HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 3250 OF 2019

Kamal K. Singh }
male adult, Indian Inhabitant, }
Aged 70 years, residing at }
15th floor, Maker Tower 'A', }
Cuff Parade, Mumbai-400 005 } Petitioner

versus

1. Union of India, }
Through the Ministry of }
Corporate Affairs, having office }
at 'A' Wing, Shastri Bhawan, }
Rajendra Prasad Road, New }
Delhi, Delhi 110 001 and also }
having an office at Registrar }
of Companies, Everest }
Building, 100, Marine Drive, }
Mumbai – 400 002 }
}

2. Registrar of National }
Company Law Tribunal, }
Mumbai Bench, }
having office at 4th floor, }
MTNL Building, G. D. Somani }
Road, Cuff Parade, Mumbai }
}

3. Value Partners Greater }
China High Yield Fund, }
Company incorporated under }
the laws of Cayman Islands, }
having its registered office at: }
PO Box 484, Strathvale House, }
90 North Church Street, }
George Town, Grand Cayman, }
KYI – 1106, Cayman Islands }
}

4. Pinpoint Multi Strategh }
Fund, company incorporated }
under the laws of Cayman }
Islands, having its registered }
office at: C/o- Campbells }

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Corporate Services Ltd., }
Floor 4, Willow House, }
Cricket Square, Grand Cayman, }
KY1-9010, Cayman Islands }
}
5. Shailendra Ajmera }
Insolvency Professional, }
Ernst & Young LLP, 3rd floor, }
Worldmark 1, Aerocity }
Hospitality, New Delhi – }
110 037 }
}
6. Rolta India Ltd. }
having its registered office at: }
Rolta Tower A, Rolta }
Technology Park, 22nd Street }
MIDC, Marol, Andheri (East), }
Mumbai – 400 093 } Respondents

Mr.Janak Dwarkadas-Senior Advocate with Mr.Vikram Nankani-Senior Advocate and Ms. Ankita Singhania I/b. Mr.Shailendra S. Kanetkar for the petitioner.

Mr.Rajshekhar V. Govilkar with Mr.Dhanesh R. Shah, Ms.Shaba Khan and Ms.Kinjal Jani for respondent nos.1 and 2.

Mr.Ravi Kadam-Senior Advocate with Mr.Zal Andhyarujina, Mr.Dhananjay Kumar, Mr.Animesh Bisht, mr.Anush Mathkar, Mr.Aarant Sarang and Ms.Sanjana M. I/b. M/s.Cyril Amarchand Mangaldas for respondent nos. 3 and 4.

Mr.B.A.Patel-Deputy Registrar of National Company Law Tribunal, Mumbai present.

CORAM :- S. C. DHARMADHIKARI &
R. I. CHAGLA, JJ.

DATED :- NOVEMBER 29, 2019

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ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

1. Heard learned counsel appearing for the parties.

2. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

3. This writ petition under Article 226 of the Constitution of India challenges the order passed by the National Company Law Tribunal, Mumbai (NCLT) passed in CP (IB) No. 4375/ NCLT/ MB/ 2018, copy of which is at Exhibit 'A' to the petition.

4. Though another relief is claimed in the petition of a declaration that section 231 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the IBC") is unconstitutional, invalid and bad in law, Mr.Dwarkadas learned senior counsel appearing in support of this petition stated that the petitioner is not pressing this relief.

5. The petitioner before us is an individual and has impleaded the Union of India, the Registrar of the NCLT, Mumbai, a company incorporated under the laws of Cayman Islands as respondent no.3, another company incorporated under the laws of Cayman Islands as respondent no.4 and Insolvency Professional as respondent no.5. The sixth respondent is a company of which the petitioner before us is the Chairman and Managing Director.

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6. It is alleged in the memo of the petition that on 8th November, 2019, respondent no. 5 entered upon and took charge/ possession of the registered office of the sixth respondent on the basis of an order of the NCLT, Mumbai. That order is purportedly passed on 22nd October, 2019. The argument is that this order is non est. It has no force in law.

7. We will come to the allegations in relation to this aspect of the matter a little later. The nature of the proceedings would have to be first noticed. It is stated that on 16th May, 2013, Rolta LLC, a limited liability company incorporated in Delaware, United States of America executed an Indenture dated 16th May, 2013 for issuance of 10.75% Senior notes in aggregate principal amount upto USD200,000,000/-. Rolta LLC issued 10.75% Senior notes and for ease in reference, the parties to this Indenture are then set out in para 7. A copy of this Indenture is annexed to the petition as Exhibit 'B'. It is stated that the parent guarantee is respondent no.6. Then, it is stated that on 24th July, 2014, a similar document was executed, in which again, the parent guarantee named was respondent no.6.

8. Thereafter, there are parent guarantees executed on 16th May, 2013 and 24th July, 2014. In respect of these Indentures, it is stated that the primary obligation of respondent no. 6 shall be

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towards holder of a note and to the trustees. Exhibits 'D' and 'E' are the copies of these parent guarantees.

9. On 24th April, 2018, the third respondent issued a letter claiming to be authorised by the holder of Notes calling upon the sixth respondent to make payment of sums described therein to the holder of Notes. Exhibit 'F' is a copy of the letter dated 24th April, 2018. Thereafter, a similar letter was addressed in relation to 2014-Indenture. After that, on 14th November, 2018, respondent nos. 3 and 4 filed an Insolvency Petition, namely, the present proceedings invoking section 7 of the IBC. The petition/ application was filed before the NCLT, Mumbai Bench seeking to initiate the Corporate Insolvency Resolution Process (CIRP) against the sixth respondent.

10. Although it is highlighted that the application suffers from several errors and discrepancies, we do not go into this aspect nor the merits of this application. It is argued that this insolvency petition, along with maintainability application was listed before a Bench comprising Mr.V.P.Singh (Judicial Member) and Mr.Rajesh Sharma (Technical Member) on several occasions and preliminary orders and directions were issued. The parties filed documents and written arguments. On 20th August, 2019, both sides placed their arguments on merits. On conclusion of the arguments, the matter

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was reserved for orders. There is an endorsement or remark to that effect in the proceedings. However, it is alleged that the petitioner was shocked and surprised to have learnt that the fifth respondent is seeking to take custody of the registered office and had informed that the board of respondent no. 6 stands suspended in view of the moratorium declared by the NCLT. The fifth respondent further informed that the NCLT had initiated CIRP of respondent no. 6 by passing the impugned order. That he has been pointed as Interim Resolution Professional (IRP). The affairs as well as management of the sixth respondent would henceforth be operated by respondent no.5. It was further informed that a public announcement would be made and published in the newspapers as well as website of respondent no. 6 informing all creditors and the public at large that the IRP of respondent no. 6 has been initiated and that the claims of all creditors be filed with respondent no.5. In para 16 of this petition, it is said that inquiries were made with respondent no. 5, who shared a copy of the impugned order. Upon perusal of the impugned order, it was revealed that it was allegedly passed on 22nd October, 2019 and the second respondent to this petition was directed to forthwith transmit copies of the same to all parties concerned. The petitioner made inquiries with the sixth respondent and the office of its advocates on record before the NCLT.. However, it was confirmed by them that the impugned

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order has not been received. The order has not been uploaded on the website of the NCLT until 13th November, 2019 as the last order uploaded for the said insolvency petition relates to the hearing on 20th August, 2019, on which date, the arguments were concluded and the matter was reserved for orders by the concerned Bench.

11. In para 18 of the petition, it is alleged that on inquiries, the petitioner learnt that the insolvency petition/ proceedings were not listed for pronouncement of the order on 22nd October, 2019 before the concerned Bench. It was further revealed that though the advocates for respondent no. 6 were present before the Bench, the insolvency petition was not taken up. The petitioner says that since the Bench had reserved the order, he was diligently tracking the daily cause list. In para 20, it is stated that Mr.V.P.Singh (Judicial Member) was expected to demit office as a member of the NCLT as he was appointed as a member of the National Company Law Appellate Tribunal (NCLAT) vide Notification dated 15th October, 2019 issued by the Central Government. The petitioner was keeping a track of the daily listing for pronouncement on board. It is stated that the insolvency petition was not listed for pronouncement until Mr.V.P.Singh demitted office and took charge, of the NCLAT, on 23rd October, 2019. On receipt of the copy of the impugned order, the petitioner sought to verify from the website of

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the NCLT as to whether there was any board or listing of the matter for pronouncement. It is stated that an additional cause list dated 22nd October, 2019 was uploaded and it featured only one item, namely, the insolvency petition at serial no. 165 under caption of "Orders". On inspecting the additional cause list, it was learnt that it was created on 5th November, 2019 at 5.38 p.m. and uploaded thereafter on the website of the NCLT, Mumbai.

12. In para 23, it is alleged that on 22nd October, 2019, the Bench of the Judicial Member and Technical Member did not conduct any adjudicatory business. Relying on Exhibits "N-1" and "N-2" of the petition, it is stated that the order has been put in communication without the same having been pronounced.

13. The petitioner has levelled these serious allegations and in para 25, it is stated as under:-

> "25. The Petitioner is aggrieved as the NCLT has passed the impugned order in an illegal manner which is in violation of the said Rules. The impugned order has resulted in the Petitioner losing control & directorship of Respondent NO. 6. It is submitted that the Petitioner is severely hampered by the Impugned Order being passed in contravention of the said Rules as well as settled principles of law in this regard as the same has prevented him from utilizing the complete period provided under the Insolvency & Bankruptcy Code, 2016 for preferring an appeal and approaching the National Company Law Appellate Tribunal for appropriate reliefs in time."

14. The further paragraphs of the petition contain reference to the NCLT Rules and then the averment is that the petitioner is

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aggrieved as the NCLT has passed the impugned order in an illegal manner in violation of the said Rules. The impugned order has resulted in the petitioner losing control and directorship of respondent no.6.

15. The petitioner, therefore, says that coercive steps would be taken by respondent no. 5 and having been left with no other remedy, he has filed this petition. The grounds are then set out and in relation to the validity and legality of the order, it is stated that this order is passed in violation of the principles of natural justice and the procedure established by law, which governs the functioning of the NCLT. It binds the Members/ officers discharging the respective duties. The order is bad in law and without jurisdiction, as the same has been passed by the NCLT in blatant violation of the Rules 150 and 152(2) of the National Company Law Tribunal Rules, 2016 (hereinafter referred to as "the NCLT Rules, 2016). It is non est as the Rules mandate that the order has to be pronounced. It is in the interest of justice and fairness, that a procedure is established and there cannot be any communication of the order without it being pronounced. Since the NCLT is a statutory tribunal exercising judicial powers, it is bound to act in terms of the law, which includes the practice rules or rules of procedure. If these Rules are bypassed and no

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compliance is made therewith, then, such an order violates the basic cannons of fairness and justice. The petitioner having been adversely and prejudicially affected by the order, including his remedies under the law being hampered, it is stated that this is a fit case where the petition should be entertained and the reliefs under this court's writ jurisdiction be granted.

16. A specific averment is inserted to the effect that the impugned order was neither pronounced under the Rules nor was informed to the petitioner and the petitioner was made aware of the same only on 8th November, 2019, when the fifth respondent sought to take charge of the respondent no. 6 company. Thus, the order is passed in breach of the principles of natural justice and has affected the petitioner's legal rights.

17. On such a petition filed in this court and moved before us by the petitioner, we placed it for admission. On 18th November, 2019, we heard Mr.Janak Dwarkadas learned senior counsel appearing for the petitioner, Mr.Ravi Kadam learned senior counsel appearing for respondent nos. 3 and 4 and finding that the issue raised in the petition is about the legality and validity of the order and the sanctity and credibility of judicial proceedings as well, we directed the Prothonotary and Senior Master of this court to issue a telephonic notice as also a notice by e-mail and hand delivery to

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the Registrar of the NCLT, Mumbai Bench (respondent no.2) to remain present in this court on 20th November, 2019 at 3.00 p.m. with all original records concerning the case, in which the order impugned in the petition is purportedly passed. The matter was adjourned to 21st November, 2019. On 21st November, 2019, we passed a detailed order and that order reads as under:-

> "1. On this petition, after hearing both sides, the following order was passed on 18th November, 2019.
>
> > "Let the Prothonotary & Senior Master issue a telephonic notice, as also by email (mum@nclt.gov.in) and hand-delivery to the Registrar of National Company Law Tribunal, Mumbai Bench, respondent No.2 in this petition, requesting him to remain present before this Court on 20-11-2019 at 3.00 p.m., with all original records concerning the case in which an Order is purportedly passed by the Tribunal on 22-10-2019 being C.P. (IB) No.4375/NCLT/MB/2018."
>
> 2. On 21st November, 2019, after the matter was called out, Mr.R.V.Govilkar, appearing on behalf of respondent Nos.1 and 2, tendered the original record.
>
> 3. However, what is tendered before this Court yesterday was a Register, which, according to Mr.Govilkar, contains the details such as the number of the proceedings, the date of the order and the date of uploading of the order or the date given for the uploading of the order.
>
> 4. It is stated with reference to this Register by Mr.Govilkar that it contains an endorsement that as far as the said proceedings are concerned, the final orders are dated 22nd October, 2019.
>
> 5. The order passed by the Members is also produced in a separate file together with some loose papers. The set of loose papers contains an endorsement, but without any date, which reads as under:-

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"ORDER

19. MA 2216/2019 in C.P. (IB) 4375 (MB)/2018

Heard the argument of the Ld.Counsel for the Financial Creditor and Counsel for the Corporate Debtor. Ld. Counsel for the Financial Creditor sought leave of the court for filing a fresh declaration of proposed RP in Form 2. Prayer is allowed. Financial Creditor may file declaration by Proposed RP in Form 2 by the end of the date.

It is Reserved for Orders.

Sd/- Sd/-

RAJESH SHARMA V.P.SINGH

Member (Technical) Member (Judicial)"

6. Thus, the arguments were concluded and the order was reserved.

7. Mr.Dwarkadas, learned senior counsel appearing on behalf of the petitioner, has contended before us that the order impugned in this petition be quashed and set aside, not on merits, but only on the ground that it does not comply with the Rules. He would draw our attention to the set of Rules which are applicable to the proceedings.

8. The rules that have been pressed into service are to be found in the National Company Law Tribunal Rules, 2016. Our attention is invited to Rule 150 of the Rules. It reads as under:-

"**150. Pronouncement of Order.-** (1) The Tribunal, after hearing the applicant and respondent, shall make and pronounce an order either at once or, as soon as thereafter as may be practicable but not later than thirty days from the final hearing.

(2) Every order of the Tribunal shall be in writing and shall be signed and dated by the President or Member or Members constituting the

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Bench which heard the case and pronounced the order,

(3) A certified copy of every order passed by the Tribunal shall be given to the parties,

(4) The Tribunal, may transmit order made by it to any court for enforcement, on application made by either of the parties to the order or *suo motu*.

(5) Every order or judgment or notice shall bear the seal of the Tribunal."

9. Then, Mr.Dwarkadas would submit that the argument of the petitioner is not hyper-technical as is projected by the other side. The argument is that there is no legal and valid order unless it is pronounced. The order may have been kept ready for pronouncement, but the Tribunal, exercising judicial powers, ought to have pronounced that order. He would submit that the Rule is couched in a language, which makes the pronouncement mandatory. It may be a pronouncement at once or as soon as after hearing the applicant and the respondent is concluded. It may not be possible to immediately pronounce the order, but there is outer limit also prescribed of thirty days from the date of final hearing. Mr.Dwarkadas submits that assuming that this outer limit is not mandatory, what is mandated by the Rules is "pronouncement". By Rule 151, pronouncement of order by any one member of the Bench is permissible. That will be a pronouncement on behalf of the Bench. When the order is pronounced under this Rule 151, the Court Master shall make a note in the order sheet, that the order of the Bench consisting of President and Members was pronounced in open court on behalf of the Bench. The argument throughout was that there was no date of pronouncement notified. There was no board prepared of the proceedings and particularly, the pronouncement of the order in open Court. There was no intimation to the parties and that the petitioner's advocate was in the Court, but no pronouncement was done. Interestingly, according to Mr.Dwarkadas, there is an endorsement at pages 547A and 547B that the pronouncement was made after the board was prepared. However, there is no contemporaneous record of this board having been notified. In fact, the contra record is that this board is prepared later. Mr.Dwarkadas sought to tender an affidavit of the petitioner affirming these allegations.

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10. Mr.Ravi Kadam, the learned senior counsel appearing on behalf of the contesting respondent, on the other hand, would submit that there is an allegation of non-compliance with the Rules. The Rules cannot be elevated to such a status making it impossible for the Tribunal to function. There is no serious omission and of the nature pointed out. Rather, there is pronouncement of the order in the absence of the parties. That does not mean that there is no pronouncement of the order or that the parties had not been intimated of such pronouncement.

11. In the light of these allegations, we had requested Mr.Govilkar to produce the original record. Until then, we had refused to take the affidavit of the petitioner on file.

