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Limited", including the appellant. RTL-1, RTL-2, RTL-3 and RTL-4 of the appellant were secured by creation of charge on the said property.

The corporate debtor created first pari passu charge on its property admeasuring 166.96 acres land at Tappal, district Aligarh, Uttar Pradesh in favour of "Axis Trustee Services Limited" (security trustee), acting for and on behalf of a consortium of lenders of "Jaiprakash Associates Limited", including the appellant. RTL-1, RTL-2, RTL-3 and RTL-4 of the appellant were secured by creation of charge on the said property. **32**

The "corporate debtor", on March 7, 2017, created first exclusive charge over immovable property comprising 151.0063 acre land at Tappal, district Aligarh, Uttar Pradesh to secure RTL-7. The "corporate debtor" created first exclusive charge over immovable property comprising 158.17 acres land at Jaganpur and Aurangpur, Uttar Pradesh to secure RTL-7. **33**

On June 28, 2017, the demand notice issued by the appellant to "Jaiprakash Associates Limited" requesting to repay the outstanding amounts under the "Jaiprakash Associates Limited" facilities. **34**

Company Appeal (AT) (Insolvency) No. 370 of 2018 (UCO Bank) :

According to the appellant-"UCO Bank", two different mortgage deeds each dated February 24 2015, were executed by the "Corporate Debtor" mortgaging its properties (as third party security) (i) measuring 167.229 acres situated at Village Chaugan and Chhalesar, Agra, Uttar Pradesh ("Property 1") and (ii) measuring 166.9615 acres situated at Village Tappal, Kansera and Jeenagarh, Aligarh, Uttar Pradesh ("Property 2") to secure the financial assistance of "Jaiprakash Associates Limited", for the first time in favour of "Axis Bank Limited" and "State Bank of India" (both lenders of "Jaiprakash Associates Limited") on February 24, 2015. Later, upon accession of other lenders and enhancement of secured limits further mortgage was effectuated on September 15, 2015 and again on December 29, 2016. The mortgages in favour of the appellant was created vide registered mortgage deeds dated September 15, 2015 and December 29, 2016. **35**

Company Appeal (AT) (Insolvency) No. 374 of 2018 (The Karur Vysya Bank P. Ltd.) :

The case of the appellant is that "Karur Vysya Bank Ltd." (Scheduled Bank is a member of consortium of lenders to the "Jaiprakash Associates Ltd." as the appellant bank granted the following credit facilities to "Jaiprakash Associates Ltd." : **36**

(i) (GOOTERM120490001) rupee term loan of Rs. 75.00 crores

(ii) (GOOTERM150890002) rupee term loan of Rs. 50.00 crores

On the execution of following loan documents ;

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(a) master security trustee agreement ("MSTA") dated September 24, 2011 ;

(b) master inter creditor agreement ("MICA") dated September 24, 2011 ;

(c) deed of accession dated February 24, 2012 to "MSTA" in relation to "Jaiprakash Associates Ltd." facilities ;

(d) deed of adherence issued on February 24, 2012 to "MICA" in relation to "Jaiprakash Associates Ltd." facilities ; as also the other consortium bankers have granted various credit facilities to.

37 The corporate debtor, "M/s. Jaypee Infratech Limited" has mortgaged its following immovable properties, to secure the term loan facilities granted to "Jaiprakash Associates Ltd." by the appellant-bank :

(a) First pari passu charge over the immovable property comprising 167.229 acres land at Agra, Uttar Pradesh ("property 1") created by registered mortgage dated September 15, 2015, executed by the "Corporate Debtor" in favour of "Axis Trustee Services Limited" ("ATSL"), acting as security trustee for the benefit of the appellant and other lenders of "Jaiprakash Associates Ltd." ; and

(b) First pari passu charge over immovable property comprising 166.9615 acres land at Tappal, district Aligarh, Uttar Pradesh ("Property 2") created by registered mortgage dated September 15, 2015 ("IOM 2") in favour of "ATSL", acting as the security trustee for the benefit of the appellant and other lenders of "Jaiprakash Associates Ltd.".

38 The said mortgages were created to secure credit facilities comprising of term loans aggregating to Rs. 20,509 Crore granted by the "Jaiprakash Associates Ltd." consortium lenders to "Jaiprakash Associates Ltd." and redeemable convertible debentures issued for an amount of Rs. 3,600 crore to various debenture holders by "Jaiprakash Associates Ltd.".

39 Subsequently, to accommodate the additional lenders into the consortium of "Jaiprakash Associates Ltd." lenders, the charges over above mortgaged properties were extended to secure credit facilities of the existing lenders and additional lenders to the extent of term loans aggregating to 21081.50 crore and redeemable convertible debentures issued for an amount of Rs. 2,409.25 crores (reduced from Rs. 3,600 crores) and for the aforesaid extension of charge, the charge was momentarily and temporarily released with the limited purpose of charge extension for the above referred additional lenders and hence immediately remortgaged vide indenture of mortgages both dated December 29, 2016.

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Company Appeal (AT) (Insolvency) No. 376 of 2018 (L&T Infrastructure Finance Company Limited) :

The appellant-"L&T Infrastructure Finance Company Ltd." provided a chart showing details of transaction, as under : **40**

Name of the Financial Creditor	*Date of Mortgage*	*Assets mortgaged*	*Date of registration of Charge with ROC*	*Amount outstanding under facilities provided to Jayprakash Associates Ltd. (JAL)*
L & T Infrastructure Finance Company Limited (The Appellant herein)	15-09-2015 and 15-09-2015	In view of the financial assistance rendered to JAL by various lenders which constitute a consortium of lenders (hereinafter "Consortium") comprising of the appellant the corporate debtor, i. e., JIL, as a third party security provider to secure the facilities provided to JAL created mortgage of immovable property as stated herein below : (a) First pari passu charge over immovable property comprising 167.229 acres land at Agra, Uttar Pradesh ("Property 1") created by registered mortgage vide an Indenture of Mortgage dated 15-09-2015 executed at Noida, Uttar Pradesh in favour of Axis Trustee Services Limited ("ATSL"), acting as security trustee for the benefit of the appellant and other pari passu lenders of JAL ; and (b) First pari passu charge over immovable property comprising 166.9615	6-10-2015 A copy of the Certificate of Registration of Charge is Annexed herewith and marked as annexure A/1.	As on 09-08-2017, Rs. 189,91,42,048 (which comprises of the matured/ unmatured principal of the term loans facilities, interest and default interest thereon at the contractual rates) is outstanding under the facilities provided to JAL which are secured by the immovable properties of Jaypee Infratech Ltd. (JIL)

Company Appeal (AT) (Insolvency) No. 411 of 2018 (Central Bank of India) :

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41 The appellant-"Central Bank of India" has also provided details of asset mortgaged and other relevant details, as under :

Sl. No.	*Name of the bank*	*Asset mortgaged*	*Date of mortgage by corporate debtor*
1.	Central Bank of India	Immovable property comprising 167.229 acres land at Agra, Uttar Pradesh ("Agra Property")	Originally created vide indenture of mortgage dated September 15, 2015 Momentarily lifted and recreated on December 29, 2016
2.	Central Bank of India	Immovable property comprising 166.9615 acres land at Tappal, District Aligarh, Uttar Pradesh ("Aligarh Property")	Originally created vide indenture of mortgage dated September 15, 2015 Momentarily lifted and recreated on December 29, 2016

Company Appeal (AT) (Insolvency) No. 424 of 2018 (Canara Bank) :

42 The case of the appellant-"Canara Bank" is that two different mortgage deeds each dated February 24, 2015, were executed by the "corporate debtor" mortgaging its properties (as third party security) (i) measuring 167.229 acres situated at Village Chaugan and Chhalesar, Agra, Uttar Pradesh ("Property 1") and (ii) measuring 166.9615 acres situated at Village Tappal, Kansera and Jeenagarh, Aligarh, Uttar Pradesh ("Property 2") to secure the financial assistance of "Jaiprakash Associates Limited", for the first time in favour of "Axis Bank Limited" and "State Bank of India" (both lenders of "Jaiprakash Associates Limited") on February 24, 2015. Later, upon accession of other lenders and enhancement of secured limits further mortgage was effectuated on September 15, 2015 and again on December 29, 2016. The mortgages in favour of the appellant was created vide registered mortgage deeds dated September 15, 2015 and December 29, 2016.

Company Appeal (AT) (Insolvency) No. 458 of 2018 (IFCI Limited) :

43 The appellant-"IFCI Limited" has provided a chart showing the details of the mortgage deeds, etc., as under :

Sl. No.	*Particulars*	*Detail*
1.	Name of bank/financial institution	IFCI Ltd. having its registered office at IFCI Tower, 61, Nehru Place, New Delhi-110019.
2.	Date of mortgage	Mortgage deed : 29-12-2016

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		(i) Mortgage deed entered into between Jaypee Infratech Limited (JIL) and Axis Trustee Services Limited (ATSL) with respect to Leasehold Land of 167.229 acres situated at Villages Chhalesar and Chaugan, AGRA. (ii) Mortgage deed entered into between Jaypee Infratech Limited (JIL) and Axis Trustee Services Limited (ATSL) with respect to Leasehold Land of 166.9615 acres situated at Villages Tappal, Kansera and Jahangarh, ALIGARH.
3.	Asset(s) mortgaged	(i) Area : 167.229 acres (Villages Chhalesar and Chaugan, AGRA)
		Area : 166.9615 acres (Villages Tappal, Kansera and Jahangarh, ALIGARH)
4.	Date of admission of application under insolvency and bankruptcy code	09-08-2017 (Admission of the Company petition No. IB/77/ALD/2017 along with C. A. No. 26 of 2018) initiated by the IRP.
5.	Date of filing application under section 43 and other provisions of law	06-02-2018 (C. A. No. 26/2018 in Company Petition No. IB/77/ALD/2017.

Company Appeal (AT) (Insolvency) No. 492 of 2018 (Allahabad Bank) :

The case of the appellant-"Allahabad Bank" is that two different mortgage deeds each dated February 24, 2015, were executed by the "corporate debtor" mortgaging its properties (as third party security) (i) measuring 167.229 acres situated at Village Chaugan and Chhalesar, Agra, Uttar Pradesh ("property 1") and (ii) measuring 166.9615 acres situated at Village Tappal, Kansera and Jeenagarh, Aligarh, Uttar Pradesh ("Property 2") to secure the financial assistance of "Jaiprakash Associates Limited", for the first time in favour of "Axis Bank Limited" and "State Bank of India" (both lenders of "Jaiprakash Associates Limited") on February 24, 2015. Later, upon accession of other lenders and enhancement of secured limits further mortgage was effectuated on September 15, 2015 and again on December 29, 2016. The mortgages in favour of the appellant were created vide registered mortgage deeds dated September 15, 2015 and December 29, 2016. **44**

Company Appeal (AT) (Insolvency) No. 511 of 2018 (Jammu and Kashmir Bank) :

According to the appellant-"Jammu and Kashmir Bank", it along with other lenders of consortium bank led by the "ICICI Bank" had sanctioned/granted credit facility to "Jaiprakash Associates Ltd." and as per the terms **45**

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and conditions of the loan to "Jaiprakash Associates Ltd.", "Jaypee Infratech Limited" had mortgaged some of its properties as collateral security in favour of "Axis Trustee Services Limited" for the benefit of the appellant and other members of the Consortium. The appellant and other members of the consortium had sanctioned/granted financial assistance inter alia in the form of term loans to the "corporate debtor", from time to time. One of the conditions of the loan agreement was that the obligations be secured by the security interest over the secured property to the satisfaction of the secured parties and hence, a security trustee agreement was executed in favour of the "Axis Trustee Services Limited" (acting as the security trustee for the benefit of the appellant and other members of consortium of lenders of "Jaiprakash Associates Ltd."), in order to secure the credit facilities sanctioned to "Jaiprakash Associates Ltd.".

46 The mortgaged properties referred above were mortgaged (as third party security) for the first time in favour of the lender of "Jaiprakash Associates Ltd." ("Axis Bank Limited" and "State Bank of India") on February 24, 2015. Later, for the purpose of securing enhanced loan amount, the mortgage deeds were extended on September 15, 2015. The last of such mortgage was extended vide two separate registered mortgage deeds both dated December 29, 2016, for land admeasuring 167.229 acres and 166.9615 acres respectively. The loans of the appellant were duly secured by the said third party mortgages, from time to time. The said mortgages deeds were existing since February 24, 2015 and the same have been merely extended (momentarily released and immediately re-mortgaged) from time to time to secure additional loans, including the loans of the appellant (i.e. an amount of Rs 150 crores lent/advanced by the appellant to "Jaiprakash Associates Ltd.").

Company Appeal (AT) (Insolvency) No. 524 of 2018 (The South Indian Bank Ltd.) :

47 The case of the appellant-"South Indian Bank Ltd." is that on May 18, 2013, "deed of accession" and "deed of adherence" was executed by the appellant for an amount of Rs. 100 crores (rupee one hundred crores only) in favour of the parties to the master security trustee agreement dated September 24, 2011, by and among "Jaiprakash Associates Limited", and other parties as mentioned therein.

48 The "credit facility agreement" executed between "Jaiprakash Associates Limited" and the appellant for an amount of Rs. 120 crores (one hundred and twenty crores only) on March 24, 2015.

49 The "corporate debtor" on September 15, 2015, vide two different mortgage deeds of the same date ("IOM 1 and IOM 2"), mortgaged its

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properties bearing 167.229 acres at Village Chagan and Chhalesar, Agra, Uttar Pradesh ("property 1") and 166.9615 acres at Village Tappal, Kansera and Jeenagarh, Aligarh, Uttar Pradesh ("Property 2") in favour of a consortium of lenders to "Jaiprakash Associates Limited" which includes the appellant ("JAL Consortium") of "Jaiprakash Associates Limited". Lenders to secure term loans aggregating to Rs. 20,509 crores sanctioned to "Jaiprakash Associates Limited" by members of "Jaiprakash Associates Limited". Consortium and redeemable non-convertible debentures issued for amounts not exceeding Rs. 3,600 crore to debenture holders. RTL-1, RTL-2, RTL-3 and RTL-4 sanctioned by the appellant were inter alia secured by the aforesaid mortgages. Thereafter, on December 29, 2016, IOM 1 and IOM 2 were momentarily released to facilitate entry of new lenders into the "Jaiprakash Associates Limited" consortium which includes the appellant thereby securing an aggregate amount of Rs. 21,081.50 crores and redeemable convertible debentures issued for an amount of Rs. 2,409.25 crores (as reduced from redeemable convertible debentures issued for an amount of Rs. 3,600 crores).

50 Learned counsel for the appellants submitted that none of the provisions such as sections 42, 44, 45 or 66 of the "Insolvency and Bankruptcy Code" are applicable to any of the transactions, in question, as referred to above. They relied on the provisions aforesaid in support of their contentions.

Stand of the "Resolution Professional" :

51 Learned counsel appearing on behalf of the "resolution professional" submitted that the transaction, in question, come within the meaning of "preferential transaction", "undervalued transaction" and "fraudulent transaction" made by the "corporate debtor".

52 It was submitted that the appellants are consortium of banks and financial institution of "Jaiprakash Associates Limited", which is the holding company of the "corporate debtor" namely—"Jaiprakash Infratech Limited".

53 It was submitted that the "corporate debtor" has been facing severe financial stress and liquidity crunch since 2015 and started facing litigation from homebuyers (allottees) before different forum. Additionally, it started defaulting in payments of loans and financial assistance borrowed from "financial creditors". The "Jaypee Infratech Limited" ("corporate debtor") was declared a non-performing asset (NPA) on September 30, 2015 by the LIC and other lenders on different dates, as detailed below :

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Name of the bank	*Date of the NPA*
J & K Bank	31-08-2015
LIC	30-09-2015
Corporation Bank	29-02-2016
Syndicate Bank	31-03-2016
Bank of Maharashtra	31-03-2016
Union Bank	31-03-2016

54 It was also submitted that the "corporate debtor" was in dire needs of funds during period and was facing severe liquidity crunch to complete the construction of projects and deliver the flats to home-buyers, as well honour the payment obligations to "financial creditors" as also the "fixed deposit" holders. "Jaypee Infratech Limited" ("corporate debtor") owns various pieces of unencumbered land which was available to be liquidated or offered as security to raise finance to complete the constructions of flats and deliver possession of flats to the homebuyers/allottees.

55 It is also submitted that in the middle of its immense financial crunch, the "corporate debtor" while continuing to commit default to allottees and other "financial creditors", even after being declared as NPA, the directors of "Jaypee Infratech Limited" in utter disregard to their fiduciary duties mortgaged 585 acres of unencumbered land owned by "Jaypee Infratech Limited" ("corporate debtor") to secure the debt of "Jaiprakash Associates Ltd." which is the related party.

56 According to the "resolution professional", the mortgaged 858 acres of land valued at Rs. 5,900 crores approximately, which the directors of the "corporate debtor", mortgaged to secure the debt of "Jaiprakash Associates Ltd.", when the "corporate debtor" itself was in dire need of funds and could have sold/mortgaged unencumbered land to raise funds to complete the construction of flats in timely manner to fulfil its own obligation to its creditors and prevent value deterioration or erosion or insolvency.

57 Further, the case of the "resolution professional" is that "Jaiprakash Associates Ltd." being the holding company owing 995,000,000 numbers of shares of "Jaypee Infratech Limited" as on March 31, 2017, "Jaiprakash Associates Ltd." is a related party within the meaning of section 2(74) of the Companies Act, 2013 and the promoter of "Jaypee Infratech Limited" within the meaning of section 2(69) of the Companies Act, 2013.

58 It was further contended that in the 49th meeting dated May 28, 2015 and 50th meeting dated August 6, 2015 of the board of directors of "Jaypee Infratech Limited" ("corporate debtor") taken up the agenda to create security over the assets of the "Jaypee Infratech Limited" in favour of

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"Standard Chartered Bank" for financial assistance to related company "Jaiprakash Associates Ltd." was considered and decided in favour of the bank. In the 52nd meeting dated February 11, 2016 of the board of directors of "Jaypee Infratech Limited", the agenda relates to creations of security over the assets of the "Jaypee Infratech Limited" in favour of the "State Bank of India" for financial assistance to related company "Jaiprakash Associates Ltd." was considered and decision taken. In the 54th meeting dated September 10, 2016 of the board of directors of "Jaypee Infratech Limited", by its agenda for creation of security over the assets of the "Jaypee Infratech Limited" in favour of the "ICICI Bank Ltd." for financial assistance to related company "Jaiprakash Associates Ltd." was considered and resolved.

59 According to him, while the mortgage of land by the company to its related party may not be forbidden under law, it becomes questionable if it has been done in complete disregard to the interest of creditors and stakeholders of such company.

Discussion on provisions of law and facts :

60 Section 43 of the "Insolvency and Bankruptcy Code" relates to "preferential transactions and relevant time", as under :

"43. *Preferential transactions and relevant time.*—(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—

(a) there is a *transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor ;* and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers—

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(a) t*ransfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee ;*

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property ; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property :

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

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

(4) A preference shall be deemed to be given at a relevant time, if—

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date ; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date."

61 From bare reading of section 43, it is clear that the "liquidator" or the "resolution professional" is to form opinion that the "corporate debtor" at a relevant time has given a preference in such transactions as laid down in sub-section (2)(a) to any person as referred to therein.

As per sub-section (2)(a) of section 43, the "corporate debtor" shall be deemed to have given a preference, if— there is a transfer of property or an interest thereof of the "corporate debtor" for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the "corporate debtor".

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In the present case, the "corporate debtor" has created interest on the property of the "corporate debtor", but such interest has not been created in favour of any creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the "corporate debtor". **62**

The aforesaid interest on the property of the "corporate debtor" has been created in all these cases with regard to financial debt given by the appellants to "Jaiprakash Associates Ltd.", which is not the "corporate debtor". **63**

Thus, it is clear that the interest on the property of the "corporate debtor" has not been created in favour of the appellants-"financial creditors" of an antecedent financial debt of the appellants owed by the "Jaypee Infratech Ltd." ("corporate debtor"). Therefore, we hold that clause (a) of sub-section (2) of section 43 is not attracted in any of the case of the appellants bank, thereby none of the appellants bank come within the meaning of "deemed to have given a preference", as used in section 43. Therefore, the mortgage(s) created in their favour cannot be annulled on the ground of preferential transaction in terms of section 43(2)(a) of the "Insolvency and Bankruptcy Code". **64**

Clause (b) of sub-section (2) of section 43 relates to transfer under clause (a) of sub-section (2) of section 43, which in effect puts such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53. As clause (a) of sub-section (2) of section 43 is not attracted, the question of applicability of clause (b) of sub-section (2) of section 43 does not arise. **65**

Apart from the aforesaid position of law in respect to mortgage, in question, as per sub-section (3) of section 43, for the purposes of sub-section (2), "a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the "corporate debtor" or the transferee". The mortgages in question which were made in favour of the appellants- banks and Financial Institutions have been made in ordinary course of the business and financial affairs of the transferee, as apparent from the relevant facts. **66**

Therefore, we hold that section 43 is not attracted to any of the transaction/mortgage(s) made in favour of the appellants. **67**

Section 44 of the "Insolvency and Bankruptcy Code" relates to "orders in case of preferential transactions", which reads as follows : **68**

> "44. *Orders in case of preferential transactions*.—(1) The Adjudicating Authority, may, on an application made by the resolution

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professional or liquidator under sub-section (1) of section 43, by an order :

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

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

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

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

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

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

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

Provided that an order under this section shall not—

(a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value ;

(b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Explanation I.—For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from

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another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference,—

(i) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor ;

(ii) is a related party,

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

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

69 From bare reading of section 44, it is clear that it is on the basis of application made by the "resolution professional" or the "liquidator" under sub-section (1) of section 43, that the Adjudicating Authority has the power to pass order in terms of section 44. In these appeals as we have held that section 43 is not attracted to any of the transactions made in favour of the appellants, the Adjudicating Authority has no power to pass order under section 44 of the "Insolvency and Bankruptcy Code".

