatorum publico juri non derogatur means that private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See Mellis v. Shirley L.B.) What is done in contravention of the provisions of an Act of the legislature cannot be made the subject of an action.

21. If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

22. Penalties are imposed by statute for two distinct purposes:
(1) for the protection of the public against fraud, or for some other object of public policy; (2) for the purpose of securing certain sources

of revenue either to the State or to certain public bodies. If it is clear that a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable."

28. Notably, the Constitution Bench of this Court in Life Insurance Corporation of India (supra) had an occasion to examine the objects and reasons for enacting the 1973 Act. The Court was called upon to consider the purport of Section 29 of the 1973 Act, which does not qualify the words "general or special permission of the Reserve Bank of India" with word "previous" or "prior" unlike in the case of Section 31 of the same Act. In paragraph 63, this distinction has been noticed and reference has been specifically made to Section 31 of the 1973 Act. That makes it amply clear that the dispensations provided in Sections 29 and 31, must be regarded as distinct and violation whereof would visit with different consequences. As regards Section 29, this Court opined that the permission can be sought from the RBI at some stage for the purchase of shares by non-resident companies and not necessarily prior permission. The Court, therefore, opined that even ex post facto permission can be accorded by the RBI in reference to transaction covered by Section 29 of the Act.
29. Significantly, the consequence of contravention of Section 31 of the Act as being rendering the transfer void, is also taken notice of in the recent decision of a three-Judge Bench of this Court in Vijay Karia (supra). It has been so noted in paragraph 88 while distinguishing the dispensation provided in the Foreign Exchange Management Act, 1999 (FEMA). The Court has noted that FEMA unlike FERA — refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being RBI under FERA. Indeed, it is not a decision dealing directly with the question involved in the present appeal. Nevertheless, it does take notice of the strict dispensation under Section 31, as it obtained under the 1973 Act, particularly requiring "previous" general or special permission of the RBI.

32. From the analysis of Section 31 of the 1973 Act and upon conjoint reading with Sections 47, 50 and 63 of the same Act, we must hold that the requirement of taking "previous" permission of the RBI before executing the sale deed or gift deed is the quintessence; and failure to do so must render the transfer unenforceable in law. The dispensation under Section 31 mandates "previous" or "prior" permission of the RBI before the transfer takes effect. For, the RBI is

competent to refuse to grant permission in a given case. The sale or gift could be given effect and taken forward only after such permission is accorded by the RBI. There is no possibility of ex post facto permission being granted by the RBI under Section 31 of the 1973 Act, unlike in the case of Section 29 as noted in Life Insurance Corporation of India (supra). Before grant of such permission, if the sale deed or gift deed is challenged by a person affected by the same directly or indirectly and the court declares it to be invalid, despite the document being registered, no clear title would pass on to the recipient or beneficiary under such deed. The clear title would pass on and the deed can be given effect to only if permission is accorded by the RBI under Section 31 of the 1973 Act to such transaction.

33. In light of the general policy that foreigners should not be permitted/allowed to deal with real estate in India; the peremptory condition of seeking previous permission of the RBI before engaging in transactions specified in Section 31 of the 1973 Act and the consequences of penalty in case of contravention, the transfer of immovable property situated in India by a person, who is not a citizen of India, without previous permission of the RBI must be regarded as unenforceable and by implication a prohibited act. That can be avoided by the RBI and also by anyone who is affected directly or indirectly by such a transaction. There is no reason to deny remedy to a person, who is directly or indirectly affected by such a transaction. He can set up challenge thereto by direct action or even by way of collateral or indirect challenge.

34. In other words, until permission is accorded by the RBI, it would not be a lawful contract or agreement within the meaning of Section 10 read with Section 23 of the Contract Act. For, it remains a forbidden transaction unless permission is obtained from the RBI. The fact that the transaction can be taken forward after grant of permission by the RBI does not make the transaction any less forbidden at the time it is entered into. It would nevertheless be a case of transaction opposed to public policy and, thus, unlawful. In this view of the matter, the appellant must succeed and would be entitled for the reliefs claimed in O.S. No. 10079 of 1984 for declaration that the gift deed dated 11.03.1977 and supplementary deed dated 19.04.1980 in favour of respondent No. 1 are invalid, unenforceable and not binding on the plaintiff. A fortiori, the plaintiff is entitled for possession of the suit property from respondent no. 1 and persons claiming through him, admeasuring 12,306 square feet and also mesne profits for the relevant period for which a separate inquiry

needs to be initiated under Order 20 Rule 12 of the Code of Civil Procedure, 1908.