12. Today, this record is produced and it has been perused by this Bench. In that, we have not found any endorsement of the Court Master. If the order was pronounced under sub-rule (2) of Rule 151, which says that after pronouncement of order under Rule 151 by a Member of the Bench, on behalf of the Bench, the Court Master shall make a note in the order sheet that the order of the Bench consisting of President and Members was pronounced in open Court on behalf of the Bench, pertinently, there is no endorsement in the original file of this nature and Mr.Govilkar has conceded that there is no roznama also.

13. Both the statements recorded and attributed to Mr.Govilkar, are made on instructions of the Deputy Registrar of the Tribunal, who is present in the Court.

14. Mr.Kadam says that his client be allowed to inspect the original record and thereafter to make submissions on the point. We deem it fit and proper to offer such an opportunity to the contesting respondent.

15. Let the concerned representative or the advocate for the contesting respondent inspect the record whereafter Mr.Kadam can make his submissions on the point.

16. Incidentally, we note that there are judgments of the Hon'ble Supreme Court, which rendered in two similar cases.

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17. We take on record the affidavit of Mr.Narendra Gupta.

18. Stand over to 22nd November, 2019."

18. After that order was passed, we have also taken on record an affidavit dated 18th November, 2019 of one Narendra Gupta, an employee of respondent no. 6 as Principal Group Manager and Secretary of the Chairman and Managing Director. He says that he is serving the company in this capacity since 1991. On 15th November, 2019, accompanied with the advocates on record for respondent no. 6, he attended the office of NCLT situated at 4th floor, MTNL Building, G.D.Somani Road, Cuff Parade, Mumbai. A formal application was made in writing requesting search/ inspection of the records. After lodging that application, the Registry of the tribunal duly acknowledged receipt of the same and affixed its stamp. After that the deponent says that along with the advocates, he took physical search of the entire set of papers and proceedings available on record in the said insolvency petition. He also examined the original order passed and the attendance sheets/ notes of appearance for the dates of hearings/ listings in the said petition. Upon examination of the entire original record and proceedings, he noted that there are appearance sheets of 4th March, 2019, 28th March, 2019, 7th May, 2019, 18th June, 2019 and 24th June, 2019. He inquired with the Deputy Registrar whether

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any order/ appearance sheets other than the aforesaid are stored in any other place or maintained in any other file. He was informed that there is no record of appearance or order other than the above.

19. We must place on record the request made by Mr.R.V.Govilkar appearing for respondent no. 1 and the Registrar of the NCLT, Mumbai to peruse the original records. All the original records were produced on the two dates on which we passed specific orders. The original records were taken into custody by the officer attached to this court. They have been allowed to be inspected by the advocate appearing for the petitioner as also the advocate appearing for respondent nos. 3 and 4.

20. It is only after the inspection was complete that we heard the oral arguments of the learned senior counsel appearing for the parties. The original record has confirmed the position emerging from a copy of the impugned order at Exhibit 'A' to the petition, that it is of 11 pages. The operative part of that order is reproduced as under:-

"**ORDER**

This application filed under Section 7 of I&B Code, 2016, filed by **Value Partners Greater China High Yield Income Fund and Pinpoint Multi-Strategy Fund**, Financial Creditor/ Applicant, against **Rolta India**

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Limited, Corporate Debtor for initiating corporate insolvency resolution process is admitted.

We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

I. That this Bench as a result of this prohibits:

a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

II. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the Corporate Debtor under section 33 of I&B Code, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.

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> VI. That this Bench appoints **Shailendra Ajmera**, a registered insolvency resolution professional having Registration Number **[IBBI/ IPA-001/IP-P00304/ 2017-18/ 10568]** as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/ RP shall comply with the IBBI Regulations/ Circulars/ Directions issued in this regard.
>
> 18. The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated Registrar is to be submitted today**."

21. The other endorsement at page 32 of the paper book is that the certified true copy has been issued free of cost on 7th November, 2019. Below this endorsement is the signature of the Assistant Registrar of the NCLT, Mumbai. The operative directions record that the application is filed under section 7 of the IBC, 2016 by Value Partners Greater China High Yield Income Fund and Pinpoint Multi-Strategy Fund, Financial Creditor/ Applicant against Rolta India Limited, Corporate Debtor for initiating CIRP. The order from paragraphs 1 to 9 verbatim reproduces the contents of the application and then says in para 10 that the application is filed on 15th November, 2018. The Corporate Debtor did not file its affidavit in reply. However, filed a Miscellaneous Application No. 2216 of 2019 on 17th June, 2019 and raised the contentions noted in para 10. In para 11, the order says that the Members heard the parties and perused the records. Thereafter, the observations of the Bench on perusal of record are set out in

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para 12 and in para 13, the Bench refers to a judgment of the Hon'ble Supreme Court in the case of *Innoventive Industries Ltd. vs. ICICI Bank and Anr.*[1]. In para 14, the Bench records its conclusions and in para 15, it says that the debt and default of the Corporate Creditor has been established and the application deserves to be admitted. Thereafter, the Bench appoints the fifth respondent as IRP and in para 17, it says that the application under sub-section (2) of section 7 of the IBC is complete. The existing financial debt of more than rupees one lakh is due and payable against the Corporate Debtor and its default is also proved. The application is within the limitation. Accordingly, the application filed under section 7 of the IBC for initiation of CIRP against the Corporate Debtor deserves to be admitted. Thereafter follow the operative directions.

22. Pertinently, the application, on which this order is passed, is dated 14th November, 2018 and there is nothing to controvert the factual averment and allegation in the writ petition that the Judicial Member Mr.V.P.Singh was promoted as a member of the NCLAT. That a notification to that effect is dated 15th October, 2019 and that Mr.Singh demitted office on 22nd October, 2019 and took the charge in NCLAT as a Member on 23rd October, 2019.

1 **(2018) 1 SCC 407**

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23. Before we proceed further, we must note the preliminary objections raised by Mr.Ravi Kadam learned senior counsel appearing for respondent nos. 3 and 4 to the maintainability of this petition. He submitted that this petition should be dismissed only on the ground that the petitioner has an alternate and equally efficacious remedy of appeal to the NCLAT. The petitioner can impugn the order passed on 22nd October, 2019 in an appeal before the appellate tribunal. The order can be challenged *inter alia* on the ground that it has not been passed in total compliance with the procedural rules which are applicable. That there being no adherence to the procedural rules with regard to the pronouncement of the order is also a ground of challenge available to the petitioner, according to Mr.Kadam. Mr.Kadam would submit that a writ petition under Article 226 of the Constitution of India is not maintainable when there is an alternate and equally efficacious remedy, particularly of an appeal. Mr.Kadam would submit that there are well known exceptions to this rule carved out in the judgments of the Hon'ble Supreme Court. Mr.Kadam fairly submits that there is no absolute bar in entertaining a writ petition under Article 226 of the Constitution of India even if alternate remedy is available, but as a rule of caution and prudence, such petitions are not entertained, save and except in cases where the challenge is to the legality and validity of a law

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under which a tribunal is set up and is functional. If any provision of such a law is challenged, then, the tribunals, including appellate tribunal set up under that law may not be in a position to decide that legal and constitutional challenge. Therefore, this is one exception and the other is when the issue raised is pertaining to the vires of any applicable rule and particularly a procedural one. In other words, the procedural rules containing any rule specifically applicable to the impugned proceedings, if challenged, as ultra vires, then, an exception can be made to the general rule carved out in the judgments of the Hon'ble Supreme Court in regard to maintainability of a petition under Article 226 of the Constitution of India in the face of an alternate and equally efficacious remedy. The third exception is violation and breach of the principles of natural justice or a grave error of jurisdiction. Save and except such exceptions, the general rule should be applied and the petition must be thrown out only on this ground. The argument is that there are plural remedies available. There are not one but two appeals which the petitioner can file. The petitioner can file an appeal to the NCLAT and if that fails to redress the grievance of the petitioner, then, the order of such an appellate tribunal can be further challenged by way of an appeal in the Hon'ble Supreme Court. In the face of plural remedies, the petition should not be entertained.

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24. Mr.Kadam was at pains to point out that there is no case made out to invoke the exception at all. In fact, we must be mindful of the object and purpose of enacting a self contained or complete Code like IBC. Our attention has been invited to the preamble of this Code. Mr.Kadam then emphasised the fact that now a speedy and expeditious resolution of the disputes is possible. We would be scuttling the time line set out in the IBC if we entertain this writ petition. In that regard, our attention is invited to sub-sections (2) to (5) of section 7 of the IBC. We cannot lose sight of other two sub-sections. The other two sub-sections are sub-sections (6) and (7) of section 7. He also submitted that in noting the aim, object and purpose of the law, we also notice the language of sections 12, 13 and sections 60 to 62 of this IBC. Mr.Kadam would submit that the impugned order ticks and triggers further steps. These further steps have to be taken the moment the application made by respondent nos. 3 and 4 is admitted. There is then no escape from the consequences provided in law. Earlier it was a very time consuming process. Now, the order of admission has to be communicated to the Financial Creditor and the Corporate Debtor. Beyond that, there is no compliance provided in the law. The petitioner can always approach NCLAT and invite its attention to the fact that although the order has been passed on 22nd October, 2019, there was no

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communication of the same till 11th November, 2019 as proclaimed by the petitioner and therefore, this period be excluded from the time limit set out by law for filing of an appeal. In other words, this period be excluded while computing the period of limitation for filing the appeal. In the present case, at best, the petitioner has a right as the Chairman and Managing Director of respondent no. 6. He is a person aggrieved within the meaning of section 60 of the IBC. The petitioner has not raised any issue of violation of fundamental right, no jurisdictional error of the magnitude highlighted in the Hon'ble Supreme Court is raised either. There is no question raised of the law or rules being ultra vires or the provisions of the Code themselves being challenged. The petition, at best and assuming without admitting highlights a procedural lapse. Now, that is an issue which can be squarely raised as a ground in appeal. Mr.Kadam then submits that in para 35 of the petition, there is a false statement made on oath. This is a case of a judgment rendered properly and in accordance with the rules. It is a judgment and order on merits. Bearing in mind the backlog and pendency of cases, the Members could not find time to pass a order and it was passed on 22nd October, 2019. In fact, after the arguments were concluded, the third and the fourth respondents moved a written request for passing of the order. That request is also on file. Unfortunately, for want of time or on account of huge

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pendency of cases, the Members did not pass the order. In these circumstances, on this ground alone, the petition should not be entertained.

25. On the other hand, Mr.Dwarkadas, learned senior counsel appearing for the petitioner would submit that the arguments of Mr.Kadam overlook the averments and assertions of the petitioner in the memo of the petition. In this petition, there is a clear issue of the tribunal not complying with the procedural rules at all. All cannons of fairness, equity and justice have been breached and violated. There is a clear allegation of breach of principles of natural justice, inasmuch as, the petitioner has not been treated in a just and fair manner. The petitioner was not aware of the fact that the impugned order is to be pronounced or will be pronounced on 22nd October, 2019. There is in fact no pronouncement of the order at all. The factum of its communication and that too after 15 days cannot displace the requirement of the order having to be pronounced. There is no question of the word "pronouncement" and "communication" carrying one and the same meaning. Mr.Dwarkadas then submits that though the petitioner has given up the relief in terms of prayer clause (a) of the petition, the prayer clause (b) is very much surviving. That seeks a writ of certiorari or any other appropriate writ, order or direction to quash and set aside the impugned order.

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26. Mr.Dwarkadas has submitted that the nature of this writ itself would denote that it is not directed against the parties. It is directed against the tribunal or the court subordinate to this court. The anxiety is that this tribunal or the court below does not exceed its jurisdiction or act beyond its powers or contrary to and in utter breach of principles of natural justice or throws every procedural rule out of the window. Thus, if there is a complaint that the applicable basic procedure has not been complied with and that has occasioned failure of justice, then, a writ must go to quash and set aside the order of such a tribunal. If such an order is challenged, then, this court is duty bound to issue a writ of certiorari and ordinarily does not refuse it. It refuses the same only on exceptional grounds and on rare occasions when it finds that the party approaching this court is itself guilty or responsible for the breach or non-compliance with the process of natural justice or procedural rules. Mr.Dwarkadas submits that such is not the case before us. There is no bar to the institution or entertainment of a writ petition under Article 226 of the Constitution of India merely because there is an alternate and equally efficacious remedy available. That is a rule of prudence and caution. That is mere guidance and cautions the court against interference routinely with appealable orders of the competent court or tribunal. If there are remedies available to correct the

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errors therein or to ensure compliance with the procedural rules, then, this court, in its discretion, may not interfere. Once there is no absolute bar, then, given the present facts and circumstances, the writ petition be entertained.

27. Mr. Dwarkadas, in support of the writ petition, relied upon the following decisions:-

1. State of Uttar Pradesh vs. Lakshmi Ice Factory (AIR 1963 SC 399);
2. Surendra Singh and Ors. vs. State of Uttar Pradesh (AIR 1954 SC 194);
3. Commissioner of Income Tax, Central-II, Delhi vs. Sudhir Choudhrie (2005 SCC Online Del 726);
4. Pushpa Shah vs. Union of India and Ors. (Writ Petition (L) No.352 of 2019 decided on 4th March, 2019);
5. Swiss Ribbons Private Limited and Anr. vs. Union of India and Ors. [(2019) 4 Supreme Court Cases 17];
6. Coal India Ltd. and Ors. vs. Saroj Kumar Mishra [(2007) 9 Supreme Court Cases 625]

28. On the point of maintainability and the power of this court to issue a writ of certiorari, we do not think that there was ever any doubt. The problem is that the salutary principles enshrined in the judgments of the Hon'ble Supreme Court post the Constitution have by now been almost forgotten. The salutary principles can be summarised hereinbelow. Once we summarise them, then, we do not think that we are either departing or deviating from the same.

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29. In the case of *T. C. Basapa vs. T. Nagappa and Anr.*[2], the Five Judge Bench of the Hon'ble Supreme Court had an occasion to refer to the essential features, effect and grounds on which the writ of certiorari is issued. The Hon'ble Supreme Court, after tracing the history of this writ, observed as under:-

> "7. One of the fundamental principles in regard to the issuing of a writ of 'certiorari', is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression 'judicial acts' includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. Atkin L.J. thus summed up the law on this point in *'Rex V. Electricity Commissioners'* , *1924-1 KB 171 at p.205 (C) :*
>
> > "Whenever any body or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."
>
> The second essential feature of a writ of 'certiorari' is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of 'certiorari' the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person, vide per Lord Cairns in 'Walsall's Overseers v. L. & N. W.Rly. Co. (1879) 4 AC 30 at p.39 (D).
>
> 8. The supervision of the superior court exercised through writs of 'certiorari' goes on two points, as has been expressed by Lord Sumner in -"King v. Nat Bell

2 **AIR 1954 SC 440**

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Liquors Ltd.', (1922) 2 AC 128 at p.156 (E). One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of 'certiorari' could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

9. 'Certiorari' may and is generally granted when a court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject matter of the proceeding or from the absence of some preliminary proceeding or the court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances, vide 'Hasbury, 2nd edition, Vol.IX, page 880. When the jurisdiction of the court depends upon the existence of some collateral fact, it is well settled that the court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess, vide - 'Bunbury v. Fuller', (1854) 9 Ex 111 (F); R.v. Income Tax Special Purposes Commissioners', (1989) 21 QBD 313 (G).

10. A tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of 'certiorari' may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a manifest error apparent on the face of the proceedings e.g. when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision.

The essential features of the remedy by way of 'certiorari' have been stated with remarkable brevity and clearness by Morris L. J. in the recent case of – Rex v. Northumberland Compensation Appellate Tribunal', 1952-1 KB 338 at p. 357 (H). The Lord Justice says:

> "It is plain that 'certiorari' will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law when revealed on the face of an order or

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> decision or, irregularity or absence of or excess of jurisdiction when shown."

30. The decision of *Basappa* (supra) has been followed in the case of *Hari Vishnu Kamath vs. Ahmad Ishaque and Ors*[3]. In the following paragraphs, the Hon'ble Supreme Court held as under:-

> "11. The writ for quashing is thus directed against a record, and as a record can be brought up only through human agency, it is issued to the person or authority whose decision is to be reviewed. If it is the record of the decision that has to be removed by 'certiorari', then the fact that the tribunal has become 'functus officio' subsequent to the decision could have no effect on the jurisdiction of the court to remove the record. If it is a question of issuing directions, it is conceivable that there should be in existence a person or authority to whom they could be issued, and when a 'certiorari' other than one to quash the decision is proposed to be issued, the fact that the tribunal has ceased to exist might operate as a bar to its issue. But if the true scope of 'certiorari' to quash is that it merely demolishes the offending order, the presence of the offender before the court, though proper, is not necessary for the exercise of the jurisdiction or to render its determination effective.
>
> .....
>
> 14. It is argued that the wording of Article 226 that the High Court shall have power to issue writs or directions to any person or authority within its territorial jurisdiction posits that there exists a person or authority to whom it could be issued, and that in consequence, they cannot be issued where no such authority exists. We are of opinion that this is not true import of the language of the Article. The scope of Article 226 is firstly that it confers on the High Courts power to issue writs and directions, and secondly, it defines the limits of that power. This latter it does by enacting that it could be exercised over any person or authority within the territories in relation to which it exercises its jurisdiction. The emphasis is on the words "within the territory", and their significance is that the jurisdiction to issue writ is co-extensive with the territorial jurisdiction of the court. The reference is not to the nature and

3 **AIR 1955 SC 233**

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> composition of the court or tribunal but to the area within which the power could be exercised."