70 Section 45 of the "Insolvency and Bankruptcy Code" deals with "avoidance of undervalued transactions", as under :

"45. *Avoidance of undervalued transactions*.—(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor—

(a) makes a gift to a person ; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,

and such transaction has not taken place in the ordinary course of business of the corporate debtor."

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71 For holding a transaction undervalued, the "resolution professional"/ "liquidator" is required to examine the transactions which were made during "the relevant period" as prescribed under section 46, if any of it is undervalued. As per sub-section (2) of section 45, the transaction shall be considered "undervalued" "where the 'corporate debtor' makes a gift to a person or enters into a transaction with a person which involves the transfer of one or more assets by the 'corporate debtor' for a consideration the value of which is significantly less than the value of the consideration provided by the 'corporate debtor' and such transaction has not taken place in the ordinary course of business of the 'corporate debtor'".

72 In these appeals, we find that the transactions as has been made, i.e., mortgage(s) in favour of the appellants as and when made against the amount payable by "Jaiprakash Associates Limited" (borrower), the amount is not payable by the "corporate debtor". Therefore, clause (a) of sub-section (2) of section 45 is not attracted. For the same very reason, clause (b) of sub-section (2) of section 43 or section 45 cannot be made applicable with regard to transaction in question which are not related to any payment due from the "corporate debtor".

73 As section 44 is not attracted, it is not necessary to notice section 46 which is not attracted and, therefore, the Adjudicating Authority has no power to pass any order under section 48 of the "Insolvency and Bankruptcy Code".

74 Section 66 relates to "fraudulent trading" or "wrongful trading", if found during the "resolution process" or "liquidation process" in regard to the business of the "corporate debtor", which reads as under :

> "66. *Fraudulent trading or wrongful trading*.—(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.
>
> (2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if,—

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(a) before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor ; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor."

75 From bare perusal of section 66, it is clear that if during the "corporate insolvency resolution process" or "liquidation process", it is found that any business of the "corporate debtor" has been carried on with intent to defraud creditors of the "corporate debtor" or for any fraudulent purpose, the Adjudicating Authority is empowered to pass appropriate order under section 67.

76 In the present case, we have noticed that the transactions in question, i.e., mortgage(s) were made in favour of the "banks and financial institutions" by the "corporate debtor" ("Jaypee Infratech Limited") in the ordinary course of business of the "corporate debtor". The appellants-banks and financial institutions have given loans to the holding company namely—"Jaiprakash Associates Limited". The "corporate debtor" being one of the group company, like a guarantor, executed mortgage deed(s) in favour of the appellants-"banks and financial institutions". We have seen that none of the transactions were "preferential transaction" or "undervalued transaction". It has not been alleged that the transactions, in question, were made to defraud the creditors in terms of section 49 so allegation has been made that such transactions amount to "extortionate credit" as defined under section 50. Therefore, the Adjudicating Authority in absence of any such finding is not empowered to pass order under section 51. Further, as we have held that the transactions were made in the ordinary course of business in absence of any contrary evidence to show that they were made to defraud the creditors of the "corporate debtor" or for any fraudulent purpose, on mere allegation made by the "resolution professional", it was not open to the Adjudicating Authority to hold that mortgage deeds, in question, were made by way of transactions which come within the meaning of "fraudulent trading" or "wrongful trading" under section 66.

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77 It is not in dispute that all the appellants had granted loan to "Jaiprakash Associates Limited". Majority of banks (appellants) functioned as joint venture. For the said reason, the "corporate debtor" executed mortgaged deeds in favour of the appellants. Such transactions having made in ordinary course of business, the allegation against the banks and financial institutions (appellants) are not justified.

78 In fact, the "resolution professional" has submitted that while the mortgage of land by the company to its related party may not be forbidden under law, it becomes questionable if it has been done in complete disregard to the interest of creditors and stakeholders of such company.

79 The Adjudicating Authority having failed to notice the aforesaid relevant facts and as it misread the provisions of sections 43, 45 and 66 of the "Insolvency and Bankruptcy Code" and on the basis of wrong presumption and error of fact held that transactions in question amount to "preferential transactions" (section 43) ; "undervalued transactions" (section 45) and for fraudulent purpose to defraud the creditors of the "corporate debtor" (Section 66), the impugned order cannot be upheld.

80 For the reasons aforesaid, we set aside the impugned order dated May 16, 2018, so far it relates to the appellants. In view of such findings, the appellants-"Axis Bank Ltd.", "Standard Chartered Bank", "ICICI Bank Ltd.", "State Bank of India", "Jai Prakash Associates Ltd.", "Bank of Maharashtra", "United Bank of India', "Central Bank of India", "UCO Bank", "Karur Vyasa Bank P. Ltd.", "L&T Infrastructure Finance Company Ltd.", "Canara Bank", "Karnataka Bank Ltd.", "IFCI Ltd.", "Allahabad Bank", "Jammu and Kashmir Bank" and "The South Indian Bank Ltd." are entitled to exercise their rights under the "Insolvency and Bankruptcy Code".

81 All the appeals are allowed. However, we make it clear that we have not made any observations with regard to the promoters or directors in absence of any appeal preferred on their behalf. No costs.

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[2020] 221 Comp Cas 625 (SC)

[IN THE SUPREME COURT OF INDIA]

ANUJ JAIN, INTERIM RESOLUTION PROFESSIONAL FOR JAYPEE INFRATECH LTD.

v.

AXIS BANK LTD.

A. M. KHANWILKAR and **DINESH MAHESHWARI** JJ.

February 26, 2020.

HF ▸ Appellant

INSOLVENCY RESOLUTION—PREFERENTIAL TRANSACTION—MORTGAGE OF CORPORATE DEBTOR'S PROPERTY TO SECURE DEBTS OF ITS HOLDING COMPANY—HOLDING COMPANY ALSO OPERATIONAL CREDITOR OF CORPORATE DEBTOR—TRANSACTION NOT IN ORDINARY COURSE OF BUSINESS—DEEMED PREFERENCE OF HOLDING COMPANY OVER OTHER CREDITORS—SECURITY INTERESTS CREATED BY CORPORATE DEBTOR OVER ITS PROPERTIES DISCHARGED IN WHOLE—LENDERS OF HOLDING COMPANY CANNOT CLAIM STATUS AS FINANCIAL CREDITORS OF CORPORATE DEBTOR—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 43, 44.

INSOLVENCY RESOLUTION—PREFERENTIAL TRANSACTIONS—RELEVANT TIME—PROVISION CANNOT BE RETROSPECTIVE MERELY BECAUSE LOOK-BACK PERIOD ENVISAGED FOR PURPOSE OF FINDING "RELEVANT TIME"—RE-MORTGAGE OF CORPORATE DEBTOR'S PROPERTY TO SECURE DEBTS OF ITS HOLDING COMPANY—FRESH MORTGAGE—TRANSACTIONS ENTERED INTO WITHIN TWO YEARS PRIOR TO RELEVANT DATE DEEMED PREFERENCE TO RELATED PART BY CORPORATE DEBTOR—COVERED WITHIN PERIOD ENVISAGED BY SUB-SECTION OF SECTION 43(4)—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 43(4).

INSOLVENCY RESOLUTION—PREFERENTIAL TRANSACTION—TRANSACTIONS ENTERED INTO IN ORDINARY COURSE OF BUSINESS—CREATION OF ENCUMBRANCES OVER PROPERTIES TO SECURE DEBTS OF HOLDING COMPANY—CORPORATE DEBTOR DECLARED AS A NON-PERFORMING ASSET AND UNDER HEAVY PRESSURE TO HONOUR ITS COMMITMENTS—CREATION OF SUCH ENCUMBRANCES NOT TRANSACTION ENTERED INTO IN ORDINARY COURSE OF BUSINESS—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 43.

INSOLVENCY RESOLUTION—PREFERENTIAL TRANSACTION—TRANSFER IN ORDINARY COURSE OF BUSINESS OR FINANCIAL AFFAIRS OF CORPORATE DEBTOR "OR" TRANSFEREE—PURPOSIVE INTERPRETATION— "OR" SHOULD BE READ AS "AND"—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 43.

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INTERPRETATION OF STATUTES—PURPOSIVE INTERPRETATION—INTERPRETATION TO ENSURE PROVISION OPERATES TO EFFECTUATE INTENTION OF LEGISLATURE AND ACHIEVES AVOWED OBJECTIVE.

INSOLVENCY RESOLUTION—PREFERENTIAL TRANSACTIONS—RESOLUTION PROFESSIONAL—DUTIES AND RESPONSIBILITIES—EXPLAINED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 43.

INSOLVENCY RESOLUTION—PREFERENTIAL TRANSACTIONS—WRONGFUL OR FRAUDULENT TRADING—UNDERVALUED TRANSACTION—APPLICATION BY RESOLUTION PROFESSIONAL—SCOPE OF REQUISITE ENQUIRIES ENTIRELY DIFFERENT—RESOLUTION PROFESSIONAL TO KEEP SUCH REQUIREMENTS IN VIEW WHILE MAKING A MOTION TO ADJUDICATING AUTHORITY—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 43, 44, 45, 66.

INSOLVENCY RESOLUTION—FINANCIAL CREDITOR—DEFINITION—THIRD PARTY SECURITY—MORTGAGE OF PROPERTY OF CORPORATE DEBTOR TO SECURE DEBT OFFERED TO ITS HOLDING COMPANY—NEITHER TOWARDS ANY LOAN, FACILITY OR ADVANCE TO CORPORATE DEBTOR NOR TOWARDS PROTECTING ANY FACILITY OR SECURITY OF CORPORATE DEBTOR—CORPORATE DEBTOR NOT OWING LENDER ANY "FINANCIAL DEBT"—SUCH LENDER NOT "FINANCIAL CREDITORS" OF CORPORATE DEBTOR—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 5(7), (8).

The scheme of the Insolvency and Bankruptcy Code, 2016 is to disapprove and disregard preferential transactions which fall within the ambit of section 43 of the Code and to ensure that any property likely to have been lost due to such transaction is brought back to the corporate debtor ; and if any encumbrance is created, to remove such encumbrance so as to bring the corporate debtor back on its wheels or in other event (of liquidation), to ensure pro rata, equitable and just distribution of its assets. Such provisions as contained in sections 43 and 44 came into operation as the comprehensive scheme of corporate insolvency resolution and liquidation from the date of being made effective ; and merely because a look-back period is envisaged, for the purpose of finding the "relevant time", it cannot be said that the provision itself is retrospective in operation.

PURBANCHAL CABLES AND CONDUCTORS P. LTD. *v.* ASSAM STATE ELECTRICITY BOARD [2012] 7 SCC 462 *distinguished.*

Fraudulent preferences in the affairs of corporate persons had been dealt with by the Legislature in the Companies Act, 1956 and have also been dealt with in the Act of 2013. Though therein, essentially, fraudulent preferences

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and transfers not in good faith are dealt with whereas, in the scheme of the Code, separate provisions are made as regards transactions intended at defrauding the creditors (section 49 of the Code) and fraudulent trading or wrongful trading (section 66 of the Code). The provisions contained in section 43 of the Code, however, indicate that the Legislature would not countenance that when a preference is given at a relevant time and thereby, the beneficiary of preference acquires an unwarranted better position in the event of distribution of assets. No new liability has been imposed or a new right has been created. Maximisation of the value of assets of corporate persons and balancing the interests of all the stakeholders being the objectives of the Code, the provisions therein need to be given fuller effect in conformity with the intention of the Legislature.

By virtue of the proviso to sub-section (3) of section 1 of the Code, different dates can be provided for enforcement of different provisions of the Code ; and in fact, different provisions have been brought into effect on different dates. However, after the coming into force of the provisions, if a look-back period is provided for the purpose of any particular enquiry, it cannot be said that the operation of the provision itself would remain in hibernation until such look-back period from the date of commencement of the provision comes to an end. There is nothing in the Code to indicate that any provision in Chapter II or Chapter III can be taken out and put in operation at a later date than the date notified.

Applying the well-known principles of noscitur a sociis, and the scheme of section 43 of the Code to discredit and disregard transactions by the corporate debtor which tend to give unwarranted benefit to one creditor or surety or guarantor over others, the purport of clause (a) of sub-section (3) of section 43 is principally directed towards the corporate debtor's dealings. In other words, the whole conspectus of sub-section (3) is that only if a transfer is found to have been made by the corporate debtor, either in the ordinary course of its business or financial affairs or in the process of acquiring any enhancement in its value or worth, might it be considered as having been done without any tinge of favour to any person in preference to others and thus, might stand excluded from the purview of being preferential, subject to fulfilment of other requirements of sub-section (3) of section 43.

If the transfer is examined with reference to the ordinary course of business or financial affairs of the transferee alone, it may conveniently get excluded from the rigour of sub-section (2) of section 43, even if not standing within the scope of ordinary course of business or financial affairs of the corporate debtor. This is not the scheme of the Code nor the intent of section 43 thereof.

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For the purpose of exception under clause (a) of sub-section (3) of section (3), the intent of the Legislature is required to be kept in view. If the ordinary course of business or financial affairs of the transferee would itself be decisive for exclusion, almost every transfer made to transferees such as lender-banks and financial institutions would be taken out of the net, which would practically result in frustrating the provision itself.

An interpretation that defeats the scheme, intent and object of the statutory provision is to be eschewed and for that matter, if necessary, by applying the principles of purposive interpretation rather than literal. The contents of clause (a) of sub-section (3) of section 43 call for purposive interpretation so as to ensure that the provision operates in tune with the intention of Legislature and achieves the avowed objectives. Therefore, the expression "or", appearing as a disjunctive between the expressions "corporate debtor" and "transferee", ought to be read as "and" ; so as to be conjunctive of the two expressions, i. e., "corporate debtor" and "transferee". Thus read, clause (a) of sub-section (3) of section 43 shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee. Only by reading "or" as "and", can it be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer to the core question as to whether the corporate debtor has done anything which falls foul of its corporate responsibilities.

Even though furnishing a security may be a normal business practice, it would become a part of "ordinary course of business" of a particular corporate entity only if it is part of "the undistinguished common flow of business done" ; and does not arise out of "any special or particular situation".

DOWNS DISTRIBUTING CO. PTY LTD. *v.* ASSOCIATED BLUE STAR STORES PTY LTD. (IN LIQUIDATION) [1948] 76 CLR 463 (Australia) *relied on*.

In the ordinary course of their business, when bankers or financial institutions examine a proposal for loan or advance or akin facility, they are bound to, and do take up the exercise commonly termed as "due diligence" so as to study the viability of the proposed enterprise and to ensure, inter alia, that the security against such loan or advance or facility is genuine and adequate ; and would be available for enforcement at any point of time. Given the nature of the transaction, the lenders must prefer a clean security to justify the transaction as being in the ordinary course of their business. In the same exercise, in the ordinary course of their business, if they enter into a transaction whereby a third party security, including that of a subsidiary company, is to be

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taken as collateral, they are obliged to undertake further due diligence so as to ensure that such third party security is a prudent and viable one and is not likely to be hit by any law. In that sequence, they remain under obligation to assure themselves that such third party whose security is being taken, is not already indebted and is not likely to fail in dealing with its own indebtedness.

Looking to the legal fictions created by section 43 and looking to the duties and responsibilities according to section 25, for the purpose of application of section 43 of the Code in an insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows : (i) In the first place, the resolution professional shall take two major but distinct steps. One is of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step is of identifying the persons involved in such transactions and of putting them in two categories ; one being of the persons who fall within the definition of "related party" in terms of section 5(24) of the Code and another of the remaining persons. (ii) In the next step, the resolution professional must identify in which of the transactions of preceding two years, the beneficiary is a related party and in which the beneficiary is not. It would lead to bifurcation of the identified transactions into two sub-sets. The sub-set concerning unrelated parties must be trimmed to include only the transactions of the preceding one year from the date of commencement of insolvency. (iii) Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find : (a) whether the transaction is of transfer of property or an interest thereof of the corporate debtor ; and (b) whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to shortlisting of such transactions which carry the potential of being preferential. (iv) In the next step, the shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. Transactions which are so found would answer section 43(2)(a) of the Code. (v) In yet further step, such of the scanned and scrutinised transactions that are found covered by clause (a) of sub-section (2) of section 43(2)(a) of the Code must be examined to see whether the transfer in question has the effect of putting such creditor or surety or guarantor in a more beneficial position than it would have been in, in the event of distribution of assets under section 53 of the Code. If so, the transaction under examination would be deemed to be of preference within a

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relevant time, provided it does not fall within the exclusion provided by section 43(3) of the Code. (vi) In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, has to pass through another filtration to find if it does not answer to either of the clauses (a) and (b) of sub-section (3) of section 43. (vii) After the resolution professional has carried out these analyses of the transactions, he has to apply to the Adjudicating Authority for necessary orders in relation to the transactions that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3).

On a motion made by the resolution professional after and in terms of the above exercise, the Adjudicating Authority, in its turn, has to examine if the transaction answers the descriptions noted above and decide what order is required to be passed, for avoidance of the transaction or otherwise. Looking to the legal fictions created by section 43 and looking to the duties and responsibilities of the resolution professional and the Adjudicating Authority, ordinarily an adherence to the process would ensure reasonable clarity and less confusion ; and would aid in optimum utilization of time in any insolvency resolution process.

The arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful or fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by section 45 or 46 or 47 or section 66 of the Code. The scope of enquiry in relation to the questions whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.

A financial creditor is from the very beginning, involved in assessing the viability of the corporate debtor who can, and indeed, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress. Hence, a financial creditor is the one whose stakes are intrinsically inter-woven with the well-being of the corporate debtor.

While defining "financial creditor" and "financial debt" in section 5(7) and section 5(8) of the Code, both the expressions "means" and "includes" have been used. According to the definition, while "financial creditor" means a person to whom a "financial debt" is owed, it also includes a person to whom such debt has been legally assigned or transferred. The term "financial debt" has also been defined with the expressions "means" and "includes". A "financial debt" means a debt along with interest, if any, which is disbursed

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against the consideration for the time value of money ; and it includes the money borrowed or raised or protected in any of the manners prescribed in sub-clauses (a) to (i) of section 5(8) of the Code.

For a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of section 5(8) ; it may also include any derivative transaction or counter-indemnity obligation according to sub-clauses (g) and (h) of section 5(8) ; and it may also be the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against consideration for the time value of money remains an essential part even in respect of the transactions or dealings stated in sub-clauses (a) to (i) of section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read as so expansive, and infinitely wide, that any transaction could stand alone to become a financial debt. In other words, the transactions stated in sub-clauses (a) to (i) of section 5(8) would fall within the ambit of "financial debt" only if they carry the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money. The root requirement for a creditor to become a financial creditor for the purpose of Part II of the Code, is that there must be a financial debt owed to that person. He may be the principal creditor to whom the financial debt is owed or an assignee in terms of the extended meaning of this definition but the requirement of existence of a debt being owed is not forsaken.

For a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

In the scheme of the Code, what is intended by the expression "financial creditor" is a person who has direct engagement in the functioning of the corporate debtor ; who is involved right from the beginning while assessing the viability of the corporate debtor ; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct

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involvement in a functional existence of corporate debtor, acquires a unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of the insolvency resolution process, this class of stakeholders, namely, financial creditors, is entrusted by the Legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be a concomitant of such resurgence of the corporate debtor.

SWISS RIBBONS P. LTD. *v.* UNION OF INDIA [2019] 213 Comp Cas 198 (SC) *relied on.*

A person having only security interest over the assets of corporate debtor (such as third party securities), even if falling within the description of "secured creditor" by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of "financial creditors" according to the definitions contained in sub-sections (7) and (8) of section 5 of the Code. If a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of "debt" under section 3(10) of the Code. However, it would remain a debt alone and cannot partake of the character of a "financial debt" within the meaning of section 5(8) of the Code.

