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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 3rd November, 2020

Date of decision: 26th November, 2020

\+ **W.P.(C) 8705/2019 & CM APPL. 36026/2019**

M/S VENUS RECRUITERS PRIVATE LIMITED ..... Petitioner

Through:Mr. Kapil Sibal, Senior Advocate with Ms. Misha Rohatgi, Ms. Anusha Nagarajan and Ms. Aarushi Tiku, Advocates. (M:9899705974)

versus

UNION OF INDIA AND ORS. ..... Respondents

Through:Mr. Anurag Ahluwalia, CGSC and Mr. Abhigyan Siddhant, Advocate with Dr. Sunil Kumar, Insolvency and Bankruptcy Board of India (IBBI). (M:9811418995) for R-1.

Mr. Vijayendra Pratap Singh, Mr. Aman Sharma and Mr. Samarth K. Luthra, Advocates for R-3.

Mr. Abhinav Vasisht, Senior Advocate with Mr. Manmeet Singh and Mr. Anugrah Robin Frey, Advocates for R-4/RP..

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This judgment has been pronounced through video conferencing.

2. The present writ petition has been filed by the Petitioner seeking issuance of a writ declaring the proceedings pending before the National Company Law Tribunal (Principal Bench) New Delhi (*hereinafter, 'NCLT')* in C.A.No.284(PB)/2018 in C.P.No. IB(201)PB/2017 as void and *non-est*.

3. The question that has arisen is whether under the Insolvency and Bankruptcy Code, 2016 *(hereinafter, 'IBC')*, an application filed under Section 43 for avoidance of preferential transactions can survive beyond the conclusion of the resolution process and the role of the RP in filing/pursuing such applications. The jurisdiction of the NCLT to hear applications under Section 43 after the approval of the Resolution Plan, is thus under challenge.

Brief Background

4. The brief background of this case is that Respondent No. 3 i.e. M/s Bhushan Steel Ltd. (now known as Tata Steel BSL Ltd.) *(hereinafter, 'Corporate Debtor')* was the subject of Corporate Insolvency Resolution Process (*hereinafter, 'CIRP')* before the NCLT, initiated by the State Bank of India by a petition being ***C.P. No.(IB) - 201(PB)/2017*** titled ***State Bank of India v. Bhushan Steel Ltd*** filed on 26th July, 2017.

5. On the same date when the CIRP was initiated, the NCLT appointed Mr. Vijay Kumar Iyer i.e. Respondent No. 4 as an Interim Resolution Professional (*hereinafter, 'IRP'*) for the Corporate Debtor. A public announcement was made in accordance with Section 15 of the IBC, inviting submissions of claims against the Corporate Debtor. The Committee of Creditors (*hereinafter 'CoC')* was thereafter constituted and its first meeting was held on 24th August, 2017, when the IRP was also confirmed as the Resolution Professional (*hereinafter, 'RP'*) for the Corporate Debtor.

6. On 20th March, 2018, the CoC approved the Resolution Plan proposed by Respondent No. 2 i.e. Tata Steel Ltd. (*hereinafter, 'successful Resolution Applicant'*) and the said Plan was filed by the RP to seek approval before the NCLT on 28th March, 2018.

7. Thereafter on 9th April, 2018, the RP filed an avoidance application

being ***CA No.284(PB) of 2018*** under Section 25(2)(j), Sections 43 to 51 and Section 66 of the IBC. In the said application, various transactions were enumerated as `suspect transactions' with related parties. The said avoidance application was a result of a Forensic Audit Report, submitted by a Forensic Consultant, which was attached to the application as well. The prayer in the application was as under:

> *"In view of the foregoing, it is most humbly prayed that this Hon'ble Tribunal may be pleased to:*
>
> *a) take on record the Forensic Consultant's report and pass appropriate directions in accordance with the Code in respect of the suspect transactions; and*
>
> *b) pass any other order(s) which this Hon'ble Tribunal may deem fit in the facts and circumstances of the case in the interest of equity, justice and good conscience."*

8. The following were the suspect transactions allegedly entered into by the Corporate Debtor:

i) Potential excess payment of lease rent to Vistrat Real Estate Pvt. Ltd.

ii) Preferential credit to various international customer sand long outstanding receivables to entities such as Shree Steel Djibouti FZCO and Shree Global Steel FZE;

iii) Excess payments to Manpower companies/ Contractors;

iv) Uncontracted payment of interest on advance to Peak Minerals and Mining Private Ltd. for cancelled sale-and-lease back transactions.

9. The Petitioner – M/s Venus Recruiters Pvt. Ltd. (*hereinafter, 'Venus Recruiters'*) is stated to be one such manpower contractor, as mentioned in (iii) above.

10. Almost five weeks after filing of the said avoidance application, the NCLT approved the Resolution Plan proposed by Tata Steel Ltd., vide a detailed judgment dated 15th May, 2018. The said Resolution Plan had found favour with the CoC and accordingly, the NCLT passed various orders and directions on the said date. Insofar as the pending avoidance application in respect of the suspect transactions was concerned, there was no separate order passed by the NCLT. The final order contained one line i.e. "*all other applications are also disposed off"*. In effect, therefore, the application filed by the RP in relation to the suspect transactions was neither heard nor decided on merits.

11. On 18th May, 2018, the Resolution Plan was finally closed and the new management took over the Corporate Debtor. On 24th July, 2018, the NCLT passed an order in the avoidance application, C.A. No. 284/2018, which was filed prior to the approval of the Resolution Plan to the following effect:

> *"**CA-284(PB)/2018***
>
> *CA-284(PB)/2018 has been filed by RP on 09.04.2018 prior to the approval of the Resolution Plan.*
>
> *Let notice be issued to the entities and the company as per the list provided by the Ld. for the R.P. Let the reply if any be filed before the next date of hearing. Let all the pending applications come up together on 09.08.2018.*
>
> ***CA-593(PB)/2018***
>
> *Ld. counsel for the applicant Vistratpal Real Estate Pvt. Ltd. requests for withdrawal of the application. Ld. counsel for the applicant submits that he wants to withdraw the application and to proceed*

as per law in that regard. The request for withdrawal of CA-593(PB)/2018 is accepted. The application is disposed of accordingly.

Let the pleadings in other applications be complete on or before the next date of hearing with a copy in advance to the other side.

For further consideration on 09.08.2018."