31. After these two judgments of the Hon'ble Supreme Court, there remains no doubt, but, if still anything remained to be stated with regard to the power of the superior/High Court to issue a writ of certiorari, in a Four Judge Bench decision of the Hon'ble Supreme Court in the case of *A.M.Allison and Anr. vs. B.L.Sen and Ors.*[4], the Hon'ble Supreme court in para 17 held thus:-

> "17. There are moreover special reasons why we should not interfere with the orders of the Deputy Commissioner, Sibsagar, in these appeals. The matters do not come to us by way of appeal directly from the orders of the Deputy Commissioner, Sibsagar. They were the subject, in the first instance, of proceedings under Art.226 of the Constitution in the High Court of Assam. Proceedings by way of certiorari are "not of course". (Vide Halsbury's Laws of England', Hailsham Edition, Vol.9, paras 1480 and 1481, pp.877-878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice, and in these appeals which are directed against the orders of the High Court in applications under Art 226, we could refuse to interfere unless we are satisfied that the justice of the case requires it. But we are not so satisfied. We are of the opinion that, having regard to the merits which have been concurrently found in favour of the respondents both by the Deputy Commissioner, Sibasagar, and the High Court, we should decline to interfere".

32. A perusal of this paragraph would reveal that the proceedings by way of certiorari are "not of course". The High Court has the power to refuse the writ if it is satisfied that there was no failure of justice. The Hon'ble Supreme Court once again had an occasion to examine the ambit and scope of this power and

4 **AIR 1957 SC 227**

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it came to the conclusion that a writ could not be issued on mere inconvenience or want of adequate remedy. The law does not create a right to a writ of certiorari. That the two conditions on which this writ can be issued are that the decision of the authority must be judicial or quasi judicial and secondly, the challenge must be in respect of the excess or want of jurisdiction of the deciding authority. Unless both conditions are fulfilled, no application for a writ of certiorari can succeed.

33. The above principles are again reiterated with a clarification in the case of *Sewpujanrai Indrasanarai Ltd. vs. Collector of Customs and Ors.*[5]. The Hon'ble Supreme Court has, in this decision, held that an essential feature of a writ of certiorari is that the control which this court exercises through it over judicial or quasi judicial tribunals or bodies is not in an appellate, but supervisory capacity (see para 20).

34. In a later decision in the case of *Syed Yakoob vs. K. S. Radhakrishnan and Ors.*[6], the Hon'ble Supreme Court, while dealing with a challenge to an order passed by the State Transport Authority, Madras exercising powers under the then Motor Vehicles Act, 1939, held that a writ of certiorari can be issued in the following circumstances:-

5 **AIR 1958 SC 845**
6 **AIR 1964 SC 477**

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"(7) The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals : these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be concreted by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned findings. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence lend on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Art.226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath v. Ahmad Ishaque, 1955-1 SCR 1104: (S) AIR 1955 SC 233);

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> Nagendra Nath v. Commr. Of Hills Division, 1958 SCR 1240 : (AIR 1958 SC 898) and Kaushalya Devi v. Bachittar Singh, AIR 1960 SC 1168.
>
> 8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law, but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious, mis-interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law, which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened."

35. Thus, one of the features of this writ is that it is issued to keep the courts or tribunals exercising judicial and quasi judicial powers and subordinate to the High Court within the limits of their jurisdiction. It means that this writ can be issued when the court comes to the conclusion that the tribunal has passed an order in utter disregard to the settled principles, including when it decides

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a question without giving an opportunity to be heard to the party affected by the order or where the procedure adopted in dealing with the dispute is oppose to principles of natural justice.

36. The above salutary principles have been summarised in a more recent decision of the Hon'ble Supreme Court in the case of *Surya Dev Rai vs. Ram Chander Rai and Ors.*[7]. The court, after referring to all the earlier judgments in the field, including those to which we have made a detailed reference above, concluded that this writ has to be issued not as a matter of course. The court would be justified in refusing the writ if no failure of the justice has occasioned. The writ of certiorari is issued for correcting gross errors of jurisdiction, namely, when a subordinate court is found to have acted without jurisdiction by assuming jurisdiction where there exists none or in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction or acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified and thereby occasioning failure of justice. Thus, the writ is directed to the court. The writ ordinarily cannot be claimed as of right by the parties (see para 37).

7 **AIR 2003 SC 3044**

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37. We have summarised these principles only to deal with the submissions of Mr.Kadam that in this case we should not entertain the petition simply because there is an alternate and equally efficacious remedy of appeal to the NCLAT and thereafter to the Hon'ble Supreme Court.

38. Mr.Kadam's arguments overlook the fact that if these principles summarised above are attracted, the writ cannot be refused. The writ cannot be refused only because the party resisting the writ petition urges that there are alternate and equally efficacious remedies available to the petitioner approaching this court seeking a writ of certiorari to challenge the adverse order. As has been succinctly clarified by the Hon'ble Supreme Court that this writ of certiorari goes to a court. It may be issued at the request of parties, but it is not a writ which can be claimed by the parties. It is a writ which is directed or addressed to the court and the High Court can always issue it once it is satisfied that the orders impugned before it and challenged on the grounds mentioned above occasion a failure of justice. Thus, if the orders of the court or tribunal subordinate to this court result or occasion a failure of justice, then, this writ of certiorari can always be issued. There is no question of then refusing it merely because the opponent or opposite party says that the person or the party

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invoking this writ has an alternate and equally efficacious remedy. That means everything that the court or the tribunal has done can either be condoned or overlooked by us and thereafter the only remedy available to parties is by way of an appeal to correct the decision. If the decision itself has been rendered in utter breach of the rules of procedure or in violation of the principles of natural justice occasioning or resulting in failure of justice, even then, the High Court need not or cannot step in. If that is how we approach this writ, possibly, we would frustrate and defeat the very object and purpose of issuing it. We have to ensure that the court or the tribunal below follows the settled procedure and norms devised while rendering justice to parties. The orders and decisions must be in accord therewith. The orders and decisions should not result in failure of justice. The bounds or limits of jurisdiction are known to these tribunals or courts subordinate to High Court. If the High Court is endowed with the power to issue this writ, then, the purpose of such endowment cannot be overlooked. It is but the duty of the High Court to ensure that the limits are not crossed or that the jurisdiction is not exercised in a manner contrary to the settled cannons of equality, fairness and justice. The very foundation of justice is sanctity of court proceedings and the records. If that is totally lost, then, the High Court should not be a mute spectator. It must step in.

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39. We have, therefore, no hesitation in holding that aware as we are of the principles enshrined in the decisions that have been brought to our notice by Mr.Kadam, this is a case covered by the exceptions. Still, we must notice the emphasis of Mr.Kadam on a decision of the Hon'ble Supreme Court on this point.

40. Mr.Kadam has brought to our notice the decision of the Hon'ble Supreme Court rendered in the case of *Nivedita Sharma vs. Cellular Operators Association of India and Ors.*[8]. There, the facts were noted in paras 2 and 3. Respondent nos. 1, 2, 4 and 5 and one Rajiv Arora filed writ petitions for quashing the order passed by the State Commission set up under the Consumers Protection Act, 1986. The operation of the order impugned in that writ petition was stayed by the Division Bench. Thereafter, there were further developments and noted in para 6. The further developments also were impugned in a writ petition filed before the same High Court. The Division Bench of the High Court disposed of all the petitions and set aside the directions in the order of the State Commission. The Division Bench also expunged the remarks contained in para 13.1 of the order. It is in these circumstances that the Hon'ble Supreme Court examined the rival contentions

8 **(2011) 14 SCC 337**

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and particularly that the Division Bench of the Delhi High Court committed error by entertaining the writ petition ignoring the fact that the 1986 Act is a Code in itself and the remedy of appeal available against the order passed by the State Commission is an equally efficacious remedy. The Hon'ble Supreme Court also noted the argument to the contrary. From para 11 onwards, the Hon'ble Supreme Court referred to the settled principles. The Hon'ble Supreme Court held that the High Court does not act as a court of appeal against a decision of the court or tribunal to correct errors of fact and does not, by assuming jurisdiction under Article 226 of the Constitution of India, trench upon an alternate remedy provided by statute for obtaining relief. The aggrieved petitioner can move another tribunal and obtain the relief or seek redress and this is, therefore, a normal ground on which the High Court would refuse to entertain the writ petition allowing the party to bypass the alternate and equally efficacious remedy. The remedy provided by the statute must be followed. The High Court, therefore, should not have entertained the writ petition. The bar enacted has exceptions and that alternate remedy is not necessarily to be availed of when the writ petition is filed for enforcement of any of the fundamental rights or there has been a breach of principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute

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is under challenge. Mr.Kadam would submit that these exceptions are exhaustive and therefore, we should not entertain the present writ petition.

41. Precisely, for this reason that we have observed in the foregoing paragraphs that Mr.Kadam's submissions overlook the very object and purpose of issuance of a writ of certiorari. That power is vested in the High Court not to correct an error of fact or to correct the orders which are capable of being challenged and corrected in appeal, but to remove certain fundamental defects and flaws in the functioning of a inferior court and tribunal and to direct it to act in accordance with the procedure or the law applicable to it. If a deviation or departure therefrom has resulted in failure of justice, then, we do not think that there is any prohibition in issuing a writ of certiorari. The decision in the case of *Nivedita Sharma* (supra) is distinguishable on facts. In any event, we have not deviated from the principles stated or referred therein. We are not providing a remedy to the petitioner to challenge the order impugned in this petition on merits. We are aware that for that purpose, the remedy of appeal is equally efficacious. We would not have interfered if that was the only grievance or complaint raised before us. There are more fundamental and basic issues involved and which require our interference in writ jurisdiction.

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42. The next judgment cited by Mr.Kadam on the point was the one in the case of *General Manager, Sri Siddeshwara Cooperative Bank Limited and Anr. vs. Ikbal and Ors.*[9]. There, the court found that the alternate remedy, which was equally efficacious, has been bypassed or rather allowed to be bypassed by the High Court. That was a case where interference was impermissible and still, the High court interfered in writ jurisdiction. There, the challenge was to the order of the Debt Recovery Tribunal (DRT). The facts have been noted and the Hon'ble Supreme Court found that mandatory requirements of Rule 9 of the Security Interest (Enforcement) Rules, 2002 were not followed and therefore, despite the remedy of appeal to the borrower provided under section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), a case was made out for interference. The Hon'ble Supreme Court concluded that this was not a case of the mandatory requirement being not followed. The borrower in that case had waived his right given under Rule 9(1) or for that matter, Rule 9(3) or 9(4) of the subject rules and in fact a sale certificate was issued. The Division Bench also committee an error in upholding the erroneous order of the learned Single Judge. This is the aspect which travelled from High Court to the Hon'ble

9 **(2013) 10 SCC 83**

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Supreme Court. It observed in para 23 that against the action of the bank under section 13(4) of the SARFAESI Act, the borrower had a remedy of appeal to the DRT under section 17. The remedy provided under section 17 is an efficacious remedy. The borrower did not avail of that remedy and further remedies from that order and instead, directly approached the High court in its extraordinary jurisdiction under Article 226 of the Constitution of India. Despite the strong objection being raised to the maintainability of the writ petition, the High Court brushed it aside. It is in these circumstances that the Hon'ble Supreme Court observed that when a statute provides efficacious and adequate remedy, the High Court will not entertain a writ petition under Article 226 of the Constitution of India. On misplaced consideration, the statutory procedures cannot be allowed to be circumvented. Once again, in this decision, which is also rendered on merits, the Hon'ble Supreme Court cautioned the High Courts in entertaining writ petitions, when there are effective and complete plural remedies to assail a sale under the SARFAESI Act and Rules. That the sale canbe challenged on all grounds including that mandatory requirement under the rules has not been followed. Hence, even this judgment is distinguishable on facts.

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43. A Division Bench judgment of this court in the case of *Anthony Raphael Kallarakkal vs. National Company Law Tribunal, Mumbai*[10], decided on 7th September, 2018 lays down no different principles. This court reiterated the principle that in a given case, when exceptional facts and circumstances are made out, the High Court is not powerless and can exercise jurisdiction under Article 226 of the Constitution of India despite availability of alternate remedy. However, in the facts of that case, the party before this court had not only one, but two alternate remedies available.

44. To our mind, in the facts and circumstances of this case, we are not providing, by way of this writ, a remedy to the petitioner to assail the order on merits, but we are constrained to hold that the present case raises important issues concerning the functioning of the tribunal itself. The flaws and defects highlighted by Mr.Dwarkadas go to the root of the matter. If we allow the tribunal to work and function in the manner it has done in the present case, it will set a wrong precedent and the tribunal would continue to resort to this procedure as a regular, routine norm. The mode of deciding applications in the impugned manner will become a precedent. We are more concerned about this aspect of the matter. In all the decisions that Mr.Kadam relies upon, we find that the Hon'ble Supreme Court, in the facts peculiar to those cases,

10 **Writ Petition No. 2193 of 2018**

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observed and held that the writ petitions should not have been entertained and the High Court committed gross error in entertaining them. The decisions are distinguishable on facts.

45. To our mind, the present case falls within the exceptions carved out in several decisions of the Hon'ble Supreme Court, including those which are referred by a Division Bench of this court in the case of *Pushpa Shah vs. Union of India*[11], decided on 4th March, 2019. The Division Bench, in passing an order on the preliminary objections, held that one of the exceptions carved out in the judgments of the Hon'ble Supreme Court is whether the statutory authority has not acted in accordance with the provisions of the enactment in question. *Pushpa Shah* (supra) was also as near as the present one. In fact, the present case is far more serious. It is also raising an important question of interpretation of the procedural rules.

46. We have, therefore, no hesitation in holding that the present writ petition is maintainable. We overrule the preliminary objection raised by Mr.Kadam.

