

LALITABEN GOVINDBHAI PATEL & 2 other(s) Versus GUJARAT STATE FINANCIAL CORPORATION & 8 other(s)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**1. R/LETTERS PATENT APPEAL NO. 2480 of 2010
In
R/SPECIAL CIVIL APPLICATION NO. 12979 of 2009**

With

2. R/SPECIAL CIVIL APPLICATION NO. 11116 of 2008

With

**3. CIVIL APPLICATION (FOR ORDERS) NO. 1 of 2010
In R/SPECIAL CIVIL APPLICATION NO. 11116 of 2008**

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE VINEET KOTHARI

and

HONOURABLE MR. JUSTICE B.N. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	YES
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	YES

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Versus

GUJARAT STATE FINANCIAL CORPORATION & 8 other(s)

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APPEARANCE IN LPA NO. 2480 OF 2010:

MR SANDEEP SINGHI WITH MR AS VAKIL(962) for the Appellant(s) No.
1,1.1,1.2,2,3

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MR BH BHAGAT(153) for the Respondent(s) No. 3,9
MR RD DAVE(264) for the Respondent(s) No. 2
MR PRANAV G DESAI(290) for the Respondent(s) No. 4
MR ABHIJIT P JOSHI for the Respondent No.6
MR NANDISH Y CHUDGAR(2011) for the Respondent(s) No. 5
MR DEVANG D TRIVEDI(2503) for the Respondent(s) No. 1

APPEARANCE IN SPECIAL CIVIL APPLICATION NO.11116 OF 2008

Mr. DEVANG TRIVEDI For the Petitioner (s) No.1
Mr. SOAHM JOSHI, AGP for Respondent (s) No.3, 15
NOTICE SERVED 3
RULE NOT RECEIVED BACK 2
RULE SERVED 8, 9
Mr. R.D. DAVE for the Respondent No.5
Mr. G.M. JOSHI for the Respondent No.6
Mr. K.M. PARIKH for the Respondent No.10
Mr. A.S. VAKIL for the Respondent (s) No.11-13, 14
Mr. ABHIJIT P. JOSHI for the Respondent No.16
Mr. NANADISH Y. CHUDGAR For the Respondent No.1
Mr. ASHISH H. SHAH for the respondent No.7
Mr. DIPEN C. SHAH for the respondent No.6

CIVIL APPLICATION NO.1/2010

MR. DEVANG TRIVEDI For the Appellant
Mr. SOAHM JOSHI, AGP For the Respondent-State
Mr. G.M. JOSHI for the Respondent
Mr. K.M. PARIKH for the Respondent
Mr. A.S. VAKIL for the Respondent
Mr. NANDISH Y. CHUDGAR for the Respondent
Mr. ASHISH H. SHAH for the Respondent

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CORAM:**HONOURABLE DR. JUSTICE VINEET KOTHARI**
and
HONOURABLE MR. JUSTICE B.N. KARIA

Date : 26/07/2021

CAV JUDGMENT
(PER : HONOURABLE DR. JUSTICE VINEET KOTHARI)

1. The aforesaid Letters Patent Appeal No.2480 of 2010,
Lalitaben Govindbhai Patel and others Vs. Gujarat State

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Financial Corporation and others has been filed by the Guarantors-Shareholders of the Defaulter Company - **M/s. Ganpati Pulp and Paper Mills Limited (GPPML)** (now in liquidation) with the Official Liquidator attached to High Court of Gujarat, aggrieved by the order of the learned Single Judge dated **06.10.2010 (Coram: Hon'ble Mr. Justice K.S. Jhaveri)** in Special Civil Application No.**12979 of 2009 - Lalitaben Govindbhai Patel and others Vs. Gujarat State Financial Corporation and seven others.**

2. The said Special Civil Application No.**12979 of 2009** was filed by the petitioners - Guarantors-Shareholders of **GPPML** challenging the One Time Settlement dated **10.06.2009** between **Gujarat State Financial Corporation (GSFC)** and **M/s.Shree Industries Limited.**

3. Though this case has a chequered history, but we need not to go into all the details of facts in view of the order proposed to be passed by us in this case, and therefore, we would quote our previous interim orders in the said Letters Patent Appeal No.**2480 of 2010** itself and extracts of the learned Single Judge's order impugned in the Letters Patent

Appeal as also the Written Submissions of the learned Counsels for giving a perspective, background and relevant facts of the case.

4. The learned Single Judge, vide order dated **06.10.2010**, dismissed the said writ petition filed by the Guarantors-Shareholders with the following observations:

“8. *As a result of hearing and perusal of the record certain facts are undisputed. **The petitioners herein are guarantors of the default unit M/s Ganpati Pulp and Paper Mills Ltd.** The possession of the mortgaged properties of GPPL were taken over by GSFC under section 29 of the SFC Act in the year 1986.*

8.1 *The respondent no.1 GSFC accepted the offer of respondent no.5 SIL for transfer of the said mortgaged properties of GPPL, under Section 29 of the SFC Act for an amount **of Rs.3.88 Crores.** Out of the said amount, **Rs.50 lacs were to be paid** immediately at the time of taking possession of the properties and the balance **amount of Rs.338 lakhs** in the nature of loan to be paid in six years by way of half yearly equal installments carrying interest at the rate of 14% per annum.*

8.2 *For the said purpose charge was created on the said properties transferred to SIL. **The SIL paid a total sum of Rs.3,45,72,307 till the year 1996.** In the*

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*meanwhile SIL had taken **term loan of Rs.56 lakhs from IFCI, Rs.47 lakhs from Punjab National Bank and Cash Credit Facility of Rs.150 lakhs from Punjab National Bank.** For the said purpose, **pari passu charges against the properties transferred to it by GSFC were created in favour of IFCI and Punjab National Bank and second charge for working capital.** The said charge was created with the consent of GSFC, GIIC, Dena Bank and Bank of Baroda who were the members of the consortium.*

8.3 *In the year **1997 SIL became financially sick** and was thus declared as “**Sick Industrial Company**” by **BIFR** under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. In the year 2007 BIFR passed an order whereby it was held that GSFC is a secured creditor of SIL and requested GSFC to participate in reconstruction and revival of SIL. Even though the said order was challenged before AAIFR by GSFC, the same came to be upheld. GSFC therefore filed Special Civil Application No.11116 of 2008 in this Court challenging the order of AAIFR dated 2nd May 2008. The said petition is pending.*

8.4 ***Admittedly there are outstanding dues which are bad debt.** Such dues could be recovered by GSFC and they could also take possession of the property especially in view the order of this Court and orders of BIFR and AAIFR.*

8.5 ***GSFC had floated several One Time Settlement***

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Schemes. *One of the schemes was with regard to purchasers of assets taken over by Corporation and sold under Section 29 of the SFC Act. **SIL therefore applied for availing the said One Time Settlement.***

8.6 *In pursuance of the said application of SIL and the OTS Schemes prevailing with regard to GSFC, **the Board of GSFC accepted the application for OTS of SIL since the prerequisites for applicability of the said OTS were fulfilled by SIL.** GSFC vide letter dated **12th May 2009** conveyed to SIL that as per the OTS Scheme the final amount payable by SIL to GSFC was worked out to **Rs.67,07,599/-** as on **31st December 2008.** 25% of the said OTS amount was to be paid as down payment and the balance was to be paid in 4 monthly installments. Vide letter dated 14th June 2009 SIL accepted the terms and conditions of the OTS and other conditions as conveyed by GSFC's letter dated 12th May 2009 and also submitted post dated cheques. By 12th October 2009 the last of the four post dated cheques was realized in favour of GSFC **and thus the entire amount as per the OTS was paid to GSFC by SIL.** Thus, the full payment has already been made by SIL. The OTS Scheme is a policy decision of the respondent no.1 and therefore the respondent no.1 was justified in settling the claim in OTS Scheme which was admittedly bad debt. I am also of the view that because of pendency of proceedings, there may be further delay and even on commercial point of view the course adopted by GSFC is just and proper.*

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- 8.7 *Before proceeding further, it is required to be noted that **the petitioners have failed to establish their locus standi to challenge settlement between GSFC and Shree Industries Limited.** They are not in a position to point out anything from the record that their rights much less fundamental rights are violated in any manner whatsoever by settling the claim as per the policy of GSFC.*
- 8.8 *It is also required to be noted that **the properties of GPPL were taken over and sold by Public Auction under section 29 of the SFC Act** by GSFC in the year 1990. The said action was not challenged at the relevant time, nor even today by GPPL and it is not open for the petitioners to challenge the same at this stage.*
- 8.9 *There were **two separate and independent transactions by GSFC.** Firstly, action under **section 29** of taking over the properties of **GPPL** and sale by Public Auction by GSFC, in the year 1990, **for Rs.3.88 crores** in favour of SIL. Therefore the rights of GSFC were crystallized from the date on which the possession is taken over and the liability of the original debtor and the guarantors is fixed and crystallized.*
- 8.10 *Secondly there was settlement pursuant to **OTS between GSFC and SIL for balance unpaid amount.** Neither GPPL nor its guarantors are concerned with it because the “realization “ of dues of GPPL by Auction Sale under section 29 of the Act had already been placed in 1990 and amount of sale i.e. Rs.3.88 crores*

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was realized and given credit of towards the dues of GPPL in the year 1990 itself.

8.11 **Now by settling with SIL, GSFC is neither increasing nor decreasing the balance liability of GPPL nor its guarantors. It remains crystallized for Rs.3.88 crores as of 1990. The rights were crystallized under section 29(2) of the SFC Act in 1990. Therefore the settlement or OTS does not and cannot affect any right or interest of the petitioners and they are not at all concerned with it.**

8.12 *It is also required to be noted that as of from the year 1990 the suits were pending.*

8.13 *The respondent No.1 Gujarat State Financial Corporation had introduced One Time Settlement (OTS) Scheme to the purchasers of assets taken over by the Corporation and sold under section 29 of the SFC Act. This scheme was floated in view of the fact that there are a few cases in which Corporation has sold assets in auction and purchasers have not made full payment after making initial down payment. Many purchasers have made default and requested for one time settlement. The assets are old and are getting depreciated with passage of time. Moreover it was reported that the recovery position of the Corporation had declined considerably affecting cash flow. It is under these circumstances that the One Time Settlement Scheme has been introduced. **The SIL was a defaulter. The property in question had already***

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been taken over by the respondent no.1. The SIL had requested for availing of OTS Scheme. Since the SIL complied with all the criteria stipulated in the OTS Scheme **the respondent no.1 has accepted the said proposal and the payment has already been made.** It is not the case that the by granting OTS Scheme to SIL the respondent no.1 has suffered loss or it had adversely affected the petitioners.