JAL, a public listed company with more than 5 lakhs individual shareholders, was the holding company of the corporate debtor. In the year 2003, JAL was awarded the rights for construction of an expressway and a concession agreement was entered into with the Yamuna Expressway Industrial Development Authority. The corporate debtor was set up as a special purpose vehicle for this purpose. Finance was obtained from a consortium of banks against partial mortgage of land acquired and pledge of 51 per cent. of the shareholding of JAL. Housing plans were envisaged for construction of real estate projects in two locations. The corporate debtor was declared a non-performing asset by LIC on September 30, 2015 and by some of its other lenders on March 31, 2016. One of the banks, instituted a petition under section 7 of the Code seeking initiation of the corporate insolvency resolution process against the corporate debtor alleging that it had committed a default to the tune of Rs. 526.11 crores in repayment of its dues. The petition was admitted and an interim resolution professional was appointed. The interim resolution professional made an application seeking directions that the transactions entered into by the directors and promoters of the corporate debtor creating

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mortgages of 858 acres of immovable property owned by it to secure the debts of JAL were preferential, undervalued, wrongful, and fraudulent ; and hence, the security interest created by the corporate debtor in favour of the lenders of JAL be discharged and such properties be deemed to have vested in the corporate debtor. The Adjudicating Authority allowed the application with respect to six of the transactions covering about 758 acres of land. On appeals filed by the lenders of JAL, the Appellate Tribunal set aside the order passed by the Adjudicating Authority and held that such lenders of JAL were entitled to exercise their rights under the Code. On further appeals :

Held, *allowing the appeals, (i) that August 9, 2017 was the insolvency commencement date. The transactions in question had the ultimate effect of working towards the benefit and advantage of the borrower, i. e., JAL who obtained loans and finances by virtue of such transactions. The mortgage deeds executed by the corporate debtor to secure the debts of JAL, obviously, amounted to creation of security interest to the benefit of JAL. JAL was admittedly the holding company of the corporate debtor as its largest equity shareholder (with approximately 71.64 per cent. shareholding). Moreover, JAL admittedly was the operational creditor of the corporate debtor, for an amount of approximately Rs. 261.77 crores. JAL itself maintained that it had been providing financial, technical and strategic support to the corporate debtor in various ways. JAL was a related party to the corporate debtor and was a creditor and surety of the corporate debtor. In other words, the corporate debtor owed antecedent financial debts as also operational debts and other liabilities towards JAL. There was nothing to doubt that the corporate debtor had given preference by way of the mortgage transactions in question for the benefit of its related person JAL (who had been its creditor as also surety) for and on account of the antecedent financial debts, operational debts and other liabilities owed to such related person. In the given fact situation, it was plain and clear that the transactions in question met all the requirements of section 43(2)(a) of the Code. The requirements of section 43(2)(b) of the Code were also met. The submission that in the distribution in case of liquidation (according to section 53 of the Code), JAL, as an operational creditor, stood much lower in priority than the other creditors and stakeholders only strengthened the position that by way of the transfers, JAL was put in a more beneficial position than it would have been in, in the absence of such transfers. With the transactions in question, JAL had been put in an advantageous position vis-a-vis other creditors on the counts that : (a) JAL received a huge working capital by way of loans and facilities extended to it by the lenders ; and (b) by way of the transactions in question, JAL's liability towards its own*

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creditors was reduced, in so far as the value of the mortgaged properties was concerned. As a necessary corollary, in the eventuality of distribution of assets under section 53, the other creditors and stakeholders of the corporate debtor would have to bear the brunt of the corresponding disadvantage because such heavily encumbered assets would not form the part of available estate of the corporate debtor. The applicability of clauses (a) and (b) of sub-section (2) of section 43 of the Code was clear and complete in relation to the six transactions. The transactions had been of transfers for the benefit of JAL, who was a related party of the corporate debtor and was its creditor and surety by virtue of antecedent operational debts as also other facilities extended by it. The transactions had the effect of putting JAL in a more beneficial position than it would have been in, in the event of distribution of assets being made in accordance with section 53 of the Code. Thus, the corporate debtor had given a preference in the manner laid down in section 43(2) of the Code.

(ii) That the look-back period was two years preceding insolvency commencement date, i. e., August 9, 2017 in terms of section 43(4)(a). Therefore, the transactions commencing from August 10, 2015 until the date of insolvency commencement would fall under the scanner. Even if JAL had entered into the facility agreement with the lender bank before August 10, 2015 it would not have a bearing on transactions by the corporate debtor entered into after the above date. Although most of the properties in question had already been under mortgage with the respective lenders and that the properties were only re-mortgaged the re-mortgage, on all its legal effects and connotations, could only be regarded as a fresh mortgage. Even if the same property had been again mortgaged with the same lenders on the same day of release, it could not be countenanced for the transaction operates towards extending unwarranted preference to JAL by the corporate debtor. While making this mortgage dated September 15, 2015 the facility amount being obtained by JAL increased from Rs. 3,250 crores to a whopping Rs. 24,109 crores and the number of creditors went up from 2 to 24. Such a transaction was a fresh mortgage to secure extra facilities obtained by JAL and thereby, extending unwarranted advantage to JAL at the cost of the estate of the corporate debtor. A fresh mortgage, even if on the same date, could not be countenanced and is hit by section 43, being a deemed preference. The transactions in question had been of deemed preference to a related party JAL by the corporate debtor during the look-back period of two years and had rightly been held covered within the period envisaged by sub-section (4) of section 43 of the Code.

(iii) That the transfers in question could be considered outside the purview of section 43(2) of the Code only if it could be shown that they were made

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in the "ordinary course of business or financial affairs" of the corporate debtor and the transferees. Though it could be assumed that the transactions in question were entered in the ordinary course of business of bankers and financial institutions the transactions did not fall within the ordinary course of business of the corporate debtor. The corporate debtor had been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. The ordinary course of business or financial affairs of the corporate debtor JIL could not be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company ; and that too at the cost of its own financial health. The corporate debtor was already reeling under debts with its accounts with some of the lenders having been declared as a non-performing asset ; and it was also under heavy pressure to honour its commitment to the home buyers. In the given circumstances, the transfers in questions were not made in ordinary course of business or financial affairs of the corporate debtor.

(iv) That the facts that the securities were disclosed in the annual reports or and that none of the creditors expressed dissent were of no effect because such disclosure or want of objection by the creditors, by themselves, would not operate as estoppel against anybody nor take the transaction out of the purview of the legal fiction predicated in section 43, if it is otherwise of a preference at a relevant time. Similarly, the distinction between "non-performing assets" and "wilful default" ; the submission that the non-performing asset could be regularised ; and that the mortgages were created before the corporate debtor was declared a non-performing, had no bearing on the question whether the transactions were in the ordinary course of business or financial affairs of the corporate debtor.

(v) That several of the lenders of JAL were shown to be the direct creditors of the corporate debtor too, to the extent of the advances made to the debtor. They could not plead ignorance about the actual state of affairs and financial position of the corporate debtor. Despite such knowledge, if they chose to take the business risk of accepting security from the corporate debtor and that too, for securing the loans made over to JAL, who was a directly related party of the corporate debtor for being its holding company, they themselves remained responsible for the legal consequences. The submission that holding the transactions in question as preferential would result in impacting large number of transactions undertaken by the bankers and financial institutions, of financing in the ordinary course of their business ; and the consequences might be devastating and irreversible on the economy, was

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to be rejected. [The Supreme Court did not go into the questions as to whether the transactions were undervalued or fraudulent.]

(vi) That the security interests created by the corporate debtor over the properties in question stood discharged in whole. Therefore, the lenders could not claim any status as creditors of the corporate debtor and there could arise no question of their making any claim to be treated as financial creditors as such.

Held also, *that the debts in question were in the form of third party security said to have been given by the corporate debtor so as to secure the loans or advances or facilities obtained by JAL from the banks and financial institutions. Such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it could not be said that the corporate debtor owed them any "financial debt" within the meaning of section 5(8) of the Code. Hence, such lenders of JAL did not fall in the category of the "financial creditors" of the corporate debtor.*

COMMITTEE OF CREDITORS OF ESSAR STEEL INDIA LTD. *v.* SATISH KUMAR GUPTA [2020] 219 Comp Cas 97 (SC) *and* SWISS RIBBONS P. LTD. *v.* UNION OF INDIA [2019] 213 Comp Cas 198 (SC) *explained*.

STATE BANK OF INDIA *v.* KUSUM VALLABHDAS THAKKAR (SMT.) [1991] SCC Online Guj 14 *and* RAJKUMARI KAUSHALYA DEVI *v.* BAWA PRITAM SINGH [1960] AIR 1960 SC 1030 *distinguished*.

SREI INFRASTRUCTURE FINANCE LTD. *v.* STERLING INTERNATIONAL ENTERPRISES LTD. [2020] 221 Comp Cas 580 (NCLT) *disapproved*.

Order of the National Company Law Appellate Tribunal in AXIS BANK LTD. *v.* ANUJ JAIN, RESOLUTION PROFESSIONAL FOR JAYPEE INFRATECH LTD. [2020] 221 Comp Cas 590 (NCLAT) *reversed*.

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ArcelorMittal India P. Ltd. *v.* Satish Kumar Gupta [2018] 211 Comp Cas 369 (SC) (para 16)

Axis Bank Ltd. *v.* Anuj Jain, Resolution Professional for Jaypee Infratech Ltd. [2020] 221 Comp Cas 590 (NCLAT) (para 1)

Barclays Bank Ltd. *v.* IRC [1962] 32 Comp Cas 308 (HL) (para 19)

Bharat Co-operative Bank (Mumbai) Ltd. *v.* Co-operative Bank Employees Union [2007] 4 SCC 685 (paras 41, 42)

Bikram Chatterjee *v.* Union of India [2019] 8 SCC 527 (para 41)

Black Diamond Beverages *v.* CTO [1997] 107 STC 219 (SC) (para 42)

British Railways Board *v.* Herrington [1972] 2 WLR 537 (HL) (para 41)

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Burns *v.* McFarlane [1940] 64 CLR 108 (Australia) (para 25)

Chitra Sharma *v.* Union of India [2018] 210 Comp Cas 609 (SC) (paras 6, 41)

Committee of Creditors of Essar Steel India Ltd. *v.* Satish Kumar Gupta [2020] 219 Comp Cas 97 (SC) (paras 36, 37, 38, 50)

Dasappa *v.* Jogiah [1964] ILR 1964 Karn 545 (para 37)

Delhi Development Authority *v.* Bhola Nath Sharma [2011] 2 SCC 54 (para 42)

Devinder Singh *v.* State of Punjab [2008] 1 SCC 728 (paras 15, 18)

Dilworth *v.* Commissioner of Stamps [1899] AC 99 (PC) (para 42)

Downs Distributing Co. Pty Ltd. *v.* Associated Blue Star Stores Pty Ltd. (in liquidation) [1948] 76 CLR 463 (Australia) (paras 14, 25)

East End Dwellings Co. Ltd. *v.* Finsbury Borough Council [1952] AC 109 (HL) (para 19)

Eera (through Dr. Manjula Krippendorf) *v.* State (NCT of Delhi) [2017] 15 SCC 133 (para 41)

Ferguson *v.* McMillan [1954] SLT 109 (Scot) (para 19)

Gough *v.* Gough [1891] 2 QBD 665 (CA) (para 42)

Hamdard (Wakf) Laboratories *v.* Deputy Labour Commissioner [2007] 5 SCC 281 (para 42)

Haryana Financial Corporation *v.* Jagdamba Oil Mills [2002] 3 SCC 496 (para 41)

Himachal Pradesh Housing and Urban Development Authority *v.* Ranjit Singh Rana [2012] 4 SCC 505 (para 41)

Hindustan Co-operative Housing Building Society Ltd. *v.* Registrar, Co-operative Societies [2009] 14 SCC 302 (para 19)

Hiralal Rattanlal *v.* State of U. P. [1973] 1 SCC 216 (para 41)

Home Office *v.* Dorset Yacht Co. Ltd. [1970] 2 All ER 294 (HL) (para 41)

Hunter Douglas Australia Pty. *v.* Perma Blinds [1970] 44 Aust LJ R 257 (para 19)

IDBI Bank Ltd. *v.* Administrator, Kothari Orient Finance Ltd. [2009] 152 Comp Cas 282 (Mad) (paras 15, 24)

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Namboodripad (N. D. P.) *v.* Union of India [2007] 4 SCC 502 (para 42)

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Pomal Kanji Govindji *v.* Vrajlal Karsandas Purohit [1989] 1 SCC 458 (para 37)

Prithi Nath Singh *v.* Suraj Ahir [1963] 3 SCR 302 (para 37)

Punjab Land Development and Reclamation Corporation Ltd. *v.* Labour Court [1990] 3 SCC 682 (para 42)

Purbanchal Cables and Conductors P. Ltd. *v.* Assam State Electricity Board [2012] 7 SCC 462 (paras 15, 23)

R. *v.* Brixton Prison (Governor), *Ex parte* Soblen [1963] 2 QBD 243 (para 19)

R. *v.* Norfolk County Court [1891] 60 LJ QB 379 (para 19)

Rajkumari Kaushalya Devi *v.* Bawa Pritam Singh [1960] AIR 1960 SC 1030 (paras 33, 37, 52)

Ram Chand Sur *v.* Iswar Chandra Giri (61 IC 539) (para 36)

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State Bank of India *v.* Jah Developers P. Ltd. [2019] 6 SCC 787 (para 15)

State Bank of India *v.* Kusum Vallabhdas Thakkar (Smt.) [1991] SCC Online Guj 14 (paras 33, 37, 51)

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State of Bombay *v.* Chamarbaugwala (R. M. D.) [1957] SCR 874 (paras 14, 25)

State of West Bengal *v.* Associated Contractors [2015] 1 SCC 32 (para 41)

Sundaram Pillai (S.) *v.* Pattabiraman (V. R.) [1985] 1 SCC 591 (para 41)

Swiss Ribbons P. Ltd. *v.* Union of India [2019] 213 Comp Cas 198 (SC) (paras 16, 36, 37, 38, 39, 47, 50)

Union of India *v.* Raman Iron Foundry [1974] 2 SCC 231 (para 41)

Venugopal (M.) *v.* Divisional Manager, LIC [1994] 2 SCC 323 (para 19)

Civil Appeals Nos. 8512-8527 with 6777-6797 and 9357-9377 of 2019.

Appeal from the judgment and order dated August 1, 2019 of the National Company Law Appellate Tribunal in Company Appeal (AT) (Insolvency) Nos. 243, 244, 245, 249, 276, 343, 370, 374, 376, 411, 424, 436, 458, 492, 511 and 524 of 2018. The judgment of the National Company Law Appellate Tribunal is reported as *Axis Bank Ltd.* v. *Anuj Jain, Resolution Professional for Jaypee Infratech Ltd.* [2020] 221 Comp Cas 590 (NCLAT).

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JUDGMENT

The judgment of the court was delivered by

DINESH MAHESHWARI J.—*Introductory*

1 These appeals are essentially directed against the common order dated August 1, 2019[1] as passed by the National Company Law Appellate Tribunal, New Delhi[2] in a batch of appeals preferred by various banks and financial institutions whereby, the Appellate Tribunal set aside the order dated May 15, 2018 passed by the Adjudicating Authority, the National Company Law Tribunal, Allahabad Bench[3] on the application moved by the interim resolution professional[4] in the corporate insolvency resolution process[5] concerning the corporate debtor company, viz., Jaypee Infratech Ltd.[6] seeking avoidance of certain transactions, whereby the corporate

1. See *Axis Bank Ltd.* v. *Anuj Jain, Resolution Professional for Jaypee Infratech Ltd.* [2020] 221 Comp Cas 590 (NCLAT).
2. Hereinafter also referred to as "the Appellate Tribunal" or "NCLAT".
3. Hereinafter also referred to as "the Tribunal" or "NCLT" or "the Adjudicating Authority".
4. "IRP" for short.
5. "CIRP" for short.
6. "JIL" for short ; also referred to as "the corporate debtor".

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debtor had mortgaged its properties as collateral securities for the loans and advances made by the lender banks and financial institutions to Jaiprakash Associates Ltd.[1], the holding company of JIL, as being preferential, undervalued and fraudulent, in terms of sections 43, 45 and 66 of the Insolvency and Bankruptcy Code, 2016[2].

1.1. It may be noticed at the outset that the batch of appeals decided by the impugned common order dated August 1, 2019 also comprised of two appeals filed by the lenders of JAL, being Comp. App (AT) (Ins) No. 353 of 2018 and Comp. App (AT) (Ins) No. 301 of 2018 that were preferred against the orders passed by the NCLT on May 9, 2018 and May 15, 2018 respectively, whereby the NCLT approved the decision of IRP rejecting the claims of such lenders of JAL to be recognized as financial creditors of the corporate debtor JIL on the strength of the mortgage created by the corporate debtor, as collateral security of the debt of its holding company JAL. These two appeals also came to be allowed as per the result recorded in the impugned order dated August 1, 2019 though the entire discussion and the final conclusion therein had only been in relation to the order dated May 16, 2018 that was passed by NCLT on the application for avoidance filed by IRP. The appellant of Civil Appeal D. No. 32881 of 2019[3], IIFCL, apart from raising other contentions, has also questioned this aspect of the order impugned that the aforesaid two appeals, involving the question as to whether the lenders of JAL could be categorised as financial creditors of JIL for the purpose of the IBC, have been allowed by the NCLAT without recording any findings and without any discussion in that regard.

Brief outline and the issues involved

Before proceeding further, we may draw up a brief outline of the subject-matter and the issues involved in these appeals. 2

2.1. As shall be noticed hereafter later, the CIRP concerning the corporate debtor JIL has already undergone several rounds and circles of proceedings in the NCLT, NCLAT and at least twice over in this court.

2.2. For what has been indicated in the introduction, it is evident that two major issues would arise in these appeals. One, as to whether the transactions in question deserve to be avoided as being preferential, undervalued and fraudulent, in terms of sections 43, 45 and 66 of the Code ; and second, as to whether the respondents (lender of JAL) could be recognized as financial creditors of the corporate debtor JIL on the strength of the

1. "JAL" for short.
2. Hereinafter also referred to as "the Code" or "IBC".
3. Now numbered as Civil Appeals Nos. 009357-77 of 2019.

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mortgage created by the corporate debtor, as collateral security of the debt of its holding company JAL.

2.3. For a preliminary insight into the first issue, suffice would be to notice that during CIRP, the interim resolution professional preferred an application before the Adjudicating Authority seeking orders for avoidance of the impugned transactions, whereby several parcels of land were put under mortgage with the lenders of JAL, the holding company of JIL. The contention of IRP, that the transactions in question were preferential, undervalued and fraudulent within the meaning of sections 43, 45 and 66 of the Code, were accepted in part by the Adjudicating Authority, the NCLT, in its order dated May 16, 2018 and necessary directions were issued for avoidance of at least six of such transactions. In other words, in relation to such six transactions, the security interest was ordered to be discharged and the properties involved therein were vested in the corporate debtor, with release of encumbrances. The NCLAT, however, took an entirely opposite view of the matter and upturned the order so passed by the NCLT, while holding that the transactions in question do not fall within the mischief of being preferential or undervalued or fraudulent ; and that the lenders in question (the lenders of JAL) were entitled to exercise their rights under the Code. Aggrieved, the IRP, one of the creditors of the corporate debtor JIL and the associations of home buyers, who have invested in the proposed projects of JIL and JAL, have preferred these appeals.

2.4. As regards the second issue, noticeable it is that during CIRP, two of the respondent-banks, namely, ICICI Bank Ltd., and Axis Bank Ltd., sought inclusion in the category of financial creditors of JIL but IRP did not agree and declined to recognize them as such. Being aggrieved by the decisions so taken by IRP, the said banks preferred separate applications under section 60(5) of the Code before the NCLT while asserting their claim to be recognized as financial creditors of the corporate debtor JIL, on account of the securities provided by JIL for the facilities granted to JAL. The NCLT rejected the applications so filed by the said banks, by way of its orders dated May 9, 2018 and May 15, 2018 respectively, while concluding that on the strength of the mortgage created by the corporate debtor JIL, as collateral security of the debt of its holding company JAL, the lenders of JAL could not be categorised as financial creditors of JIL for the purpose of the Code. As already noticed, the appeals against the said orders dated May 9, 2018 and May 15, 2018 are purportedly allowed as per the result recorded in the impugned order dated August 1, 2019 but without any discussion in that regard. Aggrieved, one of the lenders of the corporate debtor JIL, IIFCL (appellant of Civil Appeal D. No. 32881 of 2019) has also questioned

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this aspect of the order impugned while asserting that such mortgagees cannot be taken as financial creditors of the corporate debtor JIL.

Parties and their respective roles and interest in the matter

3 In view of the issues arising for determination in these appeals, with several parties carrying different roles, status and interests, worthwhile it would be to narrate at the outset, in brief, the relevant particulars of the key parties involved as follows :

3.1. Jaypee Infratech Ltd. (JIL) :

It is the corporate debtor-company in whose relation CIRP is pending ; and the mortgage transactions concerning its properties were questioned in the application filed by the interim resolution professional. Such transactions form the subject-matter of these appeals.

3.2. Jaiprakash Associates Ltd. (JAL) :

It is the holding company of JIL ; it had approximately 71.64 per cent. equity shareholding in JIL as on March 31, 2017. The impugned mortgage transactions were entered into in favour of its lenders.

3.3. Shri Anuj Jain :

He is the interim resolution professional in CIRP concerning JIL who moved the application for avoidance of the transactions in question. He is the appellant in Civil Appeals Nos. 8512-27 of 2019.

3.4. Jaypee Greens Krescent Home Buyers Welfare Association ; Jaypee Kasa Isles Welfare Association ; Jaypee Kensington Boulevard Apartments Welfare Association ; Garden Isle Welfare Association ; Jaypee Klassic Apartment Welfare Association ; Jaypee Kube Buyers Welfare Association ; Wish Town Property Owners Welfare Society ; KRH Buyers Association ABL Workplace :

They are the associations of home buyers who have invested in the projects of JIL and JAL. They are the appellants in Civil Appeals Nos. 6777-97 of 2019 ; and they also support the assertion of IRP that the transactions in question cannot be countenanced.

3.5 India Infrastructure Finance Co. Ltd. :

It is the financial creditor of the corporate debtor JIL and has filed Civil Appeal in Diary No. 32881 of 2019 while asserting that the transactions in question need to be avoided ; and that the lenders of JAL related with such transactions cannot be the financial creditors of JIL for the purpose of CIRP in question.

3.6 Axis Bank Ltd. ; Standard Chartered Bank Ltd. ; ICICI Bank Ltd. ; State Bank of India ; United Bank of India ; UCO Bank ; The Karur Vyasa Bank P. Ltd. ; L & T Infrastructure Finance Co. Ltd. ; Central Bank of India ; Canara Bank ; Karnataka Bank Ltd. ; IFCI Ltd. ; Allahabad Bank ; Jammu

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and Kashmir Bank ; South Indian Bank Ltd. ; Bank of Maharashtra and other banks and financial institutions :

They are the lenders of JAL in whose favour the properties of JIL were put under mortgage by way of the impugned transactions. They oppose the assertions of appellants while maintaining that the transactions in question are not avoidable and are valid, investing them with the capacity of financial creditors of JIL. They are the principal contesting respondents in these appeals.