47. Now, we turn to the arguments of Mr.Dwarkadas in support of the prayer of this petition to issue a writ of certiorari. The facts and circumstances, in which the order impugned before us has

11 **Writ Petition (L) No. 352 of 2019**

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been passed, are noted in the foregoing paragraphs. They require no reiteration. Mr.Dwarkadas would submit before us are the applicable rules. It is not as if the power to admit an application conferred by section 7 of the IBC has to be exercised without resorting to any procedural norms or rules. The applicable procedural rules devise proper and fair norms and standards. There, according to Mr.Dwarkadas, have been given a complete go bye and this deviation results in failure of justice. The complaint is that there is total failure of justice. That is occasioned by the fact that the tribunal heard the matter and reserved its orders. The tribunal Members were aware of the fact that one of them has been promoted as a Member of NCLAT sitting at New Delhi. That there was a notification issued promoting one of the Members, namely, the Judicial Member. He was, therefore, expected to take charge shortly. After this notification was issued, there was no great hurry to pass the order and that too without adherence to specific rules of procedure. Mr.Dwarkadas would submit that the rules themselves demand that the tribunal Members pronounce the order in open court. If such pronouncement of the order is not possible, they could have assembled in their Chambers and pronounced the order. This is not a case where there is any complaint or grievance about the manner of pronouncement. This is a complaint far more serious, according to Mr.Dwarkadas. That

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is that there was no pronouncement at all. This is not a case where an order was ready, duly signed and remaining for pronouncement. That could be done, in the absence of any Member for and on behalf of the Bench, by the functioning Member at Mumbai. This is not the complaint. The complaint is that the parties were never intimated in advance about the pronouncement of the order. The petitioner had no knowledge of the pronouncement. There is no notice to the parties by the Registry of the tribunal of the date and time of pronouncement. There is no intimation by the tribunal's Registry. There is no evidence of advance intimation by the tribunal Registry to the parties. The original records summoned by this court do not contain any contemporaneous record of pronouncement of the order on the given date and time or on the date and time indicated in the impugned order. Assuming a signed copy of the order is ready, that does not mean that it is pronounced. That 11th November, 2019 is the date on which the order was made known to or communicated to the petitioner is no evidence of its prior pronouncement and in accordance with the rules. Mr.Dwarkadas would submit that pronouncement is not an empty formality. It is a serious stage and step in the proceedings. The proceedings conclude in an order, but that order to be enforceable and binding on the parties requires it to be pronounced. Once there is no

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pronouncement, but alleged subsequent intimation and communication of the order, then, that does not meet the requirement of the rules at all. Pronouncement of order in an open and transparent manner proves that there is no doubt or suspicion about the decision of the Bench. A pronouncement in presence of parties denotes that there is either a unanimity or agreement about the conclusion and operative direction. If the order is not unanimous even that fact is evident when the two Members make a declaration to that effect in the presence of parties. The Members would have an obligation to disclose whether they have differed on the conclusion or on the reasoning on some or all aspects of the controversy. Nothing in judicial matters is a closed door or secret affair. Everything ought to be open and known. No guesswork, no conjecture, no surmise about how the matter was decided and dealt with. Mr.Dwarkadas submits that this is not a mere irregularity, but an illegality going to the root of the matter. This is a case where, according to Mr.Dwarkadas, on the eve of the Member (Judicial) demitting the office, the order is dictated, shown as signed, but without any pronouncement. Mr.Dwarkadas would submit that once there is no evidence of pronouncement by both Members or one of them, then, such order is a nullity. Mr.Dwarkadas would submit that this is not a case of mere failure of the presiding Judge to date and sign the judgment at the time of

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pronouncing it, but it is a case where a judgment and order being pushed in despite of its non-pronouncement. It is in such circumstances that Mr.Dwarkadas would submit that the impugned order is a nullity. Mr.Dwarkadas, in support of his submissions, would rely upon the NCLT Rules, 2016 and particularly Part XIX thereof containing Rules 146 to 162. He would also rely upon the preceding rules and particularly those rules where the record or proceedings have to be maintained as per the rules contained in Part X of these rules. Mr.Dwarkadas highlighted two other rules, namely, Rule 89 falling in Part IX of these Rules and Rule 99 falling in Part XI, both of which make a reference to the cases to be listed for pronouncement of order and the contents of the main file, which has to be maintained in accordance with Rule 99. That must contain the order-sheet. The endorsements that have to be made are also set out in these rules and Mr.Dwarkadas would submit that these rules subserve larger public interest. They are inserted with a definite object and purpose. The object and purpose underlining them is to preserve and protect the sanctity of judicial proceedings. The sanctity of judicial proceedings cannot be sacrificed and surrendered at the alter of total disregard to settled and established procedure. Mr.Dwarkadas has brought to our notice the fact that the petitioner has filed an affidavit to support the allegations in the

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writ petition and secondly, relied upon the record maintained in the Registry of the tribunal. That record shows that there was no board or cause list prepared containing an item for pronouncement of the order in this petition. The cause list of that date with this endorsement "for pronouncement" is pushed in by creating it subsequently and pages 547 and 547-B of the petition paper book, according to Mr.Dwarkadas, would evidence this aspect. For all these reasons, he would submit that we must quash and set aside the order impugned in the petition as it is a nullity.

48. Mr.Dwarkadas, in support of his argument that the impugned order is a nullity, relied upon the judgments of the Hon'ble Supreme Court in the case of *Surendra Singh and Ors. vs. State of Uttar Pradesh*[12] and in the case of *State of Uttar Pradesh vs. Lakshmi Ice Factory and Ors.*[13]. The other judgments relied upon by Mr.Dwarkadas are on the point of the impact of the order on the rights of the petitioner as also the larger public interest. Mr.Dwarkadas would submit that if the NCLT is allowed to proceed in the manner it has done in the instant case, possibly, all procedural rules will have no efficacy and sanctity at all. In support of his argument how the order of admission passed in this case triggers the further steps, Mr.Dwarkadas relies upon the

12 **AIR 1954 SC 194**
13 **AIR 1963 SC 399**

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judgments of the Hon'ble Supreme Court in the case of *Swiss Ribbons Private Limited and Anr. vs. Union of India and Ors.*[14] and in the case of *Coal India Ltd. and Ors. vs. Saroj Kumar Mishra*[15].

49. Mr.Kadam learned senior counsel appearing for the contesting respondents resisted the petition by arguing that the order impugned in this case is one of admission. That order has been passed in a legal and valid manner. At best there is a procedural lapse. The reliance placed by Mr.Dwarkadas on the 2016 Rules is entirely misplaced. Mr.Kadam has sought to highlight the fact that the NCLT is flooded with cases relating to both aspects covered by the Code. There are about 15 Benches of this tribunal in India. Given the backlog and pendency, at times, some procedural aspects are overlooked, but that is not deliberate and intentional. If it is a mere mistake, but not vitiating the underlying proceedings nor the impugned order, then, we must not allow this writ petition. Mr.Dwarkadas's argument that there is failure of justice is not accurate, according to Mr.Kadam. There is no failure, much less miscarriage of justice. Mr.Kadam has taken us through the scheme of the IBC. He would submit that the sections in Chapter II of this IBC are under a broad title "Corporate Insolvency Resolution Process". Section 7 enables initiation of

14 (2019) 4 SCC 17
15 (2007) 9 SCC 625

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CIRP by financial creditor. Sub-section (1), according to Mr.Kadam, enables such a Financial Creditor, either by itself or jointly with other financial creditors, or any other person on behalf of the Financial Creditor, as may be notified by the Central Government, to file an application for initiating CIRP against a Corporate Debtor before the adjudicating authority when a default has occurred. Mr.Kadam would submit that the term "adjudicating authority" is defined in section 5(1) of this Code and it says that for the purposes of this Part it means the National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. Mr.Kadam's endeavour is to show that there are rules traceable to section 439 of the Companies Act, 2013, which the tribunals apply as procedural rules to decide cases under the Companies Act, 2013.

50. The NCLT has to exercise this judicial power and when that judicial power has to be exercised by it, the set of rules that are to be applied is a matter with which we are primarily concerned. Section 239 of the IBC confers the power to make rules. That is a power conferred in the Central Government. The matters in regard to which the rules can be made, *inter alia*, are the form, the manner and the fee for making application before the adjudicating authority for initiating CIRP by financial creditor under sub-

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section (2) of section 7. The rules which Mr.Kadam highlights are traceable to this power of the Central Government. It may be that there is a pre-established and pre-existing tribunal on which the jurisdiction to decide cases under the IBC is conferred, but not everything under the procedural rules carved out under the Companies Act, 2013 would apply. There may be NCLT Rules, 2016 which are framed and also traceable to section 239 of this Code. Nevertheless, these rules are nothing but a set of procedural rules. There is nothing which would require strict adherence thereto. All rules of procedure by themselves are to aid the tribunal or court of law exercising judicial powers to render justice. If they are handmaids to render justice and their object and purpose is as above, then, a minor deviation therefrom is at best a irregularity or illegality. The present rules, assuming they are applicable, do not demand full compliance, but a substantial compliance. Mr.Kadam submits that we must be guided in this case by section 7 and particularly sub-section (3) onwards. Sub-sections (3) clause (b), (5), (6) and (7) of section 7, therefore, lays down a complete procedure. That is a complete for the purposes of initiation of CIRP by Financial Creditor and how the application in that behalf must be dealt with. They must guide us. According to Mr.Kadam, the sub-sections of section 7 do not require an order of admission to be pronounced, but merely to be communicated. If that is how the

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substantive provision reads, then, non-adherence to a procedural rule would not vitiate the order and proceedings and merely because there is no pronouncement. In other words, absence of pronouncement would not vitiate initiation of this process under section 7.

51. Mr.Kadam, therefore, made alternate submissions. His first assertion and primary one is that section 7 is the repository of the power to initiate the process and to admit the application. Anything outside that must not be read into the power conferred in the IBC. The NCLT may be existing prior to the enactment of this Code, but because the power is conferred in that tribunal does not mean that the procedure that the tribunal otherwise follows ought to be mandatorily followed while exercising power under section 7 of the IBC. The further alternate argument of Mr.Kadam is that no rules are notified under the IBC. The rules that are made by the NCLT to guide it for rendering a decision on matters covered by the Companies Act, 2013 cannot be *ipso facto* applied to the proceedings under the IBC. If the NCLT is free to devise another procedure or because there is no procedure while dealing with an application under the IBC, then, all that the tribunal is expected to adhere to are the principles of natural justice. The NCLT rules at best can be applied in addition. Rules 150 to 152 of the NCLT

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Rules, 2016 do not necessarily apply. Once there is an order passed in accordance with the power conferred in the NCLT by the IBC and that is communicated, it should be taken as sufficient compliance with the procedural rules. All the more, when the statue is a complete Code. The communication that is expected through the tribunal Registry under sub-section (7) of section 7 of the IBC is admittedly done in this case. All the more, therefore, we should not import anything into this law. We must go by the spirit of section 7(7) of the IBC. Mr.Kadam submits that the IBC is noteworthy departure from the long, cumbersome proceedings of winding up and liquidation under the erstwhile Companies Act. The Companies Act may have been amended, but a smooth corporate insolvency and bankruptcy was a far fetched dream. The proceedings would take decades to end with number of obstacles by way of several compliances of the erstwhile law. Now, there is a new regime by way of IBC. We must note the preamble to the IBC and some of the statements set out in the Statement of Object and Reasons preceding the Code. Mr.Kadam would, therefore, submit that if there is no requirement of pronouncement, but of signing, dating and communicating the order so as to bind everybody, then, that is done in this case and must be held to be enough. There is no pronouncement does not mean that there is no valid, binding and subsisting order.

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52. Mr.Kadam would submit that everything that is highlighted by Mr.Dwarkadas is a matter of practice. That is never mandatory. The practice does not merit strict adherence or compliance. It is at best a practice. Mr.Kadam highlighted the fact that the Company Law Board was deciding cases of oppression of minority and mismanagement of companies. The Company Law Board was vested with the power to decide the cases pertaining to oppression of minority. The argument in one of the cases, according to Mr.Kadam, was that the Company Law Board did not adhere to the rules on par with NCLT. It follows its own rules and although they contemplated pronouncement of order, absent it, the order was still taken to be binding. Ultimately, pronouncement was taken as equal or equivalent to communication. Mr.Kadam raised a further alternate argument by urging that if the procedural rules of NCLT are a mere guide, their strict adherence is not necessary. There is no mandate to pronounce. If that word is employed, it does not mean that a pronouncement is mandatory. The word is employed in a descriptive sense and not to make a requirement of pronouncement in open court mandatory. Even otherwise, that requirement does not mean pronouncement must be in open court.

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53. Mr.Kadam would further alternatively submit that there are some rules framed by the NCLT, which alone apply to the proceedings under the IBC. The specific rules which can be applied are enlisted in the set of rules styled as "the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the IBC Rules, 2016") published in the Official Gazette of India. After referring to these rules, particularly Rule 10, Mr.Kadam would submit that till such time the rules of procedure for conduct of proceedings under the IBC are notified, the application under sub-section (1) of section 7, sub-section (1) of section 9 or sub-section (1) of section 10 of the IBC shall be filed before the adjudicating authority in accordance with Rules 20 to 26 of Part III of the NCLT Rules, 2016. Mr.Kadam submits that the legislative intent is clear. Such of the rules of the NCLT, which are to be specifically applied, have been specifically set out in Rule 10(1) of the IBC Rules, 2016. If these do not make any reference to all the NCLT Rules, 2016 and particularly Rules 150 to 152 thereof, then, we must not read in Rule 10 something which is expressly not stated therein. Mr.Kadam would submit that section 424 of the Companies Act, 2013 is a pointer or an indicator and that would denote that only some and not all rules of the Companies Act would apply.

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54. Mr.Kadam concluded his arguments by contending that Rule 150 of the NCLT Rules, 2016 does not apply. There is no question of any pronouncement of the order of the NCLT. The essence of the whole thing is an effective communication of the order. Mr.Kadam submits that the tribunal is not *functus officio*, in the sense projected before us. Therefore, making a pronouncement of the order ought to be given a meaning as equal to communication. In any event, this is not necessarily to be done in open court. All the more, when the nature of the proceedings under section 7(1) of the IBC is distinct from other cases dealt with under other laws. The adjudicating authority is under no obligation to hold on to the proceedings. The law triggers the further steps and therefore, we should not lose sight of the seriousness of the cases brought, particularly before the NCLT under the IBC. We should only take the meaning ordinarily given to the word "pronouncement". For all these reasons, Mr.Kadam would submit that this petition be dismissed.

55. In support of his arguments, Mr.Kadam relied upon the following decisions:-

1. Surendra Trading Company vs. Juggilal Kamlapat Jute Mills Company [(2017) 16 Supreme Court Cases 143];
2. Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Ors. (Civil Appeal No.8766-67 of 2019 decided on 15th November, 2019);

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3. Innoventive Industries Limited vs. ICICI Bank and Anr. [(2018) 1 Supreme Court Cases 407];
4. Nivedita Sharma vs. Cellular Operators Association of India and Ors. [(2011) 14 Supreme Court Cases 337];
5. General Manager, Sri Siddeshwara Co-Operative Bank Ltd. and Anr. Vs. Ikbal and Ors. [(2013) 10 Supreme Court Cases 83];
6. Anthony Raphael Kallarakkal vs. National Company Law Tribunal (2018 SCC OnLine Bom 13865);
7. State Bank of India and Ors. vs. S.N.Goyal [(2008) 8 Supreme Court Cases 92];
8. Jer Rutton Kavasmaneck (alias Jer Jawahar Thadani) and Anr. vs. Gharda Chemicals Ltd. and Ors. [2012 SCC OnLine Bom 2035]
9. Mackeil Ispat and Forgoing Limited vs. State Bank of India (C.O.No.3224 of 2019 decided on 20th November, 2019);
10. Palogix Infrastructure Private Limited vs. ICICI Bank Limited (2017 SCC OnLine NCLAT 266)

56. For properly appreciating the above contentions, we must first refer to the IBC. The IBC is an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders, including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India and for matters connected therewith or incidental thereto. Mr.Kadam stops by reading only this aspect highlighted in the Statement of Objects and Reasons. In para 3 of the Statement of Objects and Reasons, it is stated that the Code seeks to provide for designating the NCLT

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and DRT as the adjudicating authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board.

57. Pertinently, Mr.Kadam does not dispute that the proceedings are judicial in nature. Mr.Kadam does not dispute that the NCLT was exercising judicial powers. Mr.Kadam does not dispute that what his clients have done is to initiate CIRP. At best, this process is initiated by the Financial Creditor. The persons who may initiate CIRP are referred in section 6 of this Code. However, preceding that section, there are two other sections, namely, sections 1 and 2. They are titled as “Short title, extent and commencement” and “Application” respectively. In section 2, it is stated that the provisions of this Code shall apply to any company incorporated under the Companies Act, 2013 and other entitles set out therein, including individuals. The provisions of this Code shall apply to these entities in relation to their insolvency,

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liquidation, voluntary liquidation or bankruptcy, as the case may be.

58. Mr.Kadam's arguments also overlook the fact that these are not novel or new proceedings. The proceedings in relation to insolvency, liquidation, voluntary liquidation or bankruptcy were preferred, initiated and concluded under the laws prevailing prior to the enactment of IBC. That there was Professional Presidency Town Insolvency Act, that there was a Companies Act, 1956 and amended from time to time right up to 2013 providing for these aspects is conceded before us. Mr.Kadam's arguments do not dispute the fact that insolvency, liquidation and voluntary liquidation or bankruptcy proceedings were prior to the enactment of the Code dealt with by the competent civil courts or courts conferred with jurisdiction under the Companies Act, 1956. After the 1956 Act, there were Company (Court) Rules, 1959 framed to guide the exercise of jurisdiction by the Company Court. The Civil Courts or the Company Courts were exercising the judicial powers and discharging judicial functions. It is these functions which have been now made over to the tribunal. Therefore, in the definitions, the definitions of certain terms are crucial. One of the definitions is of the term "prescribed". That is to be found in section 2(26). It means prescribed by rules made by the Central Government.

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Then, there is a clearcut indication and that is to be found in section 2(27).

59. Part II of the IBC contains Chapter I titled as "Preliminary". In that as well, definitions of the said part are set out. Unless the context otherwise requires, the term "adjudicating authority" for the purpose of Part II means the NCLT constituted under section 408 of the Companies Act, 2013. That it is a tribunal which is exercising judicial powers and the substitute for the Company Court is therefore clear from section 5(1) itself. The other definitions relied upon are to be found in section 5(1) to (12). They read as under:-

> 5(1) "Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013);
>
> 5(2) "auditor" means a chartered accountant certified to practice as such by the Institute of Chartered Accountants of India under section 6 of the Chartered Accountants Act, 1949 (38 of 1949);
>
> 5(3) "Chapter" means a Chapter under this Part;
>
> 5(4) "Constitutional document", in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership;
>
> 5(5) "corporate applicant" means-
>
> (a) corporate debtor; or
>
> (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or

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(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(d) a person who has the control and supervision over the financial affairs of the corporate debtor;

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

5(6) "dispute" includes a suit or arbitration proceedings relating to-

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty;

5(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;

5(8) "financial debt" means a debt alongwith 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 de-materialised 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.