36. In the first place, provision for penalty under Section 50 for contravention referred to in Section 31, does not mean that the requirement of previous permission of RBI is directory or a mere formality. It is open to the legislature to provide two different consequences for the violation. As already noted hitherto, despite the absence of express provision declaring the transfer void, the intent behind enacting Section 31 and its purport renders the transfer in contravention thereof unenforceable until permission for such transaction is granted by the RBI.

37. Suffice it to observe that merely because no provision in the Act makes the transaction void or says that no title in the property passes to the purchaser in case there is contravention of the provisions of Section 31, will be of no avail. That does not validate the transfer referred to in Section 31, which is not backed by "previous" permission of the RBI. Further, the Punjab & Haryana High Court erroneously assumed that there was no provision regarding confiscation of the immovable property referred to in Section 31. Section 63 of the 1973 Act clearly refers to property in respect of which contravention has taken place for being confiscated to the Central Government. The expression "property" therein would certainly take within its sweep an immovable property referred to in Section 31 of the Act. The expression "property" in Section 63 is an inclusive term and, therefore, there is no reason to assume that consequence of confiscation may not apply to immovable property in respect of which contravention of the provisions of sub-Section (1) of Section 31 had taken place. The basis of that judgment is tenuous and is palpably wrong. For the same reason, the decision in R. Sambasivam (supra) of the Madras High Court is erroneous as it has merely followed the dictum of the Punjab & Haryana High Court. Suffice it to observe that the transaction of gift deed without previous permission of the RBI may not be nullity, but certainly not enforceable in law until such permission is granted."

- Shri Lachoo Mal vs Shri Radhey Shyam (1971 (1) SCC 619, held that:

"The general principle is that everyone 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. If

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.

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".

XXVI. Before we proceed to discuss the point above, we usefully refer to Section 2 of Indian Contract Act, 1872, which says that,

"*In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context: — —In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context;*
(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee";
(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;
(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;
(f) Promises which form the consideration or part of the consideration for each other, are called reciprocal promises;
(g) An agreement not enforceable by law is said to be void;
(h) An agreement enforceable by law is a contract;

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;
(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Section 10 of the Indian Contract Act, says that,

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. —All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in 1[India], and not hereby expressly repealed, by which any contract is required to be made in writing 2or in the presence of witnesses, or any law relating to the registration of documents.

XXVII. Having referred to the above provisions, we shall now refer to Section 23 of the Indian Contract Act, 1872, which is as below;

"23. What consideration and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless— —The consideration or object of an agreement is lawful, unless—" it is forbidden by law; 14 or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
Illustrations
(a) A agrees to sell his house to B for 10,000 rupees. Here, B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations. (a) A agrees to sell his house to B for 10,000 rupees. Here, B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations."

(b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations. (b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations."

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here, A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations. (c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here, A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations."

(d) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations. (d) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations."

(e) A, B and C enter into an agreement for the division among them of gains acquired or to be acquired, by them by fraud. The agreement is void, as its object is unlawful. (e) A, B and C enter into an agreement for the division among them of gains acquired or to be acquired, by them by fraud. The agreement is void, as its object is unlawful."

(f) A promises to obtain for B an employment in the public service and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful. (f) A promises to obtain for B an employment in the public service and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful."

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal. (g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal."

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful. (h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful."

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter and would so defeat the object of the law. (i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter and would so defeat the object of the law."

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral. (j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral."
(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (45 of 1860)."

XXVIII. Thus, it is clear from section 23 of the Contract Act, the object of an agreement is lawful, unless it is forbidden by law, and if the contract is forbidden by law, then it cannot be enforced. Thus, the debt claimed by the petitioner/ financial creditor here in, as due and payable by the Respondent/corporate debtor under the impugned guarantee agreement, if found to have been interdicted by section 23 of Indian Contract Act, the present application under section 7 of I&B Code cannot be maintainable, in the light of the ruling, in re, Innoventive Industries, Supra.

