NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 160 of 2017

[Arising out of Order dated 20.10.2016 passed by the Board for Industrial and Financial Reconstruction in Case No. 63/2006]

IN THE MATTER OF:

Pr. Director General of
Income Tax (Admn. & TPS) ...Appellant

Vs.

M/s. Spartek Ceramics India Ltd. & Anr. ...Respondents

Present:- For Appellant:- Mr. Puneet Raj, Advocate.

For Respondents:- Mr. Neeraj Chaudhary and Mr. K.K.R. Das, Advocates for Respondent No.1.
Mr. Vijay Joshi, Senior Panel Counsel for Government of India, Advocate for Respondent No.3.

Company Appeal (AT) (Insolvency) No. 258 of 2017

[Arising out of Order dated 20.10.2016 passed by the Board for Industrial and Financial Reconstruction in Case No. 63/2006]

IN THE MATTER OF:

GMB Ceramics Ltd. ...Appellant

Vs.

M/s. Spartek Ceramics India Ltd. & Ors. ...Respondents

Present:- For Appellant:- Mr. Sanjeve Deora, Chartered Accountant, Mr. Pulkit Deora and Mr. Abhishek Kumar, Advocates.

For Respondents:- Mr. Neeraj Chaudhry, Advocate for 1ST Respondent.

Mr. Sanjay Jain, ASG with Mr. Vijay Joshi, Ms. Sneh Suman and Mr. Kartik Rai, Advocates for Respondent No.3.

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

As in these appeals the Respondent Company (M/s. Spartek Ceramics India Limited & Anr.) is common and common question of law is involved, though they were heard separately are being disposed of by this common judgment.

2. Company Appeal (AT) (Insolvency) No. 160 of 2017 has been preferred by "Principal Director of Income Tax (Admn. & TPS)" pursuant to Notification Nos. S.O.3568(E) and S.O.3569(E) both dated 25th November, 2016 issued by the Central Government in exercise of powers conferred under Section 242 of the 'Insolvency and Bankruptcy Code, 2016' (hereinafter referred to as "I&B Code") against the scheme of demerger dated 20th October, 2016 sanctioned by the 'Board for Industrial and Financial Reconstruction' (hereinafter referred to as "Board") under Section 18 of the 'Sick Industrial Companies (Special Provisions) Act, 1985' (hereinafter referred to as "SICA Act, 1985") on the ground that the Board, by flouting all norms of justice and violation of the principle of natural justice and provisions of 'SICA Act, 1985' which is prejudicial to the interest of revenue involving huge loss of income tax.

3. The Appellant is left with no other alternate remedy but to file the present appeal for removal of the grievances.

4. The other Company Appeal (AT) (Insolvency) No. 258 of 2017 has been preferred by the 'GBM Ceramics India Limited & Ors.' under Section 32 of the 'I&B Code' read with 3rd proviso to Section 4(b) of the 'Sick Industrial Companies (Special Provisions) Repeal Act, 2003' (hereinafter referred to as "SICA Repeal Act, 2003") as amended by the Eighth Schedule to the 'I&B Code' and by the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017. In this appeal, the Appellant has challenged the same very scheme of demerger sanctioned by order dated 20th October, 2016 passed in Case No. 63 of 2006 by Board, for restructuring of the 1st Respondent- 'Spartek Ceramics India Limited'. It is stated that an appeal was preferred by the Appellant before the 'Appellate Authority for Industrial and Financial Reconstruction' (hereinafter referred to as "AAIFR"), which stood abated in view of the 'SICA Repeal Act, 2003'.

5. The main challenge has been made on the ground that the Board has not discussed the objections raised by the Appellant nor has taken into consideration that the Appellant is the Creditor of the 1st Respondent Company, which was required to take the responsibility and other liabilities which were not recorded in the books of Neycer. The Board failed to consider that it had itself, in respect of Modified Rehabilitation Scheme (MS) (08) of Neycer by order dated 6th October, 2008, directed the 'Spartek Ceramics India Limited' to bring in funds in the form of an

unsecured loan to Neycer in order to meet its liability towards the Appellant Company.

6. The questions arise for consideration in these appeals are:

i. Whether the Central Government, in exercise of powers conferred under Section 242 of the 'I&B Code', which pertains to 'removal of difficulties' in giving effect to the provisions of the 'I&B Code', can empower National Company Law Appellate Tribunal (hereinafter referred to as "NCLAT") to hear an appeal against the order passed by the Board by amending Eighth Schedule of the 'I&B Code', not by a legislative Act, but by an executive order?

ii. Whether the provision to prefer the appeal within ninety-days before the NCLAT, as made by the Central Government Notification dated 25th May, 2017 is in conflict with Section 61(2) of the 'I&B Code', which provides thirty-days period to prefer an appeal before the NCLAT? and

iii. Whether the impugned scheme of demerger approved by the Board by order dated 20th October, 2016, passed in Case No. 63 of 2006 is legal or not?