12. NCLT's order dated 15th May, 2018, approving the Resolution Plan, was thereafter upheld by the National Company Law Appellate Tribunal (*hereinafter, 'NCLAT')* vide judgment dated 10th August, 2018. However, on 25th October, 2018, the NCLT impleaded the Petitioner as a party in CA No. 284(PB)/2018 and issued notice to it on the basis of a fresh memo of parties filed by the former RP. It is the said order impleading and issuing notice to the Petitioner, which is being challenged in the present petition.

Submissions

13. Mr. Kapil Sibal, ld. Senior Counsel appearing for the Petitioner raises a legal issue as to the jurisdiction of the NCLT. His submission is that under the scheme of the IBC, once the CIRP has reached finality, the Resolution Professional (RP) becomes *functus officio* and can no longer file or pursue any application on behalf of the company. He refers to various provisions of the IBC to submit that the RP merely conducts and manages the operations of the Corporate Debtor, during the CIRP process and not beyond.

14. Ld. Sr. counsel further submits that in terms of Section 60 of the IBC, jurisdiction of NCLT cannot extend beyond the approval of the Resolution Plan. The NCLT, having disposed of all the pending applications when it delivered the judgment on 15th May 2018, and the new management having come in control of the erstwhile Corporate Debtor, at this stage, the order

issuing notice in an application filed prior to the acceptance of the Resolution Plan is completely void.

15. Ld. Sr. counsel relies on Section 30(2)(a) of the IBC to argue that the Resolution Plan has to necessarily provide for payment of costs of the insolvency resolution process and under Section 5(13) of the IBC, such costs include the fee which is payable to any person acting as the RP. It is submitted that this indicates that the RP has no role beyond the CIRP process itself.

16. It is further submitted that there are strict timelines provided under the IBC. Reliance is placed on the Preamble of IBC which emphasizes that the purpose of the Code is to conclude the insolvency proceedings in a time bound manner. Reliance is also placed on the judgement of ***Innoventive Industries Ltd. v. ICICI Bank & Anr. [(2018) 1 SCC 407],*** passed by the Supreme Court. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter, *"2016 CIRP Regulations*") are referred to, to argue that there are specific timelines which are prescribed for the purpose of the RP to determine whether any transaction was preferential, undervalued, fraudulent or extortionate and also to file an application before the NCLT, both within the prescribed 180-day period. Accordingly, it is submitted that avoidance of any such transactions ought to be undertaken before conclusion of the CIRP. The said preferential transactions would also form part of the Resolution Plan, which is submitted to the CoC.

17. Ld. Sr. counsel submits that the question as to whether the transaction was a suspect transaction or a third-party related transaction and whether any financial benefits were earned from the said transaction ought to have

been gone into, prior to finalisation of the Resolution Plan. From the facts, it is highlighted that the Forensic Audit Report was submitted to the RP on 3rd April, 2018 and the avoidance application was filed before the NCLT on 9th April, 2018. However, till the time when the final Resolution Plan was approved on 15th May, 2018, no orders were passed on this application.

18. Mr. Sibal further submits that the role of the RP as set out in Section 25 of the IBC is to collect all the assets and distribute them to the lenders/creditors after the value of the assets is crystallized. Since the resolution itself is based on the assets of the company, even in respect of avoidance transactions, the monetary value cannot go to anyone else except the CoC once a new management has taken over. Once approval is granted by the NCLT to the Resolution Plan submitted by the RP, then all the records relating to the CIRP are transferred to the Insolvency and Bankruptcy Board of India (*hereinafter 'Board/IBBI'*).

19. Ld. Sr. counsel urges that under the IBC, any company in heavy debt can either go into a resolution process or can be liquidated if the resolution process fails. A liquidator can investigate the financial affairs of the Corporate Debtor to determine a preferential or undervalued transaction under Section 35(l) of the IBC. However, Section 43 does not apply in such a situation. Moreover, it is submitted that Section 25(2)(j) applies only in respect of Chapter III i.e. the liquidation process. It does not apply in respect of the resolution process. Section 43 deals with both the liquidator and the resolution professional, however, Section 25(2)(j) only relates to liquidation.

20. It is further emphasized that avoidance applications cannot be filed by the Company or by the Resolution Applicant but only by the CoC or the RP, prior to the Resolution Plan being approved.

21. The difference between a statutory remedy under Sections 43 and 44 of the IBC and a civil remedy is highlighted. It is argued that once the new management comes into control of the Company post the approval of the Resolution Plan, the Company is free to avail of its civil law remedies in respect of any new transaction that the new management is overviewing.

22. Ld. Sr. counsel submits that once the Resolution Plan is approved, the CoC itself is bound up, as all the dues of CoC are paid and a No Dues Certificate is submitted. Once the No Dues Certificate is submitted, no further proceedings can be taken up by CoC. The CoC being a final arbiter of the Resolution Plan and the same being a commercial decision, if the CoC chooses not to pursue any particular transaction, the RP ought not to be allowed to pursue the same.

23. Mr. V. P. Singh, ld. counsel appearing for Respondent No.3 i.e. Tata Steel BSL Ltd. (formerly Bhushan Steel Ltd./Corporate Debtor) submits that the Petitioner is related to the erstwhile promoters of the Company. He submits that the transaction in respect of which the present petition had been filed is not the only transaction. There were various suspect transactions involving the erstwhile Corporate Debtor *qua* which the avoidance application was filed and other entities have raised their issues before the NCLT itself. He further submits that despite receiving the notice in the avoidance proceedings in April, 2018, the Petitioner has approached this Court only in 2019 and thus it would not be entitled for discretionary jurisdiction to be exercised in its favour.

24. He further submits that the intention of the IBC is to delink the CIRP proceedings from avoidance transactions inasmuch as the adjudication of such transactions could take much longer than timelines fixed in the

adjudicatory process. He further submits that after the introduction of Section 26 in the IBC, it is clear that the power of the RP is independent of the CIRP proceedings.

25. Mr. V.P. Singh, ld. counsel further relied on the *Discussion Paper on Corporate Liquidation Process along with Draft Regulations* published by IBBI, dated 27th April, 2019 (*hereinafter 'IBBI Discussion Paper 2019')*, which according to him records that the IRP/RP functions for old creditors of the company. He submits that the IBBI Discussion Paper, 2019 is clear to the effect that applications in respect of vulnerable transactions etc. meet tough resistance and litigation goes on for a long period. It is for this reason that Section 26 clarifies that filing of avoidance application shall not affect the proceedings of the CIRP.

26. Reliance is placed on the judgment of the Supreme Court in ***S.P. Jain v. Kalinga Tubes Ltd. [AIR 1965 SC 1535]*** to submit that while dealing with a petition under Section 397 of the Companies Act, 1956 it was held that an application which deserves to be adjudicated in the interest of the company ought to be permitted to proceed further, on the basis of the facts as they were when the application was made.

