

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

% **Date of decision: 22nd February, 2019.**

+ **CS(COMM) 1246/2018 & IAs No.16056/2018 (u/O XXXIX R-1&2 CPC) & 16060/2018 (u/O II R-2 CPC)**

LIBERTY HOUSE GROUP PTE LTD. Plaintiff

Through: Mr. A.S. Chandhiok, Sr. Adv. with
Mr. Krishendu Datta, Ms. Sweta
Kabra, Mr. Aly Mirza & Ms. Priya
Agarwal, Advs.

Versus

STATE BANK OF INDIA & ORS. Defendants

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Sanjay Bhatt & Mr. Sumit
Nagpal, Advs. for D-1&4.

AND

+ **CS(COMM) 1247/2018 & IAs No.16061/2018 (u/O XXXIX R-1&2 CPC) & 16065/2018 (u/O II R-2 CPC)**

LIBERTY HOUSE GROUP PTE LTD. Plaintiff

Through: Mr. A.S. Chandhiok, Sr. Adv. with
Mr. Krishendu Datta, Ms. Sweta
Kabra, Mr. Aly Mirza & Ms. Priya
Agarwal, Advs.

Versus

STATE BANK OF INDIA & ORS. Defendants

Through: Mr. Abhinav Vasisht, Sr. Advs. with
Ms. Misha, Mr. Vijayant Paliwal
and Ms. Charu Bansal, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The application of the plaintiff in both the suits, for interim injunction restraining encashment of Bank Guarantees (BGs) and the

objection of the defendants to the subject jurisdiction of this Court to entertain these suits, are for consideration.

2. CS(COMM) No.1246/2018 has been filed against (a) State Bank of India (SBI); (b) Barclays Bank PLC (Barclays), Nehru Place; (c) Barclays Bank PLC, United Kingdom; and, (d) Mr. Dinkar T. Venkatasubramanian, for (a) permanent injunction restraining (i) SBI from invoking and/or encashing and/or seeking remittance under BG No.BARCBG2018145 dated 10th May, 2018 for Rs.40,00,00,000/- issued by Barclays in favour of SBI on instructions of the plaintiff; (ii) Barclays from remitting the amounts under the said BG and from transmitting the amount under the Counter Guarantee; and, (b) declaration that the notice of Demand/Invocation dated 20th November, 2018 addressed by SBI to Barclays is invalid, illegal and band in law, pleading:-

- (i) Castex Technologies Limited (Castex) is a part of Amtek Group of Companies. Castex was unable to meet its financial obligations and Corporate Insolvency Resolution Process (CIR Process) of Castex was put into motion by the SBI under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code). The National Company Law Tribunal (NCLT) Chandigarh, on 20th December, 2017 admitted the said application and the defendant no.4 Mr. Dinkar T. Venkatasubramanian was confirmed by the Committee of Creditors (CoC) as the Resolution Professional (RP) of Castex.

- (ii) The RP prepared and floated a Process Memorandum dated 30th March, 2018 for consideration and selection of resolution plans from prospective resolution applicants.
- (iii) The Process Memorandum required the prospective resolution applicants to submit a Bid Bond Guarantee (BBG) and the plaintiff, in accordance therewith submitted the BBG of Rs.40,00,00,000/- in favour of SBI, by furnishing a Counter Guarantee in favour of Barclays.
- (iv) The resolution plan submitted by the plaintiff was accepted by the CoC on 30th August, 2018 and a Letter of Intent (LoI) of the said date was issued in favour of the plaintiff and which was accepted by the plaintiff vide its letter dated 3rd September, 2018 to the RP.
- (v) The RP filed an application under Section 30(6) read with Sections 31 and 60 (5) of the Code for approval by the NCLT of the said resolution plan submitted by the plaintiff and approved by the CoC.
- (vi) The plaintiff, as per the terms of the LoI, was required to within ten days thereof submit a Performance Bank Guarantee (PBG) of the value of Rs.100,00,00,000/- and the RP, vide its letter dated 10th September, 2018 asked the plaintiff to submit the PBG by 17th September, 2018. The plaintiff, vide its letter dated 15th September, 2018 offered conversion of the existing BBG for Rs.40,00,00,000/- into a PBG and creating an

Overseas Escrow Account of Rs.60,00,00,000/-. The RP, vide its letter dated 21st September, 2018 communicated to the plaintiff rejection by the CoC of the said offer and requested PBG of the entire Rs.100 crores in the form of a BG from a scheduled commercial bank in India.

(vii) While negotiations between the plaintiff and the RP with respect to PBG were still under way, the RP vide its e-mail dated 4th October, 2018 called upon the plaintiff to extend the BBG up to 15th January, 2019 and which was done by the plaintiff.

(viii) The SBI, vide its letter dated 21st November, 2018 invoked the BBG; such invocation was not in terms thereof.

(ix) The plaintiff is the resolution applicant not only of Amtek but also of ARGL Limited, another company in the Amtek Group of Companies.

3. CS(COMM) No.1247/2018 has been filed against (i) SBI; (ii) ARGL Limited, through its RP Mr. Dinkar T. Venkatasubramanian; (iii) Bank of Baroda (BoB), for (a) permanent injunction (i) restraining SBI and RP from invoking and/or encashing and/or seeking remittance under BG No.2910IGPER033218 dated 17th July, 2018 for Rs.10,00,00,000/- issued by BoB in favour of SBI on the instructions of the plaintiff; (ii) restraining BoB from remitting any amounts under the said BG; and, (b) staying the validity and effect of invocation dated 17th July, 2018 of the said BG, pleading:-

- (a) ARGL Limited is a part of Amtek Group of Companies and since was unable to meet its financial obligations, by order dated 16th March, 2018 of the NCLT, Chandigarh, CIR Process of ARGL Limited was commenced and Mr. Dinkar T. Venkatasubramanian confirmed by the CoC as the RP.
- (b) An Expression of Interest, calling for resolution plans of ARGL Limited was issued and the plaintiff expressed its interest and was shortlisted for submission of a binding financial offer.
- (c) The RP issued a Process Note for submission of financial bids and binding resolution plans by prospective resolution applicants and the plaintiff submitted its financial bid and resolution plan, which was approved by the CoC and a LoI dated 30th August, 2018 issued declaring the plaintiff as the successful resolution applicant and the RP filed an application under Section 30(6) of the Code before the NCLT, Chandigarh for approval of the resolution plan and which application on the date of institution of the suit was pending consideration.
- (d) As per the Process Note the plaintiff was to furnish a PBG in the sum of Rs.60,00,00,000/- and the plaintiff, on 15th September, 2018 offered to the RP that its existing BBG of Rs.10,00,00,000/- be converted into a PBG and creation of an Overseas Escrow Account in the sum of Rs.50,00,00,000/- but the RP vide its letter dated 21st September, 2018 insisted on

PBG in the sum of Rs.60,00,00,000/- in the form of a BG from the scheduled commercial bank in India.

- (e) While negotiations in this respect were under way between the parties, the CoC sought a direction from the NCLT for a direction to the plaintiff to submit PBG and owing to which NCLT deferred hearing on the application under Section 30(6) of the Code.
- (f) However the CoC, in its meeting on 15th October, 2018 decided to proceed with the approval of the resolution plan without insisting on PBG and informed so to the NCLT. The same amounted to waiver of the condition in the Process Note for furnishing of PBG.
- (g) During subsequent meetings it transpired that the valuation shared by the RP with the plaintiff with respect to Amtek Auto Limited, another company of the same group of which ARG Limited was a part, was incorrect; however the RP took a stand that the plaintiff ought to have done its own due diligence.
- (h) Notwithstanding the pendency of the aforesaid serious issues, SBI and the RP, on 23rd November, 2018 invoked the BBG for Rs.10,00,00,000/- for failure of the plaintiff to furnish the PBG, though furnishing of PBG had been waived and the CoC was estopped from contending otherwise.

4. Both the suits, along with CS(COMM) No.1245/2018 also filed by the plaintiff with respect to invocation of BBG relating to Amtek Auto

Limited, came up first before this Court on 26th November, 2018 when counsels for SBI appeared on caveat. The counsel for the RP also appeared on that date and though not a party in suits as filed, sought impleadment which was allowed. Summons of the suit and notice of the application for interim relief were issued. It was enquired from the counsel for the SBI and RP, whether they could make submissions with respect to the application for interim relief without reply, and on their statement that reply will be needed, deeming it appropriate to hear the counsels in one go only rather than in piecemeal, granting time as sought to file reply, till further orders the payments under the BBGs were stayed subject to the BBGs being kept alive.