8.14 It is required to be noted that the petitioners have not pointed out anything from the record as to how their rights are affected or violated, **much less their fundamental rights by acceptance of SIL's application by GSFC to avail the OTS scheme floated by GSFC.**

9. **As regards challenge to the order dated 19th February 2007 and 2nd May 2008 is passed by BIFR and AAIFR are concerned, they cannot be accepted.** The said orders were passed in the Reference Proceedings with regard to revival of Shree Industries Limited with which the present petitioners are neither affected nor concerned with. **The said orders also do not affect the right, much less the fundamental rights of the petitioners,** and therefore the petitioners have no right to challenge the same in the present petition. Further the petitioners were not parties in the said Reference proceedings before BIFR or AAIFR inasmuch as they are not concerned with the said proceedings or the outcome thereof.

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10. *In the present case the property was already taken over by respondent no.1 GSFC and the settlement was as per OTS Scheme. The OTS scheme was not only for the respondent no.5 alone, but for other defaulters also. No irregularity is found in settling the matter as per the policy of the respondent no.1. Therefore the decisions cited by the petitioners are not applicable to the facts of the present case.*
- 10.1 *A contention has been raised on behalf of the petitioners that the **property should be taken back and fresh auction may be held and** the difference amount may be credited to their account. **This contention is totally misconceived** inasmuch as the price of the property as on the date of auction is realized and rights and liabilities of parties are crystallized. Assuming that a second auction is required then the benefits thereof will go to respondent no.2 and they cannot go to petitioner or Ganpati Pulp and Paper Mills Limited, the respondent no.6 herein. The rights were crystallized in auction in 1990, and only on the ground of pendency of proceedings and default by new purchaser, the petitioner cannot get any right to challenge the same. Further, in view of the restraint order passed by this Court in the above mentioned Special Civil Application, a prudent decision is taken, which cannot be faulted.*
11. *In the premises aforesaid, **I do not find any merits in the present petition.** The same is therefore dismissed. Notice is discharged with no order as to costs. Order of status quo stands vacated.*

12. *At this stage, Mr. Mihir Joshi, learned Senior Counsel, requests for extension of interim relief for approaching higher forum. However, **since the other petition i.e. Special Civil Application No.11116 of 2008 is pending** and the same is listed for hearing on 18th October 2010 it will not be appropriate to extend the interim relief. Hence the prayer is rejected.*”

5. In the present Letters Patent Appeal, a Coordinate Bench of this Court had initially passed the *status quo* order on **13.12.2010 (Coram: Hon’ble the Chief Justice Mr.S.J. Mukhopadhaya and Hon’ble Mr. Justice K. M. Thaker)**. The said order is also quoted below:

*“Taking into consideration the fact that for the very same mortgaged property in question, as another writ petition, Special Civil Application No. **11116 of 2008, has been preferred by the Gujarat State Financial Corporation, they sought to withdraw the said writ petition, but were not allowed due to objection raised by the appellant, and in this appeal, as the question of sale of this very property is involved, it will be desirable if both the cases are heard together.***

We accordingly direct to list these cases for hearing along with Special Civil Application No. 11116 of 2008 before the Division Bench on 21.12.2010 at 02.30 p.m. for final disposal. Until further order, the parties shall maintain status quo with

regard to the property in question.”

6. The said interim order came to be modified after detailed hearing by the Division Bench to which one of us (**Vineet Kothari, J.**) was a party on **17.02.2021**, vide **Paragraph-13** of the said order. Since different detailed interim orders were passed in the present case in sequence, the four of such detailed interim orders passed in the matter leading to the proposed order passed by us for facilitating the transfer of all the proceedings to the **National Company Law Tribunal (NCLT), Ahmedabad**, which is the expert fact finding Tribunal constituted under the provisions of the New & Special Law viz. **Insolvency and Bankruptcy Code, 2016** in terms of the decision of the Hon'ble Supreme Court in the case of **Action Ispat and Power Private Limited Vs. Shyam Metalics and Energy Limited** reported in **(2021) 224 Comp Cases 35 (SC)**. We quote below all the four interim orders passed by Division Benches in this case at seriatum:

(i) Order dated 04.02.2021 passed in LPA No.2480 of 2010 with other connected matters:

*“1. The present intra-Court appeal arises out of the order passed by the learned Single Judge on **06.10.2010**, in*

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*which, first, an interim order was passed by the coordinate Bench of this Court headed by the Hon'ble Chief Justice, by which the **order passed by the learned Single Judge was stayed until further orders.** The said stay order in the matter is operating for the last **ten years.***

2. *The matter, essentially, arises out of recovery action by secured creditors and financial institutions, who extended financial help to the original borrowers / guarantors – Lalitaben Govindbhai Patel and others (Guarantors) to secure the loan given by Gujarat State Financial Corporation and others in favour of borrower, Respondent No.4 – M/s. Ganpati Pulp and Paper Mills Ltd. The said Borrower Company, upon default, went into liquidation by the winding-up order passed by this Court. The action under section 29 of the State Financial Corporation Act, 1951 was taken and the Assets of the said Borrower – M/s. Ganpati Pulp and Paper Mills Ltd., were taken over and the same were sold by GSFC in favour of Respondent No.5 – M/s. Shree Industries Ltd.*

3. ***A part of the sale consideration was converted into loan and the said purchaser – M/s. Shree Industries Ltd. also defaulted and the said purchaser / borrower approached the BIFR / AAIFR** under the provisions of the Sick Industrial Companies (Special Provisions) Repeal Act, 1985, as it then existed and while the proceedings were pending before the BIFR / AAIFR, a new law in the form of the **Insolvency and Bankruptcy Code, 2016 (for short, “the IBC, 2016”)** came to be*

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enacted by the Parliament and the proceedings regarding insolvency Resolution / Recovery from the defaulting corporate debtor on its winding-up were to be taken up by the National Company Law Tribunal (NCLT), which was constituted under the provisions of Section 408 of the Companies Act, 2013.

4. *Section 408 of the Companies Act, 2013 stipulates that the NCLT shall exercise such powers and functions as may be conferred on it by the provisions of the Companies Act, 2013 or any other law for the time being in force. Under the provisions of IBC, 2016, the NCLT is designated and defined as the Adjudicating Authority and thus, has all the relevant powers to deal with these issues.*

5. *In these circumstances, in view of the matrix of facts involved in the present case, where several of the secured creditors or financial institutions are yet to recover their amounts from the First Defaulter Company and Second Defaulter Company, the proceedings against the Second Defaulter – M/s. Shree Industries Ltd. appear to have abated by virtue of The Eight Schedule under section 252 of the IBC, 2016, by which the Sick Industrial Companies Act (Special Provisions) Repeal Act, 2003 came to be amended and which provided as under:-*

“In Section 4, for sub-clause (b), the following sub-clause shall be substituted namely - “(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate

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*Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) **shall stand abated;***

*Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause **may make reference to the National Company Law Tribunal** under the Insolvency and Bankruptcy Code, 2016 within one hundred and eight days from the commencement of the Insolvency and Bankruptcy Code, 2016:*

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under the clause.”

6. *As per the aforesaid provision, it appears that the Company, whose reference was pending before the BIFR / AAIFR, could make a reference to the NCLT under the provisions of the IBC, 2016, within 180 days from the **date of commencement of the IBC, 2016, which is 28.05.2016.***
7. *If the said Company, whose reference is pending before the BIFR / AAIFR, does not make such reference to the NCLT, then what happens to the pending proceedings*

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*seems to have not been specified in the provisions of the IBC, 2016 or other relevant laws. **Whether the abatement will become final or such pending proceedings could be referred to the NCLT, by any of the parties or by the Court, is a question for our consideration.***

8. *In these circumstances, as prayed by the learned counsel, we grant some time to them to make submissions on the **following points :-***

*(i) **Whether** any proceedings, in any manner, in respect of the Assets of the Company in question – M/s. Ganpati Pulp and Paper Mills Ltd or M/s. Shree Industries Ltd., are pending before the NCLT or not and if the **proceedings are pending**, the details and status of the same may be placed before the Court ?*

*(ii) **If no such proceedings** are pending before the NCLT as of now, **whether this Court can refer the entire matter to the NCLT and direct it to decide all the questions of law involved in the present case and the questions of facts, including the respective rights of the secured creditors, leaving it open to the parties** to raise their respective claims / counter-claims and defences before the NCLT at this stage or not ?*

9. *Put up on **09.02.2021** on the top of the Board, as prayed.”*

(ii) Order dated 17.02.2021 passed in LPA No.2480 of 2010 with other connected matters:

- “1. We have heard this matter at length on **04.02.2021**, **09.02.2021** and today, **17.02.2021**. All the learned counsels have made **detailed submissions about the possibility of transfer of proceedings to the National Company Law Tribunal (NCLT)** under the provisions of the Insolvency and Bankruptcy Code, 2016 and the latest judgment of the Hon'ble Supreme Court in the case of **Action Ispat and Power Pvt. Ltd. V. Shyam Metalics and Energy Ltd. reported in (2021) 224 Comp Cases 35 (SC)** was also placed for our consideration.
2. We have perused that judgment in detail and vide **Paragraph-22** of the said judgment, which is quoted below, the conclusion of the Hon'ble Supreme Court in the aforesaid case, after discussing the **previous three judgments** in (i) Jaipur Metals & Electricals Employees Organization V. Jaipur Metals & Electricals Ltd. reported in **(2019) 4 SCC 227**, (ii) Forech India Ltd. V. Edelweiss Assets Reconstruction Co. Ltd. reported in **2019 (18) SCC 549** and (iii) M/s. Kaledonia Jute & Fibres Pvt. Ltd. V. M/s. Axis Nirman & Industries Ltd. and Others reported in **AIR 2021 SC 32**, is that the proceedings of winding-up pending in the High Court under The Companies Act, 2013, can be transferred to the NCLT on the application of any of the parties in exercise of discretion under the **5th proviso to Section 434(1)(c)**

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*of The Companies Act, 2013, unless the winding-up proceedings pending before the High Court in respect of the **Company is at an irreversible stage of winding-up and the High Court finds that it would amount to setting the clock back at that stage.** If the proceedings are pending in the High Court at such **an advanced stage, the Company Court must proceed with the winding-up** instead of transferring the proceedings to the NCLT to be decided in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016. **Whether such a stage is reached or not would depend upon the facts and circumstances of each case.***

3. **Paragraph-22** of the aforesaid judgment is quoted below for ready reference:-

*“22. Given the aforesaid scheme of winding up under Chapter XX of the Companies Act, 2013, it is clear that several stages are contemplated, with the Tribunal retaining the power to control the proceedings in a winding up petition even after it is admitted. Thus, in **a winding up proceeding** where the petition has not been served in terms of **Rule 26 of the Companies (Court) Rules, 1959** at a preadmission stage, given the beneficial result of the application of the Code, **such winding up proceeding is compulsorily transferable to the NCLT to be resolved under the Code.** Even post issue of notice and pre admission, the same result would ensue.*

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*However, post admission of a winding up petition and after the assets of the company sought to be wound up become in **custodia legis** and are taken over by the Company Liquidator, section 290 of the Companies Act, 2013 would indicate that the Company Liquidator may carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company, and **may even sell the company as a going concern**. So long as no actual sales of the immovable or movable properties have taken place, nothing irreversible is done which would warrant a Company Court staying its hands on a transfer application made to it by a creditor or any party to the proceedings. It is only where the winding up proceedings have reached a stage where it would be irreversible, **making it impossible to set the clock back that the Company Court must proceed with the winding up**, instead of transferring the proceedings to the NCLT to now be decided in accordance with the provisions of the Code. Whether this stage is reached would depend upon the facts and circumstances of each case.*

*23. In the facts of the present case, the concurrent finding of the Company Judge and the Division Bench is that despite the fact that the liquidator has taken possession and control of the registered office of the appellant company and its factory premises, records and books, **no irreversible***

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steps towards winding up of the appellant company have otherwise taken place. This being so, the Company Court has correctly exercised the discretion vested in it by the 5th proviso to section 434(1)(c). Resultantly, civil appeal arising out of SLP (Civil) No.26415 of 2019 stands dismissed.

