NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 677 of 2021

And

Company Appeal (AT) (Insolvency) No. 800 of 2021

INDEX

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 677 and 800 of 2021

1. Company Appeal (AT) (Insolvency) No. 677 of 2021

[Arising out of Order dated 07 June 2021 in I.A. No. 449/MB/C-II/2021 in C.P (IB) No.4258/MB/C-II/2019) passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai]

IN THE MATTER OF:

1. **SESA Group Employees Provident Fund**
   Through its Authorised Signatory
   Karan Kumar Kejriwal
   (SESA Ghor, 20 EDC Complex, Patto,
   Panaji, Goa – 403001 **Appellant No.1**

2. **SESA Resources Ltd**
   Employees Provident Fund
   Through its Authorised Signatory
   Milagrina De Souza Eremita
   (SESA Ghor, 20 EDC Complex, Patto,
   Panaji, Goa – 403001 **Appellant No.2**

3. **SESA Mining Corporation Ltd**
   Employees Provident Fund
   Through its Authorised Signatory
   Tina Lakhani
   (SESA Ghor, 20 EDC Complex, Patto,
   Panaji, Goa – 403001 **Appellant No.3**

Versus

1. **Dewan Housing Finance Corporation Ltd**
   Through its Administrator
   Warden House, 2nd Floor
   Sir P.M. Road, Fort, Mumbai – 400001
   Email: dhfladministrator@dhfl.com **Respondent No.1**

2. **Committee of Creditors of Dewan**
   Housing Finance Corporation Limited
   Also, through Union Bank of India
   Warden House, 2nd Floor
   Sir P.M. Road, Fort, Mumbai – 400001

Email: advsonutandon@gmail.com
raunak.dhillon@cyrilshroff.com **Respondent No.2**

3. Piramal Capital & Housing Finance Ltd
Through its Managing Director
4th Floor, Piramal Tower
Peninsula Corporate Park
Ganpatrao Kadam Marg,
Lower Parel West, Mumbai
Maharashtra – 400013 **Respondent No.3**

4. Catalyst Trusteeship Limited
(Formerly Gda Trusteeship Limited)
Gda House, Plot No.85
Bhusari Colony (Right)
Paud Road, Kothrud, Pune – 411038

Present:

For Appellant : Mr Gopal Jain, Sr Advocate with Mr Pallav Mongia, Ms Tanishka Khatana, Advocates.

For Respondent : Mr Raunak Dhillon, Ms Madhavi Khanna, Mr Shubhankar Jain, Mr Animesh Bisht and Ms Saloni Kapadia, Advocates for R-2, COC. Mr Ashish Bhan, Ms Chitra Rentala, Ms amriddhi Shukla, Mr Ketan Gaur, Mr Kaustub Narendra, Ms Lisa Mishra, Mr Aayush Mitruka and Mr Vishal Hablani, Advocates (for Piramal Capital & Housing Finance Ltd., SRA)

With

2. Company Appeal (AT) (Insolvency) No. 800 of 2021

IN THE MATTER OF:

BALCO Employees Provident Fund
Through Gaurav Garg
Bharat Aluminium Company Ltd
Finance Department, Admin Building
Balco Nagar, Korba
Chhattisgarh State – 495684 **Appellant**

Versus

1. Dewan Housing Finance Corporation Ltd
Through its Administrator

Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai – 400001
Email: dhfladministrator@dhfl.com **Respondent No.1**

2. Committee of Creditors of Dewan Housing Finance Corporation Limited
Also, through Union Bank of India
Warden House, 2nd Floor
Sir P.M. Road, Fort, Mumbai – 400001
Email: advsonutandon@gmail.com
raunak.dhillon@cyrilshroff.com **Respondent No.2**

3. Catalyst Trusteeship Limited
(Formerly Gda Trusteeship Limited)
Gda House, Plot No.85
Bhusari Colony (Right)
Paud Road, Kothrud, Pune – 411038 **Respondent No.3**

Present:

For Appellant : Mr Gopal Jain, Sr Advocate with Mr Pallav Mongia, Ms Tanishka Khatana, Advocates.

For Respondent : Mr Raunak Dhillon, Ms Madhavi Khanna, Mr Shubhankar Jain, Mr Animesh Bisht and Ms Saloni Kapadia, Advocates for R-2, COC.
Mr Ashish Bhan, Ms Chitra Rentala, Ms Samriddhi Shukla, Mr Ketan Gaur, Mr Kaustub Narendra, Ms Lisa Mishra, Mr Aayush Mitruka and Mr Vishal Hablani, Advocates (for Piramal Capital & Housing Finance Ltd., SRA)

Glossary

SGEPF	SESA Group Employees Provident Fund
SMCLEPF	SESA Mining Corporation Limited Employees Provident Fund
SRLEPF	SESA Resources Limited Employees Provident Fund
Impugned Order	Impugned Order dated 07.06.2021
NCLT	National company Law Tribunal

NCLAT	National Company Law Appellate Tribunal
I&B Code/ Code	Insolvency and Bankruptcy Code
CIRP	Corporate Insolvency Resolution Process
Catalysts	Catalyst Trusteeship Limited
CoC	Committee of Creditors
Successful Resolution Applicant	Piramal Capital & Housing Finance Limited
EPF Act	Employees Provident Fund and Miscellaneous Provisions Act, 1952
Employer	SESA Group, SESA Mining and SESA Resources and BALCO
BOT	Board of Trustees
SESAs Class	Classes of NCD holders under SESA entities
CD	Corporate Debtor
PF	Provident Fund

CORAM:
Hon'ble Mr Justice M. Venugopal, Member (J)
Hon'ble Mr V. P. Singh, Member (T)
Hon'ble Dr Ashok Kumar Mishra, Member (T)

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. These Appeals are filed by the Appellants herein, i.e., SESA Group Employees Provident Fund (hereinafter referred to as "SGEPF"), SESA Mining Corporation Limited Employees Provident Fund (hereinafter referred to as "SMCLEPF") and SESA Resources Limited Employees Provident Fund

(hereinafter referred to as "SRLEPF") under Section 61(3) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code") against the impugned order dated 07.06.2021 (hereinafter referred to as "Impugned Orders") passed by the Adjudicating Authority, Mumbai Bench (hereinafter referred to as "Adjudicating Authority") in I.A. No. 449/MB/C-II/2021, in C.P (IB) No. 4258/MB/C-II/2019). The Adjudicating Authority, while passing the said order approving the Resolution Plan submitted by Piramal Capital & Housing Finance Limited (hereinafter referred to as "the Successful Resolution Applicant"), failed to appreciate the grave consequences of allowing the said Resolution Plan and the plight of thousands of PF Holders who would face the prospect of losing their entire savings accumulated by them during their life, which was invested with the Corporate Debtor by their respective provident funds (The Appellants in this case).

Instead of complying with such direction passed by the Adjudicating Authority, the CoC has now refused to reconsider the distribution method. The Adjudicating Authority ought not to have approved the Resolution Plan until the CoC considers the distribution method directed by the Adjudicating Authority. This is without prejudice that the CoC had no entitlement to deal with the funds of the PF holders since it is beyond the scope enshrined in the Code.

2. Furthermore, in the 20th COC meeting (Voting Resolution 1) held on 17.06.2021, the COC, even after reconsidering the existing distribution plan,

failed to consider the plight of the PF holders and proposed to pay only 40% of the admitted claim. The relevant excerpt from the aforementioned meeting to produced hereunder:

> *"All unsecured NCD holders in Category 1, Category 2 and Category 3 and unsecured NCD holders which are Retirement Funds (i.e. Pension Funds, Provident Funds, Gratuity Fund, Superannuation Funds etc.) be paid in an amount in cash which is equal to approximately 40% of their respective admitted claims, similar to the recovery of the Secured Financial Creditors (who have voted in favour of the Resolution Plan)."*

3. The order passed by the Adjudicating Authority approving the Resolution Plan may be set aside on the following grounds.

a. The said Resolution Plan is in contravention to the provisions of The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "EPF Act") and the Constitutional mandate. Therefore, it is submitted that the Provident Funds parked with the Corporate Debtor are beyond the provisions of the Code and cannot be dealt with under the Code as well as by the statutory authorities created by the Code.

b. The Administrator failed to consider and appreciate that the CoC has overlooked the genuine, valid and legally tenable concerns of the Appellant and has passed various shocking resolutions, which are entirely

against the interest of the Appellant who deposited their hard-earned Money in hope for a better life.

c. The Administrator failed to consider and appreciate that the Money invested by the pension fund and PFs does not belong to the Corporate Debtor and is related to the employees. Therefore it should be released first (in total) before any other repayments begin.

d. The allocation of the Resolution Amount is entirely contrary to law. The Resolution plan passed by the CoC to the extent that the PF Holders / Appellants are concerned to be set-aside/modified.

e. The repayment of Money to the EPF holders via their respective Provident Fund Trusts is the mandate of law, which the Respondents have not fulfilled, nor even proposed to be fulfilled. Thus, the said Resolution plan and the minutes of the 18th CoC meeting were contrary to law, illegal and are void to the extent indicated above.

f. In fact, the Adjudicating Authority in the Impugned Order observed that the PF Holders should get fair, increased share money out of the Resolution Plan and thus directed the Committee of Creditors (from now on referred to as "COC") to reconsider the distribution method and distribution amongst members of CoC to not put the PF holders and other small investors to more risk. The Hon'ble Tribunal observed the following-

"--we are of the considered view that considering the number of small investors running into lakhs, senior citizens, who had deposited their hard earned savings, have to meet various expenses especially in this Covid-19 Pandemic situation, loss of jobs to number of depositors, to meet other essential needs the employees of the PF Trust which is the Money they would get at the time of , after superannuation. Therefore, are of the considered view that they should get a fair, increased share money out of the Resolution Plan. Since FSP is a different nature of company than a normal Corporate Debtor, where in thousands, Lakhs of Small Investors invest their funds for a reasonable interest income to take care of their needs. Its generally considered that investment in Fixed Deposit, NCDs are low risk investment than investing in Equity Shares therefore these small investors should not be put to more risk, take more hair cut than the stronger financial institutions viz Banks, Financial Institutions and accordingly for this limited purpose we direct the COC to reconsider their distribution method, distribution amongst various members of CoC within two weeks from today and report the same to this Adjudicating Authority."

g. Thus, there is a material irregularity in the exercise of powers by the Resolution Professional/ Administrator during the CIRP process.

4. The Employees' Provident Funds Framework in India provides provident funds, pension funds and deposit linked instruments for employees in factories

and other establishments. The EPF Framework has been brought into force keeping in view the Directive Principles of State Policy enshrined under Articles 38 and 43 of the Constitution of India. Article 38 mandates that the State strive to ensure equalities in income and eliminate inequalities in status, facilities and opportunities amongst individuals in different vocations. Article 43 further mandates that "**The State shall endeavour to secure to all workers a living wage and a decent standard of life**."

