IN THE HIGH COURT OF JHARKHAND AT RANCHI
C. M. P. No. 376 of 2023

Electrosteel Steel Limited (now M/s ESL Steel Limited), earlier having registered office at G.K. Tower, 19, Camac Street, P.O. Camac Street, P.S. Camac Street, District Kolkata-700017 (West Bengal), and present registered office at Village Siyaljori, P.O. Jogidih, P.S. Chandankiyari, O.P. Bangaria, District Bokaro – 828 303 (Jharkhand) through its Associate Officer – Raj Kumar Verma, aged about 45 years, son of Late Rasdeo Prasad, resident of Shanti Nagar, Joradih More, Chas, P.O. Chas, P.S. Chas, District Bokaro

… … Petitioner

Versus

Ispat Carriers Private Limited through its Director Durga Yadav, son of Late Jadhari Yadav, resident of G295/A, Ram Nagar Lane, P.O. Garden Reach, P.S. Garden Reach, District Kolkata – 700 024 (West Bengal) **… … Opp. Party/Decree Holder**

CORAM: HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Petitioner : Mr. Indrajit Sinha, Advocate
: Mr. Bibhash Sinha, Advocate
: Ms. Puja Agarwal, Advocate
For the Opp. Party : Mr. Atanu Banerjee, Advocate
: Mr. Rishi Pallava, Advocate
: Mr. Rajnish Kolawatia, Advocate
: Mr. Prakash Kumar, Advocate

07/17.07.2023

Learned counsel for the parties are present.

2. The present petition has been filed under Article 227 of the Constitution of India for the following reliefs: -

> *"(i) For quashing of the order dated 03.03.2023 (Annexure-12) passed by Learned Presiding Officer, Commercial Court (wrongly typed as Commercial Court)/District Judge-1st, Bokaro, in Commercial Execution Case No. 21 of 2022 (Execution Case No. 77 of 2018), whereby and whereunder application dated 14.05.2019 filed by the judgment debtor is dismissed and the judgment debtor is directed to comply the Award dated 06.07.2018 passed by West Bengal Micro, Small and Medium Facilitation Council, Kolkata, within 15 days from this order;*
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> *And/Or*
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> *(ii) For further issuance of an appropriate order/direction as Your Lordships may deem fit and proper for doing conscionable justice to the petitioner."*

3. The present proceedings arise out of execution case instituted by the respondent for execution of arbitration award dated 06.07.2018 under Section 36 of the Arbitration and Conciliation Act, 1996 for a total amount of Rs. 1,59,09,214.33 plus interest @ 3% of bank rate of RBI Compounded with monthly rests. The award was passed by the West Bengal Facilitation Council under the provisions of Micro,

Small and Medium Enterprises Development Act, 2006 (hereinafter referred as '***MSME Act)*** in case number 330 and 331 of 2014. Admittedly, the award was not challenged under section 34 of ***the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act of 1996)***. The petitioner prayed for dismissal of the execution proceedings and also to pass necessary orders that the executing court had no jurisdiction to entertain the execution petition based on illegal and non-est order passed by the West Bengal State Small and Medium Enterprises Facilitation Council on account of various orders and proceedings before the ***National Company Law Tribunal (NCLT), Kolkata / National Company Law Appellate Tribunal (NCLAT), New Delhi***. The impugned order has been passed rejecting the said plea in the execution proceedings.

Arguments on behalf of the petitioner

4. Broadly the learned counsel for the petitioner has submitted that the learned court below has failed to consider the following two aspects of the matter while passing the impugned order: -

i. Decree of nullity can be assailed in execution or co-lateral proceedings. Judgements relied are: -

(a) ***1964 (1) SCR 495-Ittyavira Mathai v. Varkey Varkey & Anr.***

(b) ***(2007) 2 SCC 355-Hasham Abbas Sayyad v. Usman Abbas Sayyad & Ors.***

(c) ***(1990) 1 SCC 193 Sushil Kumar Mehta V. Gobind Ram Bohra (dead) through his LRS.***

ii. The provisions of Insolvency and Bankruptcy Code, 2016 have overriding effect and the dues of the operational creditor including the respondent was taken as NIL. Therefore, the Facilitation Council under MSME Act lost its jurisdiction to pass any award. Judgements relied are: -

(a) ***(2021) 9 SCC 657- Ghanshyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.***

(b) ***(2020) 8 SCC 531-Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta***

(c) ***(2022) 6 SCC 343-Ruchi Soya Industries Ltd. v. Union of India and Ors.***

(d) ***(2020) 3 SCC 210-Kotak Mahindra Bank Ltd. v. Girnar Corrugators Pvt. Ltd.***

5. Learned counsel for the petitioner has referred to internal page 26 to 32 and 55 of the resolution plan passed by the National Company Law Tribunal, Kolkata to submit that it was a conscious decision to render the operational creditors to NIL payment and the resolution proposal was finally accepted, therefore, nothing was payable to the respondent and this happened during the pendency of the matter before Facilitation Council constituted under MSME Act and consequently, the award under execution is a nullity in the eyes of law.

6. Learned counsel for the petitioner has referred to Annexure-6 of the main petition to submit that a few of the operational creditors had moved the National Company Law Appellate Tribunal, New Delhi by stating that their rights have not been duly protected, but since the resolution plan was already approved, their debt was less than 10% of the total debt, their petition was ultimately rejected.

7. Learned counsel for the petitioner has submitted that even if the award was not challenged under section 34 of the Arbitration and Conciliation Act, 1996, objection could have been taken at the stage of its enforcement when it is sought to be enforced under section 36 of the aforesaid Act of 1996. Learned counsel for the petitioner has relied upon a judgment passed by the Hon'ble Supreme Court reported in ***(2003) 8 SCC 565*** para 4, to submit that it has been held by the Hon'ble Supreme Court that the objection in connection with stamping of the arbitral award could have been raised under Section 47 of the CPC at the stage of enforcement of the award under section 36 of the Act of 1996. He has also relied upon the judgment passed by the Hon'ble Supreme Court reported in ***(2022) 2 SCC 290*** para 8 and also the judgment reported in ***(2018) 18 SCC 165*** para 8 to submit that in the execution proceedings, objection under Section 47 of Code of Civil Procedure, 1908 were taken even in execution of arbitral award. He has also relied upon a judgment reported in ***(2017) 5 SCC 371*** para 22 and 23 to submit that exercise of power under section 47 of CPC is microscopic and lies in a very narrow inspection hole and the executing court can allow objection to executability of the decree if it is found that the same is *void -ab-initio* and is a nullity apart from the ground that it is not capable of execution under law either because

the same was passed under ignorance of such provision of law or the law was promulgated making the decree un-executable after its passing.

8. The learned counsel submits that the plea of the respondent in the counter affidavit that, objection under section 47 of Code of Civil Procedure is not at all applicable to enforcement of arbitral award, is misplaced and is contrary to the fact that the Hon'ble Supreme Court has considered a number of applications where objection under Section 47 of the CPC was filed, entertained and decided on merits but there has been no finding that the objection under section 47 of the CPC itself was not maintainable.