Civil Appeal Nos. 4042-4043 of 2020 (arising out of SLP (Civil) Nos. 2033-2034 of 2020):

Given the fact that the matter has been **transferred by the High Court to the NCLT to verify the necessary facts and circumstances of the case**, after which relief can be given to the appellant herein, we do not find any reason to interfere with the aforesaid order. The appeals are therefore dismissed.”

4. The earlier judgments of the Hon'ble Supreme Court, which were discussed and referred by the Hon'ble Supreme Court in the aforesaid case, were in the cases of:-

(i) Judgment rendered by the Delhi High Court in the case of *Rajni Anand V. Cosmic Structures Limited*, C.P. No.152 of 2016, decided on 27.09.2018 reported in **[2018] 150 SCL 530 (Delhi)**.

(ii) *Jaipur Metals & Electricals Employees Organization V. Jaipur Metals & Electricals Ltd.*

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reported in (2019) 4 SCC 227.

(iii) Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd. reported in 2019 (18) SCC 549.

(iv) M/s. Kaledonia Jute & Fibres Pvt. Ltd. V. M/s. Axis Nirman & Industries Ltd. reported in AIR 2021 SC 32.

(v) Swiss Ribbons Pvt. Ltd. and Anr. V. Union of India & others reported in (2019) 4 SCC 17.

(vi) Innoventive Industries Ltd. V. ICICI Bank reported in (2018) 1 SCC 407. (vii) Arcelor Mittal (India) (P) Ltd. V. Satish Kumar Gupta reported in (2019) 2 SCC 1.

5. *After referring to the aforesaid judgments, the Hon'ble Supreme Court laid down the legal position as given in paragraph-22 quoted above.*

6. *We have sought the assistance of learned counsels **Mr. A.S. Vakil, Mr. B.H. Bhagat, Mr. Abhijit Joshi, Mr. Nandish Chudgar and Mr. Devang D. Trivedi appearing** in the present case before us for the respective parties on the issue whether the provisions of the Sick Industries Companies Act (Special Provisions) Repeal Act, 2003, as amended by Section 252 of the Insolvency and Bankruptcy Code, 2016 with effect from 01.12.2016 – the date notified for the purpose of Section*

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4(b) of the Sick Industries Companies Act (Special Provisions) Repeal Act, 2003, can be transferred to the NCLT, at this stage.

- 7. We have also summoned the record of the winding-up petition, namely, Company Petition No.139 of 1985, M/s. Shethna Enterprises V. M/s. Ganpati Pulp and Paper Mills Ltd., in which a winding-up order was passed by a learned Single Judge as Company Court on 12.03.1986. The Office may place the record of the said winding-up petition before us on the next date.**
8. Mr. Abhijit Joshi, learned counsel appearing for the Official Liquidator, also submits that a Status Report was filed in this Letters Patent Appeal in March 2011, along with the copy of the winding-up order dated 12.03.1986. He submitted that the Secured Creditor, **Gujarat State Financial Corporation, had sold the Assets** of the said defaulting Company, Respondent No.6 – M/s. Ganpathi Pulp and Paper Mills Ltd., under Section 29 of the State Financial Corporation Act, 1951, **without the permission of the Company Court.**
9. However, this submission was disputed Mr. Devang Trivedi, learned counsel appearing for Respondent No.1 – Gujarat State Financial Corporation and Mr. Nandish Chudgar, learned counsel appearing for Respondent No.5 – M/s. Shree Industries Ltd., the Auction Purchaser under section 29 of the State Financial Corporation Act, 1951. He further submits that the **Official Liquidator has not yet invited claims of the other creditors, etc. with**

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*respect to the wound-up Company, Respondent No.6-
M/s. Ganpathi Pulp and Paper Mills Ltd.*

10. *In these circumstances, we direct the Official Liquidator of the said Company - M/s. Ganpathi Pulp and Paper Mills Ltd. to produce before us the **latest Status Report** of the winding-up proceedings of the said Company, along with the **copies of the relevant orders** passed by this Court, before the next date of hearing and apprise the Court about the stage of the winding-up proceedings, so **that an appropriate decision in** accordance with paragraph-22 of the judgment of the Hon'ble Supreme Court in the case of Action Ispat and Power Pvt. Ltd. (supra) **can be taken by this Court** while disposing of this Letters Patent Appeal either by remitting the matter to the NCLT or otherwise.*

11. *It was also submitted before us by **Mr. B.H. Bhagat**, learned counsel appearing for Respondent No.9 – **M/s. ASREC (India) Ltd.**, i.e. the **Assignee of another Secured Creditor – Bank of Baroda**, Respondent No.3 before us, that while the dues of other Secured Creditors or Banks, GIIC, etc. were settled by Respondent No.5 – Shree Industries Ltd. after the said Auction Purchaser also defaulted in repayment of the loan of Respondent No.1 – Gujarat State Financial Corporation, as the **purchase price** under section 29 of the State Financial Corporation Act, 1951 **was converted into a Term Loan** to Respondent No.5 – M/s. Shree Industries Ltd., but the dues of the Assignee of Bank of Baroda, Respondent No.3 and some other Secured Creditors were*

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*not settled. He also referred to some proceedings before the Delhi High Court and the purported Settlement between said **Bank of Baroda / Assignee – M/s. ASREC (India) Ltd.** with M/s. Shree Industries Ltd. by referring to the order of the Division Bench of the Delhi High Court and submitted that even that Settlement did not fructify and M/s. Shree Industries Ltd. did not pay up according to the said Settlement to the Assignee of Bank of Baroda – Respondent No.9. He submitted that the present **Letters Patent Appeal is pending in this Court for the last more than ten years** and because of the interim order of Status Quo granted by the Coordinate Bench of this Court, firstly, on **22.10.2010** and again on **13.12.2010** headed by the Hon'ble Chief Justice at that relevant time and in view of that interim order, which is continuing even now, the said Assignee of Respondent No. 3 – ASREC (India) Ltd., which steps into the shoes of the Secured Creditor - Bank of Baroda, is unable to even negotiate or settle with the said Respondent No.5 – Shree Industries Ltd. and in the interest of justice, the said blanket Status Quo order deserves to be modified and at least these parties should be directed to undertake the negotiations for Settlement of the dispute of the said Secured Creditor, the Assignee of Bank of Baroda – M/s. ASREC (India) Ltd. and such other Secured Creditors who are waiting for recovery even through such Settlement and have not yet given their **'No Dues Certificate'** in favour of Respondent No.5 – Shree Industries Ltd.*

12. This submission was opposed, initially, by Mr. A.S.

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Vakil, learned counsel for the Appellants, who are the Guarantors for the loan of Borrower – Ganpati Pulp and Paper Mills Ltd., now in liquidation. He submits that since this interim order, in the form of Status Quo order, is continuing since last about ten years, let the present Letters Patent Appeal be finally decided and till then, the interim order be continued.

13. **After hearing the learned counsels and taking a holistic view of the matter, we are of the considered opinion that** since the final decision of the matter, either at the hands of this Court or at the hands of the NCLT, even if the proceedings were to be transferred to the NCLT, **may take considerably long period from now, no useful purpose will be served by continuing with the aforesaid blanket Status Quo order,** which is continuing in this Letters Patent Appeal for the last more than **ten years**, which, in turn, has not permitted any further negotiations or development or even use of the Assets, as it was informed to us that the production activity of the Respondent No.5 – Shree Industries Ltd. is also stopped for the last 8 – 10 years. This, prima facie, means that while the **productive Assets of the Company are going junk because of disuse and no effective resolution of the matter is happening,** either by payment to the Secured Creditors and other Creditors nor the Secured Creditors are allowed to take further recovery measures, subject to the rights and contentions of the various parties involved in the matter, therefore, as an interim measure at this stage, we feel it appropriate to modify the aforesaid blanket Status Quo

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order in the following manner:-

*(I) **We direct the Respondent No.5 – Shree Industries Ltd. and the Respondent No.9 – ASREC (India) Ltd., the Assignee of Bank of Baroda and other Secured Creditors, who have not yet been finally settled and paid off by the Respondent No.5 – Shree Industries Ltd., to undertake the negotiation process for Settlement of the dues of such Secured Creditors and try to settle the dues of such Secured Creditors in the interregnum period.** If the Settlement can be arrived at, let such Settlement Document be produced before this Court. If, however, such Settlement is not possible, at least the details of the efforts made for that purpose and the reasons for not arriving at the Settlement, may also be produced in the form of Status Report by the concerned parties before this Court. To that extent, the earlier Status Quo orders dated 22.10.2010 and 13.12.2010 passed by the Coordinate Bench of this Court in the present Letters Patent Appeal No.2480 of 2010 shall stand modified.*

(II) The Settlement, if any, arrived at now under the aforesaid modification of the Status Quo order shall remain subject to the final decision of this Letters Patent Appeal and such further orders as this Court deems appropriate to be passed later on.

*14. The learned counsel for the Official Liquidator has already been directed to produce before us the **latest***

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Status Report of the winding-up proceedings taken with regard to the Company in liquidation, namely, M/s. Ganpati Pulp and Paper Mills Ltd.

15. The record of the winding-up petition being **Company Petition No.139 of 1985**, M/s. Shethna Enterprises V. Ganpati Pulp and Paper Mills Ltd. and other related Interim Applications, if any, filed in that winding-up petition, along with the Court orders passed therein, may also be placed before us along with the record of this Letters Patent Appeal on the next date of hearing.
16. All the learned counsels appearing in the present case before us are **requested to file their Brief Note of Submissions**, along with the copies of the relevant Court orders and the judgments / citations, which they want to rely by the next date of hearing, in hard-copies, after exchanging copies with the other learned opposite counsels appearing in this matter. Learned counsels Mr. HM Bhagat and Mr. Nandish Chudgar are further directed to place on record the copies of the relevant documents and the Court orders with regard to the earlier compromise efforts made by Respondent No. 5 – Shree Industries Ltd. and the Secured Creditors like Respondent No.9 and Bank of Baroda and other Secured Creditors, if any, before this Court or any other Court as well.
17. The **Original Title Deeds of the properties in question**, which are said to be in possession of Respondent No.1 – **Gujarat State Financial**

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Corporation, will not be handed over to any party except with the leave of this Court.

