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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 02.06.2020
% ***Pronounced on: 06.07.2020***

+ **O.M.P. (I) (COMM) 102/2020**

K.L. ENTERPRISES LLP & ORS ..... Petitioners
Through: Mr. Vikram Nankani, Sr. Advocate with Mr. Prateek Sakseria, Mr. Tishampati Sen, Mr. Ashish Parwani, Mr. Manish Jain, Mr. Dikshat Mehra, Ms. Abhisree Saujanya and Ms. Aarti Kumar, Advocates

versus

BAJAJ FINANCE LIMITED ..... Respondent
Through: Mr. Arun Kathpalia, Sr. Advocate with Ms. Malvika Kapila Kalra, Mr. Ravichandra Hegde, Mr. Pranav Sarthi, Mr. Ashish Venugopal and Ms. Svadha Shankar, Advocates

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking directions to restrain the Respondent and/or any person claiming through and/or under it, from selling/transferring/alienating and/or encumbering

and/or creating any third party rights in respect of the shares of Petitioner Nos. 1 to 5, pledged in favour of the Respondent as security for a loan taken by Petitioner No. 1.

2. Case as set out by the Petitioners is that Petitioner No. 1 is a Limited Liability Partnership Firm engaged inter alia in the business of investment including advisory services in wealth management. Petitioner Nos. 2 to 4 have resigned from the Partnership Firm on 31.01.2020 and currently Petitioner Nos. 5 & 6 are partners of Petitioner No. 1. Respondent is a duly incorporated and registered Non-Banking Finance Company.

3. Vide a Sanction Letter dated 28.08.2019, Respondent sanctioned a LAS Facility for an additional amount of Rs. 100,00,00,000/- in favour of Petitioners. Petitioner No. 1 already had a sanctioned loan in its favour to the tune of Rs. 250,00,00,000/- and, therefore, as on 28.08.2019 the total amount of sanctioned loan in favour of Petitioner No. 1 was Rs. 350,00,00,000/-. On 11.11.2019, one of the Petitioners executed a Loan-cum-Pledge Agreement (first Loan Agreement) with the Respondent and vide this Agreement, Petitioners pledged all securities owned by them, to secure the LAS facility and were thereby able to provide security to the extent of Rs. 60,54,12,342/-.

4. Shortly thereafter, on 12.12.2019, Loan Disbursement Kit, containing inter alia; (i) a Loan-cum-Pledge Agreement signed between Petitioner Nos. 1, 2, 3 and 5 and the Respondent (second Loan Agreement) (ii) a Demand Promissory Note issued by Petitioner No. 2 in

favour of the Respondent in the sum of Rs. 150,00,00,000/-; (iii) a Letter of Continuity in respect of the Demand Promissory Note (iv) an Irrevocable Power of Attorney executed by Petitioner Nos. 1, 2, 3 and 5 in favour of the Respondent, was executed. The various documents mentioned above are hereinafter referred to as 'loan documents'.

5. On 17.01.2020, Petitioner No. 4 was added as a Partner of Petitioner No. 1. Reconstitution of Petitioner No. 1 brought about a corresponding change amongst the Petitioners, towards discharge of their obligations in respect of the said loan. Petitioner No. 1 was the Principal borrower/pledgor from December, 2019, while Petitioner Nos. 2 to 5 stood as co-borrowers/pledgors.

6. It is the case of the Petitioners that Petitioner Nos. 1 to 5 complied with all the obligations under the loan documents, including but not limited to repayments thereof, maintenance of Minimum-Security cover/threshold/margin, etc. As on 27.02.2020, the outstanding loan amount was Rs. 185,18,72,811.98/-.

7. In February, 2020 as is well known, there was an outbreak of Covid-19 Pandemic which wrecked havoc across all Industries, market infrastructure as also trade and business, at a Global level. This unprecedented Pandemic adversely impacted the business and cash flow of the Petitioners as the stock markets plummeted globally. Uncertainties caused due to the Pandemic, triggered sell offs in all the stock markets.

8. On 06.03.2020, Respondent sent a Loan Recall Notice to Petitioner No. 2, invoking Clause 4 of the First Loan Agreement. As per the said

Notice, the outstanding loan amount was Rs. 168,12,39,830/- and the Respondent sought repayment of the entire outstanding amount within three days i.e. on or before 09.03.2020. On 09.03.2020, Respondent addressed an e-mail to certain representatives of Petitioner No.1 intimating a shortfall of Rs. 28,10,00,000/- in the Minimum-Security Margin, as per prevailing market rate. In terms of the loan documents, Petitioners were required to maintain a Minimum-Security Margin equivalent to twice the Loan Value.

9. On 11.03.2020, Respondent addressed two e-mails to the representatives of Petitioner No.1. By the first e-mail, at 8:48 A.M., Respondent informed the Petitioners regarding the increased shortfall in Security Margin and sought a top up, forthwith, by 10:00 A.M., on the same day. By the second e-mail, at 9:16 A.M., Respondent back tracked on what was stated by it in the first e-mail and informed the Petitioners that they would be unable to wait until 10:00 A.M. for the Petitioners to top up the shortfall for the following reasons:

(a) Nifty pre-opening for that day i.e. 11.03.2020 was in the negative by 120 points;

(b) Petitioners' LAS account was already in 'sell trigger'; and

(c) Petitioners' LAS account was in 'freeze mode', since no payment had been made to regularized the said LAS account.

10. Between 11.03.2020 and 30.03.2020, Respondent invoked the pledge and/or sold a significant number of pledged shares.

11. It is the case of the Petitioners that in terms of the Loan Recall Notice, the outstanding loan as on the date of the filing of the petition was Rs. 56,82,08,716.75/- plus interest as per the books of Petitioner No. 1. Despite having realized over more than 110,00,00,000 shares of the loan amount and without regard to the prevailing circumstances on account of the Pandemic and the consequent Nationwide Lockdown, Respondent addressed a Notice dated 19.03.2020 to Petitioner Nos. 2 to 6 and called upon the Petitioners to forthwith pay Rs. 65,83,08,171/-, being the outstanding amount towards the loan.

12. On 24.03.2020, a 21-day complete Lockdown was announced, followed by an Order issued under the Disaster Management Act, 2005 issuing certain Guidelines to be followed during the Lockdown. Many States including Delhi restricted trade and commerce as a precautionary measure to avoid the spread of the Pandemic, even prior to the official Lockdown orders. As a direct result of these restrictions, the operations and business of the Petitioners was impacted and the Minimum-Security Margins fell below the required cover under the terms of the loan. The Petitioners due to the sudden closure, were not even in possession of the various documents executed with respect to the loan, but despite the said circumstance, Petitioners responded to the Notice of the Respondent, vide letter dated 08.04.2020. Petitioners through the said letter requested for providing the documents executed for the loan as well as assured the Respondent that they would remain committed toward fulfilling their obligations of repaying the loan and requested the Respondent to co-operate. It was mentioned in the letter that the Covid-19 Pandemic

constituted an event of *Force Majeure*. The loan amount was prematurely recalled despite the Term being 24 months and that the loan facility was adequately secured prior to the outbreak of Covid-19. The value of the pledged shares in the prevailing circumstances was not reflective of their true value, as also that various Regulators and Statutory Authorities, including the RBI had permitted grant of moratorium/relaxations and relief packages. Courts were also restraining lenders from invoking/selling pledged shares. However, Respondent, unaffected, continued to sell certain pledged shares and, on or around 09.04.2020, 3,53,435 shares of Future Consumer Ltd. were sold and an amount of Rs. 19,61,564.25/- was recovered by the Respondent.

13. On 22.04.2020, Respondent replied to the letter dated 08.04.2020, calling upon Petitioner No. 1 to clear the outstanding dues at the earliest. It is averred in the petition that to the best of Petitioners' knowledge, the remaining pledge shares, which were not invoked and/or sold were as follows:-

> *"a. Future Consumer Ltd. ("FCL") – 1,63,844 shares;*
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> *b. Future Retail Ltd. ("FRL") – 54,29,067 shares; and,*
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> *c. Centrum Capital Ltd. ("CCL") – 49,75,427 shares,*
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> *aggregating to 1,05,68,338 shares".*

14. Value of the said remaining shares, as on 22.04.2020, was Rs. 59,40,70,895/-.

15. It is thus prayed by the Petitioners that, in these circumstances, the Respondent be restrained from selling/ transferring/ alienating/ encumbering or parting with the custody, control and possession of the balance pledged shares, being the subject matter of Arbitration, in aid of the Arbitration Proceedings.

16. On 28.04.2020, petition was listed before this Court and the parties after some deliberations, arrived at an understanding. As an interim arrangement, till the next date of hearing of the Petition, it was agreed as under:-

> *"12. Matter was taken up post lunch and the Court was informed that the parties have arrived at an understanding and worked out an interim arrangement. It has been agreed that:*
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> > *A) Petitioners shall pledge further shares as Additional Security Coverage to the respondent. Shares will be pledged through two other legal Entities on behalf of the petitioners. Details and particulars of the Additional Securities have been discussed and will be formally exchanged during the course of the day. It is agreed that the Additional Security will be to the tune of Rs.25 Crores.*
> >
> > *B) Petitioners and respondent shall comply with applicable laws to record the pledge of additional shares.*
> >
> > *C) Respondent shall not, either itself, and/or under, and/or on behalf of the respondent sell/transfer/alienate and/or encumber, and/or part with the custody, control and possession of the remaining pledged shares, which are the subject matter of the present petition.*

D) In the event, pursuant to the provision of Additional Security, the security cover, based on the market price of the respective shares, reduces to below INR 56 Crores, the petitioners undertake to provide additional shares and/or other securities to ensure that the total Security Coverage is maintained above INR 56 crores.

E) Currently, petitioner Nos. 5 and 6 are Partners of petitioner no. 1. Petitioner Nos. 2 to 4 have resigned from the Partnership Firm on 31.01.2020. However, petitioner Nos. 2 to 6 undertake that, without prejudice to their respective rights and contentions under the law and contract, they shall remain liable to the respondent to the extent provided in the loan and security transaction documents, with respect to the liability arising out of the Loan Facility extended by respondent to petitioner no. 1.

