2022 INSC 885

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 5247 of 2022

Securities and Exchange Board Of India …Appellant

Versus

Rajkumar Nagpal & Ors. …Respondents

J U D G E M E N T

Dr. Dhananjaya Y. Chandrachud, J.

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A. Facts

i. The dispute

1. Reliance Commercial Finance Limited[1] issued Non-Convertible Debentures to various persons.[2] Vistra ITCL (India) Limited was the Debenture Trustee[3] under three Debenture Trust Deeds dated 3 May 2017, 23 May 2017 and 5 February 2018.[4] RCFL committed its first default under the Debenture Trust Deeds in March 2019.

2. On 7 June 2019, RBI issued the Reserve Bank of India (Prudential Framework for the Resolution of Stressed Assets)[5] Directions 2019, with "a view to providing a framework for early recognition, reporting and time bound resolution of stressed assets".[6] The RBI Circular provided that certain lenders may opt for a resolution strategy available to them under the existing legal framework, including entering into a resolution plan[7] or initiating legal proceedings for recovery or insolvency. If the lenders chose to implement a Resolution Plan, they were required to enter into an inter-creditor agreement.[8] Bank of Baroda and other lenders of RCFL entered into an ICA on 6 July 2019, pursuant to the RBI Circular. Bank of Baroda was later appointed as the lead bank under the ICA.

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[1] "RCFL"
[2] "debenture holders"
[3] "Vistra"
[4] "Debenture Trust Deeds" or "Debenture Trust Deed"
[5] "RBI Circular"
[6] Clause 4, RBI Circular.
[7] "Resolution Plan"
[8] "ICA"

3. The RBI Circular applied to banks and specified categories of lenders. Other investors were outside its purview. SEBI issued a circular on 13 October 2020. The subject was the 'Standardisation of procedure to be followed by Debenture Trustee(s) in case of 'default' by issuers of listed debt securities'.[9] On 11 March 2021, RCFL and Vistra amended the Debenture Trust Deeds by executing a Supplementary Debenture Trust Deed which took note of the SEBI circular. On 15 July 2021, the Resolution Plan submitted by Authum Investment and Infrastructure Limited[10] was approved by RCFL's lenders.

ii. <u>The suit before the Bombay High Court</u>

4. Seventeen debenture holders instituted a suit on the Original Side of the Bombay High Court on 1 July 2021. The debenture holders instituted the suit for the protection of their interests with respect to the amounts due to them by RCFL. RCFL was impleaded as the first defendant to the suit. The debenture holders urged that Vistra, who was impleaded as the third defendant, should have taken necessary steps to protect their interests. The debenture holders also alleged that certain funds available with the Bank of Baroda, the second defendant, were distributed amongst creditors without regard to their status as 'secured' or 'unsecured' creditors. They also alleged that this was done without their consent and that they had a first charge on the receivables of RCFL. The debenture holders alleged that the RBI Circular permitted this "illegal" distribution of funds. They also stated

[9] "SEBI Circular"
[10] "Authum"

that RCFL, Bank of Baroda, and Vistra could not seek an ex post facto consent from the debenture holders for either the ICA or the Resolution Plan. They urged that it was mandatory for Vistra to sign the ICA on behalf of the debenture holders before considering the Resolution Plan. The plaintiffs in the suit before the High Court sought the setting aside of the RBI Circular as illegal and *ultra vires*. They also sought an injunction restraining RCFL, Bank of Baroda, and RBI from implementing the RBI Circular.

5. On 20 August 2021, Justice G S Patel of the Bombay High Court opined *prima facie* that a meeting of debenture holders was required. The Court, however, held that it could not recommend the manner in which the meeting of debenture holders should be convened, observing that:

> "3. Prima facie, it is clear that a meeting or possibly meetings of debenture holders are required. The question presently that Vistra faces relates to the terms on which such a meeting is to be called. Mr. Ankhad explains that one option is to proceed according to the ISIN series. The second is to proceed according to the Debenture Trust Deeds. There are three different Debenture Trust Deeds. The first option does not commend itself. Surely, this series of debentures is immaterial in a situation like this.
>
> 4. Another problem that presents itself is the curtailing or abbreviation of the necessary notice that is required.
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> 5. Both aspects are not, prima facie, one on which this Court can make a recommendation, it is one thing to ask a Civil Court to adjudicate on the correctness or otherwise of a decision of a regulator or a validity of a rule or regulation. But I am unable to see how a Civil Court can direct that a notice that is required by the Trust Deed or by the applicable regulation should be shortened or that a meeting should be held of all debenture holders in one particular manner over preference to another. These are directions that only a regulator can issue."

6. The Court noted that Vistra had sought a clarification on 11 August 2021, regarding the manner in which the meeting was to be held. It directed SEBI to respond to Vistra's representation on a "priority and extremely urgent

basis". SEBI issued a clarificatory letter on 23 August 2021 in response to this representation. The clarificatory letter referred to Regulation 15(7) of SEBI (Debenture Trustees) Regulations 1993[11] and the SEBI Circular and clarified that the voting would have to be conducted in accordance with the SEBI Circular. The relevant extract of this letter reads as follows:

> "5. In view of regulation 15(7) of the DT Regulations read with clause 3, 6.5, 6.6 and 7 of SEBI Circular, it is stated that it shall be mandatory for DTs to sign the Inter-Creditor Agreement (ICA) on behalf of debenture holders before considering the resolution plan to be implemented as a result of ICA proceedings."

7. SEBI was not impleaded as a party to the suit. On 17 September 2021, the Single Judge granted leave to the debenture holders to join SEBI as a respondent to an interlocutory application, Interim Application No. 14224 of 2021. SEBI entered appearance on 24 September 2021. SEBI in its affidavit before the High Court submitted that the debenture trustees are obligated to comply with its circular in case of a default committed by an issuer of listed debt securities even though the event of default has taken place prior to the issuance of its circular.

8. On 14 October 2021 and 20 October 2021, the Single Judge of the High Court suggested that all the concerned parties enter into a negotiated settlement.

9. The terms of repayment under the Resolution Plan formulated under the ICA and approved by the company's lenders are as follows:

[11] "1993 Regulations"

Sr. No.	Particulars	Nos.	Debt as on 6th July 2019 (Rs)	Recovery (Rs)	% of Recovery
1 ICA Lenders					
1.1	Secured	19	7,586.05	1,893.47	24.96
	Unsecured	1	640.00	130.02	20.32
2 Non-ICA Lenders					
2.1	Secured Term Loan	1	250.00	62.40	24.96
2.2 NCDs					
2.2.1	Individuals & HUFs up to Rs. 10 Lacs	227	13.92	13.92	100
2.2.2	Individuals & HUFs more than Rs. 10 Lacs	37	43.95	13.17	29.96
2.2.3	Other secured NCDs	41	202.30	50.49	24.96
2.2.4	Unsecured NCDs	21	81.00	16.46	20.32
2.2.5	Related Party	1	200.00	26.90	13.45
Total			**9,017.22**	**2,206.83**	

In terms of the above table, all individuals/ HUFs holding debentures of a value less than Rs. 10 Lakhs were to get 100% of their principal sum due, while individuals and HUFs holding debentures in excess of Rs. 10 lakhs were to receive 24.96% of the principal.

10. By an order dated 28 October 2021, the Single Judge recorded that RCFL and the resolution applicant had agreed to pay the debenture holders an additional sum of 5% of the total principal sum outstanding as an additional settlement. Therefore, the debenture holders were to receive an aggregate

sum of Rs. 91,00,000/- representing 29.96% of the total principal outstanding. In return, debenture holder parties to the suit would have to accept the terms of the negotiated settlement in full and final satisfaction of all their claims against the parties and agreed to transfer their debentures in favour of the resolution applicant. In the same order, the Court held that the SEBI Circular could not be permitted to operate retrospectively and did not govern the Debenture Trust Deeds. The Court directed Vistra to conduct a meeting of all debenture holders in terms of the Debenture Trust Deed(s):

> "13. In view of this, the 3rd Defendant is directed to call and conduct meeting of all the debenture holders under all three Debenture Trust Deeds within 30 days of this order ensuring that the calling and conduct of the meeting/s and the voting at such meetings conforms to the terms of the respective Debenture Trust Deeds. At such meeting/s, the 3rd Defendant will place for consideration and approval of the beneficial owners or debenture holders the settlement offer/compromise/arrangement as envisaged in the approved resolution plan, and as modified to the extent provided herein above.
>
> 14. If there is any further or later or supplementary trust deed, then the provisions of that supplementary trust deed will also be taken into account.
>
> 15. All parties agree and undertake to maintain confidentially of the settlement and/or compromise and/or arrangement arrived thereto.
>
> 16. In view of the above comprise arrived at between the parties, the suit stands disposed off in these terms.
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> 17. It is made clear that the aforesaid order is passed considering the peculiar facts and circumstances of the present case. It also has consent of all the parties.
>
> 18. As regards SEBI, I am making it clear that this order will constitute no precedent against SEBI nor will SEBI be held to the terms of this order for other cases. This order is made on the peculiar facts and circumstances of this case."

On 15 November 2021, the Single Judge passed a clarificatory order indicating that the meeting should not deviate from the terms of the Debenture Trust Deed(s) and that the Supplementary Trust Deeds would

have to be read with the Debenture Trust Deed(s) in a consistent manner. The court also held that a mere reference to the SEBI Circular would not override the express terms of any of the Debenture Trust Deeds.

iii. <u>The impugned judgment</u>

11. SEBI challenged the Single Judge's orders dated 28 October 2021 and 15 November 2021 before a Division Bench. SEBI submitted in its appeal, that the SEBI Circular is applicable and the consent of the debenture holders at the International Securities Identification Number[12] level is necessary before a Resolution Plan could be implemented.

12. At the first hearing, SEBI took objection to paragraphs 15 to 17 of the Single Judge's order dated 28 October 2021. Accordingly, the Division Bench passed an order dated 3 December 2021 granting liberty to SEBI to move the Single Judge to obtain a clarification. On 3 December 2021, the Single Judge clarified that SEBI was not a party to the suit and could therefore not be a party to the compromise.

13. On 6 December 2021, the Division Bench admitted the appeal filed by SEBI and allowed the meeting to be held on 8 December 2021. On 21 December 2021, a co-ordinate bench passed an order directing that the results of e-voting of the meeting conducted on 8 December 2021 be placed on record.