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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);

(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;

(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 the clause;

5(9) "financial position", in relation to any person, means the financial information of a person as on a certain date;

5(10)"information memorandum" means a memorandum prepared by resolution professional under sub-section (1) of section 29;

5(11) "initiation date" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process;

5(12) "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7,9 or section 10, as the case may be :

Provided that where the interim resolution professional is not appointed in the order admitting application under sections 7, 9 or section 10, the insolvency commencement

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date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority;"

60. A perusal of these definitions leaves us in no manner of doubt that there is an initiation and admission contemplated. The CIRP can be initiated by persons referred in section 6. Section 7 of the IBC has been heavily relied upon by both sides, which reads thus:-

"**7. Initiation of corporate insolvency resolution process by financial creditor.**-(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.- For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish-

(a) a record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

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(5) Where the Adjudicating Authority is satisfied that-

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate-

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be."

61. A perusal of sub-section (1) of section 7 denotes that the Financial Creditor, either by itself or jointly with other Financial Creditors or any other person on behalf of the Financial Creditor, as may be notified by the Central Government, may file an application for initiating CIRP against a Corporate Debtor before the adjudicating authority when a default has occurred. Thus, an application can be filed for initiating this process by a Financial Creditor either by himself or jointly with other Financial Creditors

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or any other person on behalf of the Financial Creditor, as may be notified by the Central Government, but the adjudicating authority can step in when a default has occurred. Now, the default is explained to be a default in respect of the financial debt not only to the applicant Financial Creditor, but to any other Financial Creditor of the Corporate Debtor. We find substance in the argument of Mr.Dwarkadas that the process may be initiated by an application of a Financial Creditor either by itself or jointly with others, but the default could be a default in respect of the financial debt owed not only to the applicant Financial Creditor, but to any other Financial Creditor of the Corporate Debtor. Sub-section (2) says that the Financial Creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed. Thus, the word "such" appearing twice and that is in relation to the form and manner and accompaniment with fees, all of which have to be prescribed. The prescription is by the rules. Then comes sub-section (3). That says that the Financial Creditor shall, along with the application, furnish and what should be furnished is set out in clauses (a) to (c) of sub-section (3). Thus, the record of the default recorded with the information utility or such other record or evidence of default as may be specified has to be furnished. The name of the resolution professional proposed to act as an interim resolution

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professional and any other information as may be specified by the Board has to be furnished. On receipt of this application, the adjudicating authority must ascertain the existence of the default from the records of the information utility or on the basis of other evidence furnished by the Financial Creditor under sub-section (3). Thus, the ascertainment of default has to be made and that is based upon either information provided or there has to be evidence furnished by the Financial Creditor. Upon perusal of everything, the adjudicating authority has to record a satisfaction in terms of sub-section (5) of section 7. The adjudicating shall give a notice to the applicant to rectify the defects in his application within the time stipulated in the proviso. The CIRP shall commence from the date of admission of the application under sub-section (5) and that is contemplated by sub-section (6), whereas, sub-section (7) says that the adjudicating authority shall communicate the order under clause (a) of sub-section (5) to the Financial Creditor and the Corporate Debtor. The order under clause (b) of sub-section (5) shall be communicated to the Financial Creditor within the time stipulated in clause (b) of sub-section (7) of section 7.

62. Now, the NCLT has to exercise this judicial power and when that judicial power has to be exercised by it, the set of rules that

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are to be applied is a matter with which we are primarily concerned. Section 239 of the IBC confers a power to make rules. That is a power conferred in the Central Government. The matters in regard to which the rules can be made by the Central Government, *inter alia*, are the form, the manner and the fee for making application before the adjudicating authority for initiating CIRP by Financial Creditor under sub-section (2) of section 7. The rules which Mr.Kadam highlights are traceable to this power of the Central Government.

63. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 contain the rules guiding making of the application and the form prescribed in that behalf. Then, there are further rules, but we are concerned with Rule 7, which reads thus:-

> "**7. Application by corporate applicant.**-(1) A corporate applicant, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the Code in Form 6, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
>
> (2) The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor."

64. The withdrawal of the application made under Rules 4, 6 and 7, as the case may be, is permitted by Rule 8 on a request made by

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the applicant before it is admitted, whereas, Rule 10 deals with filing of application and application fees.

65. A perusal of Rule 10 would show that the same pertains to the rules and procedure for conduct of proceedings under the Code. They are yet not notified. Until then, the application made under sub-section (1) of section 7 and sub-section (1) of section 9 and section 10 of the IBC shall be filed before the adjudicating authority in accordance with Rules 20 to 26 of Part III of NCLT Rules, 2016. Mr.Kadam overlooks the fact that Rule 10 has been inserted so that there is no vacuum. It is only to facilitate the filing of the applications under the sub-section (1) of section 7 and sections 9 and 10 that the rule makers have provided the procedure in that behalf in the NCLT Rules, 2016. Thus, only the procedure in relation to filing of application, which has been set out in the NCLT Rules, 2016, is applied until the rules of procedure for conduct of proceedings under the Code are notified. We cannot read sub-rule (1) of Rule 10 as suggested by Mr.Kadam. He would argue that Rules 20 to 26 of Part III of the NCLT Rules, 2016 shall apply and rest of the NCLT Rules, 2016 would not apply. This argument overlooks the fact that the rules of procedure for conduct of proceedings under the Code have yet to be notified, the framers of the rules and the legislature itself did not want a

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vacuum to be created. Otherwise, there would be no guide at all. A pre-existing or pre-established tribunal functional much before the Code came into force has been chosen for adjudication of the applications under section 7. That is how the term "adjudicating authority" is defined in the Code. Therefore, until the rules of procedure in relation to the conduct of proceedings under the IBC are notified, the NCLT Rules, 2016 would be the governing rules. When the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 were notified, the legislature was aware that it will have to frame and notify separate rules enabling filing of application under section 7(1), section 9(1) and section 10(1) of the IBC. If they are not notified as yet, then, Rule 10 allows filing of application under the NCLT Rules, 2016 and particularly Rules 20 to 26. However, that does not mean that the rest of the NCLT Rules already notified and governing procedural aspects and guiding the NCLT would cease to apply. That is not the mandate flowing from the language of Rule 10. We, therefore, do not find any merit in the argument of Mr.Kadam in this behalf.

66. Advisedly, Mr.Kadam did not advance any extreme argument, but alternatively contended that assuming NCLT Rules, 2016 apply, still, the language of sub-section (7) of section 7 should not be ignored and we should not read something more in the rule

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than what is warranted by the aim and object of IBC. In other words, if sub-section (7) of section 7 says that communication of the order is necessary, then, according to Mr.Kadam, the further aspects and particularly in relation to pronouncement should not be read in the IBC or particularly concerning the applications under section 7(1) of the IBC.

67. Once again, it is not possible to accept the contentions of Mr.Kadam. That is for more than one reason. The sub-sections of section 7 would have to be read in their entirety and as a whole. So read, they enable making of an application by the Financial Creditor and it is clear that sub-section (2) says that the Financial Creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed. The word "prescribed" means prescribed by the rules. In the instant case, the IBC rules are silent on the manner and fee. It is clear, therefore, that the legislature borrowed presently applicable rules of NCLT for the purpose of making of the application by the Financial Creditor. Thereafter, sub-section (3) says that the Financial Creditor shall, along with the application, furnish and what shall be furnished is then set out in clauses (a) to (c) of sub-section (3) of section 7. Thereafter, by sub-section (4), the adjudicating authority is required to ascertain the existence of

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the default from the records of the information utility or on the basis of other evidence furnished by the Financial Creditor. In terms of sub-section (5), the adjudicating authority must record its satisfaction and that is in relation to the default, if it has occurred and the satisfaction in that behalf has to be in terms of clause (a) of sub-section (5) of section 7 and if the default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, the rejection of the application is contemplated. Therefore, clause (a) of sub-section (5) enables admission of the application on the necessary satisfaction being recorded with regard to the default. Further, the disciplinary proceedings should not be pending against the proposed resolution professional. If the satisfaction is recorded on this ground, the order of admission can be made, whereas, the rejection is contemplated by clause (b) of sub-section (5) of section 7. Before rejection of the application, the applicant has to be given an opportunity to rectify the defect and within the time stipulated in the proviso below clause (b). The CIRP shall commence from the date of application under sub-section (5) and that is what sub-section (6) of section 7 contemplates, whereas, the communication of the order to the Financial Creditor and the Corporate Debtor is an aspect covered by sub-section (7) of section 7 of the IBC.

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68. We cannot read sub-section (7) of section 7 of the IBC as suggested by Mr.Kadam and to exclude the applicability of the NCLT Rules, 2016, particularly Rules 150 to 152 pressed into service by Mr.Dwarkadas. If the legislature intended communication of the order to be enough, it would have said so in clearest terms. The legislature says by sub-section (1) of section 7 that an application can be made and by other sub-sections of section 7, how the application should be dealt with is enumerated. Pertinently, sub-section (5) of section 7 requires the satisfaction to be recorded in terms thereof. If that satisfaction is recorded, there is an admission of the application. The admission of the application has to be intimated or communicated. The order of admission or rejection of the application is required to be passed and that has to be intimated or communicated. By that alone, we cannot conclude, as desired by Mr.Kadam, that there is no mandate or requirement of pronouncement of the order. The intimation or communication of admission of the application presupposes or predicates the passing of an order. Such an order of the adjudication authority is to be declared by the NCLT.

69. Mr.Kadam's arguments also overlooks the fact that it is the NCLT which has been designated as an adjudicating authority. It is a tribunal. It is discharging a judicial function. When a judicial

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function is to be discharged, then, it is inconceivable that the legislature will allow such a function to be discharged in a non-transparent manner. Ultimately, the legislature would never allow justice to be a casualty. The legislature never intends to create a situation where a party before the tribunal or court feels that justice has not been done to him or her. Eventually, justice has not only to be done, but seen to be done. If justice is to be seen to be done, then, by acceptance of the arguments canvassed by Mr.Kadam, we would be taking away that assurance or guarantee to the litigant. The legislature never intended to take away such an assurance and certainly, it cannot be taken away on the ground of expediency. Merely because the legislature intended quick, speedy and expeditious resolution of disputes enumerated in and covered by the IBC does not mean that it will be at the cost of justice. The courts of law and tribunals exercising judicial functions have to dispense justice. They cannot dispense with justice. If this is how the legislaive framework is and the NCLT being a substitute for both, the Company and the Civil Court, then, all the more it is not possible to agree with Mr.Kadam.

70. What then remains for our consideration is whether the rules as framed are capable of substantial compliance, as alternatively suggested by Mr.Kadam. He would submit that

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ultimately pronouncement means communication or intimation. Mr.Kadam would submit that if that aspect is omitted from the proceedings before the NCLT, that is at best an irregularity which is curable. Mr.Kadam's arguments once again overlook the fact that the rules do not employ the words pronouncement and/ or communication to carry one and the same meaning.

71. The rules which have been emphasised by Mr.Dwarkadas are Rules and 89 and 90 of the NCLT Rules, 2019. In Part IX, under title "Cause List" appear Rules 89 and 90. They read as under:-

> **"89. Preparation and publication of daily cause list.-**
> (1) The Registry shall prepare and publish on the notice board of the Registry before the closing of working hours on each working day the cause list for the next working day and subject to the directions of the President, listing of cases in the daily cause list shall be in the following order of priority, unless otherwise ordered by the concerned Bench; namely;-
>
> (a) cases for pronouncement of orders;
>
> (b) cases for clarification;
>
> (c) cases for admission;
>
> (d) cases for orders or directions;
>
> (e) part-heard cases, latest part-heard having precedence; and
>
> (f) cases posted as per numerical order or as directed by the Bench;
>
> (2) The title of the daily cause list shall consist of the number of the appeal or petition, the day, date and time of the court sitting, court hall number and the coram indicating the names of the President, Judicial Member and Technical Member constituting the Bench.

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(3) Against the number of each case listed in the daily cause list, the following shall be shown, namely;-

(a) names of the legal practitioners appearing for both sides and setting out in brackets the rank of the parties whom they represent;

(b) names of the parties, if unrepresented, with their ranks in brackets.

(4) The objections and special directions, if any, of the Registry shall be briefly indicated in the daily cause list in remarks column, whenever compliance is required."

"90. Carry forward of cause list and adjournment of cases on account of non-sitting of a Bench.-
(1) If by reason of declaration of holiday or for any other unforeseen reason, the Bench does not function for the day, the daily cause list for that day shall, unless otherwise directed, be treated as the daily cause list for the next working day in addition to the eases already posted for that day.
(2) When the sitting of a particular Bench is cancelled for the reason of inability of a Member of the Bench, the Registrar shall, unless otherwise directed, adjourn the cases posted before that Bench to a convenient date and the adjournment or posting or directions shall be notified on the notice board of the Registry."

72. Therefore, by sub-rule (1) of Rule 89, the Registry is required to prepare and publish on the notice board of the Registry before the closing of working hours on each working day the cause list for the next working day and subject to the directions of the President, listing of cases in the daily cause list shall be in the order of priority, unless otherwise ordered by the concerned Bench. Ultimately, the requirement of this nature and to be followed by a court, particularly a substitute for a Civil and Company Court means that people and litigants should know when

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orders are to be pronounced in cases which have been already heard. Therefore, the broad heads which have to be enumerated in the daily cause list ensure that litigants, parties and equally the public at large know that the cases have been listed for that purpose and with that object. In cases in which arguments are concluded and judgments are ready for pronouncement, then, the pronouncement has to be done after notifying to the parties in advance the date of such pronouncement. The rule makers did not desire or contemplate dispensation of the requirement of pronouncement at all. If dispensation of that was contemplated, then, possibly, there would not have been guidance provided by rules such as Rules 89 and 90. By Rule 90, there is a further assurance that if by reason of declaration of holiday or for any other unforeseen reason, the Bench does not function for the day, the daily cause list for that day shall, unless otherwise directed, be treated as the daily cause list for the next working day in addition to the cases already posted for that day. Now that information technology is introduced, particularly for listing of cases, then, all the more with the advances therein, the rule makers desired that there should be complete transparency, fair and just treatment to litigants and parties. Nobody should carry an impression that the case has been heard behind their back or that they have been taken up without any intimation or knowledge to the party or

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litigant and disposed of. Therefore, when cases are preponed or postponed, litigants have to be informed. They may have engaged advocates, but such transparency, faith, consistency, credibility and sanctity of judicial acts and proceedings is maintained. Everything in relation to judicial proceedings, therefore, is covered in the broad and wider concept of dispensation of justice. Ultimately, courts are endowed with the duty to render justice. If courts and tribunals exercising judicial functions are chosen by the legislature to render justice to litigants, then, all the more they cannot be expected to work in a closed door fashion. Judicial proceedings have to be open to public.

73. Part X of the NCLT Rules, 2016 will make this aspect further clear. Rule 91 requires diaries to be maintained by the clerk-in-charge in such form as may be specified in each appeal or petition or application and they shall be written legibly. The diary in the main file shall contain a concise history of the appeal or petition or application, the substance of the order passed thereon and in execution proceedings, it shall contain a complete record of all the proceedings in execution of order or direction or rule and shall be checked by the Deputy Registrar and initialed once in a fortnight. It is not that signatures have to be appended or that every rule demands a strict compliance. We can understand an omission or

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irregularity not vitiating the proceedings in their entirety. However, we cannot condone something which results in failure or miscarriage of justice. That is how Rule 92 of the NCLT Rules, 2016 requires the Court Master of the Bench to maintain order sheet in every proceedings and shall contain all orders passed by the tribunal from time to time. Rule 93 provides for maintenance of court diary. The parties or legal practitioners are also required to furnish to the Court Master a list of law journals, reports, statutes and other citations, which may be needed for reference or photocopy of full text thereof. Everything has to be specified and stated clearly, as is apparent from the language of these rules, so that the tribunal does not devise a procedure totally unknown to law or acts in an arbitrary manner. To avoid arbitrariness and discrimination in conduct of judicial proceedings that such rules of procedure have been framed. If one totally ignores them, then, there may be failure of justice or if the conduct of judicial proceedings is in total contravention of the procedural rules, there may be miscarriage of justice. In such an event, orders of the tribunal cannot be upheld and sustained. They may have to be declared as nullity by a writ of this court.

74. This aspect assumes significance if one peruses Part XI of the NCLT Rules, 2016, which requires maintenance of Registers.

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The contents of main file and in the order required by Rule 99 must not only contain index, order sheet, final order or judgment, but the stages, including the date of final order or judgment and if there was no requirement of pronouncement of the same at all, then, a rule like Rule 89 would not have been framed at all. That deals with the requirement of preparing the cause list, whereas, the contents of the main file require the final order or judgment to be placed in it. It could be the contemporaneous record. In the event the main file only contains the main order, but does not contain any record pertaining to the pronouncement, the contemporaneous record can be looked into and for arriving at a conclusion that the conduct of judicial proceedings before the tribunal has been done in accordance with the rules or compliance is made therewith by the tribunal. One cannot dispense with all procedural rules. If procedural rules are made to assist the tribunal and a court of law in rendering justice, then, all the more we think that there is enough guidance in the language of the rules itself to hold that pronouncement and communication is not one and the same thing.