13. The said arrangement would continue till the next date of hearing. Needless to state that this is only an interim arrangement and has been arrived at, on account of the unprecedented and peculiar circumstances, created by the ravaging effect of the pandemic COVID-19. The arrangement is without prejudice to the rights and contentions of the respective parties."

17. In terms of the said order, Petitioners offered 1,00,00,000 equity shares of Indianivesh Limited as and by way of Additional Security cover and also filed the requisite undertaking. Petition was adjourned for hearing on 21.05.2020. On 04.05.2020, Respondent filed I.A. No. 3816/2020, under Section 152 read with Section 151 CPC seeking rectification/modification of the consent order, limited to correction of two alleged errors as under:-

"a) that the outstanding loan amount was Rs. 45,29,02,400/- (Rupees Forty-Five Crore Twenty-Nine Lakh Two Thousand Four Hundred Only), and not Rs. 56 crores, as contended by the Petitioners and reflected in the said Order; and,

b) that the 1,00,000 equity shares of Indianivesh Ltd. offered by the Petitioners "cannot be accepted" by the Respondent, since the same were allegedly "not in consonance with the policies of the (Respondent) and the RBI Circular (dated 21st August 2014)."

18. Respondent also contested the offering of the equity shares of Indianivesh Limited on the ground that the Respondent had never agreed to accept the shares of the said Company.

19. On 08.05.2020, after this Court heard some arguments on the application, parties were ad-idem that in the fitness of things, the main petition should also be heard along with the application. Accordingly, the date of hearing in the main petition was preponed and with the consent of the parties, the petition was listed for final hearing. Both sides filed reply/rejoinder followed by additional affidavits and written submissions.

20. Learned Senior Counsel for the Petitioners, Mr. Vikram Nankani submits that the outbreak of Covid-19 Pandemic was entirely unprecedented and this adversely affected the business of the Petitioners which in turn impacted the performance of their obligations towards repayment of the loan. The fall in the Minimum-Security Margin/Cover is also solely attributable to Pandemic Covid-19. The said event was unforeseen and unprecedented on a Global scale. Respondent, unmindful of the prevailing circumstances, mechanically sent the Recall Notice and

threatened invocation of the pledged shares, from time to time, in the months of March and April, 2020. It is further contended that on account of the Pandemic, there was a fall in the stock prices of the pledged shares, which was solely attributable to the overall tanking of the stock market. BSE Sensex had fallen by approximately 9,878.71 points in the month of March, 2020. As a consequence of the fall/crash of the stock market, the share price of the pledged shares also fell. In a normal scenario, the price per share of the remaining pledge shares held in FCL was within the range of Rs. 26.35 - 12.35/- per share; FRL was within the range of Rs. 325 - 282/- per share; and CCL was in the range of Rs. 28.10 - 18.20/- per share from 01.01.2020 to 28.02.2020. As on 24.04.2020, remaining pledged shares were trading on the BSE at a significantly lower price, per share and it is thus clear that the current stock prices were not true reflection of their underlying value. Respondent thus ought to have exercised restraint in selling the pledged shares. The sale of shares in such circumstances would lead to a further strain on the Petitioners in toping up the Security Margin.

21. It is contended that even otherwise, the invocation Notices dated 09.03.2020 and 11.03.2020, which resulted in sale of pledged shares are ex-facie illegal and contrary to Clause 22 of the RBI Circular RBI/DNBR/2016-17/45 Master Direction DNBR. PD. 008/03.10.119/2016-17 ("RBI Master Directions"). Under the said RBI Master Directions, any NBFC lending against the collateral of listed shares shall maintain a Loan to Value (LTV) ratio of 50% for loans granted against the collateral shares and any shortfall in maintenance of

50% LTV occurring on account of movement in share prices shall be made good within seven working days. Any shortfall arising due to adverse price movement persisting for a Continuous period beyond seven working days will be recouped by sale of underlying securities pledged with the Respondent.

22. It is argued that the Respondent vide the Recall Notice dated 06.03.2020, gave the Petitioners only two-days notice and started selling the shares from 11.03.2020 to 14.03.2020, contrary to the said RBI Directions, requiring a clear seven working day Notice.

23. Mr. Nankani, Learned Senior Counsel, taking the argument further submits that on account of the challenging circumstances, Central Government and State governments have issued appropriate Notifications/Orders/Advisories, including but not limited to the provisions of the Disaster Management Act, 2005 and various Authorities/Institutions have declared the situation to constitute a *Force Majeure*. Two such examples are the OM dated 19.02.2020 issued by Department of Expenditure, Ministry of Finance and OM dated 23.03.2020 issued by Department of New and Renewable Energy, Ministry of Finance. RBI, pursuant to its Statement of Development and Regulatory Policies released on 27.03.2020, issued a Circular dated 27.03.2020. The Circular granted relaxations and set out the manner in which lending Institutions were to provide a 'relief package' on account of market destructions. It permitted the banks to grant a moratorium of three months on payment of all installments, falling due between 01.03.2020 to 31.03.2020. The Circular allows repayment schedule for

such loans to be deferred by the three months beyond the moratorium period i.e. three months from 31.05.2020. Relevant part of Circular dated 27.03.2020 is as under:

> *"(i) Rescheduling of Payments – Term Loans and Working Capital Facilities*
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> *2. In respect of all term loans (including agricultural term loans, retail and crop loans), all commercial banks (including regional rural banks, small finance banks and local area banks), co-operative banks, all-India Financial Institutions, and NBFCs (including housing finance companies) ("lending institutions") are permitted to grant a moratorium of three months on payment of all instalments1 falling due between March 1, 2020 and May 31, 2020. The repayment schedule for such loans as also the residual tenor, will be shifted across the board by three months after the moratorium period. Interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period.*
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> *3. In respect of working capital facilities sanctioned in the form of cash credit/overdraft ("CC/OD"), lending institutions are permitted to defer the recovery of interest applied in respect of all such facilities during the period from March 1, 2020 upto May 31, 2020 ("deferment"). The accumulated accrued interest shall be recovered immediately after the completion of this period."*

24. Learned Senior Counsel draws the attention of the Court to a recent Circular by the RBI dated 17.04.2020, whereby it was decided that in respect of all accounts through which lending institutions decided to grant moratorium or deferment, and which were standard as on 01.03.2020, the 90-day NPA norm shall exclude the moratorium period i.e. there would

be an asset classification standstill for all such accounts from 01.03.2020 through 31.05.2020. It is submitted that this was a further relaxation to the borrowers on account of the Pandemic. Relevant part of Circular dated 17.04.2020 is as under:

> *"the Economic activity has come to a standstill during the period of the lockdown, with consequential lingering effects which have unambiguously affected the cash flows of households and businesses. On March 27, 2020 the RBI had permitted lending institutions (LIs) to grant a moratorium of three months on payment of current dues falling between March 1 and May 31, 2020. It is recognized that the onset of COVID-19 has also exacerbated the challenges for such borrowers even to honour their commitments fallen due on or before February 29, 2020 in Standard Accounts. The Basel Committee on Banking Supervision (BCBS) has taken cognizance of the financial and economic impact of COVID-19 and very recently announced that "………the payment moratorium periods (Public or granted by banks on a voluntary basis) relating to the COVID- 19 outbreak can be excluded by banks from the number of days past due" in respect of NPA recognition.*
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> *Therefore, it has been decided that in respect of all accounts for which lending institutions decide to grant moratorium or deferment, and which were standard as on March 1, 2020, the 90-day NPA norm shall exclude the moratorium period, i.e., there would an asset classification standstill for all such accounts from March 1, 2020 to May 31, 2020. NBFCs, which are required to comply with Indian Accounting Standards (IndAS), may be guided by the guidelines duly approved by their boards and as per advisories of the Institute of Chartered Accountants of India (ICAI) in recognition of impairments. In other words, NBFCs have flexibility under the prescribed*

accounting standards to consider such relief to their borrowers."

25. Mr. Nankani submits that several Courts have issued restraint orders and other interim directions keeping in view the Pandemic Covid-19 and relaxations given by the RBI to provide financial relief to the parties who have availed loan, but are under distress on account of the impact of the pandemic on trade and commerce. Learned Senior Counsel relies on the judgment in the case of ***Eastman Auto & Power Limited v. Reserve Bank of India & Ors.**, **W.P(C) No. 2997 of 2020**, **decided on 27.04.2020***. Relevant para is as under:-

> *"15. I have considered the submissions made by the learned counsels for the petitioner and the respondent nos. 2 and 5. Prima facie, I am unable to agree with the submissions made by the respondent nos. 2 and 5. Admittedly, the responsibility of making the payment, including the interest component for such facility, is on the petitioner. The object of issuing notifications/circulars dated 27.03.2020 and 17.04.2020 was to provide financial relief to the parties who have availed the term loans and working capital facilities. This Court in its order dated 06.04.2020 passed in WP (C) Urgent 5/2020 (Supra), had considered the abovementioned notifications/ circulars of the respondent no. 1 and observed that prima facie, the intention of the respondent no. 1 appears to be to maintain status quo as on 01.03.2020 with regard to the financial facilities that have been granted to various parties and have fallen due. "*

26. Reliance is placed on the judgment in the case of ***Shakuntala Educational & Welfare Society v. Punjab & Sindh Bank, W.P (C) No. 2959 of 2020.*** Relevant para is as under:-

"12. Having considered the submissions of the learned counsel for the parties, I find that the respondent does not dispute the position that in case the petitioner had, at any time, on or before 31.03.020, made the payment qua the instalments, which had fallen due on 31.12.2019, the respondent could not have declared the petitioner's aforesaid accounts as NPA. In the light of this position, in my view, irrespective of the question, as to whether, the moratorium as envisaged by the RBI's circular dated 27.03.2020 would be applicable to the petitioner qua the instalments, which question can be determined only after completion of pleadings and considering the stand of the RBI, the fact remains that in view of the lockdown in the country as also the undisputed position that the petitioner still had time to make the payment of the due instalments till 31.03.2020, before which date on account of the lockdown and directive issued by the State Government, it has been prevented from demanding the due fees from the students of its various institutes. I also find myself in agreement with the observation of the Coordinate Bench in Anant Raj Limited (supra) that the intention of the RBI while issuing the regulatory package was to maintain status quo with regard to the classification of accounts of the borrowers as they existed on 01.03.2020.