14. After consideration of the rival submissions, the Division Bench dismissed the appeal filed by SEBI for the following reasons:

[12] "ISIN"

a. The SEBI Circular would not apply retrospectively to defaults committed prior to 13 October 2020 because: (a) it comes into force on 13 October 2020 and therefore only applies to defaults committed after 13 October 2020; and (b) it does not contain any provision for retrospective application to defaults prior to 13 October 2020;

b. The SEBI Circular will only apply in two situations, namely, enforcement of security or entering into an ICA. The SEBI Circular will not apply to the present case as the debenture holders are not proposing to enforce their security or enter into an ICA;

c. The Supplementary Debenture Trust Deed executed on 11 March 2021 makes the SEBI Circular applicable to defaults occurring after it was issued or to defaults after 13 October 2020;

d. Clause 23 of the Fifth Schedule to the Debenture Trust Deed(s) is consistent with the 1993 Regulations. Therefore, the SEBI Circular will not defeat the Debenture Trust Deed(s) in lieu of clause 59 of the Debenture Trust Deed(s); and

e. The clarificatory letter dated 23 August 2021 issued by SEBI is also inapplicable since the SEBI Circular is inapplicable.

The Court also observed that the application of the SEBI Circular would lead to a situation where one debenture holder holding debentures worth Rs. 5 crores could veto a Resolution Plan worth Rs. 9,017 crores. Thus, in the view of the Division Bench, holding an ISIN-wise meeting of debenture

holders would defeat the interests of small investors, who were realizing 100% of the debt owed to them, under the Resolution Plan.

B. Issues

15. Based on the submissions which have been canvassed by the parties, the issues which arise for determination are:

    a. Whether the debenture holders and other parties in the present case were required to follow the procedure under the SEBI Circular; and

    b. Whether the civil court had the jurisdiction to entertain the *lis* in this case.

C. Submissions

16. Mr. N Venkataraman, learned senior counsel and Additional Solicitor General made the following submissions in support of the appellant's argument that the SEBI Circular applies to the present case:

    a. The parties to the Debenture Trust Deeds have entered into a Master Supplementary Debenture Trust Deed on 11 March 2021 to align the Debenture Trust Deeds with the SEBI Circular. Therefore, the parties were aware that the SEBI Circular is applicable to the debenture holders. The meeting of debenture holders directed by the Single Judge was in contravention of Clauses 6.5 and 6.6 of the SEBI Circular;

b. The SEBI Circular is retroactive in nature because it does not travel backwards and take away or impair vested rights. The SEBI Circular operates in future, but its operation is based on events that arose prior to it. Although the Debenture Trust Deeds were signed prior to the SEBI Circular, the circular was brought into force before voting took place. Therefore, the voting ought to have taken place in accordance with the SEBI Circular;

c. The SEBI Circular has the force of law;

d. Under the SEBI Circular, voting is required to be conducted as per ISINs. ISIN-wise voting ensures that rights of small investors are protected against the excesses of large investors. The possibility of ISIN-wise voting will not defeat the Resolution Plan as the issuer company can always 'adjust' the size of the security;

e. The Resolution Plan expressly states that it has to be carried out in terms of the "Applicable Law", which includes laws enacted by SEBI. Therefore, compliance with regulatory provisions mandated by the circular issued by SEBI is required before implementing the Resolution Plan;

f. Prior to the coming into force of the SEBI Circular on 13 October 2020, a joint of meeting of a class of creditors was governed by section 230 of the Companies Act 2013.[13] The SEBI Circular adopted a special majority of 60% of the investors by ISIN and 75% of the investors by

[13] "Companies Act"

value for debenture holders to resolve their debt under a resolution plan or compromise. The SEBI Circular adopted a higher threshold than Section 230 of the Companies Act to bind the dissenting/ abstaining debenture holders. The civil court does not have jurisdiction over the present matter by virtue of Section 15Y of the SEBI Act 1992[14] and Section 430 of the Companies Act; and

g. After the SEBI Circular came into force on 13 October 2020, only two possible options were available to the debenture holders to restructure the debt: (i) a compromise independent of the NCLT under the SEBI Circular; or (ii) approaching the NCLT under section 230 of the Companies Act. No third option, especially under the Debenture Trust Deed, is available to the debenture holders. Contrary to the express provisions of law, the High Court incorrectly assumed jurisdiction and directed a meeting of debenture holders to consider the Resolution Plan in accordance with the terms of the Debenture Trust Deeds. The High Court could not have exercised jurisdiction to direct the calling of a meeting of debenture holders to consider the Resolution Plan without complying with the SEBI Circular.

17. Mr. Darius Khambata, learned senior counsel appearing for RCFL (Respondent No. 11) made the following submissions in support of his argument that the SEBI Circular does not apply retroactively or retrospectively to the present case:

[14] "SEBI Act"

a. The language employed in the SEBI Circular and in Regulation 15(7) of the1993 Regulations is facilitative and not mandatory. There is no separate or independent ICA imposed by SEBI outside RBI's Circular. RBI itself reads its framework as not extending to debenture holders. The SEBI Circular does not provide that the signing of an ICA is the only route to entering into a compromise or arrangement with the issuer company. Correspondingly, there is no prohibition, express or implied, on the freedom of debenture holders to take any course of action as they see fit. In particular, the SEBI Circular does not exclude the provisions of Sections 62 and 63 of the Indian Contract Act 1872;

b. The SEBI Circular does not provide a mechanism by which dissenting ISIN level debenture holders can 'exit' an ICA / Resolution Plan. ISIN wise voting would enable a single ISIN number to defeat the Resolution Plan;

c. The SEBI Circular is issued under section 11(1) of the SEBI Act. Hence, the SEBI circular is administrative in nature and is not delegated legislation. An administrative circular cannot have retrospective operation as it takes away vested rights. Moreover, the SEBI Act does not provide for retrospective or retroactive application of subordinate legislation;

d. The SEBI Circular extinguishes the vested rights of debenture holders under the Debenture Trust Deeds. Under Clauses 22 and 23 of the Fifth Schedule to the Debenture Trust Deeds, the debenture holders by

a special majority have a vested right to sanction any compromise or arrangement with the company. However, the SEBI Circular subjects the will of the majority to the will of the ISIN number holders, and in the process impairs the vested rights conferred under the Debenture Trust Deeds. Thus, the application of the SEBI Circular will not only be retroactive, but also renders it retrospective;

e. The SEBI Circular does not prohibit the debenture holders from conferring the authority on the debenture trustee in respect of the matters enumerated under Clause 22 of the Fifth Schedule to the Debenture Trust Deeds. The mandatory language used in the SEBI Circular applies only to the two eventualities mentioned in Clause 6.5 and does not encompass all the generalities which are covered under the Debenture Trust Deeds. The SEBI Circular is applicable to only two situations: (i) a negative consent for proceeding with enforcement of security; and (ii) a positive consent for signing an ICA. The subject matter of the Resolution Plan covers neither of the aforesaid situations;

f. The Supplementary Trust Deed does not expressly amend, substitute, or modify the provisions of Clauses 22 and 23 of the Fifth Schedule to the Debenture Trust Deeds. Even if it is assumed that the Supplementary Trust Deed incorporates each and every term of the SEBI Circular, this will not result in overriding or superseding the provisions of Clauses 22 and 23;

g. The Resolution Plan places the debenture holders in a better position than they would be in under a new ICA process. It provides for 100% repayment to debentures holders with an exposure of upto Rs. 10 lakhs. The debenture holders will constitute only 21.02% of the total value of debt if they become a part of the ICA along with the lenders. Resultantly, they could be easily outvoted by the lenders, who would constitute 78.98% of the ICA by value; and

h. SEBI's contention that Section 230 read with Section 430 of the Companies Act excludes the jurisdiction of the High Court is untenable because the law does not expressly bar a company from entering into a contractual compromise with any of its creditors.

18. It is necessary to record that Mr. Khambata does not contest the following principles of law relied upon by the appellants:

a. Circulars issued by SEBI constitute special law and are binding, with the force of law;

b. Where SEBI prescribes a particular procedure to do a particular thing, such a process cannot be dispensed with;

c. There can be no waiver of a provision of law based on public policy; and

d. No court will give effect to a contract which is forbidden either expressly or by necessary implication by statute.

PART C

19. Mr. KV Viswanathan, learned senior counsel appearing for Bank of Baroda (Respondent No. 12) submitted that the impugned order should not be interfered with because:

    a. The SEBI Circular has no retrospective/ retroactive operation because it is not a regulation in terms of section 30 of the SEBI Act.

    b. The compromise under the Resolution Plan does not fall foul of section 430 read with section 230 of the Companies Act, 2013 because the latter is only an enabling provision. The jurisdiction of the NCLT is invoked only when a company which proposes to enter into a compromise with its creditors opts to file an application before the NCLT.

    c. Any further change to the extant resolution process carried out validly under the RBI Prudential Framework would derail the efforts undertaken by all the stakeholders. Particularly, it would prejudice all the creditors of the company, including 69% of the retail debenture holders who are poised to receive 100% of the principal exposure.

20. Mr. Dhruv Mehta, learned senior counsel, appeared for Authum, the Resolution Applicant. Authum is not a party to the present proceedings. Mr Mehta submitted that the SEBI Circular can only apply prospectively and not retrospectively/retroactively. He also submitted that this Court can, after declaring the correct legal position, exercise its discretion under Article 136 of the Constitution to mould the final relief based on equitable considerations.

D. Overview of contractual arrangements

i. The Debenture Trust Deeds

21. Three Debenture Trust Deeds were entered into between the issuer company (RCFL) and the Debenture Trustee (Vistra) on 3 May 2017, 23 May 2017, and 5 February 2018. Clauses 58 and 59 of the first Debenture Trust Deed are as follows:

> "58. SEVERABILITY
>
> Each Provision of these presents shall be considered severable and if for any reason any provision of these presents is determined by a court of competent jurisdiction to be invalid or unenforceable and contrary to Indian laws or existing or future applicable law, such invalidity shall not impair the operation or prevent those provisions of these presents which are valid. In that case, these presents shall be construed so as to limit any term or provision so as to make it enforceable or valid within the requirements of any applicable law and in vent such term or provision cannot be so limited, these presents shall be construed to omit such invalid or unenforceable provisions. Following the determination that any provision of these presents is unenforceable, the Parties shall negotiate in good faith a new provision that as far as legally possible, most nearly reflects the intent of the Parties and that restores these presents as nearly as possible to its original intent and effect.
>
> 59. CONFLICT OF TERMS
>
> The parties agree that in the event any of the terms or provisions as contained in this indenture are in conflict with the provisions of the SEBI (Debenture Trustees) Regulations, 1993 as amended from time to time, then such clauses shall stand null and void. Further the Parties have agreed that in case there is inconsistency in clauses mentioned in this Deed and Information Memorandum, then the clauses mentioned in the Information Memorandum shall prevail."