9. The learned counsel submits that even in the limited scope of jurisdiction, Section 47 C.P.C. application filed before the learned court below was maintainable, which was entertained, but the fact that the award was a nullity has not been duly taken care of by the learned court below. Learned counsel has also relied upon the judgment passed by the Hon'ble Delhi High Court reported in ***2017 SCC Online Delhi 7684*** para 18 to submit that the provision of Section 47 of CPC having not been specifically excluded cannot be excluded through judicial interpretation.

Arguments on behalf of the respondents

10. Learned counsel for the respondent has submitted that considering the scope of Article 227 of the Constitution of India, the impugned order does not call for any interference. He submits that there is no illegality or perversity in the impugned order. He has referred to the judgment passed by the Hon'ble Supreme Court reported in ***AIR 2019 SC 824*** para 14 and also ***(2001) 8 SCC 470.***

11. The learned counsel has also submitted that the petitioner did not mention the provision of law under which their objection was filed before the executing court, but at best it is referable to Section 47 of the Code of Civil Procedure. The learned counsel submits that it has been held by this Court in the judgment reported in ***AIR 2012 Jhar 53*** that in a matter of execution proceedings arising out of Arbitration and Conciliation Act, 1996, objection under Section 47 of CPC is not maintainable. He has also submitted that an elaborate reasoned decision with respect to the same point has been rendered by the

Hon'ble Patna High Court in the judgment reported in ***AIR 2016 Patna 202*** para15 onwards. The learned counsel submits that such view has been taken considering the fact that there is mandate of expeditious disposal in the matter of Arbitration and Conciliation proceedings and least jurisdictional intervention has been prescribed. He has also referred to Section 5 of the aforesaid Act of 1996. The learned counsel has referred to the judgment passed by the Hon'ble Supreme Court reported in (***2018) 1 SCC 407 (Innoventive Industries Limited vs. ICICI Bank & Another) para 29***.

12. The learned counsel has referred to the provisions of Section 238 of Insolvency and Bankruptcy Code, 2016 and has submitted that it has to be read with Section 245 to 255 of the Code in view of the fact that there is a specific provision under IBC Code to make specific amendments in corresponding law to ensure that those laws are made subject to Insolvency and Bankruptcy Code, 2016. There is no such corresponding provision, so far as the MSME Act and Arbitration and Conciliation Act, 1996 are concerned.

13. He has further referred to Sections 15 to 23 of MSME Act to submit that the provisions of Sections 15 to 23 are overriding and the award has been passed in the present case under Section 18 of the MSME Act and Section 24 of MSME Act clearly stipulates that provisions of Section 15 to 23 would apply irrespective of any other contrary provision in other laws.

14. The learned counsel has further submitted that so far as the binding effect of Section 31 of Insolvency and Bankruptcy Code, 2016 is concerned, the same does not bar the legal remedy available to the party for realization of its debt. He has also submitted that the bar to legal remedy is not to be inferred unless it is specifically provided.

15. The learned counsel has also submitted that it is not the case of the petitioner that the Facilitation Council did not have the jurisdiction to pass the arbitral award, rather their specific case is that after the enforcement of the resolution plan, the Facilitation Council lost its jurisdiction to proceed further and pronounced an award. He submits that accordingly, the present case is not a case of inherent lack of jurisdiction even as per the petitioner.

16. The learned counsel submits that the grounds which have been raised through the objection petition filed before the learned court below are essentially the grounds which could have been raised by the petitioner under Section 34 of the Act of 1996. Having not challenged the award, the same grounds are sought to be raised by stating that the award itself is a nullity by filing a petition under Section 47 of CPC, which is not maintainable.

17. The learned counsel has submitted on facts that what was declared to be NIL qua the operational creditor like the respondent was not in relation to the arbitral proceedings pending before the Facilitation Council, but it was in relation to another arbitral proceedings. But, so far as the MSME proceedings are concerned, the same was not included in the list of the pending litigation settled as NIL.

18. The learned counsel has further referred to the counter-affidavit at page 73 title as *"Notes on Claims under Dispute pre corporate insolvency resolution process and Claims rejected"* and has submitted that the matters which were sub-judice were kept out of the insolvency resolution process. He has also referred to the list at page No. 87 of the counter-affidavit to submit that the claim under dispute pre corporate insolvency resolution process till 2nd April, 2018 has been enlisted therein and the name of the respondent appears at serial No. 7.

19. The learned counsel has also relied upon the order passed by the Hon'ble Supreme Court in the main petition at page No. 125 to submit that so far as the dues in connection with operational creditors are concerned, the same was to be reconsidered and therefore, it cannot be said that the claim of such creditors stood nullified finally. The resolution plan with respect to NIL payment to operational creditors did not become final. The learned counsel has finally referred to the order passed by the Hon'ble Supreme Court dated 21.01.2022 in ***Civil Appeal No. 5908/2021*** to submit that in the said order, the arbitral proceedings were permitted to be proceeded.

20. The learned counsel has also submitted that so far as the judgment passed in the case of ***Ghanshyam Mishra (supra)*** is concerned, it stands on a different footing in view of the fact that in the said case, the party did not make any claim before the resolution

professionals, therefore their claim was not subsequently maintainable and stood extinguished.

Rejoinder arguments of the petitioner.

21. In response, learned counsel for the petitioner has submitted that judgment relied upon by the respondent reported in ***(2018) 1 SCC 407*** **para 29** does not apply to the facts of the present case as the said judgment was arising out of Section 8 of the Insolvency and Bankruptcy Code 2016 which has been considered in the case of Ghanshyam Mishra's case reported in ***(2021) 9 SCC 657*** and has been limited to the provisions of Section 8 of IBC, 2016.

22. Learned counsel for the petitioner has also submitted that I & B Code, 2016 being a subsequent enactment the overriding provision under the said code will prevail over the MSME Act and other such similar Legislations.

Findings of this court.

23. The following points arise for consideration in the present case:-

a. ***The arbitral award having not been challenged under Section 34 of the Act of 1996, whether the objection to execution of the arbitral award referrable to section 47 of the CPC was maintainable by alleging that the arbitral award itself was a nullity and hence non-executable?***
b. ***Whether the arbitral award in the present case could be assailed as a nullity and hence non-executable within the permissible grounds of raising such a plea?***
c. ***Irrespective of maintainability of the objection to arbitral award under section 47 of the CPC,***

   Whether on facts, the Facilitation Council lost its jurisdiction to proceed and pronounce the arbitral award in view of insolvency resolution plan of the petitioner which was duly approved under section 31 of the IBC.

Point no (a)

The arbitral award having not been challenged under Section 34 of the Act of 1996, whether the objection to execution of the arbitral award referrable to section 47 of the CPC was maintainable by alleging that the arbitral award itself was a *nullity and hence non-executable?*

24. In the judgement reported in ***(2022) 2 SCC 290*** (***Vaishno Devi Construction v. Union of India),*** the rate of interest under the arbitral award was modified and it was at that stage that the appellant before the Supreme Court, who had an assignment, filed objections in the form of an application under Section 47 read with Order 22 Rules 1 & 2 CPC read with Sections 2(1)(g) and 36 of the Arbitration and Conciliation Act, 1996. The question before the Hon'ble Supreme Court was as to whether at the threshold, the appellants' objection could be rejected on the ground that they were assignees who acquired the rights prior to passing of the decree. It was held that the objection filed under section 47 of the C.P.C. filed before the executing court was maintainable. This judgement does not apply to the facts and circumstances of this case.