27. Mr. Singh further submits that in the present case, the total debt of the company was Rs.59,501/- crores. However, the Resolution Plan was only for Rs.35,200/- crores. Accordingly, ld. counsel submits that whatever further recoveries are made through vulnerable transactions, the same should also go to the creditors.

28. It is further argued by ld. counsel that as per Section 3(37) of the IBC, the meanings of expressions as per the Indian Contract Act, 1872 can be relied upon for the purpose of interpreting the IBC. Insofar as the question

as to how the IBC should be looked at and interpreted is concerned, reference is made to the judgment of ***Pioneer Urban Land & Infrastructure Ltd. & Anr. v. UOI & Ors [(2019) 8 SCC 416]***, to urge that a creative interpretation should be given to legislation which is beneficial in nature. In the said case, while dealing with the constitutional validity of Section 5(8)(f) of the IBC, as amended in 2018, the Supreme Court held that home buyers were to be considered financial creditors as the IBC ought to be interpreted in a manner, such that the object of the statute is achieved.

29. Similarly, reliance is placed on the decision in ***Committee of Creditors of Essar Steel India Ltd. through Authorised Signatory v. Satish Kumar Gupta [Civil Appeal No. 8766-67 of 2019, dated 15th November, 2019 (SC)]***, wherein the Supreme Court recently held that although timelines would be an important factor in the CIRP proceedings, the word 'mandatorily' was struck down from Section 12 as being violative of Article 19(1)(g) of the Constitution. The Court, therefore, read down the provision to interpret it in line with the object of the statute.

30. Ld. counsel submits that there were two instances of vulnerable transactions entered into by the erstwhile promoters of Respondent No.3 involving an onerous employment contract and an onerous rent contract, wherein the premises of Vistrat Real Estate Pvt. Ltd. ("*Vistrat*") were shown as the office space of Respondent No.3, with extremely high rent. The NCLT ruled that Vistrat and the Corporate Debtor were associated parties. This finding was upheld by NCLAT.

31. He further relies upon the judgment of this Court in ***IOCL v. UOI & Ors. [W.P.(C) 13775/2019, decided on 23rd December, 2019]*** wherein a ld. Division Bench of this Court has held that there is a statutory appeal

provided under Section 61 of the IBC and thus in the presence of an efficacious alternative remedy, a writ petition would not be maintainable. Finally, ld. counsel submits that the RP is a professional who is supervised by the NCLT. The entire resolution process is regulated by the NCLT. Thus, the Petitioner is capable of defending itself before the NCLT and there are sufficient due process protections. Ld. counsel submits that the delay in this case was due to the fact that related parties did not disclose the relevant information. He relies upon pages 66, 71 and 540 of the paperbook.

32. Mr. Anurag Ahluwalia, ld. CGSC appearing for Union of India/IBBI submits that Sections 25 & 26 of the IBC are to be read together. He submits that a perusal of Regulation 39(4) along with Form H of the 2016 CIRP Regulations clearly shows that the avoidance application could be filed/be pending when the Resolution Plan is submitted by the RP. He also relies upon Clause 4.2 of the Report of the Insolvency Law Committee (ILC), constituted by the Ministry of Corporate Affairs dated 20th February, 2020 (*hereinafter, "ILC Report"*), as per which the said Committee was of the opinion that an avoidance application may continue even beyond the closure of the resolution proceedings.

33. It is his further submission that the NCLT could not have disposed of the entire petition, without dealing with the avoidance application. The application does not come to an end and the timelines to adjudicate on the avoidance transactions can in fact be extended. On a query from the Court, Mr. Ahluwalia submits on instructions that any amount, which may be recovered through the avoidance application, would be bound to be treated in terms of any clause in the Resolution Plan and if there is no such clause dealing with the recovered amount, the NCLT would decide as to how the

amount would be dealt with.

34. Mr. Abhinav Vasisht, ld. Sr. counsel appearing for the former RP submits that there are three categories of entities/persons which can file avoidance applications i.e. the Resolution Professional, the Liquidator and the Creditors. He submits that the question is whether the NCLT becomes *functus officio* after the Resolution Plan is accepted. There is no doubt that the RP has to file an application in respect of suspect transactions before the Resolution Plan is approved but it is not necessary that the same has to be decided prior to the approval of the Resolution Plan. The RP, after arriving at a conclusion that a particular transaction is a preferential transaction has to approach the NCLT. Such transactions can be declared as void and the NCLT can reverse the effect of the transaction, meaning thereby that any monetary benefit given to any related party can be reversed. If the RP or the Liquidator does not declare the transaction as undervalued, any member/creditor can approach the NCLT.

35. He further submits that under Section 26 of the IBC, there is no fixed time limit for deciding an avoidance application. In this case, the allegation is that the Petitioner has been paid 10% extra for supply of manpower, which has caused loss to the company and in effect, there was diversion of the company's funds. Ld. Sr. counsel submits that the NCLT can upon receiving such an application restore the position as existed prior to the transaction. The provisions apply only in respect of extortionate credit transactions and not *bona fide* transactions. He submits that the application in this case was filed prior to the Resolution Plan being approved. However, notice was issued in the application on 24th July, 2018 after the RP's services were terminated on 18th May, 2018. Thus, the important stage is

the stage of filing of the application and not the date of approval of Resolution Plan. The NCLT has very wide powers under Sections 43 and 44 of the IBC and thus depending upon the situation, it can pass appropriate orders. There is no time limit which has been prescribed for exercise of the powers under Section 45, though the IBC in general has very strict timelines. The IBC is a complete, self-contained scheme. Once the decision is taken by the NCLT, an appeal would lie to the NCLAT under Section 61 and thereafter to the Supreme Court under Section 62.

36. Ld. Sr. counsel further relies upon Section 26 read with Sections 43, 44, 45, 47 and 50 of the IBC as well as Regulation 39(4) read with Form-H of the Schedule of the 2016 CIRP Regulations. His submission was that a conjoint reading of all these provisions shows that insofar as avoidance applications are concerned, they can always survive even beyond the order of the NCLT accepting the Resolution Plan. He submitted that there are various kinds of avoidance applications and it is not always possible for the NCLT to decide whether these transactions are preferential, undervalued, extortionate and/or fraudulent transactions within the strict timelines provided in the IBC for the CIRP process. He urged that such applications can continue to remain pending even on the date when the Resolution Plan is submitted and therefore, by implication can always remain pending even after the Resolution Plan is accepted by the NCLT.