The defaults by RCFL took place from March 2019. The lead bank – Bank of Baroda – in its letter dated 13 June 2020 to RBI stated that:

> "The Company (Reliance Commercial Finance Limited) availed credit facilities aggregating to Rs.9017 Crs from various banks. It started defaulting in servicing debt since March 2019. Sequence of Events lead to start Resolution Process in the company's account is as under:
>
> ♦ Demerger of commercial finance business of RCL (Reliance Capital Ltd.) into RCFL – 24.03.2017;
>
> ♦ Mr. Devang Mody, CEO of the company resigned – 31.12.2018;
>
> ♦ Default in repayment of Andhra Bank's Term Loan – 22.03.2019;
>
> ♦ Rating (LT) downgraded from CARE BBB+ to D-26.04.2019;
>
> ♦ PWC, the erstwhile auditor of the company resigned – 11.06.2019"

22. On 15 July 2019, an ICA was entered into between Bank of Baroda and the other lenders of RCFL. On 24 August 2020, Bank of Baroda issued a process note elucidating the process for seeking a Resolution Plan from eligible bidders. The process note set out three options of which the first option was in the following terms:

> "Option I – Submission of bid for RCFL as a going concern, on as-is-where-is and as-is-what-is basis.
>
> Under Option-I, bidders are invited to submit bid for the acquisition of entire shareholding and business of RCFL as a going concern, on as-is-where-is and as-is-what-is basis including each of the Asset Books, and all rights, obligations, debts (secured and unsecured) titles, interests, assets, properties whether movable or immovable real or personal, in possession or reversion, corporeal or incorporeal, tangible or intangible, present or continent, powers, allotments, approvals, allotments, consents, privileges, employees etc., of RCFL. Under this Option-I, bid for selective or part of the Asset Book will not be accepted. Exercise of this option would result in change in management of RCFL. The acquirer shall have the flexibility to structure the acquisition either as share purchase or scheme of arrangement (including merger, demerger etc.) or in such other manner which is mutually beneficial from a commercial, tax, and regulatory perspective.
>
> It is hereby clarified that an amount of Rs.100 crores will be retained in RCFL for its day to day operations. Any amount in excess of Rs.100 crores may be utilised for the benefit of the lenders."

23. The Resolution Plan was submitted by Authum on 15 January 2021. The relevant terms and conditions of the Resolution Plan submitted by Authum were as follows:

> "Clause 7.5.ii - After the settlement of the Resolution Plan related expenses, employee related expenses in operations related expenses, the Resolution Applicant will settle the dues of the Dissenting Financial Creditors and Consenting Financial Creditors
>
> Clause 7.5.vi - It is clarified the FC claims of the Dissenting Financial Creditors shall be paid in priority to the payments to any Consenting Financial Creditors
>
> Clause 41 - Financial Creditors (FC) shall mean the existing secured and unsecured lenders to the Company including but not limited to … debenture holders etc. as identified in the information memorandum of the company"
>
> Clause 40 - Financial Claims or FC Claims or Financial Creditor Claims or FC Dues means all amounts or claims to a financial creditor
>
> Clause 33 - Dissenting Financial creditors or Dissenting Lenders shall mean the financial creditors who vote against the Resolution Plan or abstain from voting in favour of the Resolution Plan, as approved by the ICA Lenders.
>
> Clause 6.1 - …..In line with this thought process the RA proposes to acquire the entire business of the company ongoing basis under Option 1 of the BID documents through either one or combination of options mentioned in section 5 herein.
>
> Clause 6 - "Applicable Law means all applicable Indian statutes, enactments, laws, ordinances, bye-laws, rules, regulations, guidelines, notifications, notices and/or judgments, decrees, injunctions, writs or orders of any court statutory or regulatory authority, tribunal, board, or stock exchange in any jurisdiction, as may be in force and effect including any amendment, modification or reenactment from time to time"

24. On 11 March 2021, parties entered into the Supplementary Debenture Trust Deed to amend the earlier Debenture Trust Deeds. The recitals to the Supplementary Trust Deed *inter alia* provide that:

> "WHEREAS
>
> A. The Parties have entered into Principal Deeds as listed in Schedule 1 hereunder for recording the terms and conditions for issuance of Debentures by the Company in accordance with the provisions of the Companies Act, 2013

and the regulations applicable to issue of debentures notified by Securities Exchange Board of India ("SEBI"), from time to time.

B. SEBI has amended certain provisions of the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 and SEBI (Debenture Trustee) Regulations, 1993 through its Gazette Notifications Nos. 34 and 35, respectively and each dated October 8, 2020. Further, SEBI has issued certain guidelines regarding debt instruments and debenture trustees through its circulars bearing reference numbers i) SEBI/HO/DDHS/CIR/P/2020/198 and dated October 5, 2020; ii) SEBI/HO/MIRSD/CRADT/CIR/P/2020/203 and dated October 13, 2020; iii) SEBI/HO/MIRSD/CRADT/CIR/P/2020/207 and dated October 22, 2020; iv) SEBI/HO/MISRD/CRADT/CIR/P/2020/218 and dated November 3, 2020; and v) SEBI/HO/MIRSD/CRADT/CIR/P/2020/230 and dated November 12, 2020 (collectively referred to as the "Debenture Circulars").

C. In accordance with the applicable laws including the terms stipulated under the Debenture Circulars, the Parties are now desirous of making amendments to the Principal Deeds by executing this Supplementary Deed."

The Supplementary Trust Deed also contains the following provisions:

"2.2 Immediately after the last provision/article/section clause of the respective Principal Deeds, the following shall be inserted:

"In order to **incorporate the terms of the SEBI Debenture Circulars within this Deed,** all the provisions set out under the schedule hereto named 'Schedule-SEBI AMENDMENTS 2020' is hereby included as an integral part of this Deed

…

2.3 A new Schedule as **'Schedule-SEBI Amendments 2020'** shall be inserted after the last existing Schedule of each respective Principal Deed as follows:

…

5. The Company shall ensure due compliance and **adherence to the SEBI Debenture Circulars in letter and spirit."**

(emphasis supplied)

The above contents of the Supplementary Trust Deed clearly take notice of the 1993 Regulations and the SEBI Circular, among others. Moreover, the Supplementary Debenture Trust Deed expressly incorporated the terms of SEBI's debenture circulars within its ambit and the requirement that RCFL shall ensure due compliance and adherence to SEBI's circulars in letter and

spirit. The Resolution Plan submitted by Authum was approved thereafter on 15 July 2021.

ii. *Steps taken by the Debenture Trustee (Vistra)*

25. In an affidavit filed before the Bombay High Court, Vistra elucidated the steps which it had taken upon being intimated by RCFL of its liquidity crisis. Vistra stated that it scheduled a meeting of the debenture holders on 17 October 2019, 6 November 2019 and 14 January 2020 on whether or not an ICA should be entered into. Vistra provided updates regarding all these meetings to SEBI and RBI. In February 2020, Vistra had filed proceedings before the Debts Recovery Tribunal, Bombay for the recovery of the outstanding dues of secured debenture holders from RCFL. On 12 June 2020, Bank of Baroda informed Vistra that under the Resolution Plan, it was proposed to distribute the funds of RCFL to those lenders who had signed the ICA and the deed of indemnity.

26. Vistra addressed a communication to the Bank of Baroda on 18 June 2020 objecting to this mechanism and the non-involvement of the debenture holders in the decision-making process. On 1 July 2020 Bank of Baroda intimated that the total amount available for distribution was Rs. 523 crores and that the debenture holders would be receiving 5.7% of the amount they had invested. Bank of Baroda stated that upon signing the ICA, a proportionate amount would be paid to the debenture holders. Vistra adverted to the steps which it took of intimating the debenture holders on various aspects of signing the ICA.

27. The Resolution Plan advisor requested Vistra to sign the ICA on behalf of the debenture holders pursuant to which a meeting of the ICA lenders was held on 6 November 2020. This meeting was *inter alia* attended by Vistra as an observer, along with four debenture holders. In the meantime, Vistra received payments in the amount of Rs. 38.6 crore (5 September 2020) Rs. 23.4 crore (29 January 2021) and Rs. 9 crore (23 April 2021) which were distributed to the debenture holders.

28. Thereafter, Vistra received an email on 16 July 2021 stating that the Resolution Plan submitted by Authum had been approved by the ICA lenders on 15 July 2021 and requesting the convening of a meeting of the debenture holders for completing the resolution process. The details of the approved Resolution Plan were sent to the debenture holders on 19 July 2021.

29. Vistra conducted a meeting of the debenture holders on 30 July 2021. After several concerns were raised by the debenture holders, Vistra communicated with the officials of SEBI. By a letter dated 23 August 2021, SEBI clarified that in consonance with the SEBI Circular, voting by the debenture holders would have to be conducted ISIN wise. Finally, Vistra clarified in its affidavit before the Bombay High Court that despite making several requests to debenture holders to provide instructions on whether to sign the ICA, it had not received any response.

E. Evolution of the law surrounding the resolution of debts

i. The framework for the resolution of debt under the Companies Act 1956

30. Prior to 6 July 2019, Section 391 of the Companies Act 1956 in Chapter V of the erstwhile legislation *inter alia* dealt with compromises, arrangements and reconstructions. Section 391 as its marginal notes indicated, elucidated upon the power to compromise or make arrangements with creditors and members. Under the provision, a compromise or arrangement could be contemplated between a company and;

    a. A creditor or any class of them; or

    b. Its members or any class of them.

31. In terms of sub-section (1) of Section 391, the Company Court (prior to the substitution of the National Company Law Tribunal for the Company Court) could order a meeting of the creditors or a class of creditors or of members or of a class of members. Sub-section (2) of Section 391 required a stipulated majority representing three-fourths in value of the creditors or members or a class of them present and voting to agree to a compromise or arrangement. In that event upon sanction by the judicial body it would be binding on all creditors or members or a class of them, as the case may be. The impact of a compromise or arrangement when approved by the special majority as stipulated in Section 391(2) was that the scheme would bind

even those who dissented or abstained from voting. These provisions applied to all kinds of creditors without exception.

32. In the absence of a provision such as Section 391 of the erstwhile Companies Act 1956, a contract for the repayment of the dues of creditors would be governed by the provisions of Section 62 of the Contract Act. Section 62 envisages that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. Similarly, Section 63 envisages that every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he may think fit. The provisions of Sections 62 and 63 would obviously apply to consenting parties. Hence, the terms of an earlier agreement between a debtor and a creditor would be varied by a specific act of acceptance.

