**THE HON'BLE SRI JUSTICE RAGHVENDRA SINGH CHAUHAN**
**AND**
**THE HON'BLE SRI JUSTICE T. AMARNATH GOUD**

**WRIT APPEAL No.1506 OF 2018**

**JUDGMENT:** (per Hon'ble Sri Justice Raghvendra Singh Chauhan)

Aggrieved by the order dated 12.09.2018, passed by a learned Single Judge, in W.P. No.7329 of 2018, whereby the learned Single Judge has allowed the Writ Petition filed by the respondent No.1 ("Petitioner-Company", for short), and has set aside the letter dated 28.08.2017 and letter dated 27.12.2017, issued by the Reserve Bank of India ('the RBI', for short), and set aside the pendency of the proceedings before the National Company Law Tribunal ('NCLT' for short), Hyderabad Bench, which was initiated by the State Bank of India ('SBI' for short) against the Petitioner-Company, the appellant, the RBI has approached this court.

Briefly the facts of the case are that the Jerrella block of mines, located in Visakhapatnam District, has huge reserves of bauxite, a raw material used for manufacturing of aluminum. On 14.02.2007, a Memorandum of Understanding ('MOU' for short) was entered between the Government of Andhra Pradesh and the Government of RAS AL KHAIMAH. On the basis of the said MOU, a Joint Venture Company, namely M/s. Anrak Aluminium Limited, the Petitioner-Company, was incorporated between the Penna Cement Group and the RAS AL KHAIMAH Investment Agency. The object of Petitioner-Company was to establish and operate a 1.5 Million Ton alumina refinery with 225 MW Cogeneration power plant at Makaravapalem Mandal, Visakhapatnam District. On 30.01.2008, the Andhra Pradesh Mining Development Corporation

('APMDC' for short) entered into a bauxite supply agreement with the Petitioner-Company. Subsequently, the Government of Andhra Pradesh issued G.O. Nos. 222 and 289 (Industries and Commerce) (M.III) Department, dated 13.08.2008 and 30.10.2008, respectively, for supply of bauxite to the petitioner-Company.

Assured of uninterrupted supply of bauxite, on 25.11.2009 the petitioner-Company approached a Consortium of Banks ('CB' for short), with SBI as the Lead Bank ('Lead Creditor'), and sought a financial assistance of Rs. 2995 Cr. Accordingly, on 25-11-2009, the CB sanctioned the term loan for the said amount.

However meanwhile, through letter dated 13.04.2016, the APMDC informed the Petitioner-Company that the Government of Andhra Pradesh had recalled the G.Os. dated 13.08.2008 and 30.10.2008. Hence, the APMDC would not supply the bauxite to the Petitioner-Company. Due to the lack of supply of bauxite, the petitioner-Company's project was identified as "stalled project" by the Project Monitoring Group. Even despite the best efforts of the Petitioner-Company, they could not find any other supplier of bauxite. Hence, the Petitioner-Company could neither generate any income, nor earn any profit. Consequently, the petitioner-Company defaulted on the repayment of the loan amount. On 31.03.2014 the loan account of the petitioner was classified as 'Non-Performing Asset' ('NPA' for short) in terms of the RBI circulars. The SBI sought the credit rating of the Petitioner-Company. According to the RBSA Advisors, an independent service valuation firm, by its report, dated 31.03.2016, informed the SBI that the Petitioner-Company is categorized as "very high risk" profile and not economically viable.

Meanwhile, the Insolvency and Bankruptcy Code, 2016 ('the Code' for short) came into force from 28.05.2016.

In light of the Code, Sections 35AA and 35AB have been introduced to the Banking Regulation Act, 1949, ('the Act', for short) by way of amendment, through the Banking Regulation (Amendment) Ordinance, 2017 ('Ordinance, 2017' for short). By virtue of Section 35AA of the Act, the Central Government was vested with the power to authorize RBI for issuing directions to any banking company(ies) to initiate the "Insolvency Resolution Process" under the provisions of the Code. Further, Section 35AB of the Act empowered the RBI to issue directions in respect of "stressed assets" for "resolution of stressed assets". On 05.05.2017, the Central Government issued authorization to RBI under Section 35AA of the Act. Consequently, on 13.06.2017, RBI released a press note outlining the steps to be taken in respect of twelve "stressed accounts", and other NPA accounts pursuant to the Ordinance, 2017, which reads as under:

1. Internal Advisory Committee (IAC) was constituted for cases that may be considered for resolution under the IBC;

2. IAC arrived at a criteria for referring such accounts for resolution under IBC and 12 accounts totaling to 25% of the NPAs of the banking system qualified for immediate reference under the IBC;

3. In respect of other NPAs which did not qualify under the set criteria, <u>IAC recommended that banks should finalize upon a resolution plan within 6 months, failing which IBC proceedings should be initiated.</u>

4. Accordingly, Appellant (RBI) would issue directions to banks to initiate insolvency proceedings.

(Emphasis added).

Further, on 07.07.2017, the Petitioner-Company filed an insolvency application under Section 10 of the Code before the NCLT, Hyderabad to initiate the Corporate Insolvency Resolution

Process. However, by order dated 31.08.2017, the NCLT dismissed the petition filed by the Petitioner-Company. The NCLT directed the stake holders to explore the possibility of revival of the Company outside the Code. Moreover, the NCLT granted the liberty to the Petitioner-Company to again file a fresh petition under Section 10 of Code before it, after consulting with the State Government.

The RBI by its letter dated 28.08.2017 advised the SBI with regard to the Petitioner-Company, where 60% of total outstanding is classified as NPA, to finalize and implement "resolution plan" in respect of the Petitioner-Company's account before 13.12.2017, failing which, the insolvency proceedings under the provisions of Code should be initiated before 31.12.2017. It was also made clear by RBI that if the entire debt amount were not cleared in the resolution plan before 13.12.2017, such "residual debt" must be rated as investment grade by two external Credit Rating Agencies ('CRAs', for short).