37. It was further submitted that in the present case, the Resolution Plan which was approved by the NCLT, specific provision has been made in respect of pending applications relating to preferential transactions. However, even if the Resolution Plan is quiet in respect of preferential or other transactions, the benefit ought to go to the Company as the application

ought to be adjudicated by NCLT.

38. Ld. Sr. counsel submits that the applications which were disposed of on 15th May, 2018 were only those which were related to the Resolution Plan itself and not the avoidance application in respect of preferential transactions. He submits that since the avoidance application was taken up on 24th July, 2018 and notice was issued itself shows that the NCLT was conscious of the pending application in respect of preferential transactions.

39. His further submission is that in respect of such avoidance applications, there are various options which can be exercised once they are adjudicated by the NCLT i.e. under Section 44 of IBC, if the transactions are held to be preferential, benefits of the transaction can be given either to the erstwhile Corporate Debtor itself or to the Financial Creditor. It can also be shared in part by the new management and the creditors. He submitted that the wisdom of the CoC is sacrosanct on the said issue and in the present case, it has been dealt with in the final Resolution Plan which was approved by the NCLT.

40. He further submits that the said Resolution Plan also deals with other statutory amounts which may be received by the Company or any other loans and other receivables etc. including tax deductions, tax refunds, etc. Such amounts are always dealt with in a miscellaneous section in the Resolution Plan and these would also form a part of the preferential transactions or directed to be adjusted therefrom by the NCLT.

41. Reliance is also placed by him on the IBBI Discussion Paper and the ILC Report, to argue that in the case of both resolution and liquidation processes, the said two documents clearly support the plea that the applications can and would survive even beyond acceptance of the

Resolution Plan.

42. Finally, Mr. Vashisht, ld. Sr. counsel argued that writ jurisdiction is not maintainable since, firstly, the IBC is a complete Code by itself and even if there is an erroneous order passed by the NCLT, the appropriate forum would be the NCLAT and not writ jurisdiction and secondly the NCLT has not passed an erroneous order and accordingly, the writ is not liable to be entertained.

43. Mr. Frey, ld. counsel submits that even if the RP becomes *functus officio* post the approval of the Resolution Plan and it was to be concluded that the RP cannot prosecute the avoidance application, then any agency of the government such as the Serious Fraud Investigation Office ("SFIO") or the Ministry of Corporate Affairs ("MCA") can prosecute the avoidance application but it cannot be allowed to fail or remain unprosecuted.

44. Mr. Sibal, in rejoinder submits that reopening of the resolution process in this manner would have enormous adverse implications. According to him, Section 26 merely means that the avoidance application would not affect the resolution process and it cannot be read to mean that the avoidance application could continue after the resolution process concludes. Mr. Sibal further refutes the Respondent's submission based on the IBBI Discussion Paper. He submits that this would have no application in the present case, as it deals with liquidation and not the resolution process.

Analysis and Findings:

(a) Structure of the IBC 2016 and Role of Resolution Professionals

45. The jurisdiction of the NCLT to decide an application pursued by a former RP of a Corporate Debtor, after the conclusion of the CIRP process, is under challenge in the present petition.

46. The questions raised in this petition call for an interpretation of some of the provisions of the IBC – especially the role of Resolution Professionals ("RPs"). Under the IBC a CIRP can be initiated under Sections 6 to 11 by various persons including financial creditors, operational creditors, and corporate applicants. Section 11 provides as to who is not entitled to initiate a CIRP. The time limit for completion of the resolution process is contained in Section 12. A perusal of Section 12 shows that the CIRP has to be completed within 180 days from the date of admission of the application and any application made to the Adjudicating Authority/NCLT for extension of the same has to be approved by the CoC by a vote of 66% of the voting shares. If such an application for extension is received, the NCLT can extend the period by a further period of not exceeding ninety days. Only one extension is permissible, as per the first proviso to Section 12(3) of the IBC. A mandatory outer limit of 330 days from the insolvency commencement date is prescribed for the completion of the CIRP under the second proviso to Section 12(3) w.e.f. 16th August 2019.

47. Upon an application for initiation of CIRP being admitted, the NCLT declares a moratorium under Sections 13 and 14 of the IBC. It also makes a public announcement of the initiation of the CIRP and calls for submission of claims under Section 15. Upon the declaration being made under Section 13, the moratorium period would immediately set in.

48. Under Section 13(1)(c), an IRP is then appointed by the NCLT in the manner as specified under Section 16. The IRP, who is appointed, shall take charge on the insolvency commencement date and shall continue till the appointment of a RP under Section 22. The IRP then manages the affairs of the Corporate Debtor in terms of Section 17 and the duties of the IRP are

provided in Section 18. The primary function of the IRP is to collect information, take control and custody of assets and to manage the operations of the Corporate Debtor as a going concern. To this end, various powers and duties of the IRP are stipulated in Sections 17, 18 and 20.

49. The purpose of resolution/liquidation processes is for the benefit of creditors. A Committee of Creditors (CoC) is then constituted by the IRP which shall include all financial creditors of the Corporate Debtor. Upon being constituted, the CoC shall meet within 7 days and can either appoint the IRP as the RP or replace the IRP with a new RP under Section 22. The RP would then be in charge of the conduct and management of the CIRP process during the CIRP period. The proviso to Section 23 makes it clear that the RP shall continue to manage the operations even after the expiry of the CIRP period, until an order under Section 31(1) approving the Resolution Plan is passed by the NCLT or an order under Section 34 appointing a liquidator is passed. The duties of the RP are set out in Section 25 and one such action which the RP can take is the filing of applications for avoidance of transactions in accordance with Chapter III, if any. The RP can be replaced by the CoC under Section 27. The RP cannot take any actions without the approval of the CoC as per Section 28.

50. In accordance with Section 30, a Resolution Applicant i.e. a third party who may be interested in making an offer for resolution of the debts of the company can submit a Resolution Plan to the RP on the basis of the information received from the RP under Section 29. The said Resolution Plan is then examined by the RP, who shall present the same to the CoC. The CoC can then approve the Resolution Plan after considering its feasibility and viability or it can reject the same. If the CoC approves the

Resolution Plan, the same is submitted by the RP before the NCLT for its approval.