33. The impact of Section 391 of the Companies Act 1956 lay in its ability, in relation to the creditors or members of a company, to bind non-consenting members or creditors where the terms of the compromise or arrangement were approved by a special majority and assented to by the judicial body. Upon the enactment of the Companies Act, Section 230 which forms a part of Chapter XV is titled “Compromises, arrangements and amalgamations”. Section 230 contains an analogous provision.

34. Sub-section (6) of Section 230 provides that where at a meeting which is held in pursuance of sub-section (1), the majority of persons representing

3/4th in value of the creditors or class of creditors or members or class of members agree to a compromise or arrangement and upon its sanction by the Tribunal, it shall be binding on the company and all the creditors or class of creditors or members or class of members and the contributories of the company. Section 230 of the Companies Act provides for the manner in which dissenting or abstaining creditors within a class of creditors of the company (such as debenture holders) can be bound by the terms of the compromise or arrangement upon approval by a special majority and by the NCLT.

35. Section 1(4) of the Companies Act, 2013 stipulates that the provisions of the Act shall apply *inter alia to*:

a. Companies incorporated under the Act or the previous company legislation;

b. Insurance companies;

c. Banking companies;

d. Companies engaged in the generation or supply of electricity;

e. Any other company governed by a special Act for the time being in force.

ii. *The RBI Circular dated 6 July 2019 and the legal framework thereafter*

36. In exercise of its powers under the Banking Regulation Act 1949 and the Reserve Bank of India Act 1934, RBI issued directions on 7 June 2019 “with

a view to providing a framework for early recognition, reporting and time bound resolution of stressed assets". The RBI Circular indicates that it applies to:

a. Scheduled commercial banks excluding regional rural banks;

b. Specified All India Term Financial Institutions;

c. Small Finance Banks; and

d. Deposit and non-deposit taking non-banking financial companies.[15]

37. The RBI Circular envisages that all lenders must recognize incipient stress in loan accounts immediately on default by classifying such assets as 'special mention accounts'. The expression 'default' means a non-payment of a debt, as defined in the Insolvency and Bankruptcy Code 2016 when the whole or any part or an instalment has become due and payable and is not paid by the debtor or corporate debtor. The framework which has been put into place by the circular includes the following provisions:-

a. The framework requires that lenders initiate the process of implementing a Resolution Plan even before a default occurs. Once the borrower is reported to be in default, lenders must undertake a

[15] "3. The provisions of these directions shall apply to the following entities:

(a) Scheduled Commercial Banks (excluding Regional Rural Banks);
(b) All India Term Financial Institutions (NABARD, NHB, EXIM Bank, and SIDBI);
(c) Small Finance Banks; and,
(d) Systemically Important Non-Deposit taking Non-Banking Financial Companies (NBFC-ND-SI) and Deposit taking Non-Banking Financial Companies (NBF-C-D)"

prima facie review of the borrower's account within 30 days from such default, within which a resolution strategy has to be decided (clause 9);

b. In cases where a Resolution Plan is to be implemented, all lenders have to enter into an ICA during the review period (clause 10); and

c. The ICA has to provide that any decision agreed by lenders representing 75% by value of the total outstanding credit facilities ("fund based and non-fund based") and 60% of lenders by number shall be binding upon all the lenders (clause 10).

The RBI Circular contains other provisions including those on the implementation of the Resolution Plan, consequences of delayed implementation, prudential norms, supervisory review, disclosures, and exceptions.

38. Clause 3 of RBI's directions indicates that its ambit is restricted to lenders as defined in that clause. The directions therefore do not make any provision for other investors such as debenture holders, a point which has been highlighted by footnote 1 to the framework.[16] Clause 10 provides as follows:

> "10. In cases where RP is to be implemented, all lenders shall enter into an inter-creditor agreement (ICA), during the above-said Review Period, to provide for ground rules for finalisation and implementation of the RP in respect of borrowers with credit facilities from more than one lender. The ICA shall provide that any decision agreed by lenders representing 75 per cent by value of total outstanding credit facilities (fund based as well non-fund based) and 60 per cent of lenders by number shall be binding upon all the lenders. Additionally, the ICA may, *inter alia*, provide for rights and duties of majority

[16] Footnote 1, RBI Circular: "For the purpose of these directions, 'lenders' shall mean all entities mentioned at paragraph 3, unless specified otherwise."

> lenders, duties and protection of rights of dissenting lenders, treatment of lenders with priority in cash flows/differential security interest, etc. In particular, the RPs shall provide for payment not less than the liquidation value due to the dissenting lenders."

Footnote 5 states:

> "In cases where asset reconstruction companies (ARCs) have exposure to the borrower concerned, they shall also sign the ICA and adhere to all its provisions."

Clause 10 makes it mandatory for all lenders to enter into an ICA, where a Resolution Plan is to be implemented. The ICA has to provide ground rules for finalizing and implementing the Resolution Plan where the borrower has credit facilities from more than one lender. Significantly, the ICA must mandate that any decision agreed by lenders representing 75% by value of the total outstanding credit facilities and 60% of lenders by number shall be binding upon by all the lenders. This means that where the requisite majority of lenders supports the decision, the decision binds all lenders including those who may dissent or abstain. The ICA is to *inter alia* provide for the protection of rights of dissenting lenders and in particular, for a payment of not less than the liquidation value to the dissenters. The liquidation value (as specified in footnote 6 to the RBI Circular) means the estimated realizable value of the assets of the borrower, if the borrower were to be liquidated as on the date of the commencement of the review period.[17] Hence the ability to bind all lenders, including those who dissent or abstain is conditioned on the decision being backed by the requisite majority representing 75% by value and 60% by number.

[17] Footnote 6, RBI Circular: "Liquidation value would mean the estimated realizable value of the assets of the relevant borrower, if such borrower were to be liquidated as on the date of commencement of the Review Period."

39. Section 1(4)(e) of the Companies Act recognizes that banking companies can be regulated by a special legislation. Section 230(2)(c)(iv) of the Companies Act contemplates that the company or person by whom an application is made under sub-section (1) shall disclose by affidavit any scheme of corporate debt restructuring consented to by not less than 75% of the secured creditors in value, and where the company proposes to adopt the corporate debt restructuring guidelines specified by the RBI, a statement to that effect. Clauses 9, 10 and 13 of the RBI Circular read together with footnote 7 contemplate a Resolution Plan inclusive of restructuring of a default account with lender institutions falling within the ambit of Clause 3.[18]

40. Since the circular issued by the RBI is under a special law within the meaning of Section 1(4)(e) of the Companies Act, Section C provides for implementation conditions for a Resolution Plan without a requirement of approaching the NCLT under Section 230, where the Resolution Plan is being implemented in relation to lenders governed by Clause 3 of the RBI Circular.

41. These provisions make it abundantly clear that the RBI Circular which traces its origin to the exercise of its statutory powers envisages that:

    a. All lenders must enter into an ICA where a Resolution Plan is being implemented;

[18] Footnote 7, RBI Circular: "Restructuring is an act in which a lender, for economic or legal reasons relating to the borrower's financial difficulty, grants concessions to the borrower. Restructuring would normally involve modification of terms of the advances / securities, which would generally include, among others, alteration of payment period / payable amount / the amount of instalments / rate of interest; roll over of credit facilities; sanction of additional credit facility / release of additional funds for an account in default to aid curing of default / enhancement of existing credit limits; compromise settlements where time for payment of settlement amount exceeds three months."

b. The ICA shall provide that a decision by lenders representing 75% by value and 60% by number shall bind all lenders, including those who may dissent. Entering into an ICA by the lenders is a mandatory first step to the implementation of the Resolution Plan; and

c. It is the ICA which will stipulate the ability to bind all lenders once the decision has been agreed upon by the stipulated majority.

Significantly, the RBI Circular has prescribed a higher voting threshold than the threshold mandated by Section 230(6) of the Companies Act. Consequently, on and from 7 June 2019 (the date of issuance of the RBI Circular), lending institutions governed by Clause 3 of the RBI Circular can avail of the special mechanism which has been introduced under it for the purpose of entering into a compromise, resolution, plan or arrangement for restructuring the debt due to lenders, with the ability to bind dissenters or those who abstain, without having to approach the NCLT under Section 230 of the Companies Act.

iii. *SEBI (Debenture Trustees) Regulations 1993*

42. Regulation 2(bb) defines 'debenture trustee' to mean a trustee appointed in respect of any issue of debentures of a body corporate. Chapter II of the 1993 Regulations contains provisions for the registration of a debenture trustee. Chapter III provides the responsibilities and obligations of debenture trustees. Chapter IV provides for inspection and disciplinary proceedings. Chapter V provides the procedure for action in case of default. Chapter VI contains a provision to relax the strict enforcement of the 1993 Regulations.

Regulation 15 provides for the duties of debenture trustees. Among them is the duty to take steps to convene a meeting of the holders of debentures as and when a meeting is required to be held (Clause (l)). Regulation 14 provides for the obligation of debenture trustees.[19]

43. As already noted earlier, the RBI Circular specifically applies to the category of lenders specified in Clause 3. The requirement that lenders enter into an ICA is triggered where a Resolution Plan is to be implemented, as specified in Clause 10.

44. Regulation 15(7) of the 1993 Regulations was inserted by the SEBI (Debenture Trustees) (Amendment) Regulation 2020 with effect from 8 October 2020. Regulation 15 (7) provides as follows: -

> "15(7) Subject to the approval of the debenture holders and the conditions as may be specified by the Board from time to time, the debenture trustee, on behalf of the debenture holders, may enter into inter-creditor agreements provided under the framework specified by the Reserve Bank of India."

Regulation 15(7) contemplates that the debenture trustees "may" enter into ICAs provided under RBI's framework subject to:

a. the approval of the debenture holders; and

b. the conditions which may be specified by SEBI from time to time.