Consequent to the said order, on 08.09.2017 the CB held its first meeting, and resolved as under:

> *All the Bankers informed that this account is identified and notified by the RBI to fine the resolution by 13th of December 2017 or else Bankers have to file application in NCLT before 31st of December 2017 for resolution of account.*
> *All the bankers opined that the Company is not increasing the OTS offer and the amount given by the company is not acceptable to all the bankers.*
> *All the Bankers opined that we have personal guarantee of the MD, so MD also have to bring in additional amount for release of personal guarantee.*
> *NCLT application filed by the Company is dismissed by the NCLT Bench on 31.08.2017, but they have not passed any order for the dismissal of the application.*
> *After the discussions Consortium have decided the following:*

*After the Bankers opined that if the Company is coming up for Rs.1400.00 Crores of OTS payable within 12 months, we can take a view on the same.*
*All the Bankers opined that, if company does not come up with an acceptable offer under OTS, then Banks will be constrained to file application in NCLT as suggested by the RBI.*
*Thereafter, the company officials were called in and DGM (SBI) conveyed the decision taken by the Consortium to the MD.*
*MD of the Company requested time till Friday (i.e.,15.09.2017) for submission of the OTS offer.*

*SBI informed that once the Company submits the OTS offer, Core Committee will be called for discussion on the same.*

The CB again met on 25.10.2017, wherein, the Petitioner-Company increased its One Time Settlement ('OTS') initial offer of Rs. 1250 Cr. to Rs. 1275 Cr. (additional Rs. 25 Cr. in lieu of interest). In the said meeting, all the participants, except Indian Overseas Bank ('IOB', for short) with a majority of 94.8% of the CB, "in principle" agreed to the OTS offer of Petitioner-Company, subject to the approval by appropriate committee of individual banks. But by the cut-off date i.e. 13.12.2017, only six out of seventeen banks received approvals from their respective authorities in respect of OTS.

The RBI issued letter dated 14.11.2017 to the SBI assigning Credit Rating Agencies in respect of "resolution plans" of certain borrowers.

As per the earlier resolution, a third meeting of CB took place on 13.12.2017. At the meeting, only six banks approved the OTS offer of the petitioner-Company. According to the minutes of the meeting, the SBI approved the OTS offer with a condition that if the petitioner-Company failed to maintain the schedule of repayment, the SBI would immediately file a case under the Code before the NCLT.

In the meanwhile, the RBI in its letter, dated 27.12.2017, informed the SBI that the conditions specified in the letters dated 28.08.2017 and 30.11.2017 were not fulfilled either by the CB, or by the Petitioner-Company. Therefore, the RBI clarified that no requests for extension of time would be accepted.

But even in the last meeting of the CB, led by SBI, held on 29.12.2017, only eleven out of seventeen banks had received approval of the OTS from their competent authority. The IOB specifically stated that it would not accept the revised OTS proposal, whereas five banks were still waiting to receive the approval from their competent authority. Thus, even by 29-12-2017, there was neither any agreement between the CB and the Petitioner-Company, nor any “resolution plan” in place. The last date for having both implemented was over.

In these circumstances, by letter dated 27.12.2017, the RBI directed the SBI to file the petition against the Petitioner-Company under the Code before the NCLT. On 29-12-2017, the Petitioner-Company, in turn, filed a Writ Petition before this court in order to challenge the letters dated 28-08-2017, and 27-12-2017, and the initiation of the proceedings before the NCLT. By order dated 12-09-2018, the learned Single Judge allowed the writ petition in the aforementioned terms. Hence, this appeal before this Court.

Mr. Niranjan Reddy, the learned Senior Counsel for the appellant, has raised the following contentions: -

Firstly, the learned Single Judge has erred in understanding the law and the facts of the case. Therefore, the conclusions drawn by the learned Single Judge are erroneous. For, under the Act, the RBI regulates the functioning of the banks. Under Section 35A of the Act, the RBI is empowered to issue instructions/directions to the banking companies or to a particular banking company. The bank company(ies) is/are duty-bound to follow the same. For, such instructions/directions are mandatory in nature. In order to buttress this plea, the learned Senior Counsel has relied upon the cases of **Peerless General Finance and Investment Co. Ltd. And Ors v RBI**[1]**, Corporation Bank v D. S. Gowda**[2]**, Central Bank of India v Ravindra & Ors**[3]**, Sardar Associates v Punjab Bank**[4]**.**

Moreover, the loan accounts are broadly categorized as "Standard Account" where there is no default in repayment of the principal and interest amount; as "Stressed Account", where there is default in repayment of principal or interest amounts. According to the RBI Circular on "*Framework for Revitalizing Distressed assets in the Economy—Guidelines on Joint Lender's Forum (JLF) and Corrective action Plan (CAP)"*, dated 26-02-2014, "Stressed Account" ought to be classified as "*Special Mention Account (SMA)*". SMAs should be further sub-categorized for the purpose of determining appropriate restructuring measures as under:

*Categories Basis of Classification*

*SMA-0 Principal or interest payment not overdue for more than 30 days.*
*SMA-1 Principal or interest payment overdue between 31-60 days.*
*SMA-2 Principal or interest payment overdue between 61-90 days.*

[1] (1992) 2 SCC 343
[2] (1994) 5 SCC 213
[3] (2002) 1 SCC 36
[4] (2009) 8 SCC 257

Further, on 01-07-2015, the RBI issued a "*Master Circular—Prudential norms on income Recognition, Asset Classification and Provisioning pertaining to Advances.*" The RBI not only defined certain terms, like NPA, but also sub-classified the NPA accounts into different categories. An NPA account was defined as "*an asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank.*" The circular further states that "*A non-performing asset (NPA) is a loan or an advance where interest and/or instalment (sic) of principal remain overdue for a period of more than 90 days in respect of a term loan.*" Further, in terms of clause 4.2.15.3, "*loans to non-infrastructure projects under implementation shall be classified as NPA if there is a delay of more than two years in commencement of commercial operations of the project from the originally envisaged date of commencement of commercial operations.*"