18. *The matter shall be treated as Part-Heard. Put up on 15.03.2021, as prayed.”*

(iii) Order dated 07.06.2021 passed in LPA No.2480 of 2010 with other connected matters:

“1. *Learned counsel for the M/s.Shree Industries Ltd., Mr. Nandish Chudgar submitted that due to Covid situation the earlier directions of this Court in the Order dated **17.2.2021** for making sincere efforts for settlement of the dues of Respondent No.9 - M/s. ASREC (India) Ltd., the Assignee of Bank of Baroda and other secured creditors who have not yet been finally settled and paid off by the Respondent No.5 – Shree Industries Ltd., such efforts could not be made. He submits that the Respondent No.5 – Shree Industries Ltd. has genuine intention to make these settlement efforts, but for the **Covid situation which had severe travel restrictions** therefore, such steps could not be taken though certain mails have been exchanged between these parties. He, therefore, prays for some more time to comply with these directions and produce the Report of such settlement/efforts made for the same on the next date of hearing by both the parties.*

2. *Learned counsel appearing for the said Respondent No.9 **Mr.B.H Bhagat** however submitted that the meeting*

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with Time, Date and Venue fixed may be fixed by the Court today, so that further steps for the said intention expressed by Respondent No.5 – Shree Industries Ltd., can be given concrete shape.

3. *In view of these submissions, let the meeting of these parties and other related parties as indicated in the Order dated **17.2.2021** passed by this Court take place at Bombay in the office of Respondent No.9 M/s. ASREC (India) Ltd., on **24th and 25th June 2021 at 11:00 a.m.** It is expected that the concerned parties involved in this dispute particularly, Respondent No.5 and Respondent No.9 shall make it a point to convene and hold such meeting and proceed further in appropriate manner in the letter and spirit of the earlier directions of this Court and undertake the process of settlement of the dues as indicated in the said Order dated 17.2.2021. Let the Report of such meeting be filed by both these parties and be placed before this Court on the next date of hearing.*
4. *List the matter again on 1.7.2021.*
5. *A copy of the Report to be submitted to this Court shall be supplied to all the other learned Counsels appearing in the matter.”*

(iv) Order dated 01.07.2021 passed in LPA No.2480 of 2010 with other connected matters:

“In this case, a detailed order was passed by Coordinate Bench of this Court of which one of us was party (Justice Vineet Kothari) on 17.02.2021 (which is not quoted again to avoid repetition, as already quoted above).

Thereafter, again on **07.06.2021**, an order was passed by this Bench (which is not quoted again to avoid repetition, as already quoted above).

*“In pursuance of the order dated **07.06.2021**, it seems that the **Respondent No. 9- M/s. ASREC (India) Limited** and **M/s. Shree Industries Limited (SIL)** have held the Meetings on **25.06.2021 and 26.06.2021** as directed by this Court, but it appears that no fruitful settlement could be arrived at in the said Meetings vide the compilation of Mails and Minutes of Meetings filed by Mr. S. H. Bhagat, learned Counsel appearing for the **M/s. ASREC (India) Limited** with the correspondence ranging from **14th June to Meeting dated 26.06.2021**.*

*Learned Counsel for M/s. Shree Industries Limited (SIL) Mr. Nandish Y. Chudagar also appears to have himself attended the said meeting on **25.06.2021** at **11.00 a.m.** at Mumbai Office of ASREC (India) Limited along with four others namely Mr. G. Manjunatha Reddy, Senior Vice President of ASREC (India) Limited; Mr. Rajesh Bichitkar, V.P. Legal of ASREC (India) Limited; Mr. Pramod Aggarwal, Chartered Accountant of Shree Industries Limited (SIL); Mr. Ravi Mittal, Director of M/s. Shree Industries Limited (SIL) and Mr. Nandish Chudgar,*

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Advocate of M/s. Shree Industries Limited (SIL).

*In the light of the aforesaid two previous Orders of this Court and earlier Orders also, in the present Letters Patent Appeal, directed against the order of the **Learned Single Judge (Coram: Hon'ble Mr. Justice K. S. Jhaveri)** dated **06.10.2010** in Special Civil Application No. **12979 of 2009, Lalitaben Govindbhai Patel and 2 others (Guarantors) qua the loan of M/s. Ganpati Pulp and Paper Mills Limited (In liquidation) of GNFC and 7 Others**, this Court had indicated that in the circumstances of the later development of law during the pendency of this litigation here in the form of enactment of **Insolvency and Bankruptcy Code 2016 and the National Company Law Tribunal (NCLT)**, being the adjudicatory body under that law to decide such disputes of Insolvent Corporate Bodies, their Rehabilitation, Claims of the Secured and Unsecured Creditors and Others etc., is the appropriate Forum for deciding such Claims and Counter Claims, respective Defences and other relevant aspects of the matter.*

*We are therefore of the considered opinion that the exercise of extraordinary jurisdiction under **Article 226** of the Constitution of India, in such cases of complex facts, financial statements & claims will be inappropriate and such question of facts may not be properly adjudicated at all under **Article 226** of the Constitution of India. Such fact finding exercise necessarily should be undertaken by the **appropriate fact finding Tribunal and Authorities**.*

We had also noticed in the previous proceedings in the present

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*Letter Patent Appeal that after the sale of the unit in question belonging to defaulter unit **M/s. Ganpati Pulp (In Liquidation)** to M/s. Shree Industries Limited (SIL), though the said purchaser has settled some of the **Secured Creditors**, but admittedly some of the **other Secured Creditors** like **Bank of Baroda** and its Assignee **M/s. ASREC (India) Limited and GIIC** etc., had not yet been settled & paid off. They may be either **Secured or Unsecured Creditors** claiming their recovery rights against the Assets of the defaulter Unit **M/s. Ganpati Pulp** in the present case. There may be valid or unsustainable defences on the part of the purchaser and others and the original defaulter Unit and its Promoters, Directors, etc. All these aspects, therefore, need to be looked into and appreciated by the **NCLT**, the appropriate fact finding body in such circumstances.*

*Further, a winding up petition was also filed under the provisions of **Companies Act, 1956** namely **Company Petition No. 139 of 1985 – M/s. Shethna Enterprises V. M/s. Ganpati Pulp and Paper Mills Limited** and the winding up proceedings are still pending before the learned Single Judge, as the Hon'ble Company Judge, under the winding up order dated **12.03.1986** passed against the Respondent-Company.*

*We have noticed in the above quoted order dated **17.02.2021**, the judgment of the Hon'ble Supreme Court of India in the case of **M/s. Action Ispat and Power Pvt. Ltd. V. Shyam Metalics and Energy Ltd. reported in (2021) 224 Com Cases 35 (SC)**, of which, **para no. 22** was quoted in our order dated **17.02.20021**.*

*From the **Report of the Official Liquidator** also, we prima facie find that the winding up proceedings pending before the learned Company Judge are not at the advance stage of the winding up of the Company and the said proceedings are pending for long period since 1986 without much of the progress and that may be apparently because the Assets of the Company were sold in favour of **M/s. Shree Industries Limited (SIL)**, and thereafter, there nothing much was left with the **Company in Liquidation -M/s. Ganpati Pulp** to square up the dues of the other **Secured and Unsecured Creditors** and also the workmen.*

In these circumstances, we propose to pass the final order in the following terms in the present Letters Patent Appeal.

Proposed Order of disposal of the present Letters Patent Appeal:

“The present Letters Patent Appeal is disposed of with a request to the Learned Company Judge to consider the aforesaid aspects of the matter and if considered appropriate to transfer the pending winding up proceedings to the NCLT Bench, Ahmedabad, who may take up the proceedings for winding up of the Company in question in appropriate manner after deciding the Claims, Counter Claims and respective defences of all the parties concerned in this litigation. Letters Patent Appeal is accordingly disposed of. No costs”

For the aforesaid proposed Order, we request all the learned

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*Counsels appearing the present matter today before us or who have already put in their appearance in this matter to file a brief **two page Note** either agreeing to the aforesaid proposed order of the Court or if they wish to make a submission against the aforesaid proposed order, they may do so with reason and case law, if any. The said brief Note not exceeding **2 to 3 pages** may be submitted in the Court on or before **5th July 2021** and the matter may be placed for final orders before the Court again on **8th July 2021.**”*

7. In view of the last order dated **01.07.2021**, learned Counsels have filed their brief notes either opposing the said proposed order by which this Court intended to dispose of the Letters Patent Appeal without going into the merits of the case and to request the learned Company Judge, where the winding-up proceedings are pending against **GPPML**, who may if considered appropriate, and which, we in the presently obtaining legal position would strongly recommend to the learned Company Judge to transfer the proceedings of winding-up in Company Petition No.139 of 1985 to the **NCLT**, Ahmedabad who can go into all the claims, counter-claims and respected defences, even now because unfortunately, not only the original borrower **GPPML** defaulted in payments of dues to **GSFC**, but the subsequent auction purchaser – **Shree**

Industries Limited (SIL) had also defaulted and the alleged One Time Settlement of **GSFC** and **SIL** was also called in question by the present appellants viz. Guarantors and Shareholders of **GPPML** and also in the connected Special Civil Application No. **11116 of 2008** filed by **GSFC Vs. Shree Industries Limited**, the orders of **BIFR** and **AAIFR** under the provisions of **Sick Industrial Companies Act, 1985** were challenged by **GSFC** for which, of course before us, the learned Counsel for **GSFC** prayed that in view of One Time Settlement, the **GSFC** may be permitted to withdraw the said Special Civil Application No. **11116 of 2008** in view of One Time Settlement, but the said request was opposed by other learned Counsels particularly Mr. Baiju Bhagat appearing for **M/s. ASREC (India) Limited (Assignee of Bank of Baroda)**, and other Security Creditors and Mr. Rajesh Dave, appearing for **GIIC**, the other Unsecured Creditors of **GPPML**, whose dues have not been settled and who are unable to take legal recourse for recovery of dues from the assets of the defaulter company **SIL** in view of the status quo order of this Court in the present Letters Patent Appeal No. **2480 of 2010**. Therefore, such leave to withdraw the Special Civil Application

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made by **GSFC** cannot be granted and the said Special Civil Application would also be disposed of along with Letters Patent Appeal No.**2480 of 2010** by this common order.