13. In these circumstances, I am of the view that the petitioner has made out a prima facie case for restraining the respondent from declaring its two accounts as NPA, when the countrywide lockdown is still continuing. Any classification of the petitioner's accounts as NPA would certainly amount to altering the position as existing on 01.03.2020 and, therefore, grave and irreparable loss will be caused to the petitioner, in case, its accounts are declared as NPA, only on account of its failure to pay the instalments, which were admittedly payable on or before 31.03.2020."

27. Reliance is also placed on an interim order passed by a Co-ordinate Bench of this Court in ***M/s. Halliburton Offshore Services Inc. v.***

Vedanta Ltd, in ***O.M.P. (I) (COMM) 88/2020, dated: 20.04.2020***, more particularly para 20, which is as under:-

> *"20. The countrywide lockdown, which came into place on 24th March 2020 was, in my opinion, prima facie in the nature of Force Majeure. Such a lockdown is unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner. Mr. Sethi has submitted, categorically, that, till the date of clamping of the lockdown, on 22nd March 2020, his client was in the process of proceeding with the project, and that, had the lockdown not be imposed, the project might have been completed by 31st March 2020. Prima facie, in my view, special equities do exist, as would justify grant of the prayer, of the petitioner, to injunct the respondent from invoking the bank guarantees of the petitioner , forming subject matter of these proceedings, till the expiry of a period of one week from 3rd May, 2020, till which date the lockdown has been imposed."*

28. Reliance is also placed on ***Transcon Skycity Pvt. Ltd. & Ors. v. ICICI Bank & Ors.,*** in ***Writ Petition LD-VC No. 28 of 2020***, ***dated: 11.04.2020***, relevant part of which is as under:

> *"22. In any case, I do not believe I am called upon to make such a categorical finding at this stage. My task, as I see it, is to attempt to preserve the parties in status quo ensuring the minimal prejudice to both sides in these unprecedented and exceptionally difficult times. Clearly the Petitioners are in distress. Equally clearly, ICICI Bank should not, on account of the lockdown, the moratorium declared by the RBI and the default of the Petitioners, find itself to be in difficulty or not in compliance with the directives issued by its regulatory authority, the RBI. Of course, ICICI Bank itself cannot, therefore, make any concession in regard to*

the RBI directions and moratorium. Therefore, nothing that Mr. Tulzapurkar says or submits today is therefore to be construed or read as an admission or as a concession on his part."

29. Learned Senior Counsel vehemently contends that having agreed to the various terms and conditions, as recorded in the order dated 28.04.2020, it is not open to the Respondent to go back on the consent recorded in the order. When the matter was being deliberated upon and discussed between the parties on 28.04.2020, Petitioners had repeatedly mentioned and apprised the Court that the Additional Security sought to be given will be of the 50,00,000 equity shares of Indianivesh Limited, in addition to the 50,00,000 equity shares already provided on 18.04.2020, by way of Power of Attorney in favour of Bajaj Financial Securities, a Group Company of the Respondent. It is thus very surprising that the Respondent is denying any knowledge of the said offer and this is only an attempt to wriggle out of the consent order, which is impermissible in law. In fact, the Respondent is guilty of suppressing from the Court that it had sold a part of the remaining pledge shares, between 24.04.2020 and 28.04.2020 after being served with an advance copy of the Petition. Respondent is also guilty of misrepresentation in making a statement before the Court that the outstanding loan amount was Rs. 56 crores, knowing fully well that the outstanding loan amount was Rs. 45,29,02,400/-, as is now brought out in the Application for rectification.

30. It is next argued that Clause 4.1 of Article V of the Loan-cum-Pledge Agreement confers a discretionary power on the Respondent and

not an obligation to recall the loan and the discretion in law has to be exercised in good faith and fairness. In any event, the said loan, advanced for working capital purposes, was to be repaid in full, with interest, not later than 30.09.2021. Given that there was no substantial or incurable breach by the Petitioners, prior to the outbreak of the Pandemic, Respondent ought to have exercised the discretion in good faith and permitted a moratorium in terms of the RBI Circulars. It is further argued that the Respondent is erroneously relying on the RBI Master Directions dated 01.09.2016 only to defeat the benefit accruing to the Petitioners under the consent order. In the application for rectification, Respondent contends that it can only accept 'Group-I shares' as securities and since Indianivesh Limited shares are not Group-I shares, they cannot be accepted as additional security. It is submitted that the RBI Circular dated 21.08.2014 stood modified by RBI circulars dated 10.04.2015 and 01.09.2016 clarifying that directions issued to NBFCs to grant loans against Group-I Securities as collaterals, applies only to cases concerning 'investment in the capital market'. In so far as the present loan is concerned, it was clearly sanctioned for 'working capital purposes'. Additionally, the phrase used in Clause 22 'where lending is being done', is indicative of the fact that Clause 22 envisages a scenario pertaining to initial stage of sanctioning the loan and not during the entire tenure thereof.

31. It is further contended that the SEBI Circular dated 11.03.2003 classifies a Group-I Security on the basis of (1) frequency of trading in the preceding 18 months (80% +/- 5%) and (2) the mean impact caused

being less than or equal to 1%, to be calculated on a rolling basis on the 15th of every month. Accordingly, a security fluctuates from Group-I to Group-II or vice-versa and such fluctuations being dynamic in nature, can never be a fundamental condition for the entire Term of a loan. More importantly, the resistance of the Respondent is belied by its own conduct as CCL, the shares of which have been held by the Respondent as valid collateral since 01.03.2020, shifted from Group-I to Group-II and remains a Group-II Security as on date. In fact, Respondent has admittedly sold certain shares of CCL on 06.03.2020. It is also argued that even otherwise Clause 22 of the RBI Directions cannot restrict the power of a Court in balancing the equities between the parties at an interlocutory stage in aid of and for preservation of the subject matter of the Arbitration. The RBI Circulars have been issued with a view to permit relaxations in lending transactions owing to adversities by declaring a moratorium and protection from loan defaults with effect from 01.03.2020. Supreme Court in the case of ***Kamal Kumar Kalia v. Union of India & Anr. in Writ Petition (Civil) – Diary No. 10955/2020*** has directed the RBI to ensure implementation of the Circular dated 27.03.2020 in letter and spirit. Circular dated 17.04.2020, in fact, gives flexibility to the NBFCs to consider granting a moratorium/deferment for three months to the borrowers and this fact is also noted by the Court in the case of ***JR Toll Road Private Limited v. Yes Bank Limited in W.P(C) No. 2970 of 2020***.

32. It is submitted that the Petitioners have a prima facie case in view of the Pandemic Covid-19 and the Court can pass interim orders, if

special equities warrant. Out of a total outstanding loan amount of approx. 160 crores, all that remains outstanding is about Rs. 45 crores. The current value of the remaining pledge shares and the additional security being offered, will together secure the Respondent upto Rs. 59 crores and thus the Balance of Convenience is also in favour of the Petitioners. Indianivesh Limited is a robust and solvent listed Company and a Parent Company of the Indianivesh Group which is engaged in various businesses, such as bridge financing, merchant banking, Corporate finance etc.

33. Learned Senior Counsel also argues that under Section 176 of the Indian Contract Act, 1872, Pledgee is bound to give the Pledger reasonable notice of sale prior to selling the goods to avoid unfair play and sharp practices and, in the present case, Respondent has failed to give the said notice and has acted unfairly in selling shares at low values.

34. Per contra, Mr. Arun Kathpalia, Learned Senior Counsel for the Respondent, before arguing on the merits, has made certain preliminary submissions. It is argued that the petition is not maintainable as there is no prima facie case against the Respondent, which is a *sine qua non* for maintainability of a petition under Section 9 of the Act. Protection and preservation sought under Section 9 of the Act should be in aid of the Arbitration, to avoid the Award from being a mere paper Decree. There is, however, no co-relation between the purported Arbitration Claim of the Petitioners and the relief claimed in the present petition, where the sole ground for relief is Covid-19 as a *Force Majeure* situation, though the Agreement does not even have a *Force Majeure* Clause.

35. It is argued that Respondent is a NBFC, a Listed Company with various shareholders and depositors to whom Respondent is answerable and being regulated by the RBI is required to be protected. The defaults existed prior to the Pandemic and being in breach, no benefit can be sought by the Petitioners under the RBI Circulars. Without adequate security, in favour of the Respondent, the restraint imposed on the sale of shares by this Court, vide order dated 28.04.2020, is jeopardizing the rights of the Respondent and the interest of stakeholders is at stake. Balance of Convenience lies in favour of the Respondent and irreparable loss would also be caused to the Respondent, if there is no recovery of loan by selling the pledged shares.

36. On merits, it is argued by learned Senior Counsel that as per the Sanction Letter by which the loan was sanctioned to the Petitioners, in tune with the RBI Directions dated 01.09.2016, Petitioners were required to keep LTV ratio of 50% and the Sell Trigger was the failure of the Petitioners to rectify any shortfall in LTV default, within seven days or the LTV falling below 85%. The parties herein are duty bound to comply with Clause 22 of the RBI Directions which is as under:

> *"**22. Loans against security of shares***
>
> *Applicable NBFC lending against the collateral of listed shares shall,*
>
> *(i) maintain a Loan to Value (LTV) ratio of 50% for loans granted against the collateral of shares. LTV ratio of 50% shall be maintained at all times. Any shortfall in the maintenance of the 50% LTV occurring on account of movement in the share prices shall be made good within 7 working days.*

(ii) in case where lending is being done for investment in capital markets, accept only Group 1 securities (specified in SMD/ Policy/ Cir - 9/ 2003 dated March 11, 2003 as amended from time to time, issued by SEBI) as collateral for loans of value more than` 5 lakh, subject to review by the Bank.

(iii) report on-line to stock exchanges on a quarterly basis, information on the shares pledged in their favour, by borrowers for availing loans in format as given in Annex V."