Since the Ld. Sr. Counsel for the financial creditor strongly contends that, mere absence of WBERC's prior consent cannot make the subject guarantee null and void, as both the Electricity Act, 2003 and WBERC Regulations envisage only a penalty on the regulated entity for failure to obtain prior consent before issuing a guarantee hence the corporate guarantee remains intact and fully enforceable, notwithstanding

violation if any of the WBERC Regulations, supra, which plea since vehemently denied by the respondent/corporate debtor, we now focus on finding whether such plea in the light of the facts of this case and the law relied on by both sides is sustainable and tenable?

Our analysis.

XXIX(i) West Bengal Electricity Regulatory Commission is a Statutory Body, created under the Electricity Act 2003, supra. By virtue of the power conferred under the Electricity Act, Regulations (Licensing & Conditions of License) 2013 were framed. The respondent/corporate debtor being a licensee under WBERC, is bound by the Regulations. Regulation 5.13.2 mandates prior written consent from the WBERC, in making any loans to, or issuing any guarantee for any obligation of any person which is beyond the normal area of business activities of the licensee in respect of its core activities. Loan to the employees pursuant to the terms of services and advances to the suppliers etc. in the ordinary course of business are excluded from the requirements to seek such approval. If any affiliates of the licensee undertake any loan for which the licensee's business may be affected

directly or indirectly then in such case licensee in required to obtain such written consent from the Commission in a manner as already specified. This Regulation has been made in the larger interest of electricity consumers in the State of West Bengal. The respondent/corporate debtor being a distribution licensee under the regulator/WBERC is statutorily obligated to ensure that it does not take upon itself any kind of obligation which may have an adverse effect on its regulated business. The company petitioner/financial creditor, also being a creature of the Act, called 'State Bank of India Act' of 1955, is also equally duty bound to follow the 'Statues and the Statutory Rules'. Needless to say, that a contract of guarantee being a contract to perform the promise or discharge the liability of a third person called the principal borrower in case of default, if entered in breach of section 10 of Indian Contract Act will be unenforceable.

- In re, Asha John Divianathan, supra, it has been held that,

> "*In every case where a statute imposes a penalty for doing an act, though, the act not prohibited, yet the thing is unlawful because it is not intended that a statute would impose a penalty for a lawful act. When penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable".*

> *"It is well established that a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. Further, it is settled that prohibition and negative words can rarely be directory. In the present dispensation provided under Section 31 of the 1973 Act read with Sections 47, 50 and 63 of the same Act, although it may be a case of seeking previous permission it is in the nature of prohibition as observed by a three-Judge Bench of this Court in Mannalal Khetan v. Kedar Nath Khetan."*
> *(Emphasis is ours)*

(ii) A bare perusal of the facts in re, Bank of India Finance, supra, relied on by the financial creditor categorically disclose that it was a case where, unlike in the case on hand where the corporate debtor admittedly and specifically brought Regulation 5.13.2 of License Regulations, to the notice of lenders before issuing the subject guarantee, in the above case , "the third parties were not aware of the direction which are being violated".

The example stated in the above judgement, namely,

> *"if the Reserve Bank by confidential circulars fixes the limit in excess of which the banks cannot give any lone but, without informing the third party, the bank while exceeding its limit gives a loan which is then utilised by the bank's customer. It will be inequitable and improper to hold hat as the directions of the Reserve Bank had not been complied with by the bank, the grant of loan cannot be regarded as valid and, as a consequence thereof, the customer must return the amount received even though he may have utilised the same in his business"*

also, fully confirms that the ruling, supra, cannot be relied on by the financial creditor for the simple reason that Regulation 5.13.2 of License Regulations has admittedly been brought to the notice of the lenders well before providing the corporate guarantee.

(iii) That apart, BOI Finance, dealt with a case where the RBI circulars were confidential in nature and thus not in the knowledge of the customers who were entering into agreements with the said banks. In the present case, admittedly, the lenders were aware of the legal embargo created in public interest and contained in a statute and also made aware of by IPCL. From the admitted facts of this case and any pleading and/or document to the contrary, reliance on BOI Finance (supra) is clearly misplaced.