75. Even if one goes by ordinary meaning of these words, they do not convey one and the same thing. The word pronouncement means to declare formally or officially. The word communication

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means making known or sharing or imparting. In legal and judicial parlance, particularly as per the Advance Law Lexicon to pronounce means to utter formally, officially or solemnly, to declare or affirm, as pronounce a judgment or order. A declaration authoritatively or by way of a judgment is understood as pronouncement. We do not think that pronouncement is a formality, as is suggested before us. We hasten to clarify that we do not intend to be exhaustive and in every fact situation or circumstances judicial orders would not be declared as illegal or not binding merely because there is a minor deviation or departure or non-adherence to procedural rules. Ultimately, no general rule can be laid down. However, when Part XIX of the NCLT Rules, 2016 titled as "Disposal of Cases and Pronouncement of Orders" contains Rules 146 to 162 and particularly Rules 150 to 152 specifically on the point of subject of pronouncement, then, they cannot be ignored totally and in all situations, particularly on broad consideration of expediency. The expediency that is demonstrated in the present case is disturbing. If there was a hearing held in the month of August, 2019 and that was the last one, the remainder of the months of August and September were available for the Members of the Bench to prepare and pronounce their order. There was no great hurry in rushing and pronouncing the order when the Member (Judicial) knew that he was due for

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promotion or that he has been intimated about the promotion and that there was a notification issued promoting him. The stage or the date from issuance of such notification till the date of taking charge is the period utilised in this case to prepare the final judgment or order. However, there was no great urgency in then dispensing with the requirement of pronouncement of the judgment kept it in the file and communicating it later on. On a date prior to taking charge as a Member of the NCLAT, by a prior notice or intimation to both parties, the order could have been pronounced. It could have been pronounced in the Chambers as well. However, in this case, there is no evidence of pronouncement at all.

76. Pertinently, the following paragraph in the petition remains uncontroverted:-

> "5. At the outset, the Impugned Order is *non est* and has no force of law. While the Impugned Order purports to be dated 22nd October, 2019, it is explicit and evident that the Impugned order was not passed by the National Company Law Tribunal since:
>
> a. The concerned bench comprising of Hon'ble Mr.V.P.Singh (Judicial Member) and Hon'ble Mr.Rajesh Sharma (Technical Member) in the National Company Law Tribunal did not conduct business on 22nd October 2019 as Hon'ble Mr.V.P.Singh (Judicial Member) was not presiding;
>
> b. There was no pronouncement of the Impugned Order as is necessary under the said Rules. The said Insolvency Petition was not listed in the cause list of 22nd October 2019 (Exhibit N) for the concerned bench

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comprising of Hon'ble Mr.V.P.Singh (Judicial Member) and Hon'ble Mr.Rajesh Sharma (Technical Member) in the National Company Law Tribunal, and;

c. An Additional Cause List (Exhibit 'N-1') purporting that the said Insolvency Petition was listed for 'Orders' before the concerned bench of the National Company Law Tribunal Mumbai was *post facto* uploaded after 5th November 2019-at 5:38 pm (Exhibit 'N-2'), and;

d. On 23rd October 2019, Hon'ble Mr.V.P.Singh (Judicial Member) took charge as member of the National Company Law Appellate Tribunal – Delhi. Since the concerned bench which heard the Insolvency Petition was not available, the Impugned Order could not have been passed, and;

e. Instead of listing the said Insolvency Petition for re-hearing, a purported certified copy of the Impugned Order seems to have been issued by Respondent No.2 to Respondent No.5 on 7th November 2019, and;

f. pronouncement of orders being mandatory under the rules, copy of the Impugned Order merely stating to be certified and bearing the inscription "SD/-" does not lend any sanctity unless the order is signed by both members of the concerned bench and pronounced in open court as per the said Rules.

g. In light of the infringement of its legal and fundamental rights, the Petitioner has approached this Hon'ble Court seeking exercise of its powers under Article 226 of the constitution of India *inter alia* based on the facts and legal grounds stated in detail hereinbelow."

77. A perusal of the record of the tribunal also does not reveal that the same was maintained in accordance with the NCLT Rules. There is nothing therein to show that barring the date of filing of the petition/ application, the date of its registration, the date of its copy being served on the other side, the replies and other proceedings being taken on record, there was anything done from

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5th November, 2018 to 20th August, 2019 on which a request was made to the tribunal to pronounce the order expeditiously after the conclusion of the arguments. From the above sequence of events, there is nothing by which one can conclude that the tribunal took steps to inform the parties about the date of pronouncement of the order (See File No. CP(IB)-4375/NCLT/ MB/2018). Hence, we find that there is much substance in the contentions of Mr.Dwarkadas.

78. With the assistance of both learned senior counsel appearing for the parties, we struggled for days together to deduce from the record a documentary evidence which would enable us to hold that there was indeed a pronouncement in this case. That such pronouncement was done on a date and time known to both sides. That there was an advance intimation of the date and time of pronouncement to both sides. Mr.Kadam would like us to hold that because there is an endorsement in the order, below the signature of the Members of the Bench, of a date, that there was indeed a pronouncement on that day. If that was so, there could have been contemporaneous record available for our perusal. We once again say that we searched for a document from the record which would enable us to hold that there was indeed a pronouncement of the order. There is nothing. We must clarify that we are not obsessed

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by the form aware as we are that on such issues, the substance matters. That is missing and we share the apprehensions of Mr.Dwarkadas when he says that this is not a matter of guesswork, conjectures and surmises. Pronouncement of judicial orders ensures that parties are not taken by surprise as far reaching consequences follow after the operative order and direction is known. One's opponent cashes on them to either take possession of properties, seize and attach movables, often taking along with him a court official or a receiver and even police force. If there is a pronouncement of orders and conferring sweeping and drastic powers on above officials, the aggrieved and affected parties can at once request the tribunal to keep the operative direction/s in abeyance for a reasonable time so as to enable them to file appeals/ revisions to higher courts and obtain therein interim relief or protection. Such an opportunity is not available and lost absent a open and transparent declaration and announcement of a judicial order.

79. In the present case, the language of Rules 150 to 152 enables us to hold that the pronouncement of the order is indeed necessary. These rules read as under:-

> "**150. Pronouncement of Order.-**
> (1) The Tribunal, after hearing the applicant and respondent, shall make and pronounce an order either at once or, as soon as thereafter as may be practicable but not later than thirty days from the final hearing.

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(2) Every order of the Tribunal shall be in writing and shall be signed and dated by the President or Member or Members constituting the Bench which heard the case and pronounced the order.

(3) A certified copy of every order passed by the Tribunal shall be given to the parties.

(4) The Tribunal, may transmit order made by it to any court for enforcement, on application made by either of the parties to the order or *suo motu*.

(5) Every order or judgment or notice shall bear the seal of the Tribunal."

"**151. Pronouncement of order by any one member of the Bench.-**
(1) Any Member of the Bench may pronounce the order for and on behalf of the Bench.

(2) When an order is pronounced under this rule, the Court Master shall make a note in the order sheet, that the order of the Bench consisting of President and Members was pronounced in open court on behalf of the Bench."

"**152. Authorising any member to pronounce order.-**
(1) If the Members of the Bench who heard the case are not readily available or have ceased to be Members of the Tribunal, the President may authorise any other Member to pronounce the order on his behalf after being satisfied that the order has been duly prepared and signed by all the Members who heard the case.

(2) The order pronounced by the Member so authorised shall be deemed to be duly pronounced.

(3) The Member so authorised for pronouncement of the order shall affix his signature in the order sheet of the case stating that he has pronounced the order as provided in this rule.

(4) If the order cannot be signed by reason of death, retirement or resignation or for any other reason by any one of the Members of the Bench who heard the case, it shall be deemed to have been released from part-heard and listed afresh for hearing."

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80. A perusal of the sub-rules of Rule 150 and 151 so also 152 would enable us to hold that the tribunal, after hearing the applicant and respondent, shall make and pronounce the order either at once or, as soon as thereafter, as may be practicable, but not late than thirty days from the final hearing. Apart from the fact that there is a limit set out for everything, that by itself does not mean that rule makers intended total dispensation of the requirement of pronouncement of the order. The pronouncement is necessary. It could be either at once or as soon as thereafter, as may be practicable, but not later than 30 days from the final hearing. We are not concerned in this case with a situation where this time limit is not adhered to. However, by sub-rule (2), what is indicated is that every order of the tribunal shall be in writing and shall be signed and dated by the President or Member or Members constituting the Bench which heard the case and pronounced the order. Sub-rule (3) of Rule 150 says that a certified copy of every order passed by the tribunal shall be given to the parties and then sub-rule (4) says that the tribunal may transmit order made by it to any court for enforcement, on application made by either of the parties to the order or *suo motu*. The rule also states that the order or judgment or notice shall bear the seal of the tribunal. If there was absolutely no necessity of pronouncement of the order, Rule 151 would not have been inserted at all. Rule 151 has been

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inserted with a purpose. It is stated in Rule 151 that any Member of the Bench may pronounce the order for and on behalf of the Bench. By Rule 152 it is permissible for the President to authorise any other Member to pronounce the order if the Members of the bench, who heard the case are not readily available or have ceased to be Members of the tribunal. This can be done after the President is satisfied that the order has been duly prepared and signed by all the Members who heard the case. Thus, as per rules a duly prepared and signed order can be pronounced by another Member who was not part of the Bench which heard the case. We are aware of the fact that there is great inconvenience to litigants and parties before a court of law if judgments are not duly prepared, signed and pronounced before the presiding officers or Members demit office or handover charge on the eve of either transfer or superannuation. The litigants, therefore, should not suffer after rendering full assistance to the Bench to pronounce its final order. The parties have duly discharged their duty of assisting the court either by arguing in-person or through advocates. Thus, after the oral arguments are concluded or written submissions are placed on record, all that remains is to pronounce the judgment/ order. If at that stage, those who heard the case are not available, but have duly prepared and signed the judgment, then, pronouncement of the judgment and order in their

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absence is permissible so as to avoid inconvenience or prejudice to the litigants. These are, therefore, enabling rules and one must note the language of sub-rule (2) of Rule 152, which says that the Member authorised to pronounce the order by the President, if making that pronouncement, that would be deemed to be a due pronouncement. The Member so authorised shall affix his signature in the order sheet of the case stating that he has pronounced the order as provided in this rule. If the order cannot be signed by reason of death, retirement or resignation or for any other reason by any one of the Members of the Bench who heard the case, it shall be deemed to have been released from part-heard case list and listed afresh for hearing. The above rule carve out exceptions for the benefit and convenience of parties and litigants. The exceptions do not enable the Members to bypass or circumvent the rules.

81. There is enlargement of time permissible by Rule 153. The rectification of order is provided under Rule 154 and by Rule 155, there is a general power to amend conferred in the tribunal. These ancillary and incidental powers enable the tribunal to render complete justice. The requirement of making entries by Court Master would play a very vital role in the conduct of judicial proceedings is contemplated by Rule 156 and by Rule 157, there is

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a transmission of order by the Court Master. There is a transmission of the order with the case file to the Deputy Registrar by Rule 157(1) and thereafter, the duty of the Deputy Registrar is to make scrutiny and record the satisfaction that the provisions of these rules have been duly complied with and in token thereof affix his initials with date on the outer cover of the order. Then, the further steps have to be taken by the Deputy Registrar. The copies have to be made. A communication of the order to the parties is contemplated by sub-rule (3) of Rule 157 but after that is pronounced by the Bench. The steps prior to the communication are as crucial as the pronouncement.

82. We searched from the records any proof or evidence of such transmission of the order by the Court Master or the entries by the Court Master and we found nothing. In fact, in this case, the records are maintained in a haphazard manner. There is index and there is nothing like required and proper entries by the Court Master or order sheets in the file. The huge pendency of cases or shortage of staff should not mean that litigants have to suffer. If the staff is required to complete the records, then, they must do so so that there is no embarrassment to the Members of the tribunal and undue harassment to the litigants by their inaction or acts of omission and commission. In the present case, when there is

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absolutely no dispute about the factual aspects and that the arguments of both sides have proceeded on the footing that there is no record of pronouncement, then, all the more we cannot agree with Mr.Kadam that in the present case, there is small or minor deviation from the rules which does not make the impugned order a nullity.

83. In fact, the judicial proceedings, the orders and judgments therein, have a certain sanctity. Inviolability of judicial proceeding is at the root of everything. The heart of the matter is that the conduct of judicial proceedings or discharge of judicial function by a court of law inspires confidence and maintains the trust and faith of the litigants in the justice delivery system. If that is shaken and destroyed, then, justice itself is a casualty. We must avoid such a situation at all costs. That is why the requirement to pronounce orders is emphasised repeatedly by the Hon'ble Supreme Court. We do not think that the decisions of the Hon'ble Supreme Court in the case of *Surendra Singh* (supra) and in the case of *State of Uttar Pradesh and Ors.* (supra) can be brushed aside. These judgments are binding on us. They continue to hold the field. In fact, the decision rendered in the case of *Surendra Singh* (supra) has been followed later in a decision in the case of *Iqbal Ismail Sodawala vs. The State of Maharashtra*[16].

16 **AIR 1974 SC 1880**

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84. Prior to reproducing the relevant paragraphs of the judgments, we must deal with the argument of Mr.Kadam that the judgment in the case of Surendra *Singh (supra)* was rendered in a criminal case where the life and liberty of an individual was at stake. We do not think that the requirement of pronouncement of a judgment or order depends upon the nature of the judicial proceedings or the case before a court of law discharging judicial functions. Civil or Criminal, transparency and fairness in conduct of judicial duties has to be maintained at all costs. A judicial function and duty ought to be performed and discharged in a manner maintaining the trust and confidence of the public in the justice delivery system. Like every other power, even judicial power is in the nature of a trust. A judicial officer works as a trustee of the public. The administrative and executive functionaries may have been vested with quasi judicial powers, but even in conduct of quasi judicial proceedings, the Hon'ble Supreme Court has held that their sanctity is paramount. In the case before the Hon'ble Supreme Court in *Surendra Singh* (supra), the Hon'ble Supreme Court considered the matter in the light of the judgment of the High Court of Allahabad delivered in a criminal appeal. The appeal was heard on 11th December, 1952 by a Bench comprising of two Judges at Lucknow. The arguments were heard. Before the judgment could be delivered, one of the Judges was transferred to

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Allahabad. While there he dictated the judgment purporting to do so on behalf of himself and his brother Judge, it was a judgment for and on behalf of the Bench. He signed every page as well as at the end, but did not date it. He then send this to other Judge at Lucknow. He died before the judgment was delivered. Now, the sole Member of the Bench of two Judges purported to deliver the judgment, he signed it and dated it. He placed the date below it. The signature of the Judge who had already expired was appearing on the judgment. The litigants and the public at large was not aware that when the judgment was delivered, one of the Judges of the Bench had already expired. The consequences and repercussions of such judgment were indeed drastic, in that the criminal appeal was dismissed, the conviction and sentence was upheld. The sentence imposed was a death sentence. In these circumstances, the question before the court was whether the delivery of the judgment is a serious act, what are the consequences of non-delivery of judgment or the delivery of the judgment in the manner done by the High Court of Allahabad. It is in these circumstances, the Hon'ble Supreme Court outlined the principles. Paragraph 4 to 13 of this judgment are extremely relevant. They read as under:-

> "4. Delivery of judgment is a solemn act which carries with it serious consequences for the person or persons involved. In a criminal case it often means the difference

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between freedom and jail, an where there is a conviction with a sentence of imprisonment it alters the status of a prisoner from an under-trial to that of a convict; also the term of his sentence starts from the moment judgment is delivered. It is therefore necessary to know with certainty exactly when these consequences start to take effect. For that reason rules which have been drawn up to determine the manner in which and the time from when the decision is to take effect and crystallise into an act which is thereafter final so far as the court delivering the judgment is concerned.

5. Now these rules are not all the same though they are designed to achieve the same result. The Criminal Procedure Code takes care of courts subordinate tot he High Court. Sections 366 and 424 deal with them. The High Courts have power to make their own rules. The power is now conferred or rather continued, under Article 225 of the Constitution.

6. The Allahabad High Court framed its present set of Rules in 1952. They came into force on the 15th of September in that year. We are concerned with the following in Chapter VII dealing with the judgment and decree, namely Rules 1-4.

7. These rules provide for four different situations:(1) for judgments which are pronounced at once as soon as the case has been heard; 92) for those wh ich are pronounced on some further date; (3) for judgments which are oral, and (4) for those which are written. These rules use the word “pronounced” in some places and “delivered” in others Counsel tried to make capital out of this and said that a judgment had to be both “pronounced” and “delivered” and that they were two different things.