5. SBI has filed its replies and to which rejoinders have been filed by the plaintiff. The counsels were heard on 6th December, 2018, 7th December, 2018, 10th December, 2018, 11th December, 2018, 12th December, 2018, 17th December, 2018, 14th January, 2019 and 21st January, 2019 and orders reserved on the applications for interim relief as well as on the aspect of jurisdiction of this Court to entertain the suits.

6. Vide order dated 7th December, 2018 it was clarified that there was no order in the suits staying any further proceedings under the Code.

7. Vide order dated 10th December, 2018, CS(COMM) No.1245/2018 was disposed of (as the bank which had issued the BBG subject matter thereof itself found the invocation to be not in terms of the BBG, and refused payment thereunder) with liberty to the plaintiff therein to sue again

if the BBG was invoked afresh or if the need for seeking return of BBG arose.

8. Vide order dated 11th December, 2018 it was proposed that the applications for interim injunction be decided on a demurrer qua jurisdiction of the Civil Court, reserving the order on the issue of jurisdiction. However the senior counsels for the defendants contended that decision on both the aspects be pronounced and addressed arguments thereon also and the counsel for the plaintiff in his written submissions also has addressed the aspect to jurisdiction of the Civil Court.

9. SBI, in its reply to the application for interim relief in CS(COMM) No.1246/2018 has pleaded:-

- (a) The BBG, encashment whereof is sought, was furnished as part of CIR Process of the Corporate Debtor under the provisions of the Code, commenced pursuant to the orders of the NCLT. The Code accords exclusive jurisdiction to deal with the matters contained therein to NCLT of the place where the registered office of the corporate debtor is located. Section 63 of the Code bars jurisdiction of the Civil Court in respect of any matter on which NCLT or National Company Law Appellate Tribunal (NCLAT) has jurisdiction under the Code. NCLT Chandigarh has jurisdiction over the CIR Process of Castex and this Court must stay its hand on account of outster of jurisdiction.
- (b) Section 231 of the Code also bars the jurisdiction of this Court.

- (c) Section 60(5)(c) of the Code empowers the NCLT to entertain the dispute raised by the suit.
- (d) The Code is a self contained legislation conferring supervisory powers on the NCLT over CIR Process, right from the stage of an application being made for initiation of CIR Process, to the completion of CIR Process and/or liquidation, as the case may be. Thus, any assertion by anyone or any issue arising out of the CIR Process under the provisions of the Code, falls within the exclusive domain and jurisdiction of NCLT.
- (e) Reference in this context is also made on Section 9 of the Code of Civil Procedure, 1908 (CPC), Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act), *Mardia Chemicals Ltd. Vs. Union of India* (2004) 4 SCC 311, *Dhulabhai Vs. The State of Madhya Pradesh* (1968) 3 SCR 662.
- (f) That the subject BBG is a contract between SBI and Barclays and the plaintiff can have no cause of action on the said BBG. Reference is made to *Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd.* (1996) 5 SCC 450.
- (g) The Process Memorandum required the plaintiff to furnish a PBG for Rs.100 crores within ten days of issuance of LoI and provides that non-submission of PBG will lead to the

resolution plan submitted by such successful resolution applicant being treated as non-responsive and invocation of BBG; admittedly PBG had not been submitted.

- (h) The plaintiff was aware of the requirement of submission of PBG but instead of furnishing PBG offered conversion of the BBG into PBG for part of the requisite amount and furnishing of Escrow Account for the balance.
- (i) The BBG is unconditional and there can be no interference therewith in terms of *Himadri Chemicals Industries Limited Vs. Coal Tar Refining Co.* (2007) 8 SCC 110 and *National Highway Authority of India Vs. Ganga Enterprises* (2003) 7 SCC 410 and no fraud or irretrievable damage has been pleaded, on which grounds alone the Court can interfere with the BG.

10. The RP, in its reply to the application for interim relief in CS(COMM) No.1247/2018, besides taking the same pleas as taken aforesaid with respect to jurisdiction of the Civil Court and law relating to interference with BG and the terms of the Process Note, has pleaded:-

- (I) that the requirement for submission of PBG was at no time waived by the CoC or the RP. The approval of the resolution plan and furnishing of PBG are two separate issues.
- (II) The minutes of the meeting held on 15th October, 2018 of CoC record that decision was taken to seek approval of the resolution plan for the sake of expediency and clarifying that

the same did not amount to waiver of the requirement to furnish PBG. Similarly, the order dated 26th October, 2018 of the NCLT also does not in any way waive the requirement to furnish the PBG.

- (III) That the plaintiff cannot raise the issue of furnishing of incorrect information relating to Amtek Auto Limited in respect of resolution plans of Castex and ARGL Limited. Even otherwise, in terms of the Process Note, the resolution applicants were required to undertake an independent due diligence and appraisal of the corporate debtor, for preparation of the resolution plan, without relying on the information provided by the RP.

11. The senior counsel for the plaintiff, on the aspect of jurisdiction of the Civil Court, has contended (i) the subject BGs are not subject matter of any proceedings under the Insolvency Code and the NCLT has no jurisdiction to decide the dispute raised in the subject suits; (ii) illegal invocation of BG is a dispute of a civil nature, independent of the Code and the plaintiff does not rely on any provision of the Code in support of its cause of action; (iii) the cause of action for the suits is illegal and fraudulent invocation of the BGs; (iv) while the jurisdiction of this Court is unlimited in all disputes of civil nature, the jurisdiction of NCLT is only with respect to matters entrusted to it by the Companies Act, 2013 and by the Code, to declare moratorium of the corporate debtor, appoint interim RP and/or RP and approve the insolvency resolution plan post its approval by the CoC; for all other matters, the jurisdiction is of the Civil Court; (v) reliance is

placed on *Most Rev. P.M.A. Metropolitan Vs. Moran Mar Marthona* AIR 1995 SC 2001 and *S.P. Sampath Kumar Vs. Union of India* (1987) 1 SCC 124; (vi) mere submission of a resolution plan, even if approved by the CoC, does not amount to a binding of document, till the order under Section 31 of the NCLT, approving the same; the resolution plans have not been approved by the NCLT and thus there is no relationship binding the plaintiff; (vii) in fact, the application seeking approval of the resolution plans submitted by the plaintiff and approved by the CoC has been withdrawn and NCLT, by the same also has been divested of any jurisdiction; (viii) neither the SBI nor the RP, themselves sought any relief before the NCLT qua the BGs, knowing that the BGs submitted by the plaintiff are outside the ambit and jurisdiction of NCLT; (ix) the cause of action which has accrued to the plaintiff is not a part, either of the moratorium or of the appointment of the RP or of the approval of the resolution plan, jurisdiction in which respect only is vested with the NCLT; (x) exclusion of jurisdiction of the Civil Court is not to be readily inferred; reliance is placed on *Secretary of State Vs. Mask and Company* AIR 1940 Privy Counsel 105; (xi) the plaintiff is not seeking any injunction in respect of any action taken or to be taken in pursuance to any order of the NCLT and thus Section 231 of the Code is wrongly invoked; (xii) Section 231 of the Code is akin to Section 34 of the SARFAESI Act and in relation where to in *Mardia Chemicals Ltd.* supra it was held that the parties have liberty to seek redressal of their grievances on account of breach of contract or otherwise, taking recourse to the normal process of law as available, by approaching ordinary Civil Courts; (xiii) submission of resolution plan and

its approval under the Code is not a *lis* and is not adversarial in nature; (xiv) Section 60(5)(c) of the Code and Regulation 37 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, to which reference was made by the senior counsels for the defendants, also do not oust the jurisdiction of the Civil Court; (xv) the reliefs sought in the present suit are under Section 34 of the Specific Relief Act, 1963 and NCLT or NCLAT have no jurisdiction there over; (xvi) the Process Memorandum has no statutory force or sanctity under the Code; reference in this regard is made to Section 25(2)(h) of the Code empowering the CoC to lay down the criteria for the prospective resolution applicants and further empowering the CoC to decide eligibility criteria. (xvii) the clarificatory Regulation 36A of the Regulations aforesaid does not provide for a process document but limit the invitation under Section 25(2)(h) to eligibility only; (xviii) even Regulation 36B inserted w.e.f. 3rd July, 2018 requires Evaluation Matrix to be provided within 15 days of submission of expression of interest; (xix) neither the Code nor the Regulations prescribe the condition or requirement of BBG or PBG to be submitted; (xx) in any case, the suit does not deal with the eligibility criteria; and, (xxi) under the BBGs also, the jurisdiction agreed is of Courts at New Delhi and not of NCLT, Chandigarh.