(iv) In re, Mauritius Commercial Bank v. Varun Corporation Limited, where in it was held that:

> *"11. The basic thing that one should not get lost sight of the fact is that a wrong doer should not take advantage of its own wrong, here this corporate Debtor is indeed under obligation to make post facto intimation to RBI, not only this, it appears that this corporate debtor knowingly has given guarantee to the loan obligation more than 400% of its net worth, fact of the matter is, this loan money has not been utilised for investing in its subsidiary RPML located in Mauritius, but clawed out to one of its group company situated in India through the route of equity. After all these mischievous acts of the debtor, can today this debtor back out from the promise of guarantee given to a loan availed by its wholly owned*

subsidiary of it? Hundred percent subsidiary means what, the acts of subsidiary are nothing but acts based on the wish of the holding company. Where this loan money has gone? It has gone to one of its group companies. If at all this approval from RBI has to be obtained prior to obtaining loan or execution of Corporate Guarantee, then it may be said that the guarantee dehors intimation is bad, in this case, it is only a post facte intimation, not making such intimation will not vitiate or frustrate the agreement or rights of the creditor. Why it has not gone to RBI, we can't make any guess work on it, but it is a fact that this debtor sent a letter on 29.3.2009 to the creditor Bank stating that corporate debtor already sent post facto intimation to the RBI by sending a letter addressed to Bank of Baroda to the creditor Bank to make them believe that execution of guarantee agreement to this loan has been intimated to the RBI. May be the debtor has not put its efforts to see it reached to the RBI because guarantee is more than its limits. Since this duty is cast upon the Corporate Debtor to intimate to RBI about giving guarantee, the person, done wrong by not ensuring intimation reached to the RBI, today cannot come out with a defense stating since intimation has not reached to the RBI, the liability arising under this agreement is not enforceable against the corporate debtor. Therefore, we have not found any merit saying that not sending intimation to RBI about execution of guarantee will make this transaction invalid. No law says a person made a gain out of a transaction can vilify the same saying by so and so glitch in the law he has become free from the obligation owed upon him. More so, even if any transaction is irregular in the teeth of any regulation, mere irregularity per se will not make an act illegal." (Emphasis is ours)

and also, in re, Eurometal Limited v. Aluminium Cables and Conductors (U.P.) P. Ltd., Vanguard Textiles Limited v. GHCL Ltd, SRM Exploration Pvt. Ltd. v. N and S and N Consultants S.R.O., supra, have dealt with a 'post facto approval' and not a case where the validity of the guarantee as in the present case. That apart, in the present case, unlike in the cases, supra, the lenders were aware of the legal embargo and the legal opinions have prevailed over the parties that the prior

consent was not required and accordingly the subject guarantee has been issued.

Moreover, submission of the Ld. Sr. Counsel for the corporate debtor that the above said cases do not deal with a willful violation of statute, the doctrine of in *pari delicto potior est conditio possidentis* and are not applicable in view of the admitted facts of the present case, is not without any force.

(v) In re, Baobab Broadband Ltd., it has been stated that,

> *"On the issue that there is no sanction/approval of RBI due to which the "corporate guarantee" in question is not enforceable is stated to be wholly vague and baseless because as per article 3 of the loan agreement, the corporate debtor/guarantor assured the financial creditor of its ability to provide such guarantee in accordance with the applicable law and regulations. Therefore, the corporate debtor/guarantor cannot hide itself behind its own failure to obtain any required approval to wriggle out of its liability or consequences of default."*

However, unlike in the above case in the case on hand the corporate debtor red flagged the issue of the WBERC embargo and SBI obtained opinions to the effect that such an embargo may not be necessary if the Corporate Guarantee was worded to exclude regulated assets and thus circumvented the law.

(vi) In Yes Bank Limited v. Zee Learn Limited, the issue was the Deed of Guarantee dated 20.06.2016 being insufficiently stamped as per

the provision of Maharashtra Stamp Act 1958, therefore cannot be looked into by this Tribunal or not? No issue has been raised by the corporate debtor, qua stamping and thus the aforesaid decision relied upon by SBI is wholly inapposite. More over admissibility of a document and enforceability of a contract are two different concepts operating in different contexts.