The Circular further classified the different categories of NPAs into "*Asset Classification*": i) Substandard Assets—"*A Substandard Asset would be one which has remained NPA for a period less than or equal to 12 months.*" ii) Doubtful Assets—"*An asset would be classified as doubtful if it has remained in the substandard category for a period of 12 months.*" iii) Loss Assets—"*A loss asset is one where loss has been identified by the bank or internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some salvage or recovery value.*"

Furthermore, according to the Circular Instructions dated 26-02-2014, restructuring of loan was permissible only for "sub-standard" or better accounts. The Circular Instructions dated 24-09-2015 enlarged the scope of restructuring to include the "doubtful assets", provided such assets were certified as "economically viable under a Techno-Economic Viability ('TEV', for short) study and the Joint Lenders' Forum ('JLF', for short)—the Empowered Group concurs with the same." However, when the case of Petitioner-Company was referred to a TEV study, the RBSA Advisors report specifically noted that "*it is a very high-risk category and not economically viable.*" Hence, under these two Circulars, the Petitioner-Company was not eligible for restructuring of its loan repayment.

Further, on 28-05-2016, the Code came into being. The Code brought about a paradigm shift in the relationship between the Corporate Creditor and the Corporate Debtor. Unlike the previous laws, namely Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ('SARFESI Act, 2002', for short) the banks and the financial institutions were no longer going to just sell off the assets of the borrower in order to recoup the loan amount. In fact, now the Corporate Creditor would take over the management and operation of the business of the Corporate Debtor till the realization of their dues. The entrenched managements are no longer allowed to continue in case of non-payment of debts. The object of the Code is to promote "resolution over liquidation". Therefore, the first objective is "resolution"; the second, "maximization of value of assets of the 'Corporate Debtor'"; the third, "promoting entrepreneurship, availability of credit and balancing the interests." Relying on the case of **Arcellormittal India Pvt. Ltd. v Satish Kumar Gupta** (Civil Appeal No. 9402-9405 of 2018), the learned Senior Counsel has pleaded that in the said case the Hon'ble Supreme Court has clearly opined that time bound process is an essential feature of the Code. Therefore, the Code provides for limited judicial role in the entire process.

Moreover, in order to give more teeth to the RBI, on 04-05-2017, the Ordinance, 2017 was brought into force. Consequently, Sections 35AA and 35AB were born. The former provision dealt with the power of the Central Government to authorize RBI to issue directions to the banking companies to initiate the "insolvency resolution process". The latter provision empowered the RBI to issue directions in respect of "Stressed assets".

Subsequently, on 13-06-17, the RBI issued a press note outlining the steps to be taken pursuant to the Ordinance, 2017. Resultantly, an Internal Advisory Committee (IAC) was constituted for cases that may be considered for resolution under the Code. Further, the IAC arrived at the criteria for referring such accounts for resolution under the Code and twelve accounts, totaling about 25% of the NPAs of the banking system qualified for immediate reference under the Code. However, with respect to the other NPAs which did not qualify under the set criteria, IAC recommended that banks should finalize the "resolution plan" within six months, failing which the procedure prescribed under the Code should be adopted. Therefore, a "resolution plan" not just had to be finalized, but most importantly had to be implemented within the stipulated period of six months. Thus, time was of essence in the process of resolving the debt owed by the Corporate Debtor to the bank(s). If the "resolution plan" were not implemented within the stipulated period of six months, then the Corporate Creditors were required to initiate the insolvency proceedings under the Code.

Keeping in mind the press release, on 28-08-2017, the RBI wrote to the SBI, the lead bank, with regard to the outstanding dues of the Petitioner-Company. For, on 31-03-2014, the Petitioner-Company's loan account was declared as NPA. Despite the lapse of three years, the petitioner-Company had not taken any concrete steps to clear the loan amount. Therefore, the RBI clearly pointed it out to the SBI that time till 13-12-2017 was given for resolving the NPA account of the Petitioner-Company. Thus, the "resolution plan" was not only to be finalized, but also had to be implemented by 13-12-2017—the cut-off date. Further, if the entire debt amount was not cleared under the "resolution plan" prior to 13-12-2017, the "residual debt" owed to the banks, such "residual debt" must be rated as investment grade by two CRAs. If these steps were not completed by the cut-off date, the SBI was to initiate the proceedings under the Code against the Petitioner-Company.

In compliance of the letter dated 28-08-2017, the CB, led by the SBI, held four meetings in order to finalize and implement the resolution plan: in the first meeting, held on 08-09-2017, the CB agreed to finalize and implement a resolution plan and to implement the same by 13-12-2017. If the resolution plan could not be implemented by the said date, then the CB would initiate the proceedings under the Code. Furthermore, although the petitioner-Company had offered an amount of Rs. 1250 Cr. as OTS, the CB directed the Petitioner-Company to come up with a more acceptable OTS offer.

In the second meeting, held on 25-10-2017, the Petitioner-Company increased the OTS offer from 1250 Cr. to 1275 Cr. Except for the IOB, the other banks agreed, in principle, to accept the said OTS offer. However, the acceptance of the offer was subject to the approvals by the appropriate committees of the individual banks.

In the third meeting, held on 13-12-2017, only six out of seventeen banks had received the approval from their respective competent authorities. Further, the SBI had made it amply clear that if the Petitioner-Company failed to pay the installments as per the schedule, then the SBI would initiate the proceedings under the Code. Hence, according to the learned Senior Counsel, by the cut-off date of 13-12-2017, only a minority of banks had received the approval from their respective authorities. Thus, the learned Single Judge is unjustified in concluding that "*since the majority of the banks had approved the OTS, the resolution plan was finalized and implemented by 13-12-2017.*" Such a conclusion is clearly belied by the record.