5. Pursuant to the above stated Directive Principles, social welfare laws have been enacted by the State, which casts an obligation on industries and other establishments to follow certain directions as regards manner, quantum and payments of wages/salary etc. to its employees. The EPF Act has been enacted to further the said objectives, as is evident from the following extracts of the 'Statement of Objects and Reasons' of the EPF Act:

> *"Considering the various difficulties, financial and administrative, the most appropriate course appears to be the institution compulsorily of contributory provident funds in which both the worker and the Employer would contribute. Apart from other advantages, there is the obvious one of cultivating among the workers a spirit of saving something regularly. The institution of a provident fund of this type would also encourage the stabilisation of a steady labour force industrial centres."*

Therefore, the EPF Act provides for contributory provident funds in industries to which the said Act is applicable. Under the EPF Act, the EPF

Scheme has been framed for the establishment of provident funds under the said Act for employees of establishments provided therein or as notified by the Central Government, from time to time.

6. It is settled law that the Employee's Provident Fund and Miscellaneous Provisions Act is a welfare legislation. When certain benefits are extended to the labourers/employees in welfare legislation, the same cannot be denied on specific technical grounds. It is the constitutional obligation of the Court to see that the low-income families struggling to meet out their day-to-day expenditures are saved. The Hon'ble Supreme Court has long settled the various dimensions of Article 21. It held that the right to "live" is not merely confined to physical existence, but it includes within its ambit the right to live with human dignity.

7. Further, Article 38 of the Indian Constitution provides the State to secure a social order to promote the welfare of the people. Accordingly, the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political justice shall inform all the institutions of national life. The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. The Court further observed:

> *"23. Employee's Provident Fund Act is one such Act enacted for the purpose of achieving constitutional perceptions.*

Therefore, this Court is of the opinion that ***the provisions contained in such Act to be given paramount importance, more specifically, in the matter of settlement of provident Fund to the employees/labourers.***"

8. A bare perusal at the legislative history of the Code would show that the Provident Fund dues should get priority over all other debts, including secured creditors and therefore, need to be protected at all stages of Resolution.

9. For the same reason, the provident Fund, the pension fund, and the gratuity fund should not be included in the liquidation estate assets and estate of the Bankrupt. The dues payable under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 are statutory dues, ultimately owed to the workers. It forms an intrinsic part of their right to life enshrined under Article 21 of the Constitution.

10. Applying the same principle, Section 155 of the Code stipulates that the estate of the bankrupt shall include all property belonging to, or vested in the bankrupt at the bankruptcy commencement date other than, inter alia, all sums due to any workman or employee from the provident Fund, the pension fund, and the gratuity fund. Similarly, gratuity funds of workers are safeguarded from being attached when the Employer is winding up or in liquidation. Therefore, in harmony with the above-said provision of the Code, it excludes the gratuity fund of workers who may be in possession of the Corporate Debtor from being part of the liquidation estate or the estate of the bankrupt. Moreover, since the

provident funds, pension funds, and gratuity funds provide a social safety net for workers and employees, the proceeds from such funds have been secured. Therefore, they shall not be included in the liquidation estate assets or the bankrupt's estate.

11. Thus, it is clear that the Code deliberately and expressly keeps the Provident Fund and Pension Fund arrears away from the clutches of the authorities created under the Code. These dues are well-protected under the Code as the Resolution Professional can take control and custody of the 'liquidation assets' only after liquidating the entire dues payable by the Corporate Debtor under the EPF & MP Act's provisions 1952. In other words, these dues should be paid on priority well before the commencement of the liquidation process itself. They should not be subject to the mercy of the creditors or the priority ladder of the waterfall mechanism.

12. Furthermore, it is submitted that it is not a case of conflict between the provisions of the EPF & MP Act and the Code. On the other hand, the 'provident fund' and the 'gratuity fund' are not the assets of the 'Corporate Debtor,' there being specific provisions. Therefore, the application of Section 238 of the I & B Code does not arise. Thus, the Adjudicatory Authority should have directed the Resolution professional to release the total amount of provident Fund, including the interest thereon in terms of the provisions of the EPF & MP Act, 1952 immediately, before approving the Resolution plan. However, the Impugned

Order passed by the Ld. Adjudicating Authority violates the aforesaid statutory mandate. It defeats the very object of the EPF Act, thereby effectively leaving the Appellant remediless and rendering the protected beneficiaries of the provident funds helpless.

13. It is pertinent to note that special welfare legislation enshrined the employee's right to claim his Provident Funds. Therefore the provident Fund cannot be touched by the CoC during the resolution process because of the statutory mandate. Moreover, if the CoC were allowed to deal with the funds above belonging to the PF Holders, that would create an anomaly considering that PF funds are to be dealt with following the Statutory mandate under the EPF Act. Therefore, entrusting the CoC with such powers would only defeat the very purpose of the welfare legislation that the EPF Act is.

14. The CoC is not empowered to deal directly with the PF holder's funds. Therefore, the same funds cannot be severed from the PF holders by the CoC indirectly by confining the Appellant in the priority list. If permitted, it will empower the Authorities to do something indirectly that they are not empowered to do directly.

15. It is essential to bear in mind that as per the provisions of Section 17(3)(a) of the EPF Act, which specifies that the Appellant had a mandatory obligation and compulsion to invest certain funds of its employees to secure the future of

thousands of people employed by it. The relevant extracts of the said provisions are;

> *"17. Power to exempt.-*
>
> *(3) Where in respect of any person or class of persons employed in an establishment as the exemption is granted under this Section from the operation of all or any of the provisions of any scheme (whether such exemption has been granted to the establishment wherein such person or class of persons is employed or to the person or class of persons as such), the Employer in relation to such establishment-*
>
> *(a) shall, in relation to the provident Fund, pension and gratuity to which any such person or class of persons is entitled, maintain such accounts, submit such returns, make such investment, provide for such facilities for inspection and pay such inspection charges, as the Central Government may direct;."*

16. Under the EPF Framework, an employer (to whom the EPF Act is applicable) is required to establish a Board of trustees for the management of the provident Fund under the directions of the Central Government. The management and the operation of the provident Fund shall vest in the Board of Trustees who will be accountable to the Employees Provident Fund Organisation. Furthermore, under the EPF Framework, the Employer must make payments (contributions) to the Provident Fund. The said requirements are provided as follows:

a. Under S.6 of the EPF Act read with paragraph 29 of the EPF Scheme, contribution to be paid in the provident Fund by the Employer has been provided; *which shall be 10% or 12% of the basic wages, as applicable, dearness allowance and retaining allowance, if any, payable to each of the employees;*

b. Under paragraph 27AA of the EPF Scheme, the Employer is duty-bound to transfer to the Board of Trustees the contributions payable to the provident Fund by himself and the employees as the rate prescribed under the EPF Act by the 15th of each month following the month for which contributions are payable;

c. Under S. 7Q of the EPF Act read with paragraph 27AA of the EPF Scheme, an employer would be liable to pay simple interest at the rate of 12% per annum or at such higher rate which may be specified, for any amount due from the Employer under the EPF Act from the date on which the amount has become so due till the date of its actual payment.

However, the CoC, Successful Resolution Applicant and the Administrator failed to appreciate that the investments above parked with the Corporate Debtor by the Appellant is an asset of the workmen and is liable to be paid back in toto. Moreover, the Adjudicating Authority acted in complete disregard of the Appellant's obligation under the statutory provisions mentioned above. Hence,

the security mechanism under the EPF Act stands eroded by the Impugned Order.

17. **Appellants Submissions**

Facts

1. Under S. 17 of the EPF Act, SESA Group, SESA Mining and SESA Resources and BALCO (from now on referred to us "Employer"), had incorporated their respective Employees' Provident Fund Trusts, namely- SESA Group Employees' Provident Fund Trust, SESA Mining Employees' Provident Fund Trust, SESA Resources Employees' Provident Fund Trust and BALCO Employees' Provident Fund Trust.

2. The Trusts described above have their respective Board of Trustees (from now on referred to as "BOT") to, inter-alia, manage the affairs of these Trusts and funds. It is pertinent to note that such Trustees, at all times, are accountable to the welfare of the Trust and its beneficiaries, which are the Employees.

3. Further, under the scheme of the EPF Act, the Trusts are mandated to deposit the Employees' contribution and their contribution in the account of their respective EPF Trusts.

4. Once such transaction is successfully executed, the monies are now the property of the Trust, and the Employer has no ownership rights over the same.

5. However, it should be noted that the monies collected in the Trust Account have to be invested in securities under para 52 of the EPF Scheme.

6. Under such duty, the Trusts had individually invested certain portions of such Money in the NCDs floated by DHFL. The total corpus invested was approximately 11 Crores (SESA) and 19 Crores (BALCO).

7. In the Resolution Plan, the Appellants (Trusts above) were deemed to be consenting Financial Creditors and accordingly were accorded 40.12% of their admitted claims.

8. Moreover, the Hon'ble SC in the case of M/s Motilal Padampat Sugar Mills vs State of UP& Ors (1979 (2) SCC 409) held in Para 28. "...It may also be noted that promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by law."

II. Applications Filed

1. Application to amend the Memo of Parties, to bring on record the names of Board of Trustees for SESA - Filing No.-9910110/05587/2021

2. Application to amend the Memo of, to bring on record the names of Board of Trustees for BALCO - Filing No.- 9910110/05625/2021

3. Application for Impleadment- Hindustan Zinc Limited Employees' Contributory Provident Fund Trust vs DHFL & Ors. (IA 1788 of 2021)

III. Appellants are different from other NCD holders?

1. The Appellants being an exempted EPF Trust had a statutory obligation and a duty to invest, under Para 52 of the EPF Scheme read with sub-para 17 of Appendix A;

> Para 52: Investment of Money belonging to Employees' Provident Fund - "(1) All Money belonging to the Fund shall be deposited in the Reserve Bank or the State Bank of India or such other Scheduled Banks as may be approved by the Central Government from time to time or shall be invested subject to such directions as the Central Government may from time to time give, in the securities mentioned or referred to in Section 20 of the Indian Trusts Act, 1882 (11 of 1882), provided that such securities are payable both in respect of capital and in respect of an interest in India."
>
> **Appendix A -Sub para 17-**
>
> "17. *The Board of Trustees shall invest the monies of the provident Fund as per the directions of the Government from time to time. Failure to make investments as per directions of the Government shall make the Board of Trustees separately and jointly liable lo surcharge as may be imposed by the Central Provident Fund Commissioner or his representative."*

2. Under the second leg of para 52, which reads - "All money belonging to the Fund..... shall be invested subject to such directions as the Central

Government may from time to time give...", the Appellants were restricted to invest only in securities prescribed by the Government and hence only had limited options to invest in securities like - AA credited institutions under the Notification by Ministry of Labour and Employment, 2015 (23.04.2015) (from now on referred to as "2015 Notification"). On the other hand, investments made by other NCD holders are without such limitations. The Appellants, therefore, clearly cannot invest such funds on their whims and fancies.