(vii). In Satyan Kasturi v. SBI & Ors., Company Appeal (AT) (CH) INS. 239/2022 relied upon by the Petitioner, as per the facts of the said case, the Appellant contended that he being an Australian National could not have guaranteed an Indian Debt without prior permission from the RBI in terms of Regulation 3A of the FEMA (Guarantee) Regulations, 2000. However, the Hon'ble NCLAT @ para 92 of the said judgment found that the Appellant entered appearance before the Adjudicating Authority resting upon an Indian Address and thus the Hon'ble Appellate Tribunal held that the Appellant cannot take mutually contradictory and inconsistent stand and "viewed in that perspective" held that the Appellant was a personal guarantor and cannot wriggle out of his liability under the guarantee.

Therefore, the said matter did not rest on an adjudication as to whether there was any debt arising under an invalid agreement which is not a contract of guarantee at all in the first place, hence has no application to the case on hand.

XXX. We are therefore of the firm view that, none of the above rulings relied on by the financial creditor can be applied to the facts of this case. On the other hand, the ruling in re, Asha John Divianathan, supra, reiterates the well-established law that a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition, in an identical fact situation.

That apart, by allowing the impugned guarantee to be enforced, we would be indirectly 'nullifying' the Regulation made under a different Statute, an act which, we as an 'Adjudicating Authority' under IB Code, not entitled to embark upon even directly. In other words, usurping jurisdiction on matters of public law by National Company Law Tribunal, which is impermissible.

In this context we usefully refer to the ruling of Hon'ble Supreme Court of India dated 03.12.2019 in Civil Appeal No.9170 of 2019 in Embassy Properties Vs State of Karnataka:

> *"though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes revolve around decisions of statutory or quasi judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and we see no reason to interfere with the decision of the High Court. Therefore, the appeals are dismissed. There will be no order as to costs."*

More over as rightly contended by the Ld. Sr. Counsel for the corporate debtor, the subject Corporate Guarantee since admittedly limited to the *non-regulated assets* and *surplus from regulated assets*, confines the recourse of the petitioner/financial creditor herein, only to the *non-regulated assets* and *surplus from regulated assets* as per Clauses 2.1, 2.2 and 2.7. which is as below,

> *"2.1 The Guarantor, hereby irrevocable, absolutely and unconditionally guarantees to the Phase I Security Trustee for the benefit of the Phase I Lenders that the Borrower and/or the Guarantor shall duly and punctually pay/repay the Guaranteed Obligations stipulated in or payable in accordance with the terms and conditions contained in the Existing Common Loan Agreement and the other Finance Documents and on the failure of the Borrower to pay the Guaranteed Obligations (or any part thereof) in accordance with the terms and conditions contained in the Existing Common Loan Agreement (or any part thereof) or upon the occurrence of an Event of Default, the Guarantor shall forthwith pay, from the Non Regulated Asset, to the Phase I Lenders, without demur or protest or without the right of any set off, deductions or adjustments of any kind*

whatsoever, the amount of the Guaranteed Obligations as may be claimed by the Phase I Lenders in relation to the Phase I Facility, as stated in the Demand Certificate to be issued by the Phase I Lenders/ Phase I Security Trustee."

"2.2 The Guarantor, hereby irrevocable, absolutely and unconditionally undertakes to utilize all Surplus Amounts towards meeting any shortfall in debt servicing in relation to the Phase I Project. Any such shortfall to be funded by the Guarantor shall be as may be claimed by the Phase I Lenders in relation to the Phase I Facility, as stated in the Demand Certificate to be issued by the Phase I Lenders/Phase I Security Trustee."

"2.7 In order to perform its obligations under Clause 2.1 above, the Guarantor shall utilize the Non Regulated Asset. In order to perform its obligations under Clause 2.2 above, the Guarantor shall utilize the Surplus Amounts."