In fact, according to the learned Senior Counsel even in the last meeting, held on 29-12-2017, only eleven out of seventeen banks had reported such approvals from their respective appropriate authorities. Thus, till 29-12-2017, that is much beyond the last date of 13-12-2017, the banks had neither finalized the resolution plan, nor implemented the same. Therefore, the conclusion drawn by the learned Single Judge that the majority of banks had finalized the resolution plan and implemented the same prior to 13-12-2017, such a conclusion is highly misplaced.

Furthermore, by letter dated 30-11-2017, the RBI had informed the SBI that the resolution plan should be taken up for implementation only if the CRA provides a credit opinion that "*the residual debt could be considered to have a 'moderate degree of safety'. But if the residual debt failed to receive such a credit opinion from both the CRAs, then the banks are required to initiate the proceedings under the Code.*" The RBI clearly stipulated that the resolution plan has to be implemented by the cut-off date of 13-12-2017, which means that the Credit opinions for the resolution plan have to be received from the two CRAs, the Master Restructuring Agreement should be signed by all the parties, and pre-conditions in the RBI guidelines have to be complied with prior to the said date of 13-12-2017.

By another letter dated 27-12-2017, the RBI informed the SBI that the conditions mentioned in the letters dated 28-08-2017 and 30-11-2017 have to be complied with. In fact, no request for extension of time would be entertained. However, by the last date of 13-12-2017, neither the resolution plan had been finalized, nor the Master Restructuring Plan agreed upon by all the banks, nor was the plan implemented. Therefore, the SBI had no other option but to file the application under Section 7 of the Code before the NCLT.

Secondly, the learned Single Judge is unjustified in concluding that the RBI's instruction to initiate the proceedings under the Code was arbitrary. For, the banking sector was and is facing the menace of NPAs. The prevalence of NPAs is destabilizing the foundation of the banking sector. In fact, the Code was enacted by the Parliament in order to deal with the mischief created by the large number of NPAs. In order to deal with the danger created by the NPAs, the RBI had initially identified twenty-nine Corporate Debtors against whom immediate action was taken under the Code. For the other NPAs, a breathing time of six months was given for the Corporate Creditors and the Corporate Debtors to put in place a resolution plan outside the Code. In case there were "residual debt" left even after the cut-off date of 13-12-2017, then rating by two CRAs was required to be taken by the Corporate Creditor. It is only after the endeavor to place such a resolution plan fails, then the Corporate Creditor is required to commence the proceedings under the Code. Relying on the case of **Swiss Ribbons Pvt. Ltd and Ano. v Union of India and Ors.**[5], the learned Senior Counsel has pleaded that a similar argument that sufficient time was not given by the RBI was raised before the Hon'ble Supreme Court. However, the Apex Court rejected the said argument.

Thirdly, the finding of the learned Single Judge that once an OTS was accepted by the CB, there was no "residual debt" left as of 13-12-2017 is highly misplaced. For, under the OTS, till 13-12-2017, the Petitioner-Company had paid only Rs. 62.5 Cr. to the CB. The balance amount of Rs. 1212.5 Cr was still outstanding. Thus, there was clearly a "residual debt" against the Petitioner-Company. Moreover, even if after the cut-off date, the Petitioner-Company has paid a total amount of Rs. 400 Cr. Even then, there is a substantive residual debt yet to be paid by the

[5] 2019 SCC OnLine SC 73

Petitioner-Company. Furthermore, according to the instructions issued by the RBI, if there is any “residual debt” left, then the rating from two CRAs has to be called for. But in the present case, no such “credit rating” was ever called for. Hence, the RBI had no other option but to instruct the SBI to file the petition under the Code before the NCLT.

Fourthly, as a corollary, the learned Single Judge has erred in ignoring the requirement of the credit rating by two CRAs in the present case. Such a requirement being mandatory could not be ignored.

Lastly, the learned Single Judge is not justified in concluding that the instructions issued by the RBI, dated 28-08-2017, were merely “advice”. Since instructions issued by the RBI have been held to be mandatory and binding, such a finding is highly misplaced. Hence, the impugned order deserves to be set aside by this court.

On the other hand, Mr. R. Raghunandan Rao, the learned Senior Counsel for the Petitioner-Company raised the following counter-arguments:-

Firstly, that RBI is but a facet of the State, since it is an instrumentality of the State, its actions should be just, fair and reasonable. However, in the facts and circumstances of this case, the RBI has acted in most “arbitrary, unfair and unjust” manner. Therefore, the letter dated 28.08.2017 and letter dated 27.12.2017 deserve to be set aside by this court.

Secondly, although the RBI was aware of the factual position and the grave difficulties faced by the Petitioner-Company in connecting its production due to the factors, which are absolutely beyond the control of Petitioner-Company, the RBI and the CB should have been more reasonable in their dealings with the Petitioner-Company. For, Petitioner-Company had not become a defaulter “by choice”, but only “by necessity”. Though the APMDC had agreed to supply the bauxite to the Petitioner-Company, eventually, the Government of Andhra Pradesh cancelled its Government Orders. Thereby the Government left the Petitioner-Company high and dry. Moreover, since the factory was established by Petitioner-Company in Special Economic Zone (‘SEZ’, for short), the Petitioner-Company could not shift the factory out of the SEZ. Furthermore, despite the best efforts of the Petitioner-Company to seek promoters, it could not attract any viable promoter. In order to revive the company, the Petitioner-Company had itself filed a petition before the NCLT on 07.07.2017. However, the NCLT had dismissed the petition filed by the Petitioner-Company as it felt that the economy would be served better by resolution outside the IBC. Moreover, in case the resolution plan could not be implemented outside the Code, the parties were always free to approach the NCLT. The fact that the Petitioner-Company had approached the NCLT clearly establishes its *bona fide* intention to salvage the situation to repay the loan amount to the CB and to keep the company as a running concern. Despite being fully aware of the steps taken by the Petitioner-Company, the RBI has been extremely harsh in its dealing with the Petitioner-Company. Therefore, the steps taken by the RBI by issuing letters dated 28.08.2017 and 27.12.2017 directing the SBI to initiate the proceeding under the Code against the Petitioner-Company are highly “arbitrary, unreasonable, unfair and unjust”.