The transactions in question

4 Having taken note of the principal contesting parties and their respective interests, it would also be worthwhile to take note of the relevant particulars of the properties and the transactions involved in this dispute. It may be usefully noticed that out of seven transactions that were questioned by IRP, the Adjudicating Authority held that six of them were preferential, undervalued and fraudulent and passed the orders for their avoidance while accepting the contentions of IRP. It may also be observed that five out of these six transactions were preceded by previous mortgage transactions for securing the loans/facilities to JAL. The transactions in question, with previous transactions and flow thereof, as given out during the course of submissions, could be comprehensively viewed as under :—

4.1. The transactions in favour of the consortium of banks and financial Institutions :

Property/transaction in question	*Previous transaction/s and flow thereof*
Mortgage deed dated 29-12-2016 for 167.229 acres of land situated at Village Chhalesar and Chaugan, Tehsil Etmadpur, District Agra, Uttar Pradesh executed by JIL in favour of Axis Trustee Services Ltd., to provide an additional security for term loans of Rs. 21,081.5 crores sanctioned as a consortium to JAL[1].	Initial mortgage deed dated 24-2-2015 released on 15-9-2015 and re-mortgaged on 15-9-2015 (changing facility amount from Rs. 3,250 crores (appx.) to Rs. 24,109 crores) ; thereafter released on 29-12-2016 and again re-mortgaged on 29-12-2016 (changing facility amount from Rs. 24,109 crores to Rs. 23,491 crores).
Mortgage deed dated 29-12-2016 for 167.9615 acres of land situated at Village Tappal, Kansera and Jahangarh, Tehsil Khair, District Aligarh, Uttar Pradesh executed by JIL in favour of Axis Trustee Services Ltd., to provide as an additional security for term loans of Rs. 21,081.5 crores sanctioned by the consortium to JAL[2].	Initial mortgage deed dated 24-2-2015 released on 15-9-2015 and re-mortgaged on 15-9-2015 (changing facility amount from Rs. 3,250 crores (appx.) to Rs. 24,109 crores) ; thereafter released on 29-12-2016 and again re-mortgaged on 29-12-2016 (changing facility amount from Rs. 24,109 crores to Rs. 23,491 crores).

1. Hereinafter also referred to as "Property No. 1".
2. Hereinafter also referred to as "Property No. 2".

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4.2. The exclusive mortgage transactions in favour of ICICI Bank Ltd. :

Property/transaction in question	*Previous transaction/s and flow thereof*
Mortgage deed dated 7-3-2017 for 158.1739 acres situated at Village Jaganpur and Aurangpur, Uttar Pradesh, executed by JIL in favour of IDBI Trusteeship Services Ltd., in the capacity of security trustee for term loan of Rs. 1,200 crores granted by ICICI Bank Ltd., to JAL against the facility agreement dated 25-5-2015[1].	Initial mortgage deed dated 12-5-2014 for 433.35 acres of land, followed by release of land admeasuring 240 acres vide release deed dated 30-12-2015 along with release of land admeasuring 35.03 acres vide release deed dated 24-6-2016. Further release of 158.1739 acres of land vide release deed dated 7-3-2017 and thereafter re-mortgaged on 7-3-2017.
Mortgage deed dated 7-3-2017 for 151.0063 acres situated at Village Jikarpur, Tehsil Khair, District Aligarh, Uttar Pradesh, executed by JIL in favour of IDBI Trusteeship Services Ltd., in the capacity of security trustee for term loan of Rs. 1,200 crores granted by ICICI Bank Ltd. to JAL against the facility agreement dated 25-5-2015[2].	Initial mortgage deed dated 12-5-2014 released on 7-3-2017 and re-mortgaged on 7-3-2017.

1. Hereinafter also referred to as "Property No. 3".
2. Hereinafter also referred to as "Property No. 4".

4.3. The exclusive mortgage transaction in favour of the Standard Chartered Bank Ltd. :

Property/transaction in question	*Previous transaction/s and flow thereof*
Mortgage deed dated 24-5-2016 for 25.0040 acres of land situated at Village Sultanpur, Sector-128, Noida, District Gautam Budh Nagar, Uttar Pradesh executed by JIL in favour of IDBI Trusteeship Services Ltd., as additional security, against the facility agreement dated 29-8-2012 between Standard Chartered Bank and JAL of Rs. 400 crores. The security was further extended for facility II for Rs. 450 crores on 27-12-2012 ; for facility III for Rs. 538.16 crores on 29-4-2015 ; for facility IV for Rs. 81.84 crores on 29-4-2015 and for working capital facility Rs. 297 crores on 29-8-2012[1].	Initial mortgage deed dated 24-6-2009, extended by mortgage deed dated 27-11-2012 (for increased facility amount of Rs. 1,300 crores as compared to Rs. 900 crores earlier). Vide mortgage on 23-3-2013 additional land admeasuring 25.0040 acres was added in the original land parcel to secure increased facility amount of Rs. 1,750 crores as compared to Rs. 1,300 crores earlier against the facility agreement dated 29-8-2012 for an amount of Rs. 400 crores. Security further extended for facilities II, III and IV as mentioned in column 1.

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	The extended mortgage deed dated 23-3-2013 was released vide release deed dated 4-11-2015 (changing facility amount from Rs. 1,750 crores to Rs. 1,470 crores) and remortgaged on 24-5-2016 (increasing facility amount from 1,470 crores to Rs. 1,767 crores).

1. Hereinafter also referred to as "Property No. 5".

4.4. The sixth transaction in question had been the exclusive mortgage transaction in favour of State Bank of India that was not preceded by any earlier transaction ; the same had been as under :

> "Mortgage deed dated 4-3-2016 for 90 acres of land situated at Village Chaugan Tehsil Elmadpur, District Agra, Uttar Pradesh, executed by JIL in favour of State Bank of India against the facility agreement dated March 26, 2015 granting short-term loan facility to JAL of Rs. 1,000 crores.[1]"

4.5. Yet another transaction was questioned by IRP as being avoidable but the Adjudicating Authority held the same to be not falling within the relevant time as provided under section 43 of the Code. The particulars of this transaction are as follows :

> "Mortgage deed dated May 12, 2014 for 100 acres of land situated at Village Tappal, Tehsil Khair, District Aligarh, Uttar Pradesh executed by JIL in favour of ICICI Bank Ltd., against the facility agreement dated December 12, 2013 granting term loan of Rs. 1,500 crores and overdraft amount of Rs. 175 crores to JAL.[2]"

The relevant factual and background aspects

5 Having taken note of the principal parties to the dispute and the transactions/properties involved, but before dilating on the issues, we may briefly narrate the background in which the present CIRP is underway as also the orders passed by this court, for ensuring its completion in accordance with law and towards the larger benefit of stakeholders.

6 JAL is stated to be a public listed company with more than 5 lakhs individual shareholders. In the year 2003, JAL was awarded the rights for construction of an expressway from Noida to Agra. A concession agreement was entered into with the Yamuna Expressway Industrial Development

1. Hereinafter also referred to as "Property No. 6".
2. Hereinafter also referred to as "Property No. 7" (as regards this description, it is pointed out on behalf of the respondent ICICI Bank that it had been of "term loan of Rs. 1,500 crores under the corporate rupee loan facility agreement and general conditions dated December 12, 2013 and mortgage deed was dated March 10, 2014").

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Authority. Coming on the heels of this project, JIL was set up as a special purpose vehicle. Finance was obtained from a consortium of banks against the partial mortgage of land acquired and a pledge of 51 per cent. of the shareholding held by JAL. Housing plans were envisaged for the construction of real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur. Several other aspects of the dealings by these companies, their creditors and other stakeholders need not be dilated for the present purpose.

6.1. The crucial and relevant part of the matter is that IDBI Bank Ltd., instituted a petition under section 7 of the Code before the NCLT, seeking initiation of corporate insolvency resolution process against JIL, while alleging that JIL had committed a default in repayment of its dues to the tune of Rs. 526.11 crores. JIL filed its objections to the petition but later on, withdrew the objections and furnished consent for resolution plan under the provisions of the Code. On August 9, 2017 the NCLT initiated the CIRP in respect of JIL. An order of moratorium was issued under section 14 by which, the institution of suits and continuation of pending proceedings, including execution proceedings were prohibited and an interim resolution professional was appointed. On August 14, 2017 IRP, in pursuance of the order of the NCLT, called for submissions of claims by financial creditors in Form-C, by operational creditors in Form-B, by the workmen and employees in Form-E and by other creditors in Form-F. On August 16, 2017 the Insolvency and Bankruptcy Board of India made an amendment to its regulations and regulation 9(a) was inserted to include the claims by other creditors. On August 18, 2017 the Board released a press note that the home buyers could fill in Form-F as they could not be treated at par with financial and operational creditors.

6.2. The aforesaid position led to the proceedings in this court that were dealt within a batch of petitions led by Writ Petition (Civil) No. 744 of 2017 *Chitra Sharma* v. *Union of India*[1]. Several orders were passed by this court in the said batch of petitions from time to time, inter alia, to the effect that IRP was permitted to take over management of JIL and was directed to ensure that necessary provisions were made to protect the interests of home buyers. Various orders were also made with directions to JAL, as holding company of JIL, for making deposits in the court, particularly looking to the claim of refund being made by some of the home buyers. This court also took note of the facts that CIRP commenced on August 9, 2017 ; the statutory period of 180 days for concluding the CIRP had come to an end ; and even the extended statutory period of 90 days also ended on May

1. See [2018] 210 Comp Cas 609 (SC).

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12, 2018 but then, by way of the Amendment Ordinance, 2018, the home buyers were accorded the statutory recognition as financial creditors with effect from June 6, 2018. While finally disposing of the matters on August 9, 2018 this court took note of the interest of home buyers as also the creditors of JIL and JAL, the status of proceedings and the statutory provisions as then obtaining and ultimately issued the following directions[1] :

> "(i) In exercise of the power vested in this court under article 142 of the Constitution, we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders in accordance with the provisions of the IBC ;
>
> (ii) We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression 'financial creditors' ;
>
> (iii) We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by the applicants, in addition to the three short-listed bidders whose bids or, as the case may be, revised bids may also be considered ;
>
> (iv) JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of section 29A ;
>
> (v) RBI is allowed, in terms of its application to this court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC ;
>
> (vi) The amount of Rs. 750 crores which has been deposited in this court by JAL/JIL shall together with the interest accrued thereon be transferred to the NCLT and continue to remain invested and shall abide by such directions as may be issued by the NCLT."

6.3. It had been during pendency of the aforesaid proceedings that the application leading to present appeals came to be filed by IRP on February 6, 2018 complaining against the transactions in question. However, before taking note of the matters involved in such application filed by IRP and, for completion of the narration about the orders passed by this court, we may also point out that during the CIRP of JIL, an application came to be made by IDBI Bank, for excluding the period of pendency of the application for clarification regarding the manner of counting of the votes of the concerned financial creditors, for the purpose of the period of 270 days for

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1. See page 646 of 210 Comp Cas.

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completion of corporate insolvency resolution process but, during the pendency of such application, the NCLT, by its order dated May 6, 2019 called upon the authorities and the representatives of allottees and others to file reply on the necessity to proceed further with CIRP for considering the resolution plan received from the concerned bidder. The IDBI Bank assailed this order of the NCLT by way of an appeal before the NCLAT that came to be decided on July 30, 2019 whereby, the NCLAT granted relief to exclude the period from September 17, 2018 to June 4, 2019 for the purpose of counting 270 days of CIRP period and issued consequential directions. This led to further appeals in this court[1], which were considered and decided on November 6, 2019.

6.3.1. In the order dated November 6, 2019 we took note of the fact that CIRP in relation to JIL stood revived in view of the directions in *Chitra Sharma* v. *Union of India*[2] as also the amendments brought about in IBC. In the peculiar, rather extraordinary, situation obtaining in the matter, we passed the orders under the plenary powers so as to ensure that an attempt was made for revival of the corporate debtor JIL, lest it was exposed to liquidation process while taking note of the unanimity amongst the parties that liquidation of JIL must be eschewed ; and while also taking note of the time limit for completion of insolvency resolution process as per third proviso to section 12(3), which came into effect from August 16, 2019. In the given circumstances, we passed the following order for the purpose of substantial and complete justice to the parties and in the interest of all the stakeholders[3] :

> "(i) We direct the IRP to complete the CIRP within 90 days from today. In the first 45 days, it will be open to the IRP to invite revised resolution plan only from Suraksha Realty and NBCC respectively, who were the final bidders and had submitted resolution plan on the earlier occasion and place the revised plan(s) before the CoC, if so required, after negotiations and submit report to the Adjudicating Authority, NCLT within such time. In the second phase of 45 days commencing from December 21, 2019 margin is provided for removing any difficulty and to pass appropriate orders thereon by the Adjudicating Authority.
>
> (ii) The pendency of any other application before the NCLT or NCLAT, as the case may be, including any interim direction given

1. Being Civil Appeal No. 8437 of 2019 (at D. No. 27229 of 2019) : *Jaiprakash Associates Ltd.* v. *IDBI Bank Ltd.* [2019] 8 Comp Cas-OL 655 (SC) and connected case.
2. See [2018] 210 Comp Cas 609 (SC).
3. See page 671 of 8 Comp Cas-OL.

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therein shall be no impediment for the IRP to receive and process the revised resolution plan from the abovenamed two bidders and take it to its logical end as per the provisions of the I and B Code within the extended timeline prescribed in terms of this order.

(iii) We direct that the IRP shall not entertain any expression of interest (improved) resolution plan individually or jointly or in concert with any other person, much less ineligible in terms of section 29A of the I and B Code.

(iv) These directions are issued in exceptional situation in the facts of the present case and shall not be treated as a precedent.

(v) This order may not be construed as having answered the questions of law raised in both the appeals, including as recognition of the power of the NCLT/NCLAT to issue direction or order not consistent with the statutory timelines and stipulations specified in the I and B Code and Regulations framed thereunder."[1]

7 Having thus referred to the orders previously passed in relation to the CIRP in question, we may, for complete narration of the orders passed by this court, also refer to the fact that in this batch of appeals, the extensive arguments were finally concluded on December 10, 2019. Even while reserving the orders, looking to the facts and circumstances of the case, we stayed the operation of the order passed by the NCLAT, in so far relating to the prayer of the lender-banks of JAL for treating them as financial creditors of JIL. The relevant part of the order dated December 10, 2019 reads as under :

"Civil Appeal at Diary No(s). 32881 of 2019

These appeals take exception to the decision of the National Company Law Appellate Tribunal allowing the appeal(s) filed by the lender-banks of Jayprakash Associates Ltd. (JAL) claiming to be financial creditor(s) of Jaypee Infratech Ltd. (JIL). The National Company Law Tribunal had rejected that claim but we find that in the impugned judgment, without dealing with the reasons recorded by the National Company Law Tribunal, the Appellate Tribunal allowed the appeal(s) filed by the stated lender-bank(s), who were claiming to be the financial creditor(s) of JIL.

1. It may also be noticed that by another order dated February 3, 2020 while accepting the reasons stated in an application filed by the IRP pointing out various difficulties and unavoidable circumstances which have delayed the culmination of proposal for approval of resolution plan, though submitted within the time frame prescribed by this court, we had extended the time by four weeks for approval of the resolution plan, in the proceedings now being dealt with by the Principal Bench of NCLT at New Delhi.

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After fully hearing counsel for the parties, prima facie, we are of view that lender-banks of JAL cannot be regarded as financial creditor(s) of JIL. We would elaborate on this aspect in our final judgment. Be that as it may, it is appropriate that we must stay the operation of the impugned judgment(s) of the Appellate Tribunal lest any confusion occurs in the revival process of JIL and the constitution of committee of creditors thereof, in view of the impugned order passed by the National Company Law Appellate Tribunal. Ordered accordingly.

We clarify that the stay of operation is only in respect of order passed on the application(s) moved by the lender-bank(s) of JAL before the National Company Law Appellate Tribunal for a declaration that they be regarded as financial creditor(s) of JIL and included in the committee of creditors of JIL."

The application by interim resolution professional and the order passed by the NCLT

8 Having thus referred to the orders already passed in relation to the CIRP in question, we may now advert to the application filed by IRP forming subject-matter of the first issue involved in these appeals.

9 The IRP, in terms of his duties under clause (j) of section 25(2) of the Code[1], made the application under consideration before the Adjudicating Authority stating, inter alia, that the corporate debtor was itself in dire need of funds ; and was facing severe liquidity crunch to complete the construction of projects and deliver flats to home buyers as well as to honour the payment obligations to financial creditors, including the fixed deposit holders. It was contended that JIL could have sold/mortgaged its unencumbered land to raise funds to complete the construction of flats in a timely manner and fulfil its obligation to its creditors and prevent value deterioration or erosion or insolvency but then, the mortgages in question were created in a highly questionable manner and in complete disregard to the interests of the creditors and stakeholders of the corporate debtor. Also, that the mortgage of land was in nature of asset stripping and was entered with intent to defraud the creditors of the corporate debtor without obtaining the approval of shareholders.

1. The relevant parts of section 25 read as under :

"*Duties of resolution professional.*—(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely :—. . .

(j) file application for avoidance of transactions in accordance with Chapter III, if any ; . . ."

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9.1. In opposition to the application, it was contended that the financial position of the corporate debtor was very strong notwithstanding the temporary financial crunch ; that JAL was helping JIL in various ways and hence, creation of impugned mortgages was not unusual, but merely reciprocal ; and such reciprocal accommodation cannot be termed without consideration. It was also contended that no transaction which was permitted by law and entered into transparently could amount to "carrying on business for a fraudulent purpose". It was further contended that the impugned mortgages had not been created on account of any antecedent debt liability owed by the corporate debtor ; they had been within the ordinary course of business of corporate debtor and the transferees ; and were not within the statutory period of one year and, therefore, section 43 of the IBC would not apply. It was maintained that the transactions in question were reciprocal and could not be termed as without consideration or undervalued. According to the contesting parties, when the essential jurisdictional conditions were not satisfied, the provisions of section 66 of the IBC were not attracted.

10 The NCLT, after having heard the parties and having scanned through the record, held that the transactions in question were to defraud the lenders of the corporate debtor JIL, as 858 acres of unencumbered land owned by the corporate debtor to secure the debt of the related party JAL was mortgaged in the midst of the corporate debtor's immense financial crunch, while continuing with default towards the home buyers and financial creditors and after it had been declared as non-performing asset[1], in utter disregard to fiduciary duties and duty of care to the creditors ; and further that the mortgage of land was created without any counter guarantee from the related party and with no other consideration being paid to the corporate debtor. The Tribunal was of the view that at the time when the mortgage was created, the corporate debtor was already in default to its lenders and it was unlikely that its lenders would have provided no-objection for creation of mortgages to secure the debt of a related party as that would have compromised not only the recovery of their dues but also the interests of thousands of home buyers waiting for their homes with investment of their hard earned money. The Tribunal also observed that even though the nominees of lenders attended the board meeting of the corporate debtor in which decision to mortgage the land was taken, but that cannot be treated as approval or no-objection of lenders, as the lenders invariably have covenants in the loan agreement that require their approval for creating interest in favour of any one of the unencumbered assets of the

1. "NPA" for short.

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borrower. Moreover, directors of the corporate debtor (JIL) and the related party (JAL) were well aware of the fact that the corporate debtor was in default and had been declared as NPA by several creditors. The Tribunal, thus, formed the opinion that when the directors of the corporate debtor were fully aware that they were in the twilight zone and insolvency was imminent, they ought to have exercised due diligence in minimizing the potential loss to the creditors but they entered into such transactions which ex facie gave benefits to the related party JAL, with a clear intent to defraud the creditors of JIL. The Tribunal further observed that the land in question could have been sold to generate cash that would have been sufficient to complete the construction of flats and the home buyers are directly and adversely affected by such a decision.

10.1. With respect to section 43 of the IBC, the NCLT held that the transaction of creating a security interest by way of mortgage in favour of lenders of the third party (JAL) on the unencumbered land of the corporate debtor without any consideration or counter guarantee cannot be treated as transfer in the ordinary course of business or financial affairs of the corporate debtor. Further, it did not benefit either the business or finances of the corporate debtor in any way and hence, was not covered under "financial affairs". The Tribunal held that the phrase under consideration cannot be interpreted to mean that the ordinary course of business also includes the transferee's ordinary course of business because transferee can never do the transfer himself ; and that the words "the transfer made" indicate that they relate to the transferor and not the transferee. As regards "relevant time" for the purpose of sub-section (4) of section 43 of the Code[1], the Tribunal observed that the Code itself has provided a retrospective effect to the provisions of section 43(4)(a) wherein it is stated that "it is given to a related party, during two years preceding the insolvency commencement date". This, according to the NCLT, indicates that the retrospective effect is laid down in the legislation itself and thus, the look-back period for the transactions was made dependent on the insolvency commencement date and not on the date when the Insolvency and Bankruptcy Code came into effect (December 1, 2016). The Tribunal, therefore, held that for transactions of a related party, the look-back period was two years preceding the insolvency commencement date and hence, the relevant period for examining the transactions in question would be from August 10, 2015 to August 9, 2017 (date of commencement of CIRP).

1. This "relevant time" for the purpose of avoidance of preferential transactions is now commonly referred to as "look-back period".