8. To the proposed order in our interim order dated **01.07.2010** quoted above, while **M/s. ASREC (India) Limited** and **GIIC** represented by Mr.Rajesh Yadav have supported the said proposed order of the Court, the other learned Counsels appearing for **GPPML** Mr.Apurva Vakil and learned Counsel for **SIL** Mr.Nandish Chudgar and Mr.Dipen C. Shah, learned Counsel appearing for the Directors-Shareholders of **SIL** have opposed the intended transfer of proceedings to **NCLT**. As directed by the Court, they have submitted their brief submissions in writing. Though learned Counsels have been heard on the said proposition at length also, but to avoid any communication gap, the said brief written notes are quoted *in extenso* as submitted by them in the Court with the respective dates and submissions:

(i) Brief Note of Appellants - Smt. Lalitaben Govindbhai Patel and others filed by Mr.Apurva Vakil, learned Counsel for the appellants, on dated 10.07.2021:

BRIEF NOTE OF THE APPELLANTS

Issues in the LPA:

1. *The question involved in the LPA is whether the auction purchaser (i.e. R.5-Shree Industries Limited/SIL) u/s.29 of the SFC Act, 1951, becomes the owner of the subject property (described at page 77 of the LPA) in absence of transfer by way of lease or sale by the Financial Corporations (i.e. R.1-GSFC, R.2-GIIC, R.3-BOB- now ASREC Limited and R.4-DB)? In the present case, after the action of taking possession of the subject property of R.6-Company (in liquidation) and after auction thereof, followed with the acceptance of the highest bid of R.5-SIL and the 'agreement' dated 27.11.1990 (pages 68-79), undisputedly R.5-SIL has failed to pay the full price and no sale deed is executed in favour of R.5-SIL. After the said agreement dated 27.11.1990, R.5-SIL was registered with the BIFR under the provisions of SICA, 1985. BIFR and AAIFR by orders dated 19.07.2007 (pages 32-47) and 02.05.2008 (pages 48-51) respectively, held against R1 GSFC and R2 GIIC that even in absence of sale deed in favour of R5 SIL by the Financial Corporations u/s. 29 of the SFC Act, the subject property purchased in auction will be treated as an asset of/ ownership of R.5-SIL. R1 GSFC challenged the orders of the BIFR and AAIFR before the learned Single Judge by way of SCA 11116 of 2008. Pending the SCA 11116 of 2008, R.1 GSFC issued a (tailor made) circular and entered into a settlement with R.5-SIL for a sum of Rs.60 lacs approx. as against the dues of around Rs.5 crores approx. The attempt*

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by R1 GSFC to withdraw its SCA 11116 of 2008 was resisted by the Appellants and hence not allowed by the learned Single Judge. Hence the Appellants, who are already impleaded in SCA 11116 of 2008, independently challenged orders of BIFR and AAIR by SCA 12979 of 2009. The learned Single Judge thereafter by the impugned judgment and order dated 06.10.2010 passed in SCA 12979 of 2009 of the Appellants, confirmed the orders of BIFR and AAIFR. The auctioned purchased subject property is of R.6-Company (in liquidation) which was ordered to be wound up by the learned Company Judge as far back as 12.03.1986. The Appellants are shareholders, guarantors of R.6-Company. The Appellants have also challenged the Circular of the R.1-GSFC/settlement between R.1-GSFC and R.5-SIL. The learned Division Bench has ordered the SCA 11116 of 2008 to be heard with LPA 2480 of 2010 ("LPA").

Proposed Order:

2. *The Appellants are not agreeable to the proposed order as reflected in the order dated 01.07.2021 passed in the present LPA.*

The proposed order can be divided in two parts, viz.

- (i) *the LPA is disposed of and*
- (ii) *the request to the learned Company Judge to consider the aforesaid aspects of the matter and if considered appropriate, to transfer the pending winding up*

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proceedings to the NCLT bench, Ahmedabad who may take up the proceedings of winding up of R.6-Company in appropriate manner 'after' deciding the claims, counter-claims and respective defenses of all the parties concerned in 'this' litigation.

Part (i) of the proposed order:

3. *The proposed disposal of the LPA would mean that there is no adjudication on the merits of the impugned orders of BIFR, AAIFR and the learned Single Judge. Consequently, the said orders of BIFR, AAIFR and learned Single Judge would attain finality and the subject property of R.6-Company (which was subject matter of auction u/s.29 of SFC Act) will be considered as the property of R.5-SIL. Thus, the basic grievance of the Appellants that the subject property cannot be considered to be of the ownership of R.5-SIL in absence of a sale deed, remains undecided/unadjudicated.*

In view of the aforesaid (i.e. disposal of the LPA without adjudication on merits), the subject property of R.6-Company (in liquidation) will be treated as the asset of R.5-SIL and not of the R.6-Company. This in the humble submission of the Appellants will be a irreversible situation / irreversible steps, as contemplated under paragraphs 22, 23 of the Hon'ble Supreme Court judgment in the case of Action Ispat and Power Private Limited ("Action Ispat").

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Apropos the opinion expressed (in the last paragraph of page 13 of the order dated 01.07.2021) in the matter of exercise of jurisdiction under Article 226 of the Constitution of India, the Appellants humbly submit that as such the Learned Single Judge has already exercised jurisdiction under Article 226 of the Constitution of India and examined all the issues "on merits". The Appellants therefore submit that this Hon'ble Court while exercising the appellate jurisdiction under Clause 15 of the Letters Patent will be required to examine the correctness of the impugned judgment and cannot refuse to do so on the ground that there are complex facts and such questions of fact may not be properly adjudicated under Article 226 and that the same would be inappropriate. The present LPA does not involve a fact finding exercise which needs to be undertaken by any appropriate Tribunal and/or Authority.

Part (ii) of the proposed order:

4. *The entire second part of the proposed order has its basis in the last proviso to Section 434(1)(c) of the Companies Act, 2013. The power to transfer to NCLT a pending winding up proceeding can be exercised only "on an application" filed for the said purpose by any party or parties to any proceedings relating to the winding up of R.6-Company and that too on sound exercise of discretion. If the said power is exercised on an application and proceedings are infact transferred, the NCLT shall deal with the same "as an application for initiation of a CIRP" under the IB Code.*

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The Appellants humbly submit that this Hon'ble Court while exercising powers under Clause 15 of the Letters Patent, will not have the jurisdiction to request the learned Company Judge to consider to transfer the pending winding up proceedings in respect of R.6-Company to the NCLT. Such 'request' also cannot be considered as an "application to transfer" as contemplated under the last proviso to Section 434(1)(c) of the Companies Act, 2013. Neither does this Hon'ble Court have the jurisdiction under Clause 15 of the Letters Patent to request/observe/direct the NCLT, Ahmedabad the manner in which the proceedings, if transferred, will be dealt with. Powers contemplated under the last proviso of Section 434(1)(c) of the Companies Act, 2013 are conferred upon the learned Company Court and cannot in any manner, directly or indirectly, be exercised by a Court exercising powers under Clause 15 of the Letters Patent.

Section 434(1)(c), last proviso and Discretion:

Assuming that the winding up proceedings are not transferred:

*Assuming without admitting that a request can be made by this Hon'ble Court to the learned Company Judge (as per the proposed order), the power to transfer being **discretionary**, such discretion will have to be exercised by the learned Company Judge on sound judicial principles. The learned Company Judge may decide against exercising discretion in favour of transfer for the reason that the subject property of the R.6-Company (in liquidation) is no longer an asset of*

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R.6-Company and has infact become the asset of R.5-SIL. Further, it may be noted that under the last proviso to section 434(1)(c), after transfer, the transferred proceedings are to be treated by NCLT as an application "for initiation of CIRP" under the IB Code. However in present case, the very discretion to transfer may not be exercised as there will not be any purpose of initiating the CIRP in absence of the subject property of R6 Company. Consequently, the winding up proceedings will be retained by the learned Company Judge and there shall be no occasion for the NCLT to decide the claims, counter-claims, etc. as contemplated under the "proposed order" of this Hon'ble Court.

Assuming that the winding up proceedings are transferred:

Assuming that the discretion is exercised in favour of transfer by the learned Company Court, even then the Appellants humbly submit that the NCLT will not have the powers and/or the jurisdiction to decide the legality and validity of the orders of BIFR, AAIFR and the learned Single Judge which are subject matter of present LPA, because the NCLT cannot sit in appeal over the said orders. Consequently, the issues arising in the LPA shall remain undecided/un-adjudicated even if the proceedings are transferred.

Facts in the case of Action Ispat and Power Private Limited:

5. *The facts in the case of Action Ispat and the facts in the present case are completely different. **In the case of Action Ispat:***

- (i) a winding up petition was filed in the year 2016 and was admitted vide order dated August, 2018,*
- (ii) thereafter, a financial creditor (SBI) had filed proceedings u/s. 7 of the IBC before NCLT, Delhi,*
- (iii) in terms of the last proviso to Section 434(1)(c) of the Companies Act, 2013, SBI made an application before the learned Company Court to transfer the winding up proceedings to the NCLT, Delhi,*
- (iv) while considering the exercise of discretion, it was observed by the learned Company Court that the order appointing OL is a 'recent' order (around one year old), not much time has lapsed since then, that the OL has only taken possession of the office/assets but further exercise is yet to be carried out and lastly,*
- (v) while transferring the winding up proceedings, the learned Company Court revoked the order admitting the winding up petition and appointing the OL. This was done apparently because, on transfer, the transferred winding up proceedings are to be treated as an application for initiation of CIRP. CIRP proceedings and winding up proceedings could not have continued simultaneously.*

As against the aforesaid, in the facts of the

present case,

- (i) the winding up order has been passed as far back as 12.03.1986 (i.e. before 35 years),*
- (ii) the subject property of the R.6-Company (in liquidation) has been taken possession of and auctioned (in/around 1988-1990) in exercise of powers u/s. 29 of the SFC Act and in view of the orders of BIFR, AAIFR and learned Single Judge and the proposed disposal of the LPA, the said subject property will be considered as an asset of the auction purchaser-R.5-SIL (in absence of any document of title) and not of R-6 Company (in liquidation),*
- (iii) there are no proceedings pending in the NCLT either u/s.7 or u/s.9 of the IBC in respect of R.6-Company,*
- (iv) none of the party to the winding up proceedings of R.6-Company have made an application under the last proviso of Section 434(1)(c) of the Companies Act, 2013 to the learned Company Judge seeking transfer of the winding up proceedings in respect of R-6 Company to the NCLT,*
- (v) considering that after transfer of winding up proceedings to the NCLT, under the last proviso of Section 434(1)(c), the transferred proceedings are to be treated as an application for initiation of CIRP process,*

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it would become necessary to revoke the winding up order dated 12.03.1986 (after 35 years)- because, as aforesaid, the CIRP process and winding up proceedings cannot continue simultaneously,

(vi) as such, no circumstances exist so as to enable the learned Company Judge to exercise "discretion" in favour of transfer.

*Hence, the LPA and SCA 11116 of 2008 be heard and decided on its own merits. The entire proposal **to request** the learned Company Judge and **thereafter to influence the NCLT** on how to conduct the proceedings if the winding up proceedings are transferred, is completely beyond the scope of powers under Clause 15 of the Letters Patent, apart from not being in consonance with the last proviso to Section 434(1)(c) of the Companies Act, 2013.*

SCA 11116 of 2008 ("SCA"):

The SCA is filed by GSFC challenging the order dated 19.07.2007 (pages 32-47) of BIFR and order dated 02.05.2008 (pages 48-51) of AAIFR. It is on record that GSFC and GIIC have repeatedly taken a stand before BIFR and AAIFR that there is no sale deed in respect of the subject property in favour of auction purchaser R-5 (SIL) and hence R-5 SIL is not the owner, that there cannot be OTS/settlement with auction purchasers u/s 29 of the SFC Act, that huge dues of over Rs.10 crores (combined in/around 2006 were outstanding), etc. However, GSFC by

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issuing a tailor made Circular, for the benefit of R-5 SIL, accepted a sum of around Rs.60 lacs by way of full and final settlement from R-5 SIL . The said Circular / settlement is also subject matter of challenge by way of amendment (in the SCA of the Appellants). Learned Single Judge rightly did not permit GSFC to withdraw its SCA 11116 of 2008 and the learned Division Bench has rightly ordered the said SCA 11116 of 2008 of GSFC to be heard with present LPA of the Appellants.