Hence, the learned Single Judge was justified in concluding that the steps taken by the RBI are highly arbitrary.

Thirdly, on 26.02.2014 the RBI had issued a Master Circular, mentioned hereinabove, dealing with revitalizing "Distressed Assets" in the economy. The circular also included guidelines to the JLF and Corrective Action Plan ('CAP', for short). According to clause 2.4 of the said circular, *all Consortium Arrangement for consortium accounts would be treated as JLF for the purpose of Master Circular*. Moreover, clause 3.2 clearly stated that a decision agreed by a minimum of 75% of the creditors by value and 60% of the creditors by number in the JLF would be binding on all the lenders in the said JLF. The said circular, furthermore, required an economic viability study to be conducted as preliminary steps to the restructuring of the loans. In the present case, in the meeting held on 13.12.2017, six out of seventeen banks had approved the OTS proposal amounting to 44.73% of the outstanding. Moreover, in its meeting dated 29.12.2017, the majority of the banks i.e. eleven banks out of seventeen, had obtained the approval from their respective authorities. Since the majority of the banks had approved the OTS offer made by the Petitioner-Company, according to the Master Circular, dated 26.02.2014, the majority decision was binding on the minority of the banks in the CB. Therefore, the learned Single Judge was justified in concluding that once the banks had accepted the OTS offer made by Petitioner-Company, the SBI is not justified in initiating the proceedings before the NCLT.

Fourthly, it is not just that the CB had approved the OTS offer, but most importantly, upon instructions issued by the SBI, the lead bank, on 09.11.2017 the Petitioner-Company had deposited the first installment of Rs. 62.5 Cr. along with its application form. Even thereafter, after the cut-off date of 13.12.2017, again, on 30.12.2017, the SBI had accepted another installment of Rs. 62.5 Cr. from the Petitioner-Company. Moreover, in compliance of the stay order granted by this court, on 29.03.2017 the Petitioner-Company had further deposited a sum of Rs. 275.00 Cr. Thus, in total, so far, the Petitioner-Company has repaid Rs. 400.00 Cr. out of Rs. 1275.00 Cr, to the CB. Since the Petitioner-Company has been depositing the amount only at the direction of the SBI, the CB are hit by "promissory and equitable" estoppel. Therefore, the action of the SBI in initiating the proceedings under the Code is highly arbitrary.

Fifthly, the learned Senior Counsel for the appellant is trying to mislead the court; when it claims that the majority of opinion would be binding on the minority opinion of the banks only in the cases of "sub-standard debts". According to the learned Senior Counsel for the appellant, since the NPA account of the Petitioner-Company was classified as "doubtful debts", this stipulation with the majority opinion would be binding on the minority banks, is inapplicable in the case of the Petitioner-Company. According to Mr. Raghunandan Rao, the learned Senior Counsel, a standard Circular dated 24.09.2015 has cleared the air and had clearly stipulated that even doubtful debts can be restructured if the account is an asset and viable under the TEV and the JLF concurs with the assets and approves the case. Thus, the bank would also restructure the accounts, which are classified in the category of being doubtful ones.

Sixthly, a distinction has to be made between “recovery plan” and “restructuring plan”. An OTS would fall within recovery of the amount, but does not fall within restructuring of the loan amount. This distinction is apparent from the fact that in its meeting on 08.09.2017 the CB had contemplated three options for the resolution plan, namely (i) deep restructure, (ii) converting debts into equity, and (iii) OTS. Considering the peculiar facts of the case, they had rejected the first two options. They had settled for the third option of OTS. They had merely asked the Petitioner-Company to enhance the OTS offer. Consequently, in the meeting dated 25.10.2017, the Petitioner-Company had enhanced the OTS offer from Rs. 1250.00 Cr. to Rs. 1275.00 Cr.

Furthermore in the Banking Sector, the purpose behind “restructuring of a loan” and “recovery of a loan” are two different purposes. Since a loan account is classified into different categories depending on the period for which the principal amount and interest amount had not been repaid, the purpose of restructuring is to ensure that a “doubtful debt” becomes a “sub-standard debt” and eventually becomes a “standard account”. It is, for this purpose, that restructuring would normally involve modification of the terms of the advances/securities, which may include among other alterations of repayment period, repayable amount, the amount of installment, and the rate of interest. This may further include rollover of credit facilities, sanction of additional credit facilities, and enhancement of existing credit limits. However, the purpose of recovery of money is, as the name implies, the recovery of the amounts settled between the parties as a One Time Settlement. Therefore, an OTS is part of recovery and not of restructuring of loan.

Once the Petitioner-Company had agreed to make an OTS offer, once the CB had agreed to accept the offer, and once the scheme is duly implemented, they can never be a “residuary debt” left against the Petitioner-Company. Therefore, the argument of the appellant that since the entire amount of Rs. 1275.00 Cr. was not paid by 13.12.2017, since the “residuary debt” was still left, therefore, the CB should have gotten credit rating done by two CRAs prior to the cut-off date i.e. 13.12.2017; however, as the same was not done, the requirements of the letters dated 28.08.2017 and 30.11.2017 were unfulfilled; hence, the SBI was justified in initiating the process under the Code, such an argument is highly fallacious. For, such an argument overlooks the fact that OTS is a ‘one time repayment scheme’. If the scheme were implemented in toto, the Petitioner-Company would not have any “residuary debt” on its hand. For, the entire amount settled between the parties would have been repaid to the CB. Moreover, the fact that the Petitioner-Company was periodically depositing the amount due, clearly proves its *bona fide* intention in wanting to settle the loan amount.