37. Learned Senior Counsel for the Respondent submits that the two Loan-cum-Pledge Agreements dated 11.11.2019 and 12.12.2019 were entered into by the Parties as commercial transactions and have incorporated the terms and conditions relating to sanction as well as repayment of loan and the nature of Securities that would be accepted as Collaterals. The Clauses relied upon by the Learned Counsel for Respondent are as under:

*"**Article I***

1.28 "Securities" means such marketable shares/debentures/bonds/units of Mutual Funds and other securities as defined in the Securities Contracts (Regulation) Act, 1956, acceptable to the lender and shall include (wherever the context of this agreement so requires) Mutual funds or funds registered with Securities Exchange Board of India, and such other securities of a nature and description acceptable to the Lender, which are deposited by the Security Provider with the lender as Security for the repayment of the Loan.

Article II

4.1 The Borrower undertakes to repay to entire "Loan Balance" on the repayment date as mentioned in the relevant Schedule of Terms.

xxx xxx xxx

4.4 Without limitation or prejudice to the rights of the Lender under this Agreement, the Loan shall be repayable in full forthwith by the Borrower in the event of Borrower's failure to:

> *i. comply with any of the requirements under this Agreement or breach of any provisions hereof;*
>
> *ii. pay any interest when due to the Lender; or*
>
> *iii. pay any amount when due to (a) the Lender under any other agreement, or (b) any other person.*
>
> *iv. Failure to maintain or provide Margin, when called upon by the Lender*
>
> *v. An Event of default, as specified in Article V has occurred.*

4.5 The Borrower also agrees that the Loan is repayable unconditionally on demand made by the Lender at the Lender's absolute discretion and without giving any reasons whatsoever. The Lender would given Three (3) Working Day(s) notice to the Borrower to repay the Loan together with all amounts due including interest accrued, charges, dues, levies, expenses, claims, costs and fees thereon or otherwise in relation to this Agreement till the date of actual realization. Upon receipt of such notice the Borrower shall forthwith repay the Loan.

Article III

2.1 So long as there exists any Loan Balance due from the Borrower to the Lender, the Lender may require the Borrower to maintain or cause to maintain with the Lender or Share Pledge Trustee at all times a Margin of such percentage as stipulated in the Schedule(s) of Terms consisting of Securities acceptable to the Lender. The computation of the value of the Securities shall be based on the "Market Price".

xxx xxx xxx

3.1 In the event that the Market Value (or net asset value, in the case of units) of the Security falls, or under any other circumstances, if the tender deems fit, the tender shall serve upon the Borrower a written notice demanding additional security by way of cash payment and/or delivery of further Securities, being Securities of companies/mutual funds/entities acceptable to it or any other security as approved by the Lender and the Borrower undertakes that within 1 (one) day from the receipt of the notice from the Lender, the Borrower shall make up the difference either by payment in cash to the lender of by causing the delivery to the lender of additional Securities, acceptable to the Lender, of the value necessary to make up the difference.

Article V

1.1 Each of the following events is, and shall be deemed to constitute, an "Event of Default".

xxx xxx xxx

ii. if the Borrower is called upon to make good the Margin as specified in the Schedule of Terms and it fails to do so within the period of notice specified in the said article;

xxx xxx xxx

x. if the Borrower and/or the Security Provider have taken or suffered to be taken any action for its reorganization, liquidation or dissolution.

xxx xxx xxx

xvii. there exists any other circumstance, which in the sole opinion of the Lender is prejudicial to the interest of the Lender."

38. Relying on these Clauses, Learned Senior Counsel submits that the Loan-cum-Pledge Agreement clearly sets out that Securities will be those which shall be acceptable to the lender, as collateral. Any failure to make good the shortfall in margin and/or any reorganization of the Petitioner No. 1 firm, or any circumstance prejudicial to the interest of the Respondent shall be deemed to constitute an Event of Default under Clause 4.4. In the event, the Petitioners fail to maintain or provide margin cover, when called upon, loan shall be repayable, in full, forthwith. Loan is also repayable unconditionally on demand by the Respondent at its absolute discretion and without giving any reasons, by a three working days Notice.

39. Mr. Kathpalia submits that the Petitioners are mischievously claiming the benefit of the circumstances arising out of the Pandemic. The defaults/breaches of the Petitioners in fact relate to a period prior to the Pandemic and thus even the benefit of the RBI Circulars and the moratorium thereunder is not available. It is pointed out that the Petitioners committed persistent defaults between 26.12.2019 and

04.03.2020. The alleged defaults as set out by the Respondent are as under:-

Dates	*Description*
26.12.2019-07.01.2020	*There was a shortfall in the value of the pledged shares for a continuous period of 7 working days (From page 522 of the Preliminary reply to the Petition).*
27.01.2020	*The Petitioners paid the interest instalment after a default of 20 days (From page 529 of the Preliminary Reply to the Petition).*
27.01.2020-01.02.2020	*There was a shortfall in the value of the pledged shares for a continuous period of 6 working days (From page 532 of the Preliminary Reply to the Petition).*
31.01.2020	*In the interim, Petitioner No. 1 changed its constitution and Petitioner Nos. 2, 3 and 4 resigned. The Respondent found out about the aforesaid re-constitution, in the last week of April, 2020, when the said information was updated on the MCA website (page 174 Rejoinder of the Affidavit-in-Rejoinder to the LA.). This is in clear violation of the negative covenants which entitled the Respondent to recall the entire loan amount for such default and breach of covenant.*
03.02.2020-20.02.2020	*There was a shortfall in the value of the pledged shares for a continuous period of 12 working days (from page 544 of the Preliminary Reply to the Petition)*
25.02.2020-04.03.2020	*There was a shortfall in the value of the pledged shares for a continuous period of 7 working days*

40. On 04.03.2020, as there was a Margin shortfall in the loan account of the Petitioners, for more than seven working days, Respondent invoked the pledge and sold 4,00,000 shares of Future Retail Limited. On 06.03.2020, Respondent issued the loan Recall Notice to repay the entire outstanding amount of Rs. 168,12,39,830/- within three working days. As the petitioners failed to repay the outstanding amount, coupled with the fact that the account fell below 85% (79.74%) on 11.03.2020, Respondent initiated sale of the pledged shares, after due intimation to the Petitioners and giving three working days notice. The sale continued till the last week of April, 2020 and no objection was raised by the Petitioners. In fact, the Petitioners acquiesced to the said sale, as on 12.03.2020, Petitioners purchased 51,00,254 pledged shares of Dwarikesh Sugar Industries Limited, sold by the Respondent via bulk deal and the same was reported on BSE Limited. This material information has been suppressed in the petition. Much later, on 08.04.2020, Petitioners responded to the Notices of the Respondent, emphasizing that they remain committed to the contractual obligations and requested the Respondent to recall the notices dated 19.03.2020 and 06.03.2020 and not to sell the balance Pledges Shares. On 22.04.2020, Respondent offered its co-operation to the Petitioners, if payments were made forthwith, to rectify the shortfall in margin cover. However, despite the assurance by the Petitioners to do so, no payment was made and the present petition was filed on 24.04.2020. In these circumstances, there is no ground for granting any interim relief to the Petitioners.

41. The next contention of Learned Senior Counsel is that the liability/debt due under the loan Recall Notice is not disputed by the Petitioners. The action impugned is the notice period being short of the requisite period, prior to the invocation and sale of pledged shares. Prior to the filing of the petition, no grievance was raised on any of the sales executed by the Respondent. The purported reference to Arbitration is also with respect to the seven days notice period allegedly not provided to the Petitioners, and it is thus clear that the Petitioners in fact have no intent to invoke Arbitration and the only purpose of filing the petition is to obstruct/stall the sale of pledged shares. Even the RBI Directions do not envisage a grant of seven days notice, prior to sale of pledged shares. Clause 22 only requires the Respondent to give seven working days notice to rectify the margin shortfall, on account of fluctuation in the prices of the pledged shares, before any coercive steps are taken.

42. As far as the objection under Section 176 of the Contract Act, 1872 is concerned, sale and pledge of dematerialized shares is governed by Regulation 58 of the SEBI (Depositories and Participants) Regulation, 1996 and there is no provision for prior notice. The only condition imposed on invocation of pledge by the pledgee under Regulation 58 (8) is the same being required to be 'subject to the provisions of a pledge documents'. Reliance is placed on the judgement in ***Tendril Financial Services Pvt. Ltd. & Ors. v. Namedi Leasing & Financial Ltd. & Ors. (2018 SCC OnLine Del 8142)*** and the judgement of the Division Bench of Bombay High Court in ***Pushpanjali Tie Up Pvt. Ltd. v. Renudevi Choudhary & Ors., (2014 SCC OnLine Bom 3661)*** in this regard.

Further, Petitioners were given three working days notice period and to contend that the period is short or unreasonable, is incorrect. The loan Recall Notice was issued on 9:00 AM on 06.03.2020 and the pledge was invoked on 11.03.2020 at 10:00 AM, clearly giving three working days notice, excluding the intervening holidays. Reliance is placed on the judgement in ***Reliance Project Ventures and Management Pvt. Ltd. and Another v. ECL Finance Limited and Others, (2019 SCC OnLine Bom 6781)***. It is thus contended that the Petitioners do not even have a prima facie case as the chances of their success in the ultimate Arbitration Proceedings are negligible.

43. Learned Senior Counsel contends that the Petitioners cannot invoke the event of Pandemic Covid-19 as an event of *Force Majeure*, as there is no *Force Majeure* Clause in the Loan-Cum-Pledge Agreement dated 11.09.2019. Reliance is placed on the judgement of the Supreme Court in ***Energy Watchdog v. Central Electricity Regulatory Commission & Ors. [(2017) 14 SCC 80].***

44. It is contended that the RBI Circular dated 27.03.2020 and the subsequent Circulars clarifying/granting further relaxations only grant moratorium on repayment of interest installments and do not deal with deficiency in Minimum Margin cover, which is the case here. Furthermore, the Circulars while granting such relaxations, call upon the Banks and NBFCs to be vigilant and provide such reliefs, which are justifiable on account of Covid-19. The NBFCs and Banks are subject to subsequent supervisory Review by the Regulator, at which time, RBI will ascertain whether grant of such relief was justified. Thus, the Respondent

cannot be expected to blindly grant relaxations to the Petitioners, more so given their conduct. Reliance is placed on a judgement of this Court in ***M/S Halliburton Offshore Services Inc. v. Vedanta Limited & Anr. being O.M.P (I) (COMM.) NO. 88/2020, decided on 29.05.2020***, wherein the Court has observed that conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, have to be assessed while considering whether genuinely the party was prevented from performance due to the Pandemic.