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10.2. The Tribunal made in-depth analysis of the facts of the case, particularly those related with the transactions in question as also the provisions of law applicable and, while rejecting the contentions urged on behalf of the opposing parties, including JAL, observed and held as under :

> "After the elaborate discussion, we have decided that impugned transactions are preferential transactions as defined in sub-section (2)(a) of section 43 of the Insolvency and Bankruptcy Code, 2016. We have found that corporate debtor Jaypee Infratech Ltd. (JIL) has by way of mortgage of unencumbered land created security interest in favour of lenders of the Jaiprakash Associates Ltd. (JAL), which happens to be the holding company of JIL, without any consideration. We have also found that the corporate debtor was facing liquidity crunch and their accounts were declared as NPA and even after formation of joint lender forum, without obtaining approval from joint lender forum, unencumbered land of the corporate debtor has been mortgaged in favour of lenders of JAL. Thereby this transfer has the effect of putting the JAL, one of the creditors of JIL in a beneficial position than it would have been in the event of distribution of assets being made by section 53 of the Code.
>
> The said mortgage of immovable properties, i. e., of the unencumbered land of the corporate debtor has been made without any consideration to the corporate debtor. Therefore the said transaction is covered under the umbrella of section 45(1) of the Code and will be treated as an undervalued transaction as defined under section 45 of the Code . . .
>
> In this case, we have found that impugned transactions are covered under preferential transactions as defined in section 43(2)(a) of the Code. Therefore, it cannot be said that section 45 does not apply for these transactions.
>
> The impugned mortgage of unencumbered land parcels of the corporate debtor in favour of lenders of the JAL to create a security interest are transactions between the corporate debtor, lenders of JAL and JAL, who happens to be an operational creditor of the corporate debtor.
>
> It is true that the collateral security is common practice in loan transactions. It is on record that in this case, the corporate debtor was under liquidity crunch and its accounts were declared NPA by LIC and other creditors. The joint lender forum was formed to deal with the situation. But the corporate debtor entered into the transaction

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even without taking prior approval of joint lender forum and mortgaged its unencumbered land in favour of the lenders of the JAL.

In the circumstances stated above it is clear that the impugned preferential transactions are also undervalued transactions and covered under section 45(1) of the Code. It is also clear that these transactions are undertaken during the relevant period of 2 years from the date of initiation of corporate insolvency process as provided under section 46(1)(ii) of the Code. Therefore, this issue is also decided in positive, in favour of applicant resolution professional and against the corporate debtor.

In view of the above, it is clear that the mortgage of land of JIL in favour of lenders of JAL, amounts to transfer of interest in property of JIL for the benefit of its creditor, i. e., JAL and putting it in a beneficial position vis-a-vis other creditors is a preferential transactions under section 43(2)(a) and (b).

The transactions were executed within the look back period of two years before the commencement of insolvency proceeding and is therefore covered under section 43(4)(a). Further, transaction cannot be treated is in ordinary course of business or financial affairs of corporate debtor and is not excluded under section 43(3)."

10.3. The Tribunal concluded in its order as follows :

"On the above basis, it is clear that the company application filed by the resolution applicant deserves to be allowed. Hence, is allowed.

ORDER

The company application filed by the resolution professional under sections 66, 43 and 45 of the Insolvency and Bankruptcy Code, 2016 is allowed. The impugned transactions, details of which are given in the schedule of the judgment are declared as fraudulent, preferential and undervalued transactions as defined under sections 66, 43 and 45 of the Code respectively.

Transactions given in the following schedule of property have been found as preferential, undervalued and fraudulent, therefore, we pass the order for release and discharge of the security interest created by the corporate debtor in favour of lenders of the Jaiprakash Associates Ltd., under the provision of section 44(c) of the Insolvency and Bankruptcy Code, 2016. We also pass an order under section 48(a) of the Code that the properties mortgaged by way of preferential and

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undervalued transactions shall from now on be deemed to be vested in the corporate debtor."[1]

Appeals before NCLAT : the impugned order

11 Assailing the aforesaid order passed by the NCLT accepting the application of IRP in relation to six of the mortgage transactions, the aggrieved parties filed separate appeals before the Appellate Tribunal, the NCLAT. The Appellate Tribunal took note of the facts of the case and the rival contentions and proceeded to upturn the order passed by the NCLT on the considerations as indicated infra.

11.1. As regards the assertion of IRP that the transactions in question were preferential transactions within the relevant time as envisaged by section 43 of the Code, the NCLAT observed that the corporate debtor had created interest over its property, but such interest had not been created in favour of any creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor and hence, section 43(2)(a) of the Code was not attracted. It was further observed that the mortgages in question were made in the ordinary course of business and financial affairs of the transferees, ruling out the applicability of section 43 as such and hence, the Adjudicating Authority had no power to pass the order under section 44 of the Code. The Appellate Tribunal observed and held, inter alia, as follows[2] :

"In the present case, the 'corporate debtor' has created interest on the property of the 'corporate debtor', but such interest has not been created in favour of any creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the 'corporate debtor'.

The aforesaid interest on the property of the 'corporate debtor' has been created in all these cases with regard to financial debt given by the appellants to 'Jaiprakash Associates Ltd.', which is not the 'corporate debtor'.

Thus, it is clear that the interest on the property of the 'corporate debtor' has not been created in favour of the appellants-'financial creditors' of an antecedent financial debt of the appellants owed by the 'Jaypee Infratech Ltd.' ('corporate debtor'). Therefore, we hold

1. In the schedule to the order aforesaid, the NCLT gave out the description of six transaction with particulars of the properties which were treated as preferential, undervalued and fraudulent and also gave the description of one transaction that was not coming within the ambit of "relevant time" per section 43 of the Code (as fully taken note of in paragraph 4 and its sub-paragraphs under the heading "Transactions in question" ibid.).

2. See page 619 of 221 Comp Cas.

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that clause (a) of sub-section (2) of section 43 is not attracted in any of the case of the appellants-bank, thereby none of the appellants-bank come within the meaning of 'deemed to have given a preference', as used in section 43. Therefore, the mortgage(s) created in their favour cannot be annulled on the ground of preferential transaction in terms of section 43(2)(a) of the 'I and B Code'.

Clause (b) of sub-section (2) of section 43 relates to transfer under clause (a) of sub-section (2) of section 43, which in effect puts such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53. As clause (a) of sub-section (2) of section 43 is not attracted, the question of applicability of clause (b) of sub-section (2) of section 43 does not arise.

Apart from the aforesaid position of law in respect of mortgage, in question, as per sub-section (3) of section 43, for the purposes of sub-section (2), 'a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the "corporate debtor" or the transferee'. The mortgages in question which were made in favour of the appellants-banks and financial institutions have been made in ordinary course of business and financial affairs of the transferee, as apparent from the relevant facts.

Therefore, we hold that section 43 is not attracted to any of the transaction/mortgage(s) made in favour of the appellants."

11.2. The Appellate Tribunal further proceeded to hold that the provisions of section 45 of the Code, for avoidance of undervalued transactions, were not applicable in relation to the transactions in question while observing as under[1] :

"For holding a transaction undervalued, the 'resolution professional'/'liquidator' is required to examine the transactions which were made during 'the relevant period' as prescribed under section 46, if any of it is undervalued. As per sub-section (2) of section 45, the transaction shall be considered 'undervalued' 'where the "corporate debtor" makes a gift to a person or enters into a transaction with a person which involves the transfer of one or more assets by the "corporate debtor" for a consideration the value of which is significantly less than the value of the consideration provided by the "corporate debtor" and such transaction has not taken place in the ordinary course of business of the "corporate debtor"'.

1. See page 622 of 221 Comp Cas.

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In these appeals, we find that the transactions as has been made, i. e., mortgage(s) in favour of the appellants as and when made against the amount payable by 'Jaiprakash Associates Ltd.' (borrower), the amount is not payable by the 'corporate debtor'. Therefore, clause (a) of sub-section (2) of section 45 is not attracted. For the same very reason, clause (b) of sub-section (2) of section 43 or section 45 cannot be made applicable with regard to transaction in question which are not related to any payment due from the 'corporate debtor'.

As section 44 is not attracted, it is not necessary to notice section 46 which is not attracted and, therefore, the Adjudicating Authority has no power to pass any order under section 48 of the 'I and B Code'."

11.3. With respect to section 66 of the Code dealing with fraudulent trading or wrongful trading, the Appellate Tribunal observed that the corporate debtor, being one of the group company, like a guarantor, had executed mortgage deeds in favour of the lender banks and financial institutions ; and the transactions were in the ordinary course of business of the corporate debtor. Thus, according to the NCLAT, in the absence of any contrary evidence to show that they were made to defraud the creditors of the corporate debtor or for any fraudulent purpose, it was not open to the Adjudicating Authority to hold that the mortgage deeds in question were made by way of transactions within the meaning of "fraudulent trading" or "wrongful trading" under section 66. The Appellate Tribunal held[1] :

"In the present case, we have noticed that the transactions in question, i. e., mortgage(s) were made in favour of the 'banks and financial institutions' by the 'corporate debtor' ('Jaypee Infratech Ltd.') in the ordinary course of business of the 'corporate debtor'. The appellants-banks and financial institutions have given loans to the holding company, namely-'Jaiprakash Associates Ltd.'. The 'corporate debtor' being one of the group company, like a guarantor, executed mortgage deed(s) in favour of the appellants-'banks and financial institutions'. We have seen that none of the transactions were 'preferential transaction' or 'undervalued transaction'. It has not been alleged that the transactions, in question, were made to defraud the creditors in terms of section 49 so allegation has been made that such transactions amount to 'extortionate credit' as defined under section 50. Therefore, the Adjudicating Authority in absence of any such finding is not empowered to pass order under section 51. Further, as we have held that the transactions were made in the ordinary course of business in

1. See page 623 of 221 Comp Cas.

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absence of any contrary evidence to show that they were made to defraud the creditors of the 'corporate debtor' or for any fraudulent purpose, on mere allegation made by the 'resolution professional', it was not open to the Adjudicating Authority to hold that mortgage deeds, in question, were made by way of transactions which come within the meaning of 'fraudulent trading' or 'wrongful trading' under section 66."

11.4. The Appellate Tribunal, therefore, allowed the appeals and set aside the impugned order passed by the NCLT on May 16, 2018 in so far relating to the lenders in question in the following[1] :

"For the reasons aforesaid, we set aside the impugned order dated May 16, 2018 so far it relates to the appellants. In view of such findings, the appellants-'Axis Bank Ltd.', 'Standard Chartered Bank', 'ICICI Bank Ltd.', 'State Bank of India', 'Jai Prakash Associates Ltd.', 'Bank of Maharashtra', 'United Bank of India', 'Central Bank of India', 'UCO Bank', 'Karur Vyasa Bank P. Ltd.', 'L and T Infrastructure Finance Co. Ltd.', 'Canara Bank', 'Karnataka Bank Ltd.', 'IFCI Ltd.', 'Allahabad Bank', 'Jammu and Kashmir Bank', and 'The South Indian Bank Ltd.' are entitled to exercise their rights under the 'I and B Code'.

All the appeals are allowed. However, we make it clear that we have not made any observations with regard to the promoters or directors in absence of any appeal preferred on their behalf. No costs."

The relevant provisions

12 For comprehension of the subject-matter and appropriate dealing with the issues involved, before proceeding further, suitable it would be to take note of the relevant statutory provisions.

12.1. It may be observed that while generally, the expressions used in the Code are defined in section 3 thereof but then, the expressions employed for the purpose of Part II of the Code, dealing with insolvency resolution and liquidation of corporate persons, are defined in section 5 thereof. The relevant definitions as occurring in sections 3 and 5 are as under :

"3. (4) 'charge' means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage ; . . .

(6) 'claim' means—

1. Page 624 of 221 Comp Cas.

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

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

(8) 'corporate debtor' means a corporate person who owes a debt to any person ; . . .

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

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

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

(30) 'secured creditor' means a creditor in favour of whom security interest is created ;

(31) 'security interest' means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person :

Provided that security interest shall not include a performance guarantee ; . . .

(33) 'transaction' includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor ;

(34) 'transfer' includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien ;

(35) 'transfer of property' means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property ;

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5. (5A) 'corporate guarantor' means a corporate person who is the surety in a contract of guarantee to a corporate debtor ; . . .

(7) 'financial creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to ;

(8) 'financial debt' means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest ;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent ;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument ;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed ;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis ;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing ;

Explanation.—For the purposes of this sub-clause,—

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing ; and

(ii) the expressions, 'allottee' and 'real estate project' shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016) ;[1]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account ;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution ;

1. This *Explanation* was inserted with effect from June 6, 2018.

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(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause ; . . .

(20) 'operational creditor' means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred ;

(21) 'operational debt' means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority ; . . .

(24) 'related party', in relation to a corporate debtor, means—

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor ;

(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor ;

(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner ;

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital ;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital ;

(f) any body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor ;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor ;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act ;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary ;

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(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement ;

(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement ;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor ;

(m) any person who is associated with the corporate debtor on account of—

(i) participation in policy making process of the corporate debtor ; or

(ii) having more than two directors in common between the corporate debtor and such person ; or

(iii) interchange of managerial personnel between the corporate debtor and such person ; or

(iv) provision of essential technical information to, or from, the corporate debtor ;"

12.2. The concept and consequences of preferential transactions at a relevant time are provided in sections 43 and 44 of the Code, which may also be usefully extracted as follows :

"43. *Preferential transactions and relevant time.*—(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor ; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

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(3) For the purposes of sub-section (2), a preference shall not include the following transfers—

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee ;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property ; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property :

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

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

(4) A preference shall be deemed to be given at a relevant time, if—

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date ; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

44. *Orders in case of preferential transactions.*—(1) The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order :—

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

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

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

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

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

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

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

Provided that an order under this section shall not—

(a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value ;

(b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Explanation I.—For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference,—

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(a) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor ;

(b) is a related party,

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

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

12.3. As the transactions in question are the mortgage(s) of the assets of corporate debtor JIL, the concept and connotations of mortgage, as occurring in section 58 of the Transfer of Property Act, 1882[1], could also be usefully noticed as under :

"58. *'Mortgage', 'mortgagor', 'mortgagee', 'mortgage money' and 'mortgage-deed' defined.*—(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee ; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage deed.

(b) *Simple mortgage.*—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) *Mortgage by conditional sale.*—Where, the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

1. Hereinafter also referred to as "the Transfer of Property Act".

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on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) *Usufructuary mortgage.*—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) *English mortgage.*—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) *Mortgage by deposit of title-deeds.*—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) *Anomalous mortgage.*—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage."

12.4. The provisions contained in sections 124, 126 and 127 of the Indian Contract Act, 1872[1] shall also have bearing on the issues at hand and hence, the same may also be noted as follows :

"124. *'Contract of indemnity' defined.*—A contract by which one party promises to save the other from loss caused to him by the

1. Hereinafter also referred to as "the Contract Act".

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conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity'.

126. *'Contract of guarantee', 'surety', 'principal debtor' and 'creditor'.*—A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety' ; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

127. *Consideration for guarantee.*—Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

Whether the transactions in question are preferential

Broad features of rival contentions and submissions

13 As noticed, being aggrieved by the order so passed by NCLAT, three sets of parties have preferred these appeals. Multidimensional and wide ranging submissions have been made by learned counsel for the respective parties, raising the issues as to whether the transactions in question could be said to be preferential and/or undervalued and/or fraudulent, essentially within the meaning of sections 43, 45, 49 and 66 of the Code. Elaborate submissions have also been made raising the issue as to whether the lenders of JAL, in whose favour the security interest by way of impugned transactions were created, would fall in the category of "financial creditors" of the corporate debtor JIL.

14 Having regard to the overall circumstances, appropriate it would be to deal, at the first, with the contentions related with the issue as to whether the transactions in question are preferential transactions within the meaning of section 43 of the Code. We may briefly summarize the contentions of the appellants, with particular focus on this issue as infra :

Interim resolution professional for Jaypee Infratech Ltd.—the appellant in C. A. Nos. 8512-8527 of 2019

14.1. It has been contended on behalf of the appellant interim resolution professional, who moved the application for avoidance of the transactions in question, that the impugned transactions have the effect of putting JAL, which is an equity shareholder and an operational creditor (for an amount of Rs. 261.77 crores) of the corporate debtor JIL, in a beneficial position than it would have been in the event of distribution of assets under section 53 of the Code vis-a-vis other creditors ; and that if the transactions are held to be valid, the liability of JAL towards its own creditors gets secured

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and becomes realisable from the value of the mortgaged properties whereby, JAL's liabilities are reduced and JAL gets benefitted in exclusion of creditors of the corporate debtor JIL. It is submitted that, in the event of distribution of assets in terms of section 53 of the IBC, for the sake of argument, even if JAL is to get full value of its shares (Rs. 995 crores), such amount is significantly less than the value of assets which have been mortgaged by way of impugned transactions for satisfaction of debts owed by JAL to its lenders.

14.1.1. It is submitted on behalf of the appellant interim resolution profession that the assets in question were released from the earlier mortgages and fresh mortgages were created during the look-back period with increased/enhanced amount of facilities as provided under each individual transaction. The said so-called re-mortgage essentially amounts to a fresh mortgage within the relevant time of two years before the date of commencement of CIRP and was not done in the ordinary course of business of JIL and hence, is hit by section 43 of the Code.

14.1.2. It is further urged that in the exclusionary clause under section 43(3)(a), which pertains to the transfer being made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee, the expression "or" will have to be read conjunctively and not in the alternative. That is to say, the word "or" will have to be read as "and". This is because if "or" is read textually, it would mean that an overwhelming majority of transactions like the present one, whereby banks who would accept the security interest over properties belonging to a third party, after disbursing financial facilities to its loan, would get out of the net of "preferential transactions", even if the transfer in question is not made in the ordinary course of business of the corporate debtor. It is submitted that the intention of Legislature behind enacting a provision like section 43 is that preferential transactions are avoided so that such assets would be available either with the resolution professional or with the liquidator, as the case may be, to put the corporate debtor back on its wheels or if that is not possible, to ensure that the creditors of the corporate debtor get a fair deal. With reference to the decisions of this court in *State of Bombay* v. *R. M. D. Chamarbaugwala* [1957] SCR 874 and *Mazagaon Dock Ltd.* v. *CITEPT* [1959] SCR 848[1], it is submitted that on the well-known cannons of interpretation, "or" could be read as "and" if it is warranted to bring the provision in question in sync with the intention of the Legislature which is to be discerned.

1. See [1958] 34 ITR 368 (SC).

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14.1.3. It is contended that section 43 ought to be read keeping in mind the intention of the Legislature in introducing such provision, which had been to protect the creditors against siphoning away of corporate assets by the management of the company, who have special knowledge of the company's financial troubles by virtue of its position.

India Infrastructure Finance Co. Ltd.—the appellant in C. A. at D. No. 32881 of 2019

14.2. This appellant is one of the entities who has advanced loan to JIL and has preferred appeal with permission, assailing the order passed by NCLAT and maintaining, inter alia, that in any case, the lenders of JAL cannot be taken as "financial creditors" of JIL. While referring to the theory behind the provisions for avoidance of certain transactions, it is submitted on behalf of this appellant that the court should consider substance rather than legal form in evaluating the true economic effect of a transaction or a set of transactions in applying the relevant provisions. On behalf of this appellant, the following submissions have been made in regard to the relevant expressions and phrases occurring in the provisions under consideration.

Ordinary course of business

14.2.1. It is submitted that mortgages could not have been made in the ordinary course of business of the corporate debtor JIL, as it is difficult to fathom why a subsidiary would furnish security to its parent company in the ordinary course and, on the contrary, it is the parent company which at times furnishes security on behalf of its subsidiary since it derives economic value from the subsidiary. According to the appellant, it is difficult to appreciate that when the corporate debtor JIL was itself reeling under financial stress, why it would routinely undertake to secure the indebtedness of JAL by furnishing such high valued securities and that too when the amount of debt secured by way of mortgaging the assets of the corporate debtor increased from Rs. 3,000 crores to approximately Rs. 24,000 crores and the number of creditors also went up from 2 to 24 with respect to the consortium mortgage. It is submitted that even though creation of third party security is a normal practice, the creation of every third party security cannot be always deemed to have been done in the ordinary course of business ; that such "ordinary course" has to be determined under the circumstances when such transactions were entered into ; and, considering that JIL was declared NPA and had defaulted on its indebtedness to some of its lenders, securing of JAL's indebtedness under such circumstances cannot be construed to have been done in the ordinary course of business of the corporate debtor JIL. Learned counsel for the appellant

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has referred, inter alia, to the decision in *Downs Distributing Co. Pty Ltd.* v. *Associated Blue Star Stores Pty Ltd. (in liquidation)* [1948] 76 CLR 463.

Relevant period and related party

14.2.2. It is further submitted that the term "transaction" under the Code includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services from or to the corporate debtor. The use of the word "include" would signify its natural import and is to be given a wide interpretation. It is submitted that as JAL was not only ad idem to the terms of the transaction but was also the beneficiary thereof, it cannot be said that the transaction was only between the corporate debtor and the lenders of JAL ; rather, the transaction was with a "related party" and the look-back period would be two years.

Home buyers—the appellants in C. A. No. 6777-97 of 2019

14.3. On behalf of the home buyers, who have invested in the projects of the corporate debtor and whose interests would be diluted if the impugned transactions are upheld, the flow of transactions in question has been referred and essentially, the same contentions have been urged with respect to section 43 of the Code, with reliance on the decision in *Downs Distributing Co. Pty Ltd.* v. *Associated Blue Star Stores Pty Ltd. (in liquidation)* [1948] 76 CLR 463, that the impugned transactions were not made in the ordinary course of business of the corporate debtor JIL ; and had been preferential transactions, putting JAL in a beneficial position at the cost of bona fide creditors of JIL, including the home buyers. We are not re-narrating all their contentions to avoid repetition. However, we may observe that to substantiate their arguments with respect to section 43 of the Code, on behalf of these appellants, reliance is also placed on the interim report of the *Bankruptcy Law Reforms Committee* (February, 2015) and the decision of this court in *Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd.* [2018] 2 SCC 674[1].