Seventhly, while trying to implement the resolution plan, even the CB was of the opinion that it was dealing with recovery plan. Furthermore since no amount would be left due i.e. the residuary amount, as and when the OTS scheme is implemented, the CB never sought for the opinion of two CRAs in the case of the Petitioner-Company. Further since the CB did not seek the opinion of the two CRAs, the Petitioner-Company cannot be blamed for their default in carrying out the responsibility.

Lastly, the period of six months given by the RBI for finalizing the resolution plan and for implementing the same is too short. Hence, the time period is an unreasonable one considering the snail's pace at which the Indian Bureaucracy scrolls. A stipulated period of six months, for finalizing everything and for its implementation, is an unreasonable time limit. Hence, the action of the RBI in issuing the letters dated 28.08.2017 and 30.11.2017 and in directing the SBI to launch a proceeding under the Code, such an action is highly arbitrary, unreasonable, unfair and unjust.

In rejoinder, Mr. Niranjan Reddy, the learned Senior Counsel for the appellant submits as under:-

Firstly, undoubtedly, the RBI is an instrumentality of the State. Of course, its actions have to be just, fair and reasonable. However, fairness is a relative term. Therefore, "fairness" and "reasonableness" have to be adjudicated within the parameters of the law. If the steps taken by the RBI are in accordance with the letter and spirit of the law, then even if the acts of the RBI were to adversely affect an individual or an entity, its actions cannot be termed as "unfair, unjust and unreasonable". Relying on the case of **Swiss Ribbon Pvt. Ltd.** (supra), the learned Senior Counsel pleads that the Code is a complete code in itself. The Code has been enacted with certain purpose and object. The object of the Code is to deal with the menace of NPA, which is systematically weakening the banking sector and exposing the national economy to grave dangers. In order to eradicate the mischief committed by corporate defaulters, in order to protect the Banking Sector from collapsing under the weight of NPA accounts, the Code prescribes not only an elaborate procedure for dealing with the burdens on NPA accounts, but also prescribes a timeline within which the NPA accounts should be converted into a standard account. Considering the cancerous growth of non-performing accounts, a surgical intervention is required under the law. Therefore, when the RBI issued the letters dated 28.08.2017 and 30.11.2017, the RBI was only fulfilling its function of protecting the banking sector. Hence, its direction to the CB to finalize and implement a resolution plan, or its instructions to the SBI to initiate the proceeding under Section 7 of the Code, cannot be termed to be "arbitrary, unfair and unjust act". Instead, the act done in compliance of the law has to be termed as reasonable, just and fair.

Secondly, neither equity nor misplaced sympathies play any role while dealing with fiscal statutes (Ref. to **Commissioner of Sales Tax, Delhi And Ors v. Shri Krishna Engg. Co. And Ors**[6]. Since the larger interest of the national economy is involved, since the economic strength of the country is involved, any inconvenience or adverse impact upon the Petitioner-Company should not be dealt with the judicious thinking of this court in its favour.

Thirdly, the Petitioner-Company is gravely mistaken if it is of the opinion that the RBI and the SBI are trying to liquidate the company. For, under the Code, two steps are envisioned; (i) the takeover of the management by the Corporate Creditors; and ii) the

[6] (2005) 2 SCC 692

implementation of the resolution plan in order to resurrect the company. In case the first step were to fail, only then is the option of liquidation to be exercised. Therefore, the intention of the RBI is not to liquidate the Petitioner-Company. The object of the RBI is to revive the Company to make it economically viable, and to turn its NPA into a standard account. Therefore, by no stretch of imagination, its actions can be dubbed as “unfair, unjust and unreasonable”.

Fourthly, as far as the Master Circular, dated 26.02.2014 is concerned, it does contain a provision, namely Clause 3.2, which has prescribed that the decision taken by 75% of the creditors would be binding upon the minority creditors. However, the said circular is not applicable to the recovery process. In fact, the said circular clearly states that it is applicable to the “restructuring process”. Since the Petitioner-Company claims that OTS is part of the “recovery process”, the Petitioner-Company cannot simultaneously claim that the benefit of the circular should be extended to it.

Fifthly, there is no estoppel against a statute. The press note dated 13.06.2017, the letter dated 28.08.2017 and the letter dated 30.11.2017 had repeatedly emphasized that an agreement has to be reached between the Corporate Creditors and the Corporate Debtors on or before 13.12.2017. They have also stressed on the fact that in case there is a “residuary debt”, which has to be paid by the Corporate Debtor to the Corporate Creditors, then the opinions of two CRAs must be procured by the Corporate Creditors. However, till 13.12.2017, only six banks had received the approval from the competent authority for accepting the OTS offered by the Petitioner-Company. Even by the deadline of 13.12.2017, there was no agreement reached between the CB and the Petitioner-Company. Since the requirement of law was not met, the Petitioner-Company is unjustified in claiming that mere acceptance of part of the OTS should be read as an estoppel against the RBI.