3. Despite the Money being invested in the NCDs of the Corporate Debtor, the nature of such Money so invested will be for the welfare of the employees. This is because the right of all other creditors over the company's assets is a property right. In contrast, PF dues of workers are a facet of Right to Life because the workmen all through their life save some portion of the hard earnings for their later life after retirement. Therefore, if such sums are being interlinked on par with debts of the company's creditors, secured or unsecured as the case may be, then it is nothing but diluting the most valuable and inalienable right of a person on par with a property right subordinate to right to life. (Precision Fasteners Ltd vs Employees Provident Fund Organization, Thane, 2018 SCC OnLine NCLT 27284, Para 30). Given the nature of such EP funds, the legislature's intent is, therefore, to regulate the same at all times. In

contrast, no other NCD is of such a nature to be under such a strict watch, and thus, EPF must be protected at all costs.

4. The contributions made by the Appellants are mandated by statute and are thus not with a profit-making objective. Sub para 21 of Appendix A mandates the Board of Trustees to credit incentives to the trust account. This essentially shows that such investments are only for the benefit of the employees and not otherwise. In contrast, the investments made by other NCD holders are made with a profit-making intention.

5. The investments made by Appellants are under a special welfare legislature and, therefore, accords the Appellants a special status. Not every NCD holder comes within the purview of such strict statutory and constitutional mandate.

IV. EPF Act will hold the field qua the PF money lying with the Corporate Debtor

1. No provision under IBC deals with the Money transferred to the account of the Board of Trustees.

2. It is essential to note that the Code does not distinguish between the Employees of the Corporate Debtor and the Employees of any other establishment, qua their rights over their Provident Fund amounts. Section 36 (4) of the IBC enumerates the list of assets that shall not be

included in the liquidation estate and shall not be used for recovery in the liquidation: -

(a) assets owned by a third party which are in possession of the Corporate Debtor, including-

(i) assets held in Trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident Fund, the pension fund and the gratuity fund;

3. It is essential to note three things. First, all the sums due to any workmen or employees from PF are third-party assets. Second, that sub-section (iii) of S. 36 (4)(a) uses the word "any workmen or employee", which means that the Code envisages no such distinction between the PF of the employees of the Corporate Debtor and the PF of the employees of any other establishment. Third, the language used in S. 36(4)(a)(iii) is "all sums due to any workmen or employee from the PF.." which means the investments made in the Corporate Debtor from the Provident Funds owed created by a third party.

4. The intent of the 2015 Notification r/w S. 14 of the EPF Act will show that the Government intends to regulate the Money at all times, even when invested. S. 14 of the EPF Act ascribes criminal liability to whoever makes

or causes false statements or representation to avoid payment under the EPF Act.

> *"S. 14. Penalties - (1) Whoever, for the purpose of avoiding any payment to be made by himself under this Act, the Scheme, the [Pension] Scheme or the Insurance Scheme]] or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to [one year, or with fine of five thousand rupees, or with both.]."*

5. The Money so transferred is not the Employer's property but now vests with the Trustees.

V. Important provisions of EPF & MP Act

1. **S. 5. Employees' Provident Fund Schemes.** - Empowers the Central Government to frame a scheme called the "Employees Provident Fund Scheme".

2. **S. 17. Power to exempt** - Provides for conditions for exemption, (a) (the Employer) shall, about the provident Fund, pension and gratuity to which any such person or class of persons is entitled, maintain such accounts, submit such returns, make such investment, provide for such facilities for inspection and pay such inspection charges, as the Central Government may direct;

3. **S. 14. Penalties** -(1) Whoever to avoid any payment to be made by himself under this Act (the Scheme (the [Pension) Scheme or the Insurance Scheme]) or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to [one year, or with fine of five thousand rupees, or with both.]

VI. IMPORTANT PROVISIONS OF EPF & MP SCHEME TO SHOW THAT EPF IS A SPECIAL LAW AND WOULD THUS PREVAIL.

1. **27AA. The exemption's terms and conditions - Provides for terms and conditions for exemption** (Appendix A).

Appendix "A"

a. "5. the Employer shall transfer to the Board of Trustees the contributions payable to the provident Fund by himself and employees at the rate prescribed under the Act from time to time by the 15th of each month following the month for which the contributions are payable. The Employer shall be liable to pay simple interest in terms of the provisions of Section 7Q of the Act for any delay in payment of any dues towards the Board of Trustees."

b. "17. **The Board of Trustees shall invest the monies of the provident Fund as per the directions of the Government from time to time**. Failure to make investments as per directions of the Government

shall make the Board of Trustees separately and jointly liable to surcharge as may be imposed by the Central Provident Fund Commissioner or his representative.

c. "19. All such investments made, like the purchase of securities and bonds, should be lodged in the safe custody of depository participants, approved by the Reserve Bank of India and the Central Government. They shall be the custodian of the same. On the closure of establishment or liquidation or cancellation of exemption from EPF Scheme, 1952, such custodian shall transfer the investment obtained in the name of the Trust and its credit to the RPFC concerned directly on receipt of a request from the RPFC concerned to that effect."

d. "21. Any commission, incentive, bonus, or other pecuniary rewards given by any financial or other institutions for the investments made by the Trust should be credited to its account."

e. "23. The Employer and the Board of Trustees shall also give the undertaking to transfer the funds promptly within the time limit prescribed by the concerned RPFC in the event of cancellation of exemption. This shall be legally binding on them and will make them liable for prosecution in the event of any delay in the transfer of funds

f. "29. In case of any change of legal status of the establishment, which has been granted an exemption, as a result of the merger, demerger,

acquisition, sale amalgamation, formation of a subsidiary, whether wholly-owned or not, etc., the exemption granted shall stand revoked. The establishment should promptly report the matter to the Regional Provident Fund Commissioner concerned for grant of fresh exemption."

2. **Para 52. Investment of moneys belonging to Employees' Provident Fund (supra)**

Reliance can also be placed on the case of-

- Bhupinder Singh vs Unitech Ltd (2020 SCC Online SC 1202), wherein the Court held the following-

  "(x) The order of moratorium shall not foreclose the statutory entitlement of the EPFO to enforce the claims for the payment of EPF and other related statutory dues by law against the erstwhile management."

- Hindustan Zinc Limited Employees Contributory Provident Fund Trusts vs Union of India & Ors. Etc.

(Civil Appeal Diary No. 41253/2019) (ROP dated 16.12.2019). "The money deposited by EPF Trusts not to be disbursed, till the next date of hearing."

3. IMPORTANT PROVISIONS OF IBC

i. **S. 18. Duties of interim Resolution professional.**- (f) take control and custody of any asset over which the Corporate Debtor has ownership rights.

Explanation--For this sub-section, the term "assets" shall not include the following, namely:-(a) assets owned by a third party in possession of the Corporate Debtor held under Trust or contractual arrangements including bailment.

ii. **S. 36 Liquidation Estate** – (4)(iii) Provides that (a) assets owned by a third party which are in possession of the Corporate Debtor are not included in the estate of the Corporate Debtor, which is all sums due to any workman or employee from the provident Fund, the pension fund and the gratuity fund shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation.

S. 155. Estate of Bankrupt (2) The estate of the bankrupt shall not include - (c) all sums due to any workman or employee from the provident Fund, the pension fund and the gratuity fund.

Case Laws dealing with EPF & MP Act,1952

1. **Tourism Finance Corporation of India Ltd vs Rainbow Papers Limited (2019 SCC OnLine NCLAT 910**:

"44. However, as no provisions of the Employees Provident Funds and Miscellaneous Provision Act, 1952 conflict with any of the provisions of the 'I&B Code' and, on the other hand, in terms of Section 36(4)(iii), the 'provident fund' and the 'gratuity fund' are not the assets of the 'Corporate

Debtor', there being specific provisions, the application of Section 238 of the 'I& B Code' does not arise.

45. Therefore, we direct the "Successful Resolution Applicant" - 2nd Respondent ('Kushal Limited') to release the entire Provident Fund and interest thereof in terms of the provisions of the Employees Provident Funds and Miscellaneous Provision Act, 1952' Immediately, as it does not include as an asset of the Corporate Debtor'

2. **Precision Fasteners Limited y Employees Provident Fund Organisation (MA.No.576 & 752/2018) in CP (IB) 1339 MB2017) –**

"34. In view of , the overriding effect of Section 238 of this Code will not have any bearing over the asset of the workmen lying in possession of the Corporate Debtor because that asset is not considered as the part of the liquidation estate, moreover, to apply Section 238 over any other law for the time being in force, the other law must be inconsistent with the provisions of the Code since Section 36(4)(a)(iii) has excluded the PF dues of the workers from the liquidation estate assets treating it as an asset of the workmen lying with the Corporate Debtor, Section 53 is not applicable to say that these dues fall within the ambit of liquidation estate. Therefore, this argument of inconsistency raised by the Liquidator counsel has no merit; hence the same is rejected.

35. Despite Presidency Insolvency Act, Provincial Insolvency Act and Companies Act 1913 were in existence by the time EPF Act 1952 has come into force, an overriding effect was given in the EPF Act overall the above-said enactments placing the PF dues in priority over any other dues payable by the Corporate Debtor or the insolvent as the case may be. After the Companies Act, 1956 came into existence, EPF Act was further amended, including the applicability of Section 11 of EPF Act to the Companies Act 1956, stating that these dues are to be paid in priority to all other debts in the distribution of the property of the insolvent or the asset of the company being would up as the case may be. Since these dues are being treated as an asset of the workers w/s. 36(1)(a)(iii) of the Code, for the realisation of such debt, EPF Act 1952 is applicable, not IBC 2016."

3. **Employees Provident Fund Commissioner v. Official Liquidator of Esskay Pharmaceuticals Limited, (2011) 10 SCC 727**

"14. An analysis of Section 11 of the EPF Act shows that it gives statutory priority to the amount payable to the employees over other debts. Section 11 (1) relates to an employer adjudged insolvent or a company against whom an order of winding up is made. It lays down that the amount due from the Employer in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under Section 14B, accumulations required to be transferred under Section 15(2) or any charges payable by him under any other provision of the Act or the

Scheme or the Insurance Scheme shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be."

"75. Section 11(2) contains a non obstante clause. It lays down that if any amount is due from an employer whether in respect of the employee's contribution deducted from the wages of the employees or the Employer's contribution, the same shall be deemed to be the first charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts. To put it differently, sub-section (2) of Section 17 not only declares that the amount due from an employer towards contribution payable under the EPF Act shall be treated as the first charge on the assets of the establishment but also lays down that notwithstanding anything contained in any other law, such dues shall be paid in priority to all other debts.

49. In terms of Section 530(1), all revenues, taxes, cesses and rates due from the company to the Central or State Government or a local authority, all wages or salary or any employee, in respect of the services rendered to the company and due for a period not exceeding four months all accrued holiday remuneration etc., and all sums due to any employee from provident Fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company are payable in

priority to all other debts. This provision existed when Section 11(2) was inserted in the EPF Act by Act No. 40 of 1973, and any amount due from an employer in respect of the employees' contribution was declared the first charge on the assets of the establishment and became payable in priority to all other debts. However, while inserting Section 529A in the Companies Act by Act No. 35 of 1985, Parliament, in its wisdom, did not declare the workers' dues (this expression includes various dues including provident Fund) as the first charge. Therefore, the effect of the amendment made in the Companies Act in 1985 is only to expand the scope of the dues of workmen and place them at par with the debts due to secured creditors. There is no reason to interpret this amendment as prioritising the debts due to secured creditors over the dues of provident Fund payable by an employer. Of course, after the amount due from an employer under the EPF Act is paid, the other dues of the workers will be treated at par with the debts due to secured creditors. Payment thereof will be regulated by the provisions contained in Section 529(1) read with Section 529(3), 529A and 530 of the Companies Act.