The respondents

15 The contesting respondents have refuted the contentions of the appellants with essentially similar submissions that the transactions in question cannot be termed as preferential transactions within the meaning of section 43 of the Code.

15.1. The respondents, particularly the lenders of JAL, while maintaining a consistent stand that the transactions in question are not preferential and do not fall under section 43 of the Code, have submitted that they being the bankers and financial institutions, are regularly engaged in the business

1. See [2018] 1 Comp Cas-OL 644 (SC).

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of extending loans and other facilities which form the backbone of economic growth ; and taking of such securities, including third party security, is one of the normal and ordinary feature of their business and dealings, particularly that of corporate money lending. According to these respondents, if at all such third party securities are avoided on the allegation of being preferential, it is likely to have a devastating effect on the entire economy because the bankers and financial institutions would then be left high and dry ; and for future dealings, they shall have no alternative but to restrict their activities only to the direct party securities which would, in turn, result in retardation and regression. It is submitted that in a given case, the borrower may not be able to offer matching security to secure the entire advance requisite for its business and growth ; and legally it is not impermissible between the related companies that one may provide security towards the loan/advance/facility obtained by the other. According to the respondents, the scheme of the Code, and particularly its Part II, has never been to allow the processes of insolvency resolution or liquidation to operate detrimental to the interests of the financiers like themselves (lenders of JAL). It is contended that on the true scope of the provisions contained under section 43 of the Code, with reference to the intent and object, the transactions in question, representing the security and guarantee extended by the corporate debtor JIL, cannot be construed as preferential, particularly when they were entered into in the ordinary course of business and financial affairs of the corporate debtor as also the transferees.

15.2. Apart from expressing such concerns about likely prejudice to themselves and to the economy if the transactions in question are held preferential, a variety of contentions have been advanced on behalf of the respondents, while refuting those of the appellants. We may briefly summarize the leading contentions on behalf of the contesting respondents while omitting repetitions.

Axis Bank

15.3. While maintaining that the impugned transactions cannot be considered as preferential within the meaning of section 43 of the Code, the principal contentions on behalf of this respondent are as under :

(a) *The transactions did not occur within the "relevant time".*

15.3.1. It is contended that the "relevant time" in the present circumstances could be only one year as the transfer of property interest was to this respondent, which is a bank and an unrelated party. It is further contended that, in any event, the land parcels were mortgaged on February 24, 2015 which is beyond even the two years formulation, the relevant time

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being from August 10, 2015 to August 9, 2017. The subsequent re-execution of the mortgage deeds on September 15, 2015 and then again on December 29, 2016 cannot be considered to be a substantive event since the nature and identity of the security remained the same and no fresh encumbrances were created. The re-mortgage was done to reflect the increase in the amount of facilities and number of members in the consortium. It is not the case that the existing facilities were paid, the mortgage satisfied, and fresh facilities were created for which a fresh mortgage was required.

(b) *Without prejudice to the above, the ingredients of section 43(2) are not met.*

15.3.2. It is further submitted that section 43/44 of the Code are expropriating provisions as they affect concluded transactions and have the potential to render void the transfers of property done through the transactions which are otherwise legitimate and hence, such provisions must be strictly construed. The decisions of this court in *Devinder Singh* v. *State of Punjab* [2008] 1 SCC 728 and *Nareshbhai* v. *Union of India* [2019] SCC Online SC 1027 have been relied upon.

15.3.3. It is submitted that the requirements set out under section 43(2) must be strictly construed and in the instant case, the two prongs under section 43(2) have not been satisfied. With reference to *UNCITRAL Legislative Guide on Insolvency Law at paragraph 177*, it is submitted that as per section 43(2)(a), a preference could only be given to an existing creditor such that he is preferred over other creditors but in this matter, the security was provided for the benefit of the respondent-bank, which did not have a pre-existing creditor-debtor relationship with the corporate debtor. Further, the security was provided on account of the debt obligations of JAL, and not any antecedent debt obligations of the corporate debtor.

15.3.4. It is further submitted, without prejudice to the above, that even if JAL is taken to be a creditor within the meaning of section 43(2)(a), then the requirements of section 43(2)(b), the second prong of the two-fold requirement for a transaction to be a preference, are not met. It is submitted that the transfer in the instant case has no effect whatsoever on the relative position of JAL in the distribution waterfall—it remains an operational creditor without any security interest.

(c) *Without prejudice to the above, security was provided in the ordinary course of business.*

15.3.5. While pointing out that section 43(3)(a) carves out exception for the transactions made in the ordinary course of business or financial affairs of either the corporate debtor or the transferee, it is contended that no

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material particulars/evidence have been produced to show that the provision of the security was not in the ordinary course of business of the corporate debtor. On the contrary, according to the respondent (i) creation of third party security is an established commercial business practice ; (ii) the corporate debtor has continuously disclosed details of the security in its annual reports beginning from the financial year ending March 31, 2015 and thus, creation of security was known to all and disclosed in public documents ; and (iii) no evidence of dissent from any existing creditor of the corporate debtor has been shown at the time of creation of the security. The transaction in question, according to the respondent, had been in the ordinary course of business of the corporate debtor and remains unexceptionable.

15.3.6. It is further contended that the provision of security was also in the ordinary course of business of the respondent who is a scheduled commercial bank and is duly authorized by statute to carry out the business of commercial lending on a secured basis (per section 6(1)(a) of the Banking Regulation Act, 1949) ; and is statutorily entitled to seek credit enhancement on account of outstanding debts by way of creation of security interests by borrowers or their related entities. For this reason too, with the transaction being in the ordinary course of business of the transferee, i. e., the respondent, it cannot be termed as a preferential transaction.

15.3.7. It is yet further submitted that the contention of IRP that the corporate debtor ought not to have given the security as its accounts had turned NPA with certain banks is fallacious as it conflates the concepts of "NPA" and "wilful defaulter" and ignores that the security was given to the respondent even before the account turned NPA qua certain banks. With reference to the interim report of the Bankruptcy Law Reforms Committee issued in February 2015, it is submitted that as per the said report, avoidance transactions relate to "wilful defaulters" and not "NPAs". It is further argued that the distinctive position of a wilful defaulter and an NPA is also indicated in section 29A of Code, where section 29A(b) provides that a wilful defaulter can never be a resolution applicant whereas, section 29A(c) provides that a company whose account has become non-performing may only be disqualified if the account has remained non-performing for a period of one year. It is submitted that RBI Master Circular on asset classification issued in July, 2015 and June, 2019 set out that an account may turn NPA qua a particular bank if the debts are not being serviced regularly but this does not mean that a particular company's accounts would have turned non-performing qua all its lenders. It is also submitted that the other account of corporate debtor with this respondent turned

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NPA only in 2017, i. e., much after the creation of security in question. It is further contended that a company's account may easily become standard if, inter alia, the company regularizes its payment timelines or if lenders decide to revise the company's repayment obligations. Reliance is placed on the decisions of this court in *Keshavlal Khemchand and Sons P. Ltd.* v. *Union of India* [2015] 4 SCC 770[1] and *State Bank of India* v. *Jah Developers P. Ltd.* [2019] 6 SCC 787.

(d) *Section 44 does not come into operation unless a transaction is made out to be preferential under section 43*

15.3.8. It is further submitted that the jurisdictional condition of exercising power under section 44 is the finding that a transaction is preferential under section 43, as is evident from the heading of section 44, i. e., "orders in cases of preferential transactions" ; and, for the transaction in question being not preferential under section 43, no orders could be made under section 44.

Standard Chartered Bank

15.4. Most of the contentions urged on behalf of this respondent are analogous to the contentions noticed in the preceding paragraphs and, therefore, we are not repeating the same. It is maintained on behalf of this respondent that in whatever way the relevant time is reckoned for the purpose of section 43 of the Code, its transactions would not fall therein because the initial mortgage in favour of this respondent was made in the year 2012, which is beyond the two years formulation. The further submission is that the subsequent conversion of registered mortgage into an equitable mortgage on November 4, 2015 and thereafter, re-conversion from equitable mortgage to registered mortgage on May 24, 2016 in relation to the same subject property as a security, cannot be considered as a fresh creation of mortgage and hence, the transaction in question does not fall within relevant time.

ICICI Bank

15.5. Again, for most of the contentions on behalf of this respondent being similar in nature, we are not repeating the same. However, we may notice that with reference to section 43(4) of the Code, it has been contended that since this respondent-bank is an unrelated party to both the corporate debtor and JAL, the relevant look-back period would be one year and not two years. It is submitted that the mortgages were created on September 15, 2015 and the same property was remortgaged on December 29, 2016 which is much before the look-back period of one year and thereby,

1. See [2015] 190 Comp Cas 452 (SC).

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this transaction could not be challenged as being preferential. The decisions of the Bombay High Court in *Monark Enterprises* v. *Kishan Tulpule* [1992] 74 Comp Cas 89 (Bom) and that of Madras High Court in *IDBI Bank Ltd.* v. *Administrator, Kothari Orient Finance Ltd.* [2009] 152 Comp Cas 282 (Mad) have been referred while submitting that a mere transfer of the assets within the look-back period would not make the transaction preferential except when it is coupled with the intent to prefer one creditor over the other. Further, for contending that the impugned transactions were made in the ordinary course of business of both the respondent-bank and the corporate debtor, the annual reports of corporate debtor JIL have been referred with the submissions that the mortgaged properties were disclosed as "inventories" for the corporate debtor being a real estate company ; and hence, dealing with the "inventories"/"stock-in-trade" is in the ordinary course of business.

15.5.1. It is further submitted that there is no relation between the financial position of the corporate debtor and the impugned transaction for another reason that as on the date of commencement of insolvency proceedings, the corporate debtor had 740 acres of unencumbered land, which could have been used to create security for the creditors of corporate debtor. While pointing out that 11 out of 13 lenders of the corporate debtor JIL are also a part of the consortium of JAL lenders whose loans were secured by mortgages made by the corporate debtor, it is submitted that prior to September 15, 2015 when the questioned consortium of mortgages was created, only Jammu and Kashmir Bank had declared the corporate debtor as NPA, which was followed by the other lenders declaring the corporate debtor as NPA. It is contended that prior to the said declaration, the transactions with this respondent had been made as also the mortgages created on September 15, 2015 which had also secured the interests of Jammu and Kashmir Bank and, therefore, the impugned transactions could not be said to be preferential.

Other respondent-lenders

15.6. Broadly speaking, similar submissions as noted above have been made on behalf of other respondent-lenders while maintaining that the impugned transactions are covered by the exclusion clause under section 43 inasmuch as the transfers had been made in the ordinary course of business of the corporate debtor as also the transferees ; and that for the purpose of section 43 of the Code, the relationship between the respondent-lenders and JIL ought to be looked into rather than assuming JAL to be the primary transferee. It has also been argued, while relying on the decision of this court in *Purbanchal Cables and Conductors P. Ltd.* v. *Assam*

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State Electricity Board [2012] 7 SCC 462, that the provisions of section 43 of the Code, by their very nature, would come into operation at least one year after the enactment of the Code, i. e., it would have only the prospective effect and cannot be given retrospective effect so as to operate over any period prior to the enactment.

Jaiprakash Associates Ltd. (JAL)

15.7. As noticed, this respondent JAL is the holding company of corporate debtor JIL ; and the transactions in question had been for securing the loans/facilities obtained by this respondent. Even while broadly adopting the contentions advanced by other respondents, further submissions have been made on behalf of this respondent to assert on the credence of the transactions in question. With reference to its relationship with JIL, it is contended on behalf of this respondent that being the holding company, JAL had been providing financial, technical and strategic support to JIL in various ways being : (i) Investment made in 99,50,00,000 shares of JIL (paid-up value Rs. 995 crores) at its very nascent stage, which means contribution of substantial funds for the business of JIL without interest ; (ii) Pledge of its 70,83,56,087 equity shares held in JIL in favour of the lender of JIL ; (iii) Promoter support agreement to meet the debt service reserve account (DSRA) obligation of JIL towards its lenders ; and (iv) Bank guarantees of Rs. 212 crores in aggregate to meet the DSRA obligation of JIL for the financial assistance obtained by JIL. It is submitted that such dealings/ transactions by JAL in favour of JIL depict the nature of business relationship between JAL and JIL and makes it amply clear that the impugned transactions were done in the ordinary course of business and financial affairs of JIL. It is further submitted that the mortgage of 858 acres of land made in favour of lenders of JAL fall within the ambit of section 186 of the Companies Act, 2013[1] and is not unauthorized.

15.7.1. It is contended that avoidance of preferential transactions applies to a case where the company's accounts has become stressed and there is a strong likelihood of it going into liquidation but in the present case, it is a matter of record that the accounts of JIL had been categorised as NPA only to an extent of 29.04 per cent. whereas the remaining accounts were still "standard". According to the respondent JAL, this fact was specifically pleaded at the stage of opposing the application filed before the NCLT for initiating CIRP against JIL but JIL gave its consent for CIRP on the bona fide belief that it would be able to restructure its loans and get back the management of JIL. The submission is that, in the given economic scenario, JIL was not in any such stress or problem that it could not have

1. Hereinafter also referred to as "the Act of 2013".

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continued with the existing mortgages for securing the facilities advanced to JAL by the lender banks and financial institutions.

Insolvency and Bankruptcy Code, 2016 : Historical background, objects, scheme and structure of the relevant parts

16 The basic issue raised in the matter being related with the effect and operation of section 43 of the Code, concerning "Preferential transactions and relevant time", appropriate it shall be to comprehend the principles underlying the concept of "preferential transactions". A little insight into the objects sought to be achieved by the Insolvency and Bankruptcy Code, 2016 and its historical background shall be apposite.

16.1. As noticed from Preamble, the Code came to be enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons and even of partnership firms and individuals in a time bound manner ; the objectives, inter alia, being for maximisation of value of assets of such persons and balance of interest of all the stakeholders.

16.1.1. In the case of *Swiss Ribbons P. Ltd.* v. *Union of India* [2019] 4 SCC 17[1], this court had the occasion to traverse through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions therein. One part of such challenge had also been founded on the ground that classification between "financial creditor" and "operational creditor" was discriminatory and violative of article 14 of the Constitution of India[2]. This ground as also several other grounds pertaining to various provisions of the Code were rejected by this court after elaborate dilation on the vast variety of rival contentions and the provisions so contained in the Code were upheld as valid. In the course of such distillation, this court took note, inter alia, of the pre-existing state of law as also the objects and reasons for enactment of the Code. While observing that the focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation is to be availed of only as a last resort, this court pointed out that on its scheme and frame work, the

1. Hereinafter also referred to as the case of *Swiss Ribbons P. Ltd.* v. *Union of India* [2019] 213 Comp Cas 198 (SC).
2. The law declared by this court in this case of *Swiss Ribbons P. Ltd.* v. *Union of India* [2019] 213 Comp Cas 198 (SC), while rejecting the contentions that the classification between "financial creditor" and "operational creditor" was discriminatory and violative of article 14, shall have some bearing on the issues at hand, particularly in relation to the second issue on the claim of the respondent-lenders for being treated a financial creditors of JIL, as shall be noticed hereafter later.

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Code was a beneficial legislation to put the corporate debtor on its feet, and not a mere recovery legislation for the creditors. This court said[1] :

> "As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. 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. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See *ArcelorMittal*[2] at paragraph 83, footnote 3)
>
> It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/ those who are in management. Thus, the resolution process is not

1. See page 235 of 213 Comp Cas.
2. *ArcelorMittal India P. Ltd.* v. *Satish Kumar Gupta* [2018] 211 Comp Cas 369 (SC) ; [2019] 2 SCC 1.

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adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

16.2. Keeping in view the objectives, discernible from the Preamble as also from the Statement of Objects and Reasons of the Code and the observations of this court, we may now take an overview of the scheme and structure of the relevant parts of the Code. Part I thereof contains the provisions regarding title, extent, commencement and application of the Code as also defines various expressions used and employed in the Code. Different provisions have come into force on different dates, as permissible under proviso to sub-section (3) of section 1. Part II of the Code deals with insolvency resolution and liquidation for corporate persons. Chapter I of Part II makes provision for its applicability and also defines various expressions used in this Part (sections 4 and 5). Chapter II of Part II contains the provisions for the corporate insolvency resolution process in sections 6 to 32 whereas Chapter III of this Part II contains the provisions for the liquidation process in sections 33 to 54[1].

16.3. Though the provisions relating to "preferential transactions and relevant time" (in section 43 of the Code) occur in Chapter III of Part II, relating to liquidation process, but such provisions being for avoidance of certain transactions and having bearing on the resolution process too, by their very nature, equally operate over the corporate insolvency resolution process, and hence, the resolution professional is obligated, by virtue of clause (j) of sub-section (2) of section 25 of the Code, to file application for avoidance of the stated transactions in accordance with Chapter III. That being the position, section 43 of the Code comes into full effect in CIRP too.

Preferential transaction at a relevant time : concept and connotations

17 Having regard to the questions involved, a brief insight into the theory relating to avoidance of certain transactions as being preferential would be pertinent at this stage.

17.1. The basic concept of "preference" as per the law dictionaries and lexicons is the act of "paying or securing to one or more of his creditors, by

1. Sections 4 to 33 came into force on December 1, 2016 whereas sections 33 to 54 came into force on December 15, 2016.

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an insolvent debtor, the whole or part of their claims, to the exclusion of the rest"[1]. We may usefully take note of the meaning, definition and basic ingredients of "preference" and "preferential transfer", as defined in the *Black's Law Dictionary*[2] :

> "*preference*. (15c) 1. The favouring of one person or thing over another. 2. The person or thing so favoured. 3. The quality, state, or condition of treating some persons or things more advantageously than others. 4. Priority of payment given to one or more creditors by a debtor ; a creditor's right to receive such priority. 5. Bankruptcy.
>
> *Preferential transfer.*
>
> • *insider preference*. (1981) A transfer of property by a bankruptcy debtor to an insider more than 90 days before but within one year after the filing of the bankruptcy petition.
>
> • *liquidation preference*. (1936) A preferred shareholder's right, once the corporation is liquidated, to receive a specified distribution before common shareholders receive anything.
>
> • *voidable preference* . See Preferential transfer . . .
>
> *preferential transfer*. (1874) Bankruptcy. A pre-bankruptcy transfer made by an insolvent debtor to or for the benefit of a creditor, thereby allowing the creditor to receive more than its proportionate share of the debtor's assets ; specif., an insolvent debtor's transfer of a property interest for the benefit of a creditor who is owed on an earlier debt, when the transfer occurs no more than 90 days before the date when the bankruptcy petition is filed or (if the creditor is an insider) within one year of the filing, so that the creditor receives more than it would otherwise receive through the distribution of the bankruptcy estate.
>
> Under the circumstances described in 11 USCA section 547, the bankruptcy trustee may, for the estate's benefit, recover a preferential transfer from the transferee.—Also termed preference ; voidable preference ; voidable transfer ; preferential assignment ; preferential debt payment . . ."

17.2. It could be readily noticed that as far back as from 15th century, the concept of "preference" has been taken note of and the principles relating to avoidance of certain preferences have evolved, particularly in the fields of mercantile laws and more particularly in the laws governing insolvency

1. P. Ramanatha Aiyar's *Advanced Law Lexicon* (5th edition-Volume 3, page 4002).
2. 10th edition—pages 1369 and 1370.

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and bankruptcy[1] ; and definitively from 1874, various jurisdictions have defined, described and dealt with "preferential transfer" as being the transaction where an insolvent debtor makes transfer to or for the benefit of a creditor so that such beneficiary would receive more than what it would have otherwise received through the distribution of bankruptcy estate. Section 547 of the US Bankruptcy Code provides for the circumstances in which a bankruptcy trustee may, for the benefit of the estate in question, recover a preferential transfer from the transferee. Section 239 of the UK Insolvency Act, 1986 also provides for the same measures for avoidance of preference given to any person at the relevant time. The time factor also plays a crucial role in such measures of avoidance. This "relevant time" for the purpose of avoidance of preferential transactions is now commonly referred to as the "look-back" period. Significantly, when the preferential transaction is with an unconnected party, the look-back period is comparatively lesser than that of the transaction with a connected party, who is referred to as "insider" or "related party[2].

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1. It may in the passing be observed that "an insolvency" essentially refers to financial distress, i. e., financial state in which a person or entity is unable to pay its dues or meet with other akin obligations. Insolvency may be temporary in character. "A bankruptcy", on the other hand, essentially refers to the legal process to regulate as to how an insolvent entity shall pay off his dues.
   As noticed, the primary focus of the IBC is "to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation". In other words, insolvency resolution is the main object; and liquidation with bankruptcy is the last resort.
2. We may also indicate that any attempt by an insolvent, of alienating or encumbering the assets in favour of one person so as to cause harm to the interest of a bona fide creditor had been sternly dealt with by the Legislature even in relation to the individuals, as could be readily noticed from the provisions contained in the erstwhile Presidency-Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. These enactments stand repealed by the IBC but the relevant provisions therein give an insight into the concepts. Section 56 of the Act of 1909 provided thus :
   "56. *Avoidance of preference in certain cases.*—(1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they became due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the official assignee.
   (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent."
   The relevant part of section 69 of the Act of 1920 had been as under :
   "69. *Offence by debtors.*—If a debtor, whether before or after the making of an order of adjudication,—. . .
   (c) fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors,—
   (i) has discharged or concealed any debt due to or from him, or
   (ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,
   he shall be punishable on conviction with imprisonment which may extend to one year."

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17.3. Coming now to the corporate personalities, it is elementary that by the very nature and legal implications of incorporation, ordinarily, several individuals and entities are involved in the affairs of a corporate person ; and impact of the activities of a corporate person reaches far and wide, with the creditors being one of the important set of stakeholders. If the corporate person is in crisis, where either insolvency resolution is to take place or liquidation is imminent ; and the transactions by such corporate person are under scanner, any such transaction, which has an adverse bearing on the financial health of the distressed corporate person or turns the scales in favour of one or a few of its creditors or third parties, at the cost of the other stakeholders, has always been viewed with considerable disfavour[1].