Therefore, assuming for a moment that the subject Corporate Guarantee is enforceable even in respect of *non-regulated assets* and *surplus from regulated assets*, the present proceeding initiated under section 7 of IB Code, if culminates in favor of the creditor, the same would have of affecting the ***entire assets*** of the Corporate Debtor and will not just limit to its non-regulated assets or surplus from regulated assets as per the scheme under the Insolvency & Bankruptcy Code, 2016. Therefore, for this reason also it can be well said that there is no enforceable guarantee in law.

Here we usefully rely on the ruling of Hon'ble Supreme Court, in State of Maharashtra v. M.N. Kaul and Ors. AIR 1967 SC 1634, where in it was held that,

> *"the guarantor must not be made liable beyond the terms of his engagement and that under the law he could not be made liable for more than he had undertaken".*

Therefore, in view of our discussion, the case law as above and having regard to the submissions made by the Ld. Sr. Counsels, we hereby ***reject*** the submission of the Ld. Sr. Counsel for the financial creditor that, *mere absence of WBERC's prior consent cannot make the subject guarantee null and void, as both the Electricity Act, 2003 and WBERC Regulations envisage only a penalty on the regulated entity for failure to obtain prior consent before issuing a guarantee as such the corporate guarantee remains intact and fully enforceable, notwithstanding violation if any of the WBERC Regulations, supra,* and ***firmly hold*** that the impugned corporate guarantee is not enforceable under law.

The Point is answered accordingly.

- **The principle *Ex turpi causa non oritur actio,* -whether applies?**

XXXI. House of Lords, in its decision in Holman v. Johnson (1775) , have recognized the rule that,

"A court will not assist those who aim to perpetuate illegality."

A three Judge Bench of Hon'ble Supreme Court, in Immani Appa Rao and Ors. vs. Gollapalli Ramalingamurthi and Ors., (1962) 3 SCR 739 had an occasion to consider the issue with regard to applicability of the aforesaid two maxims and the Supreme Court speaking through P.B. Gajendragadkar, J. (as His Lordship then was) observed thus:

> *"12. Reported decisions bearing on this question show that consideration of this problem often gives rise to what may be described as a battle of legal maxims. The appellants emphasised that the doctrine which is pre eminently applicable to the present case is ex dolo malo non oritur actio or ex turpi causa non oritur actio. In other words, they contended that the right of action cannot arise out of fraud or out of transgression of law; and according to them it is necessary in such a case that possession should rest where it lies in pari delicto potior est conditio possidentis; where each party is equally in fraud the law favours him who is actually in possession, or where both parties are equally guilty the estate will lie where it falls. On the other hand, Respondent 1 argues that the proper maxim to apply is nemo allegans suam turpitudinum audiendum est, whoever has first to plead turpitudinum should fail; that party fails who first has to allege fraud in which he participated. In other words, the principle invoked by Respondent 1 is that a man cannot plead his own fraud. In deciding the question as to which maxim should govern the present case it is necessary to recall what Lord Wright, M.R. observed about these maxims in Berg v. Sadler and Moore, (1937) 2 KB 158 at p. 62. Referring to the maxim ex trip causa non orator action Lord Wright observed that "this maxim, though veiled in the dignity of learned language, is a statement of a principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities.*
>
> *Therefore, in deciding the question raised in the present appeal it would be necessary for us to consider carefully the true scope and effect of the maxims pressed into service by the rival parties, and to enquire which of*

the maxims would be relevant and applicable in the circumstances of the case. It is common ground that the approach of the Court in determining the present dispute must be conditioned solely by considerations of public policy. Which principle would be more conducive to, and more consistent with, public interest, that is the crux of the matter. To put it differently, having regard to the fact that both the parties before the Court are confederates in the fraud, which approach would be less injurious to public interest. Whichever approach is adopted one party would succeed and the other would fail, and so it is necessary to enquire as to which party's success would be less injurious to public interest."

Hon'ble Supreme Court of India in Loop Telecom and Trading Limited v. Union of India and Another, (2022) 6 SCC 762 held as under:

"The objection, that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted."