8. We do not intend to construe these rules too technically because they are designed, as indeed are all rules, to further the ends of justice and must not be viewed too narrowly; nor do we desire to curtail the jurisdiction which the Privy Council point out is inherent in courts to make good inherent defects caused by accidents such as death. As this decision of the Judicial Committee was relied on in the arguments we will quote the passage which is relevant here. It is at page 295 of - ‘Firm Gokal Chand v. Firm Nand Ram’ AIR 1938 PC 292(A). The facts are not quite the same as here because the judgment was actually delivered in open court and

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both the judges who constituted the Bench were present and concurred in it. But before it could be signed, one Judge went on leave. The Rules required the judgment to be signed and dated at the time that it was pronounced. Their Lordships said--

> "The rule does not say that if its requirements are not complied with the judgment shall be a nullity. So startling a result would need clear and precise words. Indeed the Rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The Rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing the judgment may call for more comment, but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely on irregularity. But in truth the difficulty is disposed of by sections 99 and 108, Civil Procedure Code."

9. That was a civil case. This is a criminal one. But Section 537 of the Criminal Procedure Code does much the same thing on the criminal side as sections 99 and 108 do on the civil. The principle underlying them is the same. But even after every allowance is made and every effort taken to avoid undue technicality the question still remains what is a judgment, for it is the "judgment" which decides the case and affects the rights and liberties of the parties; that is the core of the matter and, as the Privy Council say, the whole purpose of these rules is to secure certainty in the ascertainment of what the judgment was. The question assumes more importance than even in a criminal case because of section 369 of the Criminal Procedure Code which provides that-

> "Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court, by the Letters Patent or other instrument constituting such High Court, no Court, when it has signed its judgment, shall alter or review the same except to correct a clerical error."

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10. In our opinion, a judgment within the meaning of these sections is the final decision of the Court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in open Court. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronoucement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to interfere and conjecture nor can it be vague. All the rest-the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter-can be cured; but not the hard core, namely the formal intimation of the decision and its contents formally declared in a judicial way in open Court. The exact way in which this is done does not matter. In some Courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for a given number of days for inspection.

(underlining ours)

11. An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the Court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open Court. But however it is done it must an expression of them ind of the Court at the time of delivery. We say this because that is the first judicial act touching the judgment which the Court performs after the hearing. Everything else up till then is done out of Court and is not intended to be the operative act which sets all the consequences which follow in the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may writ and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open Court with the intention of making it the operative decision of the Court. That is what constitutes the "judgment.

12. Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of 'locus paenitentiae' and indeed last minute alterations often do occur. Therefore, however much a

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draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. Only then does it crystallise into a full fledged judgment and become operative. It follows that the Judge who "delivers" the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the Court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in position to stop delivery and effect an alteration on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery.

But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometimes a signed draft, to a brother Jude who also heard the case. This may be merely for his information, or for consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a Judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light drawn upon him before the delivery of judgment.

13. Views similar to this were expressed by a Full Bench of the Calcutta High Court consisting of nine Judges in the year 1867 in ...Mahomed Akil v. Asadunnissa Bibee, 9 WR 1 (FB) (B). In that case, three of the seven Judges who constituted the Bench handed in signed judgments to the Registrar of the Court. Before the judgment could be delivered, two of them retired and one died. A Full Bench of nine Judges was convened to consider whether the drafts of those three Judges could be accepted as judgments of the Court. Seton-Kerr, J. who had heard the case along with them, said -

> "Certainly as far as I can recollect, they appeared to have fully made up their minds on a subject which

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> they had very seriously considered, and on which they had abundant opportunities of forming a final determination. I am however not prepared to say that they might not on further consideration have changed their opinions ....."

Despite this, all nine Judges were unanimous in holding that those three opinions could not be regarded as judgments in the formal sense of the term. In our opinion, Jackson, J. expressed the law aright in these words:

> "I have however always understood that it was necessary in strict practice that judgments should be delivered and pronounced in open Court. Clearly, we are met today 'for the first and only time' to give 'judgment' in these appeals; and it appears to me, beyond question, that Judges who have died or have retired from the Court cannot join in the judgment which is to be delivered today, and express their dissent from it" (p.5).

Peacock, C.J. pointed out at page 30 -

> "The mere arguments and expressions of opinion of individual Judges who compose a Court, are not judgments. A judgment in the eye of the law is the final decision of the whole Court. It is not because there are nine Judges that there are nine judgments. When each of the several Judges of whom a simple Court is composed separately express his opinion when they are all assembled, there is still but one judgment, which is the foundation for one decree. If it were otherwise, and if each of the memoranda sent in one the present occasion were a judgment, there would be nine judgments in one case, some deciding one thing and some another, and each Judge would have to review his own judgment separately, if a review should be applied for."

We do not agree with everything which fell from the learned Chief Justice and the other Judges in that case but, in our opinion, the passages given above embody the true rule and succinctly explain the reasons for it."

85. Mr.Kadam's arguments revolve around the basic and fundamental understanding that such a procedure as afore-emphasised is only applicable to a criminal case involving human rights and guarantee of life and liberty. With respect, we beg to

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differ. The judicial proceedings decide the issues concerning not only a litigant's fundamental rights but all legal rights. The right to legal access or access to justice is at stake in every judicial proceeding. The court of law or judicial tribunal may be dealing with a civil or criminal case, but every case should be handled and dealt with judiciously. A judgment brings quietus or end to the lis. We cannot allow a compromise or surrender of the salutary principles laid down in the above judgment of the Hon'ble Supreme Court. Their applicability does not depend upon the nature of the lis, the hierarchy of courts/ tribunals, the stake involved in the litigation and related issues. The above principles highlight the mode and manner of discharging judicial function and duty, permeating or spreading throughout, from entertainment of the proceedings till their culmination in a final judgment and order. Even the final act has to be performed in a manner consistent with the procedural rules and not abrogating them altogether. At all stages, regard to the underlying guiding rules is necessary, else, exceptions or departures would displace the rules completely. Litigations are frequently used as pressurising, harassing, embarrassing tactics by unscrupulous parties and they will play with the whole system if consistency is not maintained. That is not to say that small or minor infraction or deviation will necessarily vitiate the whole process. Everything depends upon

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the facts and circumstances in each case. Nobody should be allowed to manipulate the judicial process and secure favourable relief or judgment by deft management. Judges ought to be aware of the modern trends and tendencies in instituting and prosecuting litigation before a court of law. They must maintain absolute integrity and autonomy, independence of the judiciary cannot be compromised. At all costs, that should be maintained.

86. We do not think that these principles are applicable only to criminal cases or when the question is of life and liberty of a person standing as an accused, under trial and convict. The judgment lays down important principles on the very conduct of judicial proceedings and the manner of delivery of judgments. That is why in the later decision in the case in *Iqbal Ismail Sodawala* (supra), the Hon'ble Supreme Court applied and followed these very principles and held thus:-

> 8. Question then arises as to whether the appellant can be said to be not properly imprisoned if the trial judge had merely dictated the judgment but not signed it because of its not having been transcribed at the time he pronounced it. So far as this aspect is concerned, we find that Section 537 of the Code of Criminal Procedure provides, inter alia, that subject to the other provisions of the Code, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, unless such error, omission, irregularity has in fact occasioned a failure of justice.

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This section is designated to ensure that no order of a competent court should in the absence of failure of justice be reversed or altered in appeal or revision on account of a procedural irregularity. The Code of Criminal Procedure is essentially a Code of procedure and like all procedural law, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. At the same time it has to be borne in mind that it is procedure that spells much of the difference between rule of law and rule by whim and caprice. The object of the Code is to ensure for the accused a full and fair trial in accordance with the principles of natural justice. If there be substantial compliance with the requirements of law, a mere procedural irregularity would not vitiate the trial unless the same results in miscarriage of justice. In all procedural laws certain things are vital. Disregard of the provisions in respect of them would prove fatal to the trial and would invalidate the conviction. There are, however, other requirements which are not so vital. Non-compliance with them would amount to an irregularity which would be curable unless it has resulted in a failure of justice.

9. Question then arises as to whether the failure of a trial judge to sign the judgment at the time of its pronouncement because of its having not been transcribed is a procedural irregularity curable under Section 537 of the Code. In this respect we find that the question as to what is the effect of a judge not signing the judgment at the time it was pronounced was considered by the Judicial Committee in the case of Firm Gokal Chand v. Firm Nand Ram, AIR 1938 PC 292. The appeal in that case in the Lahore High Court was heard by a Division Bench consisting of Harrison and Agha Haider, JJ. The judgment in the case was actually delivered by Harrison, J. with whom Agha Haider, J. concurred. The judgment was pronounced on February 22, 1933 but Harrison, J. went on leave before signing the judgment and the same was signed by Agha Haider, J. The Deputy Registrar appended a note that Harrison, J. had gone on leave before signing the judgment he delivered. Order 41, Rule 31 of the Code of Civil Procedure requires that the judgment of the Appellate Court shall be in writing and shall at the time it is pronounced be signed and dated by the Judge or by the Judges concurring therein. The Judicial Committee considered the question as to whether the judgment was a nullity because of the failure of Harrison, J. to sign the same. Lord Wright speaking on behalf of the Judicial Committee observed :

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> "The Rule does not say that if its requirements are not complied with the judgment shall be a nullity. So startling a result would need clear and precise words. Indeed the Rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The Rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing the judgment may call for more comment, but even so the convenience of the Court and the interest of the litigants must prevail. The defect is merely an irregularity."

Reference in the above context was made to the provisions of Section 99 of the Code of Civil Procedure, according to which no decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. Although the above section dealt with appeals from original decrees, Section 108 applied the same provisions to the appeals from appellate decrees. The Judicial Committee came to the conclusion that the defect mentioned above was an irregularity not affecting the merits of the case or the jurisdiction of the court and was no ground for setting aside the decree.

10. The above decision was a referred to by this Court in the case of Surendra Singh v. State of Uttar Pradesh, 1954 SCR 330 = (AIR 1954 SC 194) and it was observed that Section 537 of the Code of Criminal Procedure does as much the same thing on the criminal side as Sections 99 and 108 on the Civil. This Court in that decision dealt with a criminal case wherein death sentence had been awarded. The case in the High Court was heard by a Bench of two judges. The judgment was signed by both of them but it was delivered in Court by one of them after the death of the other. It was held that there was no valid judgment and the case should be reheard. Arriving at that conclusion, this Court took the view that a judgment

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> is the final decision of the court intimated to the parties and the world at large by formal "pronouncement" or "delivery" in open court and until a judgment is delivered, the judges have a right to change their mind. In the course of discussion Bose, J., who spoke for this Court also made an observation regarding the signing of the judgment and other similar matters in the following words:
>
> > "Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest – the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter – can be cured: but not the hard core, namely, the formal intimation of the decision and its contents formally declared in a judicial way in open court. The exact way in which this is done does not matter. In some courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for given number of days for inspection."

87. A perusal of paras 8, 9 and 10 of this judgment would denote that the Hon'ble Supreme Court held that section 537 of the Code of Criminal Procedure provides, *inter alia*, that subject to the other provisions of the Code, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered in appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, unless such error, omission, irregularity has in fact occasioned a failure of justice.

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This section is designed to ensure that no order of a competent court should in the absence of failure of justice be reversed or altered in appeal or revision on account of a procedural irregularity. The Code of Criminal Procedure is essentially a Code of procedure and like all procedural laws, is designed to further the ends of justice and not frustrate them by introduction of endless technicalities. At the same time it has to be borne in mind that it is a procedure that spells much of the difference between rule of law and rule by whim and caprice. The object of the Code is to ensure for the accused a full and fair trial in accordance with the principles of natural justice. If there is substantial compliance with the requirements of law, a mere procedural irregularity would not vitiate the trial unless the same results in miscarriage of justice.

88. In this case [*Iqbal Ismail Sodawala* (supra)], there was indeed a procedural irregularity not resulting in any miscarriage of justice. There, the judge dictated the judgment and order of conviction and sentence, but that was not transcribed for more than nine months. However, it had been pronounced. If the conclusion was made known by a pronouncement in open court or otherwise required by the rules, then, a mere belated transcription and handing over of copies to the accused would not vitiate the trial and it could never be held to be a miscarriage of justice. The

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failure of justice results when there is absolutely no adherence to the rules of procedure.

89. In the case of *State of Uttar Pradesh* (supra), the Hon'ble Supreme Court in paras 4 to 7 and 14, 15 and 16 held as under:-

> "4. In exercise of powers conferred by clause 8 of the Statutory Order the Government had set up the Tribunal. Clause 9 of the Statutory Order provides for the procedure to be followed by the Tribunal. Sub-clause (7) of this clause is in these terms: "The decision of the Tribunal shall be in writing and shall be pronounced in open court and dated and signed by the member or members of the Tribunal, as the case may be, at the time of pronouncing it". Clause 11 of the Statutory Order gives power to the Government to refer any industrial dispute to the Tribunal.
>
> 5. Sub-clause (9) of clause 9 of the Statutory Order gives power to the Tribunal to make Standing Orders relating to its practice and procedure. Under this sub-clause the Tribunal framed certain Standing Orders. Standing Order No. 36 provided, "Judgment shall be pronounced in open court either immediately after the close of the arguments or on a subsequent date of which previous notice shall be given to the parties. It shall then be signed and dated by the Tribunal."
>
> 6. Acting presumably under Standing Order No. 36, the Tribunal in the present case had fixed a date on which it would pronounce its judgment in open court. This date does not appear on the record but on 25-9-1956, the Tribunal informed the parties that the date for pronouncing the award had been changed to 9-10-1956. On that date, however, the award was not pronounced in open court, nor was any intimation of any other date for its pronouncement given to the parties. The Ice Factories first came to know of the making of the award from the letter of the Registrar of the Tribunal dated 8-11-1956 earlier referred to. The award had in fact never been pronounced in open court.
>
> 7. The first question is whether the provisions in sub-clause (7) of clause 9 are imperative. The High Court held that they were and thereupon quashed the notification publishing the award. The appellants

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contend that the High Court was in error and that the provisions are only directory and that the failure of the Tribunal to pronounce the award in open court did not result in the award becoming void. The Ice Factories contend for the contrary view.

.....

14. ..... It cannot promptly be known to the parties unless the award is pronounced in open court. If any other manner of the giving of the decision was permissible as would be the result if it was not obligatory to pronounce the decision in open court, then a party may be deprived of its right under clause 24 to move the Tribunal for correction of errors. It is for this reason that clause 9(7) provides that the decision shall be dated and signed at the time of pronouncing it in open court. This signing and dating of the award after its pronouncement in open court makes it possible to see whether the terms of clauses 18 and 24(2) have been complied with in any case.

15. ..... Now under section 10 of the Act of 1950, an appeal is competent if preferred within thirty days from the date of the publication of the award where such publication is provided for by the law under which the award is made, or from the date of the making of the award where there is no provision for such publication. Now the U.P.Act or the Statutory Order does not provide for any publication of an award. Therefore an appeal from the Tribunal set up under the Statutory Order has to be filed within thirty days from the making of the award. Hence again it is essential that the date of the making of the award shall be known to the parties to enable them to avail themselves of the right of appeal. This cannot be known unless the judgment is pronounced in open court for the date of award is the date of its pronouncement. Hence again pronouncement of the judgment in open court is essential. If it were not so, the provisions for appeal might be rendered ineffective.

16. For all these reasons it seems to us that the clear intention of the legislature is to make it imperative that judgments should be pronounced in open court by the Tribunal and judgments not so pronounced would therefore be a nullity."

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90. Mr.Kadam tried to distinguish this judgment by urging that the facts therein were peculiar. There was a notification by the State Government under which the dispute was referred for decision by a competent tribunal. There, the tribunal heard the matter, but failed to pronounce the award in open court. Instead, the Registry of the tribunal informed the affected parties that the Award of the tribunal has been submitted to the Government and it was published in the Uttar Pradesh Gazette. The authorities called upon the litigants/ affected parties to implement the award of the tribunal. However, they moved the writ petition seeking to quash the award on the ground that the award sought to be enforced is a nullity as it was not pronounced in open court. Mr.Kadam's attempt to distinguish this judgment on the broad footing that the requirement of pronouncement in open court is not the requirement in the NCLT Rules, cannot be countenanced. If there is a requirement of pronouncement and that has not been adhered to, then, the result is a nullity. If the judgment is not pronounced at all, then, such an order is nullity. We cannot brush aside this binding precedent by the differentiation sought to be made. We could have accepted the argument of Mr.Kadam had there been a contemporaneous record of pronouncement of the judgment of the tribunal impugned before us. In fact, there is nothing, as already held. In these circumstances, we do not think

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that there is any merit in the argument of Mr.Kadam that the requirement of pronouncement of a judgment being not adhered to would not result in that being a nullity, but a mere procedural irregularity not vitiating the proceedings. We are of the firm opinion that the principles laid down in the Hon'ble Supreme Court's judgment continue to bind us.

91. Mr.Kadam then made a faint attempt to urge that if we hold that the requirement of pronouncement of the judgment is not complied with, then, we should send the matter back in order to meet with that requirement or to enable the pronouncement of a judgment and order, which is duly prepared and dated by the Members of the tribunal. According to him, that would subserve the ends of justice.