7. To decide these issues, it is necessary to notice the relevant provisions of one or other Act/ Code and Notifications issued by the Central Government from time to time under 'I&B Code'.

8. The 'Board of Directors' of Sick Companies used to form opinion that a Company had become a Sick Industrial Company, the Board of Directors were empowered to make a reference under Section 15 of the 'SICA Act, 1985' to the 'Board' for determination of the measures which were required to be adopted with respect to the Company. After inquiry into the working of Sick Industrial Companies, the 'Board' was empowered under Section 17 to make suitable order under Section 17(3) of the 'SICA Act, 1985' for sanction of scheme.

9. Section 18 of the 'SICA Act, 1985' related to 'Preparation and sanction the Schemes' where an order is made under sub-section (3) of Section 17 in relation to any Sick Industrial Company.

10. Section 18 of the 'SICA Act, 1985' was self-contained and under sub-section (12) of Section 18 the Board was empowered to monitor periodically the implementation of the sanctioned scheme.

11. The person aggrieved against the Scheme had remedy to prefer the appeal under Section 25 against the order passed by the Board within forty-five days to the Appellate Authority.

12. The 'SICA Act, 1985' was repealed by the 'SICA Repeal Act, 2003'. The 'SICA Repeal Act, 2003' was enforced with effect from 1st December, 2016. Consequently, the 'SICA Act, 1985' was repealed and ceased to be operative and proceedings under the 'SICA Act, 1985' before the Board abated.

13. 'SICA Repeal Act, 2003' was enacted by the Parliament in 2004, but was not notified under Section 1(2), till Notification No. S.O. 3568(E) dated 25th November, 2016 was issued.

14. Section 4(b) of the 'SICA Repeal Act, 2003', as originally enacted, was as under:

> *"**4. Consequential provisions**. —On the dissolution of the Appellate Authority and the Board, —*
>
> *(a) XXXX*
>
> *(b) any appeal preferred to the Appellate Authority or any reference made to the Board or any inquiry pending before the Board or any other authority or any proceeding of whatever nature pending before the Appellate Authority or the Board immediately before the commencement of this Act shall stand abated:*
>
> *Provided that a company: —*
>
> (i) *in respect of which such appeal or reference or inquiry stand abated under this clause may make a reference under Part VI-A of the Companies Act, 1956 (1 of 1956) within one hundred and eighty days from the commencement of this Act in accordance with the provisions of the Companies Act, 1956;*

(ii) *which had become a sick industrial company as defined in clause (46-AA) of Section 2 of the Companies Act, 1956 (1 of 1956), before the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003) may make a reference under Part VI-A of the Companies Act, 1956 within one hundred and eighty days from the commencement of the Companies (Second Amendment) Act, 2002 or within sixty days of final adoption of accounts after such commencement, whichever is earlier, and reference so made shall be dealt with in accordance with the provisions of the Companies Act, 1956 (1 of 1956) :*

Provided further that no fee shall be payable for making such reference under Part VI-A of the Companies Act, 1956 (1 of 1956) by a company whose appeal or reference or inquiry stand abated under this clause:

Provided also that any scheme sanctioned under subsection (4) or any scheme under implementation under subsection (12) of Section 18 of the repealed enactment shall be deemed to be a scheme sanctioned or under implementation under

Section 424-D of the Companies Act, 1956 (1 of 1956) and shall be dealt with in accordance with the provisions contained in Part VI-A of that Act;"

However, the said sub-section was never enforced.

15. By another Notification No. S.O.3569(E) also dated 25th November, 2016, Section 4(b) of the 'SICA Repeal Act 2003', was amended/modified and read as under:

"AFTER AMENDMENT OF SICA (REPEAL) ACT, 2003, W.E.F. 1ST NOVEMBER, 2016:

4. Consequential provisions *- On the dissolution of the Appellate Authority and the Board –*

(a)XXXX

(b)on such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under Sick Industrial Companies (special provisions) Act, 1985 (1 of 1986) shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016.

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause]"

The aforesaid amendment was made prior to 1st December, 2016 i.e. the date on which the 'SICA Repeal Act, 2003' was enforced.

16. The 'I&B Code' was given effect from 1st December, 2016. By 'I&B Code' different Acts were amended, including the 'SICA Repeal Act, 2003' under Section 252 in the manner specified in the Eighth Schedule as quoted below:

"THE EIGHTH SCHEDULE

(See section 252)

AMENDMENT TO SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) REPEAL ACT, 2003

(1 OF 2004)

In section 4, for sub-clause (b), the following sub-clause shall be substituted, namely —

"(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act,1985 shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause."