12. The senior counsels for the defendants as well as Mr. N.K. Kaul, Senior Counsel for defendants in CS(COMM) No.1245/2018, on the aspect of jurisdiction, contended, (i) that Sections 60, 63, 231 and 238 of the Code, read together, exclude the jurisdiction of this Court over the disputes subject matter of the suits; (ii) that Section 25, titled 'Duties of Resolution

Professional’, of the Code mandates the RP, vide sub Section 2(h) thereof, to invite prospective resolution applicants who fulfill such criteria as may be laid down by him with the approval of the CoC, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans; the invitation, in response to which the plaintiffs had submitted the resolution plans, was issued thereunder; (iii) the said invitation, in terms and conditions thereof provided for forfeiture of the BBG on non-submission of PBG; (iv) the Code emphasises time bound resolution; (v) forfeiture of the BBG has been prescribed because all the steps to be taken under the Code are time bound and to provide a deterrent to non-serious submission of resolution plan; the Code demands a deeper commitment; (vi) the plaintiff has acted contrary thereto and has blocked the said time schedules; (vii) the plaintiff, though got its resolution plans approved from the CoC, but is not acting in furtherance thereto; (viii) Section 60 titled ‘Adjudicating Authority for Corporate Persons’, in sub Section 5 thereof, while vesting jurisdiction in the NCLT, confers jurisdiction to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code; the question as has arisen in this suit, of encashment of BBG submitted along with resolution plan, is a question of law or fact arising out of or in relation to insolvency resolution; (ix) Section 63 bars the jurisdiction of Civil Court in respect of any matter which the NCLT has jurisdiction over under the Code; (x) the forfeiture effected of the BBGs is

also an action taken in pursuance of any order passed by the NCLT under the Code and jurisdiction in respect of which of the Civil Court, as this Court is, is barred by Section 231 of the Act; (xi) the question of jurisdiction of the Civil Court is to be decided taking into consideration the context and objective in which the legislation as the Code has been enacted; reliance in this regard is placed on (a) ***S. Gopal Reddy Vs. State of A.P.*** (1996) 4 SCC 596 interpreting the provisions of the Dowry Prohibition Act, 1961 in the context of the objective to achieve which the said statute was enacted; and, (b) ***Allahabad Bank Vs. Canara Bank*** (2000) 4 SCC 406 interpreting the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (DRT Act) in view of the superior purpose thereof and the special provisions contained therein; similarly the Code was enacted to bring insolvency under single umbrella; (xii) reliance is placed on ***Innoventive Industries Ltd Vs. ICICI Bank*** (2018) 1 SCC 407 holding (a) that the objective of the Code is to bring insolvency law in India within a single unified umbrella, with the object to speeding up of insolvency process, reading the Code in the context of the report of the Bankruptcy Law Reforms Committee of November, 2015; (b) that under the Code, the insolvency process has to be completed within a period of 180 days from the date of admission of the application and can only be extended beyond 120 days for a further period not exceeding 90 days, if the CoC by voting of 75% of voting shares so decides; time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation; (c) the scheme of the Code is to make an attempt, by divesting the erstwhile management of the corporate debtor of its powers and vesting it in a

professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up; (d) that it is a Code complete in itself and is exhaustive of the matters dealt with therein; and, (e) the Code is a Parliamentary law i.e. an exhaustive Code on the subject matter of insolvency in relation to corporate entities; (xiii) reliance is also placed on ***Arcelormittal India Private Limited Vs. Satish Kumar Gupta*** (2019) 2 SCC1, also holding that speed is the essence and timelines are to be observed and yet further holding that *non-obstante* clause in Section 60(5) is designed to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings; (xiv) if it were to be held that the Civil Court also has jurisdiction, the same would introduce manipulations to frustrate the resolution process; reliance is placed on ***Eureka Forbes Limited Vs. Allahabad Bank*** (2010) 6 SCC 193 holding, though in the context of DRT Act that the word ‘debt’ is incapable of being given a restricted or narrow meaning and includes any amount which is due to the bank on account of business activity undertaken by the bank and applying the principle of interpretation, of avoiding malice to prevent which the legislation was brought about; and, (xv) reliance is also placed on ***Enercon (India) Limited Vs. Enercon GMBH*** (2014) 5 SCC 1 to contend that pragmatic and not pedantic approach should be adopted and that the power of forfeiture has to be read in Section 60(5)(c) of the Code and any question arising therefrom has to be subject to the same machinery as provided in the Code; that the jurisdiction

of the Civil Court is excluded from the insolvency commencement date itself.

13. I had during the hearing drawn the attention of the counsels to the dicta in *Kailash Nath Associates Vs. Delhi Development Authority* (2015) 4 SCC 136 on the law of forfeiture and enquired, whether not in support of forfeiture, a loss will have to be pleaded and proved and without establishing the said loss, no forfeiture can be effected. The power and entitlement of the SBI which is but one of the creditors of the corporate debtor subject matter of each of the suits, to forfeit the BBG issued at the instance of the plaintiff as a resolution applicant was also enquired. It was further enquired, whether the forfeited amount would go into the coffers of the corporate debtor or would be appropriated by SBI alone or by all the creditors of the corporate debtor and if so, in what proportion. On a reading of the Code, no provision was found with respect thereto. No Regulation or Rule framed under the Code in this regard was cited. It was further enquired, whether not the dispute raised by a resolution applicant in relation to forfeiture of his BBG, insofar as such resolution applicant was not intending to interfere with the CIR Process, was a ancillary dispute, not delaying the time bound resolution process and not having any bearing on the resolution process or on the liquidation of the corporate debtor. It was further put to the counsels, that certainly a resolution applicant, who after accepting the LoI and/or after the approval of its resolution plan was unwilling to act in terms thereof, could not be directed to specifically perform the resolution plan. It was further enquired, whether not the bar to

the jurisdiction of the Civil Court contained in Section 63 of the Code was dependent on the jurisdiction over the dispute being vested with NCLT.

14. The senior counsels for the defendants then referred to the principle of comity and contended that if conflicting orders were passed by the Civil Court and by the NCLT, the same would be detrimental to the resolution process. A copy of the order dated 5th December, 2013 of the NCLT in CA No.1220(PB)/2018 in (IB)-531(PB)/2017 recording, that the plaintiff was dragging its feet and reluctant to proceed with the resolution process and holding, (i) that the PBG was a *sine qua non* and non-submission of PBG by the successful resolution applicant would lead to rendering a resolution plan by such successful applicant as non-responsive, as the RP would be entitled to reject the resolution plan and cancel the LoI; (ii) that the plaintiff was under obligation to fulfill the terms of the Process Note and under which the plaintiff was under an obligation to furnish the PBG; (iii) that the plaintiff had refused to proceed with the resolution plan inspite of CoC having relaxed the condition for furnishing PBG within ten days of the LoI; and, (iv) the somersault taken by the plaintiff after being declared as the successful resolution applicant had put the whole CIR Process and machinery to quandary and such an unsavoury stance of the plaintiff would only attract adverse comments from any fair minded person particularly when there is no justifiable reason for the plaintiff to drag its feet, was also handed over.

15. The senior counsels for the defendants contended that if it were to be held that the Civil Court also has jurisdiction, the possibility of the Civil

Court passing orders conflicting with the orders of the NCLT cannot be ruled out. It was argued that there can be no overlapping jurisdictions.

16. I had also drawn attention of the counsels to ***Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*** (2003) 5 SCC 705 holding forfeiture to be permissible, of a pre-estimated named amount, if the damages suffered by breach were not determinable. It was pointed out that neither the Process Note/Memorandum nor the BBG provided that the amount thereof was a pre-estimate, arrived at after negotiation or of the loss likely to be suffered in the event of breach being impossible to determine. It was enquired, whether in the absence thereof, forfeiture could be permitted of the entire amount.

17. The senior counsels for the defendants contended, that NCLT was best suited to also assess the loss/damage suffered on account of breach by the resolution applicant. It was contended that the plea taken by the plaintiff, that the PBG was wrongly demanded from the plaintiff, has already been rejected by the NCLT. Attention was invited to ***Ganga Enterprises*** supra, holding that:-

“The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the

earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a bid was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.

.....The Bid security was given to meet a specific contingency viz. non-withdrawal of the offer within 120 days. The contingency having arisen, Appellants were entitled to forfeit”

18. The counsels for the defendants further argued that the cost of CIR Process is high and the said cost would be wasted if there were to be no forfeiture also of BBGs inspite of the resolution applicant withdrawing the resolution plan.