4. **Organo Chemical Industries v. Union of India, (1979) 4 SCC 573:**

"The priority given to the dues of provident Fund, etc., in Section 11 is not hedged with any limitation or condition. Rather, the amount due is required to be paid in priority to all other debts. Any doubt on the width and scope of Section 11 qua other debts are removed by the use of the

expression "all other debts" in both Section 11(1) and Section 11(2). That would mean that the priority clause enshrined in Section 11 will operate against statutory and non-statutory and secured and unsecured debts, including a mortgage or pledge. Section 11(2) was designedly inserted in the Act to ensure that the workers' provident fund dues are not defeated by prior claims of secured or unsecured creditors. That is why the legislature took care to declare that irrespective of the time when a debt is created in respect of the assets of the establishment, notwithstanding anything contained in any other law for the time being in force. Therefore, the statutory first charge created on the establishment's assets by Section 11(2) and the priority is given to the payment of any amount due from an employer will operate against any types of debts.

Case Law: Rationale behind EPF & MP Act,1952

1. **Mohmedalli And Others vs Union of India And Another, 1964 AIR 980**

"..... The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments, as the preamble indicates. The institution of Provident Fund for employees is too well-established to admit any doubt about its utility as a measure of social justice. The underlying idea behind the of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit, after reviewing the circumstances of each class of establishments ....."

2. **Regional Provident Funds Commissioner v. Shibn Metal Works, (1965) 2 SCR 72: AIR 1965 SC 1076: (1965) 1 LLJ 473**

"6..... It would thus be seen that the primary purpose of the Act is to require that appropriate provision should be made by way of Provident Fund for the benefit of the employees engaged in establishments for which the Act applies. Rules made for the institution of the funds provide for contribution both by the employees and the employers, and there can be little doubt that the purpose intended to be achieved by the Act is a very benevolent purpose in that it assures to the employees concerned the payment of specified amounts of provident Fund in due time.

18. **IInd Respondent's (CoC of DHFL) Submissions**

The Appellants / SESA Group Employees Provident Fund, SESA Mining Corporation Ltd. Employees Provident Fud & SESA Resources Limited Employees Provident Fund ("SESA Entities") filed the Appeal (Company Appeal (AT) (Ins) No. 677 of 2021) under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("Code / IBC") aggrieved by the impugned order dated June 07, 2021 ("Impugned Order") passed by the Hon'ble NCLT in IA. No. 449 of 2021 in Company Petition (IB.) No. 4258 of 2019.

A. The approved Resolution Plan in the CIRP of DHFL has been implemented

(1) The Resolution Plan submitted by Piramal Capital & Housing Finance Limited / Successful Resolution Applicant ("PCHFL") was

approved by the Hon'ble National Company Law Tribunal, Mumbai Bench ("NCLT") on June 07, 2021, by way of the Impugned Order.

(ii) After that, the approved Resolution Plan was implemented on September 30, 2021, and the reverse merger of PCHEL[1] into DHFL[2] took place. The name of DHFL post the reverse merger has been changed to PCHFL.

(iii) Further, payments have been disbursed to the creditors of erstwhile DHFL including the non-convertible debenture holders ("NCD Holders") such as the Appellants herein as per the approved Resolution Plan, The NCD Holders as a class, have by a majority approved the Resolution Plan and in fact, comprised the largest vote share in the CoC of DHFL, i.e. 53.22%.

(iv) Accordingly, the NCD Holders have received payments of approx. 40% of their admitted claims and the resolution process of DHFL has concluded inter alia by the Administrator and Monitoring Committee being discharged as per the terms of the Resolution Plan.

(v) Thus, it is respectfully stated that any reliefs sought by the Appellants ought not to be granted as it would result in unsettling the concluded insolvency process.

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[1] Piramal Capital & Housing Finance Limited
[2] Dewan Housing Finance Limited

B. **The present Appeal under Section 61 of the Code is not maintainable**

(1) The Appellants are trusts registered under the Indian Trusts Act, 1882 and has filed the present Appeal in its name.

(ii) It is settled law that a trust is not a legal entity and cannot sue or be sued in its name. It is further agreed that only the trustees of a trust are legal entities and can sue on behalf of the Trust.

(iii) In the present case, the Appellants, i.e. trusts, have filed the present Appeal in its name and, as per law, cannot sue or be sued. Moreover, the trustees of the Trust are not parties to the present Appeal. Therefore, the Appellants cannot carry on the Appeal in its current form.

(iv) Further, it is pertinent that the Appellants had not filed any applications raising any grievances whatsoever before the Hon'ble NCLT.

(v) The Resolution Plan was passed by the CoC in its commercial wisdom on January 15, 2021, by an overwhelming majority of 93.65%. After that, the Hon'ble NCLT also approved the Resolution Plan vide the Impugned Order dated June 7, 2021, and the approved Resolution Plan has also been implemented as stated above. Therefore, having failed to approach the Hon'ble NCLT at an appropriate stage, the Appellants cannot now be permitted to raise its grievance directly before this Hon'ble Appellate Tribunal as an afterthought.

(vi) On this grounds alone, the Appeal being not maintainable, is liable to be dismissed.

C. **The NCD Holders (including the Appellants herein) have voted as part of their respective class of NCD Holders through their authorised representative, i.e. Catalyst Trusteeship Limited, in favour of the Resolution Plan and Distribution Mechanism**

(i) The NCD Holders of DHFL form part of a class and are being represented by an authorised representative ("AR") as per Section 21(6A) of the Code, further, and the AR has voted on behalf of the class as per Section 25A of the Code.

(ii) During the first meeting of the CoC held on December 20, 2019, it was agreed that NCD Holders would be represented by their AR[3], i.e. Catalyst Trusteeship Limited ("Catalyst") and IDBI Trusteeship Services Ltd. As per Section 21(6A)(a) of the Code, the NCD Holders have Voted throughout the CIRP of DHFL, including on the various Resolution Plans submitted through such AR as per Section 25A(3A) of the Code.

(iii) As NCD Holders, SESA Entities falls under the following classes of NCD Holders ("SESA's Class"), which have all voted in favour of the

[3] Authorised Representative

Resolution Plan as stated below. SESA Entities has abstained from voting on the Resolution Plan and Distribution Mechanism.

ISIN	Series	Resolution Plan	Voting by Appellant
INE202B07HV0	Public Issue 1-4000cr	94.67% Assent	Not Voted
INE202B07103	Public Issue 1-10000cr	98.94% Assent	Not Voted
INE202B08777	Unsecured Sr XII	96.43% Assent	Not Voted

(iv) It is also pertinent to mention that a majority of NCD Holders have also voted in favour of the Resolution Plan (approved by a majority of 93.65% of the CoC) and the Distribution Mechanism (approved by a majority of 86.95% of the CoC).

(v) The Hon'ble Supreme Court in the case of Jaypee Kensington Boulevard Apartments Welfare Association & Ors. NBCC (India) Ltd. Ors. (2021 SCC Online SC 253) ("Jaypee Judgment") while inter-alia dealing with challenges preferred to the legality of a Resolution Plan has held that:

a) When the Authorised Representative having voted in accordance with the instructions given to him from the class of Financial Creditors, every individual falling in this class remains bound by this vote, and any individual in such class cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way of Appeal;

b) The Code has itself provided for estoppel against any such attempted opposition to the plan by a constituent of the class that had voted in favour of approval. Hence, once the class votes in favour, all constituents are bound irrespective of how they may have individually voted; and

c) Thus, when a class assents to a Resolution Plan, any individual of that class cannot maintain any challenge to the Resolution Plan; cannot be treated as a dissenting Financial Creditor, and cannot be an aggrieved person on any grounds.

(vi) The rule of absolute estoppel is manifestly clear from the Jaypee Judgment of the Hon'ble Supreme Court and cannot be diluted. This is also to bring finality to the CIRP, bolster the success of the Resolution Plan, and ensure revival. That being the case, the Appellants are now estopped from raising any' objections to the Resolution Plan or the Distribution Mechanism on any grounds whatsoever.

(vii) Hence, the Appellants cannot stand outside SESA's Class and cannot have any legal grievance about the vote cast by its' AR, as it is bound by the voice of the majority as held in the Jaypee Judgment. Thus, the present Appeal is not maintainable.

D. **The Appellants are investors in DHFL like all other NCD Holders**

(i). **The Appellants are not employees of DHFL seeking payment of its provident fund dues.** The Appellants have sought to convolute the issue and insinuated that the provident Fund dues need to be kept outside CIRP.

(ii) The Appellants, by their admission, are investors who, like any other investor, has subscribed to the NCDs issued by DHFL. Like any other secured NCD Holder, the Appellants have
assessed the market risks and invested in the NCDs of DHFL. Therefore, the Appellants' status cannot be higher than any other secured NCD holder and is a creditor of DHFL.

(iii) The Appellants have not contended that it had invested all of its funds in DHFL. The Appellants would have invested in a diverse portfolio, whereas the investment of the Appellants in DHFL amounts to only approx. INR 11 Crore.

(iv) The Appellants have also not contended that it would not settle the claims of the employees who have invested in the Fund if its total investment is not returned to it.

(v) Therefore, like any other investment making entity, the Appellants have specific risk/loss taking capacity and the Appellants' investments in DHFL being a small component of its overall deposits, the hair cut being

faced by the Appellants would not adversely affect the employees who have invested in the Appellants, as they would be required to be paid by the Appellants as per their independent contracts with the Appellants.

E. **The EPF Act does not apply to the present case**

The presumption that the Resolution Plan and the Distribution Mechanism thereunder violate the EPF Act as it does not pay the PF Holders in terms of their deposits in total is wholly misconceived.

(i) The EPF Act under Section 11(2) provides that in the case of insolvency of an employer, any contributions due would be "paid in priority to all the other debts in the distribution of the property and shall be a "first charge on the assets".

(ii) A plain reading of the said Section makes it clear that the applicability of the Section would arise firstly, where the entity under insolvency is the 'employer' about which the provident Fund has been established. Secondly, the priority of payment is for contributions due from an employer under insolvency.

(ii) The misconceived nature of the Appellants' argument is further magnified by the definition of Employer-provided under Section 2(e) of the EPF Act, which in no manner brings within its fold an entity such as the Corporate Debtor / DHFL.

(iv) It is evident from the above that the EPF Act prioritises payments where the 'employer' falls into insolvency. As stated above, DHFL is not an Appellants' Employer, and the Appellants are mere investors in DHFL.

(v) Investments made in the Corporate Debtor are commercial decisions and transactions undertaken by the provident Fund. Accordingly, DHFL is not responsible for any contributions to the employees' provident Fund and therefore, the EPF Act is inapplicable to DHFL in the present factual matrix.