*Date: 10.07.2021
Place: Ahmedabad.*

*sd/-

Apurva S. Vakil
(Advocate for the Appellants)”*

(ii) Notes of arguments pursuant to order dated 01.07.2021 on behalf of Shree Industries Limited (SIL) – Respondent no.5 filed by Mr.Nandish Chudgar, learned Counsel for respondent no.5, dated 09.07.2021:

“NOTES OF ARGUMENTS PURSUANT TO ORDER Dtd. 01/07/2021 ON BEHALF OF SHREE INDUSTRIES LTD. (SIL)-RESPONDENT NO.5:

I. The decision and the ratio of the Hon’ble Supreme Court in Action Ispat reported in (2021) 224 Comp Cas 35 (SC) is not applicable in the instant case because:

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(i) *Action Ispat* was a case for transferring of Winding-Up proceedings pending before Company Court under provisions of the Companies Act, 1956 to NCLT. While the instant proceedings (LPA no. 2480/10 in SCA 12979/09) is not the proceedings under the Companies Act but is arising out of Writ Jurisdiction conferred on the High Court under Art. 226 of the Constitution.

(ii) In *Action Ispat* the properties/assets of the Company in Liquidation were not sold and the liquidation process was at the initial stage. While in the instant case the properties of Ganpati are already sold and that too u/s. 29 of SFC Act by GSFC, the leader of the consortium of the lenders of Ganpati Pulp and Paper Ltd (“Ganpati”).

(iii) In *Action Ispat* one of the secured creditors had already filed application u/s. 7 of IBC. While in the instant case none of the creditors have approached NCLT under IBC. It may be noted that in the case of “Winding-Up proceedings” of Ganpati, the **Winding-Up petition was admitted by the Company Court as way back as on 12/03/1986**. The main property of Ganpati was taken over by GSFC u/s. 29 of SFC Act and has been sold to SIL on **27/11/1990** by way of Public Auction and the possession thereof is handed over to SIL in the year **1990**.

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(iv) *None of the secured creditors have issued any notice to SIL under IBC or filed any application for the transfer of the present LPA proceedings to NCLT, as was the case in Action Ispat.*

II. The scope of the proceedings of LPA no. 2480/10 in SCA 12979/09, with which we are concerned, is limited to the adjudication and decision with regard to challenge by Guarantors of Ganpati (a stranger) as to whether the action of GSFC to enter into OTS with SIL is valid and legal or not. It may be noted that GSFC u/s. 29 had taken possession of the secured assets of Ganpati and sold to SIL by way of Public Auction for an amount of Rs. 3.88 Cr, in November-1990. The full amount of Rs. 3.88 Cr. was already given credit to Ganpati by the consortium and thus, the outstanding which Ganpati owed to Consortium was reduced by Rs. 3.88 Cr. Meanwhile, SIL had made down payment of Rs. 50 Lacs while Rs. 3.88 Cr was converted into a loan to be paid in instalments over a period of 5 years. SIL made payment of certain instalments thereafter became sick and was before the BIFR, and hence could not make the full payment. Thereafter in 2009, GSFC introduced OTS Scheme for all the defaulters who had purchased assets u/s. 29 and were unable to pay the full amount of purchase price. SIL applied for the OTS which was accepted by GSFC and the payment as per the formula of OTS was paid by SIL. GSFC, thus settled its outstanding portion with SIL. At this stage, the Guarantors of Ganpati (Appellants herein) filed a

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Writ Petition being SCA 12979/2009 challenging the settlement between GSFC and SIL (while admitting the auction and sale of the property of Ganpati u/s. 29 by GSFC). The Ld. Single Judge by a reasoned order dated 09/12/2009 rejected the Petition of the Guarantors of Ganpati, while holding that (a) they have no locus standi to challenge the settlement between GSFC and SIL under OTS; (b) auction price of Rs. 3.88 Cr. has been already given credit to the Ganpati in the year 1990 and the settlement amount or the haircut given by GSFC would have no bearing on Ganpati- it will neither increase nor decrease any liability on Ganpati or its Guarantors; (c) settlement is only qua outstanding portion of GSFC and the outstanding portion of purchase price/loan vis-à-vis GIIC, BOB and Dena Bank is not covered by the settlement; (d) OTS scheme floated by GSFC is a policy decision which is not arbitrary or illegal.

This judgement is under challenge in the present LPA. Therefore, the scope of the present LPA is limited to the impugned judgement and the challenge to the action of settlement under OTS by and between GSFC and SIL

III. In the respectful submission of SIL, that there are no disputed questions of fact or financial statements, claims of secured/unsecured creditors to be adjudicated by this Hon'ble Div. Bench. As a matter of fact, the Ld. Single Judge, has decided the matter and the issue involved in it, finally. The Ld. Single

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*Judge of this Hon'ble Court has not found himself **handicapped by any disputed questions of fact and decided the case on the question of law.** As such there are no disputed questions of fact in the instant case. It is only questions of law, in the facts of the case which is required to be decided by this Hon'ble Div. Bench.*

IV. *The pendency of Liquidation proceedings of Ganpati having its registered office in Ahemdabad before the Ld. Company Judge of this Hon'ble High Court of Gujarat **is a separate proceeding in respect of Ganpati and has nothing to do with the corporate entity of SIL or the assets owned by SIL,** having its **registered office in Delhi being subject to the jurisdiction of Delhi only.** It is further reiterated that the only issue or the question for adjudication in the present proceedings of LPA i.e. whether the action of GSFC in entering into a settlement by virtue of OTS Scheme with SIL, in the circumstances of the case is valid and legal or not.*

V. *Further, the judgement and order dated 09/12/2009 passed by the Ld. Single Judge of this Hon'ble High Court can be interfered with (if at all) only by the Division Bench of this Hon'ble High Court under the Letters Patent or by the Hon'ble Supreme Court, but cannot be interfered with by NCLT or even by the Ld. Single Judge of this Hon'ble High Court while exercising Jurisdiction as a Company Court/ Company Judge under the provisions*

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of the Companies Act, 1956. Neither the NCLT, nor the Company Judge can sit as an Appellate Forum over the judgement and order passed by the High Court (Ld. Single Judge) exercising the Writ Jurisdiction u/Art. 226 of the Constitution.

*In this context, the decision of the Hon'ble Supreme Court reported in **(2020) 2 SCC 442** in the matter of **Balkrishna Ram Vs. Union of India**, is relied upon by SIL, a copy whereof is annexed herewith as **ANNEXURE-1**. In the said matter the issue for adjudication was whether upon constitution of Armed Forces Tribunal (AFT) under the Armed Forces Tribunal Act, 2007, the proceedings of Appeal against the order of a Single Judge of Allahabad High Court, pending before the Division Bench can be transferred before the AFT or not. The Hon'ble Supreme Court in the said judgement held that an Intra-Court Appeal from the Judgement of a Single Judge of a High Court to a Division Bench cannot be transferred to the Armed Forces Tribunal (relevant paras are 1,2,5,6 and 17).*

In the respectful submission of Respondent no.5, even, in view of the said judgement of the Hon'ble Supreme Court, the present Appeal before the Div. Bench of this Hon'ble Court challenging the judgement and order dated 09/12/2009, under the Letters Patent, cannot be transferred to NCLT, nor to the Ld. Company Judge of this Hon'ble Court.

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VI. So far as merits of the matter (LPA no. 2480/10 in SCA 12979/09) is concerned, 'Brief Submissions and Synopsis/ Dates & Events' (dated 04/02/2021) on behalf of Resp. no.5 (Shree Industries Ltd. -SIL) have already been filed in the present proceedings and hence, the record is not being burdened any further, however, the same is referred to and relied upon by the Resp. no.5.

VII. The Resp. no. 5, therefore, most respectfully submits not to pass the proposed final order as reflected in the Order dated 01/07/2021 passed by this Hon'ble Court and most humbly requests this Hon'ble Court to decide the present proceedings on its merits.

Place: Ahmedabad

NANDISH CHUDGAR

Date: 09/07/2021

Advocate for Resp. no.5

Shree Industries Ltd."

(iii) Brief Notes of arguments on behalf of Respondent no.1-GSFC filed by Mr.Devang Trivedi, learned Counsel for respondent no.1, dated 10.07.2021:

**"BRIEF NOTES OF ARGUMENTS ON BEHALF OF GSFC –
RESPONDENT NO.1**

In compliance of the Order of this Hon'ble Court, respondent No.1 – Gujarat State Financial Corporation begs to file its

Brief Points of Arguments in the present proceedings.

1. ***Petitioners have no locus standi to challenge settlement between GSFC and Shree Industries Limited,*** which is pursuant to policy of GSFC for OTS, for all concerned.. Properties of Ganpati i.e. GPPL were taken over and sold by Public Auction U/s. 29 of SFC Act, by GSFC in the year 1990. Said action was not challenged at relevant time, nor even today by GPPL. There are no factual disputes what so ever between the parties to these Cognate Proceedings and that in neither of pleadings such avarments contended by any of the parties to these proceedings.