XXXII. We have already held that prior consent in terms of Regulation 5.13.2 for giving effect to a specific arrangement namely the corporate guarantee is based on the principle of public policy. The WBERC a Quasi-Judicial body, having been of the firm view that the Debt Service Capacity of the licensee/corporate debtor was stressed and the Corporate Guarantee if extended could attract a charge

on the assets of the corporate debtor in case of default in debt servicing by the principal borrower MEL, and the subsequent inadequacy of security if were to arise, hence did not accommodate to extend a Corporate Guarantee to the lenders of MEL as prayed for, against a loan attributable to a project beyond the distribution license area of license/corporate debtor under the West Bengal Electricity Regulatory Commission, which could attract a charge on the assets of IPCL used for supplying power to the consumers of electricity in the state of West Bengal.

We have also noted that, it was the corporate debtor who first red flagged the condition of submitting the corporate guarantee, therefore, instead of driving the guarantor to obtain the same from the Regulator, the financial creditor resorted to legal opinion which was followed suit by the corporate debtor as well and both parties have circumvented the statutory compliance by following the legal opinion as if the same is an order of Court of law or Tribunal. Therefore, we are of the firm view that both the parties before us are confederates in breaching a statutory provision, supra, hence it is necessary to enquire as to which party's success would be less injurious to public interest.

Admittedly, WBERC, a third party and a *quasi-judicial* body, was kept in dark about the submission of Corporate Guarantee until the corporate debtor's letter dated 17.08.2017 (post execution of the guarantee). The quasi-judicial body vide its order dated 09.11.2017 had stated that such a guarantee is not sustainable and would be injurious to interest of electricity consumers of the State of West Bengal. It is trite, to say that accepting the guarantee 'offered' by a guarantor securing the loan of a borrower is the *discretionary* power of the lender and the *prudential norms* on corporate guarantees require the lenders to ensure compliance of relevant statutes and statutory provision. The said power when compromised and the prudential norms are breached resulting in injuring the interest of electricity consumers of the State of West Bengal, which injury is larger than what has been claimed by the petitioner, the petitioner lender shall face the adverse legal consequences. Therefore, in our considered opinion, the balance of justice would tilt in favor of the respondent and against the petitioner.

In so far as the submission of the Ld. Sr. Counsel of the financial creditor that, IBC overrides the Electricity Act, 2003 and as such the

plea of the corporate debtor that the subject corporate guarantee is unenforceable, which submission was made by pacing reliance on the ruling in Paschimanchal Vidyut Vitrand Nigam Limited v Raman Ispat Private Limited and Others *, 2023 SS Online SC 842,* is concerned, it is to be noted that Hon'ble Supreme Court in the said judgement while dealing with the issue of priority if any, in realization of the government dues in insolvency proceedings under IB Code, held that,

> *"the statutory dues under the Electricity Act would not enjoy any priority over other creditors mentioned in Section 53 of IBC and to that extent the IBC overrides the Electricity Act, 2003". (Emphasis is ours).*

Therefore, as rightly contended by the Ld. Sr. Counsel for the respondent, the above case was not dispositive of the issue which has fallen for adjudication before us i.e., whether there is any valid contract of guarantee in view of the willful contravention of the WBERC Regulation rendering the guarantee as an agreement unenforceable in law in light of Section 10 and Section 23 of the Indian Contract Act, 1872.

No doubt there is 'debt' and there is a 'default' committed by MEL, the principal borrower, however since the instant petition under section 7 of IB Code, has been filed by the Financial Creditor against a

Corporate Guarantor in respect of the credit facility provided to the principal borrower MEL, which corporate guarantee having been found to be clearly interdicted by Section 23 of the Indian Contract Act, we unhesitatingly hold that the impugned corporate guarantee is unenforceable under law.

The point is answered accordingly.

XXXIII. Therefore, in the light of our discussion, *supra*, we are of the firm view that the 'debt' claimed by the Petitioner as 'due' and 'payable' is 'not payable in law', as the same is clearly interdicted by section 23 of the Indian Contract Act, the present company petition is not maintainable and is liable to be rejected. Accordingly, we hereby reject the same however under the facts and the circumstances of the case without costs.

In the result this Company Petition is hereby rejected as not maintainable, without costs.

SD/-
Dr. BINOD KUMAR SINHA
MEMBER (TECHNICAL)

SD/-
DR. VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (JUDICIAL)

Karim