17. Thereafter, vide Notification No. S.O. 1683 (E) dated 24th May, 2017, two provisos were added to Section 4(b) of the 'SICA Repeal Act,

2003'. The said Notification, also referred to as 'The Removal of Difficulty Order, 2017', which reads as under: -

> *"S.O. 1683(E).- Whereas, the Insolvency and Bankruptcy Code, 2016 (31 of 2016 (hereinafter referred to as the said Code) received the assent of the President on 28th May, 2016 and was published in the official Gazette on the same date;*
>
> *And, whereas, section 252 of the said Code amended the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (1of 2004) in the manner specified in the Eighth Schedule to the said Code;*
>
> *And, whereas, the un-amended second proviso to clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 provides that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the repealed enactment i.e., the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall be deemed to be a scheme under implementation under section 424D of the Companies Act, 1956, (1 of 1956) and shall be dealt with in accordance with the*

provisions contained in Part VIA of the Companies Act, 1956;

And, whereas, section 424D of the Companies Act, 1956 provided for review or monitoring of schemes that are sanctioned or are under implementation;

And, whereas the Companies Act, 1956 has been repealed are re-enacted as the Companies Act, 2013 (18 of 2013) which, inter alia, provides for scheme of revival and rehabilitation, sanction of scheme, scheme to be binding and for the implementation of scheme under section 261 to 264 of the Companies Act, 2013;

And, whereas, sections 253 to 269 of the Companies Act, 2013 have been omitted by Eleventh Schedule to the Insolvency and Bankruptcy Code, 2016;

And, whereas, clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 has been substituted by the Eighth Schedule to the Code, which provides that any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the

Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 shall stand abated. Further, it was provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make a reference to the NCLT under the Code within one hundred and eighty days from the date of commencement of the Code;

And, whereas, difficulties have arisen regarding review or monitoring of the schemes sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) in view of the repeal of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and omission of sections 253 to 269 of the Companies Act, 2013;

Now, therefore, in exercise of the powers conferred by the sub-section (1) of the section 242 of the insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby makes the

following Order to remove the above said difficulties, namely: -

1. Short title and commencement. – (1) This Order may be called the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017.

2. In the Insolvency and Bankruptcy Code, 2016, in the Eighth Schedule, relating to amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, in section 4, in clause (b), after the second proviso, the following provisos shall be inserted, namely: -

"Provided also that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under sub-section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said code:

Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (Special Provisions) Act, 1985 against an order of the Board had not expired as on the date of notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order."

18. The Eighth Schedule of the 'I&B Code' relates to amendment to the 'SICA Repeal Act, 2003', in clause (b) of Section 4, after the second proviso, the further provisos have been inserted by the Central Government in exercise of powers conferred by Section 242 of the 'I&B Code' on the ground of removal of difficulties.

19. The appeals, having been preferred under such amended the Eighth Schedule of the 'I&B Code' made by the Central Government, questions have been raised as to whether the Central Government in exercise of powers conferred under section 242 of the 'I&B Code' can empower the NCLAT to hear an appeal against an order passed by the 'Board' the Eighth Schedule of the 'I&B Code', having not been amended by a legislative Act, but by an executive order.

20. Learned counsel appearing on behalf of the Appellant- 'Principal Director of Income Tax (Admn. & TPS)' submitted that the Notification S.O. 1683(E) dated 24th May, 2017, whereby two provisos have been inserted to Section 4(b) of the 'SICA Repeal Act, 2003' by the Central Government was challenged before the Hon'ble High Court of Delhi in ***"Ashapura Minechem Ltd. V/s. Union of India"*** in W.P.(C) 9674/2017. The Division Bench of Hon'ble High Court of Delhi, by its judgment dated 1st November, 2017, upheld the aforesaid provisions.

21. From the judgment of the Hon'ble High Court of Delhi in **"*Ashapura Minechem Ltd. (Supra)*"**, we find that the Petitioner therein had not raised the question, as to whether by an executive order, an Act can be amended or not and whether the Central Government can delegate power to the NCLAT to hear an appeal under Section 61 of the 'I&B Code'.