45. Mr. Kathpalia further contends that in the entire petition, there is not a whisper as to what irreparable injury would be caused if the sale of the pledged share is undertaken by the Respondent. The implied injury from what has been argued, is the low realization in value on sale of the pledge shares, on account of fall in the price of the shares, solely attributable to overall tanking of the stock market due to Covid-19. Attention of the Court is drawn to para 44 of the Petition, wherein it is stated that Petitioners are merely seeking a temporary suspension or a moratorium on the Respondent's right to sell the shares, till such time the Pandemic situation stabilizes and normalcy is restored. Assuming the arguments of the Petitioners to be correct that Respondent has not been prudent in selling the shares, Petitioners would have to prove that they suffered loss or damage and being a monetary claim would be able to entitle to damages, if they succeed in Arbitration.

46. It is further argued that even the Balance of Convenience is not in favour of the Petitioners. Petitioners have constantly defaulted in

maintaining adequate margins since December, 2019, besides a decrease in the value for security cover, being the value of the pledged shares, as against the extended Financial Facilities. Respondent is already in a debit position of approx. Rs. 4.53 crores viz-a-viz the amount of pledged shares in hand. Due to the volatility in the stock market, position has been changing every day, fluctuating the debit position of the Respondent. Chances of the aforesaid shares gaining any positive momentum look bleak as Future Retail has lost over 73% value in last one month and Centrum has been classified as Group-II Security. In any case, being a RBI registered NBFC, the Respondent cannot but accept Group-I Security. This is the mandate of the Circular and Respondent is bound by it. RBI Circulars, granting relaxation and moratorium has not exempted/relaxed the nature of securities that can be accepted and even otherwise clause 1.28 mandates that Petitioners will give those Securities which are acceptable to the Lender. Ever since the First Loan Agreement was executed in 2018, only Group-I shares were given by the Petitioners and accepted by the Respondent.

47. Learned Senior Counsel submits that when the petition was listed on 28.04.2020 and the parties had agreed to certain terms and conditions, Petitioners had undertaken to pledge Additional Securities of Rs. 25 crores as Additional Security Cover and assured that the Margin cover will be maintained above Rs. 56 crores. However, subsequently it was realized by the Respondent that the Petitioners' proposed to transfer shares of Indianivesh, which was against the Contractual Clauses as well as the RBI Directions. Respondent cannot accept these shares as

securities as they do not qualify as Group-I Security, considering the parameters of volatility and liquidity, as directed by RBI through its Circular dated 10.04.2015 and SEBI through its Circular dated 11.03.2015. Respondent is a NBFC, registered with RBI, and is bound by these directions. Even if consent was given, assuming for the sake of arguments, there cannot be a consent against law.

48. It is argued that Petitioners have not disputed the existence of the condition of 50% LTV ratio, as set out in Clause 22 (I) of the RBI Directions. This ratio is required to be admittedly maintained at all times, i.e. the value of the share pledged as security shall be twice the amount of the loan. This is further affirmed by the Sanction Letter dated 28.08.2019, which states that Security Cover shall be two times the Value of the loan balance, at all times. Secondly, the lending in the present case was done for the working capital requirements of Petitioner No. 1, enabling it to meet its day-to-day Trading operations. Petitioner No. 1 is an investment firm, which is apparent from the pleading in para 5 page 18 of the petition. Financial statements of Petitioner No. 1 for year 2018-2019, reflect that the primary source of income of Petitioner No. 1 is from sale/purchase of shares and securities. This is further evident from the additional affidavit in which it is mentioned that shares of Dwarikesh Sugar Industries were purchased on 12.03.2020 in the ordinary course of business. Petitioners are thus using the Loan for investment purposes and therefore, the imperative is that the Respondent can only accept Group-I Securities as collateral not only at the initial stage of lending, but at every subsequent stage, during the term of the loan. As per the SEBI Circular

dated 11.03.2003, Group-I Securities are shares/securities of listed companies having mean impact cost of less than or equal to figure one and having traded on at least 80% (+/- 5%) of the days for the previous 18 months. Out of the list of Group-I Securities updated every month by SEBI and as classified by the stock exchange, Respondent has its own internal policies classifying the Group-I Securities into four different categories, depending on its volatility and performance. The BFL Approved Shares comprises of only Group-I Securities. The purpose of categorization is in accordance with Risk Management Procedures of the Respondent, as well as to ensure that there is a healthy balance of pledged shares of various companies viz-a-viz the overall pledge portfolio value. The Sanction Letter as well as the Loan-cum-Pledge Agreement clearly provide that the shares offered as collateral shall be as per the BFL Approved Shares i.e. Group-I Securities. In the event the pledged Group-I Securities are categorized by the stock exchange as Group-II Securities or lower or the pledged shares do not form a part of the BFL Approved List of Shares, the borrower is called upon to swap or replace those shares and this exercise is recurring every month. In fact, the Promoter entity of Petitioners i.e. Indianivesh while offering loans against securities only accepts Group-I Securities as collaterals, as is evident from their website. Various e-mails from the Petitioners dated 16.04.2019, 22.04.2019, 18.07.2019, 04.10.2019 and 28.01.2020 indicate that, all through, the Petitioners abided by this condition and never raised any grievance.

49. It is further argued that the Petitioners have erroneously placed reliance on the e-mail dated 20.08.2018 to contend that Non Approved

Securities were accepted by the Respondent as the shares therein, though Group-I Securities, did not form part of the BFL Approved Shares and were classified as unapproved shares and this is clear from the portfolio of the pledged shares. As far as the contention of the Petitioners with regard to the shares of Centrum Capital Limited as Group-II Securities on 01.03.2020 is concerned, Respondent issued a loan Recall Notice on 06.03.2020 and has recalled the entire outstanding amount. In any event, Respondent has not accepted these shares as additional security cover.

50. Learned Senior Counsel lastly relies on the counter affidavit filed by the RBI before the Supreme Court in W.P. (C) Diary No. 11127/2020 to argue that the provisions of the Circular are not meant to apply to cases where there are deficiencies in the Minimum-Security Margin. Relevant paras of the affidavit are as under:-

> *"5. It will be pertinent to mention here that the Legislature has conferred various powers on Reserve Bank of India empowering it to determine the banking policies to be followed by the banking companies. That it is submitted that the Reserve Bank of India being the regulator of the banking sector, took cognizance of the probable stress caused in the financial situation and conditions of the citizens of this country - the consequent stress upon the economy due to outbreak of Covid-19 pandemic - and issued a Statement on Developmental and Regulatory Policies dated March 27, 2020 with the following objective and purpose:*
>
> *To set out various developmental and regulatory policies that directly addresses the stress in financial conditions caused by COVID-19 i.e.*

i. Expanding liquidity in the system sizeably to ensure that financial markets and institutions are able to function normally in the face of COVID-19 related dislocations;

ii. Reinforcing monetary transmission so that bank credit flows on easier terms are sustained to those who have been affected by the pandemic;

iii. Easing financial stress caused by COVID-19 disruptions by relaxing repayment pressures and improving access to working capital; and

iv. Improving the functioning of markets in view of the high volatility experienced with the onset and spread of the pandemic.

Therefore, with a view to ease the financial stress by relaxing "repayment" pressures, clause 5 of the said Statement on Developmental and Regulatory Policy provides as follows:

5. Moratorium on Term Loans

All commercial banks (including regional rural banks, small finance banks and local area banks), co-operative banks, all-India Financial Institutions, and NBFCs (including housing finance companies and micro-finance institutions) ("lending institutions") are being permitted to allow a moratorium of three months on payment of instalments in respect of all term loans outstanding as on March 1, 2020. Accordingly, the repayment schedule and all subsequent due dates, as also the tenor for such loans, may be shifted across the board by three months.

It is submitted that following the aforesaid Statement on Developmental and Regulatory Policies, a circular was issued titled Covid-19 - Regulatory Package dated March 27, 2020 thereby providing detailed instructions qua the

regulatory measures issued by way of the said Statement. The relevant paragraph No.2 under the heading rescheduling of Payments is reproduced hereinbelow:

> ***(i) Rescheduling of** Payments **– Term Loans and Working Capital Facilities***
>
> *2. In respect of all term loans (including agricultural term loans, retail and crop loans), all commercial banks (including regional rural banks, small finance banks and local area banks), co-operative banks, all-India Financial Institutions, and NBFCs (including housing finance companies) ("lending institutions") are permitted to grant a moratorium of three months on payment of all instalments1 falling due between March 1, 2020 and May 31, 2020. The repayment schedule for such loans as also the residual tenor, will be shifted across the board by three months after the moratorium period. Interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period.*

*6. It is submitted that the aforesaid circular dated March 27, 2020 was further modified by the answering Respondent vide circulars dated April 17, 2020 titled COVID19 Regulatory Package - Asset Classification and Provisioning ("**Regulatory Package 2**") and May 23, 2020 titled "Covid-19 Regulatory Package" whereby the moratorium period is extended by another three months i.e. from June 1, 2020 to August 31, 2020 on payment of all instalments in respect of term loans (including agricultural term loans, retail and crop loans). A true copy of the Circular dated March 27, 2020 is annexed and marked as **ANNEXURE R-1**. A true copy of the Circular dated April 17, 2020 is annexed and marked as **ANNEXURE R-2**. The true copy of the Circular dated May 23, 2020 is annexed and marked as **ANNEXURE R-3**.*

7. It is submitted that the regulatory dispensations permitted by the Reserve Bank of India vide the aforesaid circulars dated March 27, 2020 which subsequently stood modified on April 17, 2020 and May 23, 2020 were with the objective of mitigating the burden of debt servicing brought about by disruptions on account of Covid-19 pandemic and to ensure the continuity of viable businesses. Therefore, the regulatory package is, in its essence, in the nature of a moratorium/ deferment and cannot be construed to be a waiver.