(vi) The employer's capacity about whose establishment the provident Fund has been established and holds is far and distinct from that of an unrelated entity, such as the Corporate Debtor/DHFL. Therefore, the obligations under the EPF Act will not apply to DHFL in the present case.

Without prejudice, Section 17(3)(a) of the EPF Act does not make it mandatory for the Appellants to invest the funds lying with it in the manner the Appellants do.

(i) Section 17(3)(a) of the EPF Act directs that the employer "shall, about the provident fund, pension and gratuity to which any such persons or class of persons is entitled, maintain such accounts, submit such returns, make such investments, provide for such facilities for inspection and pay such inspection charges, as the Central Government may direct". (emphasis supplied)

(ii) The Central Government, in the exercise of the powers conferred on it by Section 5 of the EPF Act, framed the "Employees' Provident Fund Scheme, 1952". Paragraph 52, under the same, lays down how the "Investment of money belonging to Employees' Provident Fund" may be carried out.

(iii) Under Paragraph 52, Money belonging to the Fund can be deposited with the Reserve Bank of India or the State Bank of India or in such other Scheduled Banks as may be approved by the Central Government from time to time or shall be invested, subject to such directions as the Central Government may from time to time give, in securities mentioned or referred to in Section 20 of the Indian Trusts Act, 1882.

(iv) Therefore, contrary to what has been sought to be contended by the Appellants, there was no compulsion imposed on the Appellants to invest its funds in NCDs of DHFL. The Appellants always had the option of depositing the same with the Reserve Bank of India, State Bank of India or Scheduled Banks as approved by the Central Government from time to time.

(v) Further, the commercial decision to invest in NCDs would have been driven with reason to generate higher profits. The Appellants, while investing in DHFL like all other investors, would have assessed the risks

involved and volunteered to undertake the benefits and risks associated with the investment.

(vi) Paragraph 52 of the Employees' Provident Fund Scheme, 1952 under Chapter VII "Administration of the Fund, Accounts and Audit" clearly states that "All expenses incurred in respect of, and loss, arising from, any investment shall be charged to the Fund". (emphasis supplied)

(vii) Therefore, the workers' dues which may be lost due to a bad investment by the Fund, will have to be made good by the Fund itself. Incorporating such a provision further fortifies the submission that the unrelated, third party entity in which the investment has been made cannot be made to compensate for the loss that may have incurred to the provident Fund relying on the EPF Act.

F. **Section 36(4) or Section 155 of the Code does not apply to money invested by the Provident Funds into the Corporate Debtor**

(i) Section 155 of the Code falls under Part III of the Code, i.e. "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms". However, DHFL is neither an individual nor a partnership firm, and thus, from a cursory glance, it is evident that Section 155 holds no relevance to the CIRP of DHFL in the present matter.

(ii) Further, Section 155 falls under Chapter V (of Part III), i.e. *"Administration and Distribution of the Estate of the Bankrupt"*. The Code defines "Bankrupt" under Section 79(3) to mean *"a) a debtor who has been adjudicated as a bankrupt by a bankruptcy order under Section 126, ……"* When read with Section 126 (which also falls under Part III of the Code) it is evident that by no stretch of imagination can Section 155 of the Code be made applicable to the insolvency resolution process of DHFL.

(iii) Thus, Section 155 has been misapplied by the Appellants, as DHFL does not fall within the definition of a bankrupt and further, by not being an individual or a partnership firm is anyway excluded from this Part III of the Code.

(iv) Without prejudice, assuming with agreeing, even if Section 155 applied to DHFL, the exclusions from the estate of DHFL would only apply to the sums due to any workman or employee of DHFL concerning their provident Fund, pension fund and the gratuity fund. However, the investments made into DHFL by the provident Fund of a third-party establishment would still not be covered within the categories excluded under Section 155 of the Code.

(v) Similarly, reliance on Section 36(4) of the Code is also wholly misplaced as first, Section 36 is only applicable during liquidation process and not during CIRP and second, it applies to only workers and employees

of the Corporate Debtor and not the workman or employees of a third-party like the Appellants.

(vi) Accordingly, the exclusion of PF fund, pension fund and gratuity fund from the estate of the bankrupt or liquidation estate as under Section 155 or Section 36 are in entirely different contexts than what is sought to be urged by the Appellants and inapplicable to the present case.

G. **The NCLT cannot direct the CoC to decide in a particular manner, and the decision of the CoC is not amenable to judicial review;**

(i) By the Impugned Order, the Hon'ble NCLT had requested the CoC to reconsider the distribution mechanism to give the provident funds etc., a fair increased share.

(ii) It is respectfully stated that it is a well-established principle that neither the Hon'ble NCLT nor this Hon'ble Appellate Tribunal has the power to direct the CoC to revise/modify a Resolution Plan nor can the commercial wisdom of the CoC be reversed as the commercial wisdom of the CoC is not amenable to judicial review:

(iii) In light of the judicial pronouncements regarding the commercial wisdom of the CoC, the Appellants cannot seek 100% repayment of its investments in DHFL.

(iv) It is humbly stated that this Hon'ble Appellate Tribunal can also entertain appeals from orders approving a Resolution Plan under Section 31 within the confined quarters of Section 61(3) only.

(v) The present Appeal is praying for amendment/modifications of the Resolution Plan only on account of commercial hardship which the Appellants may face and therefore deserves to be dismissed.

H. **The CoC has already, as per the directions in the Impugned Order (at paras V and VI), voted on and rejected any modifications to the distribution mechanism under the Resolution Plan**

(i) The learned AA/ NCLT in the Impugned Order has acknowledged that the distribution under the Resolution Plan is not open to judicial review. However, the NCLT has requested the CoC to reconsider the Distribution Mechanism to give *inter-alia* the 'FD Holders' as much as are assenting Financial Creditors. Accordingly, a meeting of the CoC was held when it was decided inter-alia to consider voting by the CoC on a partial modification to the distribution mechanism

(ii) The CoC rejected the Resolution by a percentage of 89.19% voting against the Resolution, 2.96% voting in favour thereof, and 7.85% abstaining from voting. The SESA Classes have voted INE202B07HV0-Public Issue 1-4000cr by 78.65% against the Resolution, INE202B07I03-

Public Issue 1-10000cr by 95.44% against the Resolution and INE202B08777-Unsecured Sr XII by 63.38% for the Resolution. Appellants No. 1 and 3 have abstained from voting within their class, whereas Appellant No. 2 has voted in dissent of the Resolution.

I. Appellants are Financial Creditors and legally has no basis for seeking priority payment, and the Appellants have based their case on equity

(i) The Appellants are financials creditor of DHFL and has filed its Form C and have been treated accordingly during the CIRP. Therefore, it is pertinent that the Appellants as NCD Holders have received the maximum percentage of any creditor class under the Resolution Plan and Distribution Mechanism.

(ii) The Appellants are admittedly Financial Creditors of DHFL. However, in its wisdom, the legislature has not granted priority treatment to any Financial Creditor under the express provisions of the Code. Therefore, all Financial Creditors are required to be treated as per their rights under the Code.

(iii) The Appellants have not established any legal right or shown any lawful provision under the Code or otherwise, which entitles the Appellants to differential treatment or priority payment of dues.

(iv) It is amply clear that the Appellants have sought to base their entire case on equity. The Appellants have highlighted that it's a welfare scheme for its employees and social objective. Further, the investments made by the Appellants are not intending to make profits. Therefore, the Appellants have contended that it has to be treated differently. However, the said contention of the Appellants finds no merit in law.

(v) It is settled law that equity, no matter how well-founded, cannot override express provisions of law, and if there is any conflict between law and equity, then it is settled law that law will prevail. [Nasiruddin v. Sita Ram Agarwal (2003) 2 SCC 577] (paragraph 35, p. 588); Raghunath Rai Bareja v. Punjab National Bank [(2007) 2 SCC 230] (paragraphs 29 to 36), B. Premanand v. Mohan Koikal (2011) 4 SCC 266] (paragraphs 4, 7); Indian School Certificate Examination v. Isha Mittal and Anr. [(2000) 7 SCC 521) (paragraph 4); P.M. Latha v. State of Kerala [(2003) 3 SCC 541) (paragraph 73)].Therefore, the Appellants' contentions solely based on equity must yield to the Resolution Plan and Distribution Mechanism that the CoC has approved under the Code. In the present case, the Impugned Order has held that the Resolution Plan is compliant with the provisions of the Code. Further, the Distribution Mechanism also complies with the requirements under the Code. Hence, the Appellants are bound by the terms of the same.

(vi) **The altruistic motive and nature do not entitle it to be treated differently or even as a sub-class.** Even if the motive and nature of the other secured NCD Holders are entirely different, the Appellants' status cannot be higher than any other secured NCD holder.

(vii) The other debenture holders of DHFL comprise retail debenture holders and fixed deposit holders. The other creditors of DHFL also comprise public sector banks who are custodians of public Money. Hence, they are also similarly placed as the Appellants and have all been treated equally.

(viii) The Appellants are seeking reliefs in a manner that would result in unequal and inequitable treatment amongst similarly placed creditors of DHFL. Suppose the dues of the Appellants are paid in priority, it will result in grave discrimination against other creditors, including NCD holders. If all creditors are paid based on equity, it will result in the depletion of assets of DHLF and ultimately in the breakdown of CIRP machinery. This would be directly contrary to the scheme of the Code.

(ix) It is settled law that AA/ NCLT and this Appellate Tribunal cannot act as a court of equity or exercise plenary powers and that there is no residual equity-based jurisdiction with the NCLT or this Appellate Tribunal. [Pratap Technocrats (P) Ltd. & Ors. v. Monitoring Committee of

Reliance Infratel Limited & Anr., Civil Appeal No. 676 of 2021 paragraphs 31, 39)

J. The Appellants have been treated fairly and equitably as per the provisions of the Code

(i) The concept of fair and equitable has been incorporated into the Code itself under Explanation-1 of Section 30 of the Code, which states that distribution by the provisions of this clause shall be fair and equitable to such creditors.

(ii) The Code envisages equitable treatment of all creditors as per the CoC's Distribution Mechanism and Resolution Plan. The Hon'ble Supreme Court has held that the Code is beneficial legislation under which the interests of all stakeholders are taken care of and not just a particular kind of creditor/stakeholder.

(iii) Hence, as long as a creditor gets the minimum liquidation value, the Code provides that the said will be fair and equitable. [CoC of Essar Steel v. Satish Kumar (2020) 8 SCC 531] In the present case, the Appellants are getting much more than the liquidation value of their investment. Hence, the Appellants cannot contend with being treated unfairly.

K. **The Appellants cannot be treated as a separate sub-class of creditors**

(i) The Appellants seek to be recognised as a separate sub-class of creditors based on the nature of the Appellants' business. However, the Appellants' submission finds no basis neither in fact nor law.

(ii) The Appellants have invested in DHFL like all other investors, i.e. by purchasing NCDs from the market obviously after assessment of risks involved. Accordingly, the Appellants' rights to receive any payments, including in the CIRP, cannot be in any manner different or priority to any other NCD Holder of DHFL or any other secured Financial Creditor. The relationship of the Appellants with DHFL is therefore only that of an NCD Holder. The nature, composition or business of the Appellants being different cannot be a ground to treat the Appellants differently.