22. The Hon'ble High Court of Delhi while noticed Section 5(1)(d) of the 'SICA Repeal Act, 2003', observed as follows:

> *"19. Section 5(1)(d) of the Repeal Act, which incorporates the saving clause, provides that the repeal would not affect any order where schemes have already been sanctioned. Section 4(b) and Section 5(1)(d) have to be read harmoniously. The effect of Section 5(1)(d) is that any order made by the Board/BIFR sanctioning*

the schemes before the date of abatement, as notified under Section 4(b), such schemes would not get affected. Read in this manner, the two provisions draw a distinction between cases where draft schemes have been approved by the Board before enforcement of the Repeal Act and cases where inquiry or draft scheme was pending consideration before the Board. In the latter case, the proceedings pending before the Board abate and come to an end. In fact, proceedings pending before the Appellate Authority under SIC Act also abate."

23. The Hon'ble High Court, while dealing with the vires of the Notification S.O. 1683 (E) dated 24th May, 2017, observed:

"48. Counsel for the petitioner has further challenged the vires of the aforesaid Removal of Difficulties Order 2017/Notification S.O. 1683(E) dated 24th May, 2017 on the ground that the same could not have been passed in exercise of power under Section 242 of the Code. It is submitted that Section 242 is a provision which merely confers the powers to 'remove difficulties' in the Code and

cannot be extended to amend the extant provisions of the Repeal Act, or other enactments like Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Violation and Reconstruction of Financial Provision and Security Interest Act, 2002 and Companies Act, 2013.

49. We have considered the said contention limited and confined to the two provisions enacted vide S.O. No. 1683(E) but do not find any merit in the contention. As noticed above, the aforesaid notification has been issued by the Central Government in exercise of power conferred under sub-Section (1) of Section 242 and 252 of the Code. A perusal of the impugned notification, extracted above, and Section 252 of the Code extracted below, clearly shows that the Eighth Schedule is a part of the Code and Section 4(b) of the Repeal Act as amended was incorporated in the Code vide the Schedule. Section 252 of the Code reads: -

> *"**252. Amendments of Act 1 of 2004. –** The Sick Industrial Companies (Special Provisions) Repeal Act, 2003 shall be amended in the manner specified in the Eighth Schedule."*

As per Section 252 of the Code, the Repeal Act was amended in the manner specified in the Eighth Schedule. The Eighth Schedule of the Code as originally enacted had amended Section 4(b) of the Repeal Act, and has been already reproduced above. Thus amended clause (b) to Section 4 of the Repeal Act was specifically incorporated and included in the Eighth Schedule. In this manner, Section 4 clause (b) of the Repeal Act became part and parcel of the Code. Thus, the said order is not ultra vires as what has been done, in effect, is under the Code itself. This being the position, we do not think that the petitioner is correct in contending that the Central Government could not have issued the Removal of Difficulties Order, to rectify and correct anomalies noticed while implementing the Code."

24. The Hon'ble High Court of Delhi has referred the decision of the Constitutional Bench of the Hon'ble Supreme Court in ***"Madeva Upendra Sinai and others v. Union of India and others (1975) 3 SCC 765",*** wherein, it has held as under:

"36. This raises two questions: (1) Is this a 'difficulty' within the contemplation of clause (7) of the

Regulation? (2) Is the Central Government in the exercise of its power under that clause competent to supply of deficiency or casus omissus of this nature?

38. For a proper appreciation of the points involved, it is necessary to have a general idea of the nature and purpose of a "removal of difficulty clause" and the power conferred by it on the Government.

39. To keep pace with the rapidly increasing responsibilities of a welfare democratic State, the Legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the Legislature and endurance and skill of the draftsman, it is well nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socio-economic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of

India. In order to obviate the necessity of approaching the Legislature for removal of every difficulty, however trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the Legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the "removal of difficulty clause", once frowned upon and nick-named as "Henry VIII clause" in scornful commemoration of the absolutist ways in which that English King got the

"difficulties" in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post-independence era."

25. Taking into consideration the facts that the Petitioner of the said case has not challenged Section 252 of the 'I&B Code', which had the effect of amending in the manner as specified in the 'Eighth Schedule' of the 'I&B Code', the Hon'ble High Court held:

> *"52. In view of the above discussion, it is held that the Central Government, in exercise of power conferred under Section 242 of the Code could have removed the difficulties which came to its notice upon enforcement of the Code and its implementation. Clause (b) to Section 4 of the Repeal Act, in fact, was substituted in terms of Eighth Schedule inserted by Section 252 of the Code."*

26. At this stage, it is desirable to notice the powers of the Central Government to remove the difficulties under Section 242 of the 'I&B Code', which reads as follows:

> *"**242. Power to remove difficulties.** — (1) If any difficulty arises in giving effect to the provisions of this Code, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Code as may appear to be necessary for removing the difficulty:*
>
> *Provided that no order shall be made under this section after the expiry of five years from the commencement of this Code.*

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament."