19. It was thus argued that ***Kailash Nath Associates*** is not applicable to the present controversy.

20. The senior counsel for the plaintiff, in rejoinder, on the aspect of jurisdiction contended, (i) that subject matter jurisdiction is not waivable; (ii) that there is no exclusion of jurisdiction of the Civil Court by any of the provisions of the Code; (iii) that the restraint on jurisdiction of the Civil

Court is only by Section 14 of the Code by imposition of moratorium; (iv) thereafter Sections 17, 18, 19 & 22 lay down the powers of the NCLT; (v) Sections 63 and 231 exclude the jurisdiction of the Civil Court only qua what NCLT has been empowered to do; (vi) that Section 25(2)(h) of the Code, on which reliance is placed, has nothing to do with the NCLT and is only concerned with the powers of the RP; (vii) as per the scheme of the Code, till the stage of Section 30(5), there is no role of NCLT and Section 30(6) provides for submission of resolution plan to NCLT for approval; (viii) Section 31 also refers only to approval of the resolution plan and is not concerned with the Process Memorandum; (ix) that the resolution plan is to be based on Section 25(2)(g) and not on Section 25(2)(h); (x) copies of the Expression of Interest document got published in relation to Amtek Auto Limited, Castex and ARGL Limited were handed over in the Court and it was contended that the same nowhere refer to PBG; (xi) that pursuant to the plaintiff expressing interest, it was shortlisted and Process Memorandum made available to it; (xii) that the Process Memorandum is not prepared with the prior approval of NCLT; (xiii) Regulation 36A titled 'Invitation for Expression of Interest', as it stood prior to its amendment w.e.f. 3rd July, 2018, required the RP to issue an invitation including Evolution Matrix to the prospective resolution applicants, to submit resolution plans; (xiv) the requirement of PBG was approved by CoC and not by the Board; the conditions specified by the Board are contained in the Regulations aforesaid; (xv) Section 14 order, in relation to the subject corporate debtors, was made on 24th July, 2017, the RP issued Expression of Interest on 31st August, 2017, Information Memorandum was issued on

21st September, 2017 and the same did not contain any provision for PBG; (xvi) the Process Note was issued on 7th December, 2017, the resolution plan was submitted on 28th December, 2017 and the BBG submitted on 23rd January, 2018; thus the old Section 25(2)(h) will apply because insolvency process within the meaning of Section 5 commenced on 31st August, 2017; (xvii) Section 25(2)(h) was amended on 23rd November, 2017; (xviii) BBG nowhere provided that the same could be invoked for non-processing of PBG; (xix) that on non-furnishing of resolution plan without the PBG, the resolution plan should have been rejected; (xx) that till the resolution plan is approved by the NCLT and which is still pending approval before the NCLT, there is no binding contract and in the absence of a binding contract, there can be no forfeiture; (xxi) between the stage prescribed in Section 14 of the Code i.e. of declaring a moratorium and the stage provided in Section 19 of the Code i.e. of approval of the resolution plan, NCLT has no role and thus NCLT cannot have any jurisdiction over the forfeiture effected prior to the approval of the resolution plan; (xxii) the jurisdiction of the NCLT before the approval of the resolution plan is limited i.e. to appoint the RP and to declare the moratorium; (xxiii) the jurisdiction with respect to the disputes arising from the BBG has been contractually conferred on this Court; (xxiv) BG is an independent contract; (xxv) as per *Arcelormittal India Private Limited* supra, resolution applicant can approach NCLT only after resolution plan is approved and not before that; (xxvi) NCLT has no inherent powers; and, (xxvii) acceptance of the resolution plan of the plaintiff by the CoC is meaningless.

21. I have considered the rival contentions on the aspect of jurisdiction of this Court to entertain the suits and have concluded that this Court does not have jurisdiction over the subject matter of the suit. My reasons for such conclusion follow.

- A. The BBG, invocation whereof and forfeiture of amount whereof is subject matter of the suits, has been demanded and submitted by the plaintiff as a resolution applicant, in favour of SBI as a creditor of the corporate debtor i.e. Castex Ltd. and ARGL Ltd. and as a member of the CoC thereof, to the RP thereof appointed by the NCLT, along with the resolution plan with respect to the corporate debtor, as a guarantee/security to, in the event of the resolution plan being approved, abide by the same. The corporate debtor, the RP, resolution applicant, the entitlement of SBI to be the beneficiary of the BBG, the CoC, the resolution plan and the NCLT as the Adjudicating Authority, all are creation of the Code.
- B. The entire transaction is in the ambit of the Code.
- C. Without the Code, the question of the plaintiff, even if desirous of acquiring the shares/management of Castex Ltd. and/or ARGL Ltd. or the assets of Castex Ltd. and/or ARGL Ltd., would have had to deal with the shareholders of the said companies or with the said companies and even if had been required to furnish any BG by way of security for performance

of such purchase, would have given it in favour of shareholders of the companies or the companies who had agreed to sell to the plaintiff, and not in favour of creditor/s of the companies. The creditors of the companies, at best would have a first charge on the purchase made by the plaintiff. In such a case, in the event of the shareholders of the said companies and/or the companies in whose favour BG was given by the plaintiff, being of the view that the plaintiff had failed to perform such agreement of purchase, would have invoked the BG and the shareholders and/or as could have justified forfeiture of BG amount by showing loss on account of such default by the plaintiff, either owing to price having fallen or some other injury caused, invoking the civil law of contracts/guarantees/forfeitures of earnest money/security.

- D. I have wondered that if such civil law were to be applied to invocation of BG and forfeiture of amount thereof by SBI, whether SBI will at all be entitled to justify forfeiture. SBI has merely granted credit to Castex Ltd. and ARGL Ltd. and its right is only to realise its dues or such part of dues as may prorata fall in its share on liquidation of the said companies. Applying the civil law aforesaid, SBI does not have any privity of contract with the plaintiff and on account of breach by plaintiff of which agreement SBI could suffer any loss. The senior counsel for the plaintiff has himself argued that even the resolution plan submitted by the plaintiff, in spite of

approval by CoC of which SBI is a member, has no binding value till approval by the NCLT. The resolution plans were invited by the RP of the Castex Ltd. and ARGL Ltd., and were also submitted to the RP albeit along with BBGs in favour of SBI. SBI thus does not have a chance even under the civil law of contracts and guarantees of justifying the forfeiture and once it is so, the forfeiture of the amount of BBGs has necessarily to be held to be bad and no long drawn trial required.

- E. However such a consequence will put at naught all CIR Process before the NCLT, with non serious applicants submitting resolution plans for consideration and after such plans are approved, not abiding therewith, leading to wastage of time, delaying the CIR Process and which may result in the corporate debtor in such time, spilling over the brink and resolution thereof being no longer feasible and liquidation thereof being left the only alternative and resultant wastage of assets and loss to the creditors thereof and to the economy of country generally. It cannot be forgotten that in every such matter and *lis*, somebody stands to benefit from the delay caused. Holding, that such unscrupulous elements will have liberty to so delay the CIR Process, without any fear of consequences of forfeiture of the security/earnest/BBG which they may have been required to furnish, would thus amount to the Civil Court interfering with the CIR Process, if not

directly, indirectly, and defeat the objective of enactment of the Code.

- F. It is only owing to the provisions of the Code, that on commencement of the CIR Process with the order of NCLT, the management of the corporate debtor has been vested in the RP, also appointed by the NCLT, and resolution plan of the corporate debtor have been invited along with BBGs in favour of SBI and the resolution plans submitted by the plaintiff have been approved by CoCs and submitted for approval of NCLT and on default by the plaintiff in submitting PBGs inspite of approval of resolution plans by CoCs and issuance and acceptance of LoIs the BBGs, have been invoked by SBI.
- G. Section 60(5)(c) of the Code provides that, “Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code”. The questions raised in these *lis*, have clearly arisen out of our in relation to the insolvency resolution of Castex Ltd. and ARGL Ltd. being corporate debtors. Once it is so, Section 63 of the Code provides, “No civil court.....shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal..... has jurisdiction

under this Code”. Since the questions raised in these suits arise out of or in relation to insolvency resolution and the NCLT has jurisdiction to entertain the same. The jurisdiction of this Court will also be barred by Section 231 of the Code which provides that “No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered, by or under, this Code to pass any order.....”.

- H. The jurisdiction of this Court is thus expressly barred over the subject matter of these suits, by aforesaid provisions of the Code.
- I. Considering further from paragraph ‘E’ above, if this Court were to have jurisdiction and apply, instead of the civil law of contracts and guarantees, the Code, for judging forfeiture, the senior counsels for the defendants are correct in contending that there is likely to arise a situation of conflicting orders of this Court and of NCLT. NCLT, in its order dated 5th December, 2018, copy of which was handed over, has unequivocally held (i) “A perusal of the aforesaid Clauses do not leave any manner of doubt that the Liberty House was under obligation to furnish the performance bank guarantee”; (ii) “the aforesaid order (dated 26th October, 2018 of NCLT) must be read with order dated 11th October, 2018 when the counsel for the Liberty House has in categorical terms stated that it was not possible for the Liberty House to honour the commitment of furnishing the performance bank guarantee. It

is in this context that CoC went to the extent of relaxing the condition for furnishing the performance bank guarantee. Despite such relaxation, the resolution plan applicant has refused to proceed with the resolution plan. The CIR Process is a time bound process and those who participated in the resolution process must be serious customers and not the one with casual approach. Having succeeded in the resolution plan, the somersault taken by the Liberty House put the whole CIR Process and the machinery to quandary. Such an unsavoury stance of the Liberty House would only attract adverse comments from any fair minded person particularly when there is no justifiable reason for Liberty House to drag its feet”; and, (iii) “Viewed in that light the *bona fide* of the Liberty House becomes doubtful”. Resultantly the RP was permitted to withdraw the applications seeking approval of the resolution plan submitted by the plaintiff.