51. Under Section 31, if the NCLT is satisfied with the Resolution Plan, it shall approve the same which shall be binding on the Corporate Debtor, all its employees, members, creditors, Central and State Governments, including all local authorities to whom dues may be owed, and all other stakeholders and guarantors. The NCLT has to also satisfy itself that the Resolution Plan has sufficient provisions for its implementation. Once a Resolution Plan is approved, the moratorium order under Section 14 shall cease to have effect and the RP shall forward all the records relating to the CIRP and the Resolution Plan to the Board to be recorded on its database. Thus, the role of a RP comes to an end here.

(b) <u>Applications for Avoidance Transactions</u>

52. The IBC contemplates various transactions which could be found to be objectionable/unacceptable and may require to be either reversed or compensated for, in some manner in order to ensure that the insolvency/liquidation process is fair to the creditors. Such transactions are of various categories namely –

- preferential transactions,
- undervalued transactions,
- transactions defrauding creditors, and
- extortionate credit transactions.

All transactions are dealt with under Chapter III related to liquidation processes.

53. As per Section 43, if the RP is of the opinion that any preferential transaction has taken place, by which the Corporate Debtor has given any

benefit to a related party, two years prior to the insolvency commencement date or a preference to an unrelated party one year prior to the said date, he can move an application with the NCLT for avoidance of the same. If the NCLT is of the view that the transaction was a preferential transaction, it can pass various types of orders as set out in Section 44, in effect neutralising the transaction. Such an order could include the reversal of the transaction, sale of any property given under the transaction, amounts being paid in respect of benefits received and such like orders. Sections 43 and 44 of the IBC read as under:

> "***43. Preferential transactions and relevant time. -***
> *(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.*
>
> *(2) A corporate debtor shall be deemed to have given a preference, if–*
> *(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and*
> *(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.*
>
> *(3) For the purposes of sub-section ((2), a preference shall not include the following transfers–*

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;
(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that –
(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and
(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:
Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. – For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if –
(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or
(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

44. Orders in case of preferential transactions. -

(1) The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order:

(a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;

(b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

(c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;

(d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;

(e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;

(f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and

(g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or

in part by the giving of the preference:

Provided that an order under this section shall not -
(a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;
(b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Explanation-I: For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference, -
(i) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;
(ii) is a related party,

it shall be presumed that the interest was acquired, or the benefit was received otherwise than in good faith unless the contrary is shown.

Explanation-II. – A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13."

54. Similar is the situation in respect of undervalued transactions, transactions defrauding creditors and extortionate credit transactions. In the present case however, this Court is only concerned with preferential transactions.

55. A perusal of Section 43, would show that not all transactions with related or unrelated parties would fall within this category. The same is

limited by time. In relation to a related party, the transaction would be preferential if it has taken place two years before the insolvency commencement date and if it has put such party in a beneficial position as against other creditors, sureties or guarantors. In case of an unrelated party, the period is one year.

56. The question that has arisen is whether an application for avoidance of a preferential transaction, though filed prior to the Resolution Plan being approved, can be heard and adjudicated by the NCLT, at the instance of the RP, after the approval of the Resolution Plan.

57. There are three dimensions to this question:

i. Whether a RP can continue to act beyond the approval of the Resolution Plan?

ii. Whether an avoidance application can be heard and adjudicated after the approval of the Resolution Plan?

iii. Who would get the benefit of an adjudication of the avoidance application after the approval of the Resolution Plan?

(c) Chronology of Events

58. In the present case, the alleged preferential transaction was a manpower resource agreement entered into between the Petitioner – Venus Recruiters and the erstwhile Corporate Debtor – M/s Bhushan Steel Ltd. (BSL). The said agreement was entered into on 3rd October, 2009. The application for initiation of CIRP was admitted by the NCLT on 26th July, 2017. The IRP was also appointed and a call for submissions was made. On 20th March, 2018, the CoC approved the Resolution Plan, proposed by Tata Steel Ltd. The approved Resolution Plan was filed by the RP under Section 31 before the NCLT on 28th March, 2018.

59. A Forensic Audit Report of the Forensic Counsultant (Deloitte Touche Tohmatsu India LLP) was submitted to the RP on 3rd April, 2018 i.e. after the Resolution Plan was approved by the CoC. In the said report, an allegation was made that 10% service charge paid to the Petitioner in lieu of the manpower supplied ***"could have been preferential in nature"***. On the strength of this report, the RP filed an application under Sections 25(2)(j), 43 to 51 and 66 of IBC for avoidance of this, as well as, other suspect transactions on 9th April, 2018 before the NCLT.

60. The submissions before the NCLT on the Resolution Plan commenced on 5th April, 2018 and judgment was reserved by the NCLT on 11th April, 2018. Thus, it was only two days before the judgment was being reserved by the NCLT that the avoidance application was filed by the RP.

61. On 15th May, 2018, the NCLT passed the final order approving the Resolution Plan and closing was achieved on 18th May, 2018 i.e. the 297th day after initiation of the CIRP.

62. The avoidance application filed on 9th April 2018, was taken up for the first time on 24th July, 2018, by the NCLT. A fresh memo of parties was filed in the application by the counsel claiming to be appointed by the ***'Former RP'*** on 14th August, 2018. Notice was issued in the avoidance application to the non-applicants. The Petitioner was thereafter impleaded and notice was issued to it on 25th October, 2018, upon an application by the RP. The said order, impleading the Petitioner, is challenged before this Court, on the ground that the entire proceedings are without jurisdiction.

63. This Court had entertained the writ petition as there were fundamental issues of jurisdiction which were raised by the Petitioner. Vide order dated 23rd August, 2019, parties were directed to seek an adjournment before the

NCLT. The said order continues till date.

64. The matter was part-heard, when court hearings had been suspended due to the lockdown caused by pandemic. Thereafter, the matter was reheard in September, 2020. In the meantime, on 26th March, 2020, the erstwhile Corporate Debtor, now managed by Tata Steel Ltd – i.e. Tata Steel BSL Ltd. informed the Petitioner that the contract between them expired on 31st March, 2020 and would not be renewed.

65. It is in this background that the prayer of the Petitioner for quashing of the proceedings is being considered. The relief prayed for in the writ petition is as under:

> *"(a) Issue a Writ, order or direction of CERTIORARI or any other writ order or direction of like nature, declaring the proceedings of CA No. 284 (PB) of 2018 in CP No. IB(201)PB/2017 pending before the Ld. Adjudicating Authority being the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi against the Petitioner, as void and non est, and consequentially quash the said proceedings.*
>
> *(b)Pass such other or further order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

(d) <u>Findings and Conclusions</u>

66. A perusal of the chronology of events would show that the avoidance application in this case was filed after the CoC had approved the Resolution Plan and almost at the very end of the submissions on the Resolution Plan being heard by the NCLT. The NCLT did not pass any orders on the avoidance application at the time of approval of the Resolution Plan. The order dated 15th May, 2018 approving the Resolution Plan expressly

disposed of some specific applications:

(a) C.A. No. 244(PB)/2018 under Sections 30 and 31 of the IBC for approval of the Resolution Plan was allowed.