27. The aforesaid provision shows that the Parliament, with a view to remove difficulties in giving effect to the provisions of the 'I&B Code', has empowered the Central Government to make such provisions not inconsistent with the provisions of the 'I&B Code' as may appear to be necessary for removing the difficulties.

28. The question arises for consideration in this appeal is whether Notification S.O. 1683 (E) dated 24th May, 2017 issued by the Central Government in exercise of the powers conferred under section 242 relates to giving effect to the provisions of the 'I&B Code' or for removing any difficulty in giving effect to the provision of the 'I&B Code'? In other words, whether Notification No. S.O. 1683 (E) dated 24th May, 2017 is consistent with the Section 242 of the 'I&B Code'?

29. The aforesaid question was neither argued nor decided by the Hon'ble High Court of Delhi.

Infirmity in the Notification S.O. 1683(E) dated 24th May, 2017

30. The infirmity in the impugned Notification S.O. 1683 (E) dated 24th May, 2017 are discussed below.

31. We have noticed the decision of the Hon'ble Supreme Court in ***"Madeva Upendra Sinai and others (Supra)"***, wherein the Hon'ble Apex Court observed:

> *"In order to obviate the necessity of approaching the legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the legislature sometimes thinks it expedient to invest the executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the 'removal of difficulty clause', once frowned upon and nick-named as 'Henry VIII clause' in scornful commemoration of the absolutist ways in which that English King got the 'difficulties' in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post-independence era."*

32. In ***"Transcore V/s. Union of India and Another (Supra)"*** the Hon'ble Supreme Court further proceeded to observe that:

> *"81. In view of the above judgment of this Court in Madeva Upendra Sinai [(1975) 3 SCC 765: 1975 SCC (Tax) 105] we are of the view that the 2004Order, in the present case, was issued with the object of supplying a deficiency, namely, levy of fees. By such levy of fees, the nature and scope of the NPA Act is not altered. It is not in dispute that the 2004 Order has been issued after the enactment of the NPA Act. After amending Act 30 of 2004, certain amendments have been made in Section 17(1) of the NPA Act. However, the 2004 Order dated 6-4-2004 does not, in any way, alter the scheme of the amended Act. It merely fills in the deficiency and, therefore, the 2004 Order will continue to operate even after amending Act 30 of 2004 and till rules are prescribed in terms of Section 2(s) of the NPA Act."*

33. From the aforesaid observations, we find that *the object of supplying a deficiency is primary factor which is to be noticed and in no manner it can alter the scheme. The Executive can fill in the deficiency but cannot amend the substantive provision of the Act.* It is a settled law that

the legislature/Parliament can authorise an executive authority to modify either existing or future laws but not any of the essential feature. The executive authority cannot act beyond the powers delegated by the legislature.

34. Section 242 of the 'I&B Code' empowers the Central Government to remove the difficulties. The Central Government is empowered to make such provisions not inconsistent with the provisions of the 'I&B Code', which is necessary for removing the difficulties in giving effect to the 'I&B Code', and reads as follows: -

> *"**242. Power to remove difficulties.** — (1) If any difficulty arises in giving effect to the provisions of this Code, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Code as may appear to be necessary for removing the difficulty:*
>
> *Provided that no order shall be made under this section after the expiry of five years from the commencement of this Code.*
>
> *(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament."*

35. The question arises for consideration is whether the impugned Notification S.O. 1683(E) dated 24th May, 2017 relates to removal of difficulty arises in giving effect to the provisions of the case.

The Notification aforesaid, mentions the following difficulties:

> *"And, whereas, difficulties have arisen regarding review or monitoring of the schemes sanctioned under subsection (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) in view of the repeal of the Sick Industrial Companies (Special Provisions) Act, 1985, substitution of clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and omission of sections 253 to 269 of the Companies Act, 2013"*

36. From plain reading of the ground as shown in the impugned Notification S.O. 1683(E) dated 24th May, 2017, we find that the notification has been issued in view of difficulties arisen to give effect to review or monitoring of the schemes sanctioned under sub-section (4) or sub-section (12) of Section 18 of the 'SICA Act, 1985', in view of 'SICA Repeal Act, 2003' and omission of Sections 253 to 269 of the Companies Act, 2013. It does not relate to removal of any difficulty arises in giving

effect to the provisions of the 'I&B Code', which is the only ground for which Central Government can exercise power conferred under Section 242.

37. In absence of any ground shown for removing any difficulty in giving effect to the provisions of the 'I&B Code' and as the Central Government cannot exercise powers conferred under Section 242 of the 'I&B Code' for removing the difficulties arisen due to 'SICA Repeal Act, 2003' or omission of provisions of the 'Companies Act, 2013', this Appellate Tribunal cannot act pursuant to impugned Notification S.O. 1683(E) dated 24th May, 2017 to entertain the appeal.