92. There is a fallacy in this argument as it overlooks the object and purpose of pronouncing a judgment. Before us, the issue is not of not following the rules of procedure in every detail nor is the manner of pronouncement challenged before us. We do not think that we can cure the basic defect in this manner. This would mean that the requirement of pronouncing a judgment need not be adhered to at all. Secondly, it makes mockery of judicial proceedings. Thirdly and importantly, the arguments or the attempt made by Mr.Kadam, if accepted, would result in paper

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compliance with the requirement of pronouncement of the judgment and order by the tribunal. We cannot take such a casual and light hearted approach. We cannot condone the defect in this manner. We do not think that the defect in this case is curable in nature. We find that this defect vitiates the proceedings in their entirety. We are, therefore, of the firm opinion that if we accept the course suggested by Mr.Kadam, we would be diluting the rigour of the requirement set out in the rules. Even if they are procedural rules, the requirement of pronouncement of the judgment or the order in open court or in a transparent manner serves a salutary purpose. We have in sufficient details outlined this object and purpose.

93. As far as the reliance placed by Mr.Kadam on the judgment of the Hon'ble Supreme Court in the case of *State Bank of India and Ors. vs. S.N.Goyal*[17], we find that the facts therein were not similar. There, the order passed by the Disciplinary Authority was under challenge in a civil suit on the file of the Civil Judge, Senior Division, Jind. The order of removal dated 30th June, 1995 as also the orders of the appellate authority and the reviewing authority were challenged as arbitrary and illegal. The suit was resisted. The suit was disposed of and thereafter, both sides filed appeals. Only the penalty was set aside by the trial court. The appeals were

17 **(2008) 8 SCC 92**

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heard by the Additional District Judge and by a common judgment, the decree of the trial court was upheld with addition that the respondent was entitled to full back-wages with interest @ 9%. The appeal of the State Bank of India was dismissed.

94. A second appeal was filed in the Hon'ble High Court and that was also dismissed. The Hon'ble Supreme Court did not find the judgment of the High Court to be in order, in the sense, in tune with the legal principles. In the course of that, the question that fell for consideration of the Hon'ble Supreme Court, *inter alia*, pertained to the manner of decisions rendered by quasi judicial authorities. Thus, the argument was whether the appointing authority became *functus officio*. In dealing with that argument, the Hon'ble Supreme Court made the observations relied upon by Mr.Kadam. In that, in para 28, the Hon'ble Supreme Court holds that a quasi judicial authority will become *functus officio* only when its order is pronounced or published/ notified or communicated to the party concerned. The order remaining on the file without it being pronounced, published or communicated is thus not a valid order and such an order can be altered. While altering such an order, the authority does not become *functus officio*.

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95. To our mind, these observations have no bearing to the facts and circumstances brought before us. It was in dealing with an argument that the authority was *functus officio* after the order was passed that the relied upon observations have been made.

96. Then substantial reliance is placed on the judgment of the learned Single Judge of this court in the case of *Jer Rutton Kavasmaneck and Anr. vs. Gharda Chemicals Ltd. and Ors.*[18]. That is also misplaced, inasmuch as, the issue arose in somewhat different context. There, after having participated in and argued the case on merits, a contention, *inter alia,* raised was that the Company Law Board Regulations, 1991 were not adhered to. The argument was that the impugned order passed by the Company Law Board had not been pronounced. The respondent had received the impugned order and took steps to implement it even before the appellant learnt and/ or received the order. It was submitted that the order that is not pronounced is not an order in the eyes of law. The answer to that argument was that where the Act or Rules did not require pronouncement in open court, then, the mode of delivery of judgment or order depends on particular Act and Rules or Regulations. The learned Single Judge noted the arguments, but eventually held that there is a requirement stipulated for pronouncement of order in open court. In the case

18 **(2013) 177 Company Cases 268**

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before the learned Single Judge, the order of the Company Law Board was not pronounced in the open court, however, it was communicated to all parties and copy of the same had been received by all parties from the Company Law Board. The real grievance of the appellant was that the respondent received the copy before it was communicated and as a result whereof, the respondent took steps to implement that order even before the appellant learnt and/ or received the said order. It is in these circumstances that the learned Single Judge found that though the order was not formally pronounced in open court, but admittedly communicated to the parties, that would be a small irregularity.

97. The observations relied upon by Mr.Kadam and particularly paras 66 and 67 of this judgment cannot be read as equating pronouncement of a judgment in open court with only its communication. In these circumstances and the only argument canvassed being different that we do not think that reliance on this judgment also carries the case of Mr.Kadam any further. In any event, the learned Single Judge, with respect, did not have full assistance and did not deem it fit to deal with the issue in depth. The observations in the above noted paras of the judgment in the case of *Kavasmaneck* (supra) cannot be considered the ratio of the same.

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98. The rest of the judgments cited by Mr.Kadam are on the ambit and scope of the IBC and the powers of the NCLT under the same. We do not think that any reference to these judgments is necessary in the facts peculiar to the case at hand.

99. If any reference to a judgment of the Hon'ble Supreme Court is necessary, then, we would usefully refer to the judgment of the Hon'ble Supreme Court in the case of *R.K.Jain vs. Union of India and Ors.*[19]. A three Judge Bench of the Hon'ble Supreme Court was considering the seriousness of the issue which was raised. The matter was that the Customs, Excise and Gold Control Appellate Tribunal, as it was then known, was without a President for more than six months. The functioning of the tribunal was seriously hampered. There was no proper business discharged and adjournments were granted as a matter of course. The Hon'ble Supreme Court noted this complaint after it was highlighted in two or three leading newspapers. Thereafter, it went into the question of legality and validity of the very provision conferring a power to set up a tribunal. The Constitution of India was referred to in great details. In fact, when in the Constitution itself Part XIVA had been inserted by the Constitution (Forth-second Amendment) Act, 1976 with effect from 3rd January, 1977, its aim was speedy and expeditious justice. Article 323A is titled as "Administrative

19 **AIR 1993 SC 1769**

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tribunals", whereas, Article 323B enables setting up of tribunals for other matters. The appropriate legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints or offences with respect to all or any of the matters specified in clause (2) with respect to which such legislature has power to make laws. The present tribunal is traceable to the power conferred in the appropriate legislature under Article 323B. Noting the ambit and scope of this constitutional power and particularly to set up tribunals, the Hon'ble Supreme Court emphasised that these tribunals are constituted as a substitute for the established and pre-existing mechanism. In paras 66, to 70, 73 and 76, the Hon'ble Supreme Court held as under:-

> "66. ..... Therefore, the personnel manning the administrative tribunal in their determination not only require judicial approach but also knowledge and expertise in that particular branch of constitutional and administrative law. The efficacy of the administrative tribunal and the legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the Administrative Tribunal. Therefore, it was held that the appropriate rule should be made to recruit the members; and consult the Chief Justice of India in recommending to appoint the Chairman, Vice-Chairman and Members of the Tribunal and to constitute a committee presided over by Judge of the Supreme Court to recruit the members for appointment. In M.B. Majumdar v. Union of India, (1990) 3 SCR 946 : (AIR 1990 SC 2263), when the members of CAT claimed parity of pay and superannuation as is available to the Judges of the High Court, this Court held that they are not on par with the judges but a separate mechanism created for their appointment pursuant to Art. 323-A of the Constitution. Therefore, what was meant by this Court in Sampath Kumar's (AIR 1987 SC 386), ratio is that the Tribunal when exercise the power and functions,

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the Act created institutional alternative mechanism or authority to adjudicate the service disputations. It must be effective and efficacious to exercise the power of judicial review. This Court did not appear to have meant that the Tribunals are substitutes of the High Court under Arts. 226 and 227 of the Constitution. J.B. Chopra v. Union of India, (1987) 1 SCC 422 : (AIR 1987 SC 357), merely followed the ratio of Sampath Kumar.

67. The Tribunals set up under Arts. 323A and 323B of the Constitution or under an Act of legislature are creatures of the Statute and in no case claim the status as Judges of the high Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision.

68. In Union of India v. Sankal Chand Himatlal Sheth, (1978) 1 SCR 423 at 442 : (AIR 1977 SC 2328 at p.2338), this Court at p.463 (of SCR) : (at p.2355 of AIR) laid emphasis that, “independence of the judiciary is a fighting faith of our Constitution. Fearless justice is the cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great judges in the past. In England too, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it would be regarded an act of insanity for any one to think otherwise”. At page 471 it was further held that if the beacon of the judiciary is to remain bright, Court must be above reproach, free from coercion and from political influence. At page 491 (of SCR) : (at p.2376 of Air), it was held that the independence of the judiciary is itself a necessitous desideratum of public interest and so interference with it is impermissible except where other considerations of public interest are so strong, and so exercised as not militate seriously against the free

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flow of public justice. Such a balance blend is the happy solution of a delicate, complex, subtle, yet challenging issue which bears on human rights and human justice. The nature of the judicial process is such that under coercive winds the flame of justice flickers, faints and fades. The true judge is one who should be beyond purchase by threat or temptation, popularity or prospectus. To float with the tide is easy, to counter the counterfeit current is uneasy and yet the Judge must be ready for it. By ordinary obligation for written reasoning, by the moral fibre of his peers and elevating tradition of his profession, the judge develops a stream of tendency to function 'without fear or favour, affection or illwill', taking care, of course, to outgrow his prejudices and weaknesses, to read the eternal verities and enduring values and to project and promote the economic, political and social philosophy of the Constitution to uphold which his oath enjoins him. In Kirshnaswami's case, (1992 (4) SCC 5605) in para 67 at p.650, it was observed that "to keep the stream of justice clean and pure the judge must be endowed with sterling character, impeccable integrity and upright behaviour, Erosion thereof would undermine the efficacy of rule of law and the working of the Constitution itself.

69. In Krishna Sahai v. State of U.P., (1990) 2 SCC 673 : (AIR 1990 SC 1137), this Court emphasised its need in constituting the U.P. Service Tribunal that, "it would be appropriate or the State of Uttar Pradesh to change its meaning and a sufficient number of people qualified in law should be on the Tribunal to ensure adequate dispensation of justice and to maintain judicial temper in the functioning of the Tribunal". In Rajendra Singh Yadav v. State of U.P., (1990) 2 SCC 763, it was further reiterated that the Services Tribunal mostly consist of Administrative Officers and the judicial element in the manning part of the Tribunal is very small. The disputes require judicial handling and the adjudication being essentially judicial in character it is necessary that adequate number of judges of the appropriate level should man the Services Tribunals. This would create appropriate temper and generate the atmosphere suitable in an adjudicatory Tribunal and the institution as well would command the requisite confidence of the disputants. In Shri Kumar Padma Prasad v. Union of India, (1992) 2 SCC 428 : (1992 AIR SCW 1094), this Court emphasised that, "Needless to say that the independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution. The objectives enshrined in the Constitution cannot be achieved

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unless the functionaries accountable for making appointments act with meticulous care and utmost responsibility.

70. In a democracy governed by rule of law surely the only acceptable repository of absolute discretion should be the Courts. Judicial review is the basic and essential feature of the Indian constitutional scheme entrusted to the judiciary. It cannot be dispensed with by creating tribunal under Arts 323A and 323B of the Constitution. Any institutional mechanism or authority in negation of judicial review is destructive of basic structure. So long as the alternative institutional mechanism or authority set up by an Act is not less effective than the High Court, it is consistent with constitutional scheme. The faith of the people is the bed-rock on which the edifice of judicial review and efficacy of the adjudication are founded. The alternative arrangement must, therefore, be effective and efficient. For inspiring confidence and trust in the litigant public they must have an assurance that the person deciding their causes is totally and completely free from the influence or pressure from the Govt. To maintain independence and imperativity it is necessary that the personnel should have at least modicum of legal training, learning and experience. Selection of competent and proper people instil people's faith and trust in the office and help to build up reputation and acceptability. Judicial independence which is essential and imperative is secured and independent and impartial administration of justice is assured. Absence thereof only may get both law and procedure wronged and wrong headed views of the facts and may likely to give rise to nursing grievance of injustice. Therefore, functional fitness, experience at the Bar and attitudinal approach are fundamental for efficient judicial adjudication. Then only as a repository of the confidence, as its duty, the tribunal would properly and efficiently interpret the law and apply the law to the given set of facts. Absence thereof would be repugnant or derogatory to the Constitution.

73. Judicial review is concerned with whether the incumbent possessed of qualification for appointment and the manner in which the appointment came to be made or the procedure adopted whether fair, just and reasonable. Exercise of judicial review is to protect the citizen from the abuse of the power etc. by an appropriate Govt. or department etc. In our considered view granting the compliance of the above power of appointment was conferred on the executive and confided to be exercised wisely. When a candidate was found qualified and eligible

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and was accordingly appointed by the executive to hold an office as a Member or Vice-President or President of a Tribunal, we cannot sit over the choice of the selection, but be left to the executive to select the personnel as per law or procedure in this behalf. In Srikumar Prasad's case (AIR 1992 SC 1213), K.N. Srivastava, M.J.S., Legal Remembrance, Secretary to Law and Justice, Govt. of Mizoram did not possess the requisite qualifications for appointment as a Judge of the High Court prescribed under Art.217 of the Constitution, namely, that he was not a District Judge for 10 years in State Higher Judicial Service, which is a mandatory requirement for a valid appointment. Therefore, this Court declared that he was not qualified to be appointed as a Judge of the High Court and quashed his appointment accordingly. The facts therein are clearly glaring and so the ratio is distinguishable.

76. Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The Judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice-Chairmen (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by special leave under Art.136 to this Court also proved to be costly and prohibitive and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would assuage a growing feeling of injustice of those who can ill afford to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the tribunals need fresh look and regular monitoring is necessary. Except body like the Law Commission of India would make an indepth study in this behalf including the desirability to bring CEGAT under the control of Law and Justice Department in line with Income-tax Appellate Tribunal and to make appropriate urgent recommendations to the Govt. of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making Judicial review efficacious, inexpensive and satisfactory."

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100. Thus, remedial steps were suggested in this judgment and we find that two decades and more have passed after this judgment, but all remedial measures have not been taken. One of the remedial measures appears to be apparent to us and that is to make the working and functioning of these tribunals litigant friendly and effective. That can be done only by placing at the disposal of the judicial members, the trained staff. Properly trained and experienced staff from the existing courts can be sent, deputed to assist the tribunals. We have noticed that presently the Members of such tribunals do not have the required degree of experience themselves much less availability of trained, co,mpetent staff so as to enable them to effectively discharge judicial functions. Very often we have noticed that the support staff comprises of members of the concerned Government department. In other words, if the functioning of the tribunal is monitored and supervised by a particular department of the Central Government, then, that departmental staff is appointed to assist the tribunal. Effective work cannot be done unless the Registrar, Superintendent and other staff members are drawn from the courts already functioning and discharging judicial functions. The trained staff of such courts can be deployed as a temporary measure and thereafter, by a proper selection process, the staff to assist and support the Judicial Members and the

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President should be selected and appointed. The staff ought to be drawn from legal field. If any administrative staff or departmental member is appointed or deputed to work in the tribunals, he may not have any experience of working in a court. We have have noticed in this case that the NCLT lacks such a staff. It is on account of the staff members that in this case both the judicial Members have been embarrassed. The litigants suffer by a requirement to hold the proceedings afresh.

101. As a result of the above discussion, we are of the firm view that the present writ petition is maintainable and for the reasons aforenoted, the writ of certiorari must go to quash and set aside the impugned order. We, accordingly, issue that writ of certiorari and quash and set aside the impugned order on the ground that the same is a nullity. Once it is a nullity and cannot be allowed to stand, then, we have no alternative, but to declare that all steps consequential to this order would also not survive. The appointment of the resolution professional would also have to go and every step/ measure taken by him also must fall to the ground. Now, the application made by the applicant in terms of sub-sections (1) and (2) of section 7 of the IBC will be heard afresh on merits and in accordance with law. It shall be decided uninfluenced by any observations, findings and conclusions in the impugned order, which we have quashed and set aside today.

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102. While we once again clarify that we have nullified the order, we have not quashed the proceedings themselves. The proceedings remain on the file, in the sense, the application can be pursued and decided in accordance with law afresh and therefore, our judgment and order should not be construed as expression of any opinion on the merits of the controversy. We were concerned with the issue of conduct of judicial proceedings and the legality and validity of the impugned unpronounced, undeclared order. We have not in any manner stripped the NCLT and its power, authority and jurisdiction to decide the application in accordance with law. It should so proceed and decide it.

103. Rule is made absolute in the above terms. There would be no order as to costs.

104. The original records and proceedings shall be returned to the official of the tribunal authorised to collect them from the Sheristedar/ Associate attached to this court.

105. All concerned to act on an authenticated copy of this order.

(R.I.CHAGLA, J.) **(S.C.DHARMADHIKARI, J.)**

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