25. In the judgement reported in ***(2018) 18 SCC 165 (Kohinoor Transporters v. State of U.P.),*** the issue was as to whether the High Court was right in directing the appointment of a chartered accountant for the purpose of determining as to whether the decretal debt is to be marked as satisfied. It has been held that the High Court had acted in excess of its jurisdiction as the issue as to whether the decree has been discharged or satisfied has to be determined by the executing court under Section 47 CPC. This judgement also does not apply to the facts and circumstances of the case.

26. In the judgement reported in ***(2003) 8 SCC 565 (M. Anasuya Devi and Another Vs. M. Manik Reddy and Others),*** it has been held that the question as to whether the award was required to be stamped or not was not required to be gone into at the stage of the proceedings under Section 34 of the Act as this issue was premature at that stage. It has been held that the question as to whether the award was required to be stamped and registered, would be relevant only when the parties would file the award for its enforcement under Section 36 of the Act and it is at this stage the parties can raise objections regarding its

admissibility on account of non-registration and non-stamping under Section 17 of the Registration Act. In the aforesaid circumstances, it has been held that the question whether an award requires stamping and registration is within the ambit of Section 47 of the Code of Civil Procedure and not covered by Section 34 of the Act. Thus, the Hon'ble Supreme Court held that the point regarding non-stamping of the award could not be taken under Section 34 of the Act of 1996 and therefore it could be taken under section 47 of the CPC at the stage of execution.

This judgement also does not help the petitioner as it is not the case of the petitioner that the objection to the award taken in the present case could not be taken under the provisions of Section 34 of the Act of 1996. Rather, the case is that even if the award was not challenged under Section 34, the objection regarding nullity could be taken under Section 47 of CPC at the stage of execution of the Award under Section 36 of the Act of 1996.

27. In the judgement passed by Hon'ble Supreme Court reported in ***(2017) 5 SCC 371 (Brakewel Automotive Components (India) Pvt. Ltd. Vs. P.R. Selvam Alagappan)***, it has been held in para 20 that an executing court can neither travel behind the decree nor sit in appeal over the same and it is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered *non-est* and is thus inexecutable. It has also been held that an erroneous decree cannot be equaled with one which is a nullity. Para 20 of the aforesaid judgement is quoted as under:

> *"20. It is no longer res integra that an executing court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardising the rights to the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus inexecutable. An erroneous decree cannot be equalled with one which is a nullity. There are no intervening developments as well to render the decree unexecutable."*

It has been further held that the scrutiny is limited to objections to its executability on the ground of jurisdictional infirmity or voidness and the judgement reported in ***(1970) 1 SCC 670*** was referred to say, that in essence, the law is that only a decree which is a nullity can be subject matter of objection under Section 47 of the Code of Civil Procedure and not one which is erroneous either in law or in facts.

Paragraphs 22 and 23 of the aforesaid judgement reported in ***(2017) 5 SCC 371 (Brakewel Automotive Components (India) (P) Ltd. v. P.R. Selvam Alagappan)*** is quoted as under:

> *"**22.** Judicial precedents to the effect that the purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. This Court, amongst others in Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman in essence enunciated that only a decree which is a nullity can be the subject-matter of objection under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt: (SCC pp. 672-73, paras 6-7)*
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> > *"6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.*
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> > *7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."*
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> ***23.** Though this view has echoed time out of number in similar pronouncements of this Court, in Dhurandhar Prasad Singh v. Jai Prakash University, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree unexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view.**"*

In the earlier judgement referred to and quoted in the aforesaid judgement in para 22 above, it has been explained as to when a decree is a nullity and certain instances have been given including where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree.

On the point of objection to execution of decree suffering from inherent lack of jurisdiction, it has been held that objection as to its validity may be raised in an execution proceeding if such objection appears on the face of the record.

It has also been held that where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been raised but not raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

It has been further held that the scope of Section 47 of the CPC is quite different and much narrower than those in appeal/revision or review. It is microscopic and lies in a very narrow inspection hole; an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing.

28. It is also relevant to note that this Court in the judgement reported in ***AIR 2012 Jharkhand 53 (Gaffar Khan Vs. Magma Shrachi Finance Limited, Kolkata)*** passed in Civil Revision No.25 of 2010 decided on 12.09.2011 has held that the objections which are covered under Section 34 of the Act of 1996 cannot be agitated by filing an objection under Section 47 of the Code of Civil Procedure. Para 7 of the aforesaid judgement is quoted as under:

> *"7. Section 34 of the Act provides for setting aside the arbitral Award. A detail procedure is provided giving opportunity to the aggrieved party to challenge the Award. The said Act is a special Act and learned Court below has rightly held that in view of the said provision in the Special Act and the provisions for setting aside the Award under Section 34 of the said Act, an objection under Section 47 of CPC on the ground covered by the provisions under Section 34 of the Arbitration and Conciliation Act, 1996 is not maintainable."*

There can be no doubt that an objection under Section 47 of CPC on the ground covered by the provisions under Section 34 of the Arbitration and Conciliation Act, 1996 is not maintainable. From the perusal of the aforesaid judgement, this Court finds that the same was not dealing with the plea of an award being a nullity in the eyes of law

or an award suffering from inherent lack of jurisdiction. The plea of nullity or a plea of inherent lack of jurisdiction stand on a completely different footing and would be governed by the principles laid down by the judgement passed in the case of ***(2017) 5 SCC 371 (Brakewel Automotive Components (India) (P) Ltd. v. P.R. Selvam Alagappan).***

29. In the judgement reported in ***2017 SCC OnLine Delhi 7684***, it has been held that applicability of Section 47 of the CPC in execution proceedings in execution of arbitral awards cannot be excluded. Para 18 of the said judgment is quoted as under:

> *"**18.** In my view, the observations MSP Infrastructure Ltd. and Bharti Cellular Ltd. supra to the effect that the judgments of civil law would not apply to a proceeding under special law as the Arbitration Act, apply to only the proceedings provided for under the Arbitration Act and cannot be extended to the proceedings for execution of an Arbitral Award, as if it were a decree of the Court. Once the Arbitration Act, 1996 itself has conferred on the Arbitral Award the status of a decree of the Civil Court and made the same executable in accordance with the provisions of CPC, I see no reason to apply the aforesaid observations made in an entirely different context i.e., to execution proceedings. To interpret so would be a violation of the express provision of Section 36 (1) of enforcement of the Arbitral Award in accordance with the provisions of the CPC in the same manner as if it were a decree of the Civil Court. If the intent of the legislature while enacting the Arbitration Act, 1996 had been to exclude objections of the nature permitted to be taken under Section 47 of the CPC in execution proceedings in execution of arbitral awards, for the reason of time limited for taking thereof under Section 34 of the Arbitration Act, 1996 or otherwise, it would have provided so and which has not been done. In the absence of any prohibition, the rights under the CPC cannot be taken away."*