Sixthly, the learned Senior Counsel for the Petitioner-Company is unjustified, as is the learned Single Judge, in claiming that the acceptance of OTS would not have left a "residuary debt" to be repaid by the Petitioner-Company. For, according to the instructions issued by the RBI, the entire due amount had to be paid by 13.12.2017. If any due amount were still owed by the Corporate Debtor to the CB, after the cut-off date, then the remaining amount would be treated as "residuary debt". Admittedly, by 13.12.2017, the Petitioner-Company had paid merely Rs. 62.5 Cr. and Rs. 62.5 Cr. Thereafter in compliance of the stay order granted by the learned Single Judge, the Petitioner-Company had further deposited an amount of Rs. 275.00 Cr. Therefore, even after the deadline of 13.12.2017, the Petitioner-Company had deposited merely Rs. 400 Cr. out of the offer of Rs. 1275 Cr. Hence, there is a "residuary debt" of Rs. 875 Cr. to be paid to the CB by the Petitioner-Company. However, notwithstanding the existence of a "residuary debt", the CB had never called for reports from two CRAs. Therefore, the procedure prescribed under the instructions by the RBI has not been fulfilled. Hence, the RBI was justified in directing the SBI to initiate Insolvency proceeding before the NCLT.

Lastly, the learned counsel for the Petitioner-Company is unjustified in trying to distinguish between a "recovery" and a "restructuring" process. In fact, while "recovery" is a genus, "restructuring" is a species. For, the ultimate aim of the CB is to recover the loan amount due to it from the Corporate Debtor. The means of recovery may be different, but the ultimate goal remains the same, namely to recover the amount. Moreover, an OTS scheme is a restructuring method adopted by the CB. Under an OTS, not only the loan amount is generally reduced to a reasonable extent, but the repayment schedule is restructuring in order to ensure that a NPA becomes a standard account. Thus even OTS is part of "restructuring process". The learned Senior Counsel further submits that for the purpose of this case, such hair splitting of the terms is not even required for the simple reason that the requirements prescribed under the instructions issued by the RBI to the CB have not been fulfilled, as mentioned hereinabove. Therefore, the action of the RBI in issuing the instructions under Section 35AA of the Act, and the instructions of the RBI to the SBI to commence the Insolvency proceeding should not have been faulted by the learned Single Judge. As a concluding remark, the learned Senior Counsel has heavily relied upon the case **Swiss Ribbon Pvt. Ltd.** (supra). To sum it up, that the days of the borrowers are over, and the days of the lenders/creditors have begun.

Heard the learned counsel for the parties and examined the impugned judgment, and perused the documents submitted by the parties, and considered the case law cited at the Bar.

It is, indeed, trite to state that while dealing with the implementation of a fiscal statute, the factors to be considered by the court are on a different footing than the criteria to be considered while dealing with non-fiscal laws. The law has kept this distinction for the logical reason, namely while the fiscal statutes deal with the economy of the nation, the non-fiscal statutes deal with only certain segments of the society or of the people. Therefore, fiscal statutes, perforce uphold the rights of the people 'as a nation'. Hence, the rights of an individual have to yield to the rights of the people at large. Thus, any inconvenience, difficulties, problems caused by the implementation of the fiscal law for an entity is insignificant in comparison to the rights and interests of the people at large. Hence, in catena of cases, the Hon'ble Supreme Court has opined that the fiscal statutes will have to be implemented literally and zealously. While dealing with fiscal provisions, equity has no place. Similarly, misplaced sympathies with the plight of the individuals or entities should not sway the judicious mind. While dealing with fiscal laws, the court has to act as objectively and precisely, as a surgeon. For, the very purpose of fiscal laws is to dissect and remove the tumorous growth afflicting economic health of the country.

According to the latest data available in the public domain, as of 31.03.2018, the provisional estimates suggest that the total volume of gross NPAs in the economy stands at Rs.10.35 lakh Crore.

The cancerous growth of such accounts is eating away at the entrails of the Banking Sector. As observed by the Apex Court, in the case of **Swiss Ribbon Pvt. Ltd.** (supra), the attempts made by the Parliament to grapple with the problem of surmounting NPAs through the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and SARFESI Act, 2002 have failed to achieve its purpose and target. Therefore, a legal surgical strike had to be made in order to quell the monster of NPAs. It is with this purpose that the Parliament had enacted the Code. Therefore, a purposive intention would have to be applied while implementing and adjudicating upon a dispute arising under the Code. Since the aim of the Code is to get rid of the mischief of the NPA, since the benevolent purpose of the Code is to both transform the sub-standard/doubtful account into standard account, and to revive the company, any harm caused to the management of a defaulting company should not be permitted to blur the judicial vision. After all, the judiciary is dedicated to strengthening the national economy. For, a strong economy ensures prosperity for the people, and peace for the nation. While adjudicating the dispute between the parties, these substantive principles of law necessarily have to be kept in mind.

Admittedly, by the Ordinance, 2017, Section 35AA and Section 35AB were inserted into the Act. While Section 35AA allows the Government to issue directions to the RBI, Section 35AB empowers the RBI to issue particular instructions to the CB. While invoking its power under Section 35AB, the RBI had issued a press release bringing it to the notice of the Corporate Debtors that keeping in mind the steps which are required to be taken for overhauling the NPAs, a procedure is being prescribed. By letter dated 28.08.2017, a detailed procedure was prescribed. According to the procedure, as mentioned above, an agreement had to be entered between the Corporate Creditors and the Corporate Debtors; a resolution plan for reviving the debt of the company, had to be implemented by 13.12.2017. However, if any outstanding amount, termed as "residuary debt", was left over, then the CB was required to get the reports from two CRAs. Once these reports were available, it was left to the discretion of the CB to decide whether the resolution plan should be implemented or not?

Needlesstosay, when the law prescribes a procedure, the procedure must be followed at each step. A divergence from the procedure is neither encouraged, nor allowed. Therefore, the constant insistent by the RBI with the CB that a resolution plan has to be agreed upon, that it has to be implemented by 13.12.2017 cannot be termed to be an "arbitrary, unfair and unjust action".

Although the learned Senior Counsel for the Petitioner-Company has pleaded that a short period of hardly four months is highly unreasonable, especially considering the snail's pace at which, the Indian Bureaucracy moves, even then the argument is unacceptable. For, in the case of **Swiss Ribbon Pvt. Ltd.** (supra), the Hon'ble Supreme Court has clearly pointed out that the steps being taken by the RBI were not bolt out of the blue. In fact, a long gestation period was granted to the Corporate Debtor, to pull himself by the boot straps, to put his house in order, and to repay the loan according to the schedule agreed between the CB and the Corporate Debtor.