17.4. Noteworthy distinctive features, in the scheme of the Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016, as regards preferences in relation to the corporate personalities, are that while section 328 of the Act of 2013 deals with fraudulent preference and section 329 thereof deals with transfers not in good faith but, on the other hand, in the Code, separate provisions are made as regards the transactions intended at defrauding the creditors (section 49 of the IBC) as also for fraudulent trading or wrongful trading (section 66 of the IBC). The provisions contained in section 43 of the Code, however, indicate the intention of the Legislature that when a transaction falls within the co-ordinates defined therein, the same shall be deemed to be a preference given at a relevant time and shall not be countenanced. Therefore, intent may not be of a defence or support of any preferential transaction that falls within the ambit of section 43 of the Code.

1. In relation to the corporate personalities, the concept of "fraudulent preference", earlier embodied in section 531 of the Companies Act, 1956 now occurs in its modified form in sections 328 and 329 of the Companies Act, 2013. Tersely put, fraudulent preference means parting with assets of the corporate person in favour of one or a few of its creditors, which has the effect of defeating the claim of other creditors. Per section 329 of the Act of 2013, any transfer of property by a company, other than that in the ordinary course of business, if made within a period of one year before presentation of a petition for winding up by the Tribunal and not in good faith and for valuable consideration, is regarded as void against the liquidator. Per section 328 of the Act of 2013, if a company has given preference to one of its creditors or a surety or a guarantor for any of the debts or other liabilities and the company does or suffers anything which has the effect of putting that person in a better position in the event of company going into liquidation than the position he would have been in but for such preference prior to six months of making winding up application, the Tribunal, on being satisfied that the transaction was of a fraudulent preference, may order for restoring the position to what it would have been if the preference had not been given. More particularly, as regards transfer of property, it is provided in sub-section (2) of section 328 that if the transaction is made six months before winding up application, the Tribunal may declare such transaction invalid and restore the position.

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17.5. At this juncture, we may usefully refer to paragraph 177 of the *UNCITRAL Legislative Guide on Insolvency Law*, as referred to and relied upon by learned counsel for the respondent as also paragraphs 178 and 179 thereof, to indicate the basic theory and principles governing the provisions under consideration. In the said Guide, while dealing with the topic of treatment of assets on commencement of insolvency proceedings, it is stated broadly on the theory of avoidance of preferential transactions as follows :

"(c) *Preferential transactions*

(i) *Criteria*

177. Preferential transactions may be subject to avoidance where : (a) the transaction took place within the specified suspect period ; (b) the transaction involved a transfer to a creditor on account of a pre-existing debt ; and (c) as a result of the transaction, the creditor received a larger percentage of its claim from the debtor's assets than other creditors of the same rank or class (in other words, a preference). Many insolvency laws also require that the debtor was insolvent or close to insolvent when the transaction took place and some further require that the debtor have an intention to create a preference. The rationale for including these types of transaction within the scope of avoidance provisions is that, when they occur very close to the commencement of proceedings, a state of insolvency is likely to exist and they breach the key objective of equitable treatment of similarly situated creditors by giving one member of a class more than they would otherwise legally be entitled to receive.

178. Examples of preferential transactions may include payment or set-off of debts not yet due ; performance of acts that the debtor was under no obligation to perform ; granting of a security interest to secure existing unsecured debts ; unusual methods of payment, for example, other than in money, of debts that are due ; payment of a debt of considerable size in comparison to the assets of the debtor ; and, in some circumstances, payment of debts in response to extreme pressure from a creditor, such as litigation or attachment, where that pressure has a doubtful basis. A set-off, while not avoidable as such, may be considered prejudicial when it occurs within a short period of time before the application for commencement of the insolvency proceedings and has the effect of altering the balance of the debt between the parties in such a way as to create a preference or where it involves transfer or assignment of claims between creditors to build up set-offs. A set-off may also be subject to avoidance where it occurs

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in irregular circumstances, such as where there is no contract between the parties to the set-off.

(ii) *Defences*

179. One defence to an allegation that a transaction was preferential may be to show that, although containing the elements of a preference, the transaction was in fact consistent with normal commercial practice and, in particular, with the ordinary course of business between the parties to the transaction. For example, a payment made on receipt of goods that are regularly delivered and paid for may not be preferential, even if made within proximity to the commencement of insolvency proceedings. This approach encourages suppliers of goods and services to continue to do business with a debtor that may be having financial problems, but which is still potentially viable. Other defences available under insolvency laws include that the counter party extended credit to the debtor after the transaction and that credit has not been paid (the defence is limited to the amount of the new credit) ; that the counter party gave new value for which it was not granted a security interest; the counter-party can show that it did not know a preference would be created ; that the counter-party did not know or could not have known that the debtor was insolvent at the time of the transaction ; or that the debtor's assets exceeded its liabilities at the time of the transaction. Some of these latter defences, in particular those involving the intent of the parties to the transaction, suffer from the disadvantage of being difficult to prove and may make avoidance proceedings complex, unpredictable and lengthy."

Analysing section 43 of the Code

18 In the backdrop of the foregoing, we may now scrutinise sections 43 and 44 of the Code. Section 44 provides for the consequences of an offending[1] preferential transaction, i. e., when the preference is given at a relevant time. Under section 44, the Adjudicating Authority may pass such orders as to reverse the effect of an offending preferential transaction. Amongst others, the Adjudicating Authority may require any property transferred in connection with giving of preference to be vested in the corporate debtor ; it may also release or discharge (wholly or in part) any security interest created by the corporate debtor. The consequences of offending preferential transaction are, obviously, drastic and practically operate towards annulling the effect of such transaction. Looking to the contents, context and con-

1. *Note* : Here the expression "offending" is only to denote the unacceptability of such transaction and not any criminality.

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sequences, we are at one with the contentions urged on behalf of the respondents with reference to the decisions in *Devinder Singh* v. *State of Punjab* [2008] 1 SCC 728 and other cited cases, that these provisions need to be strictly construed. However, even if we proceed on strict construction of section 43 of the Code, the underlying principles and the object cannot be lost sight of. In other words, the construction has to be such that leads towards achieving the object of these provisions.

18.1. Looking at the broad features of section 43 of the Code, it is noticed that as per sub-section (1) thereof, when the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has, at a relevant time, given a preference in such transactions and in such manner as specified in sub-section (2), to any person/persons as referred to in sub-section (4), he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in section 44. If twin conditions specified in sub-section (2) of section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (a) of sub-section (2) of section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be for the benefit[1] of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor ; and as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under section 53[2].

18.2. However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of section 43 of the Code, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time". The relevant time is reckoned, as per sub-section (4) of section 43 of the Code, in two ways : (a) if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the insolvency commencement date ; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within the mischief sought to be remedied by sections 43 and 44 of the Code, it ought to be a preferential one

1. It may be intended benefit or may even be unintended benefit.
2. Section 53 of the IBC makes provision for distribution of the proceeds from sale of the liquidation assets, in case of liquidation of the corporate debtor.

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answering to the requirements of sub-section (2) of section 43 ; and the preference ought to have been given at a relevant time, as specified in sub-section (4) of section 43.

18.3. However, even if a transaction of transfer otherwise answers to and comes within the scope of sub-sections (4) and (2) of section 43 of the Code, it may yet remain outside the ambit of sub-section (2) because of the exclusion provided in sub-section (3) of section 43.

18.4. Sub-section (3) of section 43 specifically excludes some of the transfers from the ambit of sub-section (2). Such exclusion is provided to : (a) a transfer made in the ordinary course of business or financial affairs of the corporate debtor or transferee[1] ; (b) a transfer creating security interest in a property acquired by the corporate debtor to the extent that such security interest secures new value and was given at the time specified in sub-clause (i) of clause (b) of section 43(3) and subject to fulfilment of other requirements of sub-clause (ii) thereof. The meaning of the expression "new value" has also been explained in this provision.

Indicting parts—deemed preference at a relevant time

19 In order to understand and imbibe the provisions concerning preference at a relevant time, it is necessary to notice that as per the charging parts of section 43 of the Code, i. e., sub-sections (4) and (2) thereof, a corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of clauses (a) and (b) of sub-section (2) coupled with the applicable requirements of either clause (a) or clause (b) of sub-section (4), as the case may be, are satisfied.

19.1. To put it more explicit, the sum total of sub-sections (2) and (4) is that a corporate debtor shall be deemed to have given a preference at a relevant time if : (i) the transaction is of transfer of property or the interest thereof of the corporate debtor, for the benefit of a creditor or surety or guarantor for or on account of an antecedent financial debt or operational debt or other liability ; (ii) such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets in accordance with section 53 ; and (iii) preference is given, either during the period of two years preceding the insolvency commencement date when the beneficiary is a related party (other than an employee), or during the period of one year preceding the

1. Whether the expression "or", as occurring in between the expressions "corporate debtor" and "transferee" in clause (a) of sub-section (3) of section 43, is to be read as "and" has been one of the significant questions raised in this matter and shall be dealt with hereafter later.

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insolvency commencement date when the beneficiary is an unrelated party.

19.2. By way of these statutory provisions, legal fictions are created whereby preference is deemed to have been given ; and is deemed to have been given at a relevant time, if the stated requirements are satisfied. Variegated features of a deeming provision have been discussed by this court in the case of *Pioneer Urban*[1] with reference to several of the past decisions, albeit in the context of such deeming expression occurring in the Explanation added to sub-clause (f) of section 5(8) of the Code[2]. We may usefully extract some of the relevant passages from the said decision in *Pioneer Urban*[3] as follows :

19.2.1. As regards construction of a deeming fiction, this court pointed out the basic and settled principles in the following[4] :

> "In every case in which a deeming fiction is to be construed, the observations of Lord Asquith in a concurring judgment in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952] AC 109 (HL) are cited. These observations read as follows (AC pages 132-133) :
>
> 'If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it . . . The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'
>
> These observations have been followed time out of number by the decisions of this court. (See, for example, *M. Venugopal* v. *Divisional Manager, LIC* [1994] 2 SCC 323 at page 329) . . .
>
> Although a deeming provision is to deem what is not there in reality, thereby requiring the subject-matter to be treated as if it were real, yet several authorities and judgments show that a deeming

1. See *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [2019] 217 Comp Cas 1 (SC).
2. Such discussion in *Pioneer Urban* essentially led to this court holding that the said deeming provision was clarificatory of the true legal position as it already obtained ; and was to put beyond the pale of doubt the fact that allottees are to be regarded as financial creditors within the meaning of the enacting part contained in section 5(8)(f) of the Code. The crucial aspects relating to section 5(8) of the Code shall be dilated hereafter during the discussion on the second issue involved in these matters.
3. See [2019] 217 Comp Cas 1 (SC).
4. See page 115 of 217 Comp Cas.

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fiction can also be used to put beyond doubt a particular construction that might otherwise be uncertain. Thus, *Stroud's Judicial Dictionary of Words and Phrases* (7th edition, 2008), defines 'deemed' as follows :

'"Deemed"—as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote", is often a convenient device for reducing the verbiage or an enactment, but that does not mean that wherever it is used it has that effect ; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or things has—the way in which it is to be adjudged ; this need not import artificiality or fiction ; it may simply be the statement of an indisputable conclusion'."

19.2.2. In *Pioneer Urban*[1], this court further extracted extensively from the decision in *Hindustan Co-operative Housing Building Society Ltd.* v. *Registrar, Co-operative Societies* [2009] 14 SCC 302 on various features of the processes of construction of different deeming provisions in different contexts. Some of the relevant parts of such extraction (as occurring in paragraph 95 of *Pioneer Urban*[1]) read as follows (in SCC at page 524)[2] :

"'The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.'

(Per Lord Radcliffe in *L. M. St. Aubyn* v. *Attorney General (No. 2)* [1952] AC 15 (HL), AC page 53).

14. '"Deemed", as used in statutory definitions (is meant) 'to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect ; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has— the way in which it is to be adjudged ; this need not import artificiality or fiction ; it may simply be the statement of an undisputable conclusion'.

1. See [2019] 217 Comp Cas 1 (SC).
2. See page 118 of 217 Comp Cas.

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(Per Windener, J. in *Hunter Douglas Australia Pty.* v. *Perma Blinds* [1970] 44 Aust LJ R 257).

15. When a thing is to be 'deemed' something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per Cave, J., in *R.* v. *Norfolk County Court* [1891] 60 LJ QB 379 :

'When a statute gives a definition and then adds that certain things shall be "deemed" to be covered by the definition, it matters not whether without that addition the definition would have covered them or not.' (Per Lord President Cooper in *Ferguson* v. *McMillan* [1954] SLT 109 (Scot))

16. Whether the word 'deemed' when used in a statute established a conclusive or a rebuttable presumption depended upon the context (see *St. Leon Village Consolidated School District* v. *Ronceray* [1960] 23 DLR (2d) 32 (Can)).

'I . . . regard its primary function as to bring in something which would otherwise be excluded.'

(Per Viscount Simonds in *Barclays Bank Ltd.* v. *IRC* [1961] AC 509 (HL)[1] at AC page 523).

'"Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken.'

(See *R.* v. *Brixton Prison (Governor), Ex parte Soblen* [1963] 2 QBD 243 at QBD page 315)".

19.3. On a conspectus of the principles so enunciated, it is clear that although the word "deemed" is employed for different purposes in different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand, i. e., section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play ; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so.

1. See [1962] 32 Comp Cas 308 (HL).

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Exclusion part

19.4. Even when the above stated indicting parts of section 43 as occurring in sub-sections (4) and (2) are satisfied and the corporate debtor is deemed to have given preference at a relevant time to a related party or unrelated party, as the case may be, such deemed preference may yet not be an offending preference, if it falls into any or both of the exclusions provided by sub-section (3), i. e., having been entered into during the ordinary course of business of the corporate debtor or[1] transferee or resulting in acquisition of new value for the corporate debtor.

Net concentrate of section 43

19.5. Thus, the net concentrate of section 43 is that if a transaction entered into by a corporate debtor is not falling in either of the exceptions provided by sub-section (3) and satisfies the three-fold requirements of sub-sections (4) and (2), it would be deemed to be a preference during a relevant time, whether or not in fact it were so ; and whether or not it were intended or anticipated to be so.

20 The analysis foregoing leads to the position that in order to find as to whether a transaction, of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of section 43 of the Code, ordinarily, the following questions shall have to be examined in a given case :

(i) As to whether such transfer is for the benefit of a creditor or a surety or a guarantor ?

(ii) As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor ?

(iii) As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with section 53 ?

(iv) If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date ; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date ?

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1. As noticed, whether this expression "or", as occurring in between the expressions "corporate debtor" and "transferee" in clause (a) of sub-section (3) of section 43, is to be read as "and" remains a question to be dealt with.

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(v) As to whether such transfer is not an excluded transaction in terms of sub-section (3) of section 43 ?

21 Having taken note of the salient features of section 43 of the Code and the questions germane for its applicability over any transaction, we may now examine the questions calling for determination in these appeals. Obviously, if the transactions in question are to fall squarely within the mischief of section 43, they must satisfy all the specifications and ingredients of sub-sections (2) and (4) of section 43 and ought not to be within the exclusion provided in sub-section (3) thereof.

Whether impugned transactions are preferential, falling within the ambit of sub-section (2) of section 43 of the IBC

22 For the purpose of dealing with the crucial question as to whether the impugned transactions are preferential and fall within the prescription of sub-section (2) of section 43 of the Code, appropriate it shall be to recapitulate and summarize the overall scenario of this case.

22.1. The fact that JAL, a public listed company with more than 5 lakhs individual shareholders, is the holding company of the corporate debtor JIL is neither of any doubt nor of any dispute. As on March 31, 2017, JAL owned 71.64 per cent. of shares of JIL, having a value of rupees 995 crores. The background had been that when in the year 2003, JAL was awarded the rights for construction of an expressway and a concession agreement was entered into with the Yamuna Expressway Industrial Development Authority, JIL was set up as a special purpose vehicle. Finance was obtained from a consortium of banks against partial mortgage of land acquired and pledge of 51 per cent. of the shareholding of JAL. Housing plans were envisaged for construction of real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur.

22.1.1. Shorn of other details which may not be necessary for the present purpose, relevant it is to notice that JIL was declared NPA by Life Insurance Corporation of India on September 30, 2015 and by some of its other lenders on March 31, 2016. Then, IDBI Bank Ltd., instituted a petition under section 7 of the Code before NCLT, seeking initiation of corporate insolvency resolution process against JIL, while alleging that JIL had committed a default to the tune of Rs. 526.11 crores in repayment of its dues. On August 9, 2017 the NCLT passed an order under section 7 of the Code and appointed an interim resolution professional[1]-[2]. The IRP made an

1. CIRP in relation to JIL is underway by virtue of the orders passed by this court on August 9, 2018 and November 6, 2019 (as referred to in paragraphs 6.2 and 6.3.1-supra).
2. This date, i. e., August 9, 2017 is the "insolvency commencement date" for the purpose of the questions under consideration.

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application on February 6, 2018 seeking directions that the transactions entered into by the directors and promoters of corporate debtor creating mortgages of 858 acres of immovable property owned by it to secure the debts of JAL are preferential, undervalued, wrongful, and fraudulent ; and hence, the security interest created by corporate debtor JIL in favour of the lenders of JAL be discharged and such properties be deemed to be vested in corporate debtor. The NCLT allowed the said application on May 16, 2018 with respect to six of the impugned transactions covering about 758 acres of land. On the appeals filed by lenders of JAL, NCLAT, by its impugned order dated August 1, 2019 set aside the order passed by NCLT and held that such lenders of JAL were entitled to exercise their rights under the Code.

22.2. At this juncture, we may again take note of the transactions that were questioned by IRP for the purpose of the application for avoidance, which had been the following : 1. Mortgage deed dated December 29, 2016 for 167.229 acres of land (property No. 1) executed by JIL in favour of Axis Trustee Services Ltd., to provide an additional security for term loans of Rs. 21,081.5 crores sanctioned as a consortium to JAL ; 2. Mortgage deed dated December 29, 2016 for 167.9615 acres of land (property No. 2), again executed by JIL in favour of Axis Trustee Services Ltd., to provide an additional security for term loans of Rs. 21,081.5 crores sanctioned by the consortium to JAL ; 3. Mortgage deed dated March 7, 2017 for 158.1739 acres of land (property No. 3) executed by JIL in favour of IDBI Trusteeship Services Ltd., for term loan of Rs. 1,200 crores granted by ICICI Bank to JAL ; 4. Mortgage deed dated March 7, 2017 for 151.0063 acres of land (property No. 4), again executed by JIL in favour of IDBI Trusteeship Services Ltd., for term loan of Rs. 1,200 crores granted by ICICI Bank to JAL ; 5. Mortgage deed dated May 24, 2016 for 25.0040 acres of land (property No. 5) executed by JIL in favour of IDBI Trusteeship Services Ltd., as additional security against the facility agreement dated August 29, 2012 between Standard Chartered Bank and JAL for Rs. 400 crores and other facilities, respectively for Rs. 450 crores, Rs. 538.16 crores and Rs. 81.84 crores as also for working capital facility of Rs. 297 crores ; and 6. Mortgage deed dated March 4, 2016 for 90 acres of land (property No. 6), executed by JIL in favour of State Bank of India for short-term loan facility to JAL to the tune of Rs. 1,000 crores.

22.2.1. As noticed, August 9, 2017 is the insolvency commencement date in this case. The transactions in question, even if of putting the concerned properties under mortgage with the lenders, carry the ultimate effect of working towards the benefit and advantage of the borrower, i. e., JAL who

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obtained loans and finances by virtue of such transactions. It is true that there had not been any creditor-debtor relationship between the lender banks and corporate debtor JIL but that will not be decisive of the question of the ultimate beneficiary of these transactions. The mortgage deeds in question, entered by the corporate debtor JIL to secure the debts of JAL, obviously, amount to creation of security interest to the benefit of JAL.

22.2.2. Now, the capacity of JAL is admittedly that of the holding company of JIL as its largest equity shareholder (with approximately 71.64 per cent. shareholding). Moreover, JAL had admittedly been the operational creditor of JIL, for an amount of approximately Rs. 261.77 crores. JAL itself maintains that it had been providing financial, technical and strategic support to JIL in various ways. It is the assertion that apart from making investment in terms of equity shareholding to the tune of Rs. 995 crores, JAL had pledged its 70,83,56,087 equity shares held in JIL in favour of the lenders of JIL ; had also entered into promoter support agreement to the lenders of JIL to meet the DSRA obligation of JIL towards its lenders ; and had further extended bank guarantees of Rs. 212 crores to meet the DSRA obligation of JIL. These assertions, in our view, put JAL in such capacity that it is a related party to JIL and is a creditor as also surety of JIL. In other words, the corporate debtor JIL owed antecedent financial debts as also operational debts and other liabilities towards JAL.

22.3. In the scenario taken into comprehension hereinabove, there is nothing to doubt that the corporate debtor JIL has given a preference by way of the mortgage transactions in question for the benefit of its related person JAL (who has been the creditor as also surety for JIL) for and on account of antecedent financial debts, operational debts and other liabilities owed to such related person. In the given fact situation, it is plain and clear that the transactions in question meet with all the requirements of clause (a) of sub-section (2) of section 43.