8. However, in order to ameliorate the difficulties faced by borrowers in repaying the accumulated interest for the moratorium/deferment period, it has been further announced in terms of the circular dated May 23, 2020 that in respect of working capital facilities, lending institutions may, at their discretion, convert the accumulated interest for the deferment period up to August 31, 2020, into a funded interest term loan (FITL) which shall be repayable not later than March 31, 2021. Further, in respect of term loans, it has been provided that the repayment schedule for such loans, including interest as well as principal, as also the residual tenor, will be shifted across the board."

51. Mr. Nankani, Learned Senior Counsel in rejoinder argues that the RBI Circulars dated 27.03.2020 and 17.04.2020 have been issued to grant various relaxations in respect of lending transactions, owing to the adversities caused on account of the Pandemic. They protect borrowers by way of inter alia declaring a moratorium as well as protection from defaults with effect from 01.03.2020. The provisions clearly referred to 'all lending institutions which includes NBFCs and would, therefore, cover the Respondent herein. Any doubt that remained has been clarified by the Circular dated 17.04.2020, which gives the NBFCs flexibility to

consider granting a moratorium or a deferment for three months in respect of the borrowers' obligations towards loan availed by them. The inability of the Petitioners to maintain the security cover is solely attributable to market destructions caused by the Pandemic and the Petitioners are only seeking a temporary moratorium/suspension on the right of the Respondent to sell the remaining pledge shares, till normalcy restores, in keeping with the letter and spirit of these Circulars.

52. Learned Senior Counsel for the Petitioners submits that even though there is no express *Force Majeure* Clause in the Agreement between the parties, yet the same would have to be treated as an implied and inherent condition when events such as the present Pandemic occur, which are unforeseen by the parties. Reliance is placed on an ad-interim order passed by the Bombay High Court in the case of ***Rural Fairprice Wholesale Limited & Anr. v. IDBI Trusteeship Services Limited & Ors.*** in ***Commercial Suit No. (L) 307 of 2020, dated 30.03.2020***, whereby the following interim relief was granted:-

> "*A. Ad interim relief in terms of prayer clause (a) and (b) till next date which reads thus*:
>
> > a*) Declare that the Mandatory Redemption Event Notices dated 11 March 2020 and 13 March 2020 (Exhibits D-1 and D-2 hereto), and the Event of Default Notices dated 17 March 2020 (Exhibits E-1 and E-2 hereto) and Notices of Sale dated 18 March 2020 ((Exhibits F-1 and F-2 hereto), are all illegal and/or invalid and/or improper;*
> >
> > *b) Order and grant a permanent injunction restraining the Defendants from acting upon and/or giving effect to and/or implementing,*

> *directly or indirectly, in any manner whatsoever, the Mandatory Redemption Event Notices dated 11 March 2020 and 13 March 2020 (Exhibits D-1 and D-2 hereto), the Event of Default Notices dated 17 March 2020 (Exhibits E-1 and E-2 hereto) as well as the Notices for Sale and/or Invocation dated 18 March 2020 respectively (Exhibits F-1 and F-2 hereto), including issuing any Orders for sale of the shares pledged under the two Debenture Trust Deeds (Exhibits- A and B hereto) and the Pledge Agreements (Exhibits C-1 and C-2 hereto), as amended from time to time and in force till date, and nullifying the sale, if any, of the pledged shares prior to the filing of this Suit, and consequentially, re-crediting Plaintiff No. 2's dematerialised account."*

53. The said order was challenged in the Supreme Court and the Court declined to interfere.

54. Responding to the contention of the Respondent that only Group-I Securities can be accepted, Mr. Nankani, in addition to the earlier arguments, submits that the requirement, in cases of lending for the purpose of investment in capital market, to accept only Group-I Security applies only at the time when lending is done, to ensure a better and a more frequently tradable security in qualitative terms and such a condition cannot be constant during a tenure of a loan due to the dynamic nature of the criteria determining what is a Group-I and a Group-II Security, at the end of each month. Moreover, if such a condition was mandatory and was to apply during the entire regime of the loan, it should have been incorporated in the Loan Agreement. It is also argued that in

the present case, the loan is recalled and the claim of the Respondent is at best a debt due and recoverable and therefore the conditions of Group-I Securities as collateral in the RBI Directions cannot apply. Respondent is losing sight of the fact that the present petition is not for securing the loan in the ordinary course of business, but is seeking a special concession due to a Pandemic, as an interim measure from the Court and therefore, even assuming that the collateral required is a Group-I Security, the same may prevent the Respondent from accepting the additional security, but does not prevent the Court to issue directions to restrain the sale of shares, de-hors the said condition.

55. Learned Senior Counsel further submits that Respondent has taken a false stand that 50,00,000 shares of Indianivesh Limited transferred to the DP account of BFSL was an independent commercial transaction and have nothing to do with the present loan transactions. It is submitted that pursuant to an understanding between the parties, Petitioners opened a new DP account with BFSL with Power of Attorney being marked in its favour and since the Respondent did not want to comply with the rigors of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Takeover Code Regulations'), this modality was adopted. Rs. 50 lakhs were transferred at the request of the Respondent into the DP account of its sister concern, only as an Additional Security.

56. Mr. Nankani submits that by the terms enumerated and agreed upon in the order dated 28.04.2020, Respondent is adequately secured, without prejudice to the contention that it is not open to the Respondent to wriggle out of the consent given before a Court of Law. During the

proceedings on 28.04.2020, Petitioners had offered additional 30% security on the basis of outstanding of Rs. 56 crores. Petitioners had offered 1 crore shares of Indianivesh valued at Rs. 25 crores, though subsequently, Respondent stated that the outstanding was Rs. 45.29 crores. According to the Petitioners, the outstanding is Rs. 39.40 crores and the Petitioners shall proportionately cover the 30% value. Petitioners have also undertaken to keep the security margin at Rs. 56 Crores at all times *de-hors* the fluctuation in the value of the shares.

57. It is argued that the Petitioners have a *prima facie* case and the Balance of Convenience is in favour of the Petitioners. The order passed on 28.04.2020 balances the equity between the parties and ought to be continued till the Arbitral Tribunal is constituted and takes a view one way or the other. Learned Senior Counsel has placed on record the notice invoking Arbitration sent to the Respondent on 25.01.2020.

58. I have heard Learned Senior Counsels for the parties and examined their rival submissions.

59. The genesis of the present petition is a Sanction Letter dated 28.08.2019, sanctioning LAS facility for an amount of Rs. 100 Crores in favour of Indianivesh Group, a promoter related entity of Petitioner No.1 and a Loan-cum-Pledge Agreement executed on 11.11.2019 for an amount of Rs. 80 Crores as well as a Loan-cum-Pledge Guarantee Agreement dated 12.12.2019 for an amount of Rs. 150 Crores. As per the Sanction Letter and Clause 22 of the RBI Master Directions dated 01.09.2016, Petitioners were to maintain LTV ratio at 50%. The sell

trigger i.e. sale of pledged shares was permissible if the Petitioners failed to rectify any shortfall in the LTV within 7 days or the LTV fell below 85%.

60. Relevant Clauses of the Agreement have been extracted above. A holistic reading of the Clauses reveals that only Securities acceptable to the lender were to be furnished by the Petitioners, as collateral. Any failure to make good the shortfall in Minimum-Margin would be deemed to constitute an Event of Default. In the event of the Petitioners failing to maintain or provide the margin when called upon, the loan was repayable in full, forthwith. The loan is repayable unconditionally on demand by the Respondent at its absolute discretion and without giving any reasons, by a three working days Notice.

61. Respondent has set out in detail the shortfall in the value of the pledged shares starting from 26.12.2019 and continuing intermittently upto 04.03.2020. Exercising their right under the Agreement, as there was a margin shortfall in the loan accounts of the Petitioners on 04.03.2020, Respondent issued a Loan Recall Notice on 06.03.2020, requiring Petitioners to repay the entire outstanding amount of Rs. 168,12,39,830/-, allegedly within 3 working days. Once the Petitioners failed to repay the outstanding amount and the account fell below 85%, Respondent, on 11.03.2020, initiated the sale of pledged shares. On 12.03.2020, Petitioners purchased 51,00,254 pledged shares of Dwarikesh Sugar Industries Limited sold by the Respondent via bulk deal. Much later after a gap of nearly more than a month, present petition was filed

by the Petitioners seeking a restraint against the Respondent from selling the pledged shares.

62. On 28.04.2020, a Consent Order was passed by this Court, which has been referred to and extracted in the earlier part of the judgment. Subsequently, however, an application was filed by Respondent for modification of the order seeking to correct the outstanding amount as also that Respondent would only accept the Securities which are Approved and permissible under the RBI Guidelines. With the consent of the parties, the main petition was taken up for hearing.

63. Extensive and elaborate arguments were addressed on both sides with regard to the alleged breaches of the terms of the Agreements, the nature of Securities acceptable under the Agreements and the RBI Directions, validity of the Recall Notice, sufficiency of Notice period before recalling the loan and the impact of Covid-19 on the value of the pledged shares and fall in the Security Margins. In my view, in the present Petition under Section 9 of the Act, it is not open to this Court to enter into the disputes of alleged breaches on either side or the validity of the Recall Notice on the grounds raised by the parties or even a final determination of the nature of Securities under the RBI Directives and clauses of the Agreements. This would be in the domain of the Arbitral Tribunal, as and when constituted.