- J. Even otherwise, when a statute, as per preamble whereof is enacted to consolidate and amend the law relating to a particular subject, as the preamble of the Code provides, in my opinion the rights and liabilities created by the said statute or in working and implementation thereof, have to be adjudicated in consonance with the objective and scheme of the said statute and by the Adjudicating Authority if any created under the said statute and not applying the principles of ordinary law and not by the ordinary civil courts. Section 238 of the Code gives

effect to provisions thereof “notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law”. The House of Lords in *Bank of England Vs. Vagliano Bros.* (1891) AC 107, cited with approval in *Norendra Nath Sircar Vs. Kamalbasini Dasi* LR (Indian Appeals) XXIII 18, *Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector & ETIO* (2007) 5 SCC 447 and also in *Innoventive Industries Ltd.* supra, held that if a statute, intended to embody in a code a particular branch of law, is to be interpreted by inquiring how the law previously stood and then assuming that it was probably intended to leave unaltered, the utility of the statute will be almost entirely destroyed and the very object with which it was enacted will be frustrated. In *Innoventive Industries Ltd.* supra it was further held that the Court, in interpreting a statute, must therefor proceed without seeking to add words which are not to be found in the statute and that it is not permissible in interpreting a statute which codifies a branch of the law, to start with the assumption that it was not intended to alter the pre-existing law or to add words which are not to be found in the statute, or for which authority is not found in the statute.

- K. Constitution Bench of the Supreme Court in *Dhulabhai* supra held that where the statute gives a finality to the orders of the special tribunals, the civil court's jurisdiction must be held to

be excluded if there is adequate remedy to do what the civil courts would normally do in a suit; only where a particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, does a suit lie. In ***The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay*** (1976) 1 SCC 496, in the context of Industrial Disputes Act, 1947 it was held that the jurisdiction of the Civil Court is ousted impliedly to try a case which could form subject matter of an industrial dispute and that when the Act creates a special machinery to enforce specially created rights, the parties cannot, therefore, approach the ordinary civil court. Again, in ***Bata Shoe Co. Ltd. Vs. City of Jabalpur Corporation*** (1977) 2 SCC 472, in the context of octroi under the Central Provinces & Berar Municipalities Act, 1922, finding that the Act provided an effective remedy to an aggrieved party to challenge the assessment of octroi duty and to claim refund, the jurisdiction of the civil court was held to be barred. With respect to the Income Tax Act, 1961, in ***Raja Ram Kumar Bhargava Vs. Union of India*** (1988) 1 SCC 681 it was reiterated that the broad guiding consideration is that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provides a machinery for the enforcement of the right, both the right and the remedy having been created *uno-flatu*, even in the absence of an exclusionary provision, the civil courts' jurisdiction is

impliedly barred. Similarly, in *Shiv Kumar Chadha Vs. Municipal Corporation of Delhi* (1993) 3 SCC 161, in the context of the constitution of the Appellate Tribunal Municipal Corporation of Delhi, by amendment of the Delhi Municipal Corporation Act, 1957, it was held (i) in the olden days the source of most of the rights and liabilities could be traced to the common law; then statutory enactments were few; even such enactments only created rights or liabilities but seldom provided forums for remedies; (ii) the result was that any person having a grievance that he had been wronged or his right was being affected, could approach the ordinary Civil Court on the principle of law that where there is a right there is a remedy; as no internal remedy had been provided in the different statutes creating rights or liabilities, the ordinary Civil Courts had to examine the grievances in the light of different statutes; and, (iii) with the concept of the Welfare State, it was realised that enactments creating liabilities in respect of payment of taxes, vesting of estates and conferring rights on a class of citizens, should be complete codes by themselves; with that object in view, forums were created under the Acts themselves, where grievances could be entertained on behalf of the persons aggrieved; provisions were also made for appeals and revision to higher authorities; (iv) where however the liability not existing at common law is created by a statute which at the same time gives a special and particular remedy

for enforcing it, the statute must be followed. In ***Rajasthan State Road Transport Corporation Vs. Krishna Kant*** (1995) 5 SCC 75, again in the context of Industrial Disputes Act it was held that where the dispute involves recognition, observance or enforcement of any rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act and it cannot be said that the remedies provided under the Industrial Disputes Act are not equally effective. In the context of Sick Industrial Companies (Special Provisions) Act, 1985, finding that the said Act contained *non-obstante* clause and was a special statute and a complete Code in itself, it was held in ***NGEF Ltd. Vs. Chandra Developers (P) Ltd.*** (2005) 8 SCC 219 that if it were to be held that both, the Company Court and Board for Industrial and Financial Reconstruction (BIFR) constituted under the said Act exercise concurrent jurisdiction, there shall be chaos and confusion and that till the company remains a sick company, BIFR alone shall have jurisdiction as regard sale of its assets, till an order of winding up is passed by a Company Court. Comparatively recently, in ***State of Punjab Vs. Amarjit Singh*** (2011) 14 SCC 713 and ***Commissioner, Bangalore Development Authority Vs. Brijesh Reddy*** (2013) 3 SCC 66, in the context of Land Acquisition Act, 1894 it was held that once the scheme of the Act was complete in itself, the jurisdiction of the civil court to take cognizance of the cases

arising under the Act, by necessary implication, stood barred and the only right an aggrieved person had was to approach the constitutional Courts. Lastly, in the context of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, applying the same principles in *Official Liquidator, Uttar Pradesh and Uttarakhand Vs. Allahabad Bank* (2013) 4 SCC 381 the jurisdiction of the civil courts was held to be barred.

- L. It can thus be seen that the NCLT has already in the aforesaid order held the plaintiff to be in default of the clauses of the Process Memorandum and the BBG, requiring the plaintiff to furnish the PBG and has resultantly held the plaintiff to be reneging from the resolution plans submitted and approved by the CoC and which was for approval by the NCLT.
- M. Now if this Court were to have jurisdiction and to hold, either that the terms of the Process Memorandum or of the BBG were not binding on the plaintiff and/or that the plaintiff is not in default thereof, the same would clearly amount to rendering findings inconsistent with the NCLT.
- N. Section 231 of the Code, also provides that “..... no injunction shall be granted by any court.....in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code”. The injunction sought by the plaintiff in these suits is clearly in respect of action to be taken by NCLT under the jurisdiction

vested in it under Section 60(5)(C) supra and barred by this part of Section 231 of the Code.

- O. The disputes raised by a resolution applicant, prior to the approval of its resolution plan by the NCLT, can be in many forms. The said disputes can also take the form of the readiness and willingness of the RP and compliance of other terms and conditions of the Process Memorandum and/or the resolution plans. If it were to be held that NCLT does not have jurisdiction over the resolution applicant till approves the resolution plan, as is contended by the senior counsel for the plaintiff, the jurisdiction with respect to all such disputes would be in the Civil Court and the exercise of jurisdiction by the Civil Court over such disputes will undoubtedly interfere with the CIR Process and amount to indirectly injuncting action by NCLT.
- P. Reference in this regard can also be made to Rule 11 of National Company Law Tribunal Rules, 2016 providing that nothing confined therein shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such order as may be necessary for meetings the ends of justice or to prevent abuse of process of the Tribunal. NCLT thus has inherent powers to pass orders in relation to the insolvency resolution, as may be necessary from time to time, even in the absence of any specific power. The contention of the senior counsel for the plaintiff that in all those matters for which

there is no specific provision to approach NCLT, Civil Court can be approached on the ground of law not permitting a person to be without remedy, cannot be accepted. Such a construction, would result in abuse of process of NCLT, to whose supervision the insolvency resolution has been entrusted.