The subject matter of Eighth Schedule and permissibility of its amendment.

38. The Eighth Schedule relates to amendment to the 'SICA Repeal Act, 2003'. The legislature by Eighth Schedule substituted sub-clause (b) of Section 4 of the 'SICA Repeal Act, 2003', as follows:

"THE EIGHTH SCHEDULE

(See section 252)

AMENDMENT TO SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) REPEAL ACT, 2003

(1 OF 2004)

In section 4, for sub-clause (b), the following sub-clause shall be substituted, namely —

"(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act,1985 shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause."

39. Against an order of the Board made under 'SICA Act, 1985', there was a provision of the appeal under Section 25 of the 'SICA Act, 1985', which was required to be preferred within forty-five days. The Appellate Authority after notice to the parties and if it so desires, after making such further inquiry as it deems fit was empowered to confirm, modify or set aside the order appealed against (passed by the Board) or remand the matter to the Board for fresh consideration.

40. In view of clause (b) of Section 4 of the 'SICA Repeal Act, 2003', the appeal preferred to the Appellate Authority or any reference made or any inquiry pending before the Board or any other authority or any proceeding of whatever nature pending before the Appellate Authority or the Board, including the powers of the Board to give effect to the Scheme or to monitor periodically for its implementation under sub-section (4) read with sub-section (12) of Section 18 of the 'SICA Act, 1985' stood abated. However, by virtue of the amendment under the Eighth Schedule, the Company in respect of which such appeal or reference or inquiry stands abated, have been allowed to make reference to the NCLAT within 180 days of commence of 'I&B Code' and in accordance with the provisions of the 'I&B Code'. In such case, no fees is payable.

41. The aforesaid amendment to the 'SICA Repeal Act, 2003' made vide sub-clause (b) of Section 4 (Eighth Schedule) shows that in respect of the Scheme which has already been framed by the Board, even if the appeal is pending, cannot proceed as the appeal stands abated.

42. The time period of 180 days given therein is for making a reference to the National Company Law Tribunal to treat the application under 'I&B Code' without payment of fees, only in respect to cases, where appeal or reference stands abated. It does not mean that the Company cannot file application under Section 10 of the 'I&B Code' after 180 days. If the Company prefers any application under Section 10 beyond 180 days, it is required to pay the requisite fee.

43. If the legislature thought it fit that no appeal against the Scheme already framed or any proceeding before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the 'SICA Act, 1985', including the proceedings for monitoring under sub-section (12) of Section 18 shall stand abated, the question of giving effect to the Scheme by treating the Scheme as a 'Resolution Plan' approved by the Adjudicating Authority does not arise.

44. If the intention of the legislature/Parliament substituting sub-clause (b) of Section 4 (by Eighth Schedule) is looked into, we find that the executive instruction issued by the Central Government under Section 242 is contrary to the provisions of sub-clause (b) of Section 4 of the 'SICA Repeal Act, 2003'.

45. In view of the aforesaid discussion, we find that the grounds shown by the Central Government in Notification S.O. 1683(E) dated 24th May, 2017 for exercising powers conferred under Section 242 are in conflict with the amended sub-clause (b) of Section 4 of the 'SICA Repeal Act, 2003'.

Powers of National Company Law Appellate Tribunal (NCALT)

46. The NCLAT has been constituted under Section 421 of the Companies Act, 2013, which reads as follows:

*"**421. Appeal from orders of Tribunal. —** (1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.*

(2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it

thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal."

47. We have noticed that the legislature have constituted the NCLAT under Section 421 of the Companies Act, 2013. By 'I&B Code' the legislature have also empowered NCLAT to hear the appeal under Section 61. By amendment to the Competition Act, 2003, the legislature have also empowered the NCLAT to hear the appeal against an order(s) passed by the Competition Commission of India. Section 53A and 53B reads as follows:

*"**53A. Appellate Tribunal.**—(1) The National Company Law Appellate Tribunal constituted under section 410 of the companies Act, 2013 shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purpose of this Act and the said appellate Tribunal shall –*

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section

32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act; and

(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub- section (2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

***53B. Appeal to Appellate Tribunal**. — (1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.*

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in

that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal."

48. The NCLAT has also been empowered by the Parliament to decide the appeal under Section 61 of the 'I&B Code' against an order passed by

the Adjudicating Authority (National Company Law Tribunal), which reads as follows: -

> *"**61. Appeals and Appellate Authority.** — (1) Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.*
>
> *(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal: Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.*
>
> *(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—*
>
> *(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;*
>
> *(ii) there has been material irregularity in exercise of the powers by the resolution*

professional during the corporate insolvency resolution period; Adjudicating Authority for corporate persons.