(b) C.A. No. 186(PB)/2018 filed by Larsen & Toubro Ltd. was dismissed with costs.

(c) C.A. No. 217(PB)/2018 filed by Bhushan Employees was also dismissed with costs.

(d) C.A. No. 176(PB)/2018 filed by RP under Section 19(2) of IBC was disposed of with a direction to the Ex-Management to cooperate in all respects in the implementation of the Resolution Plan.

However, it merely had one sentence at the end stating that "*all other applications are also disposed of*". Thus, the avoidance application being C.A. No. 284(PB)/2018 was not separately considered or ruled on by the NCLT.

67. The first preliminary objection taken by the Respondents is that any order passed by the NCLT under Section 60 and Section 61 is appealable to the NCLAT. Thus, this Court ought not to entertain this writ petition due to an existence of an alternate remedy.

68. There is no doubt that as per Section 60 of the IBC, the NCLT/Adjudicating Authority has the jurisdiction to deal with all applications and petitions *"in relation to insolvency resolution and liquidation for corporate persons"*. In this case, the issue is whether the proceedings in question were in relation to insolvency resolution or not. The insolvency resolution process had already come to an end with the approval of the Resolution Plan by the NCLT on 15th May, 2018. The NCLT chose to exercise jurisdiction post the approval of the Resolution Plan. Under the

Scheme of the IBC, as set out above, the jurisdiction of the NCLT is limited to insolvency resolution and liquidation. After the approval of the Resolution Plan and the new management taking over the Corporate Debtor, no proceedings remain pending before the NCLT, except issues relating to the Resolution Plan itself, as permitted under Section 60.

69. Certainty and timeliness is the hallmark of the Insolvency and Bankruptcy Code, 2016. The Supreme Court in ***M/s Innoventive Industries (Supra)*** observed that one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. Any continuation of the jurisdiction of the NCLT beyond what is permitted under the IBC would be contrary to its very ethos. There is a fundamental issue of jurisdiction that has been raised by the Petitioner as to whether after the approval of the Resolution Plan, the NCLT can exercise jurisdiction in respect of an avoidance application. In the opinion of this Court, the answer is in the negative. Since the plea of the Petitioner is that the NCLT lacks jurisdiction the present writ petition is maintainable before this Court.

70. An avoidance application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor. The benefit is not meant for the Corporate Debtor in its new *avatar*, after the approval of the Resolution Plan. This is clear from a perusal of Section 44 of the IBC, which sets out the kind of orders which can be passed by the NCLT in case of preferential transactions. The benefit of these orders would be for the Corporate Debtor, prior to approval of the Resolution Plan. Any property transferred or sum acquired in an order passed in respect of a preferential transaction would have to form part of the final Resolution Plan. The

Resolution Plan would have to take into consideration such amounts and benefits which can be given to the Corporate Debtor for the benefit of the CoC. The benefit of an avoidance application is not meant for the company, after the Resolution Plan is considered by the CoC and approved by the NCLT.

71. The Court has analysed the Code and the applicable Regulations. While the IBC itself does not fix any time limits for filing of avoidance applications in respect of any transactions, the 2016 CIRP Regulations in Chapter X clearly stipulate the structure and methodology for dealing with objectionable transactions. Under Regulation 35A, as amended with effect from 3rd July, 2018, a specific timeline has been provided, by which the RP has to form an opinion if the Corporate Debtor has been subjected to any of the objectionable transactions. The time limit prescribed earlier was 105 days from the insolvency commencement date, which has now been reduced to the 75th day from the insolvency commencement date. However, what is significant is the fact that under Regulation 39, the RP has to submit, along with the Resolution Plans, details of all the objectionable transactions including preferential transactions. Regulation 35A and Regulation 39(2) are set out below:

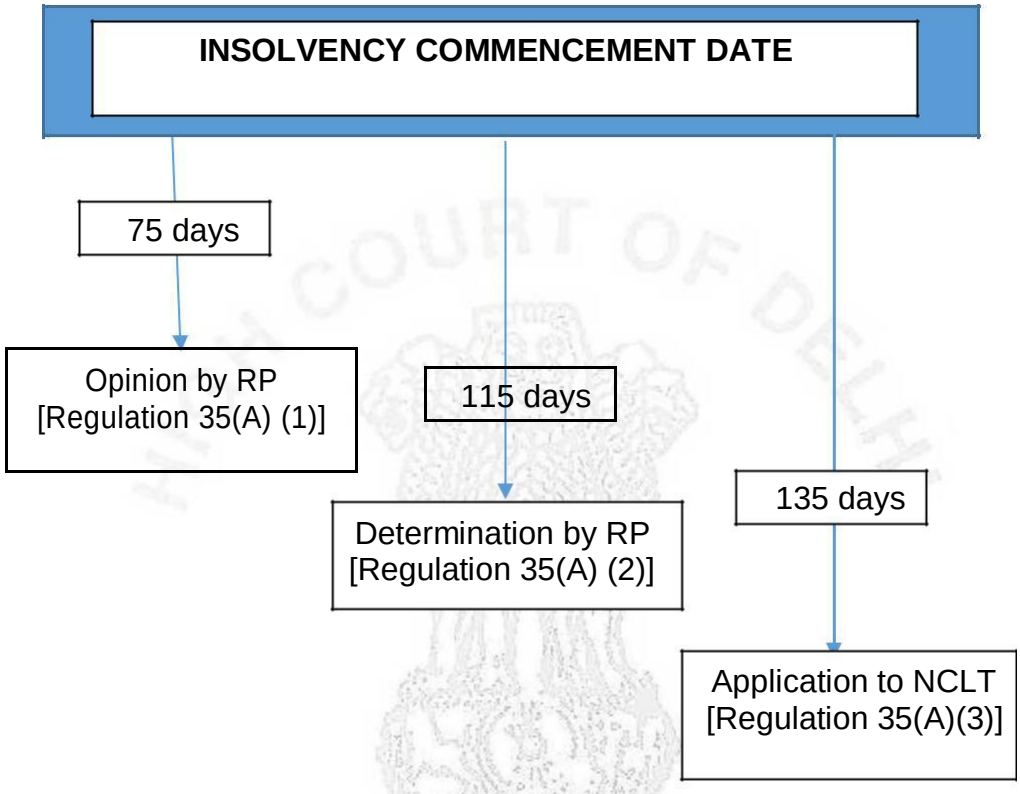
> ***"Regulation: 35A. Preferential and other transactions.***
> *(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.*
> *(2) Where the resolution professional is of the opinion that the corporate debtor has been*

subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.
(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.