30. In the judgement reported in ***AIR 2019 SC 824 (Sneh Lata Goel Vs. Pushplata and Others),*** it has been held in para 14 that objection to lack of territorial jurisdiction does not travel to the root or to the inherent lack of jurisdiction of a civil court to entertain the suit and such plea cannot be entertained at the stage of execution of decree. Earlier judgement has been referred in which it has been held that if the decree is on the face of the record without jurisdiction, objection to the jurisdiction of the Court to make the decree may be raised; It has also been held that where it is necessary to investigate facts in order to determine whether the court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding. Thus, the nature and extent to which the jurisdictional issue can be raised at the stage of execution of decree and the contours of such plea has been laid down

by the Hon'ble Supreme Court in this judgement. Para 14 of the judgement is quoted as under: -

> *"14. The objection which was raised in execution in the present case did not relate to the subject-matter of the suit. It was an objection to territorial jurisdiction which does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit. An executing court cannot go behind the decree and must execute the decree as it stands. In Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, the Petitioner filed a suit in the Court of Small Causes, Ahmedabad for ejecting the Defendant-tenant. The suit was eventually decreed in his favour by this Court. During execution proceedings, the Defendant-tenant raised an objection that the Court of Small Causes had no jurisdiction to entertain the suit and its decree was a nullity. The court executing the decree and the Court of Small Causes rejected the contention. The High Court reversed the order of the Court of Small Causes and dismissed the petition for execution. On appeal to this Court, a three judge Bench of this Court, reversed the judgment of the High Court and held thus*
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> > *"6. A court executing a decree cannot go behind the decree : between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.*
> > *8. If the decree is on the face of the record without jurisdiction and the question does not relate to the territorial jurisdiction or under Section 11 of the Suits Valuation Act, objection to the jurisdiction of the Court to make the decree may be raised; where it is necessary to investigate facts in order to determine whether the court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding."*

31. One such example of exercise of such jurisdiction to declare the arbitral award a nullity is the judgement passed by the Hon'ble Supreme Court in Civil Appeal No.2899 of 2021 ***(Jharkhand Urja Vikas Nigam Limited Vs. State of Rajasthan and Ors.),*** wherein the arbitral award passed by MSME was not challenged under section 34 of the Act of 1996 but was challenged in a writ petition. In the said judgement, the claim was filed before the Rajasthan Micro and Small Facilitation Council by the third respondent of the case and the Council had issued notice and summons for appearance of the appellant and only on the ground that the appellant did not appear on 06.08.2012, a direction was issued to make payment as claimed. In the said case, the award was not challenged under Section 34 and a writ petition was filed by alleging that the award was a nullity.

The Hon'ble Supreme Court examined the entire scheme of MSME Act and also the various provisions of the Arbitration and Conciliation Act, 1996 and it was held that if the appellant had failed to reply at the

stage of conciliation, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitral proceeding in accordance with law with the relevant provisions of Arbitration and Conciliation Act of 1996 to adjudicate the dispute and make an award. It was held that proceeding for conciliation and arbitration cannot be clubbed. On the face of the record, it was clear before the Hon'ble Supreme Court that the Facilitation Council did not initiate arbitral proceeding in accordance with the provision of 1996 Act and consequently, the award was declared to be a nullity being not only contrary to the provision of MSME, Act but also contrary to the various mandatory provisions of Arbitration and Conciliation Act, 1996 and the award was held to be patently illegal. It was held that there was no arbitral award in the eyes of law as well. It has been held that it is true that under the scheme of the Arbitration and Conciliation Act, 1996, an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996 but at the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act, 1996, Section 34 of the Act of 1996 will not apply. The Hon'ble Supreme Court refused to reject the appeal only on the ground that appellant had not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996. Para 13 of the aforesaid judgement is quoted as under:

> *"**13.** The order dated 06.08.2012 is a nullity and runs contrary not only to the provisions of MSMED Act but contrary to various mandatory provisions of Arbitration and Conciliation Act, 1996. The order dated 06.08.2012 is patently illegal. There is no arbitral award in the eye of law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996 an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply. We cannot reject this appeal only on the ground that appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996. ……Though the learned counsel appearing for the respondents have placed reliance on certain judgments to support their case, but as the order of 06.08.2012 was passed contrary to Section 18(3) of the MSMED Act and the mandatory provisions of the Arbitration and Conciliation Act, 1996, we are of the view that such judgments would not render any assistance to support their case."*

32. From perusal of the aforesaid judgement passed by Hon'ble Supreme Court, it is clear that in a given circumstances an award can

be held to be a nullity even if the award has not been challenged under Section 34 of the Act of 1996. This Court is of the considered view that ordinarily, the arbitral award can be set aside only and only on the grounds which are enumerated under Section 34 of the Arbitration and Conciliation Act, 1996. However, there are certain objections which can be raised only at the stage of execution i.e., objection as to stamping of the award or there can be certain circumstances where the award itself has been passed against a dead person without bringing the legal heirs on record or a situation where the award suffers from inherent lack of jurisdiction or where the award has been passed without even initiating an arbitration proceeding in terms of the Act of 1996.

33. Upon reading up the various judgements, which have been cited by the parties passed by this Court as well as the Hon'ble Supreme Court, this Court is of the considered view that if the decree/arbitral award has been passed by court which has no jurisdiction to the extent that it can be held to be void-ab-initio/nullity/suffering from inherent lack of jurisdiction on the fact of the record, such objection can be raised and entertained under Section 47 of the Code of Civil Procedure. This Court is of the considered view that under such extreme circumstances i.e., the award being nullity / void -ab-initio/ suffering from inherent lack of jurisdiction, the award does not exist in the eyes of law at all.

34. This Court is also of the considered view that what could have been a ground for challenge to award under Section 34 of the Act of 1996 and the aggrieved party having not challenged the award, cannot be permitted to object to its execution by alleging it to be a nullity or without jurisdiction unless the award suffers from inherent lack of jurisdiction apparent on the face of record and the jurisdiction error goes to the root of the matter and is apparent on the face of the records. The moment such plea of nullity requires deliberations on fact and law, such objection is not permissible at the stage of execution of award. ***This Court is also of the considered view that such plea of nullity on the ground of jurisdiction should be of such a grave nature that it is not even capable of being waived by one or the other party.***

35. This court is of the considered view that having not challenged the arbitral award under section 34 of the Act of 1996, the law does not contemplate second opportunity to challenge the award particularly when the Act of 1996 is a self-contained code which prescribes the specific grounds and specific mode of challenge to an arbitral award. This would be the position except under the circumstances, where the award cannot be termed as an award in the eyes of law and therefore it is required to be rendered void ab initio /nullity and consequently required to be declared *non-est* in the eyes of law. This can be done pursuant to such objection raised under section 47 of CPC at the stage of execution of the award. Award which suffers from inherent lack of jurisdiction in the eyes of law, cannot be said to be award and therefore would fall outside the provision of Arbitration and Conciliation Act, 1996 and can certainly be declared as a nullity in an appropriate proceeding including under section 47 of CPC at the stage of execution of the award.

The point no (a) is answered accordingly. Thus the plea of nullity with regard to the arbitral award can be taken under section 47 of the CPC , but in a very narrow campus as explained above in para 32 to 34.

Point no. (b)

Whether the arbitral award in the present case could be assailed as a nullity and hence non-executable within the permissible grounds of raising such a plea?

36. Keeping the aforesaid position of law in mind, it is to be examined as to whether, the arbitral award involved in the present case can be said to be a nullity in the eyes of law. Admittedly, the award was not challenged under section 34 of the Act of 1996. Moreover, the specific case of the petitioner is that in the midst of the arbitral proceedings before the Facilitation Council, the Facilitation Council lost its jurisdiction to proceed and pronounce the award.

37. Admittedly, when the arbitral proceeding in the instant case was initiated, the claim of the respondent fell within the zone of consideration in the arbitral proceedings under the provision of MSME Act. The conciliation had failed and arbitral proceeding had commenced prior to declaration of moratorium. Admittedly, the

Facilitation Council did not proceed as soon as the fact about declaration of moratorium was brought to the notice of the council. The provision of Section 14 of the IBC is very clear. It provides that upon declaration of moratorium, the adjudicating authority shall declare for prohibiting the institution of suit or continuation of pending or proceedings against corporate debtor including execution of any judgement, decree or order of any court of law and the moratorium period would come to an end, interalia, upon approval of the resolution plan by the adjudicating authority. Admittedly, the Council resumed the proceedings after the moratorium period was over and in the arbitral proceedings notice were issued to the parties. Admittedly, the petitioner did not participate and consequently, the arbitral award was passed by referring to Section 31 of the Arbitration and Conciliation Act of 1996 on the principal amount of the bill with a direction to pay interest. It is interesting to note that the principal amount for which the award has been passed stood admitted even in the resolution plan. The bone of contention is that whether the realisable value was declared to be NIL in terms of the resolution plan read with the orders passed by NCLT/NCLAT/Supreme Court arising out of the proceedings under Insolvency and Bankruptcy Code (IBC).

38. This Court is of the considered view that the point as to whether the realisable value with respect to one or the other creditor was nil or otherwise certainly require close examination of the resolution plan read with the orders passed by NCLT/NCLAT/Supreme Court which itself is a debatable issue on facts as well as on law. In view of the aforesaid situation and in the light of the facts and circumstances of this case, the arbitral proceedings culminating in the award involved in this case, cannot be said to be suffering from inherent lack of jurisdiction.

39. On the point of jurisdiction, it has also been argued by the learned counsel for the petitioner that earlier an arbitrator was appointed by the petitioner for resolution of dispute and the arbitral proceedings also commenced. This was prior to filing of claim by the respondent before the Facilitation Council of west Bengal constituted under MSME Act. It has been argued that once the arbitral proceedings had commenced before the learned sole arbitrator, the

subsequent proceedings before the facilitation council were not maintainable.

40. In reply to such plea, it has been stated by the respondent in their counter-affidavit that the respondent had sent a legal notice dated 16th September, 2014 demanding the dues, failing which arbitration will be invoked, but the petitioner did not reply to the legal notice and *suo-moto* appointed an arbitrator who was the Chief Operating Officer (Technical) of the petitioner and was himself an interested party in the matter. The respondent objected to his jurisdiction and did not file any claim before the learned Arbitrator. The respondent had not served any notice invoking arbitration clause and as such commencement of arbitration proceedings was pre-mature. The respondent did not file their claim before the learned Arbitrator and filed their claim before the Facilitation Council under MSME, in which arbitral award involved in this case has been passed. The arbitral proceedings before the Facilitation council had commenced on 02.12.2014.

It has also been stated by the respondent that objection as to jurisdiction of the facilitation council to enter into dispute was raised on the ground that an arbitrator was already appointed but such objection was rejected by the facilitation council. The order rejecting the objection as to jurisdiction was challenged by the petitioner before the District Court at Alipore, wherein an interim order was passed in favour of the present petitioner. The interim orders passed by the district court at Alipore was challenged in the civil revision application filed by the respondent before the Hon'ble Calcutta High Court, in which order contained in **Annexure-A** to the counter affidavit was passed by which all further proceedings in Miscellaneous Case No. 26 of 2017 pending before the Additional District Judge, Thirteenth Court at Alipore, South 24-Paraganas, was stayed till July 31, 2018 or until further orders, whichever is earlier. After passing of the order of stay by Hon'ble Calcutta High Court, the facilitation council proceeded, which led to passing of the final award involved in the present case.

Ultimately the Calcutta High Court vide order dated 10.09.2018 (**Annexure-C**) having found that the Facilitation Council has passed the award under section 18 of the MSME Act of 2006 held that the

petition before the high court had become academic ; section 14 proceedings before the learned court at Alipore had become infructuous and disposed of the civil revision application leaving the parties free to urge whatever grounds may be available to the parties before the appropriate forum in accordance with law.

41. Upon perusal of the proceedings of the facilitation council, this court finds that the petitioner had submitted before the facilitating council that the order of the facilitation council on the point of jurisdiction which was decided against the petitioner was challenged before the District Court at Alipore but the petitioner never produced the ad-interim order before the Facilitation Council. Otherwise also, the order of stay passed by the District Court at Alipore has no impact due to the interim order as well as the final order passed by Hon'ble Calcutta High Court in the civil revision application. The interim order passed by the District Court is also not available before this court, which was never produced before the Facilitation Council also to ascertain the nature and extent of the interim order. Such issues are not the issues relating to patent or inherent lack of jurisdiction of the facilitation council so as to render the award a nullity in the eyes of law.

42. **Thus, the argument of the learned counsel for the petitioner, that the award suffers from patent or inherent lack of jurisdiction/ nullity and therefore the objection to the execution of the award could have been taken at the stage of execution without challenging the award under Section 34 of the Act of 1996, is hereby rejected.**

43. While deciding the next point, this court has elaborately dealt with the merit of contention of the petitioner, even if, it is assumed that nature of objection involved in this case was maintainable before the learned court below under section 47 of the CPC, and has found that upon perusal of the records, it cannot be said that the claim of the respondent was determined to be nil by the insolvency resolution plan and that nothing was recoverable.

44. **Thus, the point no. (b) is decided against the petitioner and in favour of the respondent.**

Point no.(c)

Irrespective *of maintainability of the objection to arbitral award under section 47 of the CPC,*

Whether on facts, the Facilitation Council lost its jurisdiction to proceed and pronounce the arbitral award in view of* insolvency *resolution plan of the petitioner which was duly approved under section 31 of the IBC.

45. The learned counsel for the respondent has relied upon the judgement reported in ***(2018) 1 SCC 407 (Innoventive Industries Limited vs ICICI Bank & Another),*** para 29, to submit that the moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code. Financial debt and financial creditor on one hand and operational debt and operational creditor on the other hand have been . defined . The comparison is as under :-

Financial Debt [Section 5 (8)]- means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes……	**Operational Debt [Section 521)] -** means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State government or any local authority

Financial Creditor [Section 5 (7)] - means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;	**Operational Creditor [Section 5 (20] -** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred

The Hon'ble Supreme Court in the judgment of ***Innoventive Industries Limited (supra)*** has compared the provisions of initiation of Corporation Insolvency Resolution Process by financial creditor under Section 7 and Insolvency Resolution Process by operational creditor under Section 8. The Hon'ble Supreme Court at paragraph 27 to 30 of the said judgment has held as under: -

> ***27.*** *The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as*

meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. ***A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.***

28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.*

29. *The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.*

30. *On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the*

financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

(emphasis supplied)

In the present case, commencement of proceeding of insolvency was in terms of Section 7 of IBC. Accordingly, para 29 of the aforesaid judgement, as relied upon by the respondent, is not applicable to the facts of this case. Moreover, this court is of the considered view that the treatment of the operational creditor would essentially depend upon as to how they are to be treated as per the approved resolution plan.

46. The learned counsel for the petitioner has relied upon the judgement passed by the Hon'ble Supreme Court ***reported in (2021) 9 SCC 657- Ghanshyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*** The said judgement stands on a different footing in view of the fact that in the said case, the party did not make any claim before the resolution professionals, therefore their claim was subsequently not maintainable and stood extinguished. Similar is the position with regards to the judgement reported in ***(2022) 6 SCC 343-Ruchi Soya Industries Ltd. v. Union of India and Ors.*** In the judgement of ***Ghanshyam Mishra (supra)*** the scheme of the IBC has been considered and summarized in para 93 and the reference has been answered in para 102 as under:-

"93. *As discussed hereinabove, one of the principal objects of the I&B Code is providing for revival of the corporate debtor and to make it a going concern. The I&B Code is a complete Code in itself. Upon admission of petition under Section 7 there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on-going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a*

subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable.

Conclusion

102. *In the result, we answer the questions framed by us as under:*

102.1. *That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.*

102.2. *The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.*

102.3. *Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued."*

47. Para 63 and 64 of the judgement reported in ***(2020) 8 SCC 531-Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta*** has considered the fact that the decision of the committee of creditors has prime importance considering their commercial wisdom . Para 64 of the judgement is quoted as under:-

:

64. *Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the*

corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place."

48. Para 87 and 88 of the aforesaid judgement of ***Essar Steel India Ltd (supra)*** deals with the distinction between 'financial creditors' and 'operational creditors' and it has been held that they stand on different footing . It has also been held that fair and equitable dealing of operational creditors' right under the regulation involves the resolution plan stating as to how it has dealt with the interest of operational creditors , which is not the same thing as saying that they must be paid the same amount of their debts proportionately. Para 88 of the aforesaid judgement is quoted as under:-

88. *By reading para 77 (of Swiss Ribbons[8]) dehors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, para 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.*

49. The learned counsel for the petitioner has not pointed out any such provision in IBC that the claims of all such persons will stand at NIL once they fall within the definition of 'operational creditor' as defined under IBC. Rather, extensive arguments have been advanced on the approved resolution plan by both the parties.

50. This issue requires consideration of the point as to whether the amount claimed by the respondent and pending for adjudication in the arbitral proceedings much prior to insolvency commencement date, was ever declared to be *nil* in terms of the insolvency resolution plan of the petitioner read with various orders passed by NCLT, Kolkata / NCLAT, New Delhi/Supreme court. This would require examination of the approved insolvency resolution plan. It is not in dispute that the approved insolvency resolution plan was never interfered by the NCLT, Kolkata / NCLAT, New Delhi and Hon'ble Supreme Court.

51. The relevant dates /sequence of events are as follows: -

(i) *On 02.12.2014 & 20.12.2014, respondent filed claim application being Case Nos.0330 and 0331 of 2014, before* ***West Bengal Micro, Small and Medium Facilitation Council*** *for total principal outstanding receivable amount as Rs.1,59,09,214/-. In Case No.330/2014 the claim amount was Rs.1,36,69,981.33/- and Case No.331/2014 the claim amount was Rs.22,39,233/-.*

(ii) *The attempt for conciliation failed. Consequently, the first arbitration proceeding was held by the council on 07.06.2017.*

(iii) *On 27.06.2017, the financial creditors of erstwhile Electrosteel Steel Limited invoked the proceeding under Insolvency & Bankruptcy Code, 2016 by filing a petition under Section 7 of the Code before the National Company Law Tribunal ("NCLT"), Kolkata Bench, in C.P. No.(IB) 361/KB/2017.*

(iv) *On 21.07.2017, the NCLT, Kolkata had Imposed Moratorium under Section 7 & 13 of the Insolvency & Bankruptcy Code, 2016, and the interim resolution professional was appointed.*

(v) *On 24.07.2017 the Interim Resolution Professional (IRP) issued Public Announcement calling upon all the creditors to submit their claims before it.*

(vi) *The proceedings of the arbitration before the facilitation council indicates that on 31.07.2017, a newspaper publishing the order of National Company Law Tribunal, Kolkata Bench was produced that moratorium has been declared under Section 14 of the IBC. Consequently, it was decided that the matter be kept in abeyance till the moratorium period is over.*

(vii) The respondent filed its claim before the Resolution professional , which was partly rejected and partly admitted by the Resolution professional.

(viii) The resolution plan framed under IBC was accepted by NCLT Kolkata on 17.04.2018 under section 31 of the IBC and the moratorium period came to an end on 17.04.2018.

(ix) Upon completion of the moratorium period, the arbitral proceedings before the facilitation council resumed and notices were issued to the parties for participating in the arbitral proceedings and ultimately arbitral award dated 06.07.2018 was passed by referring to section 31 of the Act of 1996 as the petitioner did not contest the claim on merits. The facilitation council directed the petitioner to pay a sum of Rs.1,59,09,214/- along with interest in terms of Section 16 of the MSMED Act, 2006 to the instance of the respondent- claimant/decree holder.

(x) The arbitral award was not challenged under section 34 of the Act of 1996.

(xi) At the stage of execution of the award, a petition was filed without giving the provision of law, but was referrable to section 47 of the CPC, alleging that the arbitral award was a nullity and hence not executable interalia on the ground that the claim of the respondent (decree holder) was already settled at NIL as per the resolution plan read with the various order of NCLT/NCLAT/Supreme Court and therefore nothing was payable to the respondent.

52. It is the case of the petitioner that on 29.03.2018, Resolution Plan was submitted by Vedanta Limited wherein at para 3.8 all claim of operational creditors is settled at "NIL VALUE". On 17.04.2018, the NCLT, Kolkata in C.P. No.361/KB/2017 approved the resolution plan submitted by Committee of Creditor, Bank and other Financial Creditors. The moratorium ends on the acceptance of the Resolution Plan. It was observed in para – 50 of the order passed by the NCLT - "the claims of all the operational creditors settled as NIL". No appeal was preferred by the Respondent. The order dated 17.04.2018 was challenged before the National Company Law Appellate Tribunal, New Delhi, in Company Appeal (AT) (Insolvency) No.175 of 2018 by some of the Operational Creditors but the same was dismissed on 10.08.2018. Various other creditors also approached the NCLAT, New Delhi, in Company Appeal (AT) (Insolvency) No.265 of 2018 and analogous cases on the ground that in the resolution plan, the

resolution applicant has not taken proper care of the operational creditors. Those appeals were also dismissed vide order dated 20.08.2018 observing therein that the "Resolution Plan" having already been approved at different levels was already acted upon, and the appellate tribunal was not inclined to decide individual claim in the appeals and the appeals were dismissed. The Hon'ble Supreme Court of India dismissed the Civil Appeal No.113 of 2019 challenging the order of the NCLT and NCLAT on 27.11.2019 (Annexure – 7).

53. It is not in dispute that the secured creditors of erstwhile Electrosteel Steel Limited invoked the proceeding under ***Insolvency & Bankruptcy Code, 2016*** before the ***National Company Law Tribunal, Kolkata Bench;*** vide order dated 21.07.2017, moratorium was imposed under Section 7 & 13 of the IBC, 2016; the respondent also filed its claim for Rs. 4.34 Crore before interim resolution professional out of which claim of Rs. 2.84 Crore was rejected and a claim of Rs. 1.59 Crore was admitted by the Resolution Professional and the resolution plan was approved.

54. The approved resolution plan has been placed on record. This document is not in dispute. What is to be examined is as to how the claim of the respondent has been ultimately dealt with in the resolution plan.

clause 3.2(v) of the resolution plan provided that the Liquidation Value was not sufficient to cover debt of the Financial Creditors of the Company in full, therefore, the Liquidation Value of the Operational Creditors or the other creditors or stakeholders of the Company ,including dues to employees (other than workmen), government dues, taxes, etc. and other creditors and stakeholders) is NIL and therefore, they will not be entitled to receive any payment. The para is quoted as under: -

> *"(v) Further, while the Liquidation Value of the Company is INR 2,899.98 Cr, the Admitted Debt for Financial Creditors aggregates to approximately INR 13,395.25 Cr. Accordingly, the Liquidation Value is not sufficient to cover debt of the Financial Creditors of the Company in full. Therefore, the Liquidation Value of the Operational Creditors or the other creditors or stakeholders of the Company (including dues to employees (other than workmen), government dues, taxes, etc. and other creditors and stakeholders) is **NIL** and therefore, they will not be entitled to receive any payment. The Dissenting Financial Creditors will be entitled to receive 21.65% of the value of their Admitted Debt*

("Priority Payment") which will be paid in priority to any payments to the assenting Financial Creditors."

Clause 3.2(xii) of the resolution plan provided as follows:-

"(xii) Notwithstanding the above, upon the approval of the Resolution Plan by the NCLT under Section 31 of the IBC, on and from the Effective Date:

*(A) All pending proceedings relating to the winding-up of the Company shall stand irrevocably and unconditionally abated in perpetuity and all Claims in connection with all violation or breach of any agreement by the Company shall be settled at **NIL** value at par with Operational Creditors as specified in **Section 3.4.ii** of this Resolution Plan."*

Clause 3.4 of the resolution plan dealt with proposal for operational creditor . Clause 3.4 (i) and (ii) is relevant for the purposes of this case which is as under: -

*"3.4 **Proposal for Operational Creditors (excluding employees and Workmen):***

i. *As per the List of Creditors, total claims filed by Operational Creditors (excluding employees and Workmen) aggregate to INR 1,687.69 Cr out of which claims aggregating to INR 782.05 Cr have been verified and admitted for the purposes of CIRP by the Resolution Professional. Accordingly, the total Operational Creditors' Claims may only be partly covered in the Provisional Balance Sheet and that the entire Claims that may have been received from the Operational Creditors may not have been included therein.*

ii. *In terms of the IBC, the payment due to operational creditors should not be less than the liquidation value payable to the operational creditors in the event of a liquidation of the corporate debtor under Section 53 of the IBC. This would imply that the operational creditors have the right to demand amounts that would be payable to them under a liquidation scenario. However, as set out in Section 3.2 of this Resolution Plan above, the Liquidation Value is not sufficient to cover debt of the Financial Creditors of the Company in full, therefore, the Liquidation Value of the Operational Creditors or the other creditors or stakeholders of the Company [including dues to employees (other than Workmen), government dues, taxes] is NIL. Therefore, NIL payment has been proposed under the Resolution Plan towards claims of Operational Creditors (whether filed or not, whether admitted or not and whether or not set out in the Provisional Balance Sheet, the balance sheets of the Company or the profit and loss account statements of the Company or the List of Creditors) and no source has been identified for such payment under this Resolution Plan."*

Clause 3.8 of the of the resolution plan specifically deals with Treatment of amounts claimed under ongoing litigations. It is quoted as under :-

"3.8 Treatment of amounts claimed under ongoing litigations:

*All Claims arising out of inquiries, investigations, notices, causes of action, suits, claims, disputes, litigation, **arbitration** or other judicial, regulatory or administrative proceedings against the Company or the*

affairs of the Company, pending or threatened, present or future and the proceedings ***(under Section 138 of the Negotiable Instruments Act, 1881, the Top 30 Operational Creditor Claims and the Tax related Claims or liabilities specifically set out in Annexure 3 and Annexure 5)*** *in relation to any period prior to the Effective Date or on account of acquisition of control by Vedanta and/or the SPV over the Company pursuant to this Resolution Plan, shall be settled at* ***NIL*** *value at par with the treatment accorded to the Operational Creditors of the Company as set out in* ***Section 3.4.ii*** *of the Resolution Plan."*

Annexure-3 of the resolution plan was giving the list of contingent liabilities of the company which has two columns i.e direct tax litigation and indirect tax litigation.

Annexure- 5 of the resolution plan gives the list of litigations under different columns i.e

Criminal proceedings
Civil proceedings
Service tax proceedings
Central excise matters
Customs duty and entry tax matters
Income tax matters
Arbitration and conciliation
Winding up proceedings
Other matters and notices , and
List of Top 30 Operational Creditor Claims.

55. As per clause 3.8 of the resolution plan, , with regard to the ongoing litigation , what were to be settled at ***NIL*** amongst the list at annexure-3 and 5, were only ***the Tax related Claims or liabilities specifically set out in Annexure 3 and Annexure 5*** but the claim of the respondent was enlisted at serial no. 25 in annexure- 5 under **Arbitration and conciliation** and cannot be termed as ***Tax related Claims or liabilities*** **.**Serial 25 of Annexure-5 of the resolution plan is quoted as as under:-

	Details [No. of cases outstanding]	*Amount involved [In INR Cr]*	*Description*
ARBITRATION AND CONCILIATION			
25.	*Ispat Carriers Private Limited [1]*	*443*	*Arbitration proceedings were commenced regarding claim made by the Ispat Carriers Private Limited. Ispat had objected to appointment of arbitrator, Proceedings stayed. The amount* ***claimed by vendor is INR 4.43 Cr****.* ***As per ESL's ledger, the claim amount is INR 1.20 Cr****. The arbitration proceedings are kept in abeyance due to the order passed by NCLT for insolvency.*

56. It is also important to note that only ***the Top 30 Operational Creditors' Claims*** was settled at **NIL** and the name of the respondent does not figure in the list of top 30 operational creditors enumerated in the list mentioned in the resolution plan, which is quoted as under:-

List of Top 30 Operational Creditor Claims (excluding Employees and Workmen)

No.	Name	Amount (In INR Cr)
1.	Shandong Province Metallurgical Eng	104.985
2.	Electro Steel Castings Limited	212.920
3.	SBI Capital Markets Limited	9.626
4.	Sai Infra Motor Services Pvt Ltd	5.626
5.	A.R. Services Pvt Ltd	1.066
6.	JRL Mining Pvt Ltd	3.482
7.	O.K. Movers & Minerals Pvt. Ltd	4.673
8.	Orissa Bengal Carrier Ltd	0.237
9.	Usha Carriers Private Limited	0.651
10.	Orient Refractories Ltd	0.889
11.	Praxair India Pvt Limited	2.664
12.	Globe Ecologistics Pvt Ltd	0.546
13.	Union Roadways Limited	0.390
14.	Visakha Industrial Gases Pvt Ltd	3.413
15.	S.P. Enterprises	2.910
16.	Royal Infra & Logs	3.207
17.	SRG Earth Resources Pvt Ltd	1.555
18.	MRT Signals Limited	0.892
19.	Sanjay Udyog Pvt Limited	2.303
20.	Hi-Tech Chemicals (P) Ltd	1.379
21.	Classic Freight Carriers	0.065
22.	Texas Enterorises	0.070
23.	Lansea Engineering Pvt. Ltd.	0.359
24.	Singh Enterprises	0.525
25.	IOT Engineering Projects Limited	1.748
26.	Ability Services Private Limited	0.518
27.	Primetals Technogies India Private Limited	0.166
28.	N.R. Construction Pvt. Ltd.	1.374
29.	Dalian Wantong Industrial Equipment	1.558
30.	Isha Enterprises	1.030
	Total	**370.827**

57. Thus, the argument of the petitioner that the dues of the petitioner with respect to the pending arbitral proceedings in the instant case before the West Bengal facilitation council was determined to be **nil**, does not find support from the approved resolution plan placed on record by the petitioner themselves. In such circumstances, there was no occasion for the respondent to challenge the resolution plan. Admittedly, some of the creditors (operational/financial) had challenged the resolution plan with respect to their claim and provisions made in the resolution plan but all such objections /challenges were dismissed and there has been no interference in the approved resolution plan at any stage.

58. Thus, irrespective of maintainability of the objection to arbitral award under section 47 of the CPC, on facts, the Facilitation Council did not lose its jurisdiction to proceed and pronounce the arbitral award on account of approval of the insolvency resolution plan of the petitioner under section 31 of the IBC. This is on account of the reason that the arbitral proceedings were initiated prior to insolvency resolution date, suspended during the moratorium period, resumed upon expiry of the moratorium period and the approved resolution plan did not determine the claim of the respondent as **nil** whose pending litigation before the west Bengal facilitation council was taken note of in the resolution plan. **The point no (c) is accordingly decided against the petitioner and in favour of the respondent.**

No need to enter into the issue as to whether MSME Act will prevail order the IBC.

59. Judgement reported in ***(2020) 3 SCC 210-Kotak Mahindra Bank Ltd. v. Girnar Corrugators Pvt. Ltd.*** deals with the issue as to whether MSME Act has overriding effect on IBC and it has been held that there is no conflict between MSME Act and IBC. In the present case, this court need not deal with the issue as to whether IBC Act will have over-riding effect on MSME Act in view of the fact that there is no occasion to decide this issue as the approved resolution plan neither terminates the pending arbitral proceedings before the facilitation council nor it nullifies the claim of the respondent when seen in the light of the approved resolution plan.

60. In the facts of this case, there is no conflict between the proceedings/ *final award passed by the facilitation council on the one hand* **and** the *manner of dealing with the claim of the respondent under IBC/ approved resolution plan on the other hand*. The only impact was that the arbitral proceedings before the facilitation council remained suspended during the period of moratorium declared under IBC and such suspension of proceedings was in terms of section 14 of the IBC. Moreover, the scope of the present proceedings is very limited and it primarily relates to the issue as to whether the award could be assailed as a nullity in the execution proceedings even when it has not been challenged under section 34 of the Arbitration and

Conciliation Act of 1996 and as to whether the award could be said to be suffering from patent lack of jurisdiction.

The impugned order.

61. The learned court below has rejected the objection to the execution of the arbitral award by recording as follows: -

> **"** *It is also evident from perusal of case record that the judgment debtor has filed the said petition being aggrieved from the award passed by W.B.M.S.M.E. Facilitation Council, Kolkata, then Judgment debtor had opportunity that he would have filed an application under Section 34 of the Arbitration Act of 1996 for setting aside the said arbitral award within the period given in the same but judgment debtor did not do that. So, in the light of Section 35 of the Arbitration Act of 1996 the award passed by W.B.M.S.M.E. Facilitation Council, Kolkata became final and binding on the parties and in view of Section 5 of the Arbitration Act of 1996, the Executing Court or any competent court of law can not entertain any application save and except so provided in part-I of the Arbitration Act 1996 but judgment debtor didn't also do that. It is also settled principle of law that a court executing a decree cannot go beyond the decree. It has already held in the Judgment M/S. Brakewel Automotive components (India) Pvt. Ltd.-V-P.R. Selvam Alagappan, reported in 2017(5) SCC 371 (Para 20) that the executing court cannot act as an appellate court and cannot go beyond the decree. So, in my view, the matter raised by the Judgment debtor in its application dated 14.05.2019 will not be heard in this case. It clearly shows that the Judgment debtor seeks to deprive the decree holder of the fruits of the award and wants to keep case pending unnecessarily and also not mention any tenable ground in its application. Hence, on the basis of above-mentioned facts and circumstances of this case and perused the materials available on records, this court find no merit in the application filed by the Judgment debtor dated 14.05.2019.*
>
> *Having gone through the authorities of law relied by the learned counsel for the Judgment debtor, this court finds that the fact of those cases before the Hon'ble Supreme Court and Hon'ble High Court are identically different from the present case in hand and not applied in Toto in this case. As such, these authorities of law appears not helpful for Judgment debtor.*
>
> *Therefore, the application filed by the Judgment debtor dated 14.05.2019 is hereby dismissed and Judgment debtor is directed to comply the order of award passed on 06.07.2018 by W.B.M.S.M.E. Facilitation Council, Kolkata under Section 31 of the Arbitration, Act, 1996 within 15 days from this order and summit its compliance report in this case on the next*

date. Put up the case record on 23.03.2023 for compliance report by Judgment debtor."

62. The learned court below was of the view that the award was final and binding on the parties and in view of the Arbitration and Conciliation Act, 1996 the executing court or any competent court of law cannot entertain any application save and except so provided in part-1 of the Arbitration and Conciliation Act, 1996 and that the executing court cannot go beyond the decree and ultimately dismissed the objection filed by the petitioner by the impugned order dated 03.03.2023.

63. In view of the findings recorded above, this court is of the considered view that the points raised by the petitioner objecting to the execution of the arbitral award were not fit to be entertained at the stage of execution. The grounds do not fit in the very narrow scope of assailing the award as nullity. The scope of such ground has been dealt in details under point no. (a) with findings at para 32 to 35 above. The points raised to assail the award as nullity required deliberations on fact and law and was certainly beyond the scope of examination at the stage of execution of the arbitral award by the executing court. Even the approved resolution plan which has been referred to and relied upon by both the parties requires interpretation and deliberations on the impact of various clauses. This court has also heard the parties on the merits of the arguments of the petitioner that the award was a nullity, but the petitioner has not been able to convince this court, even prima-facie, that the award was a nullity in the eyes of law when seen in the light of the approved resolution plan as fully discussed above.

64. As a cumulative effect of the aforesaid findings, the impugned order does not call for any interference.

65. This petition is dismissed.

66. Interim order is vacated.

67. Let this order be communicated to the concerned court through FAX/e-mail.

(Anubha Rawat Choudhary, J.)

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