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

(4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order."

49. Section 32 of the 'I&B Code' relates to 'grounds of appeal' against an order passed by the Adjudicating Authority approving the 'Resolution Plan' in the manner and the grounds laid down in sub-section (3) of Section 61, and reads as follows:

*"**32. Appeal.—** Any appeal from an order approving the resolution plan shall be in the*

manner and on the grounds laid down in sub-section (3) of section 61."

50. From the aforesaid provision, it is clear that the grounds to prefer appeal under Section 61 of the 'I&B Code' against an order of approval of plan passed by the Adjudicating Authority under Section 31, should be such as mentioned in sub-section (3) of Section 61.

As per sub-section (2) of Section 61, the appeal is required to be filed within thirty days before the NCLAT. The Appellate Tribunal is empowered to condone the delay of 'another fifteen days' after the expiry of the period of thirty days in preferring the appeal that too for sufficient cause. It has no power to condone the delay if appeal under Section 61 is preferred beyond fifteen days from the date of the expiry of the period of thirty days. Meaning thereby, no appeal under sub-section (1) of Section 61 can be entertained after forty-five days of knowledge of the order passed by the Adjudicating Authority.

51. The impugned Notification S.O. 1683(E) dated 24th May, 2017 was notified after five months twenty-seven days of enactment of the 'I&B Code' (came into force from 1st December, 2016). All Schemes have been framed by the Board prior to 1st December, 2016 i.e. before coming into force of the 'I&B Code' i.e. much more than five months twenty-seven days back (177 days).

52. The limitation of thirty days has been prescribed under sub-section (2) of Section 61 for preferring an appeal against an order passed by the

Adjudicating Authority, including the order passed under section 31(1) of the 'I&B Code'. The Appellate Tribunal for sufficient cause can condone the delay but such period cannot exceed fifteen days. Therefore, no appeal can be entertained after forty-five days of knowledge of order. The Central Government, thereby cannot grant ninety days' period to prefer an appeal under section 61(1), which is contrary to Section 61(2) of the 'I&B Code'.

53. The 'difficulty' as contemplated under Section 242 of the 'I&B Code' has not been mentioned by the Central Government in the notification in question. The Central Government in exercise of its powers conferred under Section 242, is competent to make provision to remove the difficulty in giving effect to the provisions of the 'I&B Code', but it cannot be in conflict with nor can change the substantive provisions of the 'I&B Code'. The period of limitation as prescribed by Notification S.O. 1683(E) dated 24th May, 2017 being in conflict with the maximum period of limitation granted under sub-section (2) of Section 61 of the 'I&B Code' and beyond forty-five days, the NCLAT having not empowered to entertain the appeal. The NCLAT has no jurisdiction to entertain an appeal under Section 61 beyond the period of forty-five days.

54. The NCLAT, having been empowered by the Parliament to hear the appeal under provisions of the Companies Act, 2013, 'I&B Code, 2016' and the Competition Act, 2003, the Central Government cannot empower

the Appellate Tribunal to hear an appeal pursuant to Notification S.O. 1683(E) dated 24th May, 2017.

55. For the reasons aforesaid, we hold that both the appeals preferred by 'Pr. Director General of Income Tax (Admn. & TPS)' and 'GMB Ceramics India Ltd. & Ors.' against the Scheme framed by the Board are barred by limitation and otherwise not maintainable under Section 61 of the 'I&B Code'.

56. As per Section 411 of the Companies Act, 2013, the Chairperson shall be a person **who is** or has been **a Judge of the Supreme Court** or the Chief Justice of a High Court. Even though the post of the Chairman can be held by a sitting Judge of the Hon'ble Supreme Court, the NCLAT has no jurisdiction to declare any of the decision of the Hon'ble High Court passed under any jurisdiction including Article 226 of the Constitution of India as illegal. The NCLAT has also no jurisdiction to declare any Central Government Notification illegal nor can set aside the same either under Section 421 of the Companies Act, 2013 or under Section 61 of the 'I&B Code' or under Section 53(B) of the Competition Act, 2002.

57. To maintain the judicial decorum, though we have noticed the conflict in the order passed by the Hon'ble High Court of Delhi and the Notification S.O. 1683(E) dated 24th May, 2017, we refrain from giving any specific declaration about the same.

In spite of observations as made above, the next question requires consideration is that if otherwise the appeals are maintainable the impugned Scheme is legal or not.