22.4. It is also not far to seek that in the given scenario, the requirements of clause (b) of sub-section (2) of section 43 are also met fair and square. On behalf of the respondents, emphasis is laid on the fact that in the distribution waterfall in case of liquidation (per section 53 of the Code), JAL, as an operational creditor, stands much lower in priority than the other creditors and stakeholders. Such submissions, in our view, only strengthen the position that by way of the impugned transfers, JAL is put in a much beneficial position than it would have been in the absence of such transfers. It has rightly been contended on behalf of the appellants that with the transactions in question, JAL has been put in an advantageous position vis-a-vis other creditors on the counts that : (a) JAL received a huge working

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capital (approx. rupees 30,000 crores), by way of loans and facilities extended to it by the respondent-lenders ; and (b) by way of the transactions in question, JAL's liability towards its own creditors shall be reduced, in so far as the value of the mortgaged properties is concerned, which is said to be approximately Rs. 60,00 crores. As a necessary corollary of the beneficial and advantageous position of the related party JAL with creation of such security interest over the properties of JIL, in the eventuality of distribution of assets under section 53, the other creditors and stakeholders of JIL shall have to bear the brunt of the corresponding disadvantage because such heavily encumbered assets will not form the part of available estate of the corporate debtor. Obviously, JAL stands dearly benefited and has derived such benefits at the cost, and in exclusion, of the other creditors and stakeholders of the corporate debtor JIL. The applicability of clauses (a) and (b) of sub-section (2) of section 43 of the Code is clear and complete in relation to the impugned six transactions.

22.5. Therefore, in relation to the present case, the answers to questions (i), (ii) and (iii) as referred in paragraph 20 are that : the impugned transactions had been of transfers for the benefit of JAL, who is a related party of the corporate debtor JIL and is its creditor and surety by virtue of antecedent operational debts as also other facilities extended by it ; and the impugned transactions have the effect of putting JAL in a beneficial position than it would have been in the event of distribution of assets being made in accordance with section 53 of the Code. Thus, the corporate debtor JIL has given a preference in the manner laid down in sub-section (2) of section 43 of the Code.

The requirements of sub-section (4) of section 43 of the IBC—related party and look-back period

23 Even when all the requirements of sub-section (2) of section 43 of the Code are satisfied, in order to fall within the mischief sought to be remedied by section 43, the questioned preference ought to have been given at a relevant time. In other words, for a preference to become an avoidable one, it ought to have been given within the period specified in sub-section (4) of section 43. The extent of "relevant time" is different with reference to the relationship of the beneficiary with the corporate debtor inasmuch as, for the persons falling within the expression "related party" within the meaning of section 5(24) of the Code, such period is of two years before the insolvency commencement date whereas it is one year in relation to the person other than a related party. The conceptions of, and rationale behind, such provisions could be noticed in the excerpts from the

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interim report of Law Reforms Committee, as referred on behalf of the appellants. We may usefully extract the same as under :

"c. Transactions with related parties

> The law on avoidance in the UK provides for close scrutiny of transactions entered into with persons connected with the company (other than employees) by incorporating longer time periods in relation to which such transactions can be challenged. Thus, while the relevant time period for avoiding preferences is six months prior to the onset of insolvency, the time period is increased to two years in the case of persons connected with the company. Similarly, for late floating charges other than for new value, the vulnerability period for non-connected persons is twelve months while it is two years in the case of connected persons. The avoidance provisions under the CA 2013 does not provide for longer time periods in case the transactions are with connected persons. It is submitted that providing for longer time periods for vulnerability would be significant in improving the efficacy of these provisions. This is because a wider range of transactions diminishing creditor wealth entered into with insiders occur not in the 'zone of insolvency' but as soon as early signals of trouble are visible. Such insiders have superior information of the company's deteriorating financial position and may raid corporate assets knowing that the company may become insolvent. These provisions are of special significance in the Indian context where even the larger corporates are often promoter/family controlled with such insiders often enjoying significant informational advantages over even well-advised secured lenders."

23.1. Before examining as to whether the questioned preferences were given at the relevant time as specified in sub-section (4) of section 43, we may deal with one part of the submissions made on behalf of some of the respondents that in view of the look-back periods provided in sub-section (4), the provisions of section 43 of the Code, by their very nature, would come into operation at least one year after the enactment of the Code and else, it would be giving retrospective effect to these provisions which is not permissible. The submissions, in our view, remain bereft of substance.

23.1.1. The scheme of IBC is to disapprove and disregard such preferential transaction which falls within the ambit of section 43 and to ensure that any property likely to have been lost due to such transaction is brought back to the corporate debtor ; and if any encumbrance is created, to remove such encumbrance so as to bring the corporate debtor back on its wheels or in other event (of liquidation), to ensure pro rata, equitable and just

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distribution of its assets. Such provisions as contained in sections 43 and 44 came into operation as the comprehensive scheme of corporate insolvency resolution and liquidation from the date of being made effective ; and merely because look-back period is envisaged, for the purpose of finding "relevant time", it cannot be said that the provision itself is retrospective in operation. Reference to the decision of this court in the case of *Purbanchal Cables and Conductors P. Ltd.* v. *Assam State Electricity Board* [2012] 7 SCC 462 is entirely inapt. In the said case, by virtue of the enactment in question, i. e., Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, a new liability of high rate of interest was created against the buyer in displacement of the general principles of section 34 of the Code of Civil Procedure, 1908. Hence, this court found that the enactment creating new liability would only be prospective in operation. As noticed, fraudulent preferences in the affairs of corporate persons had been dealt with by the Legislature in the Companies Act, 1956 and have also been dealt with in the Act of 2013. Though therein, essentially, the fraudulent preferences and transfers not in good faith are dealt with whereas, in the scheme of IBC, separate provisions are made as regards the transactions intended at defrauding the creditors (section 49 of the IBC) as also for fraudulent trading or wrongful trading (section 66 IBC). The provisions contained in section 43, however, indicate the intention of Legislature that when a preference is given at a relevant time and thereby, the beneficiary of preference acquires unwarranted better position in the event of distribution of assets, the same may not be countenanced. Looking to the scheme of the IBC and the principles applicable for the conduct of the affairs of a corporate person, it cannot be said that anything of a new liability has been imposed or a new right has been created. Maximisation of value of assets of corporate persons and balancing the interests of all the stakeholders being the objectives of the Code, the provisions therein need to be given fuller effect in conformity with the intention of the Legislature.

23.1.2.We may also observe that if the contentions urged on behalf of the respondents were to be accepted, the result would be of postponing the effective date of operation of sub-section (4) of section 43 by two years in the case of related party and to one year in the case of unrelated party, and thereby, effectively postponing the application of entire section 43 for a period of two years! That cannot be and had never been the intention of Legislature. It is also noteworthy that by virtue of proviso to sub-section (3) of section 1 of the Code, different dates can be provided for enforcement of different provisions of the Code ; and in fact, different provisions have been brought into effect on different dates. However, after coming into force of

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the provisions, if a look-back period is provided for the purpose of any particular enquiry, it cannot be said that the operation of the provision itself would remain in hibernation until such look-back period from the date of commencement of the provision comes to an end. There is nothing in the Code to indicate that any provision in Chapter II or Chapter III be taken out and put in operation at a later date than the date notified. Such contentions being totally devoid of substance, deserve to be, and are, rejected.

24 We may now take up the question as to which of the transactions in question would entail in giving preference at a relevant time or otherwise. As noticed, the preference is given to JAL who is a related party of JIL. Hence, the look-back period is two years preceding insolvency commencement date, i. e., August 9, 2017 per clause (a) of sub-section (4) of section 43 ; and accordingly, the point of enquiry would be as to whether the preference had been given during the period of two years preceding August 9, 2017. Therefore, the transactions commencing from August 10, 2015 until the date of insolvency commencement shall fall under the scanner. As noticed, it has been one of the major contentions of the respondents that most of the impugned transactions were not of creation of any new encumbrance by JIL and in fact, most of the properties in question had already been under mortgage with the respective lenders much before the period under consideration, i. e., much before August 10, 2015.

24.1. It may at once be noticed that the transaction that was clearly falling beyond the period under consideration was, in fact, kept out of the purview of section 43 of the Code by the NCLT itself, being that relating to property No. 7 (as mentioned in paragraph 4.5 hereinbefore).

24.2. So far as the transaction relating to property No. 6 is concerned, being the mortgage deed dated March 4, 2016 towards short-term loan facility to JAL of Rs. 1,000 crores by State Bank of India, the same obviously falls within the look-back period. Even if JAL had allegedly entered into the facility agreement with this lender bank on March 26, 2015 this date is hardly of any bearing so far as transaction by the corporate debtor JIL is concerned, which was made only on March 4, 2016.

24.3. In relation to the transactions concerning property No. 1 and property No. 2, for securing loans by the consortium to JAL, it is submitted that there had been initial mortgage dated February 24, 2015 that was released on September 15, 2015 and a so-called re-mortgage was made on September 15, 2015 and thereafter, this was also released on December 29, 2016 and again the so-called re-mortgage was made on December 29, 2016. It is sought to be asserted that it had not been a case of creation of a fresh mortgage. Similarly, in relation to the transactions concerning

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property No. 3, it is alleged that there had been initial mortgage dated May 12, 2014 for 433.35 acres of land of which, 240 acres was released on December 30, 2015, 35.05 acres was released on June 24, 2016 and the remaining 158.1739 acres of land was also released on March 7, 2017 but was re-mortgaged on this very date March 7, 2017. As regards property No. 4, it is alleged that the same was put under mortgage initially on May 12, 2014 was released on March 7, 2017 and was re-mortgaged on this very date March 7, 2017. As regards property No. 5, it is alleged that the same was put under mortgage initially on June 24, 2009 the mortgage was extended on November 27, 2012 and on March 23, 2013 ; it was released on November 4, 2015 and was re-mortgaged on May 24, 2016.

24.3.1. It has been one of the major contentions of the respondents that most of the impugned transactions were not of creation of any new encumbrance by JIL and in fact, most of the properties in question had already been under mortgage with the respective lenders. The submissions of respondents in relation to the aforesaid five transactions, that they had been of so-called re-mortgage/s, carry their own shortcomings and cannot be accepted. In the first place, we are clearly of the view that on release by the mortgagee, the mortgage ceases to exist and it is difficult to countenance the concept of a so-called re-mortgage. The so-called re-mortgage, on all its legal effects and connotations, could only be regarded as a fresh mortgage ; and it obviously befalls on the mortgagor to consider at the time of creating any fresh mortgage as whether such a transaction is expedient and whether it should be entered into at all. Noticeable it is that in relation to property Nos. 1 and 2, even if the initial mortgage had been dated February 24, 2015 falling beyond the look-back period, it was released on September 15, 2015 and this date (September 15, 2015) falls within the look-back period. Even if the same property has been again mortgaged with the same lender/s on the same day of release, the same cannot be countenanced for the transaction operates towards extending unwarranted preference to JAL by the corporate debtor JIL. Significant it is to notice that while making this mortgage dated September 15, 2015 the facility amount being obtained by JAL got swelled from Rs. 3,250 crores to a whopping Rs. 24,109 crores and the number of creditors went up from 2 to 24. Such a transaction, in our view, had only been of a fresh mortgage to secure extra facilities obtained by JAL and thereby, extending unwarranted advantage to JAL at the cost of the estate of JIL. In the other transaction dated December 29, 2016 by which the properties in question were again put under mortgage with the lender/s, the facility amount was shown as Rs. 23,491 crores. The transactions on September 15, 2015 and December

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29, 2016 cannot be given credence with reference to the previous mortgage deed dated February 24, 2015. Similar is the case in relation to property No. 3. Even when the previous mortgage was given on May 12, 2014, i. e., beyond the look-back period, there had been release deeds on December 30, 2015 and June 26, 2016 as regards certain parcels of land. So far the release of land to JIL is concerned, the same causes no problem and only works to the benefit of JIL and its stakeholders. However, when the remaining land was also released on March 7, 2017 its fresh mortgage, even if on the same date, cannot be countenanced and is hit by section 43, being a deemed preference. The very same considerations apply in relation to property No. 4 too. As regards property No. 5, even if there had been certain previous mortgage transactions falling beyond the look-back period, the property got released on November 4, 2015 ; and thereafter, the fresh mortgage on May 24, 2016 with increased facility amount from Rs. 1,470 crores to Rs. 1,767 crores, suffers from the same vice, of being a deemed preference to a related party during the period of two years preceding the insolvency commencement date.

24.4. For what has been discussed hereinabove, the conclusion is inevitable that the impugned preference was given to a related party during a relevant time. However, before concluding on this part of discussion, we may also observe that reference to the decisions of the Madras and Bombay High Courts in the case of *IDBI Bank Ltd.* v. *Administrator, Kothari Orient Finance Ltd.* [2009] 152 Comp Cas 282 (Mad) and *Monark Enterprises* v. *Kishan Tulpule* [1992] 74 Comp Cas 89 (Bom) respectively, is neither apposite nor advances the cause of the respondents for the reason that the said decisions had essentially been on the question/s as to whether the impugned transactions were of fraudulent preference per section 531 or lacking in good faith per section 531A of the Companies Act, 1956. In fact, in the case of *IDBI Bank Ltd.* v. *Administrator, Kothari Orient Finance Ltd.* [2009] 152 Comp Cas 282 (Mad) the corporate debtor attempted to transfer one of its property to the appellant-bank, who was one of its creditors and in that regard, certain transactions like agreement for sale and handing over possession were suggested and it was alleged that the contract for sale was partly performed about one year and four months prior to the winding up proceedings ; and such being beyond the look-back period of six months as envisaged by section 531 of the Companies Act, 1956, it was argued that it had not been a fraudulent transfer. The contentions were not accepted by the single judge and by the Division Bench of the High Court for the reason that mere handing over of possession or documents did not complete the sale ; rather the court was of the view that such

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documents were created only in order to avoid the transaction being called a fraudulent preference. Apart that the element of fraud is not the essential ingredient of section 43 of the Code, the said decision in *IDBI Bank Ltd.* v. *Administrator, Kothari Orient Finance Ltd.* [2009] 152 Comp Cas 282 (Mad), on the approach of the courts towards corporate transactions makes it clear that any transaction favouring one stakeholder at the cost of the other is viewed with disfavour and is disapproved, particularly if it takes place during the prescribed look-back period.

24.5. For what has been discussed hereinabove, the answer to question (iv) as referred in paragraph 20 is that the transactions in question had been of deemed preference to related party JAL by the corporate debtor JIL during the look-back period of two years and have rightly been held covered within the period envisaged by sub-section (4) of section 43 of the Code.

Ordinary course of business or financial affairs

25 Even when it is held that the impugned transactions answer to the requirements of sub-section (2) of section 43 and fall within the period specified in sub-section (4) thereof, the question still remains as to whether the impugned transactions do or do not fall within the exclusion provided by sub-section (3) of section 43 of the Code ? As noticed, two types of transfers, as specified in clauses (a) and (b) of sub-section (3) of section 43, are not to be treated as preference for the purpose of sub-section (2). It has been the mainstay of the respondent-lenders that, in any case, the transfers in question were made in the ordinary course of their business and hence, fall within clause (a) of section 43(3) that excludes the transfer made in the ordinary course of business or financial affairs of the corporate debtor or the transferee. It has been forcefully argued that the lenders of JAL are the transferees in the transactions in question and their ordinary course of business being of providing financial support with loans and advances, such transfers are not included in sub-section (2) of section 43 by virtue of the exclusion provided in sub-section (3) thereof. On the other hand, the main plank of submissions on behalf of the appellants has been that the expression "or" occurring in clause (a) of sub-section (3) of section 43, seemingly disjunctive of corporate debtor on one hand and transferee on the other, is required to be read as "and" so as to be conjunctive and covering only the transfers made in the ordinary course of business or financial affairs of the corporate debtor and the transferee. It is submitted on behalf of the appellants that such mortgage transactions had neither been in the ordinary course of business or financial affairs of the corporate debtor JIL nor secure new value in the property acquired by the corporate debtor and

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hence, are not excepted transactions within the meaning of sub-section (3) of section 43 of the Code.

25.1. Having taken into comprehension the scheme of the Code and the purpose and purport of the provisions contained in section 43, we find force and substance in the submissions made on behalf of the appellants.

25.2. As noticed, in the scheme of such provisions in the Code, the underlying concept is to disregard and practically annul such transactions which appear, in the course of insolvency resolution or liquidation, to be preferential so as to minimise the potential loss to other stakeholders in the affairs of the corporate debtor, particularly its creditors. What is to be examined for the purpose of section 43 is the conduct and affairs of the corporate debtor. If the beneficiary of the transaction in question is a related party of the corporate debtor, the period of enquiry is enlarged to two years whereas this period is one year in other cases. During such scanning, by virtue of sub-section (3) of section 43, two types of transfers are kept out of the purview of sub-section (2), which would not be treated as preference. Though in the present case, we are concerned only with the phraseology occurring in clause (a) of sub-section (3) but, we may usefully refer to clause (b) thereof, for an insight into the underlying concept for providing exception in regard to certain transfers and keeping them out of the purview of "preference".

25.2.1. By virtue of clause (b) of sub-section (3) (read with Explanation thereto), any transfer creating a security interest in the property "acquired" by the corporate debtor is not to be treated as preference to the extent that such security interest secures new value in monetary terms or in terms of goods, services or new credit or in release of a previously transferred property. Any micro dissection of clause (b) of sub-section (3) of section 43 is not required in the present case. Suffice it to notice that even a bare look at the provision brings forth the concept that value enhancement or strengthening of the corporate debtor ought to be the result of a transfer, if it is to remain out of the ambit of sub-section (2) and not to fall within the mischief of being preferential.

25.2.2. Another feature of vital importance is that the matter is examined with reference to the dealing and conduct of the corporate debtor ; and qua the health and prospects of the corporate debtor. Applying the well-known principles of noscitur a sociis, whereunder the questionable meaning of a doubtful word could be derived and understood from its associates and context ; and usefully recapping that the scheme of section 43 of the Code is essentially of scanning through the affairs of the corporate debtor and to discredit and disregard such transaction by the corporate debtor which

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tends to give unwarranted benefit to one of its creditor/surety/guarantor over others, in our view, the purport of clause (a) of sub-section (3) of section 43 is also principally directed towards the corporate debtor's dealings. In other words, the whole of conspectus of sub-section (3) is that only if any transfer is found to have been made by the corporate debtor, either in the ordinary course of its business or financial affairs or in the process of acquiring any enhancement in its value or worth, that might be considered as having been done without any tinge of favour to any person in preference to others and thus, might stand excluded from the purview of being preferential, subject to fulfilment of other requirements of sub-section (3) of section 43.

25.3. Needless to reiterate that if the transfer is examined with reference to the ordinary course of business or financial affairs of the transferee alone, it may conveniently get excluded from the rigour of sub-section (2) of section 43, even if not standing within the scope of ordinary course of business or financial affairs of the corporate debtor. Such had never been the scheme of the Code nor the intent of section 43 thereof. It has rightly been contended on behalf of the appellants that for the purpose of exception under clause (a) of sub-section (3) of section 43, the intent of Legislature is required to be kept in view. If the ordinary course of business or financial affairs of the transferee (lenders of JAL in the present case) would itself be decisive for exclusion, almost every transfer made to the transferees like the lender-banks/financial institutions would be taken out of the net, which would practically result in frustrating the provision itself.

25.4. It remains trite that an interpretation that defeats the scheme, intent and object of the statutory provision is to be eschewed and for that matter, if necessary, by applying the principles of purposive interpretation rather than literal. In the case of *State of Bombay* v. *R. M. D. Chamarbaugwala* [1957] SCR 874, the Constitution Bench of this court has held that well known cannons of construction of statutes permit the court to read the word "or" as "and" after looking at the clear intention of the Legislature. In the case of *Mazagaon Dock Ltd.* v. *CITEPT* [1959] SCR 848[1], when the expression "or" occurring in sub-section (2) of section 42 of the Income-tax Act, 1922 did appear bringing out the result which could not have been intended, the same was read in the context as meaning "and". This court said[2] :

> "10. The word 'or' in the clause would appear to be rather inappropriate, as it is susceptible of the interpretation that when some

1. See [1958] 34 ITR 368 (SC).
2. See page 375 of 34 ITR.

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profits are made but they are less than normal profits, tax could only be imposed either on the one or on the other, and that accordingly a tax on the actual profits earned would bar the imposition of tax on profits which might have been received. Obviously, that could not have been intended, and the word 'or' would have to be read in the context as meaning 'and' . . ."

25.5. Looking to the scheme and intent of the provisions in question and applying the principles aforesaid, we have no hesitation in accepting the submissions made on behalf of the appellants that the said contents of clause (a) of sub-section (3) of section 43 call for purposive interpretation so as to ensure that the provision operates in sync with the intention of the Legislature and achieves the avowed objectives. Therefore, the expression "or", appearing as disjunctive between the expressions "corporate debtor" and "transferee", ought to be read as "and" ; so as to be conjunctive of the two expressions, i. e., "corporate debtor" and "transferee". Thus read, clause (a) of sub-section (3) of section 43 shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee. Only by way of such reading of "or" as "and", it could be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer of the core question as to whether the corporate debtor has done anything which falls foul of its corporate responsibilities.

25.6. The result of discussion in the foregoing paragraphs is that the transfers in question could be considered outside the purview of sub-section (2) of section 43 of the Code only if it could be shown that same were made in the "ordinary course of business or financial affairs" of the corporate debtor JIL and the transferees. Even if transferees submit that such transfers had been in the ordinary course of their business, the question would still remain if the transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL so as to fall within the exception provided by clause (a) of sub-section (3) of section 43 of the Code.

25.6.1. Thus, the enquiry now boils down to the question as to whether the impugned transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL. It remains trite that an activity could be regarded as "business" if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive[1]. As regards the meaning and essence of the expression "ordinary

1. Vide *State of Andhra Pradesh* v. *H. Abdul Bakshi and Bros.* [1964] 15 STC 644 (SC) (at page 647).

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