45. Regulation 15(7) is facilitative in character. Regulation 15(7) indicates that the debenture trustee may enter into an ICA in terms of RBI's framework

[19] Regulation 14, 1993 Regulations: "14. Every debenture trustee shall amongst other matters, accept the trust deeds which shall contain the matters as specified in section 71 of Companies Act, 2013 and Form No. SH.12 specified under the Companies (Share Capital and Debentures) Rules, 2014. Such trust deed shall consist of two parts:
a. Part A containing statutory/standard information pertaining to the debt issue;
b. Part B containing details specified to the particular debt issue."

with the approval of the debenture holders. But Clause 7 does not in and of itself specify the modalities or manner in which the approval by the debenture holders is to be provided.

iv. *The SEBI Circular dated 13 October 2020 and the legal framework thereafter*

a. The SEBI Circular: Overview and Implications

46. The subject of the SEBI Circular is the standardization of the procedure to be followed by debenture trustees when there is a default by an issuer of listed debt securities. The circular prescribes the process to be followed by the debenture trustees in the event of such default including seeking the consent of the investors for refraining from enforcing the security and/or entering into an ICA. Section B of the SEBI Circular provides for the consent of the investors for the enforcement of security and for signing an ICA. Section B is extracted in its entirety below:

> "B. Consent of investors for enforcement of security and for signing the ICA
>
> 4. The Reserve Bank of India ("RBI"), vide Circular dated June 07, 2019 issued the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019 which inter alia specified the mechanism for resolution of stressed assets by Lenders (viz. Scheduled Commercial Banks, All-India Term Financial Institutions, Small Finance Banks, Systematically Important Non-Deposit Taking Non-Banking Finance Companies (NBFCs) as well as Deposit Taking NBFCs). In terms thereof, investors in debt securities, being financial creditors, are approached by other lenders to sign an agreement, referred to as the Inter Creditor Agreement ("ICA"), under specific terms detailed in the framework as stipulated by RBI.
>
> 5. Regulation 59 of LODR Regulations provides that material modification in the structure of debt securities shall be made only after obtaining the consent of the requisite majority of investors. Regulation 18 of the Securities and Exchange Board of India (Issuer and Listing of Debt Securities) Regulations, 2008 ("ILDS Regulations"), applicable in case of public issue of debt securities,

stipulates a period of fifteen days for giving notice in case of roll-over of debt securities and further provides for approval to be obtained from not less than 75% of the holders by value of such debt securities.

6. As resolution plan in the ICA may involve restructuring including roll-over of debt securities, requiring the consent of the investors, the process to be followed for seeking consent for enforcement of security and/or entering into an Inter-Creditor Agreement shall be as under:

6.1. The Debenture Trustee(s) shall send a notice to the investors within 3 days of the event of default by registered post/acknowledgement due or speed post/acknowledgement due or courier or hand delivery with proof of delivery as also through email as a text or as an attachment to email with a notification including a read receipt, and proof of dispatch of such notice or email, shall be maintained.

6.2. The notice shall contain the following:

6.2.1. negative consent for proceeding with the enforcement of security;

6.2.2. positive consent for signing the ICA;

6.2.3. the time period within which the consent needs to be provided, viz. consent to be given within 15 days from the date of notice; and

6.2.4. the date of meeting to be convened,

6.3. Debenture Trustee(s) shall convene the meeting of all investors within 30 days of the event of default (as per para 6.1 above);

Provided that in case the default is cured between the date of notice and the date of meeting, then the convening of such a meeting may be dispensed with.

6.4. In view of Regulation 15(2)(b) of SEBI (Debenture Trustees) Regulations, 1993, in case of debt securities issued by way of public issue, the notice sent by the Debenture Trustee(s) in para 6.2 shall not contain the consent as per para 6.2.1 and the requirement to convene a meeting for enforcement of security, as per para 6.3, shall not be applicable.

6.5. The Debenture Trustee(s) shall take necessary action to enforce security or enter into the ICA or as decided in the meeting of investors, subject to the following:

6.5.1. In case(s) where the majority of investors expressed their dissent against enforcement of the security, the Debenture Trustee(s) shall not enforce security.

6.5.2. In case(s) where majority of investors expressed their consent to enter into ICA, the Debenture Trustee(s) shall enter into the ICA.

> 6.5.3. In case(s) consents are not received for enforcement of security and for signing ICA, Debenture Trustee(s) shall take further action, if any, as per the decision taken in the meeting of the investors.
>
> 6.5.4. The Debenture Trustee(s) may form a representative committee of the investors to participate in the ICA or to enforce the security or as may be decided in the meeting.
>
> 6.6. The consent of the majority of investors shall mean the approval of not less than 75% of the investors by value of the outstanding debt and 60% of the investors by number at the ISIN level."

47. Clause 4 envisages that the RBI Circular dated 7 June 2019 has specified the mechanism for the resolution of stressed assets by lenders. In terms of the RBI Circular, investors in debt securities who are financial creditors are approached by other lenders to sign an ICA under specific terms which are detailed in the framework which is stipulated by the RBI.

48. Clause 6 of the SEBI Circular acknowledges that the Resolution Plan in the ICA may involve the restructuring of debt security which would, as a consequence, require the consent of the investors. It specifies the process to be followed for seeking the consent of investors for:

    a. Enforcing the security; and / or

    b. Entering into an ICA.

    Clause 6.2 specifies the requirement of issuing a notice to investors within a specified period of the event of default. The notice must contain:

    a. A negative consent for proceeding with the enforcement of the security;

    b. A positive consent for signing the ICA;

c. The requirement that the consent needs to be given within 15 days from the date of notice; and

d. The date of the meeting to be convened for the purpose.

The debenture trustee has to convene a meeting of all investors within 30 days of the event of default. Clause 6.5 mandates that the debenture trustee must take necessary action:

a. To enforce the security; or

b. To enter into the ICA; or

c. As decided in the meeting of investors; subject to certain conditions namely:

i. Where the majority of investors has expressed its dissent against the enforcement of the security, the security is not to be enforced by the debenture trustees;

ii. Where the majority of investors has expressed its consent to enter into an ICA, the debenture trustees must enter into the ICA;

iii. Where consents are not received for the enforcement of security or signing the ICA, the debenture trustee shall take further action according to the decision which is taken in the meeting of the investors.

49. Significantly, Clause 6 of the SEBI Circular contains mandatory language by the use of the expression “shall” when it relays the process to be followed

for seeking the consent for enforcement of the security or entering into an ICA and the steps which are adopted thereafter. The expression "shall" is used in the prefatory part of Clause 6 and in Clauses 6.1, 6.2, 6.3. 6.5 and 6.6. However, in contradistinction, Clause 6.5.4 adopts the expression "may". Clause 6.5.4 permits the debenture trustee to form a representative committee of investors to participate in the ICA; or to enforce the security; or as may be decided in the meeting.

50. Clause 6.6 of the SEBI Circular specifies that the consent of the majority of investors shall mean the approval of not less than 75% of the investors by value of the outstanding debt and 60% of the investors by number at the ISIN level.

51. Clause 7 of the SEBI Circular specifies conditions for the signing of an ICA by a debenture trustee on behalf of the investors. Evidently, the debenture trustee is vested with a discretion ("may sign the ICA and consider the resolution plan on behalf of the investors") upon compliance with certain conditions, namely:

    a. The signing of the ICA and acceptance of the Resolution Plan would be in the interest of the investors;

    b. This would be in compliance with the Companies Act, the Securities Contracts (Regulation) Act 1956,[20] and the SEBI Act and the rules, regulations, and circulars issued thereunder;

[20] "SCRA"

c. The debenture trustee shall be free to exit the ICA if the Resolution Plan imposes conditions which are not in accordance with the Companies Act, 2013, the SCRA and the SEBI Act together with the rules, regulations, and circulars issued thereunder;

d. If the Resolution Plan is not finalized within a period of 180 days from the end of the review period, the debenture trustee shall be free to exit the ICA altogether; and

e. The debenture trustee is free to exit the ICA and seek legal recourse if the terms of the Resolution Plan are contravened by any of the signatories to the ICA.

52. The mechanism which has been prescribed by the RBI Circular is restricted only to those lending institutions which fall within the ambit of Clause 3. Apart from these lending institutions, debenture holders constitute another class of financial creditors to whom a debt may be due by the debtor company. Other creditors including debenture holders could voluntarily enter into a contractual arrangement for the restructuring of the debt within the ambit of Section 62 of the Contract Act. These provisions are, however, restricted to consenting parties. Prior to the issuance of the SEBI Circular, the ability to bind creditors who fell outside the purview of Clause 3 of the RBI Circular would be based on the invocation of the provisions of Section 230 of the Companies Act.

53. However, subsequent to the issuance of the SEBI Circular, debenture holders can bind dissenters by taking recourse to the SEBI Circular as well.

The SEBI Circular facilitates the process of seeking consent for enforcement of security and/or entering into an ICA. The SEBI Circular recognizes that investors in debt securities who are financial creditors falling outside the purview of the RBI Circular are approached by other lenders to sign the ICA under the RBI Circular. SEBI's circular has enunciated the modalities for standardizing the procedure.

54. Clause 6.6 incorporates the requirement of a special majority by stipulating that the consent of the majority of investors shall mean the approval of not less than 75% of the investors by value of the outstanding debt and 60% of the investors by number at the ISIN level. We have already seen how a provision for a special majority is stipulated in Section 230(6) of the Companies Act. The RBI Circular on the one hand and the SEBI Circular on the other contain separate provisions indicating the nature of the majority necessary under each circular. The SEBI Circular stipulates the requirement of the consent of a heightened majority of not less than 75% of the investors by value and 60% of the investors by number at the ISIN level. The SEBI Circular contemplates that the investors who lie outside the purview of RBI's framework may be approached by the lenders to sign an ICA. This is for the reason that the Resolution Plan in the ICA which has been entered into by the lenders may involve the restructuring of debt security.

55. Where a Resolution Plan has to be implemented, it has to be preceded by all lenders entering into an ICA, in terms of the RBI Circular. Debenture holders who lie outside the purview of the RBI Circular may agree to enter

into the ICA in which event, the Resolution Plan which is being implemented in pursuance of the ICA entered into with the lenders would enure to the benefit of the debenture holders subject to the obligations and duties cast under it. The debenture holders are not bound to enter into an ICA in which event they would not be governed by its provisions or of the Resolution Plan which is entered into under the ICA. But to bind the entire class of debenture holders, the decision to enter into an ICA has to be backed by the stipulated majority which is prescribed in the SEBI Circular. The ability to bind the dissenting debenture holders or those who abstain is precisely conditional on whether the decision to enter into an ICA is backed by the requisite majority. In the absence of the consent expressed by the majority of investors to enter into an ICA in terms of Clause 6.5.2 the debenture trustee would have no authority to enter into an ICA in which event, the trustee shall take such further action in terms of the decision taken in the meeting of the investors. Such further action would, however, not comprehend the ability to bind dissenting debenture holders. Dissenters can be bound only if a requisite majority as defined in Clause 6.6 expresses its consent.