2. *Infact, As soon as the properties of Ganpati i.e. GPPL were sold in the year 1990, whatever amount was paid, was realized, the same given credit towards the dues of GPPL in the year 1990 itself and therefore, by settling dues with Shri Industries Limited, GSFC does not increase any liability of a single rupee of GPPL. It is also not in dispute that the amounts were realized from SIL has already been distributed proportionately between the creditors including Bank of Baroda (now ASREC), GIIC and Dena Bank and that except Bank of Baroda and GIIC, the dues have been settled by another creditor Dena Bank long back.*

3. *Further humble submission before the Hon'ble Court is that the **Gujarat State Financial Corporation has filed an O. J. Appeal No.5 of 1988** against the Order passed by*

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*the Learned Single Judge in **Company Application No. 27 of 1987 in Company Petition No. 139 of 1985**, the Hon'ble Court was **pleased to stay the Order passed in Company Petition No. 139 of 1985** and therefore, the Order of **Winding-up of the Company was stayed** or not under operation and it appears from the record that the aforesaid Stay Order was confirmed by the Hon'ble Court and that **GSFC has already exercised its power U/s. 29 of the State Financial Corporation Act, 1951** for it self and also for GIIC, Dena Bank and Bank Of Baroda (Now ASREC) .*

4. *Hence, the humble submission of the respondent No.1 – GSFC is that the prayers as sought for by the original petitioner – present appellant, are in the nature of mandamus and that the same challenges Onetime Settlement (OTS) between GSFC and SIL i.e decision of Financial corporation, is the subject matter and and not in respect of any proceedings under winding of the Company therefore, the same cannot be decided by Learned NCLT, as the powers of NCLT are limited and not inherent, Constitutional and wide and that powers can not be generated, transferred or relegated to any coram other then this Hon'ble High Court.*

5. *There is no dispute that the assets of the GPPL has been sold by GSFC jointly with other creditors wise GIIC, Dena Bank and Bank of Baroda (now ASREC), U/s. 29 of the State Financial Corporation Act, 1951. The said action has*

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never been challenged by the appellant – original petitioner, guarantors of GPPL and therefore, the subject matter of Onetime Settlement in the commercial decision of Financial Institution under challenge, is without any right or locus of the guarantors of the original borrower GPPL and the submission therefore is that when the auction amount i.e. Rs.3.88 Crores have been given credit of to GPPL, and in settling with SIL, GSFC does not increase any liability of single rupee over the GPPL or its guarantors – the present appellants and hence, the guarantors of GPPL – the present appellants have no locus standi or right whatsoever to challenge the settlement between GSFC and SIL. It is also the submission that other creditors wise Dena Bank has already settled with SIL, which is not challenged so far and other creditors GIIC and Bank of Baroda appear desirous to settle their accounts also with SIL and for that drawing attention of the said fact, this Hon'ble Court has been apprized already.

6. *It is pointed out that there are two separate and independent transactions by GSFC:*
 - (i) *Action u/s 29 of taking over the properties of GPPL and sale by Public Auction by GSFC, in the year 1990, for Rs.3.88 crores in favour of SIL (said action is not challenged by GPPL.)*
 - (ii) *Settlement pursuant to OTS between GSFC and SIL for balance unpaid amount. Neither GPPL nor its*

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guarantors are concerned with it because the realization' of dues of GPPL by Auction Sale under Section 29 had already taken place in 1990 and amount of sale i.e. Rs.3.88 crores was realized and given credit of (set off) towards the dues of GPPL in the year 1990 itself.. It remains crystallized for Rs.3.88 crores as of 1990. The rights were crystallized U/s 29 (2) of SFC Act in 1990. Therefore, settlement does not affect any right or interest of Appellants, and they are not concerned with it in absence of their Locus Standi..

7. *GSFC relies on the unreported judgment dated 11.5.1999 passed by Division Bench of Gujarat High Court in the matter of LPA No. 16 of 1989 in SCA No.253 of 1987 between GSFC Versus Kumarpal V. Shah. The Letters Patent Appeal is devoid of any substance / merits and is required to be dismissed, as the Learned Single Judge has rightly rejected the petition.*

Place: Ahmedabad. (Devang D. Trivedi)

Date: .07.2021 Advocate for the Resp. No. 1 GSFC”

(iv) Brief Written Submissions on behalf of ASREC – Respondent No.9 (Secured Creditor) filed by Mr.Baiju Bhagat, learned Counsel for respondent no.9, dated 08.07.2021:

“Brief Written Submissions on behalf of ASREC Resp –

9 (Secured Creditor)

1) ***We are in Total Agreement to the Proposed Order by this Hon'ble Court to transfer the pending winding up proceedings to the NCLT Bench, Ahmedabad, who may take up the proceedings for winding up of the Company in question in appropriate manner after deciding the Claims, Counter Claims and respective defences of all the parties concerned in this litigation. Letters Patent Appeal is accordingly disposed of. No costs***

2) *Since the proposed order is based on the sound logic of the latest judgment of the Hon'ble Supreme Court in the case of **Action Ispat and Power Pvt. Ltd. V. Shyam Metalics and Energy Ltd. reported in (2021) 224 Comp Cases 35 (SC)** and more fully discussed in **Paragraph22** of the said judgment, which is quoted below,*

“22. Given the aforesaid scheme of winding up under Chapter XX of the Companies Act, 2013, it is clear that several stages are contemplated, with the Tribunal retaining the power to control the proceedings in a winding up petition even after it is admitted. Thus, in a winding up proceeding where the petition has not been served in terms of Rule 26 of the Companies (Court) Rules, 1959 at a pre-admission stage, given the beneficial result of the application of the Code, such winding up proceeding is compulsorily transferable to the NCLT to be resolved under the Code. Even post issue of notice

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and pre admission, the same result would ensue. However, post admission of a winding up petition and after the assets of the company sought to be wound up become in custodia legis and are taken over by the Company Liquidator, section 290 of the Companies Act, 2013 would indicate that the Company Liquidator may carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company, and may even sell the company as a going concern. So long as no actual sales of the immovable or movable properties have taken place, nothing irreversible is done which would warrant a Company Court staying its hands on a transfer application made to it by a creditor or any party to the proceedings. It is only where the winding up proceedings have reached a stage where it would be irreversible, making it impossible to set the clock back that the Company Court must proceed with the winding up, instead of transferring the proceedings to the NCLT to now be decided in accordance with the provisions of the Code. Whether this stage is reached would depend upon the facts and circumstances of each case.

3) *In the facts of the present case, the **liquidator has still not taken possession and control of the registered office of the appellant company and its factory premises, records and books, hence no irreversible steps towards winding up of the appellant company have taken place.***

Baiju Bhagat

Date: 08/07/2021

ADVOCATE FOR THE
Resp – 9

Place: Ahmedabad”

**(v) Brief written submissions of Respondent No.6-
Mr.Ravi Mittal against proposed order filed by Mr.Dipen
Shah, learned Counsel for respondent no.6, dated
05.07.2021:**

**“BRIEF WRITTEN SUBMISSIONS BY RESPONDENT NO.
6- MR. RAVI MITTAL AGAINST PROPOSED ORDER**

I. AT THE OUTSET:

*i. Even if the proposed order is passed **auction purchaser having paid auction price is entitled to sale certificate and therefore GSFC (seller) must be allowed to withdraw SCA 11116/2008 as it adversely affects auction purchaser despite payment of auction price. Payment of auction price is admitted by GSFC and consortium of creditors.***

ii. The court has not given any reason on why writ petition by GSFC cannot be allowed to withdraw. The court has not reversed the finding of single judge that corporate guarantors have no locus in LPA to contest withdrawal by GSFC of its petition. No creditor has approached this court

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with an affidavit stating its claims, court cannot dispose of LPA without adjudication on oral assertion of ASREC of some disputes. Even otherwise there are grave suppressions in submission of ASREC.

iii. The subject matter of apportionment of sale consideration is a matter between GSFC and other consortium creditors. Auction purchaser therefore is a third party standing outside winding up proceedings and cannot be referred to winding -up court for any of its entitlement like issuance of sale certificate.

iv. Admittedly (Page 275) GSFC (auction seller) was acting for consortium of BOB, ASREC, Dena Bank and GIIC, and hence auction sale is binding on all creditors as auction is confirmed by their consent. There are no creditors outside this consortium having independent claims. Consortium is not entitled to amount exceeding sale proceeds under the auction and there is no affidavit of any creditor making such claim. GSFC therefore cannot be prevented (dominus litus) from withdrawing SCA 11116/2008 as proposed order also does not hold that withdrawal is prejudicial to any party.

v. The court has not undertaken any inquiry to ascertain disputed question of fact. The court has neither heard parties at length nor referred to basic documents with the result that court has missed admitted facts in writ petition and LPA that auction price is paid and there is no privity between SIL (auction purchaser) and other creditors. Therefore, discretion in the proposed order is not exercised

judicially.

vi. The fact that money under Auction is already paid can be ascertained on affidavits. No affidavit of any creditor raising any dispute is filed much less dispute of fact. The court in the proposed order has not applied mind as to what facts are disputed or which complex question has arisen, and hence exercise of discretion to refer to winding-up court is not based on sound judicial principles. It is also not clear as to what is referred to company court since proceedings under SFC act, 1951 are independent of proceedings under winding-up and finalised 31 years ago. The discretion therefore is based on hunches causing failure of justice making auction purchaser to wait 31 years after purchase [(1969) 3 SCC 769 Gunwant Kaur Smt v. Municipal Committee, Bhatinda- para 14]

vii. Proceedings under State Financial Corporation act, 1951 will prevail over proceedings of company judge under winding up. (2003) 10 SCC 482 International Coach Builders Ltd v. Karnataka State Financial Corpn] -

viii. Mere observation that writ petition raised disputed question of fact is not sufficient to dispose of writ petition. [(2004) 13 SCC 710 - Savita Garg v. Union of India]

ix. The court in the proposed order fails to discuss nature of disputed question of fact and assumes that it can only be dealt by winding-up court and not writ court. Directions contained in proposed order based on such assumptions

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does not fall in category of judicial exercise of power as there is no adjudication of any issue material to such discretion.

II. SUBMISSIONS:

A. The Honorable High Court has not heard the case on merits nor appreciated fundamental fact of payment of auction price to GSFC which can be established by directing parties to file affidavit. The court has not referred to admitted fact of GSFC conducting auction on behalf of BOB, GIIC and other creditors and thus apportionment of Rs. 388 lakhs by GSFC to other creditors is a matter between them internally and auction purchaser is outsider once auction is not under challenge. Auction purchaser is an innocent buyer and has nothing to do with winding-up of GPPL whose properties were sold in auction.

B. The Honourable High Court is required to establish disputed question of fact by referring to specific pleadings in the LPA and Writ Petition and merely saying that there are disputed questions of facts is not enough as that would amount to refusal to exercise jurisdiction without even referring to disputed facts. The proposed order has not objectively evaluated any disputed question of fact which court cannot decide. The court could not have said there is disputed question of fact even without asking ASREC to file affidavit in reply and actually disputing facts. The courts proposed order is based on imagination of existence of a complex question of facts.

C. ASREC has not filed any affidavit in LPA prima facie establishing existence of debt. ASREC has also not been able to establish its locus. Learned single judge also held that GSFC was acting on behalf of BOB/ASREC under Section 29 of State Financial Corporation Act and this fact is admittedly clear on perusal of assignment deed and sale agreement with auction purchaser. Thus, sale is binding on all creditors even otherwise there is no affidavit of creditors disputing this fact.

D. There is no petition on record of any financial corporation challenging legality and validity of auction and no financial corporation or Bank has stated on affidavit that there is existence of debt against SIL which is an auction purchaser.

E. Hon'ble Delhi High Court order is already complied with. No execution of Hon'ble Delhi High Court order is preferred by any party and that is not the issue in this LPA or writ petition.