Regulation: 39. Approval of resolution plan
xxx
(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him:-
(a) preferential transactions under section 43;
(b) undervalued transactions under section 45;
(c) extortionate credit transactions under section 50; and
(d) fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions."

72. A conjoint analysis of Sections 43 and 44 read with the applicable Regulations clearly shows that the assessment by the RP of the objectionable transactions including preferential transactions cannot be an unending process. The examination has to commence on the insolvency commencement date. The RP has to form an opinion by the 105th day (pre-amendment) and 75th day (post-amendment). If the RP comes to the conclusion that the Corporate Debtor has been subject to preferential

transactions, the determination has to be made by the 115th day. The RP also has to apply to the NCLT for appropriate relief on or before the 135th day. Thus, the timeline in respect of objectionable transactions including preferential transactions, in a Resolution process, is as follows:



73. The prescribing of the above timelines has a purpose. The said purpose is that the RP includes these details in the Resolution Plan submitted under Section 30 to the NCLT. These details ought to be available before the NCLT at the time of approval of the Resolution Plan under Section 31. The argument that avoidance applications relating to preferential and other transactions can therefore survive beyond the conclusion of the CIRP is contrary to the Scheme of the Code.

74. Moreover, an RP cannot continue to file applications in an indefinite manner even after the approval of a Resolution Plan under Section 31. The

role of a RP is finite in nature. He or she cannot continue to act on behalf of the Corporate Debtor once the Plan is approved and the new management takes over. To continue a RP indefinitely even beyond the approval of the Resolution Plan would be contrary to the purpose and intent behind appointment of a RP. The Resolution Professional (RP), as the name itself suggests has to be a person who would enable the resolution. The role of the RP is not adjudicatory but administrative in nature. Thus, the RP cannot continue beyond an order under Section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved. This is however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan. In the present case, no such clause has been shown to exist.

75. The Supreme Court of India in ***Committee Of Creditors Of Essar (supra)*** has held that the detailed provisions of the IBC read with the 2016 Regulations make it clear that the RP is a person who is to manage the affairs of the Corporate Debtor as a going concern from the stage of admission of an application under Sections 7, 9 or 10 of the Code till a Resolution Plan is approved by the NCLT. The relevant extract of the decision is as under:

> *"27. The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under Sections 7, 9 or 10 of the Code* ***till a resolution plan is approved by the Adjudicating Authority****, but is also a key person who is to appoint and convene meetings of the Committee of*

> *Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional.* ***Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated and decided by the Committee of Creditors****. In fact, in ArcelorMital India (supra), this Court referred to the role of the resolution professional under the Code and the aforesaid Regulations, making it clear that* ***the said role is not adjudicatory but administrative,*** *....."*

76. According to Section 23 of the IBC, the RP conducts the CIRP and manages the operations of the Corporate Debtor *"during the corporate insolvency resolution process period"*. Section 23 reads as under:

> ***"23. Resolution professional to conduct corporate insolvency resolution process. -***
>
> *(1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor* ***during*** *the corporate insolvency resolution process period:*
>
> ***[****Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period****, until an order approving the resolution plan*** *under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.]*
>
> *(2) The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.*

> *(3) In case of any appointment of a resolution professional under sub-sections (4) of section 22, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional."*

77. There is a START line and FINISH line for the Resolution process. Section 23 clearly stipulates that the role of the RP is to `manage' the affairs of the Corporate Debtor `during' the resolution process and NOT thereafter. In fact, until the enactment of the proviso to Section 23, which was introduced with effect from 28th December, 2019, the RP's mandate concluded with the CIRP. The proviso introduced, firstly in 2018 and thereafter in 2020, merely extended the mandate of the RP till the approval of the Resolution Plan under Section 31(1) or appointment of liquidator under Section 34. This itself makes it amply clear that the RP's authority is limited in nature and in any event, cannot extend beyond the order passed under Section 31. Thus, there is an outer limit for the functioning of the RP under the proviso to Section 23(1). The continuation of a RP or filing of an application for the purpose of prosecuting an avoidance application as a ***`Former RP'*** is beyond the contemplation of the IBC. The RP ceases to be one after an order under Section 31 is passed. The RP does not have any connection whatsoever with the new Management which takes over the erstwhile Corporate Debtor, after the approval of the Resolution Plan. Any other interpretation could lead to a situation where an RP could be a '***Former RP***' for years together without any definite end date. Under Section 23, the CIRP period is a specific period and cannot be read as a perpetual period or an indefinite period. The wording of the proviso in fact

makes it further clear that the CIRP process in fact comes to an end immediately upon the RP submitting the Plan itself.

78. The IBC was meant to cure the fallacies and shortcomings in the previous legislations wherein winding-up of companies consumed years together leading to erosion of their assets and businesses. The wording of Section 23 clearly lays down the mandate for the RP. The same cannot be extended beyond the contemplation in the statute. After the Resolution Plan is approved and the new management takes over, the manner in which the affairs of the company are to be run is the sole prerogative of the new management. In the statutory scheme, the RP cannot continue to act on behalf of the Company under the title of ***`Former RP'***. That would be violative of the legislative intention and the statutory prescription.

79. A perusal of Section 30(4) also makes it adequately clear that the CIRP period has to be completed within the time period specified under Section 12(3). Thus, the IBC does not contemplate the continuation of the RP beyond the CIRP period.

80. The above interpretation is also in line with the overall object and purpose of the IBC. The IRP/RP are persons, who are assigned specific roles under the IBC. They are meant to provide a smooth transition for the Corporate Debtor during an insolvency period till the resolution process is over. Their continuation beyond the closure of the resolution process would in effect mean an interference in the conduct and management of the company, which is now having its own independent Board, managerial personnel, etc. The RP's role cannot continue once the Resolution Plan is approved and the successful Resolution Applicant takes charge of the Corporate Debtor.