22. Supreme Court recently in *Swiss Ribbons Pvt. Ltd. Vs. Union of India* 2019 SCC OnLine SC 73, while dealing with the challenge to the constitutional validity of various provisions of the Code, has reiterated (i) that till the Code was enacted, the regime of previous legislation had failed to maximize the value of stressed assets and had focused on reviving the corporate debtor with the same erstwhile management; all these legislations had failed, as a result of which, the Code was enacted to reorganize insolvency resolution of corporate debtors in a time bound manner, to maximize the value of assets; (ii) there is a paradigm shift from the erstwhile management of a corporate debtor being in possession of the stressed assets, to creditors who now assume control from the erstwhile management and are able to approve resolution plans of other better and more efficient managers, which would not only be in the interest of the corporate debtor itself but in the interest of all stakeholders namely all creditors, workers and shareholders other than shareholdings of the erstwhile management; (iii) past judgments have mandated a judicial hands-off when it came to laws relating to economic regulation; (iv) the Bankruptcy Law Reforms Committee in its Report dated 4th November, 2015 had reported that the current state of the bankruptcy process was a

highly fragmented framework, with powers of the creditor and the debtor under insolvency being provided for under different Acts; it is problematic that these different laws are implemented in different judicial fora giving rise to problems in implementation of the resolution framework; there is lack of clarity of jurisdiction, with decisions being appealed against; if economic value is indeed to be preserved, there must be a single forum that hears both sides of the case and makes a judgment based on both; in such an environment of legislative and judicial uncertainty, the outcomes on insolvency and bankruptcy are poor; if we are to bring financing patterns back on track with the global norm, we must create a legal framework to make debt contracts credible channels of financing; speed is of essence for the working of the bankruptcy code - the longer the delay, the more likely it is that liquidation will be the only answer, with the liquidation value going down with time as many assets suffer from a high economic rate of depreciation; (v) there was thus a need to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process; laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc.; the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters; in the matter of economic laws, the Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation, than in other areas where fundamental human rights are

involved; (vi) while the legislature has affirmative responsibility, the Courts have only the power to destroy, not to reconstruct; (vii) the Court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry; (viii) every legislation, particularly in economic matters, is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses; there may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid; (ix) the Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary; (x) the objective of the Code was to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues; (xi) the Code seeks to provide for designating NCLT and Debt Recovery Tribunal as the Adjudicating Authorities for corporate persons for resolution of insolvency, liquidation and bankruptcy; (xii) Insolvency Professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code; (xiii) timely resolution

of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets; (xiv) Rule 11 of the National Company Law Tribunal Rules, 2016 saves the inherent powers of the NCLT to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal; (xv) once the Code gets triggered by admission of a creditor's petition, the proceeding i.e. before the NCLT, being a collective proceeding, is a proceeding in *rem* and being a proceeding in *rem*, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim; (xvi) till the CoC is constituted, a party can approach the NCLT directly, which may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, allow or disallow an application for withdrawal or settlement; this will however be decided after hearing all the concerned parties; (xvii) vide Section 60 of the Code, the CoC does not have the last word on the subject of withdrawal; if the CoC arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code; (xviii) the RP has no adjudicatory powers; the RP cannot act in a number of matters without the approval of the CoC and which in turn decides by two-thirds majority; the RP is really a facilitator of the resolution process, whose administrative functions are overseen by the CoC and by the Adjudicating Authority; (xix) the Statement of Objects and Reasons of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 amending the Code w.e.f. 23rd November, 2017 records that the Code does not restrict or bar any person

from submitting a resolution plan or participating in the acquisition process; concerns have been raised that unscrupulous persons may participate in the resolution process; in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, it was deemed appropriate to entrust the responsibility on the CoC to give a reasonable period to repay overdue amounts and become eligible; and, (xx) the legislature should be permitted to experiment the Code with the working of the code being monitored and amendments being carried out thereto from time to time; this is an ongoing process and should not be interfered with by the Court.

23. The reasons given me above are not controverted by the aforesaid judgment; rather it supports my reasons. The judgment also expressly negates the argument of the senior counsel for the plaintiff, of jurisdiction of NCLT being limited and the Code not providing for NCLT to be approached in such matters.

24. Thus I hold this Court as the Civil Court of Original Jurisdiction to be not having jurisdiction to entertain the dispute subject matter of the present suits. Resultantly, the plaints in the suits are liable to be rejected.

25. The contention of the senior counsel for the plaintiff of the parties, under the BBG having expressly conferred jurisdiction on this Court and this Court thus having jurisdiction has to be noted to be rejected. If this Court has no jurisdiction and / or if the jurisdiction of this Court is barred, the parties cannot by agreement confer jurisdiction on this Court. Reference in this regard may be made to ***Harshad Chiman Lal Modi Vs.***

DLF Universal Ltd. (2005) 7 SCC 791 carving a distinction between pecuniary, territorial and subject jurisdiction and holding that subject jurisdiction cannot be conferred by agreement or conduct or by acquiescence. Finding in that case, the Courts at Delhi to be not having subject jurisdiction over a suit for specific performance of an Agreement of Sale of immovable property outside Delhi, notwithstanding agreement, acquiescence and waiver, the Courts at Delhi were held to have no jurisdiction.

26. Though in view of the aforesaid, I am not required to render any findings on the claim of the plaintiff to interim injunction but since the said rejection is subject to the right of the plaintiff to prefer appeal to the Division Bench of this Court, following the law of procedure requiring findings on all aspects to be returned, to avoid remand for hearing application for interim relief in the event of the Division Bench holding the suits to be maintainable, I proceed to render findings on the entitlement of the plaintiff to interim injunction in the event of this Court having subject jurisdiction to entertain the suit.

27. Interim injunction sought is interference with payment under BGs. The law in this respect is well settled. Reference if any required can be made to ***Ashoka Paper Products Vs. Govt. of India*** 2015 SCC OnLine Del 14063, order dated 20th December, 2016 in CS(COMM) 1327/2016 titled ***Universal Energies Ltd. Vs. Indraprastha Gas Ltd.*** and ***Pete Hammond Power Solutions Pvt. Ltd. Vs. Flowmore Ltd.*** 2017 SCC OnLine Del 8164 wherein I have dealt in detail with the subject and the need to repeat is not felt. The settled position of law is that in the case of unconditional BGs, no

interim injunction restraining payment thereunder is to be granted unless a case of egregious fraud, not in relation to issuance of the BG but in relation to the underlying contract, is made out or if encashment of the BG were to result in irretrievable injustice to the person at whose instance the BG is furnished viz. the said person being left with no means of recovering back the monies once paid under the BG, if were to be ultimately found that the BG was wrongly encashed. Court can also interfere if the invocation is not found to be in terms of BG.

28. The beneficiary of the BG being the SBI, the senior counsel for the plaintiff has not even raised the second of the aforesaid grounds i.e. of irretrievable injustice. Of course, if it is ultimately found that the BG has been wrongly invoked, the plaintiff can always recover back the monies recovered under the BG from SBI.

29. The only two grounds which have been urged are of fraud of egregious nature and invocation being not in terms of the BG. As aforesaid, CS(COMM) No.1245/2018 along wherewith these suits were instituted and were being taken up, was disposed of on the bank refusing to pay under the BG taking a stand that the invocation was not in terms thereof.

30. However before discussing the said aspect, it is necessary to first determine whether the BGs subject matter of these two suits are unconditional. The relevant paragraph of the BG subject matter of CS(COMM) No.1246/2018 are as under:-

“1. *IN LIGHT OF THE RESOLUTION PLAN FOR CASTEX TECHNOLOGIES LIMITED SUBMITTED BY LIBERTY HOUSE GROUP PTE LTD, HAVING ITS REGISTERED OFFICE AT 8 MARINA VIEW, NO.40-60, ASIA*

SQUARE TOWER-I, SINGAPORE (018960) ('APPLICANT') AND AS PER THE PROVISIONS OF THE PROCESS MEMORANDUM DATED 30TH MARCH, 2018 ('PROCESS MEMORANDUM'), ISSUED BY RESOLUTION PROFESSIONAL, BARCLAYS BANKS PLC, HAVING ITS REGISTERED OFFICE AT NO.1, CHURCHILL PLACE, CANARY WHARF, LONDON E-14, SHP AND ACTING THROUGH ONE OF ITS BRANCHES AT EROS CORPORATE TOWERS, NEHRU PLACE, NEW DELHI – 110 019 ('GUARANTOR BANK') HEREBY AGREES UNEQUIVOCALLY, IRREVOCABLY AND UNCONDITIONALLY TO PAY TO STATE BANK OF INDIA, HAVING ITS OFFICE AT INDUSTRIAL FINANCE BRANCH,1, TOLSTOY MARG, JAWAHAR VYAPAR BHAVAN, 14TH FLOOR, NEW DELHI – 110 001, INDIA (HEREINAFTER REFERRED TO AS 'THE BANK') FORTHWITH ON DEMAND IN WRITING FROM THE BANK OR ANY OFFICER AUTHORISED BY IT IN THIS BEHALF, IN THE MANNER SET OUT IN PARAGRAPH 6 HEREOF, ANY AMOUNT UP TO AND NOT EXCEEDING INR 400,000,000.00 (FOUR HUNDRED MILLION INDIAN RUPEE) ON BEHALF OF THE APPLICANT ('BANK GUARANTEE').