64. Under Section 9 of the Act, the power and jurisdiction of this Court is circumscribed by the parameters laid down in several judgments and the provisions of the Section itself. Section 9 of the Act is only for grant

of interim measures for preservation of the subject matter in aid of Arbitration, when filed at the pre-reference stage. Bombay High Court in the case of ***Nimbus Communications Limited v. Board of Control for Cricket in India and Ors., (2012 SCC OnLine Bom 287)***, has succinctly brought out the Guidelines laid down by the Supreme Court in ***Adhunik Steels Limited v. Orissa Manganese and Minerals (P) Ltd,. [(2007) 7 SCC 125]***, which would define the scope of exercise of power by a Court under Section 9 of the Act. The Court, while deciding a petition under Section 9 of the Act, has to keep in mind the trinity principles of Order XXXIX Rule 1 and 2 CPC, which are: (a) prima facie case; (b) irreparable loss and (c) balance of convenience. Though not textually bound by the provisions of Order XXXVIII Rule 5 CPC, the provisions will have to be the guiding light and thus, the twin principles i.e prima facie case and the satisfaction by the Court that the Respondent is in the process of removing its assets from the jurisdiction of the Court, to defeat the Award that may be passed in favour of the Petitioners, will have to be looked into. Relevant para of the judgment in ***Nimbus Communications Limited (supra)*** is as under:

> *"22. The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since Section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the court would apply. Consequently, where an injunction is sought under Section 9 the power of the Court to grant that injunction cannot be exercised independent of the principles*

which have been laid down to govern the grant of interim injunctions particularly in the context of the Special Relief Act 1963. The Court, consequently would be obligated to consider as to whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38 Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, pre-conditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under Section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammeled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act 1996 is a special statute, Section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of Section 9 under which it has been specified that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it.

This has been interpreted in both the judgments to mean that the normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this Court in National Shipping Company (supra) notes that though the power by Section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court that the exercise of power under Section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure 1908 cannot stand in view of the decision of the Supreme Court in Adhunik Steels.

xxx xxx xxx

24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute

resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b)."

65. The judgments in ***Adhunik Steels Limited (supra)*** and ***Nimbus Communications Limited (supra)*** have been subsequently followed in several judgments by this Court, but this Court need not burden the judgment with all such cases, except only to refer to a recent judgment by a Coordinate Bench in the case of ***BMW India Private Limited and Ors. vs. Libra Automotives Private Limited and Ors., [2019 (5) ARBLR 118 (Delhi)]*** where it has been reiterated that power under Section 9 of the Act has to be exercised keeping in mind the principles laid down under these two provisions of CPC.

66. Before applying the principles, the Court needs to examine the pleadings, to understand the case set up by the Petitioners. A bare perusal of the petition shows that the foundation of the case of the Petitioners, primarily rests on Pandemic Covid-19, resulting in a Nationwide

Lockdown, with consequential adverse effects on the share market. The focal point of the case of Petitioners is that the outbreak and burgeoning spread of Covid-19 adversely impacted trade and commerce in the country, including the business and cashflows of the Petitioners. On account of this, the stock markets plummeted Globally and the fall in the Minimum Security Margin, was solely attributable to the fall in prices of the pledged shares. Taking the Pandemic as the foundation, the Petitioners sought to build their case on two pillars, namely, *Force Majeure* and the RBI Circulars, which notified certain concessions/relaxations for borrowers, in respect to loan transactions.

67. Insofar as the argument of *Force Majeure* is concerned, it is an admitted fact that there is no express *Force Majeure* Clause in the Loan Agreements between the parties. *Force Majeure* is a concept under the Civil Law and a Doctrine which flows out of the Indian Contract Act, 1872. The law on *Force Majeure* has been recently settled by the Supreme Court in the case of ***Energy Watchdog (supra)***. Relevant paras of the judgement are as under:

> "*34. "Force majeure" is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:*
>
> > *"32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot*

be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

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56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

35. Prior to the decision in Taylor v. Caldwell [Taylor v. Caldwell, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER Rep 24] , the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the Common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in Taylor v. Caldwell [Taylor v. Caldwell, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER Rep 24] in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.

36. The law in India has been laid down in the seminal decision of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word "impossible" has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place dehors the contract, it will be governed by Section 56.

37. In Alopi Parshad & Sons Ltd. v. Union of India [Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588] , this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the

circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in Naihati Jute Mills Ltd. v. Khyaliram Jagannath [Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968) 1 SCR 821 : AIR 1968 SC 522] , this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

39. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH [Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, 1962 AC 93 : (1961) 2 WLR 633 : (1961) 2 All ER 179 (HL)] , despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere

rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

40. This view of the law has been echoed in Chitty on Contracts, 31st Edn. In Para 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in Treitel on Frustration and Force Majeure, 3rd Edn., the learned author has opined, at Para 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See Para 15-158.)

41. Indeed, in England, in the celebrated Sea Angel case [Edwinton Commercial Corpn. v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd. (The Sea Angel), 2007 EWCA Civ 547 : (2007) 2 Lloyd's Rep 517 (CA)] , the modern approach to frustration is well put, and the same reads as under:

> *"111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject-matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of*

express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances."

42. It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company."

68. In the first place, there being no *Force Majeure* Clause in the Agreements between the parties, in my opinion, the Petitioners cannot

take a refuge under the same. Assuming that the Agreement contained such a Clause, the question would be whether the Petitioners will be entitled to its benefit. The answer to the question would be in the negative. Prima facie, it appears that the fall in the Security Margin started on 26.12.2019 and continued till 04.03.2020, though intermittently. Can a past alleged breach by the Petitioners be condoned on a plea of *Force Majeure* on account of Covid-19 Pandemic? This exact question had arisen before a Coordinate Bench of this Court in ***Halliburton (supra)*** and the Court relying on the case of ***Energy Watchdog (supra)*** and ***Global Steel Philippines v. STC of India Ltd., [FAO (OS) No. 186/2009, decided on 12th May, 2009]*** came to a conclusion that the past non-performance of the contractor cannot be condoned due to Covid-19 Lockdown in March, 2020. The contractor in the said case was in breach since September, 2019. Court observed that opportunities were given to cure the defaults repeatedly, but the project was not completed and the outbreak of a Pandemic could not be used as an excuse for performance of a contract for which the deadlines were before the outbreak itself. In fact, the Court vacated the interim stay granted earlier on account of the Pandemic. It would be pertinent to mention that in the said case, there was an express *Force Majeure* clause in the contract, which is absent in the present Agreements. There is thus, no merit in the submission of the Petitioners that the benefit of *Force Majeure* be given to the Petitioners, on account of Covid-19.

69. Insofar as grant of benefit of moratorium under the RBI Circular dated 27.03.2020 is concerned, this argument also has no merit. Circular

dated 27.03.2020, by its plain wording, is for a moratorium of three months on repayment of Loan installments, falling due between 01.03.2020 and 31.05.2020. Circular dated 17.04.2020 provides that in respect of all accounts for which lending Institutions decide to grant moratorium or deferment and which were standard as on 01.03.2020, the 90 day NPA norm shall exclude the moratorium period. In the counter affidavit filed by the RBI in W.P.(C) 11127/2020, before the Supreme Court, the stand of the RBI is that the objective of the Circulars is to ease financial stress by relaxing repayment pressures/mitigating the burden of debt brought about by disruptions on account of Pandemic Covid-19. The moratorium period permits the lending Institutions to postpone the payments falling due during the moratorium period. The lending Institutions are required to frame Policies for providing relief to the eligible borrowers. The Circulars, as is evident, would not inure to the benefit of the Petitioners, as they are essentially with respect to a moratorium on repayment of Loan installments that have fallen due from 01.03.2020. In the present case, the alleged breach is not with respect to repayment of loan installments, but fall in the Security Margins and significantly, the fall in the margins is from December, 2019 and not on account of Covid-19. In any case, the Circular itself gives the discretion to the lenders/Banks to frame Board approved Policies for providing the relief, including applying an objective criteria for considering the said relief.

70. The judgments relied upon by the Petitioners wherein the benefit of the RBI Circulars have been granted, are in my opinion, distinguishable.

In ***Eastman Auto & Power Ltd. (supra)***, Petitioner had duly fulfilled its contractual obligations of repayment till 31.03.2020 and had sought relief only for the subsequent period. In the case of ***Shakuntala Educational & Welfare Society (supra)***, Petitioner had sought a stay for being declared an NPA by the Respondent only on account of its failure to pay the installments payable on or before 31.03.2020. In the facts of the said case, the Court observed that had the Petitioners made the payments qua the installments, which had fallen due on 31.12.2019, on or before 31.03.2020, Respondent could not have declared the accounts of the Petitioners as NPA. Keeping this in mind and with regard to the intent of the RBI Circular, maintaining a status quo on 01.03.2020, Court granted the interim relief. However, while granting the interim relief, the Court in the same order, directed the Petitioner, a charitable school, to pay the installments within one week from the date of withdrawal of the directive issued by the State of U.P., prohibiting the Petitioners from demanding fee from the students.

71. In ***Transcon Skycity Pvt. Ltd. (supra)***, the admitted position was that there was no default till December, 2019. The declaration of the account as NPA was only to be after the expiry of the grace period for regularization, from the date of default, which would be 15.04.2020 and 15.05.2020. This case was, therefore, directly covered by the moratorium period mentioned in the RBI Circulars.