56. To recapitulate, in the case of an NCLT approved scheme of compromise or arrangement within the ambit of Section 230 of the Companies Act, the threshold is of a "majority of persons representing 3/4th in value of the creditors or class of creditors or members or class of members". When it comes to the prudential framework for resolution governing lenders within the description of Clause 3 of the RBI Circular, the threshold is 75% by value of the total outstanding credit facilities and 60% of lenders by number.

The SEBI Circular on the other hand mandates the approval of not less than 75% of the investors by value of the outstanding debt and 60% of the investors by number at the ISIN level. The majority prescribed in Section 230(6) would govern NCLT approved compromises within the meaning of Section 230 in its ability to bind those who do not consent to the compromise or arrangement. Likewise, the importance of the heightened majority prescribed in the RBI Circular lies in the consequence of binding dissenting lenders. In the same vein, the heightened majority prescribed in Clause 6.6 of the SEBI Circular has the consequence of binding dissenting debenture holders.

b. Voting at the ISIN level

57. Each debenture instrument has an international security identification number (ISIN) related to a particular issue. Each ISIN forms a separate class or category having the same feature such as an issue date, face value, rate of interest, maximum duration or date of redemption. These features are homogenous for all debentures within the same ISIN or tranches when compared to debentures across different ISINs. In the present case there are three Debenture Trust Deeds having 19 ISIN numbers, with ISINs split across the three Debenture Trust Deeds dated 3 May 2017, 23 May 2017 and 5 February 2018.

58. Each ISIN being a separate class or category, the SEBI Circular mandates that the voting is required to be done ISIN wise. SEBI has explained that it is left to the debenture holder in each ISIN to determine how they wish to

vote and adopt or reject the Resolution Plan. SEBI has asserted that nothing prevents an individual holder of an ISIN to accept a haircut in the payment of its dues. But this cannot be forced upon them without following the framework prescribed by SEBI to protect the interests of debenture holders. In the present case, the three Debenture Trust Deeds with 19 ISIN numbers are distributed in the following manner:

a. Debenture Trust Deed-1 dated 5 February 2018 has four (4) ISIN with an approximate principal amount of Rs.564.77 crores;

b. Debenture Trust Deed-2 dated 3 May 2017 has nine (9) ISIN with an approximate principal amount of Rs.1249.8 crores; and

c. Debenture Trust Deed-3 dated 23 May 2017 has six (6) ISIN with an approximate principal amount of Rs.81.00 crores.

59. Clauses 22 (ii) and 22(iii) of the Fifth Schedule to the Debenture Trust Deeds contains the following provision:

> "22. A meeting of the Beneficial Owner(s) / Debenture holder(s) as the case may be shall, inter alia, have the following powers exercisable in the manner hereinafter specified in Clause 23 hereof
>
> …
>
> (ii) Power to sanction any compromise or arrangement proposed to be made between the Company and the Beneficial Owner(s) / Debenture holder(s).
>
> (iii) Power to sanction any modification, alteration, or abrogation of any of the rights of the Beneficial Owner(s) / Debenture holder(s) as the case may be against the Company or against the Mortgaged Premises or other properties whether such right shall arise under the Trust Deed or Debentures or otherwise."

Clause 23 of the of the Fifth Schedule to the Debenture Trust Deeds provides thus:

> "The powers set out in Clause 22 hereof shall be exercisable by a Special Resolution passed at a meeting of the Beneficial Owner(s) / Debenture holder(s) as the case may be duly convened and held in accordance with the provisions herein contained and carried by a majority consisting of not less than three-fourth of the persons voting thereat upon a show of hands or if a poll is demanded by a majority representing not less than three-fourths in value of the votes cast on such poll. Such a Resolution is hereinafter called "Special Resolution"."

60. All the Debenture Trust Deeds were executed prior to the RBI Circular. Clause 22(ii) deals with voting on a compromise proposed to be made between the issuer company and the debenture holder. The concept of a third party resolution applicant stepping into a debtor company in terms of a Resolution Plan led by the lenders came in with the RBI Circular. The Debenture Trust Deeds which are earlier in point of time must consequently be with reference to a compromise under Section 230 of the Companies Act. Clause 22(ii) and 23 can therefore not have precedence over the requirement of the special majority prescribed by the circulars of the RBI or SEBI.

c. <u>The SEBI Circular has a statutory character</u>

61. The SEBI Circular has been issued in exercise of the powers conferred by the SEBI Act, the 1993 Regulations, the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015 and the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations 2008 to protect the interest of investors in securities for promoting the development of and regulation of the securities

market.[21] Now it is important to emphasise that the ICA which has been referred to in the SEBI Circular is the ICA which is provided for in the RBI Circular. Clause 4 of the SEBI Circular indicates that investors in debt security who are financial creditors are approached by other lenders to sign an agreement namely an ICA "under specific terms detailed in the framework as stipulated by RBI." Moreover, Regulation 15(7) of the 1993 Regulations confers an enabling power upon the debenture trustee, subject to the approval of the debenture holders and the conditions specified by SEBI to enter into an ICA "provided under the framework specified by the RBI". In its affidavit filed before the Bombay High Court, RBI clarified that :

> "8. Given that the ICA is a contractual agreement between the creditors to a borrower undergoing resolution, inter se disputes between the signatories to the ICA have to be resolved within the ICA which is a contract. Since the Prudential Framework was issued by the RBI under powers conferred upon it by the provisions of the Reserve Bank of India Act, 1934 and Banking Regulation Act, 1949, the provisions of the Prudential Framework are mandatory only for the RBI-regulated lenders. These powers do not extend to other creditors of a borrower such as the debenture holders whose primary regulator is the Securities and Exchange Board of India (SEBI)."
>
> "9. At the same time, other creditors to the borrower can voluntarily agree to be a party to the ICA since it is ultimately a contract between the creditors. If such creditors are regulated by other financial sector regulators, signing of the ICA by such creditors may be subject to permission from their respective regulators. In this connection, it is pertinent to note that SEBI vide circular SEBI/HO/MIRSD/CRADT/CIR/P/2020/203 dated October 13, 2020 has prescribed the conditions under which Debenture Trustees may sign an ICA under the Prudential Framework."

[21] Clause 9, SEBI Circular: "9. This circular is issued in exercise of the powers conferred upon SEBI under Section 11(1) of the Securities and Exchange Board of India Act, 1992 read with the provisions of Regulation 2A of the Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993, Regulation 31(1) of the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008 and Regulation 101(1) or the Securities and Exchange Board of India (Listing Obligation and Disclosure Requirements) Regulations, 2015 to protect the interest of investors in securities and to promote the development of, and to regulate, the securities market."

62. The above extract indicates that RBI's stated position was that:

a. The prudential framework for the resolution of stressed assets formulated in the RBI Circular was in exercise of the powers conferred by the RBI Act 1934 and the Banking Regulation Act 1949;

b. The provisions of the prudential framework are mandatory only for RBI regulated lenders;

c. RBI's powers do not extend to other creditors of a borrower such as debenture holders who are primarily regulated by SEBI;

d. Other creditors of a borrower may voluntarily agree to the ICA since it is a contract between creditors;

e. Where the other creditors are regulated by a distinct financial sector regulator such as SEBI, the signing of the ICA by such creditors would be subject to permission by the concerned regulator; and

f. In this backdrop, SEBI prescribed the conditions under which debenture trustees may sign an ICA under the prudential framework, by issuing the SEBI Circular.

RBI has, in the above extract of its affidavit, clarified that the resolution of stressed assets is ultimately an act of commercial negotiation between the debtor and the creditor and between various creditors of the borrower under resolution.

F. Analysis

63. It is RCFL's case that the SEBI Circular is applicable only if the debenture holders choose to enter into an ICA under the RBI Circular. According to RCFL, it is open to debenture holders to choose not to enter into an ICA. Instead, they may approve of a Resolution Plan that the lenders have formulated independent of the modalities prescribed in the SEBI Circular. It is argued that this route permits debenture holders to approve or reject Resolution Plans based on whether their interests are properly accounted for. It has been urged that this may be preferable to entering into an ICA, where the debenture holders may find themselves at the mercy of the lenders (who may wield greater power while formulating the Resolution Plan, either due to their number or due to the value of the debt owed to them or both). Debenture holders would, it has been argued, consequently be forced to abide by a Resolution Plan which does not properly account for their interests. Hence, according the submission, they may opt out of an ICA and instead approve or reject the restructuring of debt at the stage of implementation of a Resolution Plan. While this argument may seem attractive at first blush, it gives way on closer inspection. The reasons why we are not inclined to accept the submission are formulated below:

i. *There is no bar to the civil court's jurisdiction*

64. As noted above, the suit before the Single Judge of the Bombay High Court (on the original side) sought the setting aside of the RBI Circular as illegal

and *ultra vires*. An injunction restraining RCFL, Bank of Baroda, and RBI from implementing the RBI Circular was also sought.

65. Section 15Y of the SEBI Act stipulates that no civil court shall have the jurisdiction to entertain any suit in respect of any matter which an adjudicating officer appointed under the SEBI Act is empowered to determine. Section 15-I of the SEBI Act provides that an adjudicating officer may be appointed to adjudge cases under Sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA, 15HB. None of the sections mentioned in Section 15-I of the SEBI Act would confer jurisdiction on the adjudicating officer to grant the relief sought by the plaintiffs in the first instance. Hence, the bar in Section 15Y would not operate as against the suit in the present case.

66. Similarly, Section 430 of the Companies Act provides that no civil court shall have the jurisdiction to entertain any suit in respect of any matter which the National Company Law Tribunal or the National Company Law Appellate Tribunal is empowered to determine. Nothing in the Companies Act 2013 or any other law for the time being in force vests either the National Company Law Tribunal or the National Company Law Appellate Tribunal with the jurisdiction to adjudicate upon a challenge to the RBI Circular. Hence, the bar in Section 430 is not attracted.

67. The Single Judge of the Bombay High Court (in the first instance) as well as the Division Bench of the Bombay High Court properly exercised jurisdiction over the subject matter of the suit.

ii. *The SEBI Circular is applicable if debenture holders wish to implement a Resolution Plan to which the lenders are a party*

68. It is undoubtedly true that the SEBI Circular does not stipulate that the signing of an ICA is the only route to entering into a compromise with the issuer company. Besides the absence of a clause mandating an ICA pursuant to an event of default, Clause 6.5.3 of the SEBI Circular recognizes that the debenture holders (through the Debenture Trustees) may undertake actions besides those contemplated in the SEBI Circular. However, if debenture holders choose to implement a Resolution Plan to which the lenders are party, they must do so in compliance with the conditions laid down in the SEBI Circular.