3. THE LIABILITY OF THE GUARANTOR BANK UNDER THIS BANK GUARANTEE IS RESTRICTED TO INR 400,000,000.00 (FOUR HUNDRED MILLION INDIAN RUPEE) ONLY. IN THE EVENT THE APPLICANT IS DECLARED AS THE SUCCESSFUL APPLICANT AND THE APPLICANT HAS SIGNED THE LETTER OF INTENT (AS DEFINED IN THE PROCESS MEMORANDUM) (BASED ON THE TERMS OF THE APPLICANT RESOLUTION PLAN (IN FORM AND SUBSTANCE SATISFACTORY TO THE SUCCESSFUL APPLICANT) AND ALREADY AGREED IN WRITING BY THE SUCCESSFUL APPLICANT) ISSUED TO IT BY THE COMMITTEE OF CREDITORS OF CASTEX TECHNOLOGIES LIMITED, WITHIN THE TIME LIMIT STATED IN THE LETTER OF INTENT, THEN THIS GUARANTEED AMOUNT IS LIABLE TO BE FORFEITED ('EVENT OF FORFEITURE') IF THE SUCCESSFUL APPLICANT (A) FAILS TO EXTEND THE VALIDITY OF BANK GUARANTEE AS

REQUIRED BY THE RESOLUTION PROFESSIONAL, IN THE MANNER PRESCRIBED IN CLAUSE 4 OF THE BANK GUARANTEE, (B) IS FOUND TO HAVE SUBMITTED A FALSE, MISLEADING OR INCOMPLETE DECLARATION OF ELIGIBILITY UNDER SECTION 29A OF THE IBC OR SUBMITS A FALSE OR MISLEADING DECLARATION UNDER REGULATION 38(3) OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS 2016 OR (C) WITHDRAWS ITS RESOLUTION PLAN AFTER SUBMISSION.

5. THE GUARANTOR BANK HEREBY EXPRESSLY AGREES THAT IT SHALL NOT REQUIRE ANY PROOF IN ADDITION TO THE COMPLYING WRITTEN DEMAND FROM THE BANK IN THE FORMAT SET OUT AT APPENDIX 1 ('NOTICE OF DEMAND') RAISED AT THE ABOVEMENTIONED ADDRESS OF THE GUARANTOR BANK ON THE OCCURRENCE OF AN EVENT OF FORFEITURE, IN ORDER TO MAKE THE SAID PAYMENT TO THE BANK.
6. THE GUARANTOR BANK SHALL MAKE PAYMENT HEREUNDER, ON FIRST DEMAND, WITHIN 3 (THREE) WORKING DAYS OF RECEIPT OF THE NOTICE OF DEMAND WITHOUT RESTRICTION OR CONDITIONS AND NOTWITHSTANDING ANY OBJECTION BY THE APPLICANT AND/OR ANY OTHER PERSON. THE GUARANTOR BANK SHALL NOT REQUIRE THE BANK TO JUSTIFY THE INVOCATION OF THIS BANK GUARANTEE, NOR SHALL THE GUARANTOR BANK HAVE ANY RECOURSE AGAINST THE PROCURER(S) IN RESPECT OF ANY PAYMENT MADE HEREUNDER.
12. THIS BANK GUARANTEE MAY ONLY BE INVOKED IN CASE:
 - (I) THE APPLICANT BECOMES THE SUCCESSFUL APPLICANT IN ACCORDANCE WITH THE PROCESS MEMORANDUM AND THE APPLICANT HAS SIGNED THE LETTER OF INTENT (BASED ON THE TERMS OF THE APPLICANT RESOLUTION PLAN (IN FORM AND SUBSTANCE SATISFACTORY TO THE SUCCESSFUL APPLICANT) AND ALREADY AGREED

*IN WRITING BY THE SUCCESSFUL APPLICANT)
ISSUED TO IT BY THE COMMITTEE OF CREDITORS
OF CASTEX TECHNOLOGIES LIMITED, WITHIN
THE TIME LIMIT STATED IN THE LETTER OF
INTENT, AND*

*(II) AN EVENT OF FORFEITURE HAS OCCURRED AND
IS CONTINUING.”*

31. The counsels stated that the BG subject matter of CS(COMM) No.1247/2018 is on identical terms.

32. From use of the words “hereby agrees unequivocally, irrevocably and unconditionally to pay toforthwith on demand in writing from the bank or any officer authorised by it in this behalf, in the manner set out in paragraph 6 hereof.....”, “ the guarantor Bank hereby expressly agrees that it shall not require any proof in addition to the complying written demand from the bank in the format set out at Appendix 1 (Notice of Demand)” and “the guarantor bank shall make payment hereunder on first demand, within 3 (three) working days of receipt of the notice of demand without restriction or conditions and notwithstanding any objection by the applicant and/or any other person.....” it is quite evident that the BGs subject matter of these suits are unconditional.

33. Appendix 1 to the BG, referred to in clause 5 supra of the BG, is as under:-

“APPENDIX I
NOTICE OF DEMAND
TO: (INSERT GUARANTOR BANK)
DATE: (INSERT)

BANK GUARANTEE NO.(INSERT) DATED (INSERT)
(‘BANK GUARANTEE’)

WE REFER TO THE BANK GUARANTEE. TERMS
DEFINED IN THE BANK GUARANTEE SHALL HAVE THE
SAME MEANINGS WHEN USED HEREIN.

WE CONFIRM THAT:

(A) THE APPLICANT HAS BEEN DECLARED THE
SUCCESSFUL APPLICANT BY THE RESOLUTION
PROFESSIONAL AND THE APPLICANT HAS SIGNED
THE LETTER OF INTENT ISSUED TO IT BY THE
COMMITTEE OF CREDITOR OF CASTEX
TECHNOLOGIES LIMITED, WITHIN THE TIME LIMIT
STATED IN THE LETTER OF INTENT, AND

(B) THERE IS AN EVENT OF FORFEITURE
CONTINUING AND OUTSTANDING.

WE HEREBY DEMAND THE PAYMENT OF THE SUM OF
(INSERT).

PAYMENT SHOULD BE MADE TO THE CREDIT OF OUR
ACCOUNT WITH THE FOLLOWING DETAILS:

(INSERT DETAILS)

FOR AND ON BEHALF OF STATE BANK OF INDIA”

34. Notice of Demand dated 21st November, 2018 issued by the SBI to
Barclays, invoking the BG, is as under:-

“NOTICE OF DEMAND

*TO,
BARCLAYS BANK PLC
1ST FLOOR, EROS CORPORATE TOWER
NEHRU PLACE
NEW DEHLI – 110 019.*

DATE: 21.11.2018

*BANK GUARANTEE NO. BARCBG2018145 DATED
10.05.2018 AS AMENDED VIDE AMENDMENT NO.1 DATED
17.10.2018 (“BANK GUARANTEE”)*

WE REFER TO THE BANK GUARANTEE. TERMS DEFINED IN THE BANK GUARANTEE SHALL HAVE THE SAME MEANINGS WHEN USED HEREIN.

WE CONFIRM THAT:

- (A) THE APPLICANT HAS BEEN DECLARED THE SUCCESSFUL APPLICANT BY THE RESOLUTION PROFESSIONAL AND THE APPLICANT HAS SIGNED THE LETTER OF INTENT ISSUED TO IT BY THE COMMITTEE OF CREDITORS OF CASTEX TECHNOLOGIES LIMITED, WITHIN THE TIME LIMIT STATED IN THE LETTER OF INTENT, AND*
- (B) THERE IS AN EVENT OF FORFEITURE CONTINUING AND OUTSTANDING.*

WE HEREBY DEMAND PAYMENT OF THE SUM OF INR 400,000,000.00

PAYMENT SHOULD BE MADE TO THE CREDIT OF OUR ACCOUNT WITH THE FOLLOWING DETAILS:

*Authorised Officer SBI SAMB
Account No.331084754877
IFSC CODE: SBIN0004109*

*FOR AND ON BEHALF OF STATE BANK OF INDIA
INDUSTRIAL FINANCE BRANCH NEW DELHI"*

35. A bare comparison of the Appendix 1 to the BG prescribing the format of invocation of BG and Notice of Demand dated 21st November, 2018 would show that the invocation of the BG is in terms of the BG. The position in the other suit is the same.