(iii) The Hon'ble Supreme Court has recognised only secured or unsecured, financial or operational classes of creditors [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 (paragraph 90, 142 page 607); Ghanshyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company through the Director & Ors. (Civil Appeal No. 8129 of 2019)). The Code prohibits repayment of one class of creditors in preference to other creditors during CIRP. Further, no provision in law has been shown that recognises a sub-class. Therefore, there are no legal grounds to recognise the Appellants as a sub-class from other Financial Creditors and seek preferential treatment.

(iv) The Appellants are raising frivolous grounds to seek priority payment, to the prejudice of other Financial Creditors that are similarly placed.

(v) The Appellants have exposure of only Rs. 19 Crores (out of a total claim by all the creditors of DHFL of approx. Rs. 90,000 Crores). Thus, it cannot be allowed to derail the entire CIRP of DHFL by seeking priority payment over other Financial Creditors without any legal basis.

(vi) Without prejudice to the above, the Code would override the EPF Act and EPF Scheme by the non-obstante clause in Section 238 of the Code. The priority of payments as detailed under Section 53 of the Code would take precedence over provisions directing priority under the EPF Act, if any at all.

L. All the judgments cited or relied upon by the Appellants are entirely distinguishable

(i) The judgment in Precision Fasteners Ltd. v. Employees Provident Fund Organisation, [2018 SCC OnLine NCLT 27284] at paragraph 16 states that the question for consideration is *"whether or not the Provident Fund, Pension Fund due and payable to the workers or employees of the Corporate Debtor will become part of Liquidation Estate in the light of Section 36 of IBC?"*. Admittedly, in the present case, the workers and employees of

DHFL are not concerned, and the Appellants' investors are not the Corporate Debtor's workers and employees.

(ii) Further, the judgment in Tourism Finance Corporation of India Ltd. v. Rainbow Papers Ltd. and Ors. (Company Appeal (AT) (Ins) No. 354 of 20319 inter alia relates to the question of 100% payment of the provident fund amount and interest thereupon by the Corporate Debtor. It does not discuss any purported rights of employees of third parties and their provident funds, such as the Appellants in the present case. The Appellants are investors in DHFL and not an employee of DHFL.

(iii) The paragraph relied upon by the Appellants in Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and Ors. [(2009) 10 SCC 123] (incorrectly mentioned as Organo Chemical Industries v. Union of India [(1979) 4 SCC 573] by the Appellants) deals with Section 11 of the EPF Act, and it relates to the time when Code was not enacted and therefore inapplicable. Moreover, this judgment also does not deal with the provident fund amounts of employees of third parties ,such as the Appellants.

(iv) Similarly, the case of Mohmedalli and Ors. v. Union of India and Anr. [AIR 1964 SC 980) and Regional Provident Funds Commissioner v. Shibn Metal Works (1965) 2 SCR 72] are cases much prior in time to the

Code and are entirely out of context and therefore inapplicable and distinguishable.

19. **Successful Resolution Applicant's Submissions**

1. The Appellants are not provident fund holders of the Corporate Debtor but are Financial Creditors of the Corporate Debtor

1.1 The Appellant, who was the non-convertible debenture ("NCD") holders of erstwhile Corporate Debtor Dewan Housing Finance Corporation Ltd. ("erstwhile CD/ DHFL") were Financial Creditors of erstwhile CD. Provident Fund ("PF ") contributions of the employees of a third-party employer, invested in the NCDs issued by the erstwhile CD, cannot be treated on an equal footing with PF contributions made by the employees of the erstwhile CD. Thus, the dues owed to the Appellant cannot be paid in priority over all other debts of the past CD.

1.2 The Appellants relies on Section 155 of the Insolvency and Bankruptcy Code of India, 2016 ("Code") to contend that PF dues of their employees should get priority over all other dues, as PF dues are purported "asset of workmen" and are hence, specifically protected under the Code. This contention is erroneous and misplaced. This is incorrect because Section 155 of the Code falls under Part III, i.e. "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms". However, the Corporate Debtor herein is neither an individual nor a partnership firm.

Furthermore, Section 155 of the Code deals with the "Estate of Bankrupt". In the instant case, the Corporate Debtor has not been declared "bankrupt" as per the conditions enumerated in Section 79(3) of the Code.

1.3 Most importantly, Section 155 of the Code deals with safeguarding the dues of workers or employees of the Corporate Debtor, i.e. DHFL herein. The said provision does not indicate, much less establish, the rights relating to the PF contributions made by employees of any other establishment, which are, in turn, invested through some financial instruments such as NCD's floated by the Corporate Debtor.

2. The present Appeal is not maintainable under Section 61 of the Code

2.1 The Appellant does not have the locus standi to maintain and pursue the Appeal, as it has filed the present Appeal in the capacity of Trust. It is a settled position that a trust is not a legal entity and cannot sue or be sued in its name. (Ref; Kishorelal Asera v. Haji Essa Abba Salt Endowments & Ors., 2003 SCC Online Mad 443 (Para 14)]

2. Respondent SRA submits that the last hearing was scheduled on December 06 2021, when the Appellant had applied for the amendment of the memorandum of parties; however, the same was not served upon SRA Piramal, nor Piramal was allowed to respond to the same. In any event, the said application has been filed after the pleadings in the Appeal were completed, and thus, should not be entertained at a belated stage.

Further, and without prejudice to the preceding, the National Company Law Appellate Tribunal ("NCLAT") ought not to contemplate the application as the defect is non-curable, especially considering the stage of the present matter. Therefore, the Appeal is liable to be dismissed on this ground alone.

3. Plea of Estoppel

3.1 In terms of Section 21(6A) of the Code, the Appellants were represented on the Committee of Creditors ("CoC") by their authorised representative, namely 'Catalyst Trusteeship Limited' ("Catalyst"). Indubitably, the Appellants have not contested the Authority of Catalyst to represent the Appellants in the CoC. Being a part of the CoC, the Appellants constituting a class of NCD holders of DHFL that have voted on the Resolution Plan and the distribution mechanism formulated by the CoC ("Distribution Mechanism") as follows:

(a) SESA Group Employees Provident Fund, i.e. Appellant No. 1, is a part of INE202B07HVO-Public Issue 1-4000cr, INE202B07103-Public Issue 1-10000cr and INE202B08777-Unsecured Sr XII ("SESA Class 1"). SESA Class 1 has voted in favour of the Resolution Plan by a majority of over 90% votes (i.e. 94.67%, 98.94% and 96.43%, respectively). Appellant No. 1 abstained from voting on the Resolution Plan and Distribution Mechanism within voting amongst SESA Class 1.

(b) SESA Mining Corporation Ltd. Employees Provident Fund, i.e. Appellant No. 2, is a part of INE202B07HVO-Public Issue 1-4000cr, INE202B07103-Public Issue 1-10000cr and INE202B08777-Unsecured Sr XII ("SESA Class 2"). SESA Class 2 has voted in favour of the Resolution Plan by a majority of more than 90% votes (94.67%, 98.94% and 96.43%, respectively). Appellant No. 2 abstained from voting on the Resolution Plan and Distribution Mechanism amongst SESA Class 2.

(c) SESA Resources Limited Employees Provident Fund, i.e. Appellant No. 3, is a part of INE202B07HVO-Public Issue 1-4000cr, INE202B07103-Public Issue 1-10000cr and INE202B08777-Unsecured Sr XII ("SESA Class 3"). SESA Class 3 has voted in favour of the Resolution Plan by a majority of more than 90% votes (94.67%, 98.94% and 96.43%, respectively). Accordingly, appellant No. 3 has abstained from voting on the Resolution Plan and the Distribution Mechanism amongst SESA Class 3.

3.2 Since the authorised representative of the Appellants voted in favour of the Resolution Plan that later came to be approved by a majority of 93.65% of the voting share of CcC, the Appellants cannot maintain any individual challenge against the Resolution Plan or raise any other legal grievance. (Ref; Jaypee Kensington Boulevard Apartments Welfare Assn v.

NBCC (India) and Ors, (2021) SCC Online SC 253) (Part 435)]. Moreover, the Distribution Mechanism has also been approved by a majority of 86.95% of the voting share of CoC. Furthermore, the majority of the NCD holders have also voted in favour of the Resolution Plan and the Distribution Mechanism.

3.3. The Appellants have presumably, to evade the principles of estoppel, actively concealed the above material facts to demonstrate that:

(a) the Appellants have abstained from voting on the Resolution Plan and the Distribution Mechanism within their class;

and

(b) their authorised representative, i.e., Catalyst, voted in favour of the Resolution Plan.

3.4. The Appellants in paragraphs 20, 21 and 42 of the rejoinder have contended that there is no mandate on the Appellant to be represented by the Authorised Representative, Catalyst, under Section 21 (6A) of the Code. However, the Appellant has never raised this challenge and contested the appointment or Authority of Catalyst before the National Company Law Tribunal ("NCLT") or the NCLAT to represent the Appellant in the CoC. Catalyst represented the Appellant throughout the corporate insolvency resolution process of the erstwhile CD.

4. **The present case does not warrant any interference from this Hon'ble Appellate Tribunal**

4.1 The direction of the Ld. Tribunal in approving the Resolution Plan while directing the CoC to reconsider the amount payable to the NCD holders in the Distribution Mechanism is in line with the decision of the Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments v NBCC India Ltd. & Ors., 2021 SCC OnLine SC 253 (Para 278) that states that the Ld. Tribunal does not have the power to modify the terms of the Resolution Plan on its own but can only direct the CoC to reconsider altering the terms of the Resolution Plan.

4.2 Given the above, the Ld. Tribunal and the Appellate Tribunal ought to adopt a "hands-off approach" and cannot act as a court of equity or exercise plenary powers while dealing with objections to the Resolution Plan (such as the ones relating to the treatment of NCD holders, who have invested the PF contributions of employees in the NCDs floated by DHFL) that an overwhelming majority has approved of 93.65% of the voting share of the CoC. (Ref; K. Sashidhar v Indian Overseas Bank & Ors., (2019) 12 SCC 150 (Paras 55-56); Maharashtra Seamless Ltd. v Padmanabhan Venkatesh & Ors., (2020) 11 SCC (Para 30)); Pratap Technocrats (P) Ltd. & Ors. v Monitoring Committee of Reliance Infratel Limited & Anr., Civil Appeal No. 676 of 2021 (Paras 39-41)).

5. Appellants have not challenged the resolution passed in the 20th CoC meeting

5.1 It appears that the Appellant's purported right to claim full repayment of their deposits would show that the principal grievance of the Appellants is against the Distribution Mechanism as agreed upon by the CoC. However, distribution of the total resolution amount as per the terms of the Resolution Plan is within the sole and exclusive discretion of the CoC. As such, the payout proposed to be given to the creditors of the Corporate Debtor (such as the NCD holders including the Appellants herein) had been contemplated and arrived at by the CoC in the Distribution Mechanism that was subsequently voted upon and approved by the CoC in its 18th meeting.