In the present case, as mentioned above, the loan amount was sanctioned on 25.11.2009; the loan account was not classified as NPA till 31.03.2014. It is during this period of five years that the loan account underwent from being a “standard account” to a “stressed account”. The loan account transformed itself from a “sub-standard asset” to a “doubtful asset”, and finally to a “loss asset”. At every turn and twist, the Petitioner-Company had ample opportunities to put its house in order. In fact, a ginger step was taken by the Petitioner-Company when it had filed an application before the NCLT. However, the NCLT had dismissed its petition and directed the CB to find ways and means to resolve the issue of non-performing account outside the Code. Even after the letter dated 28.08.2017 was issued by the RBI, the Petitioner-Company still had ample time to convince the CB to enter into an agreement, and to implement a resolution plan. However, the Petitioner-Company failed to pursue the acceptance of the OTS with due diligence. Finally, the Petitioner-Company had come face to face with the day of judgment—with the initiation of Insolvency proceeding. Therefore, the learned counsel for the Petitioner-Company is unjustified in claiming that “too short a time” was granted by the RBI to implement the resolution plan. Hence, the said contention is untenable.

Much was argued on the ticklish, but the subtle distinction between a “recovery process” and the “restructuring process”, and on the issue whether an OTS falls within the former or the latter category? The learned Senior Counsel for the Petitioner-Company has taken a self-contradictory stand on the issue whether an OTS falls under the “recovery process” or “restructuring process”. Initially, he argued that an OTS is part of the “recovery process”. However, when Mr. Niranjan Reddy pointed out that the circular dated 26.02.2014 is applicable only to a “restructuring process”, and that too, to the “sub-standard debts”, Mr. Raghunandan Rao claimed that by circular dated 24.09.2015, the binding effect of the majority Corporate Creditors was extended even to the “doubtful debts”. Therefore, Mr. Raghunandan Rao has taken a self-contradictory stand that the OTS falls under the “restructuring process”. Such a stand is clearly contradictory to his initial stand that the OTS falls within the “recovery process”.

Even the argument raised by the learned Senior Counsel for the Petitioner-Company that the CB was treating the entire case as a case of “recovery”, therefore, it had not called for the reports of two CRAs, hence, the fault lies with the CB but not with the Petitioner-Company, is a fallacious argument. For, even if the CB were treating the offer of OTS as falling under the “recovery process” and not under the “restructuring process”, the Petitioner-Company was still well aware of the fact that the resolution plan had to be agreed upon, and implemented before 13.12.2017. Therefore, the Petitioner-Company is not justified in shifting the responsibility on the shoulders of the CB from its own shoulders. After all, an agreement is a two-way street, where both the parties have to come to a consensus. There is no evidence available on the record to show that the Petitioner-Company had pursued the matter with the CB with due diligence. Although the Petitioner-Company did increase the amount payable under the OTS, it did not take any other concrete steps to convince the CB to enter into an agreement, and to implement the resolution plan prior to 13.12.2017. Therefore, the argument raised by the learned Senior Counsel is clearly untenable.

Be that as it may, the issue before this court is not whether an OTS falls within the “recovery” or the restructuring process”? The issue before this court is the legality or illegality of the instructions issued by the RBI by its letter dated 28.08.2017 and 30.11.2017, and of its direction to the SBI to initiate insolvency proceeding against the Petitioner-Company. As pointed out above, according to the instructions, an agreement had to be entered into between the CB and the Petitioner-Company, positively and absolutely by 13.12.2017. However, by 13.12.2017, only six out of seventeen banks had received the approval from their competent authority. Therefore, by 13.12.2017, no agreement had been reached between the CB and the Petitioner-Company. Even thereafter by 29.12.2017, only eleven banks had agreed to accept the OTS offer. Therefore, even by 29.12.2017, there was neither an agreement, nor a resolution plan in place. Hence, the RBI was certainly justified in directing the SBI to initiate the process under the Code against the Petitioner-Company. Considering the factual position, the learned Single Judge is not justified in concluding that by 13.12.2017, a resolution plan was in place. For, such a conclusion is belied by the evidence available on record.

Mr. Raghunandan Rao, the learned Senior Counsel, of course, has argued that if the OTS scheme were to be accepted, with the implementation of the scheme, there would not be any balance amount to be paid by the Petitioner-Company. However, the said argument begs the very question. For, the OTS scheme was never accepted by the CB in toto. Moreover, even if it were to be accepted for the sake of argument that an OTS scheme were accepted by the CB, the fact remains that the entire agreed repayment amount of Rs. 1275 Cr. was not paid by the cut-off date of 13.12.2017. Hence, there would still be a balance amount to be paid after the said date. Therefore, a "residuary debt" would continue to exist, which needs to be repaid after the said date. Therefore, Mr. Niranjan Reddy, the learned Senior Counsel for the appellant, is justified in arguing that since the "residuary debt" would continue to exist after the cut-off date, the CB should have called for the reports from two CRAs. However, in the present case, the CB did not call for the said reports before the cut-off date of 13.12.2017. Hence, none of the requirements of the instructions issued by the RBI were fulfilled either by the CB, or by the Petitioner-Company. Thus, the RBI was legally justified in directing the SBI to initiate the process under the Code.

For the reasons stated above, this Writ Appeal is, hereby, allowed and the order dated 12.09.2018 in W.P. No. 7329 of 2018 is set aside. No order as to costs.

Miscellaneous Petitions pending, if any, shall stand closed.

**RAGHVENDRA SINGH CHAUHAN, J**

**T. AMARNATH GOUD, J**

Date: 28.03.2019

TSR