72. Section 176 of the Contract Act, 1872 gives the discretion to the pledgee to sell the pledged goods in the event of a default by the pledger. Certainly, it is in the interest of the lender to sell at a time when the

market factors are good and maximum funds can be recovered, but again the commercial determination of when to sell, would always be in the domain of the pledgee. In ***Reliance Project (supra)***, Bombay High Court has held that stock market is a place where prices can vary from minute to minute on a given trading day. A small incident can trigger a market to collapse and it is unpredictable and speculative. No doubt that the lender is under a duty to take reasonable precautions to obtain the true market value on the day when he decides to sell, but certainly, the loan offered is the money of the lender and he is not required to consult the borrower as to the time and manner of sale. As rightly argued by Learned Senior Counsel for the Respondent, if the pledged shares are not invoked and sold and in future the value falls, then the Respondent would be answerable to its own stakeholders. Sale and pledge of dematerialized shares is governed by Regulation 58 of SEBI (Depositories and Participants) Regulations, 1996 corresponding to Regulation 79 in SEBI (Depositories and Participants) Regulations, 2018 and there is no requirement for prior notice for invocation of a pledge by the pledgee. This has been so held in the case of ***Tendril Financial Services (supra)***. Relying on ***Tendril Financial Services (supra)***, this Court in ***STCI Finance Ltd. v. Cedar Infonet Pvt. Ltd. & Ors. (2018 SCC OnLine Del 8841)***, held as under:

> *"25. I have since pronounced judgment in Tendril Financial Services Pvt. Ltd. supra reported as 2018 SCC OnLine Del 8142, on the applications for interim relief therein and have held:—*
>
> *xxx xxx xxx*

E. I may however add, that a notice under Section 176 of Contract Act is in derogation of Regulation 58 supra. While Section 176 entitles the pledgee/pawnee to, on default by the pledgor/pawnor, sell the thing pledged, "on giving the pawnor reasonable notice of the sale", Regulation 58(8) entitles the pledgee to, "subject to the provisions of the pledge document", "invoke the pledge" and mandates the depository to "on such invocation" i.e. by the pledgee, "register the pledgee as beneficial owner of such securities" i.e. the securities pledged and further mandates the depository to "amend its records accordingly". There is no place for a prior notice under Section 176, in the scheme of Regulation 58(8). On the contrary, Regulation 58(9) requires the depository to, after so amending its records under Regulation 58(8), inform the participants of the pledgor and the pledgee of the same and mandates the said participants to inform the pledgor and the pledgee. Thus, (a) while Section 176 provides for a notice to pledgor prior to effecting sale, Regulation 58 provides for notice post invocation and on which invocation beneficial ownership of pledged shares changes from that of the pledgor to that of the pledgee and which is equivalent to sale under Section 176. To hold that a prior notice under Section 176 of Contract Act is also required in the case of pledge of dematerialised shares would interfere with transparency and certainty in the securities market, rendering fatal blow to the Depositories Act and Regulations and the object of enactment thereof.

xxx xxx xxx

K. I am thus unable to interpret Section 176 of the Contract Act as entitling the plaintiffs to seek restraint against dealing with shares or return of the

shares, as the plaintiffs have sought in this suit, even if the notice under Section 176 of the Contract Act was held to be required to be given and having not been given."

73. The question that now arises is whether Petitioners are entitled to an interim relief in the present petition, and if so, to what relief.

74. As per the argument of the Learned Senior Counsel for the Petitioners, the balance of convenience is in favour of the Petitioners as the principle amount outstanding as on date, admittedly, is approximately Rs. 46 Crores and Petitioners are willing to secure the Respondent with Additional securities, as was agreed when the consent order was passed on 28.04.2020 and also undertake to ensure that margins are kept above this amount, even if the market value of shares reduces.

75. Mr. Nankani, Learned Senior Counsel for Petitioners has further argued that in case the interim order is not granted, irreparable loss will be caused if Respondent sells the pledged shares at a throw away price in these times, when the Stock Market is at its low, on account of the Pandemic. In support, it was argued that the 52 week high value of Future Retail Limited shares was at Rs. 489.45 and when Respondent sold the securities on 04.03.2020, it was Rs. 303/- approximately. However, by 24.04.2020, when Petitioners approached this Court, the value had dropped to Rs. 92/-, on 28.04.2020.

76. Balance of convenience is an equity Doctrine and the Court would have to keep in mind that its order, balancing the equity in favour of one

party does not become iniquitous to the other party. Petitioners' own case is that the subject matter of the Petition are pledged shares, which by their very nature are volatile and subject to fluctuation within minutes on a given trading day. If this Court was to restrain the Respondent from selling the pledged shares, without securing its interest, there could be a possibility that by the time the Award is rendered, the prices of the pledged shares fall drastically. Therefore, Respondent's interest, who is the lender of the money, needs to be secured by the Court while preserving the subject matter of the arbitration.

77. Mr. Nankani Learned Senior Counsel, is right in his submission that the consent order passed by the Court on 28.04.2020, wherein the Petitioners had agreed to pledge further shares as Additional Security coverage, balances the equities between the parties and must be continued. It was agreed that the security cover would be maintained at Rs. 56 Crores at all times and in case based on the market price of the respective shares, the security cover reduces, Petitioners would provide additional shares and/or other securities to ensure that the total security coverage is maintained above Rs. 56 Crores. Based on this undertaking of the Petitioners by a consent order, Respondent had agreed that it shall not itself or on behalf of the Respondent any other agent or person alienate/sell/transfer or encumber the pledged shares, being the subject matter of the petition. However, Court cannot lose sight of the issues raised by the Respondent subsequent thereto.

78. Through the application filed by the Respondent, for modification/rectification of the said order, Respondent has pointed out

that the Additional Securities sought to be offered must be "approved securities" as per the directives of the RBI and the Clauses of the Agreement entitle the Respondent to insist on securities acceptable to it in accordance with its Policies. Prima facie, the Circular mandates that the Securities have to be of 'Group I' shares when Loan is for investment in Capital market. Learned Senior Counsel has taken the Court through several paragraphs of the petition as well documents, which show prima facie that the Loan was largely used for investment purposes. Based on these binding Directions the only objection of the Respondent is that the shares of Indianivesh offered as Additional Securities, cannot be accepted as they are not the approved securities.

79. In fact, it is important at this stage to note that despite lengthy arguments by the Respondent opposing the petition, it is stated in the Preliminary Affidavit-in-reply to the Additional Affidavit that Respondent, even at this stage, is willing to comply with the order dated 28.04.2020 provided the Additional Securities offered by the Petitioners are in compliance with the RBI Guidelines and acceptable to the Respondent. Relevant paras of the application seeking modification are as under:

> *"5. The Applicant further submits that the shares which are agreed to be provided as additional securities are required to be specified, to mean "approved" securities in compliance with the directions of the Reserve Bank of India ("**RBI**") as applicable to the Applicant. The Applicant is an RBI registered NBFC and is bound to comply with all the direction and guidelines provided by the RBI, more particularly the Circular DNBS (PD) CC.NO.*

*408/03.10.001/204-15 dated August 21, 2014 in relation to collateral securities (**"RBI Circular"**).*

*6. The Applicant states that while the Petitioner had offered 1,00,00,000 equity shares of Future Retail Limited (**"FRL Shares"**) as additional security during the discussions between the parties to work out the interim arrangement, the Undertaking of the Petitioners did not contain any mention of FRL Shares and instead equity shares of IndiaNivesh Limited were being offered to the Respondent. Further, the shares of IndiaNivesh Limited which are offered as additional securities cannot be accepted by the Applicant as the same are not in consonance with the polices of the Applicant and RBI Circular. If the Undertaking was provided in advance to the Applicant, the Applicant would have mentioned the same to the Petitioners and would have also brought the issue to the notice of this Hon'ble Court while the Order was being passed. The Applicants most humbly pray that the Undertaking provided by the Applicant be taken on record which records these facts and particulars."*

80. Relevant prayer in this regard in the application is as under:

"(b) the term Additional Security/ies contained in paragraph 12 of the Order, be clearly specified to mean Approved Security/ies, in compliance with the directions issued by the Reserve Bank of India;"

81. As per the RBI Directives, the Additional Securities required to be furnished by the Petitioners and accepted by the Respondent can only be the Approved Securities, as collateral. Clause 1.28 of the Loan Agreement also clearly stipulates that the securities would be those securities which are 'acceptable to the lender'. The Loan Agreements are commercial bargains between a lender and a borrower and the terms of the loan are carefully drafted, agreed to and signed between the parties

and are sacrosanct. This Court cannot therefore, agree with the submission of Learned Senior Counsel for the Petitioners that the Respondent can be directed to accept securities which are against the Guidelines of the RBI or in the teeth of the terms of the Agreements between the parties, even though it may be only as an interim measure. No direction can be given by a Court to a party, to do an illegal act. Looking at the totality of facts and circumstances, in my view the following directions will preserve the subject matter of Arbitration and at the same time secure the Respondent, in accordance with the RBI Circulars as well as terms of the Agreement.

82. In the light of the above facts and circumstances, the following directions are passed by the Court:

a. Petitioners shall furnish 'Approved Securities' to the Respondent in compliance with the directives of RBI and acceptable to the Respondent/Lender in accordance with the terms of the Loan Agreement, as Additional Securities. The Additional Securities will be to the tune of Rs. 56 Crores and the Petitioners would ensure that the security cover does not reduce below Rs. 56 Crores. In case of any reduction in the market price of the shares, Petitioners would ensure that the total security coverage is maintained at Rs. 56 Crores.

b. Currently, petitioner Nos. 5 and 6 are Partners of petitioner no. 1. Petitioner Nos. 2 to 4 have resigned from the Partnership Firm on 31.01.2020. However, petitioner Nos. 2 to 6, without

prejudice to their respective rights and contentions under the law and the Agreement between the parties, shall remain liable to the respondent to the extent provided in the loan and security transaction documents, with respect to the liability arising out of the Loan Facility extended by respondent to petitioner no. 1.

c. Respondent, on receipt of the Additional Security, as per the RBI Guidelines, shall not themselves or through their agents sell/transfer/alienate/encumber or part with the custody, control and possession of the remaining pledged shares, which are the subject matter of the Present Petition.

d. Petitioners shall furnish the Additional Securities, to the satisfaction of the Respondent, within a period of two weeks from today. The Restraint Order passed today will remain in force against the Respondent for a period of two weeks from today. In case, Petitioners furnish the Additional Security acceptable to the Respondent, as directed above, the restraint order passed today will continue till the Arbitral Tribunal passes any other and/or further order. The Tribunal is at liberty to pass any order it deems fit, without being influenced by any observations made herein to continue, vacate or modify the order passed by this Court, after hearing the parties.

e. In case the petitioners are unable to furnish Additional Security as directed above, within a period of two weeks from today, the Restraint Order against the Respondent shall stand vacated.

83. Petition is disposed of in the aforesaid terms.

84. Nothing stated herein is an expression on the merits of the case and is only for the purposes of deciding the present petition under Section 9 of the Act.

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85. No further orders are required to be passed in the present application in view of the directions given above.

JYOTI SINGH, J

JULY 6th , 2020
yo/yg/rd