5.2 In this regard, it is pertinent to note that in the 18th meeting of the CoC, two different resolutions were discussed and considered among the members of the CoC, i.e., one for the approval of Piramal Capital & Housing Finance Limited's Resolution Plan under Option I (being 'Voting Item #5') and the other for the approval of the Distribution Mechanism (being 'Voting Item #1'). As a result, the said resolutions were both approved by a majority of 93.65% and 86.95%, respectively, by the members of the Coc. Therefore, the process for approval of the Resolution Plan by the CoC was independent of that of the approval of the Distribution Mechanism by the CoC.

5.3 Moreover, Clause 1.7 of the Resolution Plan itself categorically states that the manner of distribution of the "Total Resolution Amount" will be under the exclusive discretion of the CoC.

5.4 Incidentally, pursuant to the direction of the Ld. Tribunal in the Impugned Order is calling upon the CoC to reconsider the amounts payable to inter alia small investors under the Distribution Mechanism; the CoC in the 20th meeting voted upon the Resolution, vide #Voting Resolution to inter alia consider enhancing the amount to be paid to NCD holders (such as the Appellants), among other small creditors.

However, in its commercial wisdom and after due deliberation, the CoC rejected the said Resolution by a majority of 89% of its voting share.

5.5 Given the above, the Appellants cannot now seek to overturn the commercial decision of the CoC relating to the payout to NCD holders such as the Appellants that has twice been deliberated and addressed by the CoC. Furthermore, though the Appellants claim to be aggrieved by the amount payable to them under the Distribution Mechanism, they have failed to challenge the 20th meeting of the CoC that rejected the Resolution for any modification in the Distribution Mechanism in this regard.

6. **Appellants cannot be allowed to bypass the distribution mechanism under the Code and seek preferential treatment**

6.1. The Appellants, being the NCD holders of DHFL, are Financial Creditors of DHFL. Naturally, the Appellants ought to be subjected to the rights and treatment available to Financial Creditors under the Code even in insolvency involving a Non-Banking Financial Company.

6.2. The Appellants, being Financial Creditors, cannot claim any preferential or full payment under the Code or any allied rules and regulations. No exception has been carved out for NCD holders under the Code (that envisages a composite scheme to deal with the financial situation of the Corporate Debtor) or otherwise to claim preference or better rights to payments. Therefore, allowing a refund to one class of Financial Creditors will not be in the overall interest of the composite resolution/ revival of the Corporate Debtor under the scheme of the Code. (Ref; Chitra Sharma v Union of India, (2018) 18 SCC 575 (Paras 48.1-48.2))

7. Appellants do not have a right to demand full payment of their dues under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ("EPF & MP Act")

7.1. Appellants have relied on Section 17(3) of the EPF & MP Act to contend that they had the mandatory obligation to invest in certain funds of its employees to secure the future investments of thousands of employees. However, the selection of securities in which the investment is ultimately made falls within the domain of PF Trusts such as the

Appellants. Therefore, the Appellants are solely responsible for the risks associated with the investments (i.e., the NCDs floated by DHFL) made by them from the PF contributions of the employees.

7.2. The purported rights of the Appellants to receive their dues under the EPF Act will have to yield to the distribution mechanism for payment to creditors under the Code due to the overriding effect of the non-obstante clause contained in Section 238 of the Code. Ref; M/s Innoventive Industries Lid. V. ICICI Bank, (2018) 1 SCC 407 (Para 61); Embassy Property Developments Pw Lid v State of Karnataka & Ors., 2019 SCC OnLine SC 1542 (Para 11); Employees Organisation v Jaipur Metals & Electricals Lid., (2019) 4 SCC 227 (Para 20)]

8. Presumption of constitutionality and violation, if any, of constitutional rights cannot be alleged/ agitated by the Appellants before this Appellate Tribunal

8.1 The Appellants have contended that dues payable under the EPF Act are statutory dues, ultimately owed to the workers, which form an integral part of their right to life under Article 21 of the Constitution of India, 1950. However, the Appellants have failed to demonstrate how the approval of the Resolution Plan will be tantamount to a violation of Appellants purported constitutional rights.

8.2 In any event, it is settled law that a constitutional writ court can only address the violation of a constitutional right. It is humbly submitted that it is not within the jurisdiction of this Appellate Tribunal to determine questions involving a violation of constitutional rights. (ICICI Bank Lid. v. Innoventive Industries Ltd, 2017 SCC OnLine NCLT 12661 (Para 40); Hindustan Antibiotics Lid and Ors. Union of India and Ors, IA No.1 of 2019 in WP. No. 11366 of 2019 (Para 7)]

9. Reliance on the decision passed by the Hon'ble Supreme Court in the case of Employees Provident Fund Commissioner Official Liquidator of Esskay Pharmaceuticals Limited, (2011) 10 SCC 727 is misplaced.

9.1 Reliance has been placed on the decision passed by the Hon'ble Supreme Court in the case of Employees Provident Fund Commissioner v. Official Liquidator of Esskay Pharmaceuticals Limited, (2011) 10 SCC 727 to contend that the EPF Act, being social welfare legislation intended to protect the interest of Weaker Section of the society, i.e. the workers shall prevail over the provision of the Code.

9.2 The reliance placed on the Esskay Pharmaceuticals case is misplaced, as the concerned case dealt with the situation of conflict between the EPF Act and Companies Act, 1956, about the priority of payment of dues to the employees of the employer company against the dues owed to the secured creditors, in the event of winding up of the

company. However, in the present case, the Appellants who were the NCD holders of DHFL were Financial Creditors. Therefore, PF contributions of the employees of a third-party employer, invested in the NCDs issued by the Corporate Debtor, cannot be treated on an equal footing with PF contributions made by the employees of the Corporate Debtor such as DHFL. Thus, the dues owed to the Appellants cannot be paid in priority over all other debts of DHFL. Therefore, the reliance placed by the Appellants on the said order is misplaced, as it is merely a single line judgment and does not contain any observation on merits that establishes the purported rights of the Appellants. It is simply an attempt by the Appellants to mislead the NCLAT, therefore, not be entertained.

10. <u>Other rebuttals to the rejoinder filed by the Appellants</u>

10.1 The Appellants in paragraphs 9, 14, 15 and 16 of the rejoinder have repeatedly contended that PF, pension fund, and the gratuity fund should not be included in the *"liquidation estate"*, as the said dues are statutory dues owed to the workers, payable under the EPF Act. However, the said understanding of the Appellant is misplaced. The erstwhile CD has not gone under liquidation but has been successfully resolved under the successful implementation of the Resolution Plan. Hence, even the Appellant's contentions are flawed and incorrect understanding of law and facts.

Analysis

20. We have heard the arguments of the learned counsel for the parties and perused the record. Appellant's argument is mainly based on the following points;

- The Resolution Plan is in contravention of EPF and MP Act 1952.
- The money invested by the pension fund and Provident funds does not belong to the Corporate Debtor and is related to the employees.
- The allocation of the resolution amount is contrary to law.
- There is a material irregularity in the exercise of powers of the resolution professional/administrator.

21. The Appellant emphasises that the Provident fund, the pension fund, should not be included in the Liquidation Estate Assets and the state of bankruptcy. The dues payable under the Employee's Provident Funds and Miscellaneous Provision Act, 1952 are statutory dues, ultimately owed to the workers. Therefore, it forms an intrinsic part of the right to life incident under Article 21 of the Constitution.

22. The Insolvency and Bankruptcy Code deliberately and expressly provides that the Provident fund and pension fund are away from the authorities' clutches created. These dues are well protected under the Code that the Resolution Professional can take control in the custody of the "liquidation Assets" only after liquidating the entire dues payable by the Corporate Debtor under the provisions

of the EPF & MP Act 1952. These dues should be paid in priority well before the commencement of the liquidation process itself. They should not be subject to the mercy of the creditors or the priority provided under the waterfall mechanism.

23. The Provident fund and Gratuity funds are not the Corporate Debtor's assets. It is not a case of conflict between the provisions of the EPF & MP Act and the I& B Code. Therefore, the application of Section 238 of the IBC does not arise. The impugned order violates the statutory mandate of the EPF & MP Act, thereby leaving the Appellant remediless and rendering the protected beneficiaries of the Provident fund helpless. The CoC is not empowered to deal with the PF holders fund.

24. Appellants contended that under the EPF framework, the management and operation of the Provident fund vests in the Board of Trustees who will be accountable to the employees Provident fund Organisation. Therefore, the investments by the Board of Trustees of the Provident fund with the Corporate Debtor by the Appellants are an asset of the workmen and liable to be paid back in total.

25. In response to the argument advanced by the appellant, the respondent emphasised the Hon'ble Supreme Court's finding in the case of JP Kensington Boulevard apartment welfare Association vs NBCC reported in 2021 SCC online SC 253. In this case, Hon'ble Supreme Court has held that, when the authorised

representative has voted under the instructions given to him from the class of Financial Creditors, every individual falling in this class remains bound by this. Any individual in such a class cannot stand differently and project its view. The Code itself provided for estoppel against any attempt at a plan by a class constituent that had voted in favour of approval. Hence, once the class votes in favour, all constituents are bound irrespective of how they may have individually voted.

26. Therefore, any individual of that clause cannot maintain any challenge to the Resolution Plan and cannot be treated as a dissenting Financial Creditor and, further, cannot be an aggrieved person on this ground. The rule of absolute estoppel is manifestly clear from the Jaypee judgement of the Hon'ble Supreme Court and cannot be diluted. Therefore, the Appellant cannot stand outside SESA's Class and cannot have any legal grievance about the " votes cast by its authorised representative, as it is bound by the voice of the majority as held in the Jaypee judgement.

27. It is pertinent to mention that the Appellant are not employees of the DHFL seeking payment of its Provident fund dues. The Appellant has sought to convolute the issue and insinuated that the Provident fund dues need to be kept outside the CIRP. The appellants are investors who, like any other investor, has subscribed to the NCD's issued by the DHFL. The Appellant has assessed the

market risks and invested in NCD's of DHFL. Therefore, the appellant's stake cannot be higher than any other secured NCD holder and a creditor of DHFL.

28. The Appellant contends that the Resolution Plan and the distribution mechanism violate the EPF act. It does not pay the Provident fund holders in terms of the deposits in total and is wholly misconceived.

29. Section 11 (2) of the EPF act provides that in case of insolvency of an employer, any contributions of PF dues would be "paid in priority to all the other debts in the distribution of the property and shall be the 1st charge. On the assets."

30. The plain reading of Section 11 (2) of the EPF act makes it clear that the applicability of the Section would arise firstly, where the entity under insolvency is the Employer. Secondly, the priority of payment is for contributions due from an employer under insolvency.

31. The EPF act prioritises payments where the Employer falls into insolvency. Thus, the Corporate Debtor DHFL is not the Appellants Employer, are mere investors in the DHFL. Investments made in the Corporate Debtor are commercial decisions and transactions undertaken by the Board of Trustees of the Provident fund. Thus EPF Act is inapplicable to DHFL in the present factual metrics.