69. Clause 9 of the RBI Circular stipulates that the lenders are to undertake a review of the borrower's accounts within 30 days from the date of default, during which they may decide on the resolution strategy. The lenders may opt for any resolution strategy available to them under the existing legal framework, including (i) entering into a Resolution Plan; or (ii) initiating legal proceedings for recovery; or (iii) insolvency. If the lenders choose to implement a Resolution Plan, they are required to enter into an ICA in terms of Clause 10 of the RBI Circular. The existence of an ICA which is in compliance with the RBI Circular is a *sine qua non* for the implementation of a Resolution Plan.

70. After the RBI Circular was issued, all creditors could opt for one of the following courses of action:

a. Enforce the security;

b. Initiate CIRP under the IBC;

c. File a suit for the recovery of the monies due to them;

In addition, lenders could choose to implement a Resolution Plan in terms of the RBI Circular (with other lenders). The debenture holders could enter into an arrangement or scheme under Section 230 Companies Act (with any other creditors). Needless to say, creditors were free to exercise other options available in law, besides those detailed in this paragraph.

71. As evident from the definition of 'lenders', the RBI Circular did not apply to debenture holders. Debenture holders continued to be governed by Section 230 Companies Act. However, the options available to debenture holders increased with the issuance of the SEBI Circular. The SEBI Circular laid down the process to be followed for:

a. Refraining from enforcing security; and

b. Entering into an ICA.

72. The SEBI Circular was issued with reference to the RBI Circular; it does not specify the conditions for the execution of an independent ICA or Resolution Plan which is separate from the ICA and Resolution Plan under the RBI Circular. Both the RBI Circular and the SEBI Circular refer to one and the same ICA and Resolution Plan. This is evident from Clause 4 of the SEBI Circular which states:

> "The Reserve Bank of India ("RBI"), vide Circular dated June 07, 2019 issued the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019 which inter alia specified the mechanism for resolution of stressed assets by Lenders … In terms thereof, investors in debt securities, being financial creditors, are approached by other lenders to **sign an agreement; referred to as the Inter Creditor Agreement ("ICA"), under specific terms detailed In the framework as stipulated by RBI.**"
>
> (emphasis supplied)

Further, Regulation 15(7) of the 1993 Regulations relates to the duties of Debenture Trustees. It provides:

> "Subject to the approval of the debenture holders and the conditions as may be specified by the Board from time to time, the debenture trustee, on behalf of the debenture holders, **may enter into inter-creditor agreements provided under the framework specified by the Reserve Bank of India**."
>
> (emphasis supplied)

73. By issuing the SEBI Circular, SEBI subscribed to the overall framework of the RBI Circular and permitted debenture holders to participate in the process specified in the RBI Circular to enter into a Resolution Plan. Under the RBI Circular, the Resolution Plan cannot come into existence without an ICA. The SEBI Circular does not disturb this position. When the SEBI Circular came into force, it specified the conditions under which the debenture holders (through the Debenture Trustees) could access this Resolution Plan and participate in its formulation **via the ICA**.

74. By arguing that Clauses 22 and 23 of the Fifth Schedule to the Debenture Trust Deed(s) are not concerned with signing an ICA or with the subject matter of the SEBI Circular in general, RCFL is suggesting that the ICA and the Resolution Plan are distinct and severable. The implication is that debenture holders may opt in to the Resolution Plan after it has been

formulated, without concerning themselves with the ICA. This is an incorrect interpretation of the circulars in question. The ICA and the Resolution Plan are inextricably intertwined and the latter has its genesis in the former, and flows from it. The SEBI Circular, too, recognizes this fact in Clause 6, which states:

> "**As the resolution plan in the ICA** may involve restructuring including roll-over of debt securities, requiring the consent of the investors, the process to be followed for seeking consent for enforcement of security and/or entering Into an Inter-Creditor Agreement shall be as under …"
>
> (emphasis supplied)

Further, Clause 7 recognizes the interdependence between the ICA and the Resolution Plan:

> "The Debenture Trustee(s) may **sign the ICA and consider the resolution plan** on behalf of the investors upon compliance with the following conditions:
>
> 7.1 The **signing of the ICA and agreeing to the resolution plan** is in the interest of investors and in compliance with the Companies Act, 2013 and the rules made thereunder, the Securities Contracts (Regulations) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules, regulations and circulars issued thereunder from time to time.
>
> 7.2. **If the resolution plan imposes condition(s) on the Debenture Trustee(s)** that are not in accordance with the provisions of Companies Act, 2013 and the rules made thereunder, the Securities Contracts (Regulations) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules, regulations and circulars issued thereunder from time to time, then the Debenture Trustee(s) shall be free to exit the ICA altogether with the same rights as if it had never signed the ICA. Under these circumstances, the resolution plan shall not be binding on the Debenture Trustee(s).
>
> 7.3. **The resolution plan shall be finalized within 180 days from the end of the review period.** If the resolution plan is not finalized within 180 days from the end of the review period, then the Debenture Trustee(s) shall be free to exit the ICA altogether with the same rights as if it had never signed the ICA and the resolution plan shall not be binding on the ·Debenture Trustee(s). However, if the finalization of the resolution plan extends beyond 180 days, the Debenture Trustee(s) may consent to an extension beyond 180 days subject to the approval of the investors regarding the total timeline. The total timeline

> shall not exceed 365 days from the date of commencement of the review period.
>
> 7.4. **If any of the terms of the approved Resolution Plan are contravened by any of the signatories to the ICA, the Debenture Trustee(s) shall be free to exit the ICA** and seek appropriate legal recourse or any other action as deemed fit in the interest of the investors."
>
> (emphasis supplied)

Hence, any reference to an ICA in the SEBI Circular is also necessarily a reference to the Resolution Plan and vice versa. It is not open to debenture holders to participate in the implementation of the Resolution Plan without being involved in its genesis through the ICA. There is only one "door", so to speak, through which debenture holders can gain entry into the Resolution Plan with the lenders and that is through the ICA. Therefore, while the SEBI Circular does not mandate the execution of an ICA as the only route to entering a compromise with the issuer company, it lays down a procedure in the event that debenture holders choose the route of implementing a Resolution Plan with the lenders. This procedure cannot be circumvented.

75. The purpose of the SEBI Circular is multi-fold – not only does it protect the interests of debenture holders at large (Clause 7), but it also protects the interests of any dissenting debenture holders (Clause 6.6). If RCFL's argument was to be accepted, both these protections would fail. In the absence of Clause 7, debenture trustees would likely be unable to exit the ICA or the Resolution Plan even if they were not "in the interest of investors"[22] or if the Resolution Plan was not finalized within 180 days from

[22] Clause 7.1, SEBI Circular

the end of the review period.[23] It is indubitable that tremendous hardship would be caused to the debenture holders in both these situations. Significantly, the absence of Clause 6.6 could mean that dissenting debenture holders would be bound by decisions taken even by way of a simple majority. While Clause 23 of the Fifth Schedule to the Debenture Trust Deed(s) in this case provides for a majority of 75%, other Debenture Trust Deed(s) could provide for a simple majority. Dissenting debenture holders would then be unable to avail of the protection provided to them by the SEBI Circular.

76. We agree that the language in Regulation 15(7) of the 1993 Regulations and the SEBI Circular is facilitative and not mandatory. This is in recognition of the fact that debenture holders may opt to exercise their rights through mechanisms other than the execution of a Resolution Plan. The language cannot be construed to be facilitative in the sense of providing debenture holders with the option of by-passing the modalities prescribed by the SEBI Circular while accepting a Resolution Plan. The ICA continues to be the foundation or mother document for the Resolution Plan.

iii. *Dissenting ISIN level debenture holders are bound by the ICA / Resolution Plan*

77. Clause 6.6 of the SEBI Circular *inter alia* requires the "approval of not less than 60% of the investors by number at the ISIN level" for entering into an ICA. RCFL has argued that the ISIN level voting could potentially frustrate a

[23] Clause 7.3, SEBI Circular

Resolution Plan. The concern is that a single debenture holder who holds an entire ISIN (or more than one ISIN) can prevent the creditors from arriving at an ICA / a Resolution Plan, especially in the absence of a provision for their "exit" from this process. In response, SEBI has argued that the issuer company can "adjust" the size of the security by proportionally reducing it and releasing it to the extent that debenture holders agree to the ICA / Resolution Plan. Both these arguments miss the crux of the matter.

78. Dissenting creditors do not have the option of "exiting" the compromise or arrangement arrived at in terms of Section 230 Companies Act.[24] Similarly, dissenting lenders do not have the option of "exiting" the ICA / Resolution Plan under the RBI Circular.[25] The respective majorities provided for in each of these laws bind dissenting creditors. It is along these lines that the SEBI Circular binds dissenting debenture holders. Indeed, the SEBI Circular could bind dissenting debenture holders even in the absence of similar provisions in other laws.

79. The argument that the SEBI Circular is not applicable because a single debenture holder will be able to frustrate the Resolution Plan is a consequential one. The applicability of a circular cannot be determined on the basis of such a concern. We need not comment upon this aspect in the absence of a challenge to the SEBI Circular. We also note that it is open to the relevant stakeholders to approach SEBI with any concerns, commercial or otherwise, and request an amendment to the SEBI Circular. SEBI as a

[24] The NCLT will look into the overall fairness of the compromise or arrangement under Section 230 Companies Act.
[25] The RBI Circular states that the ICA may provide for the protection of dissenting lenders.

statutory regulator can always look at such concerns and has the power to factor them in if it deems fit to do so in public interest and for the orderly functioning of the securities' market.

iv. The SEBI Circular has retroactive application

80. Mr. N Venkataraman, learned senior counsel and Additional Solicitor General has argued that the SEBI Circular is retroactive in nature as it does not take away or impair any vested rights. It operates in the future, based on events that arose prior to its issuance. Mr. Darius Khambata, learned senior counsel appearing for RCFL argued that the effect of applying the SEBI Circular to the present case will render it retrospective and not retroactive. According to him, Clauses 22 and 23 of the Fifth Schedule to the Debenture Trust Deed(s) vested debenture holders with the right to authorize debenture trustees "to sanction any compromise or arrangement proposed to be made between the company and the beneficial owner(s) / debenture holder(s)". This sanction could be authorized by a majority of "not less than three-fourths of the persons voting … or if a poll is demanded … not less than three-fourths in value of the votes cast on such poll". The SEBI Circular, it has been urged, changed the nature of the special majority required to sanction a compromise by introducing the requirement of a majority of 60% of ISIN level votes.