36. The senior counsel for the plaintiff however has contended otherwise. It is argued, (i) that though the format of Notice of Demand/invocation of BG required SBI to state that an event of forfeiture had accrued and was continuing and it was so stated in the Notice of Demand/invocation of BG, but the condition precedent to the happening of

event of forfeiture was, declaration of the plaintiff as a successful resolution applicant, issuance of a LoI to the plaintiff and acceptance thereof by the plaintiff; (ii) the BG was thus conditional with all the said conditions being required to be complied with; (iii) there is not a whisper, that anything submitted by the plaintiff has been found false; (iv) the plaintiff has not withdrawn its resolution plan; (v) thus none of the conditions of the event of forfeiture mentioned in the BG which formed integral part of the BG and on happening of which event only the BG could be invoked have occurred; (vi) reliance is placed on *Hindustan Construction Co. Ltd. Vs. State of Bihar* (1999) 8 SCC 436 to contend that the invocation of BG is not in terms thereof and the Letter of Demand/invocation sent by the SBI did not even mention which of the event of forfeiture had taken place/happened and which the SBI was obligated to state; (vii) reliance is placed on *Harpurshad & Co. Vs. Sudarshan Steel Mill* AIR 1980 Del 174, again to contend that the liability of the bank to pay is strictly in terms of the BG; (viii) the Letter of Demand/invocation issued by the SBI does not even disclose any cause and merely stating that event of default has occurred is not sufficient; (ix) the SBI cannot be held entitled to invoke the BG without complying with the terms thereof; (x) the stand of the defendants that failure of the plaintiff to furnish PBG in terms of LoI amounts to an event of forfeiture is not in consonance with the BG; (xi) in *Hindustan Steel Construction Limited Vs. Tarapore & Co.* (1996) 5 SCC 34 it has been held that a demand may become fraudulent, not because of any fraud committed by the beneficiary while executing the underlying contract, but because of subsequent events or circumstances; (xii) that the

decision of the CoC rejecting the resolution plan of the plaintiff in fact is an event of releasing of BG; (xiii) the Process Memorandum requiring furnishing of PBG is not a binding document and in ***Bank of Baroda Vs. Vijaykumar V. Iyer*** 2018 (148) SCL 48 been held by the NCLT to be an internal document; (xiv) requirement of furnishing of PBG is not enforceable and/or binding; (xv) there is no provision in the Code in this regard; (xvi) fraud committed in the notice of the bank which would vitiate the very foundation of guarantee and injustice of the kind which would make it impossible for the guarantor to reimburse itself have also been carved out as grounds for interference by the Courts with the BGs; reliance is placed on ***Himadri Chemicals Industries Ltd. Vs. coal Tar Refining Co.*** (2007) 8 SCC 110; (xvii) the claim under the BBG is in the nature of penalty and it is settled law that unless loss suffered is proved no penalty can be imposed; (xviii) the BBGs do not set out any pre-estimate of damage; reference is made to ***Kailash Nath Associates*** supra; and, (xix) till approval of the resolution plan by the NCLT, no rights in favour of a resolution applicant crystallized and the legal status of a resolution applicant remains as that of a person making an offer and thus special equities arise in favour of the plaintiff.

37. I am unable to agree with any of the contentions aforesaid of the senior counsel for the plaintiff.

38. Once the BGs as appendix thereto annexed format of Letter of Demand/invocation, on submission whereof by the beneficiary SBI, the guarantor bank i.e. Barclays/BoB had undertaken to make payment under the guarantee, it is not open to the plaintiff to contend that though the Letter

of Demand/invocation is in terms of the said appendix to the BGs but the claim therein of the beneficiary SBI is not correct. If beneficiary SBI, in the Letter of Demand/invocation was required to explain to Barclays/BoB the event of forfeiture, the format of the Letter of Demand/invocation appended to the BGs would have provided so. On the contrary, Barclays/BoB under the BGs had expressly agreed to “..... not require the Bank to justify the invocation of this Bank Guarantee...”. The dispute raised by the plaintiff, of the event of forfeiture having not occurred, is nothing but a dispute, notwithstanding which the guarantor bank had undertaken to pay. Need to deal with the further arguments of the senior counsel for the plaintiff as to why the event of forfeiture had not occurred, is thus not felt.

39. As far as the fraud of an egregious nature, on finding whereof also the Court is empowered to interfere with payments under the BG, the same has to be in the underlying contract. In the present case the underlying contract in consideration whereof the BG at the insistence of the plaintiff was furnished, is the offer of the plaintiff to restructure Castex in CS(COMM) No.1246/2018, and ARGL Limited in CS(COMM) No.1247/2018 with respect to both of which CIR Process was under way under the Code. The senior counsels for the defendants are right in contending that there is not a whisper in the plaint of any fraud having been committed in inviting resolution applicants for Castex and ARGL Limited. Pleas of fraud in the matter of invocation of the BG do not constitute a ground to interfere with payment under the BG.

40. As far as the argument of the senior counsel for the plaintiff, of forfeiture being penal in nature and reliance on ***Kailash Nath Associates*** to which I only during the hearing had drawn attention, is concerned, on further consideration I find the said questions to be not applicable in the present controversy. I say so because Supreme Court in para 43.7 of ***Kailash Nath Associates*** itself clarified that Section 74 of the Contract Act will apply to cases of forfeiture of earnest money under a contract; where however forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. The invitation by the RP of resolution applicants for CIR of Castex and ARGL Limited for consideration, first by the CoC and thereafter by the NCLT, is in the nature of public auction. The senior counsel for the plaintiff has himself argued and also in his written arguments contended that the position of the plaintiff, till acceptance of its resolution plan, is akin to that of a person making an offer. There is thus admittedly no contract till now and the offer made by the plaintiff by submitting a resolution plan has not been accepted. What thus has been held in ***Kailash Nath Associates*** in relation to Section 74 of the Contract Act would have no application.

41. The senior counsels for the defendants in this regard have rightly referred to ***NHAI Vs. Ganga Enterprises*** supra holding that withdrawal of an offer made on a condition some earnest money will be forfeited for not entering into the contract or if some act is not performed, is a completely different aspect; though there is a right to withdraw the offer, there is no right to claim that the earnest money/security be returned. It was held that it would be an anomalous situation that a person, who by his own conduct,

precludes the coming into existence of a contract, is then given advantage or benefit of his own wrong by not allowing forfeiture. It was held that such a clause is inserted to ensure genuine bids. The said judgment was followed in *State of Haryana Vs. Malik Traders* (2011) 13 SCC 200 and *National Thermal Power Corporation Limited Vs. Ashok Kumar Singh* (2015) 4 SCC 252 also.

42. Even otherwise, *de hors* the legalese, what emerges on going through all the documents is that the plaintiff, after submitting the resolution plans and after the same were approved by the CoC, has had second thought and/or was not in a position to furnish PBG and started making counter-offer, of conversion of BBG into PBG and opening of an Escrow Account for the balance amount of the PBG and which was not acceptable to the RP/CoC who, after giving sufficient latitude to the plaintiff have invoked the BGs.

43. It cannot also be lost sight of that in the whole process, considerable time, out of the time bound schedule in terms of the Code for the resolution process, has been wasted and wastage of which time may ultimately result in the possibility of Castex and ARGL Limited being restructured ceasing to exist and being inevitably required to be liquidated, all at the cost of the creditors thereof and wastage of the stressed assets of the said two companies. The loss caused by such conduct of the plaintiff is thus mammoth, having adverse consequences on all the creditors and shareholders of the said two companies and also on the economy of the country and to remedy which, the code was enacted. The NCLT is best

equipped to also deal with apportionment of the amount of the BBGs in proper account.

44. The present case thus also falls in the category of cases envisaged in *SAW Pipes Ltd.* supra i.e. where loss caused on account of delays in construction of say, a public road, though does not cause loss to any individual or person or company in particular but causes loss to the residents of the country and which is unmeasurable and in which regard a pre-estimate is permitted to be forfeited without proof of any loss. The loss likely to be caused by the conduct of the plaintiff similarly, is to the country as a whole and thus the amount of the BBGs which the plaintiff was required to furnish to ensure that the plaintiff, after furnishing resolution plan does not withdraw, as the plaintiff has done, though not expressly but by conduct, qualifies as a genuine pre-estimate of the loss.

45. On merits also thus, I do not find the plaintiff entitled to a restraint against encashment/payment under the BG.

46. However since this Court has been found to be not having subject jurisdiction to entertain the suits, the plaint in both the suits is rejected.

47. The plaintiff, by instituting the suits has delayed the receipt of payment under the BBG by nearly over three months.

48. The law requires Courts to, while vacating the interim injunction, balance the equities. Though I am refraining from directing the plaintiff to reimburse SBI with interest on the amounts of the BGs but burden the plaintiff in each of the suits with costs of Rs.25,00,000/- considering the expense incurred by the defendants in contesting the suits including by

engaging senior counsels. The plaintiff is directed to pay the said costs to SBI within four weeks of today.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 22, 2019

‘pp’