32. The Appellant has emphasised that under Section 17 (3) (a) of the EPF Act directs that “Employer shall, about the Provident fund, pension and Gratuity to which any such persons or class' entitled, maintain such accounts, submits such returns, make such investments, provide for such facilities for inspection and pay such inspection charges, as the central government may direct."

33. Therefore, it is clear that Section 17 (3) (a) of the EPF act does not make it mandatory for the Appellant to invest in the funds lying with it in the manner done by the Appellants. In the exercise of powers conferred on it by Section 5 of the EPF Act, the central government framed the Employees Provident Fund Scheme, 1952. Therefore, like any other investment making entity, the Appellant had a specific risk-taking capacity, and the appellant investment in the DHFL was a small component of its overall deposits.

34. It is also important to mention that paragraph 52 of the Employees Provident Fund Scheme provides that money belonging to the fund can be deposited with the RBI or State Bank of India or in such other scheduled bank as may be approved by the central government subject to specific directions, the central government may, from time to time, give. Therefore, there was no such compulsion on the Appellant to invest its funds in the NCD's of the DHFL.

35. It is essential to point out that the Appellants are trusts registered under the Indian Trust Act, 1882, and has filed the appeal in its name. It is settled law that the trust is not a legal entity and cannot sue or be sued in its name. Trustees

of the trusts are not parties to the present appeal. Therefore the Appellant cannot carry on the appeal in its current form.

36. The NCD holders, including the Appellants herein, have voted as part of the respective class of NCD holders through their Authorised Representative, i.e. 'Catalyst Trusteeship Limited', in favour of the Resolution Plan & distribution mechanism. Accordingly, the NCD holders of DHFL form part of the class and are represented by Authorised Representatives as per Section 21 (6A) of the Code. It has voted on behalf of the class, as per Section 20 A of the Code.

37. In the instant case, the Adjudicating Authority has directed to reconsider the distribution mechanism to give inter-alia the holders as much as are assenting Financial Creditors. In response to the said direction, COC considered the advice but rejected the proposal to amend the distribution Plan under the approved Resolution Plan. Proposal to amend the Resolution Plan was rejected by 89.19% of the voting share of COC. In the present case, the Appellants are getting much more than the liquidation value of the investment. As long as a creditor gets the minimum liquidation value the Code provides, the said distribution will be fair and equitable.

38. The Appellant has placed reliance on the judgement in Precision fasteners Ltd v Employees Provident Fund Organisation, reported in 2018 SCC online NCLT 27284. In this case, the question for consideration was whether or not the Provident fund, pension fund dues payable to workers, or employees of the

Corporate Debtor will become part of the liquidation estate in the light of Section 36 of the IBC? Admittedly, in the present case, the workers and employers of the DHFL are not concerned, and the Appellants are investors and are not the Corporate Debtor's workers and employees.

39. Appellant further placed reliance on the judgement in case Tourism Finance Corporation of India Ltd versus Rainbow Papers Limited, Company Appeal (AT) (Ins) 354 of 2019. This case relates to the question of a hundred per cent payment of the Provident fund amount and interest by the Corporate Debtor. It does not discuss any purported right of employees of 3rd parties and their Provident Funds, such as the appellants in the present case. Moreover, the appellants are investors in the DHFL and not an employee of the DHFL.

40. The Appellant further placed reliance on the judgement of Hon'ble Supreme Court in the case of Maharashtra State Cooperative Bank Ltd versus Assistant Provident Fund Commissioner reported in (2009) 10 SCC 123. However, this judgement also does not deal with the Provident fund amount of the employees of 3rd parties such as the Appellants.

41. In the instant case Authorised Representative of the appellant voted in favour of the Resolution Plan that later came to be approved by a majority of 93.65% of the voting share of COC. Therefore, the appellant cannot maintain any individual challenge against the Resolution Plan or raise any legal grievance. Moreover, the distribution mechanism has been approved by a majority of

86.95% of the voting share of COC. The majority of the NCD holders have also voted in favour of the Resolution Plan and distribution mechanism.

42. Further, Hon'ble Supreme Court in case of Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel and Others ..., 2021 SCC OnLine SC 569 in Paras 29-51, while dealing with the issue of the scope of interference by the Adjudicating Authority and the powers of the NCLT and NCLAT regarding approval of the Resolution Plan after referring different Supreme Court judgements, has summarised the law in this regard.

43. In this case, Hon'ble Supreme Court has held that;

> ***"29.*** *The function of the Adjudicating Authority under Section 31 is to determine whether the resolution plan "**as approved by the CoC**" under Section 30(4) "meets the requirements" under Section 30(2). If the Adjudicating Authority is satisfied that the resolution plan, as approved, meets the requirements under sub-Section (2) of Section 30, "**it shall by order approve the resolution plan**", which shall then be binding on the Corporate Debtor and all stakeholders, including those specifically spelt out:*
>
> > *"31.(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment*

of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan."

30. The jurisdiction which has been conferred upon the Adjudicating Authority in regard to the approval of a resolution plan is statutorily structured by sub-Section (1) of Section 31. The jurisdiction is limited to determining whether the requirements which are specified in sub-Section (2) of Section 30 have been fulfilled. This is a jurisdiction which is statutorily-defined, recognised and conferred, and hence cannot be equated with a jurisdiction in equity, that operates independently of the provisions of the statute. The Adjudicating Authority as a body owing its existence to the statute, must abide by the nature and extent of its jurisdiction as defined in the statute itself.

31. The jurisdiction of the Appellate Authority under Section 61(3), while considering an appeal against an order approving a resolution plan under Section 31, is similarly structured on specified grounds. Section 61(3) provides:

> ***"61.....(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—***
>
> ***i. the approved resolution plan is in contravention of the provisions of any law for the time being in force;***

ii. <u>there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;</u>

iii. <u>the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;</u>

iv. <u>the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or</u>

v. <u>the resolution plan does not comply with any other criteria specified by the Board.”</u>

38. <u>The Court, also held (in paragraph 62) that the legislative history of the IBC indicated that “there is a contra indication that the commercial or business decisions of financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority”.</u>

39. *The above principles have been re-emphasised and taken further by a three-Judge Bench in Essar Steel India Limited (supra). The Court, speaking through Justice R F Narminan, held:*

> *“73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets*

of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

44. Further, Hon'ble Supreme Court in case of Jaypee Kensington Boulevard Apartments Welfare Association v NBCC(India) Ltd ..., 2021 SCC OnLine SC 253 has observed that;

> "***210.*** *To put in a nutshell****, the Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code read with the parameters delineated by this Court in the decisions above-referred. The jurisdiction of the Appellate Authority is also circumscribed by the limited grounds of appeal provided in Section 61 of the Code****. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the Adjudicating Authority or the Appellate Authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by Code and exposited by this Court.*

45. Further, in the case of Ebix Singapore (P) Ltd. v. Committee of Creditors of Educomp, 2021 SCC OnLine SC 707 Hon'ble Supreme Court has observed that;

> ***115.*** *A reading together of the UNCITRAL Guide and the BLRC Report clarifies, in no uncertain terms, that the procedure designed for the insolvency process is critical for allocating economic coordination between the parties who partake in, or are bound by the process. This procedure produces substantive rights and obligations.* ***For instance, the composition of the CoC, the method and percentage of its voting, the timelines for CIRP, the obligation on the RP to file specific forms***

after every stage of the process and the obligation to explain to the Adjudicating Authority reasons for any deviations from the timeline while submitting a Resolution Plan, and other such procedural requirements create a mechanism which tightly structures the conduct of all participants in the insolvency process. This process invariably has an impact on the conduct of the Resolution Applicant who participates in the process and consents to be bound by the RFRP and the broader insolvency framework*. **An analysis of the framework of the statute and regulations provides an insight into the dynamic and comprehensive nature of the statute. Upholding the procedural design and sanctity of the process is critical to its functioning. The interpretative task of the Adjudicating Authority, Appellate Authority, and even this Court, must be cognizant of, and allied with that objective.** *The UNCITRAL Guide has echoed this position by noting the interplay between the procedural design of the insolvency law and the corresponding institutional infrastructure by observing:*

> *"27. While the institutional framework is not discussed in any detail in the Legislative Guide, some of the issues are touched upon below. Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature.* ***The design of the procedural rules plays a critical role in determining how roles are to be allocated between the various participants, in particular in terms of decision-making. To the extent that the insolvency law places considerable responsibility upon the institutional infrastructure to make key decisions, it is essential that that infrastructure be sufficiently developed to enable the required decisions to be made****."*

116. Any claim seeking an exercise of the Adjudicating Authority's residuary powers under Section 60(5)(c) of the IBC, the NCLT's inherent powers under Rule 11 of the NCLT Rules 2016 or even the powers of this Court under Article 142 of the Constitution must be closely scrutinized for broader compliance with the insolvency framework and its underlying objective. The adjudicating mechanisms which have been specifically created by the statute, have a narrowly defined role in the process and must be circumspect in granting reliefs that may run counter to the timeliness and predictability that is central to the IBC. Any judicial creation of a procedural or substantive remedy that is not envisaged by the statute would not only violate the principle of separation of powers, but also run the risk of altering the delicate coordination that is designed by the IBC framework and have grave implications on the outcome of the CIRP, the economy of the country and the lives of the workers and other allied parties who are statutorily bound by the impact of a resolution or liquidation of a Corporate Debtor.

46. Based on the judgement of the Hon'ble Supreme Court in the case of Pratap Technocrats (P) Ltd (supra) wherein Hon'ble Supreme Court has while analysing the scope of Section 31 considering the earlier judgement of the Hon'ble Supreme Court passed in the case of K. Shashidhar versus Indian Overseas Bank4, reiterated the principle of law that neither the Adjudicating Authority (NCLT) nor the Appellate Authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the Committee of Creditors. Therefore, CoC's commercial or business decisions are not open to judicial review

[4] (2019) 12 SCC 150,

by the Adjudicating Authority or the Appellate Authority. The Hon'ble Supreme Court has further placed reliance on the earlier judgement of the three-judge bench in the case of Essar Steel India Limited (supra) and observed that there is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such committee must reflect the fact that it has taken into account maximising the value of the assets of the Corporate Debtor and the fact that it has adequately balance the interests of all the stakeholders including Operational Creditors.

47. The judicial review of the Adjudicating Authority that the Resolution Plan as approved by the Committee of Creditors has met the requirements referred to in Section 30 (2) would include a judicial review that is mentioned in Section 30 (2) (e), of the code and is also in compliance with the provisions of the law for the time being in force.

48. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial wisdom taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the Corporate Debtor needs to keep going as a going concern during the Insolvency Resolution Process; that it needs to maximise the value of its assets; and that the interest of all the stakeholders including operational creditors has been taken care of.

49. Based on the above discussion, we have concluded that the impugned order needs no interference from this Appellate Tribunal and both the Appeals sans merit. Hence deserves to be dismissed-no order as to costs.

ORDER

Company Appeals CA (AT) (Ins) 677 and 800 of 2021 are dismissed- no order for costs.

[Justice M. Venugopal]
Member (Judicial)

[Mr. V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
27th January 2022

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