81. Mr. Ahluwalia, ld. CGSC for the Union of India has placed reliance on Form H of the CIRP Regulations, which is filed by the RP at the time of submitting the Resolution Plan to the NCLT. It is the submission of ld. CGSC that the avoidance applications could be pending at the stage when the RP files the Plan. He relies on the language in point no. 15 in Form H i.e. the 'Compliance Certificate' which reads as under:

> "*15. Provide details of section 66 or avoidance application* ***filed/ pending****.*

SL. No	Type of Transaction	Date of filing with Adjudicating Authority	Date of Order of the Authority	Brief of the Order
1	Preferential transactions under section 43			
2	Undervalued transactions under section 45			
3	Extortionate credit transactions under section 50			
4	Fraudulent transactions under section 66			

82. Though at first blush, Mr. Ahluwalia's submission may appear attractive, a closer analysis reveals that Form H seeks to achieve what is mandated in the Regulations. Regulation 39 requires details of the objectionable transactions to be placed by the RP before the NCLT. Form H is merely a format prescribed to provide the said details. The application in respect of such transactions would obviously be pending on the date when

the Resolution Plan is submitted by the RP. The details of the transactions would be contained in Form H, would be filled by RP and submitted by the RP before the NCLT. However, Form H cannot be read to mean that they can remain pending after the order under Section 31.

83. Finally coming to Section 26 of the Code. The said provision reads as under:

> *"**26. Application for avoidance of transactions not to affect proceedings** – The filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process"*

84. The manner in which it is sought to be interpreted by the Petitioner and by the Respondents is in stark contrast. The Respondents rely heavily on this provision to argue that avoidance applications would not affect the CIRP. This is because under the scheme of the IBC, insofar as avoidance applications are concerned, the RP has to collect the details, form an opinion, make a determination and submit the same to the NCLT within the prescribed timelines. This is independent of the various other steps which are part of the CIRP. The activities in respect of objectionable transactions, which the RP has to conduct, would run parallelly with the other steps of the CIRP. However, finally, the RP would submit all the details to the NCLT along with the Resolution Plans. That is the purpose of the provision. The provision cannot be interpreted in a manner so as to say that the applications can survive the CIRP itself. Section 26 of the IBC also cannot be read in a manner so as to mean that an application for avoidance of transactions under Section 25(2)(j) can survive after the CIRP process. Once the CIRP process

itself comes to an end, an application for avoidance of transactions cannot be adjudicated. The purpose of avoidance of transactions is clearly for the benefit of the creditors of the Corporate Debtor. No benefit would come to the creditors after the Plan is approved. Thus, Form H cannot come to the aid of avoidance applications to remain pending beyond the CIRP process.

85. Clause 2.4 of Chapter III of the ILC Report, dated 20th February, 2020 is relied upon to urge that a Resolution Applicant ought not to be permitted to file an avoidance application and the crux of this recommendation would, in effect, mean that the benefit for any of the avoidance applications cannot be given to the Resolution Applicant. However, a closer look at the ILC Report shows that as per Clause 2.4 the successful Resolution Applicant cannot be permitted to file such avoidance applications, as the same was not factored into the bid. The relevant extract reads as under:

> *"2.4. The Committee also considered if the successful resolution applicant should be permitted to file such applications. However, it was agreed that this would possibly result in the resolution applicant being entitled to a return that was not factored in at the time of submitting their bid. Therefore, the Committee decided that the resolution applicant should not be permitted to file applications against improper trading or applications to avoid transactions"*

86. Thus, the Resolution Applicant whose Resolution Plan is approved itself cannot file an avoidance application. The purpose is clear from this itself i.e., that the avoidance applications are neither for the benefit of the Resolution Applicants nor for the company after the resolution is complete. It is for the benefit of the Corporate Debtor and the CoC of the Corporate Debtor. The RP whose mandate has ended cannot indirectly seek to give a benefit to the Corporate Debtor, who is now under the control of the new

management/Resolution Applicant, by pursuing such an application. The ultimate purpose is that any benefit from a preferential transaction should be given to the Corporate Debtor prior to the submission of bids and not thereafter.

87. Mr. V.P. Singh, ld. counsel had sought to rely on the IBBI Discussion Paper 2019. However, the said Discussion Paper primarily deals with liquidation proceedings and not resolution proceedings.

88. Moreover, if an avoidance application for preferential transactions is permitted to be adjudicated beyond the period after the Resolution Plan is approved, in effect, the NCLT would be stepping into the shoes of the new management to decide what is good or bad for the Company. Once the Plan is approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not. Thus, if the CoC or the RP are of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the Resolution Plan.

89. In the present petition, this Court is concerned with a Corporate Debtor, in respect of which the Resolution Plan was approved by the NCLT and an application is sought to be filed by the RP as former RP through its counsel. The RP cannot wear the hat of the ***`Former RP'*** and pursue an avoidance application in respect of preferential transactions after the hat of the Corporate Debtor has changed and it no longer remains a Corporate Debtor. This would be wholly impermissible in law as the mandate of the RP has come to an end. The NCLT also has no jurisdiction to entertain and decide avoidance applications, in respect of a Corporate Debtor which is now under a new management unless provision is made in the final

Resolution Plan.

90. A far-fetched argument was made by the ld. counsels for the Former RP that the former RP is willing to step down and the application can be pursued by some governmental authority such as the SFIO or the MCA. The vesting of such power with authorities that are alien to the CIRP process would be contrary to the IBC, which contemplates supervision by an Adjudicating Authority like the NCLT, duly assisted by an RP, only during the CIRP and not beyond that.

91. The fact that the new management can take a decision in respect of any agreement which is deemed to be not beneficial to it also supports the interpretation that after the Plan is approved, the company is completely in the hands of the new management and neither the NCLT nor the RP has any right or power in respect of the said company. As can be seen in the present case, the Corporate Debtor in its new *avatar* has terminated the agreement with the Petitioner.

92. The parties would have to be therefore left to their civil and other remedies in terms of the contract between them. The NCLT ought not to be permitted to now adjudicate the preferential nature of the transaction under a contract which now stands terminated, after the approval of the Resolution Plan.

93. The above discussion is only in the context of Resolution processes and would however not apply in case of liquidation proceedings. In the case of a liquidation process, the situation may be different inasmuch as the liquidator may be able to take over and prosecute applications for avoidance of objectionable transactions. The benefit of orders passed in respect of such transactions may be passed on to the Corporate Debtor which may assist in

liquidating the company at the final stage. However, that is not the case in the present petition.

94. In view of the above findings, the order of the NCLT impleading the Petitioner and any consequential orders are liable to be set aside. The proceedings *qua* the Petitioner before the NCLT under the Avoidance application are accordingly quashed.

95. The present petition is allowed, in the above terms. All pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 26, 2020
dj/dk/RC/A