Merit of the appeals

58. Though we are not supposed to decide the merit of each of the appeals, but if the arguments of the parties are accepted that the appeals are maintainable under Section 61 read with Section 32 of the 'I&B Code' and are within time, in such a case, following facts are to be noted:

(i) Whether the Scheme which is deemed to be a 'Resolution Plan' approved by the Adjudicating Authority under section 31(1) of the 'I&B Code', is in contravention of the provisions of any law for the time being in force?

(ii) Whether there has been a material irregularity in exercising of the powers by the 'Insolvency Resolution Professional' during the 'Corporate Insolvency Resolution Process'?

(iii) Whether the 'debts' owed to the 'Operational Creditors' have been provided for in the 'Resolution Plan'?

(iv) Whether Insolvency Resolution Process costs have been provided for repayment in priority to all other debts? and;

(v) Whether the 'Resolution Plan' complies with the criterias prescribed by the Insolvency and Bankruptcy Board of India?

59. The impugned Scheme was approved by the Board on 20th October, 2016 i.e. much prior to enforcement of the 'I&B Code', which came in force on 1st December, 2016. On 20th October, 2016, as the 'I&B Code' had not come in force and there was no Adjudicating Authority, the question of approval of the 'Resolution Plan' on 20th October, 2016 does not arise.

60. Section 30 of the 'I&B Code' relates to the submission of resolution plan. As per sub-section (2), the 'Resolution Professional' is required to be examined by the 'Resolution Professional' as to whether the 'Resolution Plan' conforms to the provisions mentioned in clause (a), (b), (c), (d) and (f) or not. As per sub-section (2) (e) of Section 30, it is to be seen that the 'Resolution Plan' does not contravene any of the provisions of the law for the time being in force.

The 'Committee of Creditors' are supposed to approve the 'Resolution Plan' by a vote of not less than seventy-five percent of in terms of sub-section (4) of Section 30. To understand the process of resolution, it is desirable to refer Section 30 which is quoted below:

"30. Submission of resolution plan. *— (1) A resolution applicant may submit a resolution plan*

to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;

(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board."

61. Section 31 of the 'I&B Code' relates to approval of the 'Resolution Plan' by the Adjudicating Authority and as quoted below:

"31. Approval of resolution plan. — *(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.*

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database."

62. From bare perusal of Section 31, it is clear that if the 'Resolution Plan' approved by the 'Committee of Creditors' meets the requirement as referred to in sub-section (2) of Section 30, it can be approved by the Adjudicating Authority.

63. As the impugned Scheme dated 20th October, 2016 has not been approved by the 'Committee of Creditors' in terms of sub-section (4) of Section 30 of the 'I&B Code', it cannot be treated to be approved 'Resolution Plan' under sub-section (1) of Section 31. If the 'Resolution Plan' does not conform to the requirements of sub-section (2) of Section 30, it is to be rejected.

64. The Appellant- Pr. Director General of Income Tax (Admn. & TPS) has pointed out that the 'Resolution Plan' contravenes the provisions of the Income Tax Act.

65. Learned Senior Counsel for the Appellant pointed out that the demerger Scheme has been passed at the cost of Government revenue which is against public interest. The demerger Scheme is in violation of the provision of sub-section (2) of Section 19 of SICA as per which consent of the Appellant was mandatory. Though the Appellant had filed its comments within sixty-days of the receipt of the draft Scheme and raised objections but the Board sanctioned the Scheme without considering the same.

66. The Respondent Company claimed unabsorbed losses to the extent of Rs. 77.12 Crores and possibility of further heavy loss of revenue due to exemption of capital gain tax on the transfer of assets of demerged company to SBPL, which is against the existing provisions of law, power being vested with the Income Tax Authorities.

67. Thus, if the impugned approved Scheme dated 20th October, 2016, is treated to be an approved 'Resolution Plan' under sub-section (1) of Section 31 of the 'I&B Code', it being against the provisions of the existing laws and being in violative of sub-section (2) of sub-clause (e) of Section 30 of the 'I&B Code' is fit to be set aside. The allegations, as made above, that the Scheme is against the provisions of the existing law, have not been disputed by the Respondents.

68. Though, we find that the impugned Scheme dated 20th October, 2016 is illegal but in absence of our jurisdiction to exercise of powers under Section 61 of the 'I&B Code', being barred by limitation, it will not

be desirable to set aside the impugned illegal Scheme dated 20th October, 2016. But we hold the same illegal.

69. Further, in absence of any provision to get the Scheme executed through any Court of Competent jurisdiction, the relevant provision(s) having been repealed, the Appellant may raise the question, if the Respondents move before any court of Law for implementation the Scheme.

70. Both the appeals are disposed of with aforesaid observations as recorded above. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

NEW DELHI
28th May, 2018
/AR/