81. We are of the opinion that the SEBI Circular has retroactive application. In *Principles of Statutory Interpretation* by Justice G.P. Singh (14th edition, 2016 at page 583), it is stated that:

> "The **rule against retrospective construction is not applicable to a statute merely because "a part of the requisites for its action is drawn from a time antecedent to its passing**". If that were not so, every statute will be presumed to apply only to persons born and things which come into existence after its operation and the rule may well result in virtual nullification of most of the statutes."
>
> (emphasis supplied)

82. In **Vineeta Sharma** v. **Rakesh Sharma,**[26] this Court described the nature of prospective, retrospective, and retroactive laws:

> "61. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events."

83. The terms 'retrospective' and 'retroactive' are often used interchangeably. However, their meanings are distinct. This Court succinctly appreciated the difference between these concepts in **State Bank's Staff Union (Madras Circle)** v. **Union of India**:[27]

> "'Retroactivity' is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called 'true retroactivity', consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as 'quasi-retroactivity', occurs when a new rule of law is applied to an act or transaction in the process of completion....The foundation of these concepts is the distinction between completed and pending transactions...."
>
> (T.C. Hartley, The Foundations of European Community Law 129 (1981)"

Many decisions of this Court define 'retroactivity' to mean laws which destroy or impair vested rights. In real terms, this is the definition of 'retrospectivity' or 'true retroactivity'. 'Quasi-retroactivity' or simply

[26] 2020 (9) SCC 1
[27] (2005) 7 SCC 584

'retroactivity' on the other hand is a law which is applicable to an act or transaction that is still underway. Such an act or transaction has not been completed and is in the process of completion. Retroactive laws also apply where the status or character of a thing or situation arose prior to the passage of the law. Merely because a law operates on certain circumstances which are antecedent to its passing does not mean that it is retrospective.

84. In the present case, RCFL issued the debentures and defaulted on the payments to the debenture holders prior to the issuance of the SEBI Circular. However, as of 13 October 2020 (the date on which the SEBI Circular came into force), a compromise or agreement on the restructuring of the debt owed by RCFL did not exist. The debenture holders were not vested with any rights with respect to the resolution of RCFL's debt. The existence of the debt and the subsequent default by RCFL was the status of events, which existed prior to 13 October 2020. Once it came into force, the SEBI Circular applied to the manner of resolution of debt, as specified therein.

85. Even assuming that debenture holders were vested with the right to sanction a compromise or arrangement in terms of the special majority in Clause 23 to the Fifth Schedule of the Debenture Trust Deed, they were divested of such a right upon the issuance of the SEBI Circular. Clause 59 of the Debenture Trust Deed stipulates that any provision in the Debenture Trust Deed which is in conflict with the 1993 Regulations is null and void. In

so doing, it lays down a trigger for the divestment of rights under the Debenture Trust Deed. A contractually vested right may be taken away by the operation of a statutory instrument. *A fortiori*, in the present case, the SEBI Circular owes its existence to statutory powers conferred by a special legislation enacted with a view to protect the interests of investors and to ensure the stable and orderly growth and development of the market for securities.

86. The SEBI Circular was issued partly in exercise of the powers under the 1993 Regulations.[28] Further, Regulation 15(7) of the 1993 Regulations lays the foundation for the conditions specified in the SEBI Circular. As such, the phrase "provisions of the [1993 Regulations]" in Clause 59 must be read to include the SEBI Circular. Clauses 22 and 23 of the Fifth Schedule to the Debenture Trust Deed are evidently in conflict with the SEBI Circular as they each provide for different voting mechanisms. Therefore, Clauses 22 and 23 must give way to the SEBI Circular, which will take precedence.

v. Exercise of this Court's power under Article 142 of the Constitution

87. Under the present scheme of the Resolution Plan, retail debenture holders having an exposure of up to INR 10 lakhs would stand to realize 100% of their principal dues. The secured retail debenture holders having an exposure of more than INR 10 lakhs would realize 29.69%. The table showing the distribution is extracted below:

[28] Clause 9, SEBI Circular

Particulars	**Count**	**Exposure (INR)**	**Recovery (In INR)**	**Recovery (In %)**
Secured individuals and HUF debenture holders (up to INR 10 lakhs)	227	13.92 crores	13.93 crores	100
Secured individuals and HUF debenture holders (more than 10 lakhs)	37	43.95 crores	13.17 crores	29.96
Other secured debenture holders	42	1,556.70 crores	388.55 crores	24.96
Unsecured debenture holders	21	81 crores	16.46 crores	20.32
Related party	1	200 crores	26.90 crores	13.45
Total	**328**	**1,896 crores**		

88. The above table highlights that small investors, especially those whose exposure is up to INR 10 lakhs, are benefiting to the extent of 100% of their principal amount. Even debenture holders whose exposure is more than 10 lakhs are receiving 29.96% of their principal amount. In comparison, the secured ICA lenders would receive 24.96% of their principal amount, which is lower than the recovery made by the debenture holders. It is also important to highlight that none of the debenture holders have raised any grievance with regard to the proposed compromise. In such a situation, application of the SEBI Circular, though right in law, may lead to unjust outcomes for the retail debenture holders if this court were to reverse the entire course of action which has occurred in the present case.

89. The different voting mechanism proposed under the SEBI Circular will further delay the resolution process and potentially disrupt the efforts undertaken by the stakeholders, including the retail debenture holders. Such unscrambling of the resolution process will not only prove time-consuming, but may also adversely affect the agreed realized gains to the retail debenture holders, who have already consented to the negotiated settlement before the High Court.

90. Depending upon the facts and circumstances of a case, this Court can, having regard to Article 142 of the Constitution of India, stipulate suitable directions to mitigate the potential denial of rights.

91. In its decision in **State** v. **Kalyan Singh**[29] this Court observed that the jurisdiction under Article 142 can be used to relax the rigors of law depending upon the peculiar facts and circumstances. It was observed:

> "22. […] This article gives a very wide power to do complete justice to the parties before the Court, a power which exists in the Supreme Court because the judgment delivered by it will finally end the litigation between the parties. It is important to notice that Article 142 follows upon Article 141 of the Constitution, in which it is stated that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus, every judgment delivered by the Supreme Court has two components — the law declared which binds courts in future litigation between persons, and the doing of complete justice in any cause or matter which is pending before it. It is, in fact, an Article that turns one of the maxims of equity on its head, namely, that equity follows the law. By Article 142, as has been held in State of Punjab [State of Punjab v. Rafiq Masih, (2014) 8 SCC 883: (2014) 4 SCC (Civ) 657: (2014) 6 SCC (Cri) 154: (2014) 3 SCC (L&S) 134] judgment, equity has been given precedence over law. **But it is not the kind of equity which can disregard mandatory substantive provisions of law when the court issues directions under Article 142. While moulding relief, the court can go to the extent of relaxing the application of law to the parties or exempting altogether the parties from the rigours of the law in view of the peculiar facts and circumstances of the case. This being so, it is clear that this**

[29] (2017) 7 SCC 444

> **Court has the power, nay, the duty to do complete justice in a case when found necessary.** […]"
>
> (emphasis supplied)

92. In **Laxmidas Morarji** v. **Behrose Darab Madan**[30], a three-judge bench of this Court held that the use of powers under Article 142 should be based on equitable principles in situations where the provisions of law cannot do complete justice. It was observed:

> **"25.** Article 142 being in the nature of a residuary power based on equitable principles, the Courts have thought it advisable to leave the powers under the article undefined. The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. **The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties.**"
>
> (emphasis supplied)

93. The compromise presently arrived at, which is in the interests of all the parties, will be disturbed if a new process is directed to be commenced in accordance with the SEBI Circular at the present stage.

94. Pertinently, the SEBI Circular only contemplates two situations where ISIN-wise voting is mandated: (i) non-enforcement of security; and (ii) entering into an ICA. Although it applies retroactively, it admittedly does not

[30] (2009) 10 SCC 425

contemplate a scenario where the debenture holders could give ex post facto consent to ICAs agreed prior to the commencement of the SEBI Circular, that is 13 October 2020. In the present case, the application of the SEBI Circular will lead to a scenario where a Resolution Plan validly agreed upon by the ICA lenders under the RBI Framework will have to be unscrambled. For this reason, we consider it necessary to extend the benefit under Article 142 to the retail debenture holders by allowing the Resolution Plan to pass muster. We would like to reiterate that this Court is issuing the directions to mould the relief under Article 142 in view of the peculiar facts and circumstances of the present case noted above.

vi. *Dissenting debenture holders in the present case*

95. As stated in the above sections, after 13 October 2020, there are two mechanisms in situations where a compromise or resolution is sought:

a. A compromise under the SEBI Circular, which lies outside the process of the NCLT, to restructure the debt, binding both dissenting and abstaining debenture holders;

b. A compromise under Section 230 of the Companies Act by approaching the NCLT, binding dissenting/abstaining debenture holders.

96. It is clear that a compromise arrived under the SEBI Circular or Section 230 of the Companies Act effectively assimilates the rights of the dissenting

creditors. The SEBI Circular adopts a higher voting threshold of 60% by number and 75% to bind dissenting/ abstaining debenture holders.

97. SEBI submits that debenture holders are entitled to full outstanding amounts due (principal plus interest) if their debt cannot be resolved under the compromise/ resolution mechanism. However, it has been argued that the compromised arrived at in terms of the direction of the Division Bench will also bind all the other debenture holders, who were not a party to the original suit before the High Court. This will prejudice the dissenting debenture holders as they have to settle for a lesser amount – 24.96% of the principal among with a further 5% of the principal outstanding. We agree with SEBI's submission that the compromise arrived at the Debenture Trust Deed level among the consenting debenture holders should not bind the dissenting debenture holders.

98. The dissenting debenture holders would have been bound by the Resolution Plan if it had been approved in accordance with the Insolvency and Bankruptcy Code, 2016 or under an ICA as acceded to under the SEBI Circular. We accordingly deem it appropriate that dissenting debenture holders should be provided an option to accept the terms of the Resolution Plan. Alternatively, the dissenting debenture holders have a right to stand outside the proposed Resolution Plan framed under the lender's ICA and pursue other legal means to recover their entitled dues.

99. For the reasons indicated in the text of the judgment, we accept the submissions which have been urged by SEBI and disapprove of the

interpretation placed by the Division Bench of the Bombay High Court on the SEBI Circular. The appeal is allowed in part, subject to the directions issued above under Article 142 of the Constitution.

100. Pending applications, if any, stand disposed of.

…….. J.
[Dr. Dhananjaya Y Chandrachud]

…..……..J.
[Surya Kant]

……..……J.
[A S Bopanna]

New Delhi;
August 30, 2022