F. An auction purchaser of a property is an outsider to winding-up proceedings and the court cannot refer the issue in relation to auction proceedings to winding-up court when the auction was conducted outside winding-up proceedings under a special law of State Financial Corporation Act. Even otherwise there was no winding-up order in operation on the date of sale. In **Bakemans Industries (P) Ltd. v. New Cawnpore Flour Mills, (2008)**

15 SCC 1 at page 20 the court held:

37. *The 1951 Act indisputably is a special statute. If a financial corporation intends to exercise a statutory power under Section 29 of the 1951 Act, the same will prevail over the general powers of the Company Judge under the Companies Act.*

38. *There cannot be any doubt whatsoever that the proceedings under Section 29 of the 1951 Act would prevail over a winding-up proceeding before a Company Judge in view of the decision of this Court in International Coach Builders Ltd. v. Karnataka State Financial Corpn. [(2003) 10 SCC 482].*

III. Prayer: *This Respondent therefore requests the court to decide LPA and writ petition on merits after hearing all parties and direct all creditors to file of detailed affidavits in indicating their outstanding debts and amount paid by SIL to GSFC and other creditors.*

Place: Ahmedabad
Date: 5th July 2021.

sd/-

Advocate Dipen Shah
For R-6 Ravi Mittal.”

9. Considering all the rival submissions and after hearing the learned Counsels, at length on various dates, we are of the considered opinion that the draft or proposed order, which we formulated on **01.07.2021**, deserves to be made absolute and the present Letters Patent Appeal and Special Civil Application deserve to be disposed of with the said order itself. The said proposed order, as quoted above in the order dated **01.07.2021** passed by us, is quoted again hereinbelow for ready reference:

“In these circumstances, we propose to pass the final order in the following terms in the present Letters Patent Appeal.

Proposed Order of disposal of the present Letters Patent Appeal:

“The present Letters Patent Appeal is disposed of with a request to the Learned Company Judge to consider the aforesaid aspects of the matter and if considered appropriate to transfer the pending winding up proceedings to the NCLT Bench, Ahmedabad, who may take up the proceedings for winding up of the Company in question in appropriate manner after deciding the Claims, Counter Claims and respective defences of all the parties concerned in this litigation.

Letters Patent Appeal is accordingly disposed of. No costs”

10. The reasons are as under:-

10.1 The present litigation on the board of this Court in the form of Special Civil Application No.11116 of 2008 and Letters Patent Appeal No.2480 of 2010 has arisen on account of sheer misconception on the part of the writ petitioners and writ appellants in the Letters Patent Appeal, that such complicated and complex questions of facts regarding financial liability of Creditors viz-a-viz the statutory action of the financial institutions under the Special Laws like **State Financial Corporation Act, 1951**, etc. can be undertaken by the writ Court under Article **226** of the Constitution of India. From the facts contained in the various orders above, it is clear that in the present case, the parties have not only indulged in filing Civil Suits, Writ Petitions and Letters Patent Appeals under Article **226** of the Constitution of India, but also have gone for forum shopping and while the auction purchaser - **SIL** not only was involved in litigation before this Court, and entered into an alleged OTS (One Time Settlement) with **GSFC** which is with a doubtful integrity to say the least and is under a

serious contest by left out Secured and Unsecured Creditors, but SIL also approached the Hon'ble Delhi High Court by way of writ petitions merely because it had a namesake registered office of the Company in Delhi also, whereas its industry in question is in Gujarat. This kind of scattering the litigation in various Forums is the root cause of multiplicity of litigation and amounts to misuse and abuse of process of law and by sheer passing of the different orders which may or may not be conflicting orders *inter-se* by different Forums, who apparently would have the competent jurisdiction to be seized of those proceedings and passed those orders, ultimately may result in an utter messy confusion of the things and unresolved problems for long time. Such malpractices deserve to be seriously checked by enacting some kind of filters where the parties to one lis essentially are restricted to one competent Forum to avoid any such chance of conflicting orders and forum shopping. Even if different Forums entertain such litigation launched by any of the parties to one lis before them, as soon as they come to know or are made aware of the pendency of the proceedings before the competent Forum, they should transfer the proceedings to that Forum or return

the plaint for proper presentation and this streamlining of litigation and restricting the adjudication by one competent Forum is considered very essential in such circumstances and that is why after a detailed hearing of the matter not on merits of the claims and counter-claims, but on the question of appropriateness of the Forum which should decide these issues, we are of the considered opinion that **NCLT** would be the best suited Forum in these circumstances to the said all the concerned and connected issues in this case.

10.2 In the meantime, there has been evolution and development of new law also in this regard in India also and not only the **Old Companies Act, 1956** stands substituted by the **New Companies Act, 2013** which too has been amended from time to time, but the **Insolvency and Bankruptcy Code, 2016** has also been enacted by the Parliament which repealed several such other laws like **SICA, 1985** etc. The **NCLT** has been empowered to undertake the insolvency resolution or winding-up of the corporate bodies under the **New Special Law viz. IBC, 2016** and this law has already been made subject matter of interpretation in various judgments rendered by the Apex Court of the Country and realizing the importance

of the urgently interpreting this complex law, the Hon'ble Supreme Court has rendered series of judgments on this law settling the various controversies.

10.3 For our purposes, we have referred and relied upon the judgment of the Hon'ble Supreme Court only in the case of **Action Ispat and Power Private Limited Vs. Shyam Metalics and Energy Limited** rendered by the Hon'ble Supreme Court on **15.12.2020** by three Judges Bench (Judgment Authored by **Hon'ble Mr. Justice Rohinton Fali Nariman**. In which the Hon'ble Supreme Court has clearly laid down in Paragraph No.**22** quoted above that the winding-up Court or the Company Court should transfer the winding-up proceedings to NCLT, not only at the initial stage, but even in the mid stage of winding-up proceedings, unless the winding-up proceedings have reached a stage where it would be irreversible and making it impossible to set the clock back and then only that the Company Court must proceed with the winding-up, instead of transferring the proceedings to **NCLT** under **IBC** provision. Of course whether this stage is reached or not would depend upon the facts and circumstances of each case.

10.4 In the present case, we have noted above that the winding-up proceedings in Company Petition No. **139 of 1985 - M/s. Shetna Enterprises Vs. M/s. Ganpati Pulp and Paper Mills Limited (GPPML)** have not reached in advanced stage and in fact, not even taken off, basically in view of the fact that the assets of the Defaulter Company - **M/s. GPPML** were taken over by GSFC in exercise of its statutory powers under **Section 29** of the **SFC Act, 1951** and sold away to **SIL** at a price which was subject matter of challenge by the appellants themselves in Special Civil Application No. **12979 of 2009**, out of which the present Letters Patent Appeal No. **2480 of 2010** arises. Even the One Time Settlement of **GSFC** with **SIL** at mere **Rs.60 lakhs** while the outstanding dues of Bank of Baroda which has assigned its right in favour of **M/s. ASREC (India) Limited** were over **Rs.7 crores** and other Secured Creditors like **GIIC** and Unsecured Creditors including workmen dues might still be waiting in the wings to be determined and settled by the Official Liquidator of **GPPML**. The action on the part of **GSFC** in this matter right from beginning against **GPPML** and **SIL** is required to be reexamined and reassessed on the anvil of **IBC** provisions in CIRP.

10.5 In these circumstances, the hurried One Time Settlement of

GSFC with **SIL** in favour of which even the major part of the auction price was converted into a term loan by **GSFC** and in the repayment of which, **SIL** defaulted, still instead of again taking over the assets and re-auctioning them, **GSFC** chose, for the reasons best known to it to enter into One Time Settlement with **SIL** at a mere **Rs.60 lakhs** and that is a matter to be looked into by the NCLT. The said **SIL** is also said to have stopped its production activities and the assets of **GPPML** sold to it under **Section 29** way back in the year **1990** are still in disuse or are not being used for any productive activity and that is not only a wastage of assets for the creditors and other stakeholders, but also a national waste.

10.6 All these aspects cannot obviously be looked into by this Court in writ jurisdiction or even a winding-up Court while seized of the winding-up proceedings, but a Special Body like **NCLT** can definitely look into all the aspects of the matter as it is vested with the powers of **CIRP (Corporate Insolvency Resolution Process)** as enacted in the provisions of **IBC, 2016**, as defined in **Chapter-2, Sections 6 to 32A of the IBC, 2016**.

10.7 We quite understand the anxiety of the learned Counsel,

who opposed the aforesaid proposed order of this Court in the interim order dated **01.07.2021** to request the learned Company Judge seized of the winding-up proceedings of Company Petition No.**139 of 1985** to transfer the same to **NCLT, Ahmedabad** and to allow all the parties to raise their claims, counter-claims and defences before it because either they have gained out of the events which have taken place so far and orders passed by different Courts, or want to avoid the further legal action against them by the Creditors like Bank of Baroda or **GIIC**, the Secured Creditors or Unsecured Creditors and workmen seeking to take legal recourse against the Defaulter Companies for realizing their dues which run into crores of rupees now.

10.8 In the inherent & plenary jurisdiction under **Article 226** of the Constitution of India read with **Clause 15** of the Letters Patent vested in us, while deciding the present Letters Patent Appeal and Special Civil Application No.11116 of 2008, we are therefore of the considered opinion that entire litigation of these two corporate bodies viz. **GPPML** and **SIL** deserves to be decided by the **NCLT** by examining the claims, counter-claims, defences and other relevant aspects of all the parties involved in the matter afresh in respect of both the corporate entities in question **GPPML & SIL**

without being influenced by any observations made by any Forum below or OTS Settlement by **GSFC** & **SIL** nor such transfer of proceedings depends upon filing of the application by any party. Some Creditors have already agreed to this proposal and therefore, that is sufficient compliance with Section **434(1)(c)** of the Companies Act, 2013. There is no question of the **NCLT** sitting over the judgment and orders passed by previous bodies like **BIFR**, **AAIFR** or even learned Single Judge as was sought to be made out. On the contrary, we feel that the development of new law in the form of **IBC** is an opportunity for all these stakeholders to get their claims adjudicated and corporate insolvency resolved in a best appropriate manner on the Forum of **NCLT** which is the most competent body under the law as available now for these issues.

10.9 Since we are not seized of the winding-up of proceedings in the present Letters Patent Appeal, we make our aforesaid proposed order absolute now and dispose of this Letters Patent Appeal No.2480 of 2010 as well as Special Civil Application No.11116 of 2008 by requesting the learned Company Judge, who is seized of the winding-up proceedings of Company Petition No.**139 of 1985** to consider all the aforesaid relevant aspects of

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the matter and then take appropriate decision in the matter to transfer the winding-up proceedings to **NCLT, Ahmedabad Bench** which we strongly recommend. We may make it clear that we have not made any pronouncement on the merits of claims or counter-claims of any of the parties in this matter and advisedly so left the said aspects to be considered and decided by the **NCLT** afresh, once the proceedings are transferred by learned Company Judge, who may pass appropriate orders in its his discretion in this regard and for that purpose only the impugned orders and OTS Settlement will not stand in the way of NCLT.

11. With these observations, both of the present matters are ***disposed of***. No costs.

(DR. VINEET KOTHARI,J)

(B.N. KARIA, J)

ORDER IN CIVIL APPLICATION (FOR ORDERS) NO. 1 of 2010

In view of the order passed in the main matter, Civil Application No.1 of 2010 does not survive and accordingly stands ***disposed of***.

(DR. VINEET KOTHARI,J)

(B.N